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

IN THE

Supreme Court of the United States

DAVID ZUBIK, *et al.*,

Petitioners,

—v.—

SYLVIA BURWELL, *et al.*,

Respondents.

LITTLE SISTERS OF THE POOR
HOME FOR THE AGED, DENVER, COLORADO, *et al.*,

Petitioners,

—v.—

SYLVIA BURWELL,
Secretary of Health and Human Services, *et al.*,

Respondents.

(*Caption continued on inside cover*)

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD, FIFTH, TENTH AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF OF NORMAN DORSEN, ARYEH NEIER, JOHN SHATTUCK, AND BURT NEUBORNE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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—v.—

Petitioners,

SYLVIA BURWELL, *et al.*,

Respondents.

SOUTHERN NAZARENE UNIVERSITY, *et al.*,

—v.—

Petitioners,

SYLVIA BURWELL, *et al.*,

Respondents.

PRIESTS FOR LIFE, *et al.*,

—v.—

Petitioners,

SYLVIA BURWELL, *et al.*,

Respondents.

ROMAN CATHOLIC
ARCHBISHOP OF WASHINGTON, *et al.*,

—v.—

Petitioners,

SYLVIA BURWELL, *et al.*,

Respondents.

GENEVA COLLEGE, *et al.*,

—v.—

Petitioners,

SYLVIA BURWELL, *et al.*,

Respondents.

QUESTION PRESENTED

May the United States require eleemosynary employers associated with a religious denomination to provide written notice of a decision to invoke a religiously-based exemption from the duty to provide their employees with cost-free health insurance covering an array of contraceptive techniques?

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae, Norman Dorsen, Aryeh Neier, John Shattuck, and Burt Neuborne, have devoted much of their careers to the advancement of religious liberty in the United States and abroad. Norman Dorsen is the Frederick I. and Grace Stokes Professor of Law at NYU School of Law. He served as ACLU General Counsel from 1969-1976, and as President of the ACLU from 1976-1991. Professor Dorsen has appeared before this Court many times in defense of civil liberties. Aryeh Neier is President Emeritus of the Open Society Institute and a Distinguished Visiting Professor at SciencePo in Paris. He served as Executive Director of Human Rights Watch, and as Executive Director of the ACLU from 1970-1978. John Shattuck is the President of Central European University in Budapest. He served as Assistant Secretary of State for Democracy, Human Rights and Labor, and as ACLU National Legislative Director from 1976-1984. Burt Neuborne is the inaugural Norman Dorsen Professor in Civil Liberties at NYU School of Law. He served as National Legal Director of the ACLU from 1982-1986, and, until 2007, as Founding Legal Director of the Brennan Center for Justice at NYU.

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[1] All parties in these consolidated cases have filed blanket consents with the clerk to the filing of briefs *amici curiae*. No counsel for a party or for an *amicus* authored this brief in whole or in part; nor did any person other than *amici* or their counsel make a monetary contribution to the preparation or submission of this brief.

Amici have appeared before this Court on several occasions in recent years in order to present the Court with First Amendment arguments and perspectives that do not appear to be fully incorporated in the materials submitted by the parties, or in the opinions of the courts below.

SUMMARY OF ARGUMENT

Amici argue that the Religion Clauses should not be read by the Court as freestanding sources of law in tension with one another.[2] Rather, *amici* urge the Court to read the Establishment and Free Exercise Clauses robustly, as harmonious integrated expressions of the Founders' prescient understanding of the hydraulic capacity of the religious impulse to shape human behavior.

Amici argue, as well, that the law's insistence, in the context of administering the Selective Service System, that sincere, religiously-motivated "non-cooperators" register for the draft and provide the government with information needed to ascertain whether they qualify for conscientious objector status provides a useful model for the resolution of this dispute.

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[2] Although petitioners rely principally on the Religious Freedom Restoration Act (RFRA), for the reasons set forth in n. 4 *infra*, *amici* believe that this case is controlled by the Court's Religion Clauses jurisprudence.

STATEMENT OF THE CASE

The Affordable Care Act, as interpreted and implemented by the Executive agencies vested by Congress with the duty to administer and enforce it, requires most employers with 50 or more employees to provide their employees with cost-free health insurance covering a range of contraceptive options.

