Nos. 18-15144, 18-15166, & 18-15255

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, *et al.*,

Plaintiffs–Appellees,

v.

ALEX M. AZAR II, in his official capacity as Acting Secretary of the U.S. Department of Health and Human Services, *et al.*,

Defendants–Appellants,

and

LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE and MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

Intervenors–Defendants–Appellants.

On Appeal from the United States District Court
for the Northern District of California
Case No. 17-cv-05783-HSG, Hon. Haywood S. Gilliam, Jr.

BRIEF OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; HEART WOMEN & GIRLS; INTERFAITH ALLIANCE FOUNDATION; JEWISH WOMEN INTERNATIONAL; METHODIST FEDERATION FOR SOCIAL ACTION; MUSLIM ADVOCATES; NATIONAL COUNCIL OF JEWISH WOMEN, INC.; PEOPLE FOR THE AMERICAN WAY FOUNDATION; RECONSTRUCTING JUDAISM; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; AND SIKH COALITION SUPPORTING APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amici are nonprofit organizations. They have no parent corporations, and no publicly held corporation owns any portion of any of them.

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INTERESTS OF THE *AMICI CURIAE*[1]

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

Amici, described in the Appendix, are:

- Americans United for Separation of Church and State.
- Bend the Arc: A Jewish Partnership for Justice.
- Hadassah, The Women's Zionist Organization of America, Inc.
- HEART Women & Girls.
- Interfaith Alliance Foundation.
- Jewish Women International.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties have consented to this filing.

- Methodist Federation for Social Action.
- Muslim Advocates.
- National Council of Jewish Women, Inc.
- People For the American Way Foundation.
- Reconstructing Judaism.
- Reconstructionist Rabbinical Association.
- Sikh Coalition.

INTRODUCTION AND SUMMARY OF ARGUMENT

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

Under 45 C.F.R. § 147.132(a)(1)(i)(A), houses of worship have been fully exempt from the requirement. Under 45 C.F.R. § 147.131(d), religiously affiliated entities have been entitled to a religious accommodation (i.e., an exemption) if they give notice that they want one; in that case, the government arranges for the coverage to be provided without cost to or participation by the objecting entity. And under *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), closely held for-profit businesses with religious objections are entitled to the same accommodation as are religiously affiliated entities.

On October 6, 2017, without notice-and-comment rulemaking, the U.S. Departments of Health and Human Services, Labor, and the Treasury issued two Interim Final Rules that nullify the contraceptive-coverage requirement's protections for countless women by permitting employers and educational institutions not just to refuse to provide or pay for the insurance coverage, but also affirmatively to block provision of the coverage to employees and students. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 82 Fed. Reg. 47,792; Moral Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 82 Fed. Reg. 47,838.

The Religious Exemption provides that all nongovernmental insurance-plan sponsors may, on the basis of religious objections, exempt themselves from the contraceptive-coverage requirement in a way that affirmatively bars the government from making separate arrangements to provide the coverage. *See* 82 Fed. Reg. at 47,806. Or objecting entities may instead elect to notify the government of their intention not to provide the coverage without standing in the way of the government's separate arrangements (*id.*)—the accommodation that had already been available to all but publicly traded companies (*see* 26 C.F.R. § 54.9815-2713A; 29 C.F.R. § 2590.715-2713A; 45 C.F.R. § 147.131 (2015)). But objecting entities get to choose; and they may revoke their notice to the government if previously given, thus curtailing the government's provision of the coverage. *See* 82 Fed. Reg. at 47,813.[2]

The Moral Exemption provides that nongovernmental insurance-plan sponsors (other than publicly traded for-profit companies) may also avail

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

themselves of either of the two versions of the exemption—and switch between the two at will—based on what the government labels a nonreligious, "moral objection." *See* 82 Fed. Reg. at 47,850, 47,854.

Amici agree with the district court that the government's adoption of the Interim Final Rules violated the Administrative Procedure Act. We write to address additional, related reasons to affirm the preliminary injunction.

A. The Supreme Court has made clear that when evaluating religious exemptions from generally applicable laws, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). If in purporting to accommodate the religious exercise of some the government imposes costs and burdens of that religious exercise on others, it violates the Establishment Clause. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985). That is true whether a religious exemption is premised on the Religious Freedom Restoration Act (42 U.S.C. § 2000bb *et seq.*), on other federal or state statutes or regulations, or on the First Amendment's Free Exercise Clause. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2781 n.37; *Cutter*, 544 U.S. at 720; *Caldor*, 472 U.S. at 709–10. Yet the Religious Exemption here does just that: In the name of religious accommodation for businesses and colleges, it strips employees, students, dependents, and other innocent

third parties of the insurance coverage to which they are entitled by law, thereby imposing on them substantial costs and burdens to obtain the critical healthcare that should be available to them free of charge.

