Nos. 19-15072, 19-15118, & 19-15150

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, *et al.*,
Plaintiffs–Appellees,
v.
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Defendants–Appellants,
and
THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,
Intervenor–Defendant–Appellant,
and
MARCH FOR LIFE EDUCATION AND DEFENSE FUND,
Intervenor–Defendant–Appellant.

On Appeal from the United States District Court
for the Northern District of California
Case No. 17-cv-05783-HSG, Hon. Haywood S. Gilliam Jr.

BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* SUPPORTING APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amici are nonprofit organizations. They have no parent corporations and no publicly held corporation owns any portion of any of them.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

Constitution, Statutes, and Regulatory Materials

Other Authorities

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

INTERESTS OF THE *AMICI CURIAE*[1]

Amici are religious and civil-rights organizations representing diverse faiths and beliefs but united in respecting the distinct roles of religion and government in the life of the Nation. Constitutional and statutory protections work hand-in-hand to safeguard religious freedom for all Americans by ensuring that the government does not interfere in private matters of conscience, promote any particular denomination, provide believers with preferential benefits, or force innocent third parties to bear the costs of others' religious exercise. *Amici* write to explain why the challenged final rules violate fundamental First Amendment protections for religious freedom.

Amici, described individually in the Appendix, are:

- Americans United for Separation of Church and State.
- Bend the Arc: A Jewish Partnership for Justice.
- Central Conference of American Rabbis.
- Central Pacific Conference of the United Church of Christ.
- Global Justice Institute, Metropolitan Community Churches.
- Hadassah, The Women's Zionist Organization of America, Inc.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of *amicus* briefs.

- Hawaii Conference of the United Church of Christ.
- Illinois Conference of the United Church of Christ.
- Interfaith Alliance Foundation.
- Men of Reform Judaism.
- Methodist Federation for Social Action.
- Muslim Advocates.
- National Council of Jewish Women, Inc.
- New York Conference of the United Church of Christ.
- Northern California Nevada Conference of the United Church of Christ.
- People for the American Way Foundation.
- Reconstructing Judaism.
- Reconstructionist Rabbinical Association.
- Religious Coalition for Reproductive Choice.
- Religious Institute, Inc.
- The Sikh Coalition.
- Southwest Conference of the United Church of Christ.
- T'ruah.
- Union for Reform Judaism.
- Women of Reform Judaism.

INTRODUCTION

The Women's Health Amendment to the Patient Protection and Affordable Care Act and the ACA's implementing regulations require that employer-provided health plans cover preventive care for women—including all FDA-approved methods of contraception—without cost-sharing. *See* 42 U.S.C. § 300gg-13(a)(4); 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv). This requirement guarantees insurance coverage for family planning and other medical services that the government determined are essential to women's health and well-being. *See* INSTITUTE OF MEDICINE, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 102–10 (2011), http://bit.ly/2t6lgfr.

Under 45 C.F.R. § 147.131(a) (2015), houses of worship were exempt from the requirement. Under 45 C.F.R. § 147.131(c) (2015), religiously affiliated entities were entitled to a religious accommodation (i.e., an exemption) if they give notice that they want one; the government then arranges for coverage to be provided without cost to or participation by the objecting entity. And under *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), closely held for-profit businesses with religious objections were entitled to the same accommodation as religiously affiliated entities.

In October 2017, without notice-and-comment rulemaking, the government issued two interim final rules that changed the accommodation process dramatically. Thirteen months later, the government issued "nearly identical" final rules. *California v. U.S. Dep't of Health & Human Servs.*, 351 F. Supp. 3d 1267, 1279 (N.D. Cal. 2019).

The final rules establish religious and moral exemptions that effectively nullify the contraceptive-coverage requirement's protections for countless women. The Religious Exemption (45 C.F.R. § 147.132) provides that nongovernmental insurance-plan sponsors may, on the basis of religious objections, exempt themselves from the contraceptive-coverage requirement in a way that affirmatively bars the government from making separate arrangements to provide coverage. Objecting entities may also voluntarily notify the government of their intention not to provide coverage without standing in the way of the government's separate arrangements (*see id.* § 147.131(d)) by invoking the accommodation previously available to all but publicly traded companies.[2] And objecting entities that have taken

[2] Though it has become common shorthand to use "accommodation" to mean the ability to refuse to provide the coverage on giving notice (so that the government may ensure that the coverage is provided by a third-party insurer), and "exemption" to mean the ability also to block the government's separate arrangements for the coverage, a religious accommodation is simply an exemption from the law on religious grounds. *See generally Corp.*

the preexisting accommodation may revoke their notice to the government, thus requiring the government to curtail its separate provision of the coverage. *See id.* § 147.131(c)(4).

The Moral Exemption provides that nongovernmental insurance-plan sponsors (other than publicly traded for-profit companies) may likewise avail themselves of either version of the exemption and switch between the two at will, based on what the government terms a "moral objection." *See id.* §§ 147.131(c), 147.133.

Amici agree with the district court that the challenged rules violate the Administrative Procedure Act. We write to explain in more detail why the Religious Freedom Restoration Act (42 U.S.C. §§ 2000bb *et seq.*) does not confer authority on the government to promulgate these rules, and why Appellants' reading of RFRA raises serious constitutional concerns.

SUMMARY OF ARGUMENT

A. The Supreme Court has made clear that when evaluating religious exemptions from generally applicable laws, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). If, in purporting to accommodate the religious exercise of some, the government

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of the Presiding Bishop v. Amos, 483 U.S. 327 (1987). *Amici* therefore use the terms interchangeably.

imposes costs and burdens on others, it prefers the beliefs of the benefited over the beliefs, rights, and interests of the burdened, thus violating the Establishment Clause. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985). That is true whether a religious exemption is premised on the Religious Freedom Restoration Act, other federal or state statutes or regulations, or the First Amendment's Free Exercise Clause. *See, e.g.*, *Hobby Lobby*, 573 U.S. at 729 n.37; *Cutter*, 544 U.S. at 720; *Caldor*, 472 U.S. at 709–10. Yet in the name of accommodating businesses and colleges, the Religious Exemption here strips employees, students, dependents, and other innocent third parties of the insurance coverage to which they are entitled by law, impermissibly imposing on them significant costs and burdens just to obtain critical healthcare that should be available to them without out-of-pocket costs.

