No. 16-1275

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REAL ALTERNATIVES INC., *et al.*,

Plaintiffs-Appellants,

v.

SYLVIA M. BURWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants-Appellees.

On Appeal from a Final Judgment of the
United States District Court for the Middle District of Pennsylvania
Case No. 1:15-cv-00105, Hon. John E. Jones, III

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ANTI-DEFAMATION LEAGUE; CENTRAL CONFERENCE OF AMERICAN RABBIS; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; NATIONAL COUNCIL OF JEWISH WOMEN; PEOPLE FOR THE AMERICAN WAY FOUNDATION; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM AS *AMICI CURIAE* SUPPORTING APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amici are all nonprofit corporations. None has any parent corporation, 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 share a commitment to religious freedom and the separation of church and state. Consistent with Supreme Court precedent, *amici* support the government's authority to grant certain religious accommodations that do not impose undue burdens or harms on innocent third parties. In this appeal, Appellants seek to upend that carefully calibrated system of permissible accommodations by demanding that religious exemptions and accommodations provided to houses of worship must be extended to nonreligious entities as well—thus creating strong incentives for government to decline to afford permissible religious accommodations to anyone. *Amici* oppose Appellants' effort to so undermine critical protections for the religious liberty of all Americans.

The *amici* are:

- Americans United for Separation of Church and State
- Anti-Defamation League
- Central Conference of American Rabbis
- Hadassah, the Women's Zionist Organization of America, Inc.

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that 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 the filing of this brief.

- National Council of Jewish Women
- People For the American Way Foundation
- Union for Reform Judaism
- Women of Reform Judaism

Each *amicus*'s individual statement of interest is set forth in the Appendix.

INTRODUCTION

In 2010, Congress passed the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). The ACA's implementing regulations require employer-provided health-insurance plans to cover FDA-approved contraceptives at no cost to plan participants. *See* 45 C.F.R. § 147.130(a)(1)(iv). The regulation exempts houses of worship and their integrated auxiliaries from that requirement, with the result that employees of objecting churches do not receive contraceptive coverage. *Compare* 45 C.F.R. § 147.131(a) *and* 77 Fed. Reg. 8725 (Feb. 15, 2012) *with* 26 U.S.C. § 6033(a)(3)(A)(i), (iii). A wider set of religious nonprofit and for-profit entities may likewise opt out of providing contraceptive coverage, but the government arranges for their employees to receive the coverage through third parties at no cost to, and with no participation of, the objecting entities. *See* 45 C.F.R. § 147.131(b)–(c); 78 Fed. Reg. 39,870, at

39,874–39,875 (July 2, 2013); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751 (2014).

As this Court is aware, a number of religious nonprofits assert that even the act of opting out of the contraceptive-coverage regulation violates their rights under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*, because it triggers the government's provision of contraceptive coverage through third parties. *See, e.g.*, *Geneva Coll. v. Sec'y U.S. Dep't. of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015), *vacated and remanded on other grounds*, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (remanding for more fact-finding while expressing "no view on the merits of the cases"). These religious universities, hospitals, and other entities argue that they should be treated just like churches: They seek to receive the ACA's full house-of-worship exemption rather than the accommodation for religiously affiliated entities—meaning that they wish wholly to block provision of contraceptive coverage to their employees and students. Their challenges remain pending.

As those institutions continue to argue vociferously for the special right of religiously affiliated entities to receive special treatment under RFRA, Real Alternatives now makes equally zealous arguments that there can be no special religious exemptions at all: If churches receive a religious exemption, they say, then so too must nonreligious entities.

That argument is wrong as a matter of law. When government grants to churches a religious accommodation from a neutral, generally applicable law, it does not thereby take on the obligation to extend a general exemption to nonreligious objectors as well. And the Religious Freedom Restoration Act does not create a right to compel others to participate in one's religious exercise.

STATEMENT

Real Alternatives is an avowedly nonreligious 501(c)(3) nonprofit organization. *See Our Mission*, REAL ALTERNATIVES, http://www.tinyurl.com/AboutUsRealAlt (last visited July 26, 2016); *Service Provider Approval Process*, REAL ALTERNATIVES, http://www.tinyurl.com/RAserviceprovider (last visited July 26, 2016). It does not hold itself out as a religious entity, is not incorporated as a religious entity, is not affiliated with a religious entity, and has not adopted or propounded religious or theological doctrine. *See Real Alternatives, Inc. v. Burwell*, 2015 WL 8481987, at *3 (M.D. Pa. Dec. 10, 2015). It contracts with states to provide certain parenting and prenatal services, but it expressly excludes and forbids presentation of or counseling about emergency contraception and abortion in the performance of the contracts. *See Our Mission*, *supra*. Real Alternatives then subcontracts for the delivery of the state-funded services solely with service providers that refuse to counsel women about abortion

and emergency contraception under any circumstance (*i.e.*, not even in cases of rape or incest). *Service Provider Approval Process*, *supra*.