B. The Supreme Court has also made clear that religious exemptions from general laws are permissible, if at all, only when they alleviate substantial government-imposed burdens on religious exercise. *See, e.g.*, *County of Allegheny v. ACLU of Greater Pittsburgh Chapter*, 492 US. 573, 613 n.59 (1989). When they do not, they are unconstitutional preferences for religion. *Amos*, 483 U.S. at 334. Yet the government makes the Religious Exemption available without regard to whether any entity has demonstrated, or even asserted, that the pre-existing accommodation substantially burdens its religious exercise—a prerequisite that cannot be met. So RFRA does not authorize, and the Establishment Clause does not allow, the exemption.

C. Finally, although the government purports to create two classes of exemptions—religious and moral—the latter is just another version of the former, because the limited class of moral views recognized must, as a matter of law, be treated as religion. Hence, the exemptions are duplicative and suffer precisely the same constitutional defects. Neither Rule can stand.

ARGUMENT

A. The Government Cannot Create Religious Exemptions That Unduly Harm Third Parties.

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

The right to believe, or not, and to practice one's faith, or not, is sacrosanct. But it does not extend to imposing the costs and burdens of one's beliefs on innocent third parties. Government should not, and under the Establishment Clause cannot, favor the religious beliefs of some at the expense of the rights, beliefs, and health of others. Hence, religious exemptions from general laws must not detrimentally affect non-beneficiaries. If they do, they constitute unconstitutional preferences for the favored religious beliefs and the adherents thereto.

Thus, in *Caldor*, the Supreme Court invalidated a law requiring employers to accommodate Sabbatarians in all instances, because "the statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." 472 U.S. at 709. The Court held that "unyielding weighting in favor of Sabbath observers over all other interests" has "a primary effect that impermissibly advances a particular religious practice." *Id.* at 710. Similarly, in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the Court invalidated a sales-tax exemption for religious periodicals because, as the plurality explained, the exemption

unconstitutionally "burden[ed] nonbeneficiaries by increasing their tax bills by whatever amount [was] needed to offset the benefit bestowed on subscribers to religious publications." *Id.* at 18 n.8 (plurality opinion). The Supreme Court has upheld religious exemptions from general laws only when they "did not, or would not, impose substantial burdens on non-beneficiaries while allowing others to act according to their religious beliefs." *Id.*

The Supreme Court's free-exercise jurisprudence reflects these same considerations. In *United States v. Lee*, 455 U.S. 252, 261 (1982), the Court rejected an Amish employer's requested exemption from paying social-security taxes because the exemption would "operate[ ] to impose the employer's religious faith on the employees." And in *Braunfeld v. Brown*, 366 U.S. 599, 608–09 (1961), the Court refused an exemption from Sunday-closing laws because it would have "provide[d Jewish-owned businesses] with an economic advantage over their competitors who must remain closed on that day." In contrast, the Court recognized a Seventh-Day Adventist's right to an exemption from a restriction on unemployment benefits in *Sherbert v. Verner*, 374 U.S. 398, 409 (1963), because the exemption would not "serve to abridge any other person's religious liberties." And the Court granted exemptions from state truancy laws in *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1972), only after Amish parents demonstrated the "adequacy

of their alternative mode of continuing informal vocational education" to meet the children's educational needs.

In short, a religious accommodation "must be measured so that it does not override other significant interests." *Cutter*, 544 U.S. at 722. When non-beneficiaries would be harmed, religious exemptions are forbidden. *Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion); *Caldor*, 472 U.S. at 709–10.[3]

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

The government contended below, and Intervenor Little Sisters argues here, that the Religious Freedom Restoration Act requires the new Religious Exemption. That is incorrect both as a constitutional matter and as a matter of statutory construction.

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

a. Because RFRA cannot require what the Establishment Clause forbids (*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) ("'[T]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.'" (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992))), it should not be read to afford religious accommodations that would impermissibly harm nonbeneficiaries if another construction is possible (*see, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005)). Thus, in interpreting RFRA and its sister statute, the Religious Land Use and Institutionalized Persons Act (42 U.S.C. § 2000cc *et seq.*), the Supreme Court has enforced the rule against unduly burdening third parties by affording the statutes a saving construction that builds in the Establishment Clause's prohibitions.[4]

Specifically, the Supreme Court in *Cutter* held that Congress's accommodation of inmates' religious exercise does not violate the

[4] RFRA and RLUIPA employ virtually identical language and serve the same congressional purpose. *Compare* 42 U.S.C. § 2000bb-1, *with* 42 U.S.C. § 2000cc-1. Accordingly, RLUIPA applies " 'the same standard as set forth in RFRA' " (*Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006))), and decisions interpreting and applying each apply equally to both (*see, e.g.*, *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661 (10th Cir. 2006); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226–27 (11th Cir. 2004)).