Under the governing regulations, religious organizations directly involved in worship (as defined in Section 6033(a)(3)(A)(i) of the Internal Revenue Code) are exempt from the contraceptive coverage mandate. *See* 45 C.F.R. § 147.131(a); 78 Fed. Reg. 39,870, 39,873-74 (July 2, 2013). Thus, if a religious worship organization elects to omit contraceptive coverage from its health insurance plan, its employees must make their own arrangements at their own expense if they wish to have contraceptive services included in their health insurance coverage. *See* 77 Fed. Reg. 8725, 8726 (February 15, 2012).[3]

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[3] In excluding the employees of religious worship organizations from the guaranty of seamless, cost-free health insurance covering a range of contraceptive techniques, the government reasons that most, if not all, the employees of a religious worship organization would tend to share their employer's religious views about contraception. However, were an employee of a religious worship organization to challenge the government's decision to exclude her from the important preventive health benefit afforded by the contraceptive mandate, it is unclear whether such discriminatory treatment of employees of religious worship organizations would survive scrutiny under the Equal Protection and Establishment Clauses. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98

Eleemosynary organizations associated with a religious denomination but not directly involved in worship may also obtain an exemption from the contraceptive coverage mandate, but only by formally notifying the government in writing of the decision to invoke a religiously-based exemption. Under ground rules set by this Court in *Wheaton College v. Burwell,* 134 S. Ct. 2806 (2014), once the government receives such a written notice, it notifies the eleemosynary employer's insurance carrier of the carrier's responsibility to provide seamless cost-free contraceptive coverage to the affected employees (or students) at the carrier's expense. Prior to *Wheaton College*, an eleemosynary employer had been required to file an official form (EBSA Form 700) seeking an exemption, and to forward a copy of the form to its insurance carrier. After *Wheaton College*, the employer must merely inform the government in writing of its decision to opt out of contraceptive coverage, leaving the government with the responsibility of verifying the employer's eligibility, and notifying the relevant insurance carrier of its obligation to continue to provide seamless contraceptive coverage without charge to the affected employees.

Finally, under ground rules imposed by this Court in *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014), employers in the profit-seeking sector who assert a religious objection to facilitating the use

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(2001) (forbidding unequal treatment of religious and secular institutions in access to public facilities); *Tex. Monthly, Inc. v. Bullock*. 489 U.S. 1 (1989) (invalidating preferential tax treatment of religious journals).

of contraceptives by their employees may secure an exemption from the mandate by persuading the government that their religiously-based objection is both intense and sincere. As with eleemosynary employers, once the secular employer is exempted, its insurance carrier is notified of the carrier's responsibility to continue to provide seamless contraceptive coverage without cost to affected employees.

In all three exemption settings - religious worship employers, eleemosynary employers, and profit-seeking employers – the employer may implement the exemption by deducting the *pro rata* percentage of its health insurance premiums attributable to the disputed contraceptive coverage, leaving the insurance carriers (in the case of eleemosynary and profit-seeking employers) to bear the expense of covering the disputed items at no cost to the affected employees. Participating insurance carriers have agreed to absorb the, thus far, relatively minor costs of contraceptive coverage for the employees of exempt eleemosynary and profit-seeking employers because: (1) covering the cost of contraception is deemed less expensive than paying for the cost of an unintended pregnancy; and (2) agreeing to absorb an exempt employer's costs is a condition of participating in health insurance programs established pursuant to the Affordable Care Act. If the expense of such cost-shifting becomes unduly burdensome, one or more insurance carrier may challenge the current cost-shifting structure, raising serious issues under both the "unconstitutional conditions" doctrine, and the Establishment Clause. *See Legal Serv. Corp. v.*

Velazquez, 531 U.S. 533 (2001); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

Accordingly, all participants in the cost-shifting program — (1) the insurance carriers who must absorb the cost; (2) competitors who must continue to pay full premiums; (3) employees who depend on the kindness of an insurance carrier to continue to receive seamless coverage; and (4) government officials who must administer the program — share a common interest in assuring that cost-shifting operates seamlessly; that only legitimate costs are shifted from religious employers to their insurance carriers and that "zero costs" are shifted to employees.

In the consolidated cases before the Court, religiously-affiliated eleemosynary employers, whose numerous and diverse work forces provide valuable skilled secular services to the entire community (such as education, health care, and delivery of social services to the weak and poor), balk at providing the government with the required written notice of exemption, arguing that since filing the notice operates to trigger the obligation of a third-party (the insurance carrier) to use the infrastructure of the employers health plan to provide seamless, cost-free insurance coverage of contraceptives to their employees and students, the very act of filing the exemption notice causally implicates the religious employer in the facilitation of sinful practices.

Instead, the eleemosynary employers demand to be automatically exempted from the contraception

mandate in the same manner as religious institutions devoted to worship. For the reasons that follow, *amici* believe that the demand should be rejected.[4]

ARGUMENT

I.