In keeping with its nonreligious views on abortion, Real Alternatives seeks to exclude contraceptive coverage from its employer-provided health plan. Appellant Br. 17–18. Invoking equal protection and the Administrative Procedure Act, it argues that the Court must grant to it the house-of-worship exemption from the ACA's contraceptive-coverage requirement—in other words, treat it as a church—because otherwise, it contends, the ACA would impermissibly discriminate in favor of religion. Real Alternatives does not seek the accommodation for religiously affiliated entities—an accommodation that, as explained above, ensures that the objecting religious entity does not provide or pay for contraceptive coverage but still provides for the entity's employees to receive that coverage by other means.

Appellants Bagatta, Lang, and McKeown are Real Alternatives's officers and employees. *Real Alternatives*, 2015 WL 8481987, at *4. They, their wives, and their seven children—including three daughters—receive health insurance through Real Alternatives. *Id.* All three men are religiously opposed to hormonal contraception, IUDs, and abortion (JA 99), and they seek to ensure that the health plan does not cover contraceptives. 2015 WL 8481987, at *4. They argue that RFRA gives them the right to

demand a contraceptive-exclusive insurance plan not just for themselves but also for their dependents.

SUMMARY OF ARGUMENT

Real Alternatives contends that it has constitutional and statutory rights to be treated like a church. But it is not a church. It is not closely related to a church; it is not distantly related to a church; it is not religiously affiliated in any sense. Rather, it is an avowedly nonreligious organization with a single-issue nonreligious commitment against abortion.

The government has legitimate interests in respecting the freedom of conscience of religious denominations and houses of worship. In furthering these interests, the government may extend limited accommodations to these religious and spiritual sanctuaries so as not to impose undue burdens on their ability to preserve and advance their theological and doctrinal commitments. When government chooses to respect the religious integrity of churches in this way, it has a constitutional obligation to extend the same treatment to similarly situated nontheistic entities, such as Humanist congregations. But it does not abdicate its legitimate authority to pass general legislation that regulates nonreligious entities like Real Alternatives. If it did, then all existing legal exemptions for churches—if they were not also extended to nonreligious entities—would violate the Constitution. As a result, the government would be sharply deterred from

granting any religious accommodations whatever, for fear that Real Alternatives's argument would expand those accommodations without limit, undermining important legislative and regulatory programs.

Nor does participation in a health plan that gives individuals access to certain services, but neither advocates for, nor coerces anyone to use, those services, substantially burden religious exercise under RFRA. Those who object on religious grounds to any particular benefit can decline to use it. Although they may dislike that other plan participants—whether dependents or other employees—may use the benefit, that is not a legally cognizable substantial burden on religious exercise. In all events, requiring secular employers' health plans to include contraceptive coverage is the least restrictive means of furthering the government's compelling interests in public health and gender equality. A religious accommodation may exempt individuals or institutions from a neutral law when the accommodation harms no one—such as allowing a Sikh servicemember to wear a turban despite a military dress code (*see Singh v. McHugh*, 2016 WL 2770874 (D.D.C. May 13, 2016)) or a Muslim inmate to grow a beard when other inmates may do so for nonreligious reasons (*see Holt v. Hobbs*, 135 S. Ct. 853 (2015)). It does not confer the right to impose one's religious beliefs on others.

ARGUMENT

I. Equal Protection Does Not Require Extending The ACA's House-of-Worship Exemption To Nonreligious Entities.

Equal protection means treating similarly situated parties similarly; it does not require identical treatment of differently situated parties. *See generally, e.g.*, *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209 (D.C. Cir. 2013). Parties are similarly situated for equal-protection purposes "when they are alike 'in all relevant aspects.'" *Startzell v. City of Philadelphia*, 533 F.3d 183, 203 (3d Cir. 2008) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). When it comes to obtaining a religious accommodation from a generally applicable law, Real Alternatives, a nonreligious state contractor, is nothing like a church, synagogue, mosque, or Buddhist monastery in any relevant respect. The government has a rational basis to treat houses of worship—sanctuaries for the development of individuals' comprehensive moral systems—differently from academic think tanks, advocacy organizations, providers of publicly funded services, and other nonprofits. That is what the government has done here.

A. The ACA's house-of-worship exemption serves the legitimate purpose of respecting church autonomy.

Real Alternatives's equal-protection claim is subject to rational-basis scrutiny. *See* Br. 27–28; Appellee Br. 12. *See generally Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004) (when religious distinctions comport with First

Amendment, rational-basis scrutiny applies to equal-protection claims). Thus, Congress's decision to treat houses of worship differently from other institutions and individuals under the ACA need only "bear[ ] a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). And treating houses of worship differently from ordinary, mine-run nonprofits straightforwardly serves the government's legitimate interests in preserving religious freedom by respecting church autonomy.

The government established the ACA's house-of-worship exemption "to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46,621, at 46,623 (Aug. 3, 2011); *accord* 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013). This principle of noninterference in the internal workings of churches has its roots in "the text of the First Amendment itself, which gives special solicitude to" houses of worship by recognizing their "'independence from secular control or manipulation—in short, [their] power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706, 712 (2012) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952)).