Establishment Clause because, "[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" to ensure that any accommodations do "not override other significant interests." 544 U.S. at 720, 722 (citing *Caldor*, 472 U.S. at 709–10). The Court reiterated the rule in *Hobby Lobby*: "It is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'" 134 S. Ct. at 2781 n.37 (quoting *Cutter*, 544 U.S. at 720). Indeed, with respect to exemptions from the very contraceptive-coverage requirement at issue here, every Justice authored or joined an opinion recognizing that detrimental effects on nonbeneficiaries must be considered. *See id.* at 2760 ("Nor do we hold . . . that . . . corporations have free rein to take steps that impose 'disadvantages . . . on others' or that require 'the general public [to] pick up the tab.'"); *id.* at 2787 (Kennedy, J., concurring) (religious exercise must not "unduly restrict other persons . . . in protecting their own interests"); *id.* at 2790 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting) ("Accommodations to religious beliefs or observances . . . must not significantly impinge on the interests of third parties."); *see also Holt*, 135 S. Ct. at 867 (Ginsburg, J., concurring) (religious accommodation constitutionally permissible because it "would not detrimentally affect others who do not share petitioner's belief").

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

Before 1990, the Supreme Court had interpreted the Free Exercise Clause to require strict scrutiny (i.e., a compelling governmental interest and narrow tailoring) when general laws substantially burdened religious exercise. *See, e.g.*, *Sherbert*, 374 U.S. at 407 (challenge to disqualification from unemployment benefits for refusing to work on Sabbath). In *Employment Division v. Smith*, 494 U.S. 872 (1990), however, the Court changed the rule, holding that generally applicable laws that are facially neutral with respect to religion are presumptively constitutional and subject to only minimal rational-basis review, even if the burden falls more heavily on some people because of their religion. Congress responded by enacting RFRA to restore by statute the Court's pre-*Smith* free-exercise jurisprudence as the test for religious accommodations. *See* 42 U.S.C. § 2000bb(b)(1); *Gonzales*, 546 U.S. at 424; S. Rep. No. 103-111, at 8 (1993).

In doing so, Congress necessarily—and quite consciously—adopted into RFRA the Establishment Clause's limitations on religious accommodations recognized in pre-*Smith* free-exercise law. *See, e.g.*, 139 Cong. Rec. S14,350–01 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy) ("The act creates no new rights for any religious practice or for any potential litigant. Not every free exercise claim will prevail, just as not every claim

prevailed prior to the *Smith* decision."); 139 Cong. Rec. S14,352 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (RFRA "does not require the Government to justify every action that has some effect on religious exercise").

RFRA provides critical protections for religious exercise. But it does not, and as a constitutional matter cannot, license the government's imposition on innocent third parties of the costs, burdens, and harms of accommodating another person's or business's religious exercise.

3. The Religious Exemption would impermissibly harm countless women.

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

and burdens of accommodating objecting entities, the Exemption violates the Establishment Clause and is not authorized by RFRA.

a. Contraceptives are critical healthcare for many women. Not only do contraceptives prevent unintended pregnancies, but they protect the health of women with the "many medical conditions for which pregnancy is contraindicated" (*Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring)). They reduce risks of endometrial and ovarian cancer. *See Large Meta-Analysis Shows That the Protective Effect of Pill Use Against Endometrial Cancer Lasts for Decades*, 47 PERSP. ON SEXUAL & REPROD. HEALTH 228, 228 (2015). They preserve fertility and ability to have children in the future by treating conditions such as polycystic ovary syndrome. *See* Mira Aubuchon & Richard S. Legro, *Polycystic Ovary Syndrome: Current Infertility Management*, 54 CLINICAL OBSTETRICS & GYNECOLOGY 675, 676 (2011). And they alleviate severe premenstrual symptoms, such as dysmenorrhea. *See* Anne Rachel Davis et al., *Oral Contraceptives for Dysmenorrhea in Adolescent Girls: A Randomized Trial*, 106 OBSTETRICS & GYNECOLOGY 97, 97 (2005), https://bit.ly/2L9LVgo.

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

https://bit.ly/2HSYwmM. And the most effective contraceptive methods—intrauterine devices or contraceptive implants—can cost $1,000 out-of-pocket. *Id.*

Because of these substantial costs, many women who would be deprived of contraceptive coverage under the Interim Final Rules may face pressure to choose cheaper, often less effective or less medically appropriate contraceptive methods—or to do without. Even small differences in cost between forms of contraception may deter women from choosing the method that is most effective and medically appropriate for them: Women who must pay more than $50 out-of-pocket, for example, are about seven times less likely to obtain an intrauterine device than are women who would pay less than $50. *See* Aileen M. Gariepy et al., *The Impact of Out-of-Pocket Expense on IUD Utilization Among Women with Private Insurance*, 84 CONTRACEPTION e39, e41 (2011). And with less effective contraceptive methods or reduced options for the most medically appropriate ones come increased risks of unintended pregnancies, increased risks of serious, potentially life-threatening illnesses, and increased severity of symptoms from what should be treatable conditions.