THE RELIGION CLAUSES SHOULD NOT BE READ AS ISOLATED SILOS IN TENSION WITH ONE ANOTHER, BUT AS AN INTEGRATED RESPONSE TO THE HYDRAULIC POWER OF THE RELIGIOUS IMPULSE TO SHAPE HUMAN BEHAVIOR

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[4] The eleemosynary employers assert a religiously-based exemption under the Religious Freedom Restoration Act (RFRA), which applies solely against the federal government, and codifies the "strict scrutiny" test developed by this Court in Free Exercise cases. *See Sherbert v. Verner*, 374 U.S. 398 (1963). Importantly, RFRA dispenses with the scienter requirement erroneously imposed on the Free Exercise Clause in *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). Apart from the issue of scienter, however, the statutory analysis under RFRA parallels classic Free Exercise jurisprudence, which controls the outcome of these consolidated cases. In Point I, *infra, amici* urge the Court to abandon the unduly narrow reading of the Free Exercise Clause in *Smith*, thereby rendering RFRA superfluous, and restoring robust constitutional protection of religious freedom against the states, as well as the federal government. *See City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating RFRA as applied to state and local government; upholding it against the federal government).

A.

The Religion Clauses Reflect the Founders' Understanding of, and Respect for, the Extraordinary Motive Power of the Religious Impulse

The two Religion Clauses open the Bill of Rights with what appear to some to be conflicting instructions about religion.[5] The Establishment

[5] The initial version of the First Amendment, introduced on the floor of the House of Representatives by James Madison on June 8, 1789, contained a clause protecting secular, as well as religious conscience. 1 Annals of Cong. 451 (1789) (Joseph Gales ed., 1834) (" . . ,the full and equal rights of conscience [shall not] be in any manner, or on any pretext, infringed."). Although an edited version of Madison's secular conscience clause was approved by the House on August 24, 1789, *id.* (" . . . the rights of conscience [shall not] be infringed."), the conscience clause was deleted by the Senate in closed session, presumably (one hopes) because it was deemed redundant. In the modern era, the Court has recognized First Amendment protection of secular conscience in settings where secular conscience provides comprehensive behavioral guidance similar to the influence of religious conscience. *E.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (recognizing a First Amendment right to decline to participate in compulsory flag salutes in school); *United States v. Seeger*, 380 U.S. 163 (1965) (Harlan, J., concurring) (construing Selective Service Act to provide for secular conscientious objection); *Welsh v. United States*, 398 U.S. 333 (1970) (recognizing an equality-based right to secular conscientious objection). *But see Gillette v. United States*, 401 U.S. 437 (1971) (rejecting claims of selective conscientious objection to a particular war). Since the claims of conscience raised in these consolidated cases are exclusively religious in nature, no issue of secular conscience is before the Court.

Clause, reflecting the Founders' historically-rooted suspicions about the darker side of the religious impulse, protects us *from* religion.[6] The Free Exercise Clause, reflecting the profound link between religious freedom and human dignity, guarantees us freedom *of* religion.[7] In an effort to minimize the supposed tension between the two clauses, the Court in recent years has sought to "level" them down into a more harmonious relationship. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 894 (1990) (imposing scienter requirement on the Free Exercise Clause), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. 103-141, 107 Stat. 1488; *accord Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (rejecting an Establishment Clause challenge to the

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[6]As Justice Black recounted in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8-16 (1947), the Religion Clauses were drafted in the shadow of a prolonged era in European history marked by efforts by both Protestants and Catholics to use state power to persecute each other. During this period of intense religious strife, many Protestants and Catholics agreed on only one theological point – a shared enthusiasm for persecuting Jews and followers of Islam. Justice Black noted that the New World was settled in part by fugitives from state-imposed religious persecution. Ironically, after religious refugees gained freedom and a degree of security in the New World, some used their newly-acquired state power to persecute other religious dissenters. Concern over the persistence of sectarian strife may well have played a role in the personal decisions by Founders like Thomas Jefferson to adopt a non-denominational form of Deism. *See* Thomas Jefferson, *The Life and Morals of Jesus of Nazareth* (Princeton University Press ed. 1983) ("The Jefferson Bible").

[7] *See* John Locke, *A Letter Concerning Toleration* (1689).

practice of commencing local legislative sessions with a predominantly Christian prayer in which the audience is invited to participate).

It is, however, both unnecessary and unwise to level the Religion Clauses down in an effort to minimize an inconsistency that does not exist. Far from expressing inconsistent attitudes towards religion, both Establishment and Free Exercise Clauses are agnostic about the merits of religion. In fact, far from being rooted in inconsistent attitudes towards religion, both Religion Clauses are agnostic about religion itself, neither endorsing nor rebuffing it on the merits. Rather, the Religion Clauses codify the Founders' prescient understanding of the profound power of the religious impulse to influence how human beings behave. Social scientists and political thinkers have long sought to identify the mainsprings of human conduct. Adam Smith and his legion of followers argue that it is the rational pursuit of self-interest.[8] Sigmund Freud announced that it was sex.[9] Modern social science argues for a baffling, exasperatingly complex combination of rational calculation and irrational impulse.[10]

James Madison, the principal force behind the Religion Clauses, believed that one of the determinants of human behavior – if not its principal

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[8] *See* Adam Smith, *The Wealth of Nations* (1776).

