IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 2:17-cv-04540

BRIEF OF *AMICI CURIAE* RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTERESTS OF *AMICI CURIAE*

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

Amici, described individually in the Appendix, are:

- Americans United for Separation of Church and State.
- Bend the Arc: A Jewish Partnership for Justice.
- Central Conference of American Rabbis.
- Global Justice Institute, Metropolitan Community Churches.
- Interfaith Alliance Foundation.
- Jewish Social Policy Action Network.
- Men of Reform Judaism.
- Methodist Federation for Social Action.
- National Council of Jewish Women, Inc.
- Reconstructionist Rabbinical Association.
- Religious Coalition for Reproductive Choice.
- Religious Institute.
- The Sikh Coalition.
- T'ruah: the Rabbinic Call for Human Rights.
- Union for Reform Judaism.

- Women of Reform Judaism.

INTRODUCTION

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

When the Health Resources & Services Administration adopted the contraceptive-coverage requirement, it exempted houses of worship. See 76 Fed. Reg. 46,621 (Aug. 3, 2011). HRSA expanded that exemption in 2013 to afford religiously affiliated entities a religious accommodation (i.e., an exemption) on giving notice to the government that they want one; the government then arranged for contraceptive coverage to be provided without cost to or participation by the objecting entities. *See* 78 Fed. Reg. 39,870 (July 2, 2013).[1] 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.

In October 2017, without notice-and-comment rulemaking, the government issued two interim final rules that dramatically expanded these exemptions. Thirteen months later, the

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[1] Though it has become common shorthand to use "accommodation" to mean the ability to refuse to provide the coverage on giving notice (so that the government may ensure that the coverage is provided by a third-party insurer), and "exemption" to mean the ability also to block the government's separate arrangements for the coverage, a religious accommodation is simply an exemption from the law on religious grounds. *See generally Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). *Amici* therefore use the terms interchangeably.

government issued "nearly identical" final rules. *California v. U.S. Dep't of Health & Human Servs.*, 351 F. Supp. 3d 1267, 1279 (N.D. Cal. 2019).

The final rules establish religious and moral exemptions that effectively nullify the contraceptive-coverage requirement's protections for countless women. The Religious Exemption (45 C.F.R. § 147.132) provides that nongovernmental insurance-plan sponsors—including publicly traded companies—may, on the basis of religious objections, exempt themselves from the contraceptive-coverage requirement in a way that affirmatively bars the government from making separate arrangements to provide coverage. Objecting entities may instead voluntarily notify the government of their intention not to provide coverage without standing in the way of the government's separate arrangements (*see id.* § 147.131(d)) by invoking the accommodation previously available to all but publicly traded companies. But they are no longer required to do so. And objecting entities that took the preexisting accommodation may revoke their notice to the government, thus requiring the government to curtail its separate provision of the coverage. *See id.* § 147.131(c)(4).

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

Amici write to explain why the Religious Freedom Restoration Act (42 U.S.C. §§ 2000bb *et seq.*) does not confer authority on the government to promulgate these rules, and why Defendants' reading of RFRA is barred by the Establishment Clause and Supreme Court precedent.

SUMMARY OF ARGUMENT

A. The Supreme Court has made clear that when evaluating religious exemptions from generally applicable laws, "courts must take adequate account of the burdens a requested

accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). If, in purporting to accommodate the religious exercise of some, the government imposes costs and burdens on others, it prefers the beliefs of the benefited over the beliefs, rights, and interests of the burdened, thus violating the Establishment Clause. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985). That is true whether a religious exemption is premised on the Religious Freedom Restoration Act, other federal or state statutes or regulations, or the First Amendment's Free Exercise Clause. *See, e.g.*, *Hobby Lobby*, 573 U.S. at 729 n.37; *Cutter*, 544 U.S. at 720; *Caldor*, 472 U.S. at 709–10. Yet in the name of accommodating businesses, nonprofits, and universities, the Religious Exemption here strips employees, students, and dependents of the insurance coverage to which they are entitled by law, impermissibly imposing on them significant costs and burdens to obtain critical healthcare that should be available to them with no out-of-pocket costs.

