# No. 14-427

**In the United States Court of Appeals for the Second Circuit**

The Roman Catholic Archdiocese of New York, *et al.*,
*Plaintiffs-Appellees*,

Catholic Charities of the Diocese of Rockville Centre,
*Plaintiff*,

v.

Kathleen Sebelius, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,
*Defendants-Appellants*.

On Appeal from the U.S. District Court
for the Eastern District of New York, No. 12-cv-2542 (Cogan, J.)

Brief in Support of Appellants and Reversal by *Amici Curiae*
Americans United for Separation of Church and State,
American Civil Liberties Union, and New York Civil Liberties Union

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## Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici curiae* makes the following disclosures:

Americans United for Separation of Church and State, the American Civil Liberties Union, and the New York Civil Liberties Union are organizations committed to advancing civil rights and civil liberties, including the freedom of religion provided by the First Amendment to the U.S. Constitution.

None of *amici* has any parent company. No publicly held corporation has a 10% or greater ownership interest in any of *amici*.

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## Identity and Interests of *Amici Curiae*[1]

**Americans United for Separation of Church and State** is a national, nonsectarian, public-interest organization that seeks to advance the free-exercise rights of individuals and religious communities to worship as they see fit, and to preserve the separation of church and state as a vital component of democratic government. Americans United was founded in 1947 and has more than 120,000 members and supporters, including many thousands residing in this Circuit.

Americans United has long supported legal exemptions that reasonably accommodate religious practice. *See, e.g.*, Br. of Ams. United for Separation of Church & State et al., as *Amici Curiae* Supporting Petitioners, *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (No. 03-9877), 2004 WL 2945402 (supporting religious accommodations for prisoners). Consistent with its support for the separation of church and state,

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* state the following: (1) no party's counsel authored this brief in whole or in part, and (2) no party, party's counsel, or person other than *amici*, their members, or their counsel, contributed money intended to fund the brief's preparation or submission.

however, Americans United opposes the recognition of religious exemptions that come at the expense of innocent third parties. To that end, Americans United currently represents three women who have intervened in a parallel case in defense of the regulations now before the Court. *See Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014), *reh'g en banc denied*, No. 13-3853, ECF No. 64 (May 7, 2014).

The **American Civil Liberties Union** ("ACLU") is a nationwide, non-profit, non-partisan public-interest organization of more than 500,000 members dedicated to defending the civil liberties guaranteed by the Constitution and the nation's civil-rights laws. The **New York Civil Liberties Union** ("NYCLU") is the New York State affiliate of the ACLU. The ACLU and the NYCLU have a long history of defending the fundamental right to religious liberty, and routinely bring cases designed to protect the right to religious exercise and expression. At the same time, the ACLU and the NYCLU are deeply committed to fighting gender discrimination and inequality and protecting reproductive freedom.

In accordance with Federal Rule of Appellate Procedure 29(a), *amici* have concurrently filed a motion requesting leave to file this brief.

## Background

### A. The Regulations

Congress enacted the Patient Protection and Affordable Care Act ("ACA" or "Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010), to "increase the number of Americans covered by health insurance and decrease the cost of health care." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012) ("NFIB"). The Act requires all large employers either to provide their employees with minimally adequate health insurance—including coverage for preventive care without cost-sharing—or to pay a tax of $2,000 per employee (after the first 30 employees) to defray the cost of public subsidization of the employees' healthcare. *See* 26 U.S.C. § 4980H(a)-(d).

To aid in development of the preventive-care requirement, the U.S. Department of Health and Human Services ("HHS") asked the Institute of Medicine ("IOM"), the nonpartisan "health arm of the

National Academy of Sciences," *About the IOM* (2013), http://bit.ly/1l0M6J2, to identify the medical services necessary for women's health and well-being, IOM, *Clinical Preventive Services for Women: Closing the Gaps* 2 (2011) ("IOM Rep."), http://bit.ly/19XiWHK.[2] After extensive study, the IOM recommended that coverage be provided for, among other things, all forms of FDA-approved contraceptives, *see* IOM Rep. at 109-10, a recommendation that the federal government adopted. *See* 42 U.S.C. § 300gg-13a; 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012).

**B. The Accommodation**

Before finalizing the regulations and after extensive comment, HHS sought to address the objections of religious organizations to the contraceptive-coverage requirement. HHS exempted houses of worship from the requirement upon finding that they "are more likely than other employers to employ people of the same faith who share the same objection" and their employees "would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013).

[2] All websites cited in this brief were last visited on June 3, 2014.