[9] *See* Sigmund Freud, *Civilization and Its Discontents* (1930).

[10] *See* Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (1905).

mainspring - is the hydraulic power of conscience, especially religious conscience.[11] Madison and the Founders understood that, to a believer, the commands of a Supreme Being (or a secular equivalent) stand above the ordinary obligations of citizenship. Read as an integrated whole, and not as freestanding legal silos in tension with one another, the Religion Clauses provide identical guidance to government about how to deal with the intersection between government power and the hydraulic force of the religious impulse. Almost a century ago, Justice Oliver Wendell Holmes, Jr., in his celebrated dissent in *Abrams v. United States*, 250 U.S. 616, 624, 630 (1919) (Holmes, J., dissenting), taught us that, given the human tendency to use state power to silence political opponents, a robust Free Speech Clause is needed to check the recurrent temptation to censor. Justice Holmes's warning about human nature in *Abrams* is, if anything, even more compelling in the context of the uniquely powerful

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[11] Madison's deep engagement with conscience is demonstrated by the fact that his original version of what was to become the Bill of Rights contained three "lost clauses" protecting conscience: (1) the secular conscience clauses described *supra* at n.5; (2) a provision exempting conscientious objectors from being required to bear arms; and (3) a clause protecting conscience against the states. Although none of Madison's conscience clauses made it into the text of the Bill of Rights, each "lost clause" is law today. First Amendment protection of secular conscience is discussed *supra* at n.5. The Selective Service Act's grant of conscientious objector status is discussed *infra* at Point II. And the Fourteenth Amendment has been held to incorporate the First Amendment against the states.

psychological pressures exerted by religious conscience.

The Establishment Clause recognizes that once a believer gains access to governmental power, it is logical to predict that, in grip of religious conscience, the believer will seek, in good faith, to use state power to save, convert, compel, or punish non-believers. In order to protect non-believers against such a predictable human dynamic, the Establishment Clause erects a prophylactic wall between church and state, not because of hostility towards religion, but out of a profound respect for the enormous motive power of the religious impulse.

Similarly, the Free Exercise Clause recognizes that when a believer is directed by the state to act inconsistently with her god's commands, it is logical to expect the believer, in the grip of religious conscience, to feel compelled to place the commands of god above the commands of Caesar. Failure to do so erodes the kernel of self-respect at the core of human dignity; but doing so exposes the believer to secular punishment. In order to minimize the number of times a believer is subjected to such a Hobson's choice, the Free Exercise Clause extends the metaphorical wall between religion and secular activity to protect the believer's exercise of religion, not because the Founders supported the idea of religion, but because they realized how difficult it is for any believer to say "no" to her god.

With respect, *amici* believe that both *Smith* and *Galloway* are inconsistent with such a robust

reading of the Religion Clauses as a coherent whole. Far from "leveling down" the Religion Clauses in an effort to minimize the conflict between them, respect for the Founders' recognition of the hydraulic force of conscience calls for "doubling down" on both clauses, resulting in robust Establishment and Free Exercise Clauses that simultaneously remove the temptation to use the government to advance religion, while freeing private individuals to follow the dictates of religious conscience.

B.

Reading the Religion Clauses as an Integrated Whole Requires Careful Calibration of the Costs Associated With Government Activity Tolerating, Forbidding, or Facilitating Religious Practice

Most government behavior affecting religion inextricably implicates both Religion Clauses. A good faith effort by government to respect free exercise may inadvertently constitute a forbidden establishment. Conversely, good faith efforts by government officials to avoid an establishment may inadvertently impinge on free exercise. For example, a Connecticut law designed in good faith to enhance free exercise by providing employees with a day-of-rest on their respective religious Sabbaths shifts the onerous burden of working on the weekend to non-believers, thereby effecting an establishment of religion. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985). Similarly, good faith efforts by public educational authorities to respect the

Establishment Clause by denying religious groups equal access to public resources and facilities may violate the First Amendment rights of religious adherents. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 99 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 820–21 (1995).

