Case No. 15-1330

In the United States Court of Appeals
for the Eighth Circuit

School of the Ozarks,
Plaintiff-Appellants,

v.

RightCHOICE Managed Care, Inc., et al.,
Defendants,

and

U.S. Department of Health & Human Services et al.,
Defendants-Appellees.

Brief of *Amici Curiae* Americans United for Separation of Church and State, American Civil Liberties Union, American Civil Liberties Union of Missouri, and People for the American Way Foundation in Support of Appellees/Affirmance

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Corporate Disclosure Statement

As required by Federal Rule of Appellate Procedure 26.1, counsel for *amici* certifies that *amici* are 501(c)(3) nonprofit corporations, have no parent entities, and do not issue stock.

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Identity and Interests of *Amici Curiae*

Americans United for Separation of Church and State is a national, nonsectarian, public-interest organization that was founded in 1947 and has more than 120,000 members and supporters. The organization 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 has long supported legal exemptions that reasonably accommodate religious practice. *See, e.g.*, Brief of Americans United for Separation of Church and State, as Amicus Curiae Supporting Petitioner, *Holt v. Hobbs*, 135 S. Ct. 853 (2015), 2014 WL 2361896 (supporting religious accommodation for prisoner seeking to wear beard for religious reasons); Brief of Americans United for Separation of Church and State et al., as Amici Curiae Supporting Petitioners, *Cutter v. Wilkinson*, 544 U.S. 709 (2005), 2004 WL 2945402 (asking Court to uphold constitutionality of statute requiring religious accommodations for prisoners). Consistent with its support for the separation of church and state, however, Americans United opposes

religious exemptions that would harm innocent third parties. Americans United currently represents a university student as an intervenor in another case involving the regulations now before the Court. *See Univ. of Notre Dame v. Burwell*, 786 F.3d 606 (7th Cir. 2015), *petition for reh'g en banc filed*, No. 13-3853 (July 2, 2015).

The American Civil Liberties Union 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 ACLU of Missouri, the organization's affiliate in Missouri, was founded to protect and advance civil rights and civil liberties, and currently has more than 5,000 members and supporters in the state. The ACLU has a long history of defending the fundamental right to religious liberty, and routinely brings cases designed to protect the right to religious exercise and expression. At the same time, the ACLU is deeply committed to fighting gender discrimination and inequality and protecting reproductive freedom.

People for the American Way Foundation is a nonpartisan civic

organization established to promote and protect civil and constitutional rights, including religious liberty, as well as American values like equality and opportunity for all. Founded in 1981 by a group of religious, civic, and educational leaders, PFAWF now has hundreds of thousands of members nationwide. PFAWF strongly supports the application of the Free Exercise Clause of the Constitution and the Religious Freedom Restoration Act as a shield against governmental encroachments on the exercise of religion. PFAWF is concerned, however, about the transformation of this shield into a sword that prevents others from exercising their rights, including the right to contraceptive access.

As required by Federal Rule of Appellate Procedure 29(c)(5), *amici* state: (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.

Summary of Argument

Plaintiff wants an exemption from regulations requiring that it include contraception in its insurance plans, but refuses to fill out the paperwork necessary to request this exemption. To opt out of including contraceptive coverage in its plan, Plaintiff must simply indicate in writing that it objects to covering contraception, and provide its written objection to either its third-party plan administrator or the government. Once it does so, it is "effectively exempt[ ] … from the contraceptive mandate." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2754 (2014).

Yet in Plaintiff's view, the mere act of requesting an accommodation itself violates Plaintiff's free-exercise rights, because after it requests the accommodation, the government will work with third parties to ensure that Plaintiff's employees and students get contraceptive coverage. In other words, Plaintiff "not only challenge[s] a law that requires [it] to provide contraceptive coverage against [its] religious beliefs, [it] challenge[s] the exception that the law affords to [it]." *Little Sisters of the Poor Home for the Aged v. Burwell*, __ F.3d __,

2015 WL 4232096, at *14 (10th Cir. July 14, 2015). This argument is not only unprecedented in free-exercise law, but would have the practical effect of preventing Plaintiff's employees and students from receiving essential contraceptive coverage—from third parties, without any involvement by Plaintiff.

Indeed, the very regulations that Plaintiff challenges were invoked by the Supreme Court in *Hobby Lobby* to justify allowing for-profit employers to opt out of including contraceptive coverage in their own health plans. The Court explained that the government "has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." 134 S. Ct. at 2759. This alternative, said the Court, "achieves all of the Government's aims while providing greater respect for religious liberty." *Id.* Justice Kennedy, who supplied the deciding vote, added that the accommodation "furthers the Government's interest but does not

impinge on the plaintiffs' religious beliefs." *Id.* at 2786 (Kennedy, J., concurring).

