Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191

IN THE

Supreme Court of the United States

DAVID A. ZUBIK, *et al.*,

Petitioners,

v.

SYLVIA BURWELL, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third, Fifth, Tenth, and District of Columbia Circuits

BRIEF FOR *AMICI CURIAE* CHURCH-STATE SCHOLARS IN SUPPORT OF RESPONDENTS

ELIZABETH SEPPER
Box 1120
One Brookings Drive
St. Louis, Missouri 63130
314-935-3380
liz.sepper@gmail.com

Catherine Weiss
Counsel of Record
Natalie J. Kraner
Meg Slachetka
LOWENSTEIN SANDLER LLP
65 Livingston Avenue
Roseland, New Jersey 07068
973-597-2500
cweiss@lowenstein.com

Counsel for Church-State Scholars

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

FEDERAL STATUTES

FEDERAL REGULATIONS

STATE STATUTES AND REGULATIONS

OTHER AUTHORITIES

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are legal scholars who teach and write about church-state issues.[1] They submit this brief to offer a more thorough analysis of the Establishment Clause implications of this case than was undertaken in the decisions below.

A full list of amici is attached as an Appendix to this brief.

SUMMARY OF ARGUMENT

For several years, Congress, the Administration, and the courts have struggled with how to accommodate religious objections to the requirement of contraceptive coverage in the Affordable Care Act (the "Mandate") while also ensuring that women retain the full access to contraceptive services the Act guarantees them. In all phases of the litigation, the courts have recognized that religious accommodation cannot come at the expense of women's access to contraception, although the courts have not always been clear about why this is so. Amici submit that the parties and the courts have overlooked or underemphasized a critical reason for this limitation on religious accommodation: the Establishment Clause prohibits the government from shifting the costs of accommodating a religion from those who practice it to those who do not. Shifting burdens in this way improperly imposes one person's faith on another, in violation of the government's

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[1] Letters from petitioners and respondents consenting to the filing of briefs by amici curiae are on file with the Court. No part of this brief was written by counsel for any party, and no person or entity other than Amici and their counsel made any monetary contribution to its preparation or submission.

obligation to be evenhanded in the face of religious differences among citizens.

When for-profit family-held corporations sought refuge in the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 ("RFRA"), for their objections to providing contraceptive coverage, this Court allowed them to opt out on the ground that the government had a less restrictive means to achieve its interest in ensuring that their employees receive full access to prescription contraceptives. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780–83 (2014). The Court pointed to an accommodation already available under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 ("ACA"). *Hobby Lobby*, 134 S. Ct. at 2782. This accommodation allowed religious nonprofits to express an objection to covering contraception, in which case their health insurers or third party administrators ("TPAs") would offer the coverage instead. "Under the accommodation," the Court emphasized, "the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives." *Id.* at 2782. Thus, the "effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero." *Id.* at 2760. The accommodation was extended in the wake of *Hobby Lobby* to cover closely held for-profit corporations with religious objections to the Mandate.

It is this accommodation that Petitioners challenge here. An array of religious nonprofits and universities asks the Court to relieve them from the obligation to register their objections to covering

contraception. They view their expression of an objection as setting in motion the alternative mechanisms for providing coverage. Although the regulations create multiple, explicit indicia of separation between the objecting entities and the alternative coverage mechanisms, Petitioners assert that the paperwork required to express an objection "enabl[es] their own plan infrastructure to be used to provide contraceptive coverage." Pet'rs' Br. in Nos. 15-35, 15-105, 15-119, & 15-191 ["*ETBU* Br."] 53; *see also* Pet'rs' Br. in Nos. 14-1418, 14-1453, & 14-1505 ["*Zubik* Br."] 53 (characterizing the regulations as "hijack[ing] the health plans of religious nonprofits").

Seven of the eight circuit courts hearing these challenges have held that the ACA accommodation places no "substantial burden" on Petitioners' religious exercise and therefore poses no conflict with RFRA. Resp'ts' Br. in Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-101 ["*Gov't's* Br."] 21–24 & n.12. There were two key reasons for these holdings: (1) the act of expressing a religious objection by filling out a short form or directly notifying the Department of Health and Human Services ("HHS") does not itself burden Petitioners' religious exercise, and (2) this act does not "trigger" or make Petitioners "complicit" in the alternative coverage to which they object because federal law, rather than their completion of paperwork, requires the insurers and TPAs to step into the breach.

For the reasons argued by the Government and analyzed by the circuit courts, Amici agree that the ACA accommodation does not substantially burden Petitioners' religious exercise within the meaning of RFRA.

Even if Petitioners were to succeed in demonstrating a substantial burden on their religious exercise, however, they could not prevail in this case. The Establishment Clause bars the government from allowing the cost of Petitioners' religious exercise to be shifted to employees and students, and their dependents, who are entitled by federal law to receive contraceptive coverage without cost-sharing. RFRA cannot be read to protect Petitioners' religious freedom by sacrificing the federal rights of third parties who do not share their beliefs. Such cost-shifting would endanger religious accommodation in general: the legislature may show solicitude toward religious practices that impose significant burdens on others only if it also acts to lift those third-party burdens. By ensuring substitute coverage for Petitioners' employees and students, and their dependents, the government has saved the religious accommodation itself.

The Establishment Clause prohibition on cost-shifting religious accommodations was most recently reaffirmed in *Cutter v. Wilkinson*, 544 U.S. 709 (2005). *Cutter* addressed the facial constitutionality of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), a federal statute that closely tracks its antecedent, RFRA. While upholding the statute on its face, the Court held that in "[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries . . . ." *Id.* at 720.

Cutter's rejection of cost-shifting under RLUIPA rests on *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). In *Caldor*, the Court held that a statute

requiring employers to give observant employees an absolute right not to work on their Sabbath violated the Establishment Clause because of the "substantial economic burdens" it imposed on employers and the "significant burdens" it imposed on other employees. *Id.* at 710.