Moreover, "[t]he evidence shows that contraceptive use is highly vulnerable to even seemingly minor obstacles." *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 265 (D.C. Cir. 2014), *vacated and*

remanded by Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016) (per curiam). For example, one study showed that requiring women to return to the clinic for oral-contraceptive refills every three months rather than providing a year's supply at once yielded a 30% greater chance of unintended pregnancy and, correspondingly, a 46% increase in abortions. Diana Greene Foster et al., *Number of Oral Contraceptive Pill Packages Dispensed and Subsequent Unintended Pregnancies*, 117 OBSTETRICS & GYNECOLOGY 566, 570 (2011), https://bit.ly/2IKftiS.

Hence, even for those women who may as a formal matter have other routes to obtain contraceptive coverage, the administrative hurdles, additional time, additional expense, and potential need to expose intensely personal details of their medical history or intimate relations are all significant and sometimes decisive deterrents to obtaining needed contraception. Thus, while it may be true that, for some women, "contraception access can be provided through means other than coverage offered by religious objectors, for example, through 'a family member's employer,' 'an Exchange,' or 'another government program' " (82 Fed. Reg. at 47,806), for any particular individual that assertion is speculative at best; alternatives may be impracticable—or wholly unavailable.[5]

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[5] The referenced "[ ]other government program" presumably is Title X of the Public Health Service Act, 42 U.S.C. § 300 *et seq.*, which provides federal

b. Intervenor Little Sisters contends that the government's pre-existing regulation exempting houses of worship (*see* 76 Fed. Reg. 46,621, 46,625 (Aug. 3, 2011)) requires extending precisely the same exemption at least to the broad class of all religiously affiliated nonprofits. Otherwise, in Intervenor's view, this legacy exemption violates the Religion Clauses by making "explicit and deliberate distinctions between different religious organizations" (Little Sisters Br. 51–52 (quoting *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982))). That argument is incorrect.

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funding for family-planning services. On May 22, 2018, the government proposed a new rule that would make employees of entities that take the Religious Exemption eligible to receive contraceptives from Title X clinics. *See* Compliance with Statutory Program Integrity Requirements, RIN 0937-ZA00, at 51, https://bit.ly/2J0k0kI. But that rule is merely *proposed* and does not obviate the need for a preliminary injunction. Moreover, it would deny funding to clinics that offer abortion referrals (*id.* at 17), substantially reducing the number of Title X clinics across the country (Kinsey Hasstedt, *Beyond the Rhetoric: The Real-World Impact of Attacks on Planned Parenthood and Title X*, 20 GUTTMACHER REV. 86, 89 (2017)). It would allow Title X clinics to limit the range of contraceptive methods that they provide. RIN 0937-ZA00, at 56–57. It would do nothing for students at objecting colleges. *Id.* at 51 (covering "employees" only). It would not require objecting entities to refer their employees to Title X clinics, or even to give notice of eligibility for the benefits—and many employers surely wouldn't. And another proposed HHS rule would permit healthcare workers to refuse to provide contraception even at Title X clinics that supposedly offer the service. *See* Protecting Statutory Conscience Rights in Health Care, 83 Fed. Reg. 3880 (Jan. 26, 2018). Hence, the proposed alternative would for many women be illusory.

Larson forbids denominational preferences, explaining: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." 456 U.S. at 231–32, 244. It does not require—or even hint—that non-churches must be treated precisely the same way as houses of worship.

And "the establishment clause does not require the government to equalize the burdens (or the benefits) that laws of general applicability impose on religious institutions." *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 560 (7th Cir. 2014), *vacated and remanded by Zubik*, 136 S. Ct. at 1560. The law routinely draws distinctions between houses of worship and non-church nonprofits (including religious ones), because of the First Amendment's special solicitude toward ecclesiastical authorities. *Cf., e.g.*, 2 U.S.C. § 1602(8)(B)(xviii) (exempting churches from Lobbying Disclosure Act's registration requirements); 26 U.S.C. § 6033(a)(3)(A)(i), (iii) (exempting chuches from obligations for nonprofits to register with Internal Revenue Service and to submit annual informational tax filings); 29 U.S.C. § 1003(b)(2) (exempting church plans from ERISA). That is the reason for the limited exception in *Hosanna-Tabor* and *Amos* to the strict rule against granting religious accommodations that unduly burden third parties (*see supra* note 3). Because the Establishment Clause otherwise strictly prohibits preferential treatment of religion, a requirement that religiously

affiliated non-church entities be treated precisely the same as churches would not extend the house-of-worship exemption to these other entities but instead would require that the house-of-worship exemption be invalidated. That would hardly get Intervenor what it seeks here.

B. The Government May Provide Religious Exemptions Only When Needed To Alleviate Substantial Government-Imposed Burdens On Religious Exercise.

"However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988). This principle is not just practical but also constitutionally required: When official action has the effect of imposing substantial burdens on religious exercise, the government may (and sometimes must) act to ameliorate those burdens (*see, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)), subject to, among other restrictions, the constitutional prohibition against shifting the costs onto nonbeneficiaries (*see* Part A, *supra*). But when the asserted burdens on religious exercise are insubstantial (or nonexistent), or else exist independently of any governmental action, the grant of a legal exemption would constitute official promotion of religion that violates the Establishment Clause. *See Allegheny*, 492 U.S. at 613 n.59; *Texas Monthly*, 489 U.S. at 15 (plurality opinion).