Because Plaintiff need not actually do anything other than express its objection to covering contraception, Plaintiff cannot meet its burden of showing that the challenged regulations substantially burden its religious exercise. Nothing in RFRA allows Plaintiff to interfere with the government's decision to follow up by imposing insurance-coverage obligations on third parties.

Even if the accommodation were deemed to impose a substantial burden, it serves the government's compelling interests in promoting women's health, decreasing the number of unintended pregnancies, and eliminating healthcare-cost disparities between men and women. The existence of other exceptions to the contraceptive-coverage requirement does not undermine the strength of those interests. And the government has employed the least restrictive means of vindicating its interests—which would be impeded if women were forced to pursue and receive contraceptive coverage outside the framework of their existing healthcare plans.

The accommodation challenged by Plaintiff "furthers the Government's interest but does not impinge on [its] religious beliefs." *Id.* For this reason, every Court of Appeals to consider a challenge to the accommodation has rejected that challenge. Plaintiff is entitled to opt out of covering contraceptives, but it is not entitled to opt *others* out of stepping in to fill the void.

Background

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). The Act requires insurance providers and plan administrators to cover preventive care without cost-sharing. *See* 42 U.S.C. § 300gg-13(a). In addition, employers with at least 50 employees must either provide adequate health insurance to their employees or pay a tax to defray the cost of public subsidies for their employees' health insurance. *See* 26 U.S.C. § 4980H(a)–(d).

To help develop the preventive-coverage requirement, the

Department of Health and Human Services ("HHS") asked the Institute of Medicine ("IOM")—the nonpartisan "health arm of the National Academy of Sciences"—to identify the medical services necessary for women's health and well-being. *See* IOM, *Clinical Preventive Services for Women: Closing the Gaps* 2 (2011) ("*IOM Report*"), http://tinyurl.com/ClosingGaps; *About the IOM*, Institute of Medicine, http://tinyurl.com/aboutIOM (all websites last visited on July 15, 2015). After extensive study, IOM recommended that coverage be provided for, among other things, all forms of FDA-approved contraceptives. *IOM Report*, *supra*, at 109–10. The government adopted that recommendation and required health plans to include contraceptives in their battery of preventive services. *See* 42 U.S.C. § 300gg-13(a); 77 Fed. Reg. 8,725, 8,725 (Feb. 15, 2012).

After receiving comments from religious organizations that objected to covering contraceptives, the government exempted houses of worship from the requirement. The government also authorized other religious non-profit organizations to opt out of providing contraceptive coverage by sending a form to their healthcare provider or plan

administrator, which then separately arranges and provides for the coverage. *See* 29 C.F.R. §§ 2590.715-2713A(b)(1)–(2), (c)(2); 78 Fed. Reg. 39,870, 39,873–76 (July 2, 2013) ("First Accommodation").

In response to an interim order from the Supreme Court in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014) (interim order granting relief pending appeal), the government added a second way for objecting organizations to opt out of the contraceptive-coverage requirement. Under this alternative accommodation ("Second Accommodation"), a religious non-profit may opt out by notifying the government of its religious objection, the nature of its health plan, and the identity of its provider or administrator. No specific form or set of words is required to convey this information, and the non-profit need not separately inform its provider or plan administrator. *See* 79 Fed. Reg. 51,092, 51,094–95 (Aug. 27, 2014). After receiving notice that the nonprofit objects to covering contraception, the government independently arranges for the objecting organization's insurance provider or administrator to provide the coverage at no cost to the objecting organization. *Id.* at 51,095. This Second Accommodation was

finalized in July 2015, and the government has also extended the First and Second Accommodations to closely held for-profit corporations. *See* 80 Fed. Reg. 41,318, 41,318 (July 14, 2015).

Plaintiff contends that the Accommodations violate the Religious Freedom Restoration Act ("RFRA"), 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." 42 U.S.C. § 2000bb-1. According to Plaintiff, pursuing either Accommodation "triggers" the provision of contraceptives by a third party, this "trigger" of third-party conduct substantially burdens the religious exercise of Plaintiff, and the contraceptive coverage regulations fail to satisfy strict scrutiny. Ozarks Br. 10–12.

The district court concluded that the regulations do not substantially burden Plaintiff's religious exercise, because Plaintiff objects to the independent actions of third parties, and these "actions taken by the government and the insurance provider cannot form the basis" of a RFRA claim. Add. 8. The court also concluded that, even if the Accommodations were deemed to substantially burden Plaintiff's

religious exercise, they advance a compelling governmental interest by the least restrictive means. *Id.* at 9–14.

