No. 19-10754

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RICHARD W. DEOTTE, on behalf of himself and others similarly situated, *et al.*,

Plaintiffs–Appellees,

v.

STATE OF NEVADA,

Movant–Appellant.

On Appeal from the United States District Court
for the Northern District of Texas
Case No. 4:18-cv-825, Hon. Reed Charles O'Connor

BRIEF OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ADL (ANTI-DEFAMATION LEAGUE); BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; CENTRAL CONFERENCE OF AMERICAN RABBIS; GLOBAL JUSTICE INSTITUTE, METROPOLITAN COMMUNITY CHURCHES; INTERFAITH ALLIANCE FOUNDATION; MEN OF REFORM JUDAISM; METHODIST FEDERATION FOR SOCIAL ACTION; NATIONAL COUNCIL OF JEWISH WOMEN, INC.; PEOPLE FOR THE AMERICAN WAY FOUNDATION; RECONSTRUCTING JUDAISM; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; RELIGIOUS INSTITUTE, INC.; T'RUAH; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM SUPPORTING APPELLANTS AND REVERSAL

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

(1) Case number 19-10754, *Richard DeOtte, et al. v. State of Nevada*;

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

The following religious and civil-liberties organizations have an interest in the outcome of the case as *amici curiae*:

- Americans United for Separation of Church and State.
- ADL (Anti-Defamation League).
- Bend the Arc: A Jewish Partnership for Justice.
- Central Conference of American Rabbis.
- Global Justice Institute, Metropolitan Community Churches.
- Interfaith Alliance Foundation.
- Men of Reform Judaism.
- Methodist Federation for Social Action.
- National Council of Jewish Women, Inc.
- People For the American Way Foundation.
- Reconstructing Judaism.
- Reconstructionist Rabbinical Association.

- Religious Institute, Inc.
- T'ruah.
- Union for Reform Judaism.
- Women of Reform Judaism.

Counsel for *amici*, all of whom are employed by Americans United for Separation of Church and State, are:

- Richard B. Katskee.
- Carmen N. Green.
- Patrick Grubel.

All *amici* are nonprofit organizations, and none has a corporate parent or is owned in whole or in part by any publicly held corporation.

/s/ *Richard B. Katskee*
Attorney of Record for Amici Curiae

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are religious and civil-liberties organizations that represent diverse faiths and beliefs but are united in respecting the distinct roles of religion and government in our 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 third parties to bear the costs of others' religious exercise. *Amici* write to explain why the requested religious exemption would violate fundamental First Amendment principles. *Amici* are described individually in the Appendix.

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, as well as counseling in the medically appropriate selection and use thereof—without cost-sharing. *See* 42 U.S.C. § 300gg-13(a)(4); 26 C.F.R. § 54.9815-2713(a)(1)(iv);

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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. The parties to this appeal have consented to this filing.

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 PREVENTATIVE SERVICES FOR WOMEN: CLOSING THE GAPS 102–10 (2011), https://bit.ly/2t6lgfr.

Under 45 C.F.R. § 147.132(a)(1)(i)(A), houses of worship are exempt from the requirement. Under 45 C.F.R. § 147.131(c) and (d), religiously affiliated entities are entitled to a religious accommodation (i.e., an exemption) if they give notice that they want one; the insurance issuer or 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 are entitled to the same accommodation as are religiously affiliated entities.[2] The federal government has issued

[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), and "exemption" to mean the ability affirmatively to block the government's arrangements for the coverage, the terms are synonymous as a legal matter: A "religious accommodation" is simply an exemption from the law on religious grounds. *See generally Corp. of the Presiding Bishop of the Church of Latter-day Saints v. Amos*, 483 U.S. 327 (1987). *Amici* therefore use the terms interchangeably.

regulations that would expand the exemption to allow nongovernmental insurance-plan sponsors with religious objections to opt out of both the coverage requirement and the accommodation process described above (*see* 45 C.F.R. § 147.132), but has been preliminarily enjoined from enforcing these new rules (*see Pennsylvania v. President U.S.*, 930 F.3d 543, 576 (3d Cir. 2019) (affirming nationwide preliminary injunction); *see also California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 431 (9th Cir. 2019) (affirming preliminary injunction limited to plaintiff states)).