Thus, the First Amendment prohibits government from interposing itself in theological disputes, appointments of ministers, or questions of distribution of church property; government must not dictate to houses of worship what to believe or how to structure their relations with clergy to implement and teach those beliefs. *See, e.g.*, *Hosanna-Tabor*, 132 S. Ct. 694 (employment decisions for ministers); *Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich*, 426 U.S. 696 (1976) (internal theological disputes and religious tribunals); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969) (church property); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929) (appointment of clergy).

Even when noninterference is not strictly required by the First Amendment, government has discretion to grant certain religious accommodations, subject to Establishment Clause restrictions. *See Cutter v. Wilkinson*, 544 U.S. 709 (2005) (identifying constitutional limitations on religious accommodations, including rule that accommodations must not burden third parties). These accommodations may be extended to houses of worship and religious denominations, without applying to all nonprofit entities, in order to "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions" (*Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-*

Day Saints v. Amos, 483 U.S. 327, 335 (1987)). In part because of this deference to ecclesiastical governance, the government has historically granted to houses of worship a wide array of permissive accommodations that reduce or relieve general legal obligations—including, for example, burdens imposed by zoning and land-use regulations (Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc), retirement-plan regulations (Employee Retirement Income Security Act, 29 U.S.C. § 1003(b)(2)), requirements that nonprofits make annual informational tax filings (Internal Revenue Code, 26 U.S.C. § 6033(a)(3)(A)(i), (iii)), and requirements that employers not discriminate on the basis of religion (Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a)).

Like these accommodations, the exemption from the ACA's contraceptive-coverage regulation is intended to respect the autonomy of houses of worship to establish doctrine and govern their own internal operations. *See* 76 Fed. Reg. at 46,623; 78 Fed. Reg. at 8461. The principal question in this case, then, is whether Real Alternatives, an avowedly nonreligious entity, is tantamount to a church, such that the government's decision to respect church autonomy must apply to it also. The answer to that question is an unequivocal "no."

B. Real Alternatives is not like a house of worship or a religious denomination, and its views on abortion are not like a religion.

Real Alternatives's sole professed moral commitment—its disapproval of abortion—is certainly shared by some religious denominations. But that does not make Real Alternatives the equivalent of a church for equal-protection purposes.

1. At its most basic, a church is "an organization that includes a body of believers who assemble regularly for communal worship." *Found. of Human Understanding v. United States*, 614 F.3d 1383, 1387 n.2 (Fed. Cir. 2010). As the district court recognized, churches and religious denominations provide "a comprehensive code by which individuals may guide their daily activities." *Real Alternatives*, 2015 WL 8481987, at *14; *see, e.g.*, *United States v. Seeger*, 380 U.S. 163, 176 (1965) (religion is a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God"); *Africa v. Pennsylvania*, 662 F.2d 1025, 1032–33 (3d Cir. 1981) (at minimum, religion must tackle the "[f]undamental and ultimate questions" and provide overarching moral principles).

Typical features include: a code of doctrine and discipline; a distinct system of ecclesiastical governance (like a Catholic canon-law court or a Jewish *beit din*); ordained clergy or faith leaders (like ministers, rabbis, or

imams); prescribed courses of study, academies, or other training for those faith leaders; a distinct religious history, creed, and literature (such as the Bible, Qur'an, or Buddhist Sutras); a membership that does not jointly belong to other houses of worship; and established places or times of congregation (such as services or assemblies). *See Found. of Human Understanding*, 614 F.3d. at 1387 n.2 (outlining IRS's test for church status).

2. The courts have consistently—and correctly—concluded that certain nontheistic institutions, such as ethical societies, are the legal equivalents of churches or religious denominations and therefore are entitled to the same legal treatment. *See, e.g.*, *Ctr. for Inquiry, Inc. v. Marion Cir. Ct. Clerk*, 758 F.3d 869, 872–73 (7th Cir. 2014) (Buddhism, Jainism, Shintoism, and some forms of Taoism are nontheistic religions; Humanist celebrants are nontheistic equivalent of clergy); *Glassroth v. Moore*, 335 F.3d 1282, 1294 (11th Cir. 2003) ("For First Amendment purposes religion includes non-Christian faiths and those that do not profess belief in the Judeo-Christian God; indeed, it includes the lack of any faith.").

That is true when (and because) these institutions hold a place in the lives of their members that traditional theistic churches hold for religious adherents—including, most notably, providing comprehensive moral codes,

principles, and answers to ultimate questions about the meaning and purpose of life. *See, e.g.*, *Malnak v. Yogi*, 592 F.2d 197, 208–10 (3d Cir. 1979) (Adams, J., concurring) (nontheistic belief system is "religion" if it (1) deals with questions of "ultimate concern"; (2) provides answers that speak to comprehensive and ultimate truth; and (3) has formal characteristics analogous to those of traditional religions); *Wash. Ethical Soc'y v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957) (nontheistic ethical society that had regular Sunday meetings, "Leaders" who preached to members and provided spiritual guidance, and ceremonies for naming, marrying, and burying members qualified for tax exemption as church); *Fellowship of Humanity v. Alameda County*, 315 P.2d 394 (Cal. Dist. Ct. App. 1957) (nontheistic fellowship qualified for tax exemption as church because it conducted itself and propounded belief system like churches do).