B. The Supreme Court has also made clear that for religious exemptions from general laws to be potentially permissible, they must alleviate substantial government-imposed burdens on religious exercise. *See, e.g.*, *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 US. 573, 613 n.59 (1989). When they do not, they are unconstitutional preferences for religion. *Amos*, 483 U.S. at 334–35. Yet the Religious Exemption here is available regardless of whether an entity demonstrates that the preexisting regulatory accommodation substantially burdens its

religious exercise—a prerequisite that cannot be met. So RFRA does not authorize the exemption, and the Establishment Clause does not allow it.

C. Finally, although the government also affords a "Moral Exemption," either that exemption is broader than the Religious Exemption, in which case it is *ultra vires*, or it is just the Religious Exemption by another name, in which case it suffers the same constitutional defects as its sibling. Neither exemption can stand.

ARGUMENT

A. Religious Exemptions That Unduly Harm Third Parties Are Unconstitutional.

1. Religious exemptions that harm third parties violate the Establishment Clause.

The rights to believe, or not, and to practice one's faith, or not, are sacrosanct. But they do not extend to imposing the costs of one's beliefs onto innocent third parties. Government should not, and under the Establishment Clause cannot, favor the religious beliefs of some at the expense of the rights, beliefs, and health of others. For if religious exemptions from general laws detrimentally affect nonbeneficiaries, they constitute unconstitutional preferences for the favored religious beliefs and their adherents.

Thus, in *Caldor*, the Supreme Court invalidated a law requiring employers to accommodate Sabbatarians in all instances, because "the

statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." 472 U.S. at 709. The Court held that "unyielding weighting in favor of Sabbath observers over all other interests" has "a primary effect that impermissibly advances a particular religious practice." *Id.* at 710. Similarly, in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the Court invalidated a sales-tax exemption for religious periodicals because it unconstitutionally "burden[ed] nonbeneficiaries by increasing their tax bills by whatever amount [was] needed to offset the benefit bestowed on subscribers to religious publications." *Id.* at 18 n.8 (plurality opinion).

Free-exercise jurisprudence incorporates this same principle. In *United States v. Lee*, 455 U.S. 252, 261 (1982), 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." And in *Braunfeld v. Brown*, 366 U.S. 599, 608–09 (1961), the Court refused an exemption from Sunday-closing laws because it would have provided Jewish business owners with "an economic advantage over their competitors who must remain closed on that day." In contrast, the Court recognized a Seventh-Day Adventist's right to an exemption from a restriction on unemployment benefits in *Sherbert v. Verner*, 374 U.S. 398, 409 (1963), because the exemption would not "serve

to abridge any other person's religious liberties." And the Court granted exemptions from state truancy laws in *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1972), only after Amish parents demonstrated the "adequacy of their alternative mode of continuing informal vocational education" to meet their children's educational needs.

In short, a religious accommodation "must be measured so that it does not override other significant interests" (*Cutter*, 544 U.S. at 722) and must "not impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs" (*Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion)). When nonbeneficiaries would be unduly harmed, religious exemptions are forbidden. *Cutter*, 544 U.S. at 720; *Caldor*, 472 U.S. at 709–10.

Indeed, in only one narrow set of circumstances (in two cases) has the Supreme Court *ever* upheld religious exemptions that burdened third parties in any meaningful way—namely, when core Establishment and Free Exercise Clause protections for the autonomy and ecclesiastical authority of religious institutions required the accommodation. Specifically, the Court held in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 196 (2012), that the Americans with Disabilities Act could not be enforced in a way that would interfere with a church's selection of its ministers. And in *Amos*, 483 U.S. at 330, 339, the Court upheld, under Title

VII's statutory religious exemption, a church's firing of an employee who was not in religious good standing. These exemptions did not amount to impermissible religious favoritism, and therefore were permissible under the Establishment Clause, because they directly implicated "church autonomy," which is "enshrined in the constitutional fabric of this country" (*Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 352 (3d Cir. 2017)).

Concerns for church autonomy have no bearing here, as the challenged rules do not apply to churches, which were already exempted. *See* 45 C.F.R. § 147.131(a) (2015). As the Supreme Court recently explained, if the special solicitude for churches and clergy "were not confined," the result would be "inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).[3]

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[3] For similar reasons, Appellants (Gov't Br. 22–25, 35–36, 45; Little Sisters Br. 29–31; March for Life Br. 39–41) are incorrect that the Religious Exemption and the preexisting exemption for houses of worship must stand or fall together. Although the government now contends that "[t]he church exemption . . . is not tailored to any plausible Free Exercise Clause concerns" (Gov't Br. 25), it created the exemption "to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions" (76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011); *accord* 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013)). In

2. RFRA does not, and cannot, authorize religious exemptions that harm third parties.

Appellants argue that RFRA requires the Religious Exemption. That is incorrect both as a constitutional matter and as a matter of statutory construction.

a. Because RFRA cannot require what the Establishment Clause forbids (*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) ("'[T]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.'" (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992)))), it should not be read to afford religious accommodations that would harm nonbeneficiaries if a constitutionally permissible alternative construction is possible (*see, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005)). Thus, in interpreting RFRA and its sister statute, the Religious Land Use and Institutionalized Persons Act (42 U.S.C. §§ 2000cc *et seq.*),

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keeping with the principle of noninterference with the internal workings of churches, the government routinely draws distinctions between houses of worship and nonchurch nonprofits. *Cf., e.g.*, 2 U.S.C. § 1602(8)(B)(xviii) (exempting churches from Lobbying Disclosure Act's registration requirements); 26 U.S.C. § 6033(a)(3)(A)(i), (iii) (exempting churches from obligations for nonprofits to register with Internal Revenue Service and to submit annual informational tax filings); 29 U.S.C. § 1003(b)(2) (exempting church plans from ERISA). The numerous classes of entities—including publicly traded for-profit corporations—exempted here are not situated similarly to houses of worship.