Relying on the Religious Freedom Restoration Act (42 U.S.C. §§ 2000bb *et seq.*), the court below enjoined the federal government from enforcing the contraceptive-coverage requirement against the health-insurers and plan sponsors of two expansive groups: (1) "[e]very current and future employer in the United States" with religious objections to the coverage requirement and the accommodation process; and (2) "[a]ll current and future individuals in the United States" who have religious objections to "cover[ing] or pay[ing] for some or all contraceptive services" but still wish to purchase health insurance. *DeOtte v. Azar*, 393 F. Supp. 3d 490, 499, 513–14 (N.D. Tex. 2019). The class-wide religious exemptions and resulting nationwide injunctions displace the system that Congress mandated, as well as the system of accommodations that the Supreme Court recognized

in *Hobby Lobby* (573 U.S. at 730–31). In doing so, they effectively nullify the ACA's protections for countless women.

SUMMARY OF ARGUMENT

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 imposes costs or burdens of that religious exercise 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 RFRA, on other federal statutes or regulations, or on 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 the injunctive relief granted by the district court does just that: In the name of religious accommodations for employers and individuals who want them, it strips others of the insurance coverage to which they are entitled by law, impermissibly imposing on them substantial costs and burdens just to obtain the critical healthcare that should be available to them automatically.

The Supreme Court has also made clear that for religious exemptions from general laws to be 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. The court below incorrectly determined that the classes' religious exercise was substantially burdened by the contraceptive-coverage requirement—a conclusion that cannot be squared with this Court's reasoned determination of the same question in *East Texas Baptist University v. Burwell*, 793 F.3d 449, 459–63 (5th Cir. 2015), *vacated and remanded by Zubik v. Burwell*, 136 S. Ct. 1557 (2016), and one that impermissibly grants religious exemptions based on what others may later do, not on what is required of the objectors themselves. Hence, RFRA does not authorize, and the Establishment Clause does not allow, the exemptions sought and awarded here.

ARGUMENT

A. The District Court Improperly Granted Religious Exemptions That Materially Harm Third Parties.

1. Religious exemptions that materially harm nonbeneficiaries 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 and burdens of

one's beliefs on others. 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 amount to unconstitutional preferences for the benefited 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 reflects 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 businesses 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" (*Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion)). When nonbeneficiaries would be unduly burdened, 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. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 196 (2012), the Court held 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 Alts., 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 contraceptive-coverage requirement does not apply to churches. *See* 45 C.F.R. § 147.131(a). And 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).

2. RFRA does not, and cannot, authorize the religious exemptions sought and granted here.

The district court held that RFRA requires a blanket exemption from the contraceptive-coverage requirement, allowing religious employers to provide and religious individuals to purchase insurance that does not cover contraceptive care for employees and dependents. 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 (*see generally Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000)), it should not be read to afford religious accommodations that would impermissibly harm nonbeneficiaries. Thus, in interpreting RFRA and its sister statute, the Religious Land Use and Institutionalized Persons Act (42 U.S.C. §§ 2000cc *et seq.*), the Supreme Court has enforced the constitutional prohibition against unduly burdening third parties by adopting a saving construction that builds in Establishment Clause safeguards.[3] *See Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) (explaining canon of interpretation).

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[3] 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) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006)). Decisions interpreting one

Specifically, the Supreme Court held in *Cutter* that, when "[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" to ensure that the accommodation would "not override other significant interests." 544 U.S. at 720, 722 (citing *Caldor*, 472 U.S. at 709–10). The Court repeated that requirement when interpreting RFRA 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 such 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) (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.").