They often have celebrants, akin to clergy, who provide instruction to members and perform marriages, funerals, and other ceremonies; they have comprehensive statements of principle and central texts, akin to traditional theology and holy scriptures; and they have regular gatherings or meetings, akin to traditional worship services, where members seek ethical guidance and find comfort in difficult times. *See, e.g.*, *Ctr. for Inquiry*, 758 F.3d 869 (Humanist celebrants equivalent to clergy for solemnizing marriages); *Humanist Manifesto II*, AMERICAN HUMANIST ASSOCIATION,

http://www.tinyurl.com/manifestoII (last visited July 28, 2016); *About*, SUNDAY ASSEMBLY, http://www.tinyurl.com/AboutSA (last visited July 28, 2016). Hence, these groups are entitled to equal treatment with churches.

3. As the district court recognized, Real Alternatives is nothing like a church, a religious denomination, or their nontheistic counterparts. Not in identity, not in structure, not in aim, not in purpose, and not in function. *See Real Alternatives*, 2015 WL 8481987, at *14.

First of all, Real Alternatives's single-issue stance on abortion is not the nontheistic equivalent of a religion. *See id.* Though undeniably sincere and premised on moral views, opposition to abortion "does not operate to fill the same position in one's mind that religion can occupy" (*id.*) or offer answers to ultimate theological and philosophical questions about the meaning and purpose of life. Rather, it is "[m]ore akin to a political position with moral underpinnings" (*id.*), such as a commitment to the humane treatment of animals or to defining marriage as an institution only for different-sex couples. Those commitments may be important to the people who hold them; but they are not a religion in any legally or theologically accepted sense; and organizations do not become quasi-churches for equal-protection purposes merely by espousing a commitment of that sort.

Beyond that, Real Alternatives lacks the features and structures of a church: It has no ecclesiastical government or comprehensive code of moral

doctrine; no ordained ministers or prescribed course of clerical study; and no religious or spiritual history, creed, or literature. Its three employees are adherents to at least two different faiths. *See id.* at *4 (identifying Bagatta and Lang as Catholic and McKeown as Evangelical Christian). And far from having an established congregation and worship services, Real Alternatives is an ordinary place of business that operates state-funded programs.

In short, Real Alternatives is functionally similar not to a church, but to the countless nonreligious 501(c)(3) nonprofit organizations that take morally informed positions on some discrete set of issues. *Cf., e.g.*, *Our Mission*, NAACP, http://www.naacp.org/pages/our-mission (last visited July 28, 2016) (describing NAACP's moral commitment to "ensur[ing] the political, educational, social, and economic equality of rights of all persons and to eliminat[ing] race-based discrimination"); *About Us*, NATIONAL ORGANIZATION FOR MARRIAGE, http://www.nationformarriage.org/about (last visited July 28, 2016) (mission is "to protect marriage and the faith communities that sustain it"). While these organizations may have strong moral commitments, they are not situated similarly to churches.

4. The contrary conclusion of the district court in *March for Life v. Burwell*, 128 F. Supp. 3d 116 (D.D.C. 2015), *appeal filed*, No. 15-5301 (D.C. Cir. Oct. 30, 2015), is based on both an incorrect view of what it means to be similarly situated for equal-protection purposes and an incorrect

characterization of the ACA's house-of-worship exemption. The *March for Life* court concluded that a nonreligious anti-abortion group had an equal-protection right to receive the ACA's house-of-worship exemption because it shared with some religious groups "the precise attribute selected for accommodation" (*id.* at 126)—namely, the view that abortion is wrong. But the attribute that Congress selected for accommodation is not opposition to abortion; it is status as a house of worship. The purpose of the exemption was not to let employers' moral commitments trump congressional will, but to respect the autonomy of houses of worship—regardless of their stance on contraception.

If fervency of desire for an exemption alone were sufficient to confer equal-protection rights, as the *March for Life* court opined, then merely *asserting* an equal-protection challenge would create an absolute legal entitlement to be treated like a church, because those who sue for privileges afforded to churches surely want what they are requesting. And the NAACP, the NRA, Planned Parenthood, Toys for Tots, the American Red Cross, and virtually every other nonreligious nonprofit would be entitled to demand all the legal rights and protections that churches receive. The National Collegiate Athletic Association, which made nearly $1 billion in 2014 (Maxwell Strachan, *The NCAA Just Misses $1 Billion in Annual Revenue*, HUFFINGTON POST (Mar. 11, 2015), http://www.tinyurl.com/

revenueNCAA), would have the right to ignore ERISA's protections for employees' retirement savings (*cf.* 26 U.S.C. § 410(c)(1)(B); 26 U.S.C. § 414(e)), despite this Court's holding that only churches may operate ERISA-exempt church plans (*Kaplan v. Saint Peter's Healthcare Sys.*, 810 F.3d 175 (3d Cir. 2015)). And hospitals, universities, and other charitable and philanthropic organizations across the country could invoke the Religious Land Use and Institutionalized Persons Act to avoid zoning regulations so that they could build high-rise offices and research facilities in residentially zoned or historic neighborhoods (*see* 42 U.S.C. § 2000cc).