B. The Supreme Court has also made clear that for religious exemptions from general laws to be potentially permissible, they must alleviate substantial government-imposed burdens on religious exercise. *See, e.g.*, *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 US. 573, 613 n.59 (1989). When they do not, they are unconstitutional preferences for religion. *Amos*, 483 U.S. at 334–35. This constitutional requirement was incorporated into the text of RFRA, which authorizes religious exemptions only when necessary to relieve substantial, government-imposed burdens. Yet the Religious Exemption here is made available regardless of whether an entity demonstrates that the preexisting regulatory accommodation substantially burdens its religious exercise—which, as eight circuits have previously held, it does not. So RFRA does not authorize the exemption, and the Establishment Clause does not allow it.

C. Finally, although the government also affords a "Moral Exemption," either that exemption is broader than the Religious Exemption, in which case it is *ultra vires*, or it is just the

Religious Exemption by another name, in which case it suffers the same constitutional defects as its sibling. Neither exemption can stand.

ARGUMENT

A. Religious Exemptions That Harm Third Parties Are Forbidden.

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

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

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

Free-exercise jurisprudence incorporates this same principle. In *United States v. Lee*, 455 U.S. 252, 261 (1982), the Court rejected an Amish employer's request for an exemption from paying social-security taxes because the exemption would "operate[ ] to impose the employer's religious faith on the employees." And in *Braunfeld v. Brown*, 366 U.S. 599, 608–09 (1961), the

Court refused an exemption from Sunday-closing laws because it would have provided Jewish business owners with "an economic advantage over their competitors who must remain closed on that day." In contrast, the Court recognized a Seventh-Day Adventist's right to an exemption from a restriction on unemployment benefits in *Sherbert v. Verner*, 374 U.S. 398, 409 (1963), because the exemption would not "serve to abridge any other person's religious liberties." And the Court granted exemptions from state truancy laws in *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1972), only after Amish parents demonstrated the "adequacy of their alternative mode of continuing informal vocational education" to meet their children's needs.

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

Indeed, in only one narrow set of circumstances (in two cases) has the Supreme Court *ever* upheld religious exemptions that burdened third parties in any meaningful way—namely, when core Establishment and Free Exercise Clause protections for the autonomy and ecclesiastical authority of religious institutions required the accommodation. Specifically, the Court held in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 196 (2012), that the Americans with Disabilities Act could not be enforced in a way that would interfere with a church's selection of its ministers. And in *Amos*, 483 U.S. at 330, 339, the Court upheld, under Title VII's statutory religious exemption, a church's firing of an employee who was not in religious good standing. These exemptions did not amount to impermissible religious favoritism, and therefore were permissible under the Establishment Clause, because they directly implicated

"church autonomy," which is "enshrined in the constitutional fabric of this country" (*Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 352 (3d Cir. 2017)).

Concerns for church autonomy have no bearing here, as the challenged rules do not apply to churches, which were already exempted by 45 C.F.R. § 147.131(a) (2015). As the Supreme Court recently explained, if the special solicitude for churches and clergy "were not confined," the result would be "inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).[2]

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

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

a. Because RFRA cannot require what the Establishment Clause forbids (*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000)), it should not be read to afford religious accommodations that would harm non-beneficiaries if a constitutionally permissible alternative construction is possible (*cf., e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005)). Thus, in

[2] For similar reasons, the Religious Exemption and the preexisting exemption for houses of worship need not and do not stand or fall together. In creating the exemption for houses of worship, the government stated that its purpose was "to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions." Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011); *accord* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013). In keeping with the principle of noninterference with the internal workings of churches, the government routinely draws distinctions between houses of worship and nonchurch nonprofits. *Cf., e.g.*, 2 U.S.C. § 1602(8)(B)(xviii) (exempting churches from Lobbying Disclosure Act's registration requirements); 26 U.S.C. § 6033(a)(3)(A)(i), (iii) (exempting churches from obligations for nonprofits to register with Internal Revenue Service and to submit annual informational tax filings); 29 U.S.C. § 1003(b)(2) (exempting church plans from ERISA). The numerous classes of entities—including publicly traded for-profit corporations—exempted here are not situated similarly to houses of worship, and therefore their exemption from the contraceptive-coverage requirement is not similarly justified by the noninterference principle.