Argument

I. The Accommodations Do Not Substantially Burden Plaintiff's Religious Exercise.

Every Court of Appeals to consider the issue has held that the Accommodations do not impose a substantial burden on an objecting nonprofit's religious exercise. *See Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 437–42 (3d Cir. 2015), *petition for cert. filed*, No. 14-1418; *E. Tex. Baptist Univ. v. Burwell*, __ F.3d __, 2015 WL 3852811, at *3 (5th Cir. June 22, 2015), *petition for cert. filed*, No. 15-35; *Univ. of Notre Dame*, 786 F.3d at 611–12; *Wheaton Coll. v. Burwell*, __ F.3d __, 2015 WL 3988356, at *5 (7th Cir. July 1, 2015); *Little Sisters*, __ F.3d __, 2015 WL 4232096, at *26–32; *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 252–56 (D.C. Cir. 2014), *petition for cert. filed*, Nos. 14-1453, 14-1505; *see also Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 385 (6th Cir. 2014), *vacated and remanded*, 135 S. Ct. 1914 (2015). These courts have recognized that a plaintiff is not burdened by asking

to be relieved of the obligation to provide coverage for contraception.

Plaintiff claims that its assertion of a substantial burden under RFRA is irrebuttable. *See* Ozarks Br. 19–20. But RFRA does not require blind deference to Plaintiff's claim that its own religious exercise is burdened by the independent actions of third parties. Although RFRA's first draft prohibited the government from imposing any burden on religion whatsoever, *see* 138 Cong. Rec. 18,018 (1992), Congress added the adverb "substantially" to make clear that RFRA "does not require the Government to justify every action that has some effect on religious exercise." 139 Cong. Rec. 26,180 (1993) (statement of Sen. Hatch). Congress reiterated that RFRA "would not require [a compelling governmental interest] for every government action that may have some incidental effect on religious institutions." S. Rep. No. 103-111, at 9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898.

Even after the Supreme Court's decision in *Hobby Lobby*, "[e]very circuit that has addressed a RFRA challenge to the accommodation scheme at issue here has concluded that whether the government has imposed a 'substantial burden' is a legal determination." *Little Sisters*,

2015 WL 4232096, at *18. The D.C. Circuit recognized that "[w]hether a law substantially burdens religious exercise under RFRA is a question of law for courts to decide[.]" *Priests for Life*, 772 F.3d at 247. The Seventh Circuit explained that although the plaintiff "is the final arbiter of its religious beliefs, it is for the courts to determine whether the law actually forces [the plaintiff] to act in a way that would violate those beliefs." *Univ. of Notre Dame*, 786 F.3d at 612. The Fifth Circuit made clear that "all of our sister circuits that have considered contraceptive-mandate cases have come to the same conclusion: The court makes that decision." *E. Texas Baptist Univ.*, 2015 WL 3852811, at *3. And the Tenth Circuit held that "RFRA's statutory text and religious liberty case law demonstrate that courts—not plaintiffs—must determine if a law or policy substantially burdens religious exercise." *Little Sisters*, 2015 WL 4232096, at *18.

In making this legal determination, courts have consistently rejected claims that a substantial burden on religious exercise can arise from an objection to the conduct of others. In *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), a group of Native

Americans claimed that the disruption that would be caused by a governmental forestry project would "virtually destroy the … Indians' ability to practice their religion." *Id.* at 451. The Supreme Court rejected the plaintiffs' claim, because they objected to independent governmental action that did not itself coerce affected individuals into violating their religious beliefs. *Id.* at 449–50. Similarly, in *Bowen v. Roy*, 476 U.S. 693 (1986), the plaintiffs contended that their religious beliefs prevented them from acceding to the government's use of a social-security number for their daughter in administering a federal welfare program. *Id.* at 700. The Supreme Court rejected the challenge, because the "Free Exercise Clause … does not afford an individual a right to dictate [others'] conduct." *Id.*

Here, Plaintiff is asked to do something to which it does not actually object: request an exemption from providing insurance coverage for contraceptives. The response of others to Plaintiff's request does not create a substantial burden. In *Kaemmerling v. Lappin*, 553 F.3d 669, 677 (D.C. Cir. 2008), the D.C. Circuit relied on *Bowen* to reject a prisoner's RFRA challenge to the government's collection and analysis

of his DNA. Despite the "sincere and … religious nature" of the prisoner's objection to DNA analysis, there was no substantial burden because "[t]he extraction and storage of DNA information [were] entirely activities of the [government]." *Id.* at 679.