In short, if this Court were to accept Real Alternatives's if-they-get-it-then-we-get-it-too argument, any religious accommodations for houses of worship would automatically be expanded into all-inclusive exemptions available to every nonprofit entity (or at least to all that invoke some moral commitment or objection)—and under *Hobby Lobby*, *supra*, to closely held for-profit corporations as well. Legislatures and regulatory agencies would therefore be sharply deterred from granting any permissive accommodations to churches—and would be loath to acknowledge even constitutionally required ones—for fear that doing so would inevitably lead to unlimited expansions of the accommodations by groups such as Real Alternatives, thus undermining carefully crafted regulatory programs. Indeed, Real Alternatives's requested rule would create intense political

pressure to repeal the thousands of religious accommodations that have already been enacted at the federal, state, and local levels, lest they become vehicles to avoid compliance by anyone who dislikes the underlying laws. The result would be insuperable obstacles to governmental efforts to legislate while also accommodating religion.

5. Moreover, if Real Alternatives were correct, many of the existing house-of-worship exemptions would violate the Establishment Clause. Although government may constitutionally create some accommodations that go beyond the Free Exercise Clause, the Establishment Clause prohibits accommodations that harm third parties. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). While that may be the effect of certain exemptions for houses of worship also, raising questions about the underlying validity of even carefully cabined exemptions, allowing countless nonreligious employers to piggyback on religious exemptions in order to skirt generally applicable laws protecting employees and their families would far exceed the constitutional limitations that protect against harms to third parties.

In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), for example, the Supreme Court struck down a statute permitting all employees to take off the Sabbath of their choosing, because the statute gave Sabbatarians an unqualified religious exemption without considering the burdens on their employers and their fellow employees. *Id*. at 709–11. According to the Court,

this unqualified exemption "contravene[d] a fundamental principle of the Religion Clauses" because "'[t]he First Amendment . . . gives no one the right to insist that in pursuit of [his] own interests others must conform their conduct to his own religious necessities.'" *Id.* at 710 (*quoting Otten v. Balt. & O.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)). Similarly, in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the Court struck down a sales-tax exemption for religious periodicals, because an accommodation that "burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community." *Id.* at 15 (quoting *Amos*, 483 U.S. at 348 (O'Connor, J., concurring in judgment)). And in *Cutter*, the Court upheld the Religious Land Use and Institutionalized Persons Act, which accommodates religious exercise in prison and in the enforcement of land-use regulations, with the caveat that, when "[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." 544 U.S. at 720.

Most recently, in *Hobby Lobby*, *supra*, the Supreme Court afforded to closely held corporations the right to opt out of the ACA's contraceptive-coverage requirement on religious grounds by invoking the accommodation

for religiously affiliated entities. The Court did so, however, solely because the government's administration of the accommodation (which entails arranging for the coverage to be provided by third parties) meant that the effect on women's access to contraception would be "precisely zero." 134 S. Ct. at 2760. Justice Kennedy, who supplied the crucial fifth vote, wrote separately to emphasize that an entity's religious exercise may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Id.* at 2787 (Kennedy, J., concurring). The same compelling interests are at issue here. *See infra* Section II.B. That some house-of-worship exemptions may burden third parties, such as church employees who perform no religious functions, poses difficult questions about the proper balancing of individual rights and church autonomy. But there are no such difficulties here: Treating all nonprofit organizations like churches, as long as they voice some moral commitment to something, would expand the exemptions well beyond what is constitutionally permissible, while also making legislatures hesitate to provide even carefully crafted, entirely benign religious accommodations to churches for fear that me-too demands would expand the exemptions without limit.

* * *

Equal protection is a constitutional commitment of the highest order. But it does not supersede the First Amendment principle that, subject to the Establishment Clause's limitations, government may avoid interfering with church doctrine and governance. If government were deterred from affording these protections to houses of worship for fear that entire regulatory programs would be derailed by claimants like Real Alternatives, religious freedom—and the citizens who depend on it—will be the victims.

II. The Religious Freedom Restoration Act Does Not Permit Real Alternatives's Employees To Demand Contraceptive-Coverage-Free Health Insurance.

RFRA provides that if a claimant establishes that his or her religious exercise is substantially burdened by a neutral, generally applicable law, then the government must either demonstrate that the law is narrowly tailored to serve a compelling governmental interest, or grant a religious accommodation. 42 U.S.C. § 2000bb-1. The question here is whether Real Alternatives's employees have a right under RFRA to demand an insurance plan that excludes contraception for themselves and their fellow plan participants. They do not.