Other religious nonprofit organizations were given an Accommodation that allows them to opt out of providing contraceptive coverage by certifying their religious objection to their insurance administrator or provider. *See id.* at 39,873-74. In the event of such an opt out, the administrator or provider must assume responsibility for offering contraceptive coverage to the organization's employees at no cost to the organization. *Id.* at 39,876; *see also* 29 C.F.R. §§ 2590.715-2713A(b)(1), (b)(2)(i)-(iii), (c)(2).

**C. Proceedings Below**

Plaintiffs are the Roman Catholic Archdiocese of New York ("Archdiocese"); the Roman Catholic Diocese of Rockville Centre ("Diocese"); Cardinal Spellman and Monsignor Farrell High Schools ("School Plaintiffs"); Catholic Health Care System ("ArchCare"); and Catholic Health Services of Long Island ("CHSLI"). A30-31.[3] The Archdiocese and Diocese are altogether exempt from any requirement to provide contraceptive coverage, A286-87, while the remaining

[3] Catholic Charities of the Diocese of Rockville Centre, though originally a plaintiff, was not listed in Plaintiffs' Amended Complaint. *See* SPA10 n.4.

Plaintiffs are eligible for the Accommodation, A27. All of the Plaintiffs assert that they have self-insured "church plans," which are exempt from the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. (1974). *See* A317-28.

Plaintiffs challenged the Accommodation under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1, which forbids the government to "substantially burden a person's exercise of religion" except by the least restrictive means necessary to accomplish a "compelling governmental interest."[4] Plaintiffs identify a burden in the Accommodation's requirements that they (1) submit a certification form that, in their view, authorizes the provision of religiously objectionable services, and (2) maintain a relationship with an insurer or third-party administrator that provides those objectionable services. *E.g.*, R. 88, Pls.' Summ. J. Br. 4, 8, 13.

[4] Plaintiffs brought constitutional claims as well, *see* R. 88, Pls.' Mem. of Law Pursuant to Court's July 25, 2013 Scheduling Order ("Pls.' Summ. J. Br.") 34-50, but those claims were not reached, or did not figure prominently, in the decision below. *See* SPA36-37.

The district court granted the government's motion for summary judgment with respect to the Archdiocese and Diocese. SPA41. The court held that these Plaintiffs were not religiously burdened because the regulations require "nothing at all" from them. SPA28. Neither the Archdiocese nor the Diocese appealed that ruling.

In contrast, the court held that the self-certification process burdened the religious exercise of ArchCare, CHSLI, and the School Plaintiffs by requiring them to "authorize[ ] a third-party to provide the contraceptive coverage to which [Plaintiffs] object," thereby compelling "affirmation of a repugnant belief." SPA25 (quotation marks omitted). The regulations did not withstand strict scrutiny, the court held, because the government had not demonstrated a particularized interest in enforcing the regulations against these Plaintiffs, and "numerous less restrictive alternatives are readily apparent." SPA29-36. The fact that third-party administrators of church plans "aren't actually required to do anything after receiving the self-certification" further "undermine[d] any claim that imposing the [regulations] on these plaintiffs serves a compelling governmental interest." SPA33.

## Argument

### I. Plaintiffs' Religious Exercise Is Not Substantially Burdened by the Challenged Regulations.

The challenged regulations allow Plaintiffs to discontinue their health-insurance plans by paying a tax—not a "crippling fine[ ]," R. 73, Pls.' Mem. in Supp. of Mot. for Prelim. Inj. ("Pls.' Prelim. Inj. Br.") 7—amounting to a fraction of what they currently spend on health insurance. And even if they maintain their insurance plans, the Accommodation imposes obligations on insurers and administrators, not on objecting employers. Plaintiffs therefore have failed to demonstrate a substantial burden under RFRA.

#### A. Plaintiffs may comply with the law and avoid religious injury altogether.

Under this Court's precedent, a substantial burden exists only when government action "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (quotation marks omitted). Pressure is not deemed substantial when the challenged law merely "operates so as to make the practice of [an adherent's] religious beliefs more expensive."

*Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). Thus, the Supreme Court rejected a challenge by Orthodox Jewish businessmen to a Sunday closing law that allegedly would "put [them] at a serious economic disadvantage if they continue[d] to adhere to their Sabbath." *Id.* at 602. The Court reasoned that the law did not render the plaintiffs' religious exercise impracticable, and that the Court could not insulate religious business people from the need ever to weigh their beliefs when making business decisions without "radically restrict[ing] the operating latitude of the legislature." *Id.* at 606; *see also Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 392 (1990) (no "constitutionally significant burden" where tax does not "effectively choke off an adherent's religious practices").