Such impermissible cost-shifting is not a feature of all, or even most, religious accommodation. For example, a Muslim prisoner may wear a short beard, *Holt v. Hobbs*, 135 S. Ct. 853 (2015), and a tiny religious community may ingest a controlled substance as part of its sacraments, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), without imposing significant burdens on any identifiable third party. Likewise, a religious accommodation may shift a burden so small and incremental to a group so large and indeterminate that no Establishment Clause problem arises, as when the general population pays a negligible additional tax to make up for the tax exemption of churches and religious and other nonprofits. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664 (1970). In contrast, when a religious accommodation demands significant sacrifice from a discrete group that does not share the beliefs of the adherents, the government infringes the rights of those third parties and violates the Establishment Clause. *Cutter*, 544 U.S. 709; *Caldor*, 472 U.S. 703.

The Court has also rejected burden-shifting religious accommodations when interpreting the Free Exercise Clause and Title VII of the Civil Rights Act of 1964. *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 261 (1982) (refusing to grant employer an exemption from payroll taxes under Free Exercise Clause

because of the burden imposed on employees); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (requiring employer to accommodate employee's religious practices under Title VII only when costs are de minimis).

Because the Establishment Clause prevents the application of RFRA Petitioners seek, they could not prevail even if they were able to establish that the accommodation substantially burdens their religious exercise. RFRA itself provides that the statutory right gives way to a "compelling governmental interest," 42 U.S.C. § 2000bb-1(b), and conformity with the Constitution is always such an interest. Accordingly, RFRA may not be applied in a manner that causes the government to violate the Establishment Clause by allowing Petitioners to claim a religious exemption that imposes a significant burden upon thousands of identifiable third parties.

ARGUMENT

I. RELIGIOUS ACCOMMODATIONS THAT IMPOSE SIGNIFICANT COSTS ON THIRD PARTIES ARE IMPERMISSIBLE.

A. The Establishment Clause Prohibits Religious Accommodations That Shift Significant Burdens to Discrete Third Parties.

The Establishment Clause prevents the government from accommodating the religious exercise of believers by exacting a significant price from a discrete group of third parties who do not share their beliefs. *See* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the*

Contraception Mandate: An Unconstitutional Accommodation of Religion, 49 Harv. C.R.-C.L. L. Rev. 343 (2014).

The Establishment Clause has long been understood to prohibit the government from requiring one person to support the religion of another. Prominent members of the founding generation condemned laws that compelled people to underwrite or participate in a government-established church to which they did not belong. *See, e.g.*, Thomas Jefferson, *Draft of Bill Exempting Dissenters from Contributing to the Support of the Church* (Nov. 30, 1776) ("[A]ll Dissenters of whatever Denomination from the said Church [of England] shall . . . be totally free and exempt from all Levies Taxes and Impositions whatever towards supporting and maintaining the said Church as it now is or may hereafter be established and its Ministers."), *in* 5 The Founders' Constitution 74, 74 (Philip B. Kurland & Ralph Lerner eds., 1987); James Madison, *Memorial and Remonstrance against Religious Assessments* ¶ 4 (asserting that proposed Virginia religious tax "violate[d] equality by subjecting some to peculiar burdens" and "granting to others peculiar exemptions"), *quoted in Everson v. Bd. of Educ.,* 330 U.S. 1, 66 (1947) (Rutledge, J., dissenting); *see also Cutter*, 544 U.S. at 729 (Thomas, J., concurring) ("[E]stablishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers.").

These historical concerns are reflected in contemporary Establishment Clause decisions. In *Estate of Thornton v. Caldor*, the Court struck down a Connecticut statute that guaranteed every

employee the right to be free from work on his or her Sabbath. 472 U.S. at 710–11. By giving employees an unqualified right not to work on their Sabbath, the statute shifted the costs of accommodating Sabbath observance to employers and nonobservant employees, forcing employers to offer premium pay to attract volunteers to cover weekend shifts, or to order non-Sabbath observers to cover such shifts irrespective of their seniority or personal preferences. *Id.* at 709–10. This, the Court held, violated the Establishment Clause:

> This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses . . . : "The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."

Id. at 710 (quoting *Otten v. Balt. & O.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (Hand, J.)).

The Court unanimously affirmed the holding and rationale of *Caldor* in *Cutter*, 544 U.S. 709. *Cutter* rejected a facial challenge to RLUIPA, a statute similar to RFRA in all relevant respects. *Id.* at 713–15. It did so, however, on the express understanding that the statute would violate the Establishment Clause if it threatened the safety or other interests of third parties:

> Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to

> resist the imposition. In that event, adjudication in as-applied challenges would be in order.

Id. at 726.

Explaining that its "decisions indicate that an accommodation must be measured so that it does not override other significant interests," the Court quoted *Caldor* with approval:

> In *Caldor*, the Court struck down a Connecticut law that "arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath." We held the law invalid under the Establishment Clause because it "unyielding[ly] weigh[ted]" the interests of Sabbatarians "over all other interests."

Id. at 722 (quoting *Caldor*, 472 U.S. at 709, 710). To avoid unconstitutional applications of RLUIPA, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Id.* at 720 (citing *Caldor*, 472 U.S. 703).

This prohibition on burden-shifting helps to maintain the appropriate balance between the religion clauses. As the Court has emphasized, "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). And foremost among these limits is that "government may not coerce anyone to support or participate in religion or its exercise." *Id.*; *see also*

Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 722 (1994) (Kennedy, J., concurring) ("[A] religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or so discriminate against other religions as to become an establishment.").