The key factor in applying the intertwined commands of the Establishment and Free Exercise Clauses is a careful calibration of the costs and burdens associated with the religious activity at issue. In each case, it is important to ask whether government action facilitating religion (as in *Caldor, Inc.*), or avoiding religion (as in *Good News*) imposes meaningful costs on third-persons. If so, as in *Caldor, Inc.,* government goes beyond Free Exercise into the realm of Establishment. If not, as in *Good News* and *Hobby Lobby*, government must permit, and may even facilitate free exercise.[12]

Not surprisingly, much of our Religion clauses jurisprudence is a careful inquiry into the nature, size, and allocation of third-party costs associated with government activity affecting religion. In Free Exercise cases, the Court asks whether a private

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[12] Justice Alito, writing for the Court in *Hobby Lobby*, observed that granting a religiously-based exemption to employers under the Affordable Care Act would impose "zero" costs on employees because the participating insurance companies had agreed to absorb the cost of providing full health insurance coverage to employees even if the employer opted out of contraceptive coverage. *See Burwell v. Hobby Lobby Stores*, 134 S. Ct 2751, 2760 (2014).

religious observance risks imposing meaningful costs on third persons. If so, the religious observance may be prohibited, despite the adverse effect on religious conscience. If not, it must be permitted in the name of religious conscience. In Establishment Clause cases, the Court asks whether state facilitation of a religious observance would impose meaningful costs on third persons. If so, the state facilitation is forbidden as an Establishment. If not, it is permitted (and perhaps required) as an "accommodation" of Free Exercise.

Where recognition of a religiously-based exemption from an otherwise valid legal duty would not impose substantial costs on third parties, this Court has insisted on religious tolerance. *See e.g.*, *Hobby Lobby*, 134 S. Ct. at 2760 (religiously-based employer exemption poses "zero costs" on affected employees, requiring exemption under RFRA); *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (prisoner's religiously mandated 1/4 inch beard poses no costs and is, therefore, protected under RLUIPA). *See generally Barnette*, 319 U.S. at 642 (recognizing religiously-based exemption from duty to salute the flag); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (recognizing religiously-based exemption from conditions for receipt of unemployment compensation in the absence of proof of a substantial burden on third-parties); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 719-20 (1981)

(same); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145-46 (1987) (same).[13]

Where, however, judicial enforcement of a religiously-based exemption would impose costs on third parties, this Court has uniformly denied a free exercise claim. For example, in denying a free exercise exemption sought by Jehovah's Witnesses from a child labor law, the Court explained that "[t]he right to practice religion freely does not include liberty to expose the . . . child to . . . ill health or death." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944)*; see also Wisconsin v. Yoder*, 406 U.S. 205 (1972) (denying religious exemption from compulsory elementary education law; granting exemption for high school). More recently the Court denied a free exercise exception from rules limiting tax exemptions, because to have granted it would have endangered the public fisc: "[E]ven a substantial burden [on religious exercise] is justified by the broad public interest in maintaining a sound tax system." *Hernandez v. Comm'r*, 490 U.S. 680, 682 (1989) (citation omitted); *see also Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) (denying religiously-based exemption from ban on bigamy

[13] The principal, perhaps sole, exception to the settled practice of recognizing religious exemptions in the absence of third-party costs is *Smith*, where Native Americans suffered at the hands of the state for the "crime" of smoking peyote in sacred rites, despite the failure to identify any person who would be harmed by a religiously-based exemption from the ban on the use of hallucinogenic drugs. *See Smith*, 494 U.S. at 890. The identical behavior has received an exemption under RFRA. *See Gonzales v. O Centro Espirita Beneficente Unaio do Vegetal*, 546 U.S. 418 (2006).

based on risk to multiple wives); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 265 (1934) (denying religiously-based exemption from military obligations shifting burden to third-persons); *United States v. Macintosh*, 283 U.S. 605, 623-24 (1931) (same), *overruled on other grounds by Girouard v. United States*, 328 U.S. 61, 63 (1946); *Gillette*, 401 U.S. at 461-63 (1971) (same); *United States v. Lee*, 455 U.S. 252, 260-61 (1982) (denying religiously-based exemption from payment of Social Security taxes); *Bob Jones Univ. v. United States*, 461 U.S. 574, 602-04 (1983) (denying religiously based exemption from anti-discrimination norms); *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985) (denying religiously-based exemption from minimum wage and record keeping rules imposed by Fair Labor Standards Act); *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 389-92 (1990) (denying religiously-based exemption from payment of sales taxes); *Bowen v. Roy*, 476 U.S. 693 (1986) (denying religiously-based exemption to duty to provide child with Social Security number); *Lyng v. Nw. Indian Cemetery Prot. Ass'n*, 485 U.S. 439 (1988) (rejecting free exercise challenge to government decision to build road on public land).