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 affording the statutes a saving construction that builds in the Establishment Clause's safeguards.[3]

Specifically, the Supreme Court held in *Cutter* that "[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries" to ensure that accommodations do "not override other significant interests." 544 U.S. at 720, 722 (citing *Caldor*, 472 U.S. at 709–10). The Court repeated that requirement in *Hobby Lobby*. *See* 573 U.S. at 729 n.37. Indeed, with respect to exemptions from the very contraceptive-coverage requirement at issue here, every Justice in *Hobby Lobby* authored or joined an opinion recognizing that detrimental effects on nonbeneficiaries must be considered. *See id.* at 693 ("Nor do we hold . . . that . . . corporations have free rein to take steps that impose 'disadvantages . . . on others' or that require 'the general public [to] pick up the tab.'"); *id.* at 739 (Kennedy, J., concurring) (religious exercise must not "unduly restrict other persons . . . in protecting their own interests"); *id.* at 745 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting) ("Accommodations to religious beliefs or observances . . . must not significantly impinge on the interests of third parties."); *see also Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring) (religious accommodation constitutionally permissible because it "would not detrimentally affect others who do not share petitioner's belief").

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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) (citation omitted). And decisions under one apply equally to the other. *See, e.g.*, *Walker v. Beard*, 789 F.3d 1125, 1134 (9th Cir. 2015); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661 (10th Cir. 2006); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226–27 (11th Cir. 2004).

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

Before 1990, the Supreme Court interpreted the Free Exercise Clause to require strict scrutiny (i.e., a compelling government interest and narrow tailoring) when general laws substantially burdened religious exercise. *See, e.g.*, *Sherbert*, 374 U.S. at 406–07. In *Employment Division v. Smith*, 494 U.S. 872, 879 (1990), however, the Court held that generally applicable laws that are facially neutral with respect to religion are presumptively constitutional and subject to only rational-basis review, even if the legal requirements fall more heavily on some people because of their religion. Congress responded by enacting RFRA to restore the Court's pre-*Smith* free-exercise jurisprudence as a statutory test for religious accommodations. *See* 42 U.S.C. § 2000bb(b)(1); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006); S. Rep. No. 103-111, at 8 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1897–98.

In doing so, Congress necessarily—and quite consciously—built into RFRA the Establishment Clause's prohibitions recognized in pre-*Smith* free-exercise law. *See, e.g.*, 139 Cong. Rec. S14,350–51 (daily ed. Oct. 26, 1993), https://bit.ly/2VaZYdl (statement of Sen. Kennedy) ("The act creates no new rights for any religious practice or for any potential litigant. Not every free exercise claim will prevail, just as not every claim prevailed prior to the *Smith* decision."); 139 Cong. Rec. S14,352 (daily ed. Oct. 26, 1993), https://bit.ly/2VaZYdl (statement of Sen. Hatch) (RFRA "does not require the Government to justify every action that has some effect on religious exercise"). Hence, "when assessing RFRA claims" this Court should "look to pre-*Smith* free exercise jurisprudence" for those limitations. *Real Alternatives*, 867 F.3d at 355. It follows that although RFRA provides critical protections for religious exercise, it does not—and as a constitutional matter cannot—license the government's imposition of costs and burdens on third parties in the name of religious accommodations.

c. The government would subjugate these constitutional mandates to bureaucratic whim: Having decided for itself that it no longer acknowledges a compelling interest in the contraceptive-coverage requirement, it has elsewhere argued that this decision disposes of the Establishment Clause. *See* Br. Fed. Appellants 42, *California v. U.S. Dep't of Health & Human Servs.*, Case Nos. 19-15072, 19-15118, & 19-15150 (9th Cir. Feb. 25, 2019). In other words, because the government no longer attaches much importance to protecting women's health and equality through consistent enforcement of the ACA, it believes that the Constitution affords no protection either.