In limiting the power of the government to impose the beliefs of one citizen upon another, the Establishment Clause — no less than the Free Exercise Clause — safeguards *individual* religious freedom. The Court's central concern in both *Caldor* and *Cutter* was to protect third-party employers, employees, prison administrators, and prisoners from undue hardships and risks associated with religious accommodation. *Caldor*, 472 U.S. at 709–10; *Cutter*, 544 U.S. at 722–23. The rights of these third parties are distinct from whatever interest the government may assert to justify a burden on religious exercise. While, as this Court observed in *Hobby Lobby*, the avoidance of harm to third parties "will often inform the analysis of the Government's compelling interest," 134 S. Ct. at 2781 n.37, the government may or may not assert its interest in a way that is coterminous with the interests of third parties. And the harms to third parties may violate their rights without being so severe that the government would have a compelling interest in preventing them, independent of its undoubted interest in complying with the Establishment Clause. Again, consider *Caldor*. The government has no compelling interest in protecting employees from regular weekend shifts, but the Establishment Clause nevertheless prevents the government from forcing them to work on weekends *for the purpose of*

enabling others to observe their Sabbath. *Caldor*, 472 U.S. at 710. Similarly here, the Establishment Clause prevents the government from depriving Petitioners' employees and students of contraceptive coverage *for the purpose of enabling Petitioners to act in strict conformance with their religious beliefs*. Moreover, the Establishment Clause would prevent such burden-shifting even if it were not the case that contraceptive coverage is so important to the health, equality, and economic security of women that the government has an independent compelling interest in ensuring its provision.

In only one Establishment Clause case has this Court upheld a cost-shifting accommodation of religion, allowing a nonprofit gymnasium run by the Mormon Church to fire an employee when he failed to remain a member in good standing of the Church. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). *Amos* is best understood as an extension of decisions that give churches control over their internal affairs, in particular the hiring and firing of clergy. *E.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (reaffirming under religion clauses that "ministerial exception" requires dismissal of lawsuits by ministers against their churches for adverse employment actions); *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 698 (1976) (holding that church had final authority over whether and how to remove bishop). Such employment decisions bear far more closely on religious nonprofits' ability to "carry out their religious missions," *Amos*, 483 U.S. at 339, than does

the ACA accommodation. However sincerely and fervently Petitioners object to the accommodation, it does not affect internal religious governance as hiring and firing may. *See Hosanna Tabor*, 132 S. Ct. at 707 (distinguishing ban on ingestion of peyote from regulation of "an internal church [employment] decision that affects the faith and mission of the church itself").

Moreover, the concerns expressed in *Amos* about government entanglement with religion are absent here. The *Amos* Court considered it "a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious" such that it would be entitled to insist that employees engaged in such activities adhere to the faith. 483 U.S. at 336. Indeed, the concurring justices approved an exemption allowing religious nonprofits to discriminate in employment on the basis of religion mainly to avoid intrusive judicial inquiries into "whether an activity is religious or secular." *Id.* at 343 (Brennan, J., concurring).

Here, in contrast, the regulations effect scrupulous separation. After an objector files the required form or directly notifies HHS, no more is required. The regulations remove the objector from any involvement in the provision of contraceptive coverage and require insurers and TPAs to notify insureds of the entity's objection. *E.g.*, 45 C.F.R. § 147.131(c)(2)(ii) and 29 C.F.R. § 2590.715-2713A(c)(2)(ii) (insurers must "segregate premium revenue" received from objectors "from the monies used to provide payments for contraceptive services"); 29 C.F.R. § 2590.715-2713A(b)(2)(ii) (TPAs

may not impose "a premium, fee, or other charge" on the objector for providing contraceptive coverage); 45 C.F.R. § 147.131(d) and 29 C.F.R. § 2590.715-2713A(d) (insurers and TPAs must notify insureds that objector will not "contract, arrange, pay, or refer for contraceptive coverage")[2]; *see also E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 460 & nn.42–45 (5th Cir. 2015) (explaining and citing separation regulations).

Petitioners repeatedly insist that the accommodation hijacks "*their* plan infrastructure," *ETBU* Br. 51, providing contraceptive coverage to "their own plan beneficiaries" through "their own insurance companies in connection with their own health plans." *Zubik* Br. 10. But the insurers and TPAs are independently owned and controlled companies, just as the plan beneficiaries are autonomous individuals who answer to their own consciences with regard to their health care decisions. The insurers and TPAs already maintain lists of beneficiaries covered by the employer-based health plan. No additional information, let alone "infrastructure," is required from Petitioners for the insurers and TPAs to identify beneficiaries who need alternative contraceptive coverage. Nor have the regulations forced Petitioners into contractual privity with insurers and TPAs that offer contraceptive coverage, as Petitioners claim. *Zubik* Br. 19. Petitioners chose their own contractors, and many of

[2] As the regulations published by the Departments of Labor and Treasury are identical, this brief will cite the Labor regulation at 29 C.F.R. § 2590.715-2713A without a parallel citation to the Treasury regulation at 26 C.F.R. § 54.9815-2713A.

these companies have been offering contraceptive coverage to women across the nation since long before the Mandate. Under the regulations, the insurers and TPAs rely on information they already have to offer contraceptive coverage to Petitioners' employees and students so that Petitioners do not have to.[3] Given this level of separation between the objectors and the conduct from which they believe they must distance themselves, *Amos* has limited relevance here, animated as it was by concerns about internal governance and entanglement.

Flaws in *Amos*'s reasoning also diminish the counter-force it exerts against the general Establishment Clause principle that the government may not require discrete third parties to underwrite the religious exercise of others. For example, the *Amos* majority opines that "it was the Church . . . and not the Government, who put [plaintiff] to the choice of changing his religious practices or losing his job." 483 U.S. at 337 n.15. In her concurrence, Justice O'Connor points out the fallacy in this logic: the church could fire its employee only "because *the Government* had lifted from religious organizations the general regulatory burden imposed by [the law banning religious discrimination]." *Id.* at 347 (O'Connor, J., concurring).

In a similar vein, the *Amos* majority suggests that the proper point of comparison is the world before enactment of the anti-discrimination laws:

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[3] Amici do not refer here to those insurers and TPAs that have expressed religious objections in their own right and are themselves Petitioners in these cases.