As this case illustrates, our national commitment to religious freedom does not stop with judicially enforceable rights and duties. Where exclusively judicial enforcement of a claim of religious conscience would be improper because it would result in the imposition of substantial costs on third persons, this Court has recognized a limited power in the political branches to "accommodate"

religious values by balancing relatively insignificant costs to third parties against the demands of religious conscience. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339-40 (1987) (upholding statutory exemption for non-profit religious group from Title VII's prohibition against discrimination in employment on the basis of religion, allowing it to limit employment to church members); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, __ U.S. __, 132 S. Ct. 694, 706 (2012) (upholding "ministerial exemption" from Title VII in order to preserve the free exercise values of members of congregation); *see also Seeger*, 380 U.S. at 176 (upholding conscientious objectors' exception from the draft based on secular conscience); *Welsh*, 398 U.S. at 339-40 (same).

When, however, a legislative effort at accommodation imposes onerous costs on third parties, this Court has invalidated the statute as an establishment of religion. *See Caldor, Inc.*, 472 U.S. at 709-11 (invalidating law mandating time-off for religious Sabbath, because law required co-workers to work on weekend); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84-85 (1977) (construing Title VII to require religious accommodation only where substantial costs are not imposed on owner or co-workers).

The key issue before the Court, therefore, is whether the government's demand that a religiously-affiliated eleemosynary employer inform it in writing of a decision to opt out of the

contraceptive mandate accurately calibrates and fairly allocates the relevant burdens imposed by the employer's decision.

C.

The Political Branches Have Accurately Calibrated the Costs and Burdens Associated with Requiring Religiously Affiliated Eleemosynary Employers to Notify the Government of a Decision to Opt Out of the Contraceptive Mandate Imposed by the Affordable Care Act

1.

The Burden of Simple Notification is Extremely Light, but is Sufficient to Require Justification

Once the government acceded to this Court's preliminary ruling in *Wheaton College* by dispensing with the requirement that religiously-affiliated eleemosynary employers wishing to opt out of the duty to provide cost-free contraceptive coverage must direct their insurance carriers to provide identical unpaid coverage to affected employees, the sole burden placed on an eleemosynary employer seeking a religiously-based exemption is delivery to the government of written notification of its decision to invoke the exemption. The physical burden imposed by such a notification requirement is virtually non-existent. To say that the physical burden is extremely light, however, is not to deny that religious employers are genuinely troubled at being forced to play any role at all in the administration of

a program that will ultimately result in the availability of cost-free contraceptives to their employees and students. Thus, while it would be tempting to dispose of these appeals by holding that a mere requirement of written notice of the decision to invoke a statutory exemption from the ACA does not impose a cognizable burden on an eleemosynary employer's religious conscience, *amici* believe that the better course is to refrain from seeking to measure the intensity of the interference with conscience, and to concentrate on asking whether failure to require notice would impose unacceptable costs on third persons.

2.

The Costs to Employees, Competitors, Insurance Carriers, and the Government of Failing to Require Written Notice Are Substantial

Without either a requirement of government notification, or a requirement of employer notice to the affected insurance carrier, it would be extremely difficult, if not impossible, to provide affected employees with seamless, cost-free contraceptive coverage once their religious employer opted out of paying for the coverage. As Justice Alito noted in *Hobby Lobby*, the ACA relies on insurance carriers to act as unpaid *ad hoc* safety nets, providing continued cost-free contraceptive coverage using an employer's existing infrastructure even after eligible employers have opted out of paying for the coverage on religious grounds. *See* 134 S. Ct. at 2782.

In order for such a complex cost-shifting process to operate, someone must inform the affected insurance carrier that it is necessary to deploy the safety net. This Court ruled in *Wheaton College* that dissenting employers cannot be required to provide the necessary information to their insurance carriers. *See Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014). That leaves the government with the responsibility of providing necessary authorizations and instructions to the affected insurance carrier. But, unless an employer notifies the United States of its decision to opt out, the government will not be aware of the necessity of instructing the insurance carrier to deploy the safety net. In many settings, in the absence of notice from either the insured or the government, a participating insurance carrier would be unable to determine whether a given premium underpayment should affect coverage, and would be unable to ascertain whether it is both authorized and obliged to offer seamless coverage in the absence of full payment. In the absence of notice, excusable failures to pay the full premium cannot be distinguished from non-excusable failures to pay, causing confusion over the precise scope of coverage in a given employment setting. Finally, in the absence of a notice requirement, it becomes impossible for the government to verify an employer's eligibility to opt out, and impossible for insurance carriers to arrive at a precise calculation of the shifted costs they are being asked to bear.

It is, of course, true that notice of a decision to opt out is not required of religious worship organizations. But that is because their employees

are not eligible for mandated contraceptive coverage, rendering it unnecessary to notify an insurance carrier of any duty triggered by the decision to opt out. *See* 45 C.F.R. § 147.131(a); 78 Fed. Reg. 39,870, 39,873-74 (July 2, 2013) (granting "religious employers" an exemption from the contraceptive mandate).