the Supreme Court has enforced the constitutional prohibition against unduly burdening third parties by affording the statutes a saving construction that builds in the Establishment Clause's safeguards.[4]

Specifically, the Supreme Court held in *Cutter* that "[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" to ensure that accommodations do "not override other significant interests." 544 U.S. at 720, 722 (citing *Caldor*, 472 U.S. at 709–10). The Court repeated that requirement in *Hobby Lobby*. *See* 573 U.S. at 729 n.37. Indeed, with respect to exemptions from the very contraceptive-coverage requirement at issue here, every Justice in *Hobby Lobby* authored or joined an opinion recognizing that detrimental effects on nonbeneficiaries must be considered. *See id.* at 693 ("Nor do we hold . . . that . . . corporations have free rein to take steps that impose 'disadvantages . . . on others' or that require 'the general public [to] pick up the tab.'"); *id.* at 739 (Kennedy, J., concurring)

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[4] RFRA and RLUIPA employ virtually identical language and serve the same congressional purpose. *Compare* 42 U.S.C. § 2000bb-1, *with* 42 U.S.C. § 2000cc-1. Accordingly, they apply "the same standard." *Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015) (citation omitted). And decisions under one apply equally to the other. *See, e.g.*, *Walker v. Beard*, 789 F.3d 1125, 1134 (9th Cir. 2015); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661 (10th Cir. 2006); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226–27 (11th Cir. 2004).

(religious exercise must not "unduly restrict other persons . . . in protecting their own interests"); *id.* at 745 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting) ("Accommodations to religious beliefs or observances . . . must not significantly impinge on the interests of third parties."); *see also Holt*, 135 S. Ct. at 867 (Ginsburg, J., concurring) (religious accommodation constitutionally permissible because it "would not detrimentally affect others who do not share petitioner's belief").

b. This construction of RFRA is not just presumed as a matter of constitutional avoidance; it is what Congress intended.

Before 1990, the Supreme Court interpreted the Free Exercise Clause to require strict scrutiny (i.e., a compelling government interest and narrow tailoring) when general laws substantially burdened religious exercise. *See, e.g.*, *Sherbert*, 374 U.S. at 406–07. In *Employment Division v. Smith*, 494 U.S. 872, 879 (1990), however, the Court held that generally applicable laws that are facially neutral with respect to religion are presumptively constitutional and subject to only rational-basis review, even if the legal requirements fall more heavily on some people because of their religion. Congress responded by enacting RFRA to restore the Court's pre-*Smith* free-exercise jurisprudence as a statutory test for religious accommodations. *See* 42 U.S.C. § 2000bb(b)(1); *Gonzales v. O Centro Espirita Beneficente*

Uniao do Vegetal, 546 U.S. 418, 424 (2006); S. Rep. No. 103-111, at 8 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1897–98.

In doing so, Congress necessarily—and quite consciously—adopted into RFRA the Establishment Clause's prohibitions recognized in pre-*Smith* free-exercise law. *See, e.g.*, 139 Cong. Rec. S14,350–51 (daily ed. Oct. 26, 1993), https://bit.ly/2VaZYdl (statement of Sen. Kennedy) ("The act creates no new rights for any religious practice or for any potential litigant. Not every free exercise claim will prevail, just as not every claim prevailed prior to the *Smith* decision."); 139 Cong. Rec. S14,352 (daily ed. Oct. 26, 1993), https://bit.ly/2VaZYdl (statement of Sen. Hatch) (RFRA "does not require the Government to justify every action that has some effect on religious exercise"). Hence, when assessing RFRA claims this Court looks to the "pre-*Smith*" "body of Supreme Court case law" expounded in *Sherbert* and the other decisions described above. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1074 (9th Cir. 2008) (en banc). It follows that although RFRA provides critical protections for religious exercise, it does not—and as a constitutional matter cannot—license the government's imposition of costs and burdens on innocent third parties.

c. The government would subjugate constitutional mandates to bureaucratic whim. Having decided for itself that it no longer has a compelling interest in the contraceptive-coverage requirement, the

government argues (Br. 42) that this decision disposes of the Establishment Clause. In other words, because the government no longer attaches much importance to protecting women's health and equality through consistent enforcement of the ACA, it believes that the Constitution affords no protection either.

Preliminarily, adhering to the Establishment Clause ***is*** a compelling government interest (*see, e.g.*, *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1104 n.9 (9th Cir. 2000)), regardless of the government's position *du jour* on contraceptive coverage. But more importantly, the Establishment Clause defines the metes and bounds of RFRA (*cf. Cutter*, 544 U.S. at 720); it is not cabined by RFRA's statutory compelling-interest test or undermined by the government's reassessment of its goals. The First Amendment prohibits religious accommodations that impose costs on nonbeneficiaries, full stop. That prohibition is not cast aside because the government changes litigating positions. Nor is the government's assessment of the seriousness of the harms resulting from its actions the measure of a constitutionally cognizable burden.

Neither is the proper inquiry a balancing of estimated burdens on religious objectors against harms to women receiving medical coverage through objecting employers. The constitutional question is whether third parties are unduly burdened—not how those burdens compare to other

concerns. *See, e.g.*, *id.* at 722; *Caldor*, 472 U.S. at 709–10. Not only is there no precedent for a balancing approach, but such an approach necessarily presumes that those seeking religious exemptions should sometimes win over the substantial rights and interests of nonbeneficiaries. That is not the constitutional rule.

3. The Religious Exemption would impermissibly harm countless women.

Because the Religious Exemption empowers employers not just to opt out of providing contraceptive coverage but also to bar the government from ensuring that coverage is provided another way, the practical effect is that women who get their health insurance through entities that avail themselves of the Exemption will be denied the insurance coverage to which they are entitled by law. They will thus have to pay out-of-pocket for critical medical services that otherwise would be available to them without cost-sharing. And those who cannot afford to pay will be forced to choose less medically appropriate health services or to forgo needed care altogether. By making employees, students, and dependents bear these costs and burdens, the Exemption violates the Establishment Clause and cannot be authorized by RFRA.