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

Neither is the proper inquiry a balancing of estimated burdens on religious objectors against harms to women receiving medical coverage through objecting employers. The constitutional question is whether third parties are unduly burdened—not how those burdens compare to other concerns. *See, e.g.*, *id.* at 722; *Caldor*, 472 U.S. at 709–10. Not only is there no precedent for a balancing approach, but such an approach necessarily presumes that those seeking religious exemptions should sometimes be able to employ the machinery of the government to burden non-beneficiaries. That is not the constitutional rule.

3. The Religious Exemption would impermissibly harm countless women.

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

Contraceptives are critical healthcare. Not only do they prevent unintended pregnancies, but they protect the health of women with the "many medical conditions for which pregnancy is contraindicated" (*Hobby Lobby*, 573 U.S. at 737 (Kennedy, J., concurring)). They also reduce risks of endometrial and ovarian cancer. *See Large Meta-Analysis Shows That the Protective Effect of Pill Use Against Endometrial Cancer Lasts for Decades*, 47 PERSP. ON SEXUAL & REPROD. HEALTH 228, 228 (2015). They preserve fertility by treating conditions such as polycystic ovary syndrome. *See* Mira Aubuchon & Richard S. Legro, *Polycystic Ovary Syndrome: Current Infertility Management*, 54 CLINICAL OBSTETRICS & GYNECOLOGY 675, 676 (2011). And they alleviate severe premenstrual symptoms such as dysmenorrhea. *See* Anne Rachel Davis et al., *Oral Contraceptives for Dysmenorrhea in Adolescent Girls: A Randomized Trial*, 106 OBSTETRICS & GYNECOLOGY 97, 97 (2005), https://bit.ly/2L9LVgo.

But contraceptives are expensive. Without insurance, the annual cost for prescription oral contraception may be as much as $600. *See* Elly Kosova, *How Much Do Different Kinds of Birth Control Cost Without Insurance?*, NAT'L WOMEN'S HEALTH NETWORK (Nov. 17, 2017),

https://bit.ly/2HSYwmM. The most effective contraceptives—intrauterine devices or contraceptive implants—may cost $1,000 out-of-pocket. *Id.* And even small differences in cost may deter women from choosing the most effective and medically appropriate form for them: Women who must pay more than $50 out-of-pocket, for example, are about seven times less likely to obtain an intrauterine device than are women who would pay less than $50. *See* Aileen M. Gariepy et al., *The Impact of Out-of-Pocket Expense on IUD Utilization among Women with Private Insurance*, 84 CONTRACEPTION c39, c40–41 (2011). And with less effective contraceptives or reduced options for the most medically appropriate ones come increased risks of unintended pregnancies, increased risks of serious, potentially life-threatening illnesses, and increased severity of symptoms from otherwise treatable conditions.

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

The government itself estimates that more than 125,000 women will lose contraceptive coverage because of the challenged exemptions. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care Act, 83 Fed. Reg. 57,536, 57,551 (Nov. 15, 2018); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care Act, 83 Fed. Reg. 57,592, 57,627(Nov. 15, 2018). These women will incur actual, out-of-pocket expenses and experience pressure to choose cheaper,

often less effective or less medically appropriate contraceptives—or to do without. Even for those who may as a formal matter have other routes to obtain insurance coverage, the administrative hurdles, additional time, additional expense, and potential need to expose intensely personal details of their medical history or intimate relations are all significant and sometimes decisive deterrents. Thus, while for some women contraceptives may be available from other sources, for any particular individual that assertion is speculative at best; alternatives may be impracticable or wholly unavailable.[4] Whether the government deems these harms significant is beside the point: Establishment Clause mandates are not policy matters left to the shifting priorities of bureaucrats.