"we find no persuasive evidence in the record before us that the Church's ability to propagate its religious doctrine . . . is any greater now than it was prior to the passage of the Civil Rights Act in 1964." *Id.* at 337. This makes no sense. The appropriate baseline is the laws in effect at the time of the challenge — in fact, the laws that give rise to the challenge — the Civil Rights Act in *Amos* and the ACA here. Otherwise, religious employers could refuse to provide or facilitate whatever government benefits they considered objectionable — minimum wages, limited work hours, Social Security benefits — on the theory that their employees had no right to these benefits before protective laws were passed. Petitioners cannot obviate the burdens that an exemption would place on their employees and students by positing that, before the ACA was passed, they had no right to contraceptive coverage. The point is that the ACA was passed, and Petitioners' employees and students are entitled to contraceptive coverage, a right that the total religious exemption Petitioners seek would deny them.[4] Indeed, employers asserting a free exercise right to withhold benefits from their employees have

[4] For analysis and rejection of baselines that attempt to define away a federal right to contraceptive coverage, *see* Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines: Hobby Lobby's Puzzling Footnote 37 in* The Rise of Corporate Religious Liberty 323, 332–36 (Micah Schwartzman, Chad Flanders, & Zoë Robinson eds., 2016); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 Colum. L. Rev. 1453, 1487–89 (2015); *cf.* Br. of Amici Curiae Const'l Law Scholars in Support of Pet'rs ("Scholars' Br.") 17 (arguing that baseline is the world before the ACA, when employees had no "new benefit").

repeatedly lost in cases from the period RFRA seeks to restore. *See infra* Point I.B.

Petitioners rely on the Title VII exemption upheld in *Amos* to make another argument: they say that the exemption from the ACA Mandate should be coextensive with the Title VII exemption such that all religious nonprofits that are allowed to discriminate in employment in favor of co-religionists should also be allowed to deny contraceptive coverage without having to lodge an objection. *ETBU* Br. 66–67; *Zubik* Br. 65. Congress is under no obligation, however, to map the ACA exemption to the Title VII exemption. The two federal statutes serve different purposes and may contain distinct religious exemptions. Moreover, a blanket exemption from the ACA Mandate would sweep in all religious nonprofits, including those that do not use their license to discriminate on the basis of religion but instead employ diverse workforces. All of them would be free to deny contraceptive coverage, not only to their employees but also to their employees' dependents. Religiously affiliated colleges and universities (such as Notre Dame and Wheaton College) could deny coverage to students, no matter how various their religious backgrounds and beliefs. And these entities would be entitled to deny coverage without putting the government on notice so that it could take steps to ensure alternative coverage for those who had lost it. Such burden-shifting goes far beyond that allowed in *Amos* and might not stop there. The accommodation at issue also applies to closely held for-profit corporations which do not enjoy an exemption under Title VII and which may not discriminate in hiring on the basis of religion. Given

that their standing to bring a claim under RFRA is the same as the standing of religious nonprofits, *Hobby Lobby*, 134 S. Ct. at 2768–72, would the blanket exemption Petitioners advocate also extend to them? The Establishment Clause rules out this result.

B. The Free Exercise Clause Does Not Permit Religious Accommodations That Impose Significant Burdens on Third Parties.

The Court's decisions under the Free Exercise Clause reflect the same aversion to cost-shifting as its Establishment Clause decisions. In *United States v. Lee*, 455 U.S. at 254–55, 260–61, the Court refused a free exercise exemption to an Amish employer who objected to the payment of Social Security taxes on his employees. Concluding that the federal government has a compelling interest in the uniform collection of such taxes, the Court observed that "every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs." *Id.* at 261. The Court declined to grant the accommodation Mr. Lee requested because exempting an employer from paying Social Security taxes "operates to impose the employer's religious faith on the employees." *Id.*[5]

Similarly, in *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985), the Court

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[5] Congress later tailored an accommodation by exempting employers with religious objections from payment of Social Security taxes but *only* with respect to employees who shared the same objection and would therefore reject benefits. *See* I.R.C. § 3127(a).

construed the Fair Labor Standards Act to require a nonprofit religious organization to pay the minimum wage to employees working in its commercial operations because of the burdens a free exercise exemption would have imposed on third parties. While the employees who testified at trial viewed their work as ministry and objected to accepting wages, the Court held that the "purposes of the [Fair Labor Standards] Act require that it be applied even to those who would decline its protections." *Id.* at 302. Otherwise, employers could use their "superior bargaining power to coerce employees to . . . waive their protections under the Act." *Id.* Employees in similar businesses would also face "downward pressure on wages" resulting from competition from businesses with artificially depressed labor costs. *Id.*[6]

Indeed, the very decisions that Congress sought to restore through RFRA, *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), were careful to note that the free exercise exemptions they granted did not impose significant costs on third parties. *See* 42 U.S.C. § 2000bb(b) ("The purposes of this chapter are . . . (1) to restore the compelling interest test as set forth in [*Sherbert*]

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[6] Nor did the Court accept at face value the employees' assertions about how the law would interfere with their religious beliefs. Independently assessing that question, the Court concluded that the employees could avoid violating their faith by accepting wages in the form of room, board, and medical care, as they had been doing, or by donating cash wages back to the Foundation that ran the businesses. *Id.* at 304–05.

and [*Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened.").

In *Sherbert*, the appellant was discharged for refusing to work on her Saturday Sabbath, and South Carolina then disqualified her from receiving unemployment benefits because of her failure to accept suitable work when offered. 374 U.S. at 399–401. The Court held that this disqualification burdened appellant's free exercise rights, especially because South Carolina law expressly protected the employment rights of Sunday worshippers in other contexts. *See id.* at 404–06. Finding no compelling interest in the policy, the Court invalidated it. *Id.* at 409. In arriving at its holding, the Court specifically noted that "the recognition of the appellant's right to unemployment benefits under the state statute [does not] serve to abridge any other person's religious liberties." *Id.*; *see also id.* at 410 ("This is not a case in which an employee's religious convictions serve to make him a nonproductive member of society.").