Contraceptives are critical healthcare. Not only do they prevent unintended pregnancies, but they protect the health of women with the

"many medical conditions for which pregnancy is contraindicated" (*Hobby Lobby*, 573 U.S. at 737 (Kennedy, J., concurring)). They also reduce risks of endometrial and ovarian cancer. *See Large Meta-Analysis Shows That the Protective Effect of Pill Use Against Endometrial Cancer Lasts for Decades*, 47 PERSP. ON SEXUAL & REPROD. HEALTH 228, 228 (2015). They preserve fertility by treating conditions such as polycystic ovary syndrome. *See* Mira Aubuchon & Richard S. Legro, *Polycystic Ovary Syndrome: Current Infertility Management*, 54 CLINICAL OBSTETRICS & GYNECOLOGY 675, 676 (2011). And they alleviate severe premenstrual symptoms such as dysmenorrhea. *See* Anne Rachel Davis et al., *Oral Contraceptives for Dysmenorrhea in Adolescent Girls: A Randomized Trial*, 106 OBSTETRICS & GYNECOLOGY 97, 97 (2005), https://bit.ly/2L9LVgo.

But contraceptives are expensive. Without insurance, the annual cost for prescription oral contraception may be as much as $600. *See* Elly Kosova, *How Much Do Different Kinds of Birth Control Cost Without Insurance?*, NAT'L WOMEN'S HEALTH NETWORK (Nov. 17, 2017), https://bit.ly/2HSYwmM. The most effective contraceptives—intrauterine devices or contraceptive implants—may cost $1,000 out-of-pocket. *Id.* And even small differences in cost between contraceptives may deter women from choosing the most effective and medically appropriate form for them: Women who must pay more than $50 out-of-pocket, for example, are about seven times

less likely to obtain an intrauterine device than are women who would pay less than $50. *See* Aileen M. Gariepy et al., *The Impact of Out-of-Pocket Expense on IUD Utilization among Women with Private Insurance*, 84 CONTRACEPTION c39, c40–41 (2011). And with less effective contraceptives or reduced options for the most medically appropriate ones come increased risks of unintended pregnancies, increased risks of serious, potentially life-threatening illnesses, and increased severity of symptoms from otherwise treatable conditions.

Moreover, "[t]he evidence shows that contraceptive use is highly vulnerable to even seemingly minor obstacles." *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 265 (D.C. Cir. 2014), *vacated and remanded by Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (per curiam). For example, requiring women to return to the clinic for oral-contraceptive refills every three months rather than providing a year's supply yielded a 30% greater incidence of unintended pregnancies and, correspondingly, a 46% increase in abortions. *See* Diana Greene Foster et al., *Number of Oral Contraceptive Pill Packages Dispensed and Subsequent Unintended Pregnancies*, 117 OBSTETRICS & GYNECOLOGY 566, 570 (2011), https://bit.ly/2IKftiS.

The government estimates that more than 125,000 women will lose their contraceptive coverage because of the challenged exemptions. *See*

Religious Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care Act, 83 Fed. Reg. 57,536, 57,551 (Nov. 15, 2018); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care Act, 83 Fed. Reg. 57,592, 57,627(Nov. 15, 2018). These women will incur actual, out-of-pocket expenses and experience pressure to choose cheaper, often less effective or less medically appropriate contraceptives—or to do without. Even for those who may as a formal matter have other routes to obtain insurance coverage, the administrative hurdles, additional time, additional expense, and potential need to expose intensely personal details of their medical history or intimate relations are all significant and sometimes decisive deterrents. Thus, while for some women contraceptives may be available from other sources, for any particular individual that assertion is speculative at best; alternatives may be impracticable or wholly unavailable. Whether the government deems these harms significant is beside the point; Establishment Clause mandates are not policy matters left to the shifting priorities of bureaucrats.

B. Religious Accommodations Are Permissible Only When Needed To Alleviate Substantial, Government-Imposed Burdens On Religious Exercise.

When official action has the effect of imposing *substantial* burdens on religious exercise, the government may act to ameliorate those burdens (*see,*

e.g., *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)), subject to, among other restrictions, the constitutional prohibition against shifting the costs to non-beneficiaries (*see* Part A, *supra*). But "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988). And when asserted burdens on religious exercise are insubstantial or exist independently of any governmental action, legal exemptions would constitute official promotion of religion that violates the Establishment Clause. *See Allegheny*, 492 U.S. at 613 n.59; *Texas Monthly*, 489 U.S. at 15 (plurality opinion).

Here, the government affords categorical exemptions without requiring businesses to show, or even assert, a substantial, government-imposed burden on religious exercise. The Religious Exemption thus exceeds the authority granted by RFRA and impermissibly promotes religion in derogation of the Establishment Clause.

1. Religious exemptions that do not alleviate substantial, government-imposed burdens on religious exercise violate the Establishment Clause.

An "accommodation of religion, in order to be permitted under the Establishment Clause, must lift 'an identifiable burden on the exercise of religion'" that the government itself has imposed. *Allegheny*, 492 U.S. at 613 n.59 (quoting *Amos*, 483 U.S. at 348 (O'Connor, J., concurring in the

judgment)); *see also Texas Monthly*, 489 U.S. at 15 (plurality opinion) (accommodations must "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion"); *Wallace v. Jaffree*, 472 U.S. 38, 84 (1985) (O'Connor, J., concurring in the judgment) (religious accommodation must lift "state-imposed burden on the free exercise of religion" that does not result from Establishment Clause). Absent a substantial government-imposed burden, a religious accommodation would impermissibly "create[ ] an incentive or inducement (in the strong form, a compulsion) to adopt [the benefited religious] practice or conviction." Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992).

Thus, granting a religious exemption from a general law without first objectively determining that there exists a substantial government-imposed burden on the claimant's religious exercise would unconstitutionally "single out a particular class of [religious observers] for favorable treatment and thereby have the effect of implicitly endorsing a particular religious belief." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145 n.11 (1987).

2. RFRA does not, and cannot, authorize religious accommodations when there is no substantial government-imposed burden on religious exercise.