In a similar vein, when adherents have a viable alternative means to satisfy their religious obligations—even one that is less convenient or otherwise inferior—no substantial burden exists. *See Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303-05 (1985) (employees' ability to receive in-kind wages, or to return cash payments to employer, provides alternative means that ameliorate

burden otherwise caused by fair-wage regulation); *Patel v. United States*, 515 F.3d 807, 814 (8th Cir. 2008) (no substantial burden from lack of *halal* meals where prisoner could purchase religiously unobjectionable food at own expense from commissary); *Watkins v. Shabazz*, 180 F. App'x 773, 775 (9th Cir. 2006) (prisoner's right to religious diet not substantially burdened by unavailability of compliant meals, where prisoner could eat meat substitute or find outside organization to provide *halal* meat); *Henderson v. Kennedy*, 253 F.3d 12, 16-17 (D.C. Cir. 2001) (regulation banning sale of t-shirts on National Mall did not substantially burden plaintiffs' evangelizing obligations where plaintiffs could still "distribute t-shirts for free on the Mall, or sell them on the streets surrounding the Mall").

Plaintiffs have failed to demonstrate a substantial burden under these principles. Although they present their "impossible choice" as one between "breaching their faith or suffering potential financial ruin," Plaintiffs' financial exposure is far from ruinous, nor may it accurately be characterized as a "penalt[y]." R. 88, Pls.' Summ. J. Br. 7, 46. Rather, Plaintiffs may discontinue their health-insurance plans by

paying a *tax* amounting to a fraction of what they currently spend on health insurance.

The pertinent provision is titled "Shared responsibilities for employers regarding health coverage." 26 U.S.C. § 4980H. If an employer does not offer health insurance, its employees become eligible for public health-insurance subsidies. When an eligible employee applies for subsidized health insurance on the public exchanges, and her employer, like Plaintiffs, has more than 50 employees, the employer becomes obligated to make "assessable payments" to the IRS amounting to $2,000 per employee (discounting the first 30 employees) per year. *Id.*

The payment is a tax, in both name, *see id.* § 4980H(c)(7), and substance. The assessable payments generate governmental revenue, and so present the essential feature of a tax. *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 96 (4th Cir.), *cert. denied*, 134 S. Ct. 683 (2013). The tax is triggered only when necessary to offset the cost of publicly subsidizing health insurance, and the amount is manifestly "proportionate rather than punitive." *Id.* at 98.

Indeed, the assessable payment amounts to less than half the average per-employee cost of employer-provided healthcare in New York ($4,779). *See* Henry J. Kaiser Family Found., *Average Single Premium per Enrolled Employee for Employer-Based Health Insurance* (2012), http://bit.ly/1eVfSK6. Thus, because the tax is paid instead of healthcare-insurance premiums, choosing to pay the tax actually would accrue to Plaintiffs' financial benefit. And if Plaintiffs are concerned about the implications of discontinuing their plans, nothing would preclude them from using their savings to supplement their employees salaries or to provide a health-insurance stipend to aid the employees' purchase of health insurance on the exchanges. Accordingly, as the Fourth Circuit has held, the law "does not punish unlawful conduct, [but] leaves large employers with a *choice for complying with the law*—provide adequate, affordable health coverage to employees or pay a tax." *Liberty Univ.*, 733 F.3d at 98 (emphasis added).[5]

[5] Plaintiffs would have no valid RFRA objection to this payment, as the Supreme Court has repeatedly rejected challenges to general taxation schemes. *See, e.g., United States v. Lee*, 455 U.S. 252, 257-59 (1982); *Hernandez v. Comm'r*, 490 U.S. 680, 699-700 (1989); *Jimmy Swaggart Ministries,* 493 U.S. at 391.

Many view the latter option as preferable, as recognized by a publication of the University of Notre Dame, itself a plaintiff in parallel litigation. *See* Ed Cohen, *Pay or Play? Impending Reforms Have Employers Weighing the Costs and Benefits of Health Care Coverage*, Notre Dame Bus. Mag., June 2013, http://bit.ly/1kEECgv; *see also* Ross Manson, *Health Care Reform: to "Pay or Play?"*, Eide Bailly, http://tinyurl.com/ocjgmxf. Under the new regulatory regime, in which insurance coverage is available at affordable rates, irrespective of age or preexisting conditions, discontinuing health insurance has become a more feasible alternative for many employers. The Supreme Court itself expressed considerable interest in this option during the *Hobby Lobby* oral argument, *see* Tr. of Oral Arg. 22-28, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. argued Mar. 25, 2014), *available at* http://1.usa.gov/1ljXNMv—and its availability may very well carry the day in that case.

Ultimately, the ACA puts all large employers, religious and secular alike, to a choice: provide minimally compliant plans or assume "[s]hared responsibility" under the statute. 26 U.S.C. § 4980H.