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

When official action has the effect of imposing *substantial* burdens on religious exercise, the government may act to ameliorate those burdens (*see, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)), subject to, among other restrictions, the constitutional prohibition against shifting the costs to nonbeneficiaries (*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*

[4] Defendants have argued that women who are denied contraceptives under the Religious Exemption will be able to obtain them via Title X of the Public Health Service Act, 42 U.S.C. §§ 300 *et seq.*, which provides federal funding for family-planning services. *See* 83 Fed. Reg. at 57,551. But Title X is an insufficient remedy for the harms caused by the Religious Exemption. First, a new federal regulation that makes certain women whose employers take the Religious Exemption eligible for Title X benefits provides no relief to students attending universities that take the Religious Exemption. *See* Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7,714, 7,734 (Mar. 4, 2019). Second, objecting employers are not required to refer their employees to Title X clinics, or even to provide notice of eligibility for the benefits. Third, a temporarily enjoined portion of the new rule denies funding to clinics that offer abortion referrals. *Id.* at 7,744. If allowed to go into effect, that provision would substantially reduce the number of Title X clinics across the country. *See* Kinsey Hasstedt, *Beyond the Rhetoric: The Real-World Impact of Attacks on Planned Parenthood and Title X*, 20 GUTTMACHER REV. 86, 89 (2017). Finally, the rule allows Title X clinics to limit the range of contraceptive methods that they provide to a single method, such as so-called natural family planning. 84 Fed. Reg. at 7,742. Hence, the government's proposed alternative of obtaining contraception from Title X clinics would for many women be illusory.

Protective Ass'n, 485 U.S. 439, 452 (1988). And when asserted burdens on religious exercise are insubstantial or exist independently of any governmental action, legal exemptions would constitute official promotion of religion that violates the Establishment Clause. *See Allegheny*, 492 U.S. at 613 n.59; *Texas Monthly*, 489 U.S. at 15 (plurality opinion).

Here, the government affords categorical exemptions without requiring businesses to show, or even assert, a substantial, government-imposed burden on religious exercise. And as the government itself explained (Religious Exemptions and Accommodations for Coverage of Certain Preventive Services under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,800 (Oct. 13, 2017); 83 Fed. Reg. at 57,546), it promulgated the exemptions to remove a purported burden that the Third Circuit and seven sister circuits held to be insubstantial as a matter of law. The Religious Exemption thus exceeds the authority granted by RFRA and impermissibly promotes religion, in derogation of the Establishment Clause.

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

An "accommodation of religion, in order to be permitted under the Establishment Clause, must lift 'an identifiable burden on the exercise of religion'" that the government itself has imposed. *Allegheny*, 492 U.S. at 613 n.59 (quoting *Amos*, 483 U.S. at 348 (O'Connor, J., concurring in the judgment)); *see also Texas Monthly*, 489 U.S. at 15 (plurality opinion) (accommodations must "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion"); *Wallace v. Jaffree*, 472 U.S. 38, 84 (1985) (O'Connor, J., concurring in the judgment) (religious accommodation must lift "state-imposed burden on the free exercise of religion" that does not result from Establishment Clause). Absent a substantial government-imposed burden, a religious accommodation would impermissibly "create[ ] an incentive or inducement (in the strong form, a compulsion) to adopt [the benefited religious] practice or

conviction." Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992).

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

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

What the Establishment Clause requires, RFRA incorporates as an express statutory prerequisite: To assert a colorable accommodation claim, claimants must first demonstrate that the "[g]overnment [has] substantially burden[ed their] exercise of religion." *See* 42 U.S.C. § 2000bb-1.

The bare assertion that religious exercise is burdened is insufficient because "accepting any burden alleged by [complainants] as 'substantial'" would "ignore the import . . . of the 'substantial' qualifier in the RFRA test." *Real Alternatives*, 867 F.3d at 358 & n.24 (quoting *Little Sisters of the Poor v. Burwell*, 794 F.3d 1151, 1176 (10th Cir. 2015), *vacated and remanded by Zubik*, 136 S. Ct. at 1560). And absent the "imperative safeguard" of RFRA's prerequisites, "religious beliefs would invariably trump government action." *Id.* at 365.