Unlike in *Thomas v. Review Board*, 450 U.S. 707 (1981), the Court is not being asked to determine that Plaintiff's religious beliefs are irrational. Rather, the Court need only decide, based on secular principles of law, whether Plaintiff is itself burdened by the challenged regulations or whether, instead, it seeks to tie the hands of third parties. Plaintiff asks the Court to accept without question its "assessment of how the regulatory measure actually works." *Geneva Coll.*, 778 F.3d at 436. But "[t]here is nothing about RFRA … that requires the Court to accept [Plaintiff's] characterization of the regulatory scheme on its face." *Id.*

In consistently rejecting RFRA challenges to the Accommodations, the Courts of Appeals have recognized that a nonprofit need only "send a single sheet of paper honestly communicating its eligibility and sincere religious objection." *Priests for Life*, 772 F.3d at 249. The courts

have explained that "[t]his is hardly a burdensome requirement; nor does it leave the provider … with any residual involvement in the coverage of drugs or devices of which it sincerely disapproves on religious grounds." *Wheaton Coll.*, 2015 WL 3988356, at *5. To call the act of opting out a substantial burden on religion, the courts have observed, would be both "paradoxical and virtually unprecedented." *Priests for Life*, 772 F.3d at 246. Were it otherwise, it would be nearly impossible for the government to provide reasonable accommodations for religious practice: "By definition, all opt-out mechanisms require some affirmative act by objecting parties." *Little Sisters*, 2015 WL 4232096, at *3 n.3.

Plaintiff argues that sending the letter causes a third party to assume the responsibilities that Plaintiff has shed. But that could be said of all religiously motivated opt-outs: "An opt out religious accommodation typically contemplates that a non-objector will replace the religious objector and take over any legal responsibilities." *Id.* at *16 n.21. A wartime conscientious objector cannot refuse to register for an exemption on the ground that doing so would result in the

government's drafting another in his place. *Cf. id.* at *24 n.33; *E. Texas Baptist Univ.*, 2015 WL 3852811, at *7; *Priests for Life*, 772 F.3d at 246. A judge who seeks recusal from a death-penalty case cannot refuse to request a recusal in order to prevent the court from assigning a new judge to hear the case. *See E. Texas Baptist Univ.*, 2015 WL 3852811, at *7. And the plaintiffs in *Bowen* could not prevent the government from using their daughter's social-security number even though they had "triggered" that use by applying for welfare benefits. *See* 476 U.S. at 696, 699–700.

In short, Plaintiff's act of opting out does not "trigger" what comes later. It only relieves Plaintiff of an obligation; someone else's assumption of that obligation is "triggered" by the operation of law. *Cf. Zubik v. Burwell*, __ S. Ct. __, 2015 WL 3947586, at *1 (U.S. June 29, 2015) (interim order: refusing to "preclude the Government from relying on the information provided by [an objecting religious nonprofit], to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act"). Here, the regulations independently obligate insurance providers to cover contraceptives. *See*

42 U.S.C. § 300gg-13(a), (a)(4) (requiring a "group health plan" or "health insurance issuer" to "provide coverage for … preventive care"). And RFRA does not require the Court to "defer to [Plaintiff's] erroneous view about the operation of the ACA and its implementing regulations." *Little Sisters*, 2015 WL 4232096, at *29.

The only harm to Plaintiff is that it feels "aggrieved by [its] inability to prevent what other people would do to fulfill regulatory objectives after [it] opt[s] out." *Priests for Life*, 772 F.3d at 246. But those feelings, however sincerely held, do not entitle Plaintiff to "hamstring government efforts to ensure that plan participants and beneficiaries receive the coverage to which they are entitled under the ACA." *Little Sisters*, 2015 WL 4232096, at *30.

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

Even if the Accommodations were deemed to substantially burden Plaintiff's religious exercise, the regulations serve compelling governmental interests through the least restrictive means.

A. The regulations serve compelling governmental interests.

The Supreme Court in *Hobby Lobby* "assume[d] that the interest

in guaranteeing cost-free access to [FDA-approved] contraceptive methods is compelling within the meaning of RFRA." 134 S. Ct. at 2780. Justice Kennedy, who provided the deciding vote, explained "that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees"—an understanding that he deemed "important to confirm." *Id.* at 2786 (Kennedy, J., concurring).

The contraceptive coverage regulations address the problem that women have different and more expensive health needs than men. *IOM Report*, *supra*, at 18; Ctrs. for Medicare & Medicaid Servs., *National Health Care Spending by Gender and Age: 2004 Highlights*, http://tinyurl.com/o32jhww (women aged 19–44 spent 73% more per capita on healthcare than male counterparts). Many of the most effective contraceptive methods used by women—for example, IUDs—are expensive up front. *IOM Report*, *supra*, at 108. The higher cost of preventive services for women, combined with the historical disparity in women's earning power, creates 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 [services] in the first place." 155 Cong. Rec. 29,302 (2009) (statement of Sen. Mikulski).