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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).

b. This construction is not just 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 governmental interest and narrow tailoring) whenever governmental action substantially burdened religious exercise. *See, e.g.*, *Sherbert*, 374 U.S. at 406–07. In *Employment Division v. Smith*, 494 U.S. 872, 878–79 (1990), however, the Court held that generally applicable laws that are facially neutral with respect to religion are presumptively constitutional and subject to rational-basis review only, 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. *See* 42 U.S.C. § 2000bb(b); *Gonzales*, 546 U.S. at 424; S. Rep. No. 103-111, at 8–9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897.

In doing so, Congress necessarily—and quite consciously—adopted into RFRA the Establishment Clause prohibitions recognized in pre-*Smith* free-exercise law. *See, e.g.*, 139 Cong. Rec. S14,350–01 (daily ed. Oct. 26, 1993) (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) (statement of Sen. Hatch)

(RFRA "is consistent with the case law developed by the Court prior to the Smith decision"). Hence, though RFRA provides critical protections for religious exercise, it does not—and as a constitutional matter cannot—license imposing meaningful costs or burdens on third parties.

3. The religious exemptions granted by the district court will impermissibly harm countless women.

a. The religious exemptions here allow objecting employers to provide, and objecting individuals to purchase, health insurance that does not cover contraceptive care. And it does so without any mechanism—like that in the current religious accommodation—to ensure that employees and dependents still receive contraceptive coverage. The practical effect is that women who get their health insurance through a class member 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 and dependents bear these costs and burdens, the exemptions violate the Establishment Clause and cannot be authorized by RFRA.

Contraceptives are critical healthcare. They not only prevent unintended pregnancies but also 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 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 treat conditions such as polycystic ovary syndrome. *See* Ahmed Badawy & Abubaker Elnashar, *Treatment options for polycystic ovary syndrome*, 3 INT'L J. WOMEN'S HEALTH 25, 30–31 (2011), https://bit.ly/36TL11u. 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, 102 (2005), https://bit.ly/2L9LVgo.

But contraceptives can be 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—can cost $1,000 out-of-pocket. *Id.* And even small differences in cost between contraceptives may deter women from choosing the method that is most effective and medically appropriate for them: Women who would pay less than $50, for example, are about seven

times more likely to obtain an intrauterine device than are women who must pay more than $50 out-of-pocket. *See* Aileen M. Gariepy et al., *The impact of out-of-pocket expense on IUD utilization among women with private insurance*, 84 CONTRACEPTION e39, e41 (2011).

Indeed, "[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*, 136 S. Ct. 1557. For example, requiring women to return to the clinic for oral-contraceptive refills every three months rather than providing a year's supply at once yielded a 30% greater chance of unintended pregnancy and, correspondingly, a 46% increase in abortions. 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.

Women who lose access to contraceptive coverage will incur real out-of-pocket expenses and experience pressure to choose cheaper, often less effective or less medically appropriate contraceptives—or do without. Even for those who may 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, that assertion is speculative at best for any particular individual: Alternatives may be impracticable or wholly unavailable. And with less effective and appropriate contraceptives come increased risks of unintended pregnancies, increased risks of serious, potentially life-threatening illnesses, and increased severity of symptoms from otherwise-treatable conditions.

b. Two circuits have affirmed injunctions barring broad regulatory exemptions from the contraceptive-coverage requirement that would have had the same effect as the decision below, because (among other defects) those regulatory exemptions would have harmed third parties.

In November 2018, the U.S. Department of Health and Human Services issued regulations that would permit nongovernmental employers to receive a religious exemption from both the contraceptive-coverage requirement and the currently available accommodation, thus effectively allowing them to deny contraceptive coverage to their employees and their employees' dependents. *See* 45 C.F.R. §§ 147.131(c)(4), 147.131(d), 147.132. HHS, like the court below, sought to justify the blanket exemption under RFRA. 83 Fed. Reg. at 57,544 (Sep. 21, 2018); *see also, e.g.*, *Pennsylvania*, 930 F.3d at 572.