Because it is a legal question, not a factual one, whether an asserted burden is substantial (*id.* at 356 (quoting *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 442 (3d Cir. 2015), *vacated*, 126 S. Ct. 1557 (2016))), it is for the courts, not individual claimants, to make the dispositive determination (*see EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 588 (6th Cir. 2018), *cert. granted*, 2019 WL 1756679 (Apr. 22, 2019) (mem.) ("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."). And administrative determinations with respect to that legal question are subject to *de novo* review, because government agencies can never be the last word on constitutional issues. *Cf. Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) (recognizing "long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees") (citing *City of Boerne v. Flores*, 521 U.S. 507, 519–24 (1997)). Hence, the executive branch is not entitled to deference here. *See Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 823 (E.D. Pa. 2019); *see also Hobby Lobby*, 573 U.S. at 720–36 (analyzing whether contraceptive-coverage requirement violated RFRA, without affording deference to HHS).

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

Suppose, for example, that the government required wellness checkups for all children living on military bases, but a parent sought an exemption based on a religious objection to blood transfusions. The objection, though sincere, would be inadequate to entitle the parent to the requested exemption because wellness checkups do not include blood transfusions. *Cf., e.g.*, *Wilson v. James*, No. 15-5338, 2016 WL 3043746, at *1 (D.C. Cir. May 17, 2016) (per curiam)

(RFRA did not protect National Guardsman against discipline for sending e-mail attacking Army officials for allowing same-sex couples to marry in West Point chapel because he "failed to show this letter of reprimand substantially burdened any religious action or practice"). No nexus, no substantial burden. So no claim.

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

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

a. As the government has elsewhere acknowledged, the challenged rules do not require, or even permit, it to assess whether any particular objector's religious exercise is substantially burdened before the objector avails itself of the exemption. *See* Defs.' Br. Resp. Mot. Class Certification 7–8, *Deotte v. Azar*, Case No. 4:18-cv-00825-Y (N.D. Tex. Mar. 8, 2019), ECF No. 30. Hence the Religious Exemption does not provide for individualized determinations, nor does it require or even allow for an administrative record sufficient for judicial review of those determinations, as RFRA and the Establishment Clause demand. *See Real Alternatives*, 867 F.3d at 357–58; *Pennsylvania*, 351 F. Supp. 3d at 823. Objectors do not have to assert any burdens, or even provide bare legal notice that they plan to take the exemption, so there is no way to identify RFRA claimants, much less to differentiate genuine objections from after-the-fact or sham excuses for not following the law. The upshot is "personalized oversight [by] millions of [entities]. Each [holds] an individual veto to prohibit the government action solely because it offends [the entity's]

religious beliefs, sensibilities, or tastes, or fails to satisfy [its] religious desires." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008). And entities are "'allowed to be a judge in [their] own cause,'" violating bedrock principles of due process. *See* Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 100–01 (2017) (quoting THE FEDERALIST NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961)).

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

c. Moreover, the government extends the exemption to whole classes of entities without any basis to conclude that even a single class member's religious exercise is substantially burdened by the coverage requirement or the preexisting regulatory accommodation. For example, the government provides exemptions for insurance companies despite "not know[ing] that issuers with qualifying religious objections exist." 83 Fed. Reg. at 57,566. The government likewise extends

the exemption to publicly traded corporations without pointing to even one that has sought an accommodation, and without identifying who might assert substantial burdens, or how, on behalf of shareholders. *See id.* at 57,562–63.

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

d. Finally, the Exemption is provided despite judicial determinations that no substantial burden on religious exercise exists. The Exemption allows plan sponsors and issuers to create contraceptive-coverage-free insurance plans for individuals (45 C.F.R. § 147.132(b)), notwithstanding the Third Circuit's holding that individuals' religious beliefs are not substantially burdened when their plan sponsors or issuers comply with the contraceptive-coverage requirement (*Real Alternatives*, 867 F.3d at 359–66). And the Third Circuit and *seven* other Circuits have concluded that being asked to give bare notice of one's intent to avail oneself of the already-available religious accommodation is no substantial burden, even if the government then provides the insurance coverage another way.[5] As Judge Posner explained, the government's contrary

[5] *See, e.g.*, *Priests for Life*, 772 F.3d at 247–56 (D.C. Cir.); *Geneva Coll.*, 778 F.3d at 442–42 (3d Cir.); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 459–63 (5th Cir. 2015); *Little Sisters*, 794 F.3d at 1180–95 (10th Cir.); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 611–16 (7th Cir. 2015); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 218–26 (2d Cir. 2015); *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738, 749–50 (6th Cir. 2015); *Eternal*

position here makes no more sense than would the assertion that a conscientious objector could avoid the draft on religious grounds (without even asking to be excused from military service) and then affirmatively bar the government from drafting anyone else to fill the spot. *See Notre Dame*, 786 F.3d at 623. Religious exemptions are not private vetoes over governmental action respecting third parties.