As a result, the United States has a much higher rate of unintended pregnancy than other developed nations. Nearly half of American pregnancies are unintended. *IOM Report*, *supra*, at 102. A woman who chooses to carry an unintended pregnancy to term faces an increased risk of having an infant that is premature and underweight; suffering depression and domestic abuse; and experiencing other harmful effects. *See id.* at 102–03. In addition, "[t]here are many medical conditions for which pregnancy is contraindicated." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

The contraceptive coverage regulations also fulfill the compelling interest in reducing both teen pregnancy and abortion. When the most convenient forms of contraception—those requiring the least effort to maintain—were made available at no cost to young women, the rate of teen pregnancy dropped by 80%. Sarah Kliff, *Free Contraceptives*

Reduce Abortions, Unintended Pregnancies. Full Stop., Wash. Post, Oct. 5, 2012, http://tinyurl.com/reduceabortion. More generally, forty-two percent of unintended pregnancies end in abortion. *IOM Report*, *supra*, at 102. In light of this experience, researchers predict that the contraceptive coverage regulations at issue in this case could "prevent[ ] as many as 41–71% of abortions performed annually in the United States." Kliff, *supra.*

The government's interests are made no less compelling by exceptions that serve to ease the transition costs of nationwide healthcare reform. A regulation "cannot be regarded as protecting an interest of the highest order … when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). But a law must be "*substantially* underinclusive" to fail strict scrutiny. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 214 (3d Cir. 2004) (Alito, J.) (emphasis added). A statute will survive strict scrutiny if there is a "qualitative or quantitative difference between the particular religious exemption requested [by Plaintiff] and other [ ] exceptions already tolerated …

[which] further[ ] distinct compelling governmental concern[s]." *Yellowbear v. Lampert*, 741 F.3d 48, 61 (10th Cir. 2014).

Plaintiff claims that three exceptions undermine the government's compelling interest in ensuring that women have access to contraceptive coverage: (1) employers with fewer than fifty employees need not provide health insurance at all; (2) houses of worship are exempted from the contraceptive-coverage requirement; and (3) grandfathered employers are exempted from some coverage requirements, including the one pertaining to contraceptives. Ozarks Br. 45–46. None of these exceptions undercuts the government's interest. *See Priests for Life*, 772 F.3d at 266–67; *see also Univ. of Notre Dame*, 786 F.3d at 624 (Hamilton, J., concurring) ("the government has a strong argument on the compelling-interest issue"). As the D.C. Circuit held in *Priests for Life*, the relevant exceptions are principled, qualitatively different, and distinguishable from the exemption sought by objectors such as Plaintiff. *See* 772 F.3d at 266.

First, small employers are not exempt from the contraceptive-coverage requirement, which applies to all group plans no matter how

small the employer. *See* 42 U.S.C. 300gg-13. Small employers are exempt from a different provision, which requires employers to furnish employees with health coverage or to pay a tax. *See* 26 U.S.C. 4980H(c)(2)(A). While small employers may decline to provide coverage without paying the tax, any coverage they do provide must include contraceptives. Thus the scheme contemplates that small-business employees will have comprehensive coverage, either through their employer or through a subsidized plan purchased on an exchange.

Second, the religious exemption for churches reflects the government's reasonable conclusion that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection" and that 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. at 39,874. The exemption also preserves the special solicitude given to houses of worship and church-run institutions under the First Amendment's Religion Clauses. *See, e.g.*, *Hosanna-Tabor Evangelical*

Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724 (1976); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). Many statutes and regulations provide analogous exemptions for houses of worship but not for other religiously affiliated institutions. *See, e.g.*, 26 U.S.C. § 6033(a)(3)(A)(I) (unlike other nonprofits, churches need not file tax forms); 26 U.S.C. § 501(c)(1)(A) (unlike other nonprofits, churches need not register with the IRS as nonprofit organizations); 2 U.S.C. § 1602(8)(B)(xviii) (unlike other nonprofits, churches need not comply with Lobbying Disclosure Act); 26 U.S.C § 7611 (unlike other nonprofits, churches have enhanced protection against tax audits). The distinction between houses of worship and other kinds of religious organizations has been upheld by this Court and other circuits. *See, e.g., Spiritual Outreach Soc'y v. Commissioner*, 927 F.2d 335, 339 (8th Cir. 1991); *Living Faith, Inc. v. Commissioner*, 950 F.2d 365, 376 (7th Cir. 1991).