But the Third and Ninth Circuits rejected HHS's view that RFRA does—or even can—require the exemptions because, among other reasons,

the regulations would have deprived third parties of the health-insurance coverage to which they are legally entitled. *See Pennsylvania*, 930 F.3d at 574 ("[T]he Religious Exemption and the new optional Accommodation would impose an undue burden on nonbeneficiaries"); *California*, 941 F.3d at 428 n.3 ("The religious exemption fails to 'take adequate account of the burdens . . . impose[d] on nonbeneficiaries' . . . [and] is not 'measured so that it does not override other significant interests.'"). The exemptions granted by the court below impose precisely the same impermissible harms as the enjoined HHS regulations. But the rule against third-party harms applies to judicial orders just as it does to agency action. *See Cutter*, 544 U.S. at 720 ("[C]ourts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"). So the judgment cannot stand.

B. The District Court Improperly Granted Religious Exemptions That Do Not Alleviate Substantial Government-Imposed Burdens On Religious Exercise.

When official action imposes substantial burdens on religious exercise, the government may take steps to ameliorate those burdens (*see, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)), subject, of course, to the prohibition against shifting costs to nonbeneficiaries, among other constitutional restrictions (*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 the asserted burdens on religious exercise are insubstantial or nonexistent, exemptions from the law constitute governmental promotion of religion that violates the Establishment Clause. *See County of Allegheny*, 492 U.S. at 613 n.59; *Texas Monthly*, 489 U.S. at 15 (plurality opinion).

The burdens on religious exercise alleged by the class representatives here are insubstantial at best, as this Court and virtually every other circuit to address similar RFRA claims has held. The fundamental problem is that the classes' objections are to the actions of others (be they the government, insurance companies, or other individuals) and not to any actions required of the class members themselves. The religious exemptions ordered by the court below thus exceed what RFRA does or can authorize and impermissibly promote 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 are impermissible if they burden nonbeneficiaries or "cannot 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 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 (1991).

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." *See Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145 n.11 (1987).

2. RFRA does not authorize religious exemptions 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 an accommodation claim, the claimant must first demonstrate that the "[g]overnment [has] substantially burden[ed the claimant's] exercise of religion." *See* 42 U.S.C. § 2000bb-1.

Whether a law burdens a claimant's religious exercise, and whether any such burden is substantial, are questions of law reserved for the courts. *E. Tex. Baptist Univ.*, 793 F.3d at 456; *accord Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1144 (11th Cir. 2016) (identifying agreement of "seven sister circuits"), *vacated*, 2016 WL 11503064, No. 14-12696-CC (11th Cir. May 31, 2016). The "nature of the claimed burden and the substantiality of that burden on the [claimant's] religious exercise" are objective inquiries. *Real Alternatives*, 867 F.3d at 356 (emphasis omitted; brackets in original). It thus cannot be the case that bare assertions by complainants that their religious exercise has been burdened are sufficient to trigger RFRA's compelling-interest analysis. *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 588 (6th Cir. 2018) ("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."), *cert. granted on unrelated issue*, 139 S. Ct. 1599 (Apr. 22, 2019) (No. 18-107).

What is more, while a religious practice need not be "central to" the adherents' "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 them] 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; *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").

3. The class members' religious exercise is not substantially burdened.

There is no burden on the class members' religious exercise because their religious objections are, at heart, objections to the acts of third parties—be they government officials, insurance companies, or women who want the insurance coverage guaranteed to them by the ACA. Although Plaintiffs have artfully pleaded that they object to submitting the form required of employers seeking the § 147.131 accommodation or to purchasing health insurance as required of individuals, the asserted burdens on their religious exercise cannot be disentangled from the actions that others might undertake. And "[t]o the extent that [Plaintiffs] object to third parties acting in ways contrary to [Plaintiffs'] religious beliefs, they have no recourse" (*California*, 941 F.3d at 430 (citing *Lyng*, 485 U.S. at 449)), because "RFRA confers no right to challenge the independent conduct of third parties" (*E. Tex. Baptist Univ.*, 793 F.3d at 459). *Accord Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 440 (3d Cir. 2015) (when analyzing a RFRA claim, "we are to examine the act the [complainants] must perform—not the effect of that act"), *vacated and remanded by Zubik*, 136 S. Ct. 1557.