The preexisting regulatory requirement of notice does not compel religious objectors to "substantially modify [their] behavior and to violate [their] beliefs." *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007). It asks only that they state their belief that they should not pay for contraceptive coverage. The actual provision of the objected-to medical coverage under the preexisting regulatory accommodation is "totally disconnected from the" objecting entities and therefore does not burden their religious exercise. *See Geneva Coll.*, 778 F.3d at 442. With no substantial burden on religious exercise to alleviate, the Exemption cannot be authorized, let alone required.

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In *Hobby Lobby*, the Supreme Court expressed doubt that a scheme like the one here would, or could, be authorized by RFRA: Addressing a proposed statutory amendment that would have allowed refusals to provide insurance coverage for any health service that was

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Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs., 818 F.3d 1122, 1148–51 (11th Cir. 2016); *but see Dordt Coll. v. Burwell*, 801 F.3d 946, 950 (8th Cir. 2015); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 941–43 (8th Cir. 2015).

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

contrary to an employer's "religious beliefs or moral convictions," the Court concluded that "a blanket exemption for religious or moral objectors" that "would not . . . subject[ ] religious-based objections to the judicial scrutiny called for by RFRA" would "extend[ ] more broadly than the pre-existing protections of RFRA." 573 U.S. at 719 n.30. The regulatory scheme here has just that defect. *See California*, 351 F. Supp. 3d at 1293 n.14. Hence, it exceeds the statutory authority granted by RFRA and violates the Establishment Clause.

C. The Moral Exemption Is Similarly Invalid.

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

But those are not the Moral Exemption's only defects. There is strong reason to conclude that the Moral Exemption is not, after all, a secular counterpart to the Religious Exemption but is just the latter by another name. For it is expressly premised on *Welsh v. United States*, 398 U.S. 333, 339–40 (1970), a conscientious-objector case in which the Supreme Court held that when "purely ethical or moral . . . beliefs function as a religion in [an individual's] life, such an individual is as much entitled to a 'religious' . . . exemption . . . as is someone who derives his [objection] from traditional religious convictions" (*id.* at 340). *See* 83 Fed. Reg. at 57,600–01. Quoting directly from *Welsh*, 398 U.S. at 339–40, the regulation defines exempted "moral convictions" as those:

> (1) That the "individual deeply and sincerely holds"; (2) "that are purely ethical or moral in source and content["]; (3) "but that nevertheless impose upon him a duty";

> (4) and that "certainly occupy in the life of that individual [']a place parallel to that filled by . . . God' in traditionally religious persons," such that one could say "his beliefs function as a religion in his daily life."

83 Fed. Reg. at 57,604–05.

Personal moral codes meeting this description must be treated as religions for legal purposes. *See, e.g.*, *Fallon v. Mercy Catholic Med. Ctr.*, 877 F.3d 487, 491 (3d Cir. 2017); *Africa v. Pennsylvania*, 662 F.2d 1025, 1031–36 (3d Cir. 1981). Thus, though the government has described the Moral Exemption as broader than the Religious, which would render it *ultra vires* (*see California*, 351 F. Supp. 3d at 1297), the rules in fact define the two exemptions as coextensive and coterminous (aside from the fact that the Moral Exemption is unavailable to publicly traded companies) because only a legal "religion" under *Welsh* qualifies for the Moral Exemption. Accordingly, both exemptions are unauthorized and unconstitutional religious preferences for the reasons explained in Sections A and B, *supra*.

CONCLUSION

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

Summary judgment should be granted to Plaintiffs.

Respectfully submitted,

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