Employers may drop their plans for any number of reasons—whether to provide employees with a wider range of coverage choices, reduce costs and paperwork, or maintain their religious scruples. As in *Braunfeld*, there is no reason that Plaintiffs should be spared this choice simply because religion is part of their business calculus.

### B. Plaintiffs may avail themselves of the Accommodation and avoid any obligation to provide contraception coverage.

Even if Plaintiffs were somehow required to retain their health-insurance plans and avail themselves of the Accommodation, their religious exercise would still not be substantially burdened. A burden is not substantial under RFRA simply because Plaintiffs say so; "substantiality . . . is for the court to decide." *Univ. of Notre Dame*, 743 F.3d at 558. Thus, courts have long distinguished between the factual recitation of a plaintiff's religious beliefs, which are "accept[ed] as true," and "the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened." *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008).

Although Plaintiffs' beliefs may be "sincerely held, it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden on their right to free exercise of religion." *Goehring v. Brophy*, 94 F.3d 1294, 1299 n.5 (9th Cir. 1996). Otherwise, strict scrutiny would arise from "the slightest obstacle to religious exercise," "however minor the burden it were to impose." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). "Unless the requirement of substantial burden is taken seriously, the difficulty of proving a compelling governmental interest will free religious organizations from . . . restrictions of any kind." *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007).

In this case, to avail themselves of the Accommodation, Plaintiffs need only provide certification of their religious objection to their third-party administrators. 29 C.F.R. §§ 2590.715-2713A(b)(1), (c)(1). Upon receipt of the certification, these third parties must make contraception coverage available without imposing cost-sharing requirements on Plaintiffs. *See id.* Self-certification therefore permits an "organization

[to] raise[ ] its hand and say[ ] 'I object' to participating in the provision of contraceptive services itself." *Roman Catholic Archbishop of Wash. v. Sebelius*, __ F. Supp. 2d __, No. 13-1441 (ABJ), 2013 WL 6729515, at *18 (D.D.C.), *injunction pending appeal granted*, Nos. 13-5371, 14-5021 (D.C. Cir. argued May 8, 2014).

Accordingly, the Accommodation calls for Plaintiffs to do what they have always done: notify their third-party administrators of their religious objection to providing most forms of contraceptive coverage.[6] *See* R. 101, Pls.' Reply Br. in Supp. of Pls.' Mot. for Summ. J. 10 ("In the past, plaintiffs contracted with [administrators] that would *not* provide the mandated coverage . . . .") (emphasis in original). The only thing that changed with the passage of the ACA is that their third-party administrator will now step in to provide the contraceptive coverage that otherwise would have been unavailable to Plaintiffs' employees.

Although the Accommodation permits Plaintiffs to "declare[ ] [their] intention to step out of the process," *Roman Catholic*

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[6] Plaintiffs appear to have no objection to providing contraceptives "for non-contraceptive, medically necessary purposes." A47; *see also* A36.

*Archbishop*, 2013 WL 6729515, at *17, and avoid any obligation to provide contraceptive coverage, Plaintiffs argue that the mere act of certifying their religious objection "triggers the provision of 'free' contraceptive coverage," and makes them "the vehicle by which 'free' abortion-inducing products, contraception, sterilization, and related counseling are delivered to the organizations' employees." A66-67. But that result could be said of virtually all instances of conscientious objection. A wartime conscientious objector cannot refuse to register for an exemption on the ground that doing so would cause the government to draft another in his place. *Cf. Univ. of Notre Dame*, 743 F.3d at 556 (observing that Plaintiffs' position necessarily leads to this result). A judge who seeks recusal from a death-penalty case cannot claim a RFRA right to refuse to recuse in writing so as to avoid facilitating the assignment of a new judge to preside.

To accept that the need to put one's objection in writing can itself be a substantial burden on religion would be both "paradoxical and

virtually unprecedented." *Id.* at 557.[7] The written objection *relieves* the conscientious objectors—and Plaintiffs—from providing the objectionable services; it is not a "permission slip" "authorizing the [third-party administrator] to make the objectionable payments to plaintiffs' employees." R. 101, Pls.' Reply Br. in Supp. of Pls.' Mot. for Summ. J. 9-10. As the Seventh Circuit recently explained, "[f]ederal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured health plans, to cover contraceptive services." *Univ. of Notre Dame*, 743 F.3d at 554. The "permission" comes from the government, which has chosen, in the event of an opt-out, to place a coverage obligation on insurers and administrators.