a. The employer-class representative does not state a general religious objection to submitting forms to the government or insurance

administrators, nor does he assert a religious obligation to keep secret his religious beliefs about contraceptive use. Rather, he objects to submitting the certification form for the regulatory accommodation (45 C.F.R. § 147.131), because, in his words, that would "enable[ ] his company's employees to obtain and use" contraceptives (*DeOtte*, 393 F. Supp. 3d at 501). In other words, he objects to submitting the form because of "what follows from" it (*Pennsylvania*, 930 F.3d at 573)—namely, that third parties will act, in accordance with federal law, to ensure that his company's employees receive, by other means and wholly at others' expense, the insurance coverage to which they are legally entitled.

Nine circuits, including this one, have already considered virtually identical RFRA challenges; and eight, including this one, have concluded that this objection is insufficient as a matter of law to state a RFRA claim. *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 252–53 (D.C. Cir. 2014); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 222 (2d Cir. 2015); *Geneva Coll.*, 778 F.3d at 437; *E. Tex. Baptist Univ.*, 793 F.3d at 449; *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738, 749 (6th Cir. 2015); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 613–14 (7th Cir. 2015); *Little Sisters of the Poor Home for the Aged, Denver v. Burwell*, 794 F.3d 1151, 1173–74 (10th Cir. 2015); *Eternal Word*, 818 F.3d

at 1144. *But see Dordt Coll. v. Burwell*, 801 F.3d 946 (8th Cir. 2015).[4] For "RFRA does not entitle [employers] to control their employees' relationships with third parties that are willing and obligated to provide contraceptive care." *California*, 941 F.3d at 430.

The court below departed from this reasoning based ostensibly on how the employer-class representative phrased his objection: While the plaintiffs in *East Texas Baptist* stated that they "object to providing or facilitating access to" contraceptives (793 F.3d at 455), the employer here pleaded that "the act of executing a certification form is itself a violation of his religious beliefs" (*DeOtte*, 393 F. Supp. 3d at 504 (internal quotation marks omitted)). That, according to the district court, distinguishes this case from the RFRA claim that this Court rejected in *East Texas Baptist*. *Id.*

But it remains for the courts to answer, from an objective viewpoint, the legal question whether the ACA's contraceptive-coverage requirement

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[4] Though the Supreme Court vacated and remanded all the pre-*Zubik* decisions, it did so with the instruction that the parties on remand "should be afforded an opportunity to arrive at an approach going forward that accommodates [objecting entities'] religious exercise while at the same time ensuring that women covered by [those entities'] health plans receive full and equal health coverage, including contraceptive coverage." *Zubik*, 136 S. Ct. at 1560 (internal quotation marks and citation omitted). No such compromise was reached. And post-*Zubik* cases have affirmed the reasoning that the act of submitting a form is not a legally cognizable burden on religious exercise. *See Pennsylvania*, 930 F.3d at 573; *California*, 941 F.3d at 429.

has substantially burdened the claimants' religious exercise. *E. Tex. Baptist Univ.*, 793 F.3d at 456. Artful pleading does not avoid or alter that inquiry. For if it did, the results would be both illogical and untenable.

Suppose, for example, that the government instituted a military draft but provided exemptions for conscientious objectors who submitted an opt-out form that allowed the government to identify them and move to the next person on the rolls. Under *East Texas Baptist*, people who asserted religious objections to triggering the selection of alternate draftees and hence demanded exemptions from submitting the form would not have cognizable RFRA claims. *Cf. Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 556 (7th Cir. 2014), *vacated and remanded*, 575 U.S. 901 (2015). Yet under the district court's rationale here, those who instead asserted religious objections to submitting the form *because they objected to triggering the selection of an alternate* would have valid claims.