What the Establishment Clause requires, RFRA incorporates as an express statutory prerequisite: To assert a colorable accommodation claim,

claimants must first demonstrate that the "[g]overnment [has] substantially burden[ed their] exercise of religion." *See* 42 U.S.C. § 2000bb-1.

The bare assertion that religious exercise is burdened is insufficient because "accepting any burden alleged by [complainants] as 'substantial'" would "ignore the import . . . of the 'substantial' qualifier in the RFRA test." *Real Alternatives*, 867 F.3d at 358 & n.24 (quoting *Little Sisters of the Poor v. Burwell*, 794 F.3d 1151, 1176 (10th Cir. 2015), *vacated and remanded by Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (per curiam)). And courts "'are obliged to give effect, if possible, to every word Congress used.'" *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 890 (9th Cir. 2011) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)); *see also Oklevueha Native Am. Church v. Lynch*, 828 F.3d 1012, 1016–17 (9th Cir. 2016) (assessing and rejecting plaintiffs' contention that asserted burden was "substantial").

Thus, whether a RFRA claimant's religious exercise is substantially burdened is a legal question for the courts, with "'substantial burden' [being] a term of art chosen by Congress to be defined by reference to Supreme Court precedent." *Navajo Nation*, 535 F.3d at 1063; *see also EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 588 (6th Cir. 2018), *cert. granted in part*, 2019 WL 1756679 (Apr. 22, 2019) ("Most circuits . . . have recognized that a party can sincerely believe that he is being coerced into engaging in conduct that violates his religious convictions without actually,

as a matter of law, being so engaged."). Administrative determinations with respect to that legal question are subject to *de novo* review, because government agencies can never be the last word on constitutional issues. *Cf. Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) (recognizing "long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees"). And hence, the executive branch is not entitled to deference here. *See Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 823 (E.D. Pa. 2019); *see also Hobby Lobby*, 573 U.S. at 720–36 (analyzing whether contraceptive-coverage requirement violated RFRA, without affording deference to HHS).

What is more, while a religious practice need not be "central to" the adherent's "system of religious belief" to give rise to a potential RFRA claim (42 U.S.C. § 2000cc-5(7)(A); *see* 42 U.S.C. § 2000bb-2(4)), there must always be a sufficient "nexus" between claimants' religious beliefs and the practices for which accommodations are sought to demonstrate that the government is "'forc[ing claimants] to engage in conduct that their religion forbids or . . . prevent[ing] them from engaging in conduct their religion requires'" (*Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011) (omission in original) (quoting *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001))). Otherwise, there is no substantial burden on religious exercise—as a matter of law. *Mahoney*, 642 F.3d at 1122.

Suppose, for example, that the government required wellness checkups for all children living on military bases, but a parent sought an exemption based on a religious objection to blood transfusions. The objection, though sincere, would be inadequate to entitle the parent to the requested exemption because wellness checkups do not include blood transfusions. *Cf., e.g.*, *Wilson v. James*, No. 15-5338, 2016 WL 3043746, at *1 (D.C. Cir. May 17, 2016) (per curiam) (RFRA did not protect National Guardsman against discipline for sending e-mail attacking Army officials for allowing same-sex couples to marry in West Point chapel because he "failed to show this letter of reprimand substantially burdened any religious action or practice"). No nexus, no substantial burden. So no claim.

3. The Religious Exemption impermissibly authorizes exemptions without requiring substantial burdens on religious exercise.

Without satisfying RFRA's statutory prerequisites and the constitutional mandates on which they are premised, the Religious Exemption licenses any organization with a sincerely held religious objection to contraceptive coverage—be it a nonprofit, college or university, closely held corporation, publicly traded corporation, insurance company, or individual—to avoid complying with the preexisting regulatory accommodation's simple expectation that objectors must ask for an exemption to receive it. *See* 45 C.F.R. §§ 147.131(c)–(d), 147.132(a)–(b). The

challenged rules thus go well beyond what RFRA authorizes or the Establishment Clause allows.

a. As the government has elsewhere acknowledged, the challenged rules do not require, or even permit, the government to assess whether any particular objector's religious exercise is substantially burdened before the objector avails itself of the exemption. *See* Defs.' Br. in Resp. to Mot. for Class Certification 7–8, *Deotte v. Azar*, Case No. 4:18-cv-00825-Y (N.D. Tex. Mar. 8, 2019), ECF No. 30. Hence the Religious Exemption does not provide for individualized determinations, much less a record sufficient for judicial review of those determinations, as RFRA and the Establishment Clause require. *See Real Alternatives*, 867 F.3d at 357–58. Objectors do not have to assert any burdens, or even provide bare legal notice that they plan to take the exemption, so there is no way to identify RFRA claimants, much less to differentiate genuine objections from after-the-fact or sham excuses for not following the law. The upshot is "personalized oversight [by] millions of [entities]. Each [holds] an individual veto to prohibit the government action solely because it offends [the entity's] religious beliefs, sensibilities, or tastes, or fails to satisfy [its] religious desires." *Navajo Nation*, 535 F.3d at 1063. And entities are "'allowed to be a judge in [their] own cause,'" violating bedrock principles of due process. *See* Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge*

Burdens on Religion Under RFRA, 85 GEO. WASH. L. REV. 94, 100–01 (2017) (quoting THE FEDERALIST NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961)).

b. There is strong reason to conclude that many objecting entities will fail RFRA's nexus requirement. Though the Religious Exemption is purportedly afforded "to the extent" of objecting entities' religious beliefs (45 C.F.R. § 147.132(a)), the lack of any requirement that objectors state those beliefs means that there can be no genuine inquiry into whether the exemption taken is tailored to supposed burdens on religious exercise. In that regard, many entities have explained that they object to only a small subset of contraceptive methods. *See* 83 Fed. Reg. at 57,575 & n.79 (noting that *Hobby Lobby* plaintiffs objected to just 4 of 18 FDA-approved contraceptive methods). Yet there is no assurance that they will refuse to provide coverage solely for what they consider religiously forbidden. And overbroad exclusions are not just possible, but likely: Insurance companies will, for business reasons, almost certainly offer standard-package or off-the-shelf "objector" policies that are not specifically tailored to each employer's genuine religious objections.

c. Moreover, the government extends the exemptions to whole classes of entities without any basis to conclude that even a single class member's religious exercise is substantially burdened by the coverage requirement or

the preexisting regulatory accommodation. For example, the government provides exemptions for insurance companies despite "not know[ing] that issuers with qualifying religious objections exist." 83 Fed. Reg. at 57,566. The government likewise extends the exemption to publicly traded corporations without pointing to even one that has sought an accommodation, and without identifying who might assert substantial burdens, or how, on behalf of shareholders. *See id.* at 57,562–63.