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[7] The claim that self-certification requires Plaintiffs "to become morally complicit in the delivery of abortion-inducing products," R. 101, Pls.' Reply Br. in Supp. of Pls.' Mot. for Summ. J. 11, is especially "paradoxical" with respect to ArchCare, which, "under protest," not only provides but also financially contributes to coverage for contraception and elective abortion to 3,000 unionized employees. *See* A92-95. Unlike ArchCare's current health-insurance plan, the Accommodation alleviates this obligation to provide—let alone pay for—contraception. Indeed, the self-certification process enables ArchCare to "wash[ ] its hands of any involvement in contraceptive coverage." *Univ. of Notre Dame*, 743 F.3d at 557.

No matter how sincere Plaintiffs' religious objection to contraceptives may be, they lack the right to interfere with that governmental choice. The Native Americans in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), could not disrupt a governmental forestry project, even one that would "virtually destroy [their] ability to practice their religion." *Id.* at 451 (quotation marks omitted). The plaintiffs in *Bowen v. Roy*, 476 U.S. 693, 696, 699-700 (1986), could not prevent the government from using a social-security number for their daughter, even though they believed that the practice would rob her of her spirit. And in *Kaemmerling*, a prisoner could not prevent the government from analyzing his blood for DNA. *See* 553 F.3d at 679. Here, too, it is "the subsequent actions of third parties . . . in which [Plaintiffs] play[ ] no role—that animate [their] religious objections." *Priests for Life v. U.S. Dep't of Health & Human Servs.*, __ F. Supp. 2d __, No. 13-1261 (EGS), 2013 WL 6672400, at *9 (D.D.C.), *injunction pending appeal granted*, No. 13-5368 (D.C. Cir. argued May 8, 2014).

Plaintiffs' reliance on *Gilardi v. U.S. Department of Health & Human Services*, 733 F.3d 1208 (D.C. Cir. 2013), and *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), is unavailing. In those cases, the D.C. Circuit and Seventh Circuit found a substantial burden in regulations that required for-profit companies to "approve and endorse the inclusion of contraceptive coverage in their companies' employer-provided plans." *Gilardi*, 733 F.3d at 1217-18. By contrast, the Accommodation relieves Plaintiffs of that obligation; it allows them to *remove* contraception from their "basket of goods." *Id.* at 1217. In any event, as the Court is well aware, even if Plaintiffs were correct in their assertion that *Gilardi* and *Korte* involved "the same religious exercise [as that] at issue in this case," R. 112, Pls.' Resp. to Defs.' Sur-Reply 1—which they are not—neither decision is binding precedent in this Circuit.

Nor are Plaintiffs entitled to a different outcome merely because they have elected to provide health insurance through self-funded plans, rather than through an insurance carrier. Plaintiffs neither designate nor authorize the third-party administrator to serve as the

plan administrator; the government does. *See Univ. of Notre Dame*, 743 F.3d at 555. The self-certification simply reminds the administrator "of an obligation that the *law*, not [Plaintiffs], imposes on it." *Id.* (emphasis in original). And nowhere have Plaintiffs asserted that their third-party administrators will, or are even likely to, terminate their contracts. Thus, despite Plaintiffs' contention that they now will be required to "locate and identify a third party administrator willing to provide the very services they deem objectionable," R. 88, Pls.' Summ. J. Br. 8, this alleged burden "is entirely speculative and so not a ground for equitable relief." *Id.* at 557; *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 104-05 (1983) (speculative harm inadequate to establish an "actual controversy"). Furthermore, if Plaintiffs are uncomfortable with the Accommodation, nothing precludes them from using an insurance company rather than self-insuring their employees—an alternative that likewise defeats any claim that the regulations leave them with no viable alternatives.

## II. Removing Barriers to Insurance Coverage for Contraceptives Is the Least Restrictive Means of Furthering Compelling Governmental Interests.

Even if the regulations were deemed to substantially burden Plaintiffs' religious exercise, they should still be upheld because they withstand strict scrutiny. To satisfy strict scrutiny, the government is not "require[d] . . . to prove a negative—that no matter how long one were to sit and think about the question, one could never come up with an alternative regulation that adequately serves the compelling interest while imposing a lesser burden on religion." *United States v. Wilgus*, 638 F.3d 1274, 1288 (10th Cir. 2011). "Not requiring the government to do the impossible—refute each and every conceivable alternative regulation scheme—ensures that scrutiny of federal laws under RFRA is not 'strict in theory, but fatal in fact.'" *Id.* at 1289 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring)).

There are specific and compelling reasons to apply the challenged regulations to Plaintiffs: providing Plaintiffs' employees with access to a benefit essential to their well-being; reducing unintended pregnancies

and, in turn, the need for abortions; and ensuring that female employees do not face substantially higher costs than their male counterparts in meeting healthcare needs. Removing cost and logistical barriers, and thereby equipping women with the tools to decide whether and when to become parents, is the least restrictive means of ensuring that women can participate equally in society.