Similarly, in *Yoder*, two parents who were members of the Old Order Amish were convicted of violating a Wisconsin law making school attendance compulsory for children younger than sixteen. 406 U.S. at 207–08. The parents argued that the law violated their free exercise rights because their religion forbade attendance in high school. *Id.* at 208–09. The Court found in favor of the parents, but only after concluding that the case was "not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." *Id.* at 230. Justice Stewart concurred for

the purpose of emphasizing that the Yoders' daughter had testified that she shared her parents' beliefs. The case therefore did not involve "any questions regarding the right of the children of Amish parents to attend public high schools, or any other institutions of learning, if they wish to do so." *Id.* at 237 (Stewart, J., concurring).

Sherbert and *Yoder* build on earlier cases in which this Court rejected free exercise claims to avoid burden-shifting. In *Prince v. Massachusetts*, 321 U.S. 158 (1944), for example, the Court affirmed a guardian's conviction under the child labor laws for allowing her young ward to sell magazines on the streets for the Jehovah's Witnesses. Declining to create a free exercise exemption from the child labor laws, the Court relied on an earlier decision upholding laws that require vaccination: "[A parent] cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Id.* at 166–167 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)). Mandatory vaccination remains controversial, but courts have continued to hold that accommodating an adherent's religious beliefs cannot come at the expense of either a child's safety or the public health more generally. *See Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015) ("[F]ollowing the reasoning of *Jacobson* and *Prince* . . . mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause.").

In the same vein, when parents have objected on religious grounds to necessary medical treatment for their children, the courts have repeatedly stepped in to order that treatment. *E.g.*, *In re McCauley*, 565 N.E.2d 411, 413 (Mass. 1991) (ordering lifesaving blood transfusion to eight-year-old girl against her parents' religious objection as Jehovah's Witnesses because "the interests of [the child] and of the State outweigh her parents' rights to refuse the medical treatment"); *In re Karwath*, 199 N.W.2d 147, 150 (Iowa 1972) (ordering surgery to prevent hearing loss in three ward-of-the-state children because "[the state's] paramount concern for the best interests and welfare of the children overrides the father's [religious objections]"). Parents who have withheld necessary medical care or provided only treatment by prayer can face criminal charges ranging from child endangerment to negligent homicide. *E.g.*, *State v. Neumann*, 832 N.W.2d 560 (Wis. 2013) (upholding parents' convictions of second-degree reckless homicide when their child died from juvenile diabetes treated only by prayer); *Walker v. Super. Ct.*, 763 P.2d 852, 871 (Cal. 1988) (affirming charges of involuntary manslaughter and felony child endangerment when child died of meningitis after prayer treatment). If parents with religious objections may nevertheless be required to vaccinate their children or to ensure that they receive adequate medical care, even on pain of prosecution, then Petitioners here may be required to register their objections and identify their health insurers or TPAs so that these independent entities may step in to protect maternal and child health by providing contraceptive coverage.

This is the free exercise foundation upon which RFRA builds, and this Court's reading of RFRA in *Hobby Lobby* follows a familiar pattern, affirming the importance of avoiding third-party harms. Writing for the majority, Justice Alito recognized that "in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'" *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (quoting *Cutter*, 544 U.S. at 720). In concurrence, Justice Kennedy added that religious exemptions may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Id.* at 2787 (Kennedy, J., concurring). The four dissenting Justices also expressly endorsed this limit, saying "[n]o tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others . . . ." *Id.* at 2801 (Ginsburg, J., dissenting). The Court went on to uphold the corporations' right not to cover contraception in their health plans, but only after determining "that there is an existing, recognized, workable, and already-implemented framework to provide coverage" through the very accommodation now at issue. *Id.* at 2786 (Kennedy, J., concurring); *see also id.* at 2782 (majority opinion) ("Under the accommodation, the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives . . . ."). Shifting the burden of Petitioners' religious beliefs to their employees and students, and their dependents, is no more legally acceptable here than it was in *Hobby Lobby*.

C. Title VII Entitles Employees to Religious Accommodations Only When They Impose No More Than a De Minimis Burden.

Finally, the Court has authoritatively interpreted Title VII to permit accommodations of an employee's religious exercise only when the costs borne by others are de minimis. *Hardison*, 432 U.S. at 84 (holding Title VII did not require employer to alter standard shift assignments under collective bargaining agreement to accommodate employee who observed a Saturday Sabbath). Any other standard, the Court held, would impose an "undue hardship" on the employer, contrary to Title VII, by forcing the employer to impose on other employees the costs of accommodating a religion in which they did not believe or participate. *Id.* ("[T]o require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion.").

The Court reaffirmed *Hardison*'s de minimis test for Title VII accommodations in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67, 69 (1986), and the federal courts of appeals have followed suit. *See, e.g.*, *Doughty v. Dep't of Developmental Servs. STS*, 607 F. App'x. 97, 99 (2d Cir. 2015) (finding no Title VII violation where accommodating a Sabbatarian's shift "would constitute an undue burden" on the employer); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607–608 (9th Cir. 2004) (rejecting Title VII claim by employee who repeatedly posted anti-homosexual scripture verses because company "need not accept the burdens that would result from allowing actions that demean or degrade, or are designed to demean or degrade,

members of its workforce"); *Virts v. Consol. Freightways Corp. of Del.*, 285 F.3d 508, 517 (6th Cir. 2002) (finding no Title VII violation because employer "could not have reasonably accommodated [employee's] religious objection to going on sleeper runs with females" without violating collective bargaining seniority provisions).

The Court's intolerance of burden-shifting to accommodate the religious practices of employees stands in stark contrast to its indulgence of accommodations for religious employers under Title VII. *Compare Hardison*, 432 U.S. at 84, *with Amos*, 483 U.S. at 335–37.[7] This asymmetry in the treatment of observant employees and employers itself raises Establishment Clause concerns. *Cf. Larson v. Valente*, 456 U.S. 228, 244–46 (1982) (holding that strict scrutiny applies to laws exhibiting denominational preference). This Court should avoid further widening the gap by granting the total exemption Petitioners seek, at the expense

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[7] A purported "distinction between a religious *exemption* that lifts a government-imposed burden on religion and a statutory religious *preference*" cannot explain this difference. *See* Scholars' Br. 17. The Government expresses its solicitude for religious exercise no less when it accommodates employers with religious objections by relieving them from otherwise generally applicable laws, such as the Mandate, than when it requires employers to accommodate the religious practices of employees. *See* Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *Hobby Lobby and the Establishment Clause*, *Part III*: *Reconciling* Amos *and* Cutter, Balkinization (Dec. 9, 2013, 11:15 AM), http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment- clause_9.html.

of the health and equal opportunity of their female employees.