Here, the government purports to afford categorical exemptions that may be taken without showing, or even asserting, a substantial government-imposed burden on religious exercise. The Religious Exemption thus exceeds the authority granted by RFRA and impermissibly promotes religion in derogation of the Establishment Clause.

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

An "accommodation of religion, in order to be permitted under the Establishment Clause, must lift 'an identifiable burden on the exercise of religion.'" *Allegheny*, 492 U.S. at 613 n.59 (quoting *Amos*, 483 U.S. at 348 (O'Connor, J., concurring)); *see also Texas Monthly*, 489 U.S. at 15 (plurality opinion) (accommodations must "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion"); *Wallace v. Jaffree*, 472 U.S. 38, 84 (1985) (O'Connor, J., concurring in the judgment) (religious accommodation must lift "state-imposed burden on the free exercise of religion" that does not result from Establishment Clause). Absent a substantial burden of this sort, a religious accommodation would impermissibly "create[ ] an incentive or inducement (in the strong form, a compulsion) to adopt [the religious] practice or conviction." Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992).

The bare assertion of a burden on religious exercise cannot meet this constitutional requirement. Granting a religious exemption from a general law, whether under RFRA or any other statute, regulation, or policy, without first objectively determining that there exists a substantial government-imposed burden on the claimants' religious exercise would unconstitutionally "single out a particular class of [religious observers] for favorable treatment and thereby have the effect of implicitly endorsing a particular religious belief." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145 n.11 (1987).

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

What the Establishment Clause requires, RFRA incorporates as an express statutory prerequisite: To assert an accommodation claim, the claimant must first demonstrate that the "[g]overnment [has] substantially burden[ed its] exercise of religion." *See* 42 U.S.C. § 2000bb-1. And because the courts "'are obliged to give effect, if possible, to every word Congress used'" (*Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 890 (9th Cir. 2011) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979))), the statutory terms "substantially" and "burden" must each be read to have meaningful, objective content.

It thus cannot be the case—nor is it—that the bare assertion that religious exercise is burdened is sufficient to trigger RFRA's requirement to accommodate. Rather, whether a RFRA claimant's religious exercise is substantially burdened is a legal question for the courts to decide, with "'substantial burden' [being] a term of art chosen by Congress to be defined by reference to Supreme Court precedent." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008) (en banc).

If a *RFRA claimant*'s assertion of a substantial burden is not enough, then neither is a categorical assumption by the *government* that burdens exists in the abstract; an individual inquiry is required for any entity seeking an accommodation. "[O]therwise, any action the federal government were to take . . . would be subject to the personalized oversight of millions of citizens. Each citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires." *Id.* at 1063. And if there is no objective assessment, the claimant "'is allowed to be a judge in his own cause,'" also violating bedrock principles of due process. *See* Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 100–01 (2017) (quoting THE FEDERALIST NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961)). That is not how law works.

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

Suppose, for example, that the government required that all children living on military bases receive wellness checkups, but a parent asserted a religious objection to blood transfusions as the ground for seeking an exemption from that requirement. The religious objection, though sincere, would be inadequate to establish that refusing wellness checkups is RFRA-protected religious exercise for that parent, because medical checkups do not involve blood transfusions. *Cf., e.g.*, *Wilson v. James*, No. 15-5338, 2016 WL 3043746, at *1 (D.C. Cir. May 17, 2016) (per curiam) (RFRA did not protect National Guardsman against discipline for sending e-mail decrying same-sex couples as a "mockery to god" because he "failed to show this letter

of reprimand substantially burdened any religious action or practice"). No nexus, no claim.

Without the gatekeeping function that RFRA's statutory prerequisites provide, Congress and the Executive Branch would be strongly deterred from accommodating religious exercise at all, for fear that any attempt to do so could then be expansively invoked to the point that it would derail the government's entire legislative or regulatory program. Religious freedom is far better served by the congressionally mandated system for accommodating religion, which treats substantial RFRA claims seriously while disposing of insubstantial ones at the threshold inquiry.

3. The Religious Exemption does not require objectors to show a substantial burden on their religious exercise—and there is none.

Without satisfying RFRA's statutory prerequisites and the constitutional mandates on which they are premised, the Interim Final Rules license "any organization with a sincerely held religious objection to contraceptive coverage" (82 Fed. Reg. at 47,813)—be it a nonprofit (*id.* at 47,810), college or university (*id.* at 47,811), closely held corporation (*id.* at 47,810), publicly traded corporation (*id.*), insurance company (*id.* at 47,811), or individual (*id.* at 47,812)—to avoid complying with the pre-existing regulatory accommodation's requirement that objectors must ask for an

exemption to receive it (*id.* at 47,808). The Rules thus go well beyond what RFRA requires or the Establishment Clause allows.