Finally, "grandfathered plans" are not an "exception" to the insurance-coverage requirement, much less to the requirement that

insurance plans cover contraceptives. As the Tenth Circuit recently explained, "[t]he exception for grandfathered plans is temporary and transitional." *Little Sisters*, 2015 WL 4232096, at *5 n.5. Grandfathered plans are those that existed before March 23, 2010 and have not made specified changes after that date. *See* 42 U.S.C. § 18011(a), (e). The government included the grandfathering rule in order "to ease the transition of the healthcare industry into the reforms established by the ACA by allowing for gradual implementation of reforms." IRS, *Internal Revenue Bulletin: 2010-29*, 19 (Jul. 7, 2010), http://tinyurl.com/IRSBulletin. The transitional process is not exclusive to contraceptives or even preventive care, and applies to a range of coverage requirements. 42 U.S.C. § 18011(a). As older healthcare plans are updated and renewed, the number of grandfathered plans will continue to dwindle.

Plaintiff quotes statistics from 2012, *see* Ozarks Br. 45–46, but they are outdated and inaccurate. The percentage of employees in grandfathered plans has dropped from 56% in 2011, to 48% in 2012, to 36% in 2013, to 26% in 2014. The Henry J. Kaiser Family Found., *2014*

Employer Health Benefits Survey (Sept. 10, 2014), http://tinyurl.com/healthbenefitssurvey. Nothing suggests that the government's interest in a massive, sweeping reform must be accomplished in one fell swoop.

More generally, courts have rejected the argument that the presence of exceptions requires the conclusion that the government's interests are not compelling. For example, in *Gillette v. United States*, 401 U.S. 437, 455 (1971), the Court sustained the government's interest in the draft against a conscript's religious objection to a particular war. *See id.* at 455. The government's interest was compelling even though it provided exceptions for students, people over 26, people engaged in agriculture, ministers and divinity students, and those with religious objections to all wars. *See id.*; Anne Yoder, *Military Classifications for Draftees* (2011), http://tinyurl.com/draftexemptions. Similarly, maintaining a uniform tax system is a quintessential compelling interest, but few schemes have more "deductions and exemptions." *Hernandez v. Commissioner*, 490 U.S. 680, 700 (1989).

Neither *Hobby Lobby* nor *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), suggests otherwise.

In *O Centro*, the government's reasons for refusing to make an exception for the plaintiff applied "in equal measure" to a different exception it had already granted. *Id.* at 433. The lesson of that case is not that any exception undermines the general rule, but that if the government grants one exception, it must have a principled reason for denying another. In other words, "[e]ven a compelling interest may be outweighed … by another even weightier consideration." *Hobby Lobby*, 134 S. Ct. at 2780.

Justice Kennedy's deciding vote in *Hobby Lobby* depended on "the Court's … assumption that the HHS regulation [ ] furthers a legitimate and compelling interest." *Id.* at 2786 (Kennedy, J., concurring). By ensuring that Plaintiff's employees and students have access to contraceptive coverage, the government ensures that they are protected against unintended pregnancies (and, in turn, have reduced the need for abortions), advances their equality and freedom to decide whether and when to become parents, and eliminates significant disparities in healthcare costs between women and men. *See Priests for Life*, 772 F.3d at 257–63.

B. The regulations employ the least restrictive means of achieving the government's compelling interests.

To demonstrate that it is using the least restrictive means of fulfilling its compelling interest, the government must "show[ ] that no efficacious less restrictive measures exist." *Knight v. Thompson*, 723 F.3d 1275, 1286 (11th Cir. 2013). If, as Plaintiff proposes, the government required women to access contraceptive coverage outside the framework of their existing healthcare plans, women would experience logistical and cost barriers that would impede their access to contraceptives and thereby frustrate the government's goals.

As the D.C. Circuit held in *Priests for Life*, "[t]he evidence shows that contraceptive use is highly vulnerable to even seemingly minor obstacles." 772 F.3d at 265. Indeed, "even moderate copayments for preventive services" deter women who might otherwise use contraception. *See IOM Report*, *supra*, at 19. In contrast, and as described in many public comments to the government, reducing costs and logistical barriers increases women's use of birth control. *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, April 8, 2013, http://tinyurl.com/OBGYNComment. The IOM's Committee on Women's Health Research thus concluded that barriers to women's healthcare could be mitigated by "making contraceptives more available, accessible, and acceptable through improved services." *IOM Report*, *supra*, at 104.