D. The Exemption Petitioners Seek Would Impose a Significant Burden on Discrete Third Parties.

1. *Unconstitutional burden-shifting*

Many religious accommodations entail no burden on third parties. Just last term, for example, this Court granted a RLUIPA exemption to a Muslim inmate who wished to wear a half-inch beard despite the grooming policy of the Arkansas Department of Corrections. *Holt*, 135 S. Ct. 853. While recognizing the importance of the Department's interests in preventing prisoners from hiding contraband and in ensuring their quick and consistent identification, the Court held that these interests need not be undermined by the accommodation the inmate requested. *Id.* at 863–67; *see also id.* at 867 (Ginsburg, J., concurring) ("Unlike the exemption this Court approved in [*Hobby Lobby*], accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief.") (citation omitted). Similarly, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Court granted a RFRA exemption to a 130-member sect whose members drank a sacramental tea containing a federally controlled substance. 546 U.S. at 435–37. The Court noted that the government did not identify any burdens imposed on persons not belonging to the sect, *see id.* at 435–36, and that the sect's small size prevented the government from showing that a RFRA exemption would compromise

its administrative or drug enforcement interests, *see id.* at 437.

Other religious accommodations create third-party burdens that are insignificant because they are widely distributed among a large and indeterminate class. The prototypical example is a property tax exemption for churches, along with all other nonprofit entities, which the Court has held does not violate the Establishment Clause by requiring taxpayers to make an unwilling "contribution to religious bodies." *Walz*, 397 U.S. at 667. There, the incremental increase in the pre-existing tax burden was spread among all owners of taxable property and did not fall on a discrete class.[8]

The cases excusing religious objectors from compulsory military service provide another example of burden-shifting that crosses no constitutional line. The exemption for religious pacifists upheld in *Welsh v. United States*, 398 U.S. 333 (1970), and *United States v. Seeger*, 380 U.S. 163 (1965), increased the probability that nonexempt persons would be drafted in their place. This increase, however, was both infinitesimal and distributed among millions of

[8] Where a tax exemption ran only to religious publications, in contrast, a plurality of the Court evinced intolerance for the burden imposed on other taxpayers, even though it was widely dispersed. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (plurality opinion) (recognizing that "[e]very tax exemption . . . affects non-qualifying taxpayers, forcing them to become indirect and vicarious donors," but finding no Establishment Clause problem so long as "that subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end" (internal quotation marks and citations omitted)).

potential draftees. Like the incremental tax increase in *Walz*, the religious pacifist exemption barely increased an already-existing burden, and thus did not impose significant *additional* costs on others in violation of the Establishment Clause, even though whoever was drafted in place of the objectors faced the consequence of going to war.

Unlike the exemptions from the grooming policy in *Holt*, the drug laws in *O Centro*, or the military draft in *Welsh* and *Seeger*, affording all religious nonprofits a total exemption from the Mandate would impose significant burdens on an identifiable group. The accommodation challenged here allows Petitioners to opt out of covering contraception while enlisting their insurers and TPAs to provide alternative coverage. In contrast, the total exemption Petitioners demand provides no mechanism through which the government might ensure replacement coverage, and the alternatives Petitioners suggest would not fill this void. *See infra* Point II.C. Instead, women who do not share the beliefs of their nonprofit religious employers or colleges would have to pay for or forgo contraceptives that their health plans would otherwise cover. Whereas the tax and draft exemption cases involved an infinitesimal, marginal increase in an already-existing burden, the total exemption Petitioners seek would impose significant costs on the women affected.

2. *The costs imposed on employees, students, and their dependents*

The Mandate is a valuable legal entitlement. It guarantees women access to all FDA-approved contraceptives without cost-sharing in order to

overcome persistent economic and practical barriers to the consistent use of preventive services, including contraceptive care. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,872 (July 2, 2013); Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 16–18 (2011) ("IOM Rep."). The particular harms women suffer when they lack cost-free access to contraception are amply addressed in the opinions of this Court and the circuit courts, as well as in other briefs filed in this case. *See*, *e.g.*, *Hobby Lobby*, 134 S. Ct. at 2785–86 (Kennedy, J., concurring) ("[HHS] makes the case that the mandate serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee."); *id.* at 2789 (Ginsburg, J., dissenting); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 259–64 (D.C. Cir. 2014); *Gov't's* Br. 55–58. The denial of contraceptive coverage would mean higher spending, greater health risks, and the perpetuation of disadvantage in both employment and education for the women who work for or study with Petitioners. This would impede the ability of each beneficiary to make decisions about contraception based on her own religious and moral beliefs. Such burdens are too heavy for these women to carry in the service of enabling their employers and colleges to refrain from lodging an objection to the Mandate.

II. RFRA SHOULD BE INTERPRETED TO AVOID VIOLATING THE ESTABLISHMENT CLAUSE.

The Establishment Clause marks a structural limit that the government may not exceed. *See, e.g.*, *Lee v. Weisman*, 505 U.S. at 589–90, 596. It is axiomatic that federal legislation like RFRA may not be applied in a manner that conflicts with the constraints imposed by the Constitution. Accordingly, this Court should follow traditional canons of statutory construction so as to avoid a violation of the Establishment Clause and interpret RFRA to preclude cost-shifting religious accommodations.

A. Observing Establishment Clause Limits Is a Compelling Government Interest.

RFRA itself signals that the statutory rights it creates are subject to overriding constitutional constraints. 42 U.S.C. § 2000bb-4 ("Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion . . . ."). The statute permits the federal government to place substantial burdens on a person's exercise of religion so long as "it demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The standard for determining a compelling governmental interest under RFRA is the same as "the compelling interest test . . . set forth in prior Federal court rulings." 42 U.S.C. § 2000bb(a)(5).