These failings are noteworthy because, as the Supreme Court explained in *Hobby Lobby*, "the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable." 573 U.S. at 717. And though the government contends that "[t]he mechanisms for determining whether a company has adopted and holds . . . sincerely held religious beliefs . . . is [sic] a matter of well-established State law with respect to corporate decision-making," the government apparently will do nothing to ascertain whether "such principles or views . . . have been adopted and documented in accordance with the laws of the jurisdiction under which [exemption-seeking businesses are] incorporated." 83 Fed. Reg. at 57,562 & n.61.

d. Finally, though this Court has not yet addressed the question, *eight* sister Circuits have independently concluded that being asked to give bare

notice of one's intent to avail oneself of the already-available religious accommodation is no substantial burden, even if the government then provides the insurance coverage another way.[5] As Judge Posner has explained, the government's contrary position here makes no more sense than would the assertion that a conscientious objector could avoid the draft on religious grounds (without even asking to be excused from service) and affirmatively bar the government from drafting anyone else to fill the spot.

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[5] *See, e.g.*, *Priests for Life*, 772 F.3d at 247–56 (D.C. Cir.); *Geneva Coll. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 778 F.3d at 442–42 (3d Cir. 2015); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 459–63 (5th Cir. 2015); *Little Sisters*, 794 F.3d at 1180–95 (10th Cir.); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 611–16 (7th Cir. 2015); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 218–26 (2d Cir. 2015); *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738, 749–50 (6th Cir. 2015); *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1148–51 (11th Cir. 2016); *but see Dordt Coll. v. Burwell*, 801 F.3d 946, 950 (8th Cir. 2015); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 941–43 (8th Cir. 2015).

Though the Supreme Court vacated and remanded these decisions, it ""express[ed] no view on the merits of the cases," explicitly refrained from deciding "whether petitioners' religious exercise ha[d] been substantially burdened," and instructed the parties on remand "to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage." *Zubik*, 136 S. Ct. at 1560 (internal quotation marks and citation omitted); *see also, e.g.*, *Burwell v. Dordt Coll.*, 136 S. Ct. 2006 (2016) (Mem.); *Dep't of Health & Human Servs. v. CNS Int'l Ministries*, 136 S. Ct. 2006 (2016) (Mem.). This the government has not done.

See Notre Dame, 786 F.3d at 623. Religious exemptions are not private vetoes over governmental action respecting third parties.

The former requirement of notice does not compel religious objectors to "choose between following the tenets of their religion and receiving a governmental benefit . . . or coerce[them] to act contrary to their religious beliefs" (*Navajo Nation*, 535 F.3d at 1070). It asks only that objectors state their belief that they should not pay for contraceptive coverage. The actual provision of the objected-to medical coverage under the preexisting regulatory accommodation is "totally disconnected from the" objecting entities and therefore does not burden their religious exercise. *See Geneva Coll.*, 778 F.3d at 442. With no burden to alleviate, the Exemption cannot be authorized, let alone required.

* * *

In *Hobby Lobby*, the Supreme Court expressed doubt that a scheme like the one here would, or could, be authorized by RFRA: Addressing a proposed statutory amendment that would have allowed refusals to provide insurance coverage for any health service that was contrary to an employer's "religious beliefs or moral convictions," the Court concluded that "a blanket exemption for religious or moral objectors" that "would not . . . subject[ ] religious-based objections to the judicial scrutiny called for by RFRA" would "extend[ ] more broadly than the pre-existing protections of

RFRA." 573 U.S. at 719 n.30. The regulatory scheme here has just that defect. *See California*, 351 F. Supp. 3d at 1293 n.14. Hence, it exceeds the statutory authority granted by RFRA and violates the Establishment Clause.

C. The Moral Exemption Is Similarly Invalid.

The Moral Exemption (45 C.F.R. § 147.133) is no saving secular counterbalance to the Religious Exemption (*contra* March for Life Br. 62). First, there is no statutory authorization for the Moral Exemption: Appellants correctly conceded below that RFRA does not authorize it (*California*, 351 F. Supp. 3d at 1296), and if it is as expansive as they suggest, no other statute authorizes it either (*see id.* at 1297). Second, even considered together, the Exemptions still impermissibly privilege religion because the Religious Exemption covers at least one massive class—publicly traded companies—that the Moral Exemption does not. *Compare* 45 C.F.R. § 147.132(a)(1)(i)(D), *with id.* § 147.133(a)(1)(i)(B).

But those are not the Moral Exemption's only defects. There is strong reason to conclude that it is not, after all, a secular counterpart to the Religious Exemption but is just the latter by another name. For it is expressly premised on *Welsh v. United States*, 398 U.S. 333, 339–40 (1970), a conscientious-objector case in which the Supreme Court held that when "purely ethical or moral . . . beliefs function as a religion in [an individual's]

life, such an individual is as much entitled to a 'religious' . . . exemption . . . as is someone who derives his [objection] from traditional religious convictions" (*id.* at 340). *See* 83 Fed. Reg. at 57,600–01. Quoting directly from *Welsh*, 398 U.S. at 339–40, the regulation defines exempted "moral convictions" as those:

> (1) That the "individual deeply and sincerely holds"; (2) "that are purely ethical or moral in source and content["]; (3) "but that nevertheless impose upon him a duty"; (4) and that "certainly occupy in the life of that individual ['a place parallel to that filled by . . . God' in traditionally religious persons," such that one could say "his beliefs function as a religion in his daily life."