In claiming that the government lacks a compelling interest in "forcing non-profit religious organizations to provide free contraception in violation of the sincere religious beliefs," R. 101, Pls.' Reply Br. in Supp. of Pls.' Mot. for Summ. J. 12, Plaintiffs have mischaracterized the inquiry. Unlike *Gilardi* and *Korte*, which addressed whether for-profit companies and their owners could be required to provide coverage for contraceptives under the companies' health-insurance plan, the Accommodation lifts the requirement for religious nonprofits to subsidize contraceptive coverage. Plaintiffs' interests are therefore comparatively minimal, while the government's interests in ensuring the health and welfare of women, and in redressing gender inequities, remain paramount. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626

(1984) (state has compelling interest in eradicating discrimination against women by "removing the barriers to economic advancement and political and social integration"); *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 656 (4th Cir. 1995) (law forbidding protestors to block abortion clinics serves compelling interest in "protect[ing] public health by promoting unobstructed access to reproductive health facilities").

As the IOM concluded, women have different, and more costly, health needs than men. IOM Rep. at 18; Ctrs. for Medicare & Medicaid Servs., *National Health Care Spending by Gender and Age: 2004 Highlights*, http://go.cms.gov/1iDkoSB (women aged 19-44 spent 73% more per capita on health care than male counterparts). Many of the most effective contraceptive methods carry a high up-front cost. IOM Rep. at 108. The disproportionately high cost of preventive services, in tandem with the historical disparity in women's earning power, create cost-related barriers to "medical tests and treatments and to filling prescriptions for [women] and their families." *Id.* at 18-19. These barriers to preventive care "are so high that [women] avoid getting [the

services] in the first place." 155 Cong. Rec. 29,302 (2009) (statement of Sen. Mikulski).

Consequently, the United States has a much higher rate of unintended pregnancy than other developed nations, accounting for *nearly half* of all pregnancies in the nation. IOM Rep. at 102. Forty-two percent of women who experience an unintended pregnancy obtain an abortion. *Id*. And women who carry an unintended pregnancy to term are more likely than women who have planned pregnancies to experience depression and domestic violence during their pregnancies, delay prenatal care, and give birth prematurely. *See id.* at 103. In contrast, "[w]omen who can successfully delay a first birth and plan the subsequent timing and spacing of their children are more likely than others to enter or stay in school and to have more opportunities for employment and for full social or political participation in their community." Susan A. Cohen, *The Broad Benefits of Investing in Sexual and Reproductive Health*, 7 Guttmacher Rep. on Pub. Pol'y 5, 6 (2004), http://bit.ly/1j0sEtY.

The IOM's Committee on Women's Health Research concluded that unintended pregnancies, and the harms that they cause, could be mitigated by "making contraceptives more available, accessible, and acceptable through improved services." IOM Rep. at 104 (quotation marks omitted). Because "even moderate copayments for preventive services" substantially deter women who might otherwise avail themselves of such services, *id.* at 19, reducing or eliminating costs for contraceptives causes women to rely on more effective methods, *id.* at 109. Furthermore, as indicated in many public comments that the government received, reducing not just costs, but logistical barriers, further facilitates women's access to needed contraceptives. *See, e.g.,* Hal C. Lawrence, *Comment of the American Congress of Obstetricians and Gynecologists Re: NPRM: Certain Preventive Services Under the Affordable Care Act, CMS-9968-P*, Apr. 8, 2013, *available at* http://www.regulations.gov.

These comments and conclusions find support in myriad social-science studies, which demonstrate that even exceedingly low barriers, whether financial or logistical, can deter people from accessing benefits

and services. Because "people may decline to change from the status quo even if the costs of change are low and the benefits substantial," "[i]t follows that complexity can have serious adverse effects, by increasing the power of inertia, and that ease and simplification (including reduction of paperwork burdens) can produce significant benefits." Cass R. Sunstein, *Nudges.gov: Behavioral Economics and Regulation* (Feb. 16, 2013), Oxford Handbook of Behav. Econ. & the Law (Eyal Zamir & Doron Teichman eds.) (forthcoming), http://ssrn.com/abstract=2220022. Indeed, removing even minor cost or logistical barriers can dramatically increase consumption. *See* Kristina Shampan'er & Dan Ariely, *Zero as a Special Price: The True Value of Free Products* (2007), http://bit.ly/1iy2eSp.[8]

[8] This dynamic holds true across goods and services. When Amazon inadvertently imposed a 10-cent shipping price for goods sent to one European country, while dropping the shipping price to zero for other countries, sales soared in the latter context and remained largely unchanged in the former. *See* Shampan'er & Ariely, *supra* at 40. Similarly, moving a bowl of food mere inches away, or making food more difficult to eat by changing the utensil provided, can lead to a substantial decrease in consumption. Paul Rozin et al., *Nudge to Obesity I: Minor Changes in Accessibility Decrease Food Intake*, 6 Judgment & Decision Making 323 (2011), http://bit.ly/1jPM20r. One study found that if employees are faced with a default rule in which

Women's use of contraception reflects this phenomenon. One study showed that when condom prices rise from zero to merely 25 cents, sales decline by 98%. *See* Deborah Cohen et al., *Cost as a Barrier to Condom Use: The Evidence for Condom Subsidies in the United States*, 89 Am. J. of Pub. Health 567, 567 (1999), http://1.usa.gov/1b1Q1gV. According to a different study, making oral contraceptives only slightly less convenient (dispensing them quarterly rather than annually) resulted in a 30% greater chance of unintended pregnancy, and a 46% greater chance of abortion. *See* Diana Greene Foster et al., *Number of Oral Contraceptive Pill Packages Dispensed and Subsequent Unintended Pregnancies*, 117 Obstetrics & Gynecology 566, 566 (2011), http://bit.ly/1ebyZRQ.

By contrast, in another study, when the most convenient forms of contraception—those requiring the least effort to maintain—were made

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they automatically contribute 3% of their income to a 401(k) plan, very few employees opt out; but a majority of employees will not make any contributions in the absence of an enrollment-by-default rule. Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q. J. of Econ. 1149 (2001), http://bit.ly/1ftWFDi.

available at no cost to young women, the rate of unintended pregnancy dropped by 80%, leading researchers to predict that the regulations at issue in this case could "prevent[ ] as many as 41-71% of abortions performed annually in the United States." Sarah Kliff, *Free Contraceptives Reduce Abortions, Unintended Pregnancies. Full Stop.*, Wash. Post, Oct. 5, 2012, http://wapo.st/1ideMhQ.

The Accommodation heeds this social-science data by allowing women to receive coverage from their existing healthcare provider, on a cost-free basis, while, at the same time, ensuring that religiously affiliated entities are entitled to opt out of covering services that they find objectionable. In contrast, all of the alternative approaches suggested by Plaintiffs would balkanize women's access to contraceptives and thereby impede the government's goals. *See* R. 73, Pls.' Prelim. Inj. Br. 21-22. The Accommodation thus constitutes the least-restrictive means to accomplish the government's compelling goals.[9]

[9] The district court erred in concluding that the government lacks a compelling interest in applying the regulations to the Plaintiffs, because the third-party administrators of Plaintiffs' self-insured church

## III. The Establishment Clause Forbids the Relief That Plaintiffs Seek.

Plaintiffs' interpretation of RFRA would exceed Establishment Clause limitations because it would override significant third-party interests, and grant a religious veto over the regulatory rights and obligations of third parties. Pursuant to the canon of constitutional avoidance, this interpretation of RFRA should be rejected.

### A. The Court has repeatedly rejected religious exemptions that cause significant third-party harms.

Plaintiffs do not seek a garden-variety accommodation; they seek one that would come at significant cost to the women who would otherwise obtain insurance coverage that is essential to their well-being. RFRA does not authorize, let alone require, an exemption that comes at that cost.

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plans cannot be required to provide contraceptive coverage after receiving an eligible organization's self-certification form. *See, e.g.* SPA33-34. But even if it presently cannot *require* these third-party administrators to provide contraceptive coverage, the government has offered financial incentives to administrators that make such coverage available, including reducing their "Federally-facilitated Exchange user fee." *See* 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50.

When debating the law, Congress envisioned exemptions imposing few if any burdens on third parties. *See, e.g.*, 139 Cong. Rec. E1234-01 (daily ed. May 11, 1993) (statement of Rep. Cardin) (burial of veterans in "veterans' cemeteries on Saturday and Sunday . . . if their religious beliefs required it"); 139 Cong. Rec. S14350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (allowing parents to home school their children). None of the exemptions contemplated by Congress would have required third parties, like Plaintiffs' employees, to forfeit federal protections or benefits.

That debate reflected the Supreme Court's Free Exercise Clause jurisprudence preceding *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which RFRA was enacted to recapture. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). That jurisprudence long distinguished between religious exemptions that burdened third parties and those that did not. Thus, in *Lee*, the Court rejected an Amish employer's request for an exemption from paying social-security taxes because the exemption would "operate[ ] to impose the employer's

religious faith on the employees." 455 U.S. at 261. And in *Braunfeld*, the Court refused to recognize an exemption to the Sunday closing law because that would have "provide[d] [the plaintiffs] with an economic advantage over their competitors who must remain closed on that day." 366 U.S. at 608-09. In contrast, in *Sherbert v. Verner*, 374 U.S. 398, 409 (1963), the Court recognized a right to unemployment benefits that did not "serve to abridge any other person's religious liberties"; and the Court granted an exemption from public-school-attendance requirements in *Wisconsin v. Yoder*, 406 U.S. 205, 235-36 (1972), only after the Amish parents had demonstrated the "adequacy of their alternative mode of continuing informal vocational education."

Exemptions that come at the cost of third parties are equally disfavored under the Establishment Clause. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the Court struck down a statute that granted employees a right not to work on the Sabbath day of their choosing. The Court reasoned that "the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath," and impermissibly bestowed the "right

to insist that in pursuit of [one's] own interests others must conform their conduct to [one's] own religious necessities." *Id.* at 709-10 (quotation marks omitted); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality op.) (sales-tax exemption limited to religious periodicals impermissibly "burden[ed] nonbeneficiaries by increasing their tax bills"). As the Court recently held in upholding RLUIPA against an Establishment Clause challenge, any accommodation "must be measured so that it does not override other significant interests." *Cutter*, 544 U.S. at 722.[10]

Plaintiffs urge an interpretation of RFRA that would inflict widespread harm on the thousands of female employees and covered family members that Plaintiffs insure. For women who cannot

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[10] To the extent the Court has ever approved religious exemptions that potentially harm third parties, it has done so only when necessary to preserve religious associational values. *See Texas Monthly*, 489 U.S. at 18 n.8. Thus, in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), the Court held that the Establishment Clause permitted, and in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 132 S. Ct. 694 (2012), that the Religion Clauses required, non-interference with the selection of a religious community's membership. This case does not present any such considerations.

otherwise afford contraceptives, the regulations at issue provide a lifeline to security in their bodies and futures—personal autonomy interests that lie "[a]t the heart of liberty." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). Granting Plaintiffs the relief they seek would undermine these personal autonomy interests by denying women access to needed contraceptives and to education and counseling about contraceptive methods. It would also subject women to greater financial burdens than their male counterparts and impose educational and economic hardships upon women who experience unintended pregnancies. These results cannot be reconciled with the Supreme Court's religion-clause jurisprudence.

### B. Plaintiffs seek an unconstitutional religious veto over the flow of regulatory benefits to third parties.

The relief that the Plaintiffs seek is not an exemption, as that term is normally understood; it is a veto. Plaintiffs seek to prevent the "actions of third parties—the government's and the issuer's provision of contraceptive services—in which [Plaintiffs] play[ ] no role." *Priests for Life*, 2013 WL 6672400, at *9. Plaintiffs' claim that RFRA entitles them

to this outcome cannot be reconciled with *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), which struck down a law that vested religious organizations with the authority to veto liquor-license applications of nearby establishments. "The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 734 (1994) (quoting *Larkin*, 459 U.S. at 127). The *Larkin* Court was particularly troubled by the prospect that a "power ordinarily vested in agencies of government" could be wielded in a manner that was not "religiously neutral." 459 U.S. at 122, 125.

Plaintiffs' interpretation of RFRA is similarly infirm. Delineating access to regulatory benefits is undeniably a "power ordinarily vested in agencies of government." *Id.* at 122. While Plaintiffs may refuse to receive or provide such benefits themselves, they cannot preclude the government from making the benefits available via third-party arrangements. Plaintiffs seek to redefine the regulatory relationship between affected women, insurers, and the government—for reasons

that are admittedly not "religiously neutral." *Id.* at 125. The Constitution forbids this result.

* * *

Privileging Plaintiffs' religious interests over the interests of countless women in obtaining contraceptive coverage—and giving Plaintiffs veto power over the flow of benefits between third parties—would place RFRA at odds with the Establishment Clause. "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, [courts] are obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citation and quotation marks omitted). For all of the reasons set forth above, the Court should interpret the statute to disallow the exemption that Plaintiffs seek.

## Conclusion

The judgment of the district court should be reversed.

Respectfully submitted,

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## Certifications of Compliance

I hereby certify to the following:

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6,412 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it was prepared in WordPerfect, Century Schoolbook, 14-point font.

/s/ *Ayesha N. Khan*
Ayesha N. Khan

Certificate of Service

On June 3, 2014, I electronically filed the foregoing brief with the Clerk of this Court through the appellate CM/ECF system and caused six hard copies to be delivered within two business days. The participants in the case are registered CM/ECF users, and service will be accomplished through the appellate CM/ECF system.

/s/ *Ayesha N. Khan*
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