First, the government makes no individualized determination whether any objecting entity has had its religious exercise substantially burdened, much less does the regulatory scheme allow for judicial review of such determinations. Indeed, objectors do not have to assert that they are burdened, or even provide bare legal notice that they plan to take the exemption, so the government could not assess their claims if it wanted to.

Second, there is strong reason to conclude that RFRA's nexus requirement would not be satisfied. Though exemptions are nominally available "'to the extent' of the objecting entities' sincerely held religious beliefs" (*id.* at 47,809 (quoting 45 C.F.R. § 147.132(a))), objectors are not required even to state their beliefs; and there is no inquiry (and no provision for inquiry) into the legal question whether the exemption that any entity takes is religiously required. In that regard, many entities that have explained their specific objections to the coverage requirement object to just a small subset of contraceptive methods. *See id.* at 47,801. Yet because objectors do not have to voice and explain their objections to avail themselves of the Exemption, there is no assurance that they are limiting their refusals to provide coverage to what they consider to be religiously forbidden. Overbroad exclusions are possible. Indeed, they are likely:

Insurance companies would, for business reasons, almost certainly offer standard-package or off-the-shelf "objector" policies that would not be specifically tailored to each employer's objections.

Third, the government extends the Exemption to whole classes of entities without any basis to conclude that even a single class member feels burdened by either the coverage requirement itself or the terms for invoking the pre-existing accommodation. For example, the government provides exemptions for insurance companies despite being "not currently aware of [any] health insurance issuers that possess their own religious objections to offering contraceptive coverage." 82 Fed. Reg. at 47,811. The government likewise extends the exemption to publicly traded corporations, without saying that any have sought accommodation; without describing what a religious exercise or a substantial burden thereon might be for such companies; and without identifying who might assert burdens, or how, on behalf of the shareholders. *See* 82 Fed. Reg. at 47,800. These failings are noteworthy because, as the Supreme Court explained in *Hobby Lobby*, "the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable." 134 S. Ct. at 2774. And though the government contends that "[t]he mechanisms for determining whether a company has adopted and holds such principles or views is [*sic*] a matter

of well-established State law with respect to corporate decision-making," the government apparently will do nothing to ascertain whether "such principles or views . . . have been adopted and documented in accordance with the laws of the jurisdiction under which [exemption-seeking businesses] are incorporated." 82 Fed. Reg. at 47,810 & n.60.

Finally, the overwhelming majority of the Circuits to have considered the question have concluded that having to give bare notice of intent to claim the already-available religious accommodation in order to receive it is no substantial burden, even if the government will then provide the coverage.[6] Hence, RFRA does not authorize, and the Establishment Clause

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[6] *See, e.g.*, *Priests for Life*, 772 F.3d at 252–56 (D.C. Circuit); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 442–44 (3d Cir. 2015); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 459–63 (5th Cir. 2015); *Little Sisters of the Poor v. Burwell*, 794 F.3d 1151, 1180–95 (10th Cir. 2015); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 611–15 (7th Cir. 2015); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 218–26 (2d Cir. 2015); *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738, 749–50 (6th Cir. 2015); *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't Health & Human Servs.*, 818 F.3d 1122, 1148–51 (11th Cir. 2016); *but see Dordt Coll. v. Burwell*, 801 F.3d 946, 949–50 (8th Cir. 2015); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 941–43 (8th Cir. 2015).

Though the Supreme Court vacated and remanded these decisions, it instructed that the parties on remand "should be afforded an opportunity to arrive at an approach going forward that accommodates [objecting entities'] religious exercise while at the same time ensuring that women covered by [those entities'] health plans receive full and equal health coverage, including contraceptive coverage." *Zubik*, 136 S. Ct. at 1560 (internal quotation marks and citation omitted); *see also, e.g.*, *Burwell v. Dordt Coll.*,

does not allow, the government to go further in empowering objectors affirmatively to bar the government from ensuring that the coverage is provided.

As Judge Posner has explained, the government's contrary position here makes no more sense than would an argument that a conscientious objector could avoid the draft on religious grounds (without even asking to be excused from service, much less satisfying the rigorous requirements for conscientious-objector status) while affirmatively barring the government from drafting anyone one else to fill the spot. *See Notre Dame II*, 786 F.3d at 623; *Notre Dame I*, 743 F.3d at 556. Religious exemptions are not private vetoes of governmental action toward third parties.