Numerous studies confirm that even minimal 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," "complexity can have serious adverse effects, by increasing the power of inertia, and … ease and simplification (including reduction of paperwork burdens) can produce significa nt benefits." Cass R. Sunstein, *Nudges.gov: Behavioral Economics and Regulation* 3 (Feb. 2013), http://tinyurl.com/nudgesgov. Studies demonstrate that removing even minor cost or logistical barriers can dramatically increase access. *See, e.g.,* Kristina Shampan'er & Dan Ariely, *Zero As a Special Price: The True Value of Free Products* (2007), http://tinyurl.com/Shampaner. This happens in a range of settings—whether it's changing the default

rules for employee retirement saving, moving a bowl of food a few inches away, or raising the price of shipping from zero to a dime. *See* Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Quarterly J. of Econ. 1149, 1149 (2001), http://tinyurl.com/BMadrian (contributions to retirement plans); Paul Rozin et al., *Nudge to Obesity I: Minor Changes in Accessibility Decrease Food Intake*, 6 Judgment & Decision Making 323, 323 (2011), http://tinyurl.com/PaulRozin (food proximity); Shampan'er & Ariely, *supra* (Amazon shipping costs).

Barriers impede contraception access in the same way. 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. Pub. Health 567, 567 (1999), http://tinyurl.com/DeborahCohen. 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://tinyurl.com/GreeneFoster.

Heeding this social-science data, the Accommodations seek to eliminate barriers to contraceptive access by allowing women to receive coverage from their existing healthcare provider. The Supreme Court recognized as much in *Hobby Lobby*: "Under the accommodation, the plaintiffs' female employees … face minimal logistical and administrative obstacles, because their employers' insurers [are] responsible for providing information and coverage." 134 S. Ct. at 2782 (citations and quotation marks omitted).

Plaintiff, however, would have the government replace a system of seamless access with one that resurrects old barriers. In Plaintiff's view, the government could achieve its goals using one of four other methods: "(1) offering tax deductions or credits for the purchase of contraceptive services; (2) expanding eligibility for already existing federal programs that provide free contraception; (3) allowing citizens who pay to use contraceptives to submit receipts to the government for

reimbursement; or (4) providing incentives for pharmaceutical companies that manufacture contraceptives to provide such products to pharmacies, doctor's offices, and health clinics free of charge." Ozarks Br. 47. But each of these alternatives would balkanize women's access to health insurance and introduce logistical barriers that would undermine the government's goals.

For this reason, the other circuits to consider these claims have rejected similar proposed alternatives. The Seventh Circuit observed that these alternatives "would involve cumbersome administrative machinery and at the same time impose a burden on … students and employees who want to obtain contraceptives." *Univ. of Notre Dame*, 786 F.3d at 617. The D.C. Circuit concluded that these proffered alternatives would introduce "financial, logistical, informational, and administrative burdens" and would "not serve the government's compelling interest with anywhere near the efficacy of the challenged accommodation and would instead deter women from accessing contraception." *Priests for Life*, 772 F.3d at 265. In the broader context of insurance coverage as a whole, the Supreme Court concluded that

"leaving [plaintiffs'] employees to find individual plans on government-run exchanges or elsewhere" is "scarcely what Congress contemplated." *Hobby Lobby*, 134 S. Ct. at 2783 (quotation marks omitted).

Justice Kennedy reiterated in *Hobby Lobby*, moreover, that "it is the Court's understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government." 134 S. Ct. at 2786 (Kennedy, J., concurring). He added that requiring the government to create a new program could have the perverse effect of protecting "one freedom … by creating incentives for additional government constraints." *Id.* Nor must the government "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). Such a "draconian construction of [the] least restrictive means test would render federal judges the primary arbiters of what constitutes the best solution to every religious accommodation problem … [and] would be inconsistent with

congressional intent." *Fowler v. Crawford*, 534 F.3d 931, 941 (8th Cir. 2008).

In pointing to one of the Accommodations at issue here, the Supreme Court concluded that "this system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty." *Hobby Lobby*, 134 S. Ct. at 2759. While the government in *Hobby Lobby* had a less-restrictive approach available, *id*. at 2782, no such alternative is available here. If the Accommodations are invalidated, affected women will have nowhere to turn.

III. The Establishment Clause Forbids a Construction of RFRA That Would Allow Plaintiff's Religious Objections to Override Employees' Access to Contraceptive Coverage.

Plaintiff's arguments overlook that "third-party rights and interests are at stake in this litigation—namely, that plan participants and beneficiaries are entitled by law to contraceptive coverage without cost sharing." *Little Sisters*, 2015 WL 4232096, at *32 n.50. If RFRA privileged Plaintiff's religious objections over its employees' and students' statutory right to vital healthcare benefits, or if the Court

allowed Plaintiff to stop the provision of those benefits by third parties, then the application of RFRA in this case would violate the Establishment Clause.