Finally, a notice requirement enables the government to verify whether a given eleemosynary employer is, in fact, eligible for a religious exemption. While the vast bulk of employers will respect the rules, the absence of a verification capability invites employers on the margin to shift economic burdens to their insurance carriers and competitors with little or no supervision, improperly increasing the costs borne by insurance carriers, perhaps to the point where the entire cost-shifting program is endangered.

II.

THE NATION'S EXPERIENCE IN ENACTING AND ADMINISTERING CONSCIENTIOUS OBJECTION TO MILITARY SERVICE PROVIDES A MODEL FOR THE RESOLUTION OF THIS DISPUTE

This is not the first time that sincere religious individuals have sought to be excused from cooperating with what they believe to be an engine of death. Many deeply religious young men whose conscientious opposition to war in any form would

have entitled them to conscientious objector status, have, over the years, found it impossible to cooperate with what they perceived to be an immoral engine of death by either registering for the draft or filing an application for conscientious objector status. They called themselves "non-cooperators." This Court's treatment of their sincere, religiously-motivated claims provides a model for the resolution of this dispute. *See generally* Central Committee for Conscientious Objectors, *The Non-Cooperator and the Draft* (1963).

A.

Sincere Religious "Non-Cooperators" Have Uniformly Been Required to Provide the Government with Information Needed to Administer the Selective Service System

The legal and moral position advanced by the religious employers in these cases closely parallels arguments raised by certain conscientious opponents of the military draft who describe themselves as "non-cooperators." Both Selective Service non-cooperators and the religious employers before the Court in these appeals refuse to play any role, however small, in what each sincerely believes to be a government-administered engine of death. Under existing free exercise law, neither set of religious objector would be eligible for a judicially-created exemption under the Free Exercise Clause because, in both settings, granting such an exemption would shift substantial costs to third parties.

In a Selective Service context, a purely judicial decision exempting a religious objector from the draft on free exercise grounds would shift the burden of conscription to someone else. Unlike conscientious objectors, who were required to perform some non-combatant or civil service, non-cooperators seeking a judicially enforced religious exemption hoped to bypass the system altogether. Not surprisingly, therefore, this Court has repeatedly rejected heartfelt pleas to recognize a judge-created religiously-based conscientious exemption from military service. *See Falbo v. United States*, 320 U.S. 549, 553-54 (1944) (denying judicial intervention in criminal prosecution against religiously-inspired violation of local board's order to report to national service); *Macintosh*, 283 U.S. at 623-24 (denying religiously-based exemption from military obligations). Similarly, flatly exempting an eleemosynary religious employer from a statutory duty under the Affordable Care Act to provide cost free contraceptive insurance would, in the absence of an alternative mechanism of providing coverage, unfairly shift the cost of providing contraceptive insurance coverage from a religious employer to its employees. Not surprisingly, this Court granted a religiously-based exemption in *Hobby Lobby* only because the costs of providing contraceptive coverage would to be borne, not by covered employees, but voluntarily by the affected insurance carriers.

In both settings, while exclusively judicial protection of conscience is unavailable, respect for the relationship between conscience and human dignity has led the political branches to seek to "accommodate" the commands of conscience. In each

accommodation context, the political branches have sought to respect religious conscience while limiting the costs to third parties. In the Selective Service context, government requires an applicant for conscientious objector status to file a formal application permitting the government to vet the application to assure that it meets demanding criteria; and requires a successful claimant to perform either non-combatant military or alternative civilian service. In the Affordable Care Act context, filing a formal notice of the decision to opt out permits the government to vet the decision, and to administer a complex program that shifts the cost of exemption from employees to their insurance carriers who, thus far, have voluntarily borne those costs.

Finally, in both contexts, sincere religious objectors argue that the mere act of providing notice to the government of their decision to opt out implicates them in administering an engine of death. It is tempting to insist, as have several courts below, that the minimal effort required to notify the government of a decision to opt out of the contraceptive mandate, or to file a CO application, does not constitute a cognizable burden on religious freedom. Such a response, however reasonable it may appear to most of us, fails to confront the religious employers', or the Selective Service non-cooperators', sincere plea that any coerced cooperation with an engine of death, however minimal, implicates the actor in a deeply immoral act. Given that sincerely held belief, *amici* believe that if non-cooperator claims are to be denied in both settings, it should not be on the spurious ground that no significant

interference with conscience is occurring; but rather because the government has no choice but to insist on being notified when a religious eleemosynary employer, or a conscientious objector, elects to opt out of either the contraceptive mandate, or the military draft.