* * *

The Supreme Court has expressed doubt that a scheme like the one here would, or could, be authorized by RFRA: In *Hobby Lobby* the Court addressed a proposed statutory amendment that would have allowed employers to refuse to provide insurance coverage for any health service otherwise required under the ACA that was contrary to any employer's "religious beliefs or moral convictions." 134 S. Ct. at 2775 n.30. The Court

136 S. Ct. 2006 (2016) (Mem.); *Dep't of Health & Human Servs. v. CNS Int'l Ministries*, 136 S. Ct. 2006 (2016) (Mem.). This the government has not done.

concluded that "a blanket exemption for religious or moral objectors" that "would not . . . subject[ ] religious-based objections to the judicial scrutiny called for by RFRA" would "extend[ ] more broadly than the pre-existing protections of RFRA." *Id.* The regulatory scheme here does not require the *prima facie* showing that the Court recognized to be necessary, and does not afford any mechanism for the government or courts to determine whether religious exemptions taken are valid. Hence, the scheme exceeds the statutory authority granted by RFRA and violates the Establishment Clause.

C. The Moral Exemption Is Just Another Iteration Of The Religious Exemption, So It Fails For The Same Reasons.

The government argued below that the Moral Exemption (82 Fed. Reg. 47,838) is broader than the Religious Exemption, and conceded, therefore, that it is not authorized by RFRA (*see* Defs.' Opp'n Pls.' Mot. Prelim. Inj. 25 (Doc. No. 51)). The Moral Exemption also lacks any other statutory authorization, thus violating the APA, for the reasons that the States have explained. *See* Pls.' Mot. Prelim. Inj. 13 & n.15 (Doc. No. 28). But because the Moral Exemption is expressly premised on the constitutional mandate that certain classes of moral views must be treated as a religion for legal purposes (*see* 82 Fed. Reg. at 47,846 (quoting *Welsh v. United States*, 398

U.S. 333, 339–40 (1970))), it is just the Religious Exemption by another name. And hence, it, too, violates the Establishment Clause.

The Supreme Court held in *Welsh*—a conscientious-objector case—that when "purely ethical or moral . . . beliefs function as a religion in [an individual's] life, such an individual is as much entitled to a 'religious' . . . exemption . . . as is someone who derives his [objection] from traditional religious convictions." 398 U.S. at 340. The Court reasoned:

> If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from [certain activities], those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by . . . God' in traditionally religious persons.

Id. The rule that moral convictions meeting this description must be treated as a religion for legal purposes is now firmly settled First Amendment law. *See, e.g.*, *United States v. Ward*, 989 F.2d 1015, 1018–19 (9th Cir. 1992); *Barraza Rivera v. I.N.S.*, 913 F.2d 1443, 1451–52 (9th Cir. 1990).

Quoting directly from *Welsh*, 398 U.S. at 339–40, the government defines "moral convictions" entitled to the Moral Exemption as those:

> (1) That the "individual deeply and sincerely holds"; (2) "that are purely ethical or moral in source and content["]; (3) "but that nevertheless impose upon him a duty"; (4) and that "certainly occupy in the life of that individual ['a place parallel to that filled by . . . God' in a traditionally religious persons," such that one could say "his beliefs function as a religion in his daily life."

82 Fed. Reg. at 47,846.

The Moral Exemption is thus coextensive and coterminous with the classes of belief systems that are the legal equivalent of a religion and must be treated as such. Accordingly, both Rules are unauthorized and unconstitutional for the reasons explained in Sections A and B, *supra*.

CONCLUSION

The Interim Final Rules privilege businesses' religious views and judgments about employees' conduct over the rights, interests, and health of the employees themselves. And the Rules afford religious exemptions from general laws without requiring objecting entities to show—or even to assert—that the government has substantially burdened their religious exercise. RFRA does not authorize, and the Establishment Clause does not allow, exemptions under those circumstances. The preliminary injunction should be affirmed for these reasons as well as those stated by the district court.

Respectfully submitted,

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-15144, et al.

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Signature of Attorney or Unrepresented Litigant: s/ Richard B. Katskee

Date: May 29, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I certify that on May 29, 2018, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Richard B. Katskee*

APPENDIX

APPENDIX OF *AMICI CURIAE*

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that represents more than 125,000 members and supporters across the country. Americans United has long supported legal exemptions that reasonably accommodate religious practice. *See, e.g.*, Br. of Ams. United for Separation of Church & State et al. as *Amici Curiae* Supporting Petitioners, *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (No. 03-9877), 2004 WL 2945402. But Americans United opposes religious exemptions that unduly harm third parties or favor a religious practice not actually burdened by the government. *See, e.g.*, Br. Intervenors–Appellees Jane Does 1–3, *Univ. of Notre Dame v. Burwell*, 786 F.3d 606 (7th Cir. 2015) (No. 13-3853), 2014 WL 523338 (representing Notre Dame students as intervening defendants).

Bend the Arc: A Jewish Partnership for Justice

Bend the Arc: A Jewish Partnership for Justice is the nation's leading progressive Jewish voice empowering Jewish Americans to advocate for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for

all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

Hadassah, The Women's Zionist Organization of America, Inc.

Hadassah, The Women's Zionist Organization of America, Inc., founded in 1912, has over 330,000 Members, Associates, and supporters nationwide. While traditionally known for its role in initiating and supporting healthcare and other initiatives in Israel, Hadassah has long-standing commitments to improving healthcare access in the United States and supporting the fundamental principle of the free exercise of religion. Hadassah strongly believes that women have the right to make family-planning decisions privately, in consultation with medical advice, and in accordance with one's own religious, moral, and ethical values.

