Nos. 19-431, 19-454

In the Supreme Court of the United States

THE LITTLE SISTERS OF THE POOR
SAINTS PETER AND PAUL HOME, PETITIONER

v.

THE COMMONWEALTH OF PENNSYLVANIA, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Additional Caption Information on Inside Cover

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

THE COMMONWEALTH OF PENNSYLVANIA, ET AL.

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INTEREST OF AMICI CURIAE[1]

Amici curiae are the States of Texas, Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia. Each of these States has enshrined a commitment to religious liberty in their foundational charter. And many have enacted legislation ensuring that their residents may practice their faith free from governmental intrusion. Amici therefore have a strong interest in ensuring that that the federal government and federal courts respect core principles of religious liberty.

That interest is implicated in this case. At issue is whether the federal government may grant exemptions to generally applicable regulations that impose a substantial burden on the free exercise of religion. Not only *may* the federal government do so—it *must*. As Congress made clear in the Religious Freedom Restoration Act (RFRA), absent the most compelling justifications, generally applicable laws that substantially burden religious exercise must allow for reasonable accommodations. And the government has no legitimate basis on which to second-guess religious adherents' determinations of what conduct is sinful or immoral.

The federal government rightly sought to provide an exemption to the Little Sisters of the Poor and similarly situated objectors, and the lower courts were wrong to stand in the way. Amici urge the Court to reverse the judgment below.

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[1] No counsel for any party authored this brief, in whole or in part, and no person or entity other than amici contributed monetarily to its preparation.

INTRODUCTION

It has long been obvious that religious minorities are particularly at risk from the "tyranny of the majority." *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 *The Writings of James Madison* 272 (Gaillard Hunt ed., 1904). Recognizing this, Congress enacted RFRA to codify the commonsense principle that respecting religious beliefs "sometimes requires special exemptions and accommodations that cannot be afforded by general laws." John Witte, Jr. & Joel A. Nichols, *"Come Now Let Us Reason Together": Restoring Religious Freedom in America and Abroad*, 92 Notre Dame L. Rev. 427, 445 (2016). "In a pervasively regulated society," these exemptions from generally applicable laws for religious objectors "are essential to religious liberty." 1 Douglas Laycock, *Religious Liberty* xvii (2010). And the availability of religious exemptions "reflect[s] the notion that our society is better and richer" for religious diversity, "and that the law should not force people to violate their deeply held religious beliefs without a very good reason." Mark L. Rienzi, *The Case for Religious Exemptions—Whether Religion is Special or Not*, 127 Harv. L. Rev. 1395, 1396 (2013).

This case lies in the heartland of RFRA's protection of religious exercise. Many religious employers around the country feel compelled by their religious beliefs to care for their employees by providing them with health insurance. But some employers believe sincerely that it is incompatible with their religious convictions to provide health insurance when it means contracting with a company that then, because of that relationship, becomes obligated to provide contraceptives that the employers regard as abortifacients. These beliefs reflect the common religious tenet that one must not only avoid sin, but also

any "action that might seem to imply approval of, or cooperation with," sin. JD Flynn, *US Bishops: Pope Francis Talks Fr. James Martin, Euthanasia, at Private Meeting*, Catholic Herald (Feb. 21, 2020), https://perma.cc/B47J-K2GL. Thus, the reasonableness of such line-drawing about one's moral complicity in enabling conduct regarded as sinful is fundamentally a religious question, not a legal one. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014).

Before the agency's contraceptive mandate underlying this dispute, a religious employer could abide by the religious belief at issue here by offering health insurance without engaging in an insurance relationship that would obligate coverage for contraceptives.[2] The agency's contraceptive mandate, however, made some employers unable to abide by that religious belief without violating federal regulations and incurring substantial financial liability. In turn, RFRA, required an accommodation. *Id.* at 730-32; *see* 42 U.S.C. §§ 2000bb, et seq.

The original supposed "accommodation" the agency offered—submitting a form certifying one's religious objection—did not relieve the burden on religious exercise for many employers. Under that supposed "accommodation," if a religious employer provided notice of its objection to contraceptive coverage and continued to engage a company to issue or administer health insurance for its employees, then and only then would that insurance-

[2] Consistent with this Court's usage of the singular noun "the Government" to describe collectively the relevant executive-branch entities, *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (per curiam), this brief uses the singular noun "the agency" to refer to the relevant regulatory entities.

administering company be legally required to cover contraceptives, some of which the religious employers regard as abortifacients. *See E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 454 (5th Cir. 2015) (insurer or third-party administrator "must . . . provide . . . payments" only where the religious employer maintains the mandated "insured" or "self-insured" plan giving rise to the coverage), *vacated*, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam). But many religious employers believe that providing such notice makes them complicit in the grave sin of terminating human life.