A. Plaintiff's interpretation of RFRA would violate the Establishment Clause prohibition against exemptions that harm others.

The Establishment Clause precludes the award of religious exemptions that override other significant interests. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the Court struck down a statute that guaranteed employees the day off on the Sabbath day of their choosing. Under the statute, "religious concerns automatically control[led] over all secular interests at the workplace; the statute [took] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." *Id.* at 709. Similarly, in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.18 (1989), the Court struck down a sales-tax exemption limited to religious periodicals in part because the exemption would have "burden[ed] nonbeneficiaries by increasing their tax bills."

RFRA heeds this general principle. In *Cutter v. Wilkinson*, 544

U.S. 709 (2005), the Court upheld RLUIPA—a statute that, like RFRA, applies strict scrutiny to laws that burden religious exercise—against an Establishment Clause challenge. Relying on *Caldor*, the Court held that courts must ensure that a religious exemption is "measured so that it does not override other significant interests." *Id.* at 722. Most recently, in *Hobby Lobby*, the Court reaffirmed that "in applying RFRA courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." 134 S. Ct. at 2781 n.37 (quoting *Cutter*, 544 U.S. at 720).

In *Hobby Lobby*, the Court was able to balance employers' religious interests and employees' compelling interests in obtaining the coverage, because "the means to reconcile those two priorities are at hand in the *existing accommodation* the Government has designed, identified, and used." *Id.* at 2787 (Kennedy, J., concurring) (emphasis added). Because the government had a viable, existing mechanism, an exemption could be granted to the for-profit employers without "any detrimental effect on any third party." *Id.* at 2781 n.37 (majority opinion); *see also id.* at 2781–82.

Not so here. Without the Accommodations, Plaintiff's employees and students would lose access to contraceptive coverage altogether. As Justice Kennedy observed in *Hobby Lobby*, religious accommodations must not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Hobby Lobby*, 134 S. Ct. 2786–87 (Kennedy, J., concurring). Because the exemption sought by Plaintiff would undermine students' and employees' vital interests, it cannot be extended without violating the Establishment Clause.

B. Plaintiff requests an unconstitutional veto over the regulatory obligations of third parties.

Plaintiff seeks not an exemption, but a veto. In Plaintiff's view, RFRA entitles it to prevent third parties from providing contraceptive coverage to Plaintiff's employees and students. But "[t]he 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 v. Grendel's Den, Inc*, 459 U.S. 116, 127 (1982)).

In *Larkin*, 459 U.S. at 125, the Court struck down a law that allowed religious organizations to veto other entities' liquor-license applications. The Establishment Clause, explained the Court, did not allow "power ordinarily vested in agencies of government" to be wielded in a manner that was not "religiously neutral." *Id.* at 122, 125. In *Grumet*, the Court reiterated that the government "may not delegate its civic authority to a group chosen according to religious criterion." *Grumet*, 512 U.S. at 698. Others courts have invalidated laws delegating regulatory duties to religious entities, *see Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337 (4th Cir. 1995); *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2d Cir. 2002), and allowing "a religious organization to impose religiously based restrictions on the expenditure of taxpayer funds." *ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 488 (D. Mass. 2012), *vacated on other grounds*, 705 F.3d 44 (1st Cir. 2013).

Plaintiff's interpretation of RFRA raises similar problems. While Plaintiff may refuse to pay for or arrange for certain benefits, *see Hobby Lobby*, 134 S. Ct. 2751, it cannot preclude the government from

requiring third parties to make those benefits available. *See Univ. of Notre Dame*, 786 F.3d at 614 (Accommodations confer rights and obligations on third parties, not on the exempt organization). The requirement that third-party insurance companies provide contraceptive coverage to women arises from a "power ordinarily vested in agencies of government." *Larkin*, 459 U.S. at 122. Plaintiff seeks not only to exempt itself, but to use its own religious beliefs to redefine the regulatory relationship between the government, insurance companies, and affected women. The Establishment Clause forbids that result.

Conclusion

The district court's judgment should be affirmed.

Respectfully Submitted,

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Certificate of Compliance

This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6,831 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). 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 Microsoft Word, Century Schoolbook, 14-point font.

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/s/ Gregory M. Lipper
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Certificate of Service

On July 16, 2015, I electronically filed this brief with the Clerk of this Court through the appellate CM/ECF system. The participants in the case are registered CM/ECF users, and service will be accomplished through the CM/ECF system.

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