A. Requiring employees to participate in a health plan that includes contraceptive coverage does not substantially burden religious exercise.

No one questions the sincerity of the employee-plaintiffs' religious beliefs. But "[w]hether a burden is 'substantial' under RFRA is a question

of law, not a question of fact." *Geneva Coll.*, 778 F.3d at 442 (citing *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011)). Therefore, the courts must still engage in "a qualitative assessment of the burden that the accommodation imposes on the [claimants'] exercise of religion" (*id.*), which is precisely what the district court did here (2015 WL 8481987, at *22).

Burdens on religious exercise are legally cognizable only when government puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981); *see also E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 456 (5th Cir. 2015) (substantial-burden inquiry asks whether "the challenged law pressure[s plaintiffs] to modify [their religious] exercise"), *vacated and remanded on other grounds*, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). Real Alternatives's employees have not shown any compelled change in their religious exercise because of their participation in an ACA-compliant health plan, so the required threshold inquiry is not satisfied.

1. As the district court explained, participating in a contraceptive-inclusive plan "simply does not cause Plaintiffs to modify their behavior in violation of their beliefs—arguably they have not modified any behavior at all." 2015 WL 8481987, at *23. Health plans provide for free contraceptives only to insureds who choose to use that benefit. They do not require insureds to use or advocate for contraception. If contraceptive-exclusive coverage

were provided, the employee-plaintiffs would do just what they do now: Take advantage of some of the many plan benefits while forgoing others.

2. The only behavior that the government's contraceptive-coverage regulation modifies is "the behavior of a third party, the insurer." *Id.* And the Supreme Court has consistently held that individuals do not have a religious veto over governmental action that affects them only incidentally and does not coerce them to violate their faith.

In *Bowen v. Roy*, 476 U.S. 693 (1986), for example, the Supreme Court held that the government did not substantially burden religious exercise by identifying the plaintiff's daughter using a Social Security number—even though the plaintiff believed that using the number would harm his daughter's spirit. *See id.* at 699. "Just as the government may not insist that [private parties] engage in any set form of religious observance, so [private parties] may not demand that the Government join in their chosen religious practices." *Id.* at 699–700.

Similarly, in *Lyng v. Northwest Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the Supreme Court held that the government did not substantially burden the religious exercise of Indian tribes even when it destroyed sacred lands for road construction. The Court explained that the First Amendment "does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain

religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Id.* at 450–51. "'[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" *Id.* at 451 (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

Similarly, the government cannot compel the employee-plaintiffs here to obtain and use contraceptives, but neither can the employees compel the government to structure its relations with a third party—Real Alternatives's insurance carrier—to promote the employees' views about contraception. "The Supreme Court has consistently rejected the argument that an independent obligation on a third party can impose a substantial burden on the exercise of religion in violation of RFRA." *Geneva Coll.*, 778 F.3d at 440.

3. Because, as a matter of law, legal obligations on third parties cannot substantially burden religious exercise, neither can third parties' private decisions. Hence, choices by other plan participants to take advantage of contraceptive coverage cannot substantially burden the employee-plaintiffs' religious exercise. *See E. Tex. Baptist Univ.*, 793 F.3d at 459 ("RFRA confers no right to challenge the independent conduct of third parties"); *Priests for*

Life v. U.S. Dep't. of Health & Human Servs., 772 F.3d 229, 246 (D.C. Cir. 2014) (religious objectors "have no RFRA right to be free from the unease, or even anguish, of knowing that third parties are legally privileged or obligated to act in ways their religion abhors"), *vacated and remanded on other grounds*, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

Indeed, even when individuals have a clear right to an accommodation for themselves, they have no right whatever to compel the government to impose that accommodation on others. In prison, for example, inmates have the right to demand kosher meals for religious reasons. *See* 42 U.S.C. § 2000cc-1; *Kretchmar v. Beard*, 241 Fed. App'x 863, 865 (3d Cir. 2007) (inmates have right to receive cold Kosher meals). But no court has ever so much as hinted that an inmate can impose his religious beliefs on others by insisting that the entire prison commissary be kosher. Yet that is precisely the claim that the employee-plaintiffs here make when they argue that Real Alternatives's insurer should provide, and their dependents and other plan participants should receive, contraception-exclusive insurance to satisfy the employee-plaintiffs' religious beliefs.