That is empty formalism that should not produce different answers to the legal question here. The attempt by the employer-class representative to describe the burden on his religious exercise using fewer references to the third parties to whose conduct he actually objects does not render his objection meaningfully different from the one that this Court rejected in *East Texas Baptist*—especially because the class representative still

acknowledges that the resulting actions by others are the true source of his objection (*see DeOtte*, 393 F. Supp. 3d at 501).

Nor is the district court correct that religious objectors get the last word on whether the act of filling out a form is so closely connected to the religiously forbidden behavior of providing contraceptives that it receives RFRA protection. The distinction between a RFRA claimant's acts and those of third parties remains an objective legal question for the courts, regardless of the claimant's views. *See Bowen v. Roy*, 476 U.S. 693, 701 n.6 (1986) (although an individual's "religious views may not accept this distinction between individual and governmental conduct[,] [i]t is clear . . . that the Free Exercise Clause, and the Constitution generally, recognize such a distinction"); *see also Lyng*, 485 U.S. at 451 ("Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.").[5]

The principle that complainants may assert RFRA claims based on the acts required of *them* but not on the resulting actions of *others* is critical to the government's ability to function. Take again the military-draft

[5] Both *Bowen* and *Lyng* are among the body of free-exercise case law that RFRA encompasses. *See supra* pp. 11–12.

hypothetical: Under the district court's reasoning, the government's design of a process by which it can identify conscientious objectors (such as requiring an applicant to mark a particular check-box on a Selective Service Registration Form that must be submitted at the post office on one's eighteenth birthday) would have to survive strict scrutiny, meaning not only that the process must serve a compelling governmental interest but also that there must be no less restrictive way for the government to meet that interest (such as sending registrars to every home to identify eighteen-year-olds or making the draft an opt-in system rather than having conscientious objection be an opt-out). "That seems a fantastic suggestion" (*Univ. of Notre Dame v. Sebelius*, 743 F.3d at 556) that would grind the wheels of government to a halt. *See also E. Tex. Baptist Univ.*, 793 F.3d at 461–62 (expressing "doubt" that Congress intended to subject a wide variety of federal programs to strict-scrutiny analysis when it enacted RFRA).

No matter how he pleads it, the employer-class representative here wishes not to sign the form because he objects on religious grounds to the subsequent, resulting actions of third parties. As a matter of law, that is not a substantial burden on his religious exercise, so the claim fails.

b. The claim by the individual objectors has the same fatal flaw: The objection is to the actions of others. While the class representatives are willing to purchase health insurance (*DeOtte*, 393 F. Supp. 3d at 499), they

have chosen to forgo it on the belief that, because all available plans cover contraceptives, they would be "compelled to pay premiums that subsidize the provision of other people's contraception"—the use of which is the central evil to which they object (*id.* at 508 (internal quotation marks omitted)). Without conducting the required objective analysis of whether these Plaintiffs' religious exercise was substantially burdened in a legally cognizable sense, the district court simply accepted their subjective view of the matter. *Id.* at 509. That is legal error.

What is more, the only other circuit to address a RFRA challenge to the contraceptive-coverage requirement brought by individuals rather than employers—the Third Circuit—flatly rejected the claim. *See Real Alternatives*, 867 F.3d at 361. That should be the result here, too. The class representatives' essential objection is to how health-insurance companies will spend money later. For neither the class representatives nor the absent class members are required to purchase (or use) contraceptives. Rather, the premiums that they pay will be put by insurers into a common pool from which others may receive reimbursements for contraceptive care, just as that money may be used for reimbursements for vaccinations, blood transfusions, and other procedures to which some policyholders may object on religious grounds.