This compelling interest test provides a means of conforming RFRA to the constitutional requirements of the Establishment Clause. The government has a compelling interest in acting within the limits imposed by the Establishment Clause. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 271 (1981) ("We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling."); *Gentala v. City of Tucson*, 213 F.3d 1055, 1066 n.9 (9th Cir. 2000) ("Obeying the mandate of the Establishment Clause is undeniably a compelling state interest.").

Even assuming that the Mandate imposes a substantial burden on Petitioners' exercise of religion, that burden cannot justify a total exemption that would compromise the government's efforts to ensure contraceptive coverage for the women who work for or study at objecting entities. The government has a compelling interest in remaining within the constitutional boundaries set by the Establishment Clause, which prohibit imposing on these women the significant burdens arising from the accommodation Petitioners seek.

B. Other ACA Exceptions Do Not Diminish the Compelling Governmental Interest Because They Do Not Shift the Costs of a Religious Accommodation to Third Parties.

That the ACA makes other permissible exceptions has no bearing on whether a cost-shifting religious exemption violates the Establishment Clause. The existence of other exemptions cannot cure an unconstitutional exemption because the government's interest in complying with the Constitution is paramount. The other exceptions are

facially permissible because they do not violate the Establishment Clause or any other constitutional provision.

The ACA's other important religious accommodation is a total exemption for "churches, their integrated auxiliaries, and conventions or associations of churches," as well as for "the exclusively religious activities of any religious order," so long as these are operated as nonprofit entities under the Internal Revenue Code. I.R.C. § 6033(a)(3)(A)(i), (iii), *cited in* 45 C.F.R. § 147.131(a). The government has defended this exemption against critical public comments by explaining that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874. The proposition that employees of churches generally share their employers' views reduces third-party burdens, and not every church must be homogeneous nor every religious nonprofit heterogeneous for the line-drawing to make sense. More importantly, the exemption reflects the government's usual interest in leaving churches to their own internal governance, intruding as little as possible into their employment relationships. *Gov't's* Br. 67–72. This interest is animated by the Establishment Clause. *See*, *e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 706.

The ACA includes other exceptions, but these are not exemptions from the Mandate. Instead, they

limit the reach or delay the full implementation of the ACA. These exceptions are religiously neutral and thus do not implicate the Establishment Clause. *See* I.R.C. § 4980H(c)(2)(A) and 42 U.S.C. § 300gg-13(a)(4) (employers with fewer than 50 employees are not required to provide health insurance, but if they choose to do so, they must adhere to the Mandate); 45 C.F.R. § 147.140 (grandfathering plans in existence in March 2010 so that they need not come into compliance with most provisions of the ACA, including the Mandate, until they significantly alter coverage). These exceptions do not vitiate the government's interest in ensuring contraceptive coverage in those plans that are within, or later come within, the ACA's reach. *Gov't's* Br. 61–66.

C. The Accommodation Is the Least Restrictive Means of Protecting Petitioners' Religious Exercise While Preventing Unconstitutional Burden-Shifting.

When the government creates religious accommodations, it not only may but must devise a system to prevent unconstitutional burden-shifting to a discrete group of non-adherents. This system will often include a requirement that adherents express their objections in a way that allows others to step in. The circuit courts noted several examples: the selective service laws require religious and conscientious objectors to claim an exemption from the military draft (and often also to perform alternative government service), alerting the government of the need to conscript another, *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 556 (7th Cir. 2014), *vacated and remanded sub nom. Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528, *aff'd on*

reh'g, 786 F.3d 606 (7th Cir. 2015); health care providers in Connecticut who refuse to implement a do-not-resuscitate order must "turn over care of the patient without delay to another provider who will implement the DNR order," *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1183 n.31 (10th Cir. 2015) (quoting Conn. Agencies Regs., § 19a-580d-9 (2016)); to ensure service to same-sex couples, county clerks in Utah must "ensure that the county clerk, or a designee of the county clerk who is willing, is available during business hours to solemnize a legal marriage for which a marriage license has been issued," *id.* (quoting Utah Code Ann. § 17-20-4 (West 2015)). Likewise, several states require pharmacies to fill all legal prescriptions for the drugs they carry, while permitting individual pharmacists to opt out and refer customers to co-workers. *E.g.*, N.J. Stat. Ann. § 45:14-67.1 (West 2015) ("A pharmacy practice site has a duty to properly fill lawful prescriptions for prescription drugs or devices that it carries for customers, without undue delay, despite any conflicts of employees to filling a prescription and dispensing a particular prescription drug or device due to sincerely held moral, philosophical or religious beliefs."); Cal. Bus. & Prof'l Code § 733(b) (West 2016) (a pharmacist may decline to dispense a drug on moral or religious grounds, "only if the licentiate has previously notified his or her employer, in writing, of the drug or class of drugs to which he or she objects, and the licentiate's employer can, without creating undue hardship, provide a reasonable accommodation of the licentiate's objection . . . [to] ensure that the patient has timely access to the prescribed drug or device").

The accommodation at issue here is similar. The government sought to allow Petitioners and others to opt out based on their religious objections while still protecting their employees' and students' access to contraceptive coverage, to be provided by others. In serving these dual purposes, the government went to great lengths to separate objectors from the alternative coverage system. *E. Texas Baptist Univ.*, 793 F.3d at 460 & nn.42-45 (explaining separation regulations). This Court relied on the accommodation as a "less restrictive means" in *Hobby Lobby*, recognizing that it both accommodates religious objections to providing insurance coverage for contraceptives and "serves HHS's stated interest equally well." 134 S. Ct. at 2782.

Petitioners' rejection of the accommodation amounts to an attack on this balancing system itself. The total exemption they claim would undermine the government's attempt to lift unconstitutional burdens on third parties. And the "less restrictive alternatives" Petitioners propose are ineffective or unworkable.