As the district court noted, "no court has as of yet permitted an individual to demand a health plan tailored to his or her exact religious beliefs, and no insurance provider supplies one." *Real Alternatives*, 2015 WL 8481987, at *24. A Jehovah's Witness cannot demand a health plan that

excludes blood transfusions—much less force her employer's group plan to exclude transfusions for everyone—though she may certainly refuse a covered transfusion recommended by her doctor. *Cf. Faith Healing: Two Christian Groups That Oppose Medical Care*, RELIGIOUS TOLERANCE, http://www.tinyurl.com/medobjection1 (last visited July 28, 2016). And a member of the Nemenhah Band cannot demand a health plan that excludes chemotherapy for those who need and want that treatment. *Cf.* Wendy Cage, *When Medicine and Religion Conflict Around Children: The Case of Daniel Houser*, RELIGION DISPATCHES (June 18, 2009), http://www.tinyurl.com/medobjection2. Instead, an objector's recourse is to decline the services that she does not want.

4. Even an optional contraception-free plan for individual employees who request it would impermissibly burden third parties—namely, the employees' dependents. *See also infra* Section II.B. The employee-plaintiffs here have no right to use RFRA to impose their religious beliefs on their wives and daughters by forcing the government to deny them the covered medical services guaranteed by the ACA. The ability to make others conform to one's religious beliefs is simply not a right that the Constitution or RFRA affords.

B. The contraceptive-coverage regulation is the least restrictive means of furthering the government's compelling interests in public health and gender equality.

Even if the contraceptive-coverage regulation placed substantial burdens on the religious exercise of Real Alternatives's employees, which it does not, the regulation is justified as the least restrictive means of furthering the government's compelling interests in gender equality and public health.

1. Five members of the Supreme Court and a panel of the D.C. Circuit have recognized the government's compelling interests in ensuring seamless access to cost-free contraception. *See Priests for Life*, 772 F.3d at 258–64; *Real Alternatives*, 2015 WL 8481987, at *25–27 (describing compelling interests identified in *Hobby Lobby*). Unintended pregnancies "elevate health risks for women and children and impose other costs on society. Women whose pregnancies are unintended are more likely to experience depression, anxiety, or domestic violence during those pregnancies." *Priests for Life*, 772 F.3d at 262. "[Contraceptive] coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening. And the [contraceptive-coverage] mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain." *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting) (citation omitted).

2. Access to reliable contraception has also revolutionized women's ability to make long-term plans about school, work, and marriage, allowing women to achieve personal, educational, and professional goals that were previously unattainable. *See, e.g.*, Claudia Goldin & Lawrence F. Katz, *Career and Marriage in the Age of the Pill*, 90 AM. ECON. REV. 461, 461, 463–64 (2000), http://tinyurl.com/ageofpill. Improved access to contraception substantially increases the number of women who graduate from college and go on to earn advanced professional degrees. Martha J. Bailey et al., Nat'l Bureau Econ. Research, Working Paper No. 17922, *The Opt-In Revolution? Contraception and the Gender Gap in Wages* 1–2 (Mar. 2012), http://tinyurl.com/contraceptionwagegap. These expanded educational opportunities, combined with reduced risk of unplanned career interruptions, have allowed women to enter fields such as law and medicine that were previously dominated by men. Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730, 748–49 (2002), http://tinyurl.com/powerofpill. Access to affordable contraception thus helps women have the same professional opportunities as men do.

3. As a matter of law, women have constitutional rights to reproductive autonomy—rights that are not subject to the religious views of their husbands and fathers. *Planned Parenthood of Se. Pa. v. Casey*, 505

U.S. 833 (1992); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Parents United for Better Sch., Inc. v. Sch. Dist. of Phila. Bd. of Educ.*, 978 F. Supp. 197, 209–12 (E.D. Pa. 1997) (neither common law nor U.S. Constitution gives parents veto over minor's access to contraceptives), *aff'd on other grounds*, 148 F.3d 260 (3d Cir. 1998). And many women and girls, including those whose religious traditions disapprove of contraception, exercise that right by choosing to use contraception. *See, e.g.*, *Contraceptive Use in the United States*, GUTTMACHER INSTITUTE, Oct. 2015, at 2, http://www.tinyurl.com/contraceptivefacts (68% of Catholics, 73% of Mainline Protestants, and 74% of Evangelicals at risk of unintended pregnancy use sterilization, oral contraceptives, IUDs, or other hormonal methods).

Moreover, in cases of rape or incest, women and girls may conclude that emergency contraception or abortion is needed despite their parents', their spouses', and even their own religious beliefs. *See, e.g.*, Melisa M. Holmes et al., Abstract, *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 AM. J. OBSTETRICS & GYNECOLOGY 320 (Aug. 1996), *available at* http://www.tinyurl.com/statsrape (majority of rape-related pregnancies examined by study occurred among adolescent victims with known, often related, perpetrators; 32.2% of victims kept children, 50% had abortions, and 5.9% placed children for

adoption). These women have the right to make decisions about their reproductive health independently, without approval from their partner, parent, or assailant.