The Supreme Court has roundly rejected the free-exercise theory advanced to support this claim: In *United States v. Lee*, the Court held that an Amish employer had no right to an exemption from paying Social Security taxes despite his religious objection to funding (and receiving) Social Security benefits. 455 U.S. at 260;[6] *see also Jenkins v. C.I.R.*, 483 F.3d 90, 93 (2d Cir. 2007) (religious objector to military spending had no right under RFRA to exemption from paying taxes); *Adams v. C.I.R.*, 170 F.3d 173, 178 (3d Cir. 1999) (same); *United States v. Ramsey*, 992 F.2d 831, 833 (8th Cir. 1993) (same under First Amendment).

Put simply, there is "no RFRA right to be free from the unease, or even anguish, of knowing that third parties are legally privileged or obligated to act in ways [one's] religion abhors." *Priests for Life*, 772 F.3d at 246. Yet that is exactly what the individual objectors seek and the district court granted: a right to stop third parties from making purchases that the objectors feel religiously required not to make themselves. That claim is simply unavailing under RFRA. *See, e.g.*, *Real Alternatives*, 867 F.3d at 361.

* * *

"[I]ndividuals cannot use RFRA to compel the Government to structure its relations with a third party in a certain way." *Id.* at 364

[6] *Lee* is another pre-*Smith* free-exercise decision encompassed by RFRA. *See supra* pp. 11–12.

(collecting cases). The district court ignored this Court's reasoning in *East Texas Baptist* regarding strikingly similar claims when it rejected that critical principle. If affirmed, the ruling here would make artful pleading, not legal standards, what is controlling and would "subject a wide range of federal programs to strict scrutiny," from passport applications to Social Security to the draft. *E. Tex. Baptist Univ.*, 793 F.3d at 461. "The possibilities are endless." *Id.* at 461–62. But as this Court recognized, it is "doubt[ful that] Congress, in enacting RFRA, intended for them to be." *Id.*

CONCLUSION

The religious exemptions granted by the district court privilege employers' and would-be policyholders' religious views over the rights, interests, and health of the women who have lost the insurance coverage (and resulting health services) to which they are legally entitled. Further, both the employer- and individual-class representatives premise their religious objections not on the acts required of them, but on the subsequent actions of third parties. As a matter of law, RFRA does not authorize, and the Establishment Clause does not permit, exemptions under these circumstances. The decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that:

(i) he is a member of the bar of this Court;

(ii) this brief complies with the type-volume limitations of Federal Rules 29(a)(5) and 32(a)(7)(B)(i) and Fifth Circuit Rule 29.3 because it contains 6,365 words including footnotes and excluding the parts of the brief exempted by Rule 32(f);

(iii) this brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Word for Microsoft Office 365 and is set in Century Schoolbook font in a size measuring 14 points or larger;

(iv) the text of the electronic brief is identical to the text in the paper copies; and

(v) a virus scan has been run on this brief and no virus was detected.

/s/ *Richard B. Katskee*

CERTIFICATE OF SERVICE

I certify that on December 26, 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*

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 advocated for legal exemptions that reasonably accommodate religious practice. *See, e.g.*, Br. of Ams. United for Separation of Church & State et al. as *Amici Curiae* Supporting Petitioners, *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (No. 03-9877), 2004 WL 2945402. But Americans United opposes religious exemptions that unduly harm third parties or favor a religious practice not actually 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).

ADL (Anti-Defamation League)

Founded in 1913 in response to an escalating climate of anti-Semitism and bigotry, ADL is a leading anti-hate organization with the timeless mission to protect the Jewish people and to secure justice and fair treatment for all. To this end, ADL is a staunch supporter of the religious rights and liberties guaranteed by both the Establishment and Free Exercise Clauses.

Although ADL vigorously supported the Religious Freedom Restoration Act as a means to protect individual religious exercise, RFRA should not be used as a vehicle to enable some Americans to impose their religious beliefs on others to deny access to healthcare, including contraception.

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.

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.

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.

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.

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 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.

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 American 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.