This Court strongly signaled in *Zubik* and *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), that this supposed accommodation was insufficient. In response, the agency laudably switched course. The agency revised its rules and now allows religious objectors to remove themselves from the machinery of the contraceptive-coverage scheme. As the agency concluded, the changes in the most recent rule "ensure that proper respect is afforded to sincerely held religious objections in rules governing this area of health insurance and coverage, with minimal impact on [the agency's] decision to otherwise require contraceptive coverage." U.S. Dep't of Health and Human Servs., *Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 83 Fed. Reg. 57536, 57537 (Jan. 14, 2019). The decision below upholding the injunction against that sensible accommodation is fatally flawed. It misunderstands the role of the agency in accommodating religious belief. And it disregards RFRA's substantive mandate in the same way this Court has already all but rejected.

SUMMARY OF ARGUMENT

At least two federal statutes authorize the exemptions at issue in this case. The first, as petitioners explain, is 42 U.S.C. section 300gg-13(a). *See* Little Sisters of the Poor Br. 41-44; United States Br. 15-20. The second is RFRA. In enjoining the challenged exemptions, the decision below seriously misreads both statutes. As to the latter, the decision below vitiates the agency's very authority to proactively account for RFRA when issuing regulations. Worse still, they insist that even if an agency had authority to account for RFRA, RFRA would not support the exemption at issue here. Both of those holdings intolerably cabin RFRA and leave sincerely held religious beliefs all but defenseless against the administrative state. The Court should reverse.

I. The decision below and the respondents here misunderstand the relationship between RFRA and agency action. According to the Third Circuit, RFRA allows an agency accommodation only if a court would find a RFRA violation in a particular case. *See* Little Sisters of the Poor Pet. App. 43a-44a. Respondents push that error one step further, arguing that *only* a court may apply RFRA—and *only* after someone's religion has been burdened. Br. in Opp. 22-24, *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, No. 19-431 (Dec. 9, 2019). The decision below and respondents are wrong: RFRA specifically applies to federal agencies and thus commands them to accommodate religion except in narrow circumstances.

Nothing in section 300gg-13(a) suggests a different result. That statute conveys broad rulemaking authority to the agency. That *general* grant neither conflicts with nor repeals RFRA's *specific* direction to accommodate religious beliefs substantially burdened by government

action. To the contrary, the statutes stand in harmony—and each confirms that the decision below is wrong.

II. The decision below misconstrued RFRA in a way that undermines RFRA's core protections of free exercise. The Third Circuit held that even if RFRA applies to agency action, "RFRA does not require the enactment of the Religious Exemption to address this burden." Little Sisters of the Poor Pet. App. 43a. But the exemption at issue in this case is exactly what RFRA demands when sincerely held religious beliefs are substantially burdened by a generally applicable administrative regulation. That is, not only do section 300gg-13(a) and RFRA both *authorize* the exemption, but RFRA affirmatively *requires* it.

ARGUMENT

RFRA broadly protects free exercise and commands agencies to accommodate religious adherents in agency rule-making. In promulgating the exemption at issue here, the agency simply invoked its broad statutory power to engage in rulemaking to do as RFRA instructs. The court below erred in concluding otherwise and should be reversed.

I. The Agency Has the Authority and Duty to Accommodate Religious Objectors.

A. RFRA requires agencies to implement generally applicable legislation without substantially burdening the free exercise of religion.

Two statutes support the agency's action here. The first, 42 U.S.C. section 300gg-13(a), confers on the agency the rulemaking authority to promulgate the exemption at issue here. *See* Little Sisters of the Poor Br. 41-44; United States Br. 15-20. The second, RFRA, not only permits, but requires the agency action enjoined

below. After all, any agency must comply with the law, and RFRA is no less binding than the ACA. RFRA directly limits government action, including agency action like the contraceptive mandate. And contrary to the district court's reasoning, RFRA's creation of a judicial remedy does not somehow negate the statute's direction that agencies avoid prohibited burdens in the first place.

The decision below read RFRA to, at most, create a right that an agency may protect only if a religious objector would be able to satisfy every court in the country that RFRA requires an exemption. Respondents go even further, claiming a "threshold question" of whether agencies ever have power to account for RFRA of their own volition. Br. in Opp. 22-24, No. 19-431. In making this argument, Respondents resurrect the unsupportable position of the district court, which was too extreme even for the Third Circuit to accept. The district court dismissed the agency's authority to "determine what RFRA demands with respect to the ACA," Little Sisters of the Poor Pet. App. 110a, suggesting that "RFRA does not permit an agency to create exemptions to regulations absent a judicial determination" of a prohibited burden, *Id.* at 119a n.23 (emphasis added). Both are impermissibly narrow readings of RFRA that conflict with text and precedent.

1. Agencies, no less than courts, may seek to accommodate religious objections. RFRA is a purposely broad statute. *See Hobby Lobby*, 573 U.S. at 693 ("Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty."). It commands that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the burden furthers "a compelling governmental interest" and "is the least

restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b). It then defines "government" as including