4. Requiring employer-provided insurance plans to cover contraception is the least restrictive means of promoting these compelling interests, because it is the only realistic way to ensure that women have seamless access to contraceptive services should they wish to avail themselves of those services. "The evidence shows that contraceptive use is highly vulnerable to even seemingly minor obstacles." *Priests for Life*, 772 F.3d at 265*; see, e.g.*, Deborah Cohen et al., *Cost as a Barrier to Condom Use: The Evidence for Condom Subsidies in the United States*, 89 AM. J. PUB. HEALTH 567, 567 (1999), http://www.tinyurl.com/barrieruse (increasing condom prices from zero to a quarter dropped sales by 98%); Diana Greene Foster et al., *Number of Oral Contraceptive Pill Packages Dispensed and Subsequent Unintended Pregnancies*, 117 OBSTETRICS & GYNECOLOGY 566, 570 (2011), http://www.tinyurl.com/PillPackages (dispensing oral contraceptives annually, rather than quarterly, yielded 30% lower chance of unintended pregnancy and 46% lower chance of abortion); 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)

(women who must pay more than $50 out-of-pocket for an IUD are almost seven times less likely to obtain one).

In *Hobby Lobby*, the Supreme Court allowed closely held for-profit corporations with religious objections to opt out of paying for contraceptive coverage only because the accommodation still ensured that "employees of these entities [would] have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." 134 S. Ct. at 2759. Allowing objecting employees of nonreligious employers to deny coverage to their dependents (by modifying their own plan) or other employees and *their* dependents (by requiring the employer to modify the group health plan) would be far more burdensome. That burden is not one that RFRA requires or the Constitution even permits.

CONCLUSION

The Constitution does not require government to treat every nonprofit organization like a church. Nor does it require—or even permit—government to impose certain individuals' religious beliefs on others. The judgment should be affirmed.

Respectfully submitted,

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APPENDIX

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that works to advance the free-exercise rights of individuals and religious communities to worship as they see fit, and to preserve the separation of church and state as a vital component of democratic government. Founded in 1947, Americans United has more than 120,000 members and supporters nationwide. Americans United has participated as counsel to parties or as an *amicus curiae* in contraceptive-coverage litigation throughout the country; and it regularly litigates to protect the freedom of conscience of all Americans.

The Anti-Defamation League was organized in 1913 with the mission to stop the defamation of the Jewish people and to secure justice and fair treatment for all. Today, it is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism, and safeguarding individual religious liberty. ADL is a staunch supporter of the religious rights and liberties guaranteed by both the Establishment and Free Exercise Clauses, and constitutional equal protection. ADL views reproductive freedom as an issue of personal and religious autonomy, and firmly believes that the ability to make decisions about one's reproductive health and family planning has played an essential role in advancing women's equality. Although ADL vigorously supported the Religious

Freedom Restoration Act as a means to protect individual religious exercise, neither RFRA nor equal-protection principles should be used as vehicles to enable some Americans to impose their religious or moral beliefs on others and thereby to deny access to reproductive-health services, including contraception.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United States, with over 330,000 members, associates, and supporters nationwide. While traditionally known for its role in developing and supporting healthcare and other initiatives in Israel, Hadassah has long-standing commitments to improving healthcare access in the United States, particularly with regard to the healthcare needs of women. Hadassah strongly supports full and complete access to reproductive-health services and a woman's right to make health decisions according to her own religious, moral, and ethical values, and recognizes the role that reproductive freedom plays in women's empowerment, economic equity, and security.

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 our democratic society. And NCJW's resolutions state that NCJW endorses and resolves to work for comprehensive, confidential, accessible family planning and reproductive-health services, regardless of age or ability to pay. Consistent with our mission, principles, and resolutions, NCJW joins this brief.

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 has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF's advocacy affiliate, People For the American Way, was deeply involved in drafting and helping secure the enactment of the Religious Freedom Restoration Act. PFAWF strongly supports the principles that both the Free Exercise Clause and Establishment Clause of the First Amendment to the Constitution work to truly protect religious liberty for all Americans; that it is appropriate under the First Amendment for government to grant religious accommodations that do not harm third parties without granting similar nonreligious accommodations; and that it

is important that RFRA be applied only when there is a truly substantial burden on religious free exercise. PFAWF thus has a strong interest in the proper resolution of this case and accordingly joins this brief.

The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews, **the Central Conference of American Rabbis**, whose membership includes more than 2000 Reform rabbis, and **Women of Reform Judaism**, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue with a proud legacy of fighting for civil rights and social justice, including defending both religious freedom and the separation of church and state.

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(C), the undersigned counsel certifies that this brief:

(i) complies with the type-volume limitations of Rules 29(d) and 32(a)(7)(B) because it contains 6,722 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2010 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

In accordance with Local Rule 31.1(c), the undersigned counsel certifies that the text of the electronic brief is identical to the text in the paper copies. Counsel also certifies that the virus detection program, Webroot version 9.0.10.21, has been run on the file and that no virus was detected.

/s/ *Richard B. Katskee*

Date: August 1, 2016

CERTIFICATE OF SERVICE

I certify that on August 1, 2016, 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.

I further certify that, within five days of receiving notice that the brief has been accepted for filing, I will file seven paper copies of the brief with the Clerk of Court by overnight delivery.

/s/ *Richard B. Katskee*