HEART Women & Girls

HEART promotes sexual health and sexual-violence awareness in Muslim communities through health education, advocacy, research, and training. We believe in reproductive agency and choice but acknowledge that there are systems in place that act as barriers for individuals to exercise their agency. In order to foster real choice for individuals in our communities, we advocate for systems-level changes that dismantle these barriers.

Interfaith Alliance Foundation

Interfaith Alliance Foundation is a 501(c)(3) nonprofit organization that celebrates religious freedom by championing individual rights, promoting policies to protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance Foundation's members belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance Foundation has a long history of working to ensure that religious freedom is a means of safeguarding the rights of all Americans and is not misused to favor the rights of some over others.

Jewish Women International

Jewish Women International has 50,000 members and supporters across the country and is the leading Jewish organization working to prevent the cycle of violence and empower women and girls to realize their full potential. JWI has been an unwavering Jewish voice for comprehensive reproductive-health services, and continues to advocate for access to reproductive-health information and services, which build a foundation for healthier families and communities. JWI believes that women should be able to make private health decisions according to the dictates of their own faith and conscience.

Methodist Federation for Social Action

The Methodist Federation for Social Action was founded in 1907 and is dedicated to mobilizing the moral power of the faith community for social justice through education, organizing, and advocacy. MFSA believes that every child should be a wanted child and that access to affordable family planning should be readily available to all people and not restricted by the government or employers.

Muslim Advocates

Muslim Advocates is a national legal-advocacy and educational organization founded in 2005 that works on the front lines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civic education. Muslim Advocates also serves as a legal resource for the Muslim American community, promoting the full and meaningful participation of Muslims in American public life.

National Council of Jewish Women, Inc.

The National Council of Jewish Women is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding

individual rights and freedoms. NCJW's Principles state that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain democratic society." We also resolve to work for "Laws, policies, and practices that protect every woman's right and ability to make reproductive and child bearing decisions." Consistent with our Principles and Resolutions, NCJW joins this brief.

People For the American Way Foundation

People For the American Way Foundation is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF and its advocacy affiliate People For the American Way have conducted extensive education, outreach, litigation, and other activities to promote these values, including helping draft and support the Religious Freedom Restoration Act. PFAWF strongly supports the principle of the Free Exercise Clause of the First Amendment and RFRA as a shield for the free exercise of religion, protecting individuals of all faiths. PFWAF is concerned, however, about efforts, such as in this case, to transform this important shield into a sword

to obtain accommodations that unduly harm others, which also violates the Establishment Clause. This is particularly problematic when the effort is to obtain exemptions based on religion or moral beliefs that harm women's ability to obtain crucial reproductive-healthcare coverage, as in this case.

Reconstructing Judaism

Reconstructing Judaism is the central organization of the Reconstructionist movement. We train the next generation of rabbis, support and uplift congregations and *havurot*, and foster emerging expressions of Jewish life—helping to shape what it means to be Jewish today and to imagine the Jewish future. There are over 100 Reconstructionist communities in the United States committed to Jewish learning, ethics, and social justice. Reconstructing Judaism believes both in the importance of the separation of church and state and that the reproductive rights of women must be preserved and protected.

Reconstructionist Rabbinical Association

The Reconstructionist Rabbinical Association is a 501(c)(3) organization that serves as the professional association of 340 Reconstructionist rabbis, the rabbinic voice of the Reconstructionist movement, and a Reconstructionist Jewish voice in the public sphere. Based on our understanding of Jewish teachings that every human being is

created in the divine image, we have long advocated for public policies of inclusion, antidiscrimination, and equality. Based on our commitment to the dignity of every human being, we have long-standing resolutions and statements calling for equal access to healthcare—including access to contraceptive services—for all individuals.

Sikh Coalition

The Sikh Coalition is a community-based civil-rights organization that defends civil liberties, including religious freedom, for all Americans. Our mission is to promote educational awareness and advocacy, and to provide legal representation in moving toward a world in which Sikhs and other religious minorities may freely practice their faith without bias or discrimination. The Sikh Coalition is the largest community-based Sikh civil-rights organization in the United States. Since its inception on September 11, 2001, the Sikh Coalition has worked to defend civil rights and liberties for all people, to empower the Sikh community, to create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and to educate the broader community about Sikhism in order to promote cultural understanding and diversity. The Sikh Coalition has vindicated the rights of numerous Sikh Americans subjected to bias and discrimination because of their faith. Ensuring the rights of religious and

other minorities is a cornerstone of the Sikh Coalition's work. The Sikh Coalition joins this *amicus* brief in the belief that the Establishment Clause is an indispensable safeguard for religious-minority communities. We believe strongly that Sikh Americans across the country have a vital interest in the separation of church and state.