83 Fed. Reg. at 57,604–05.

Moral convictions meeting this description must be treated as religions for legal purposes. *See, e.g.*, *United States v. Ward*, 989 F.2d 1015, 1018–19 (9th Cir. 1992). Thus, though the government has described the Moral Exemption as broader than the Religious, which would render it *ultra vires* for the reasons stated by the district court, the rules in fact define the two exemptions as coextensive and coterminous (aside from the fact that the Moral Exemption is unavailable to publicly traded companies) because only a legal "religion" under *Welsh* qualifies for the Moral Exemption. Accordingly, both exemptions are unauthorized and unconstitutional religious preferences for the reasons explained in Sections A and B, *supra*.

CONCLUSION

The challenged rules privilege objecting entities' religious views about employees' conduct over the beliefs, rights, interests, and health of women. And they afford exemptions from general laws without requiring beneficiaries to demonstrate (or even assert) that the government has substantially burdened their religious exercise. RFRA does not authorize, and the Establishment Clause does not allow, exemptions under these circumstances.

The preliminary injunction should be affirmed.

Respectfully submitted,

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Dated: April 22, 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I certify that on April 22, 2019, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Richard B. Katskee*
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APPENDIX

APPENDIX OF *AMICI CURIAE*

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that represents more than 125,000 members and supporters across the country. Americans United has long supported legal exemptions that reasonably accommodate religious practice. *See, e.g.*, Br. 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. But Americans United opposes religious exemptions that unduly harm third parties or favor religious practices not actually and substantially burdened by the government. *See, e.g.*, Br. Intervenors–Appellees Jane Does 1–3, *Univ. of Notre Dame v. Burwell*, 786 F.3d 606 (7th Cir. 2015) (No. 13-3853), 2014 WL 523338 (representing Notre Dame students as intervening defendants).

Bend the Arc: A Jewish Partnership for Justice

Bend the Arc: A Jewish Partnership for Justice is the nation's leading progressive Jewish voice empowering Jewish Americans to advocate for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for

all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

Central Pacific Conference of the United Church of Christ

The Central Pacific Conference of the United Church of Christ includes 45 churches in Oregon, Southern Idaho, and Southwest Washington. We believe that all persons are made in the image of God and deserving of just treatment in all things. We stand together as a community of Christians committed to a just world for all. Our healthcare system in the United States should be focused on the health and wholeness of all people and not be used as a weapon for forcing one's belief on others.

Global Justice Institute, Metropolitan Community Churches

The Global Justice Institute was founded to serve as the social-justice arm of Metropolitan Community Churches and was separately incorporated in 2011. GJI partners with people of faith and allies around the globe on projects and proposals that further social change and human rights.

Hadassah, The Women's Zionist Organization of America, Inc.

Hadassah, The Women's Zionist Organization of America, Inc., founded in 1912, has over 330,000 Members, Associates, and supporters nationwide. While traditionally known for its role in initiating and

supporting healthcare and other initiatives in Israel, Hadassah has long-standing commitments to improving healthcare access in the United States and supporting the fundamental principle of the free exercise of religion. Hadassah strongly believes that women have the right to make family-planning decisions privately, in consultation with medical advice, and in accordance with one's own religious, moral, and ethical values.

Hawaii Conference of the United Church of Christ

The mission of the Hawaii Conference of the United Church of Christ, its 130 congregations on six islands, and more than 20,000 members in the state of Hawaii reads, "Sent forth by the Spirit, we walk humbly in Christ's footsteps pursuing peace, justice and the renewal of all creation." The Conference is dedicated to mobilizing the power of faith communities for personal transformation, community building, and social justice. Its Justice and Witness Missional Team advocates for justice and witness concerns in the public arena, as well as in denominational, ecumenical, and interfaith settings. Among these concerns are the many people who experience sickness and who look to the U.S. healthcare system for help. The Conference seeks a system that is inclusive, equitable, and affordable for all, as well as accountable and accessible to all, and includes access to essential medicines and key services necessary to maintain health and

wholeness, including but not limited to mental-health, preventive, and prenatal services.

Illinois Conference of the United Church of Christ

The Illinois Conference of the United Church of Christ is a covenant community composed of 239 diverse congregations serving the People of God in Illinois. We are young and old, racially and ethnically diverse, and a people who believe that the government has no business denying coverage to women based on a conservative theological agenda. Our congregations are urban, suburban, and rural. We believe that all persons are made in the image of God and deserving of just treatment in all things. We stand together as a covenant community of Christians committed to social justice, equality, and equal treatment under the law. We strive to live our faith through Extravagant Welcome to all peoples, even when we disagree, to create a just world for all. Our healthcare system in the United States should be focused on letting doctors and patients decide what is in their medical best interest. The health and wholeness of all people is paramount and should not be used as a weapon to impose one's religious and theological values on others who may have a completely different moral, ethical, and spiritual framework.

Interfaith Alliance Foundation

Interfaith Alliance Foundation is a 501(c)(3) nonprofit organization that celebrates religious freedom by championing individual rights, promoting policies to protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance Foundation's members belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance Foundation has a long history of working to ensure that religious freedom is a means of safeguarding the rights of all Americans and is not misused to favor the rights of some over others.

Methodist Federation for Social Action

The Methodist Federation for Social Action was founded in 1907 and is dedicated to mobilizing the moral power of the faith community for social justice through education, organizing, and advocacy. MFSA believes that every child should be a wanted child and that access to affordable family planning should be readily available to all people and not restricted by the government or employers.

Muslim Advocates

Muslim Advocates is a national legal-advocacy and educational organization founded in 2005 that works on the front lines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim

Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civic education. Muslim Advocates also serves as a legal resource for the Muslim American community, promoting the full and meaningful participation of Muslims in American public life.

National Council of Jewish Women, Inc.

The National Council of Jewish Women is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles state that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain democratic society." We also resolve to work for "Laws, policies, and practices that protect every woman's right and ability to make reproductive and child bearing decisions." Consistent with our Principles and Resolutions, NCJW joins this brief.

New York Conference of the United Church of Christ

The New York Conference of the United Church of Christ includes 260 congregations from around New York State, including New York City. We believe that all persons are created in the image of God. As a Just Peace

conference we affirm that justice is achieved when all persons live with dignity and freedom. This is the basis on which we hold that no religious group has the right to modify, restrict, or define the choices of individuals in determining the well-being of their own lives—including all reproductive rights for all individuals.