- First, Petitioners say that women deprived of contraceptive coverage can buy plans on the health care exchanges. This suggestion ignores that these women already have underlying health care coverage (excluding contraceptive coverage) by virtue of their employment or matriculation with Petitioners. They are unlikely to forgo this valuable coverage to buy a comprehensive plan on their own. The cost of doing so would exceed even the significant expenditures associated with paying independently for contraception.

Moreover, contraception-only plans do not exist in the private market, as what makes offering contraception cost-effective for insurers is the considerable offsetting savings that result from the prevention of unintended and high-risk pregnancies, 78 Fed. Reg. 39,877 (citing studies showing that providing contraceptive coverage on top of more general coverage is "at least cost neutral" for insurers). Nor does the ACA permit such specialty plans to participate in the exchanges. *Gov't's* Br. 82.

- Second, Petitioners suggest that the government should provide contraceptive coverage directly to those who lose it by virtue of Petitioners' and others' religious objections. But how is the government to know who they are? The TPAs and insurers that contract with Petitioners know who the beneficiaries are because these entities administer the employer-based and student health plans. The accommodation enlists them to offer the missing contraceptive coverage because they already have and maintain a system for identifying and reaching covered individuals. The government has no such system. Even if it were reasonable to require the government to create a new program to compensate third parties burdened by Petitioners' religious objections — which it is not, *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) (expressing doubt about whether government could be required to create a new program) — such a program would depend on women without contraceptive coverage to take steps to

> qualify for and use it. These extra steps would thwart the government's interest in lowering barriers to preventive care, including contraception, in the face of studies showing that the general population undervalues and under-utilizes such services, seeking care instead only when more urgent needs arise. IOM Rep. 16–18; 78 Fed. Reg. at 39,888; *Gov't's* Br. 73–76.

These alternatives fail to achieve the government's compelling interest in ensuring that the accommodation for Petitioners' religious beliefs is not paid for, both personally and financially, by their employees and students.

In the end, Petitioners' attack on the accommodation amounts to an all-or-nothing proposition in which their religious objections prevail regardless of the costs to others. Their interpretation of RFRA offends the Establishment Clause because they see the statute as "arm[ing] [them] with an absolute and unqualified right" not to take any step that might lead to objectionable conduct by others. *Caldor*, 472 U.S. at 709. Ultimately, that reading of RFRA threatens rather than advances religious freedom. We can expect our legislatures to be "solicitous" of the "protection accorded to religious belief," *Employment Division v. Smith*, 494 U.S. 872, 890 (1990) — as Congress was in enacting both RFRA and the ACA — but only if the legislatures also hew to their obligation to ensure that religious accommodations do not impose significant burdens on third parties who do not share the beliefs in question.

CONCLUSION

For these reasons, the Establishment Clause requires affirmance of the judgments of the United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits.

Respectfully submitted,

CATHERINE WEISS
Counsel of Record
NATALIE J. KRANER
MEG SLACHETKA
LOWENSTEIN SANDLER LLP
65 Livingston Avenue
Roseland, NJ 07068
(973) 597-2500
cweiss@lowenstein.com

ELIZABETH SEPPER
Box 1120
One Brookings Drive
St. Louis, MO 63130
(314) 935-3380
Liz.sepper@gmail.com

Counsel for Church-State Scholars[9]

[9] Counsel express their thanks to George Carotenuto, a law student at the University of Virginia School of Law, for his assistance with researching this brief.

APPENDIX

List of Amici Curiae

Amici church-state scholars include:

Aziza Ahmed, Associate Professor of Law, Northeastern University School of Law;

Carlos A. Ball, Distinguished Professor of Law, Rutgers Law School;

Shawn Marie Boyne, Professor of Law, Indiana University Robert H. McKinney School of Law;

Corey Brettschneider, Professor of Political Science, Brown University;

J. Stephen Clark, Professor of Law, Albany Law School;

Caroline Mala Corbin, Professor of Law, University of Miami School of Law;

Professor Dr. Jennifer Drobac, Indiana University Robert H. McKinney School of Law;

Katherine M. Franke, Isidor and Seville Sulzbacher Professor of Law, Director, Center for Gender & Sexuality Law, Columbia Law School;

Frederick Mark Gedicks, Guy Anderson Chair & Professor of Law, Brigham Young University Law School;

Suzanne B. Goldberg, Herbert and Doris Wechsler Clinical Professor of Law, Columbia Law School;

Steven K. Green, Fred H. Paulus Professor of Law, Director of the Center for Religion, Law & Democracy, Willamette University College of Law;

Ariela Gross, University of Southern California Gould School of Law;

B. Jessie Hill, Associate Dean for Academic Affairs and Judge Ben C. Green Professor of Law, Case Western Reserve University School of Law;

Robert Katz, Professor of Law, Indiana University Robert H. McKinney School of Law;

Kara Loewentheil, Director, Public Rights/Private Conscience Project, Center on Gender & Sexuality Law, Columbia Law School & Research Fellow, Columbia Law School.

Aviva Orenstein, Professor of Law & Val Nolan Faculty Fellow, Indiana University Maurer School of Law;

Michael J. Perry, Robert W. Woodruff Professor of Law, Emory University School of Law;

Frank S. Ravitch, Professor of Law & Walter H. Stowers Chair of Law and Religion, Michigan State University College of Law;

Zoë Robinson, Professor of Law, DePaul University College of Law;

Laura Ann Rosenbury, Dean and Levin, Mabie & Levin Professor of Law, University of Florida, Fredric G. Levin College of Law;

Lawrence Sager, Alice Jane Drysdale Sheffield Regents Chair, University of Texas at Austin School of Law;

Elizabeth Sepper, Associate Professor of Law, Washington University School of Law;

Laura S. Underkuffler, J. DuPratt White Professor of Law, Cornell University;

Patricia J. Williams, James L. Dohr Professor of Law, Columbia Law School; and

Susan H. Williams, Walter W. Foskett Professor of Law, Indiana University Maurer School of Law.

The institutional affiliations of Amici are supplied for the purpose of identification only. The positions set forth above are solely those of Amici.