This Court has consistently rebuffed efforts to challenge the validity of a draft classification in the absence of draft registration and the presentation of an appropriate application to the draft board. *See Falbo*, 320 U.S. at 554 (denying judicial review of classification decision if fail to exhaust administrative remedies); *McGee v. United States*, 402 U.S. 479, 491 (1971) (same). *But see McKart v. United States*, 395 U.S. 185, 202-03 (1969) (entertaining defense in absence of full exhaustion of administrative remedies). In refusing to permit conscientious non-cooperation with the draft, the Court has recognized that the fair and efficient administration of the Selective Service System requires participants to inform the government of their sincere efforts to opt out on religious grounds.

Identical reasoning should doom the demand by eleemosynary religious employers to total non-cooperator status under the Affordable Care Act. As *amici* have noted, in the absence of timely notice of an eleemosynary employer's decision to stop paying for contraceptive coverage, it would become impossible to administer the complex process by which a religious employer's insurance carrier is directed to continue to provide seamless, cost-free contraceptive coverage. It is no answer to complain

that religious worship employers are not required to soil their hands with an opt-out notice. Such a notice by religious worship employers would have no purpose because, unlike the employees of an eleemosynary employer, employees of a religious worship organization are not covered by the contraceptive mandate. Indeed, if there is a troublesome constitutional distinction in the treatment of religious worship employers and eleemosynary employers, it lies in the disparate treatment of the workforce. If and when, employees of religious worship entities are granted the same rights as employees of eleemosynary organizations, there will be time enough to consider whether identical rules should govern the grant of religious exemptions to both sets of employers.

B.

Almost 50 Years Ago, the Compassionate Actions of a Wise Trial Judge Taught That Once the Government Obtains Information Needed to Administer the Program in Question, No Further Demands Should Be Made of a Sincere Religious Non-Cooperator

During the Vietnam War, the duty of sentencing sincere religious non-cooperators to jail was deeply troubling to many United States District Judges. It often appeared clear that the young men would be entitled to conscientious objector status, if only they would register and file the required application. Judge Jacob Mishler, then Chief Judge of the United States District Court for the Eastern District of New York, when confronted with a non-

cooperator who declined legal representation, would occasionally ask counsel to be present in the audience during aspects of the legal proceedings to inform the Court of potential defenses. When, one morning, counsel indicated that no defenses seemed available, after adjourning the formal proceedings, Chief Judge Mishler asked counsel and the young non-cooperator to approach the bench, and dismissed the court reporter.

> "Before I sentence you to jail" Judge Mishler said to the young man, "I want to understand why you will not accept the conscientious objector status you seem to deserve?"
>
> The young man answered: "Because I will have no truck with the engine of death."
>
> "If," the Chief Judge asked, "draft registration was automatic, would you fight the machine by seeking CO status?"
>
> "You bet your ass I would," snapped the young man.
>
> "Done," smiled the Judge. "I deem that an application for CO status." "Case indefinitely adjourned."
>
> Judge Mishler then turned to counsel and said: "That is how to beat an innocent

> plea out of someone. Everyone needs a *Shabbos goy* sometimes."[14]

Chief Judge Mishler's wise and compassionate actions that morning a half-century ago on behalf of a young man whose name counsel never knew illustrates the legal principles that control this case far better than could a learned treatise. Chief Judge Mishler understood that no matter how sincere a religious non-cooperator may be, concerns of conscience cannot justify refusing to provide information to the government needed to administer an important program affecting others. But he also understood that once the necessary information is obtained by government, by whatever means, the claims of religious conscience should, if possible, be respected.[15] While, on the existing record, the claims of conscience raised in this case (and in the Selective Service cases) must be denied, it is not beyond the

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[14] In the medieval European Jewish tradition, the *Shabbos goy* was a non-Jewish neighbor, usually a Christian, who performed an act of kindness by entering the home of observant Jews on the Sabbath to assure that heating and cooking fires were safely lit because the observant occupants were forbidden by their god from doing so.

[15] Counsel described Chief Judge Mishler's act of kindness at the Judge's Memorial Service held on May 21, 2004, at the Eastern District Courthouse in Brooklyn. *See* 359 F. Supp.2d XLVII, LV-LVII (2004). No official record of Chief Judge Mishler's actions appear to exist. Nor does counsel know the ultimate resolution of the legal proceeding in question. It is also important to acknowledge that counsel's best recollection of the literal words spoken by the Judge almost 50 years ago may have eroded over time.

ability of a nation committed to respecting conscience to devise a practical mechanism to assure that the government and affected insurance companies obtain the necessary information without requiring the conscientious non-cooperator to comprise his or her principles in either setting. In Chief Judge Mishler's words, everyone needs a *Shabbos goy* sometimes.

CONCLUSION

The requirement that notice be given of an eleemosynary employers' decision to opt out of the contraceptive mandate imposed by the Affordable Care Act should be upheld.

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