Northern California Nevada Conference of the United Church of Christ

The Northern California Nevada Conference of the United Church of Christ includes 117 churches in Northern California and Northern Nevada. NCNC prides itself on its work and participation in issues of justice. Justice in our healthcare system is one area of focus for many of our churches and for our Conference as a whole. We believe that no employer has a right to make decisions about the health and welfare of an employee or to force individuals' beliefs on to employees who are helpless to do anything about it if they want to keep their job. Jesus did not discriminate when it came to carrying out healing ministry. When he saw people in need, he did not force a religious test on them before providing healing. Our healthcare system in the United States should be focused on the health and wholeness of all people and not be used as a weapon for forcing one's belief on others.

People For the American Way Foundation

People For the American Way Foundation is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF and its advocacy affiliate People For the American Way have conducted extensive education, outreach, litigation, and other activities to promote these values, including helping draft and support the Religious Freedom Restoration Act. PFAWF strongly supports the principle of the Free Exercise Clause of the First Amendment and RFRA as a shield for the free exercise of religion, protecting individuals of all faiths. PFAWF is concerned, however, about efforts, such as in this case, to transform this important shield into a sword to obtain accommodations that unduly harm others, which also violates the Establishment Clause. This is particularly problematic when the effort is to obtain exemptions based on religion or moral beliefs that harm women's ability to obtain crucial reproductive healthcare coverage, as in this case.

Reconstructing Judaism

Reconstructing Judaism is the central organization of the Reconstructionist movement. We train the next generation of rabbis,

support and uplift congregations and *havurot*, and foster emerging expressions of Jewish life—helping to shape what it means to be Jewish today and to imagine the Jewish future. There are over 100 Reconstructionist communities in the United States committed to Jewish learning, ethics, and social justice. Reconstructing Judaism believes both in the importance of the separation of church and state and that the reproductive rights of women must be preserved and protected.

Reconstructionist Rabbinical Association

The Reconstructionist Rabbinical Association is a 501(c)(3) organization that serves as the professional association of 340 Reconstructionist rabbis, the rabbinic voice of the Reconstructionist movement, and a Reconstructionist Jewish voice in the public sphere. Based on our understanding of Jewish teachings that every human being is created in the divine image, we have long advocated for public policies of inclusion, antidiscrimination, and equality. Based on our commitment to the dignity of every human being, we have long-standing resolutions and statements calling for equal access to healthcare—including access to contraceptive services—for all individuals.

Religious Coalition for Reproductive Choice

The Religious Coalition for Reproductive Choice is a broad-based, national, interfaith movement that brings the moral force of religion to protect and advance reproductive health, choice, rights, and justice through education, prophetic witness, pastoral presence, and advocacy. RCRC values and promotes religious liberty, which upholds the human and constitutional rights of all people to exercise their conscience to make their own reproductive-health decisions without shame or stigma. RCRC challenges systems of oppression and seeks to remove the multiple barriers that impede individuals, especially those in marginalized communities, in gaining access to comprehensive reproductive healthcare with respect and dignity.

Religious Institute, Inc.

The Religious Institute is a multifaith organization with a network of more than 10,000 people of faith, including thousands of clergy and other religious leaders from more than 50 faith traditions. The Religious Institute provides prophetic, moral leadership at the intersection of religion and sexuality, gender, and reproductive health. The Religious Institute works for a world where all people are free, where bodies and souls are not subject to systems of control, and where those on the margins are able to flourish.

The Religious Institute values religious freedom and works to ensure that this freedom does not impinge on others' rights and that no one set of religious beliefs is privileged over others in civil life and law.

The Sikh Coalition

The Sikh Coalition is the largest community-based Sikh civil-rights organization in the United States. Since its inception on September 11, 2001, the Sikh Coalition has worked to defend civil rights and liberties for all people, to empower the Sikh community, to create an environment in which Sikhs can lead a dignified life unhindered by bias or discrimination, and to educate the broader community about Sikhism in order to promote cultural understanding and diversity. The Sikh Coalition has vindicated the rights of numerous Sikh Americans subjected to bias and discrimination because of their faith. Ensuring the rights of religious and other minorities is a cornerstone of the Sikh Coalition's work. The Sikh Coalition joins this *amicus* brief in the belief that the Establishment Clause is an indispensable safeguard for religious-minority communities. We believe strongly that Sikh Americans across the country have a vital interest in the separation of church and state.

Southwest Conference of the United Church of Christ

Established in 1964, the 49 churches and faith communities that make up the Southwest Conference of the United Church of Christ are extravagantly welcoming and affirming followers of Christ called to embody God's unconditional love and justice in the world. We affirm the theological statements and calls for action of the United Church of Christ's eighth, ninth, eleventh, twelfth, thirteenth, sixteenth, and seventeenth General Synods, namely, that all people should have access to the full range of safe and affordable family-planning services, and that the government should not impinge on any woman's freedom of choice to follow her *personal* religious and moral convictions concerning the completion or termination of her pregnancy.

T'ruah

T'ruah: The Rabbinic Call for Human Rights brings together rabbis and cantors from all streams of Judaism with all members of the Jewish community to act on the Jewish imperative to respect and advance the human rights of all people. T'ruah trains and mobilizes a network of 2,000 rabbis and cantors and their communities to bring Jewish values to life through strategic and meaningful action.

Union for Reform Judaism, Central Conference of American Rabbis, Women of Reform Judaism, and Men of Reform Judaism

The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews; the Central Conference of American Rabbis, whose membership includes more than 2,000 Reform rabbis; Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world; and Men of Reform Judaism come to this issue as longtime supporters of religious liberty. The United States' commitment to principles of religious liberty has allowed religious freedom to thrive throughout our nation's history. At the same time, we also strongly support women having the access and ability to make their own reproductive-health decisions. We are inspired by Jewish tradition, which teaches that healthcare is the most important communal service and therefore should be available to all. Every woman is entitled to access to contraception as a matter of basic rights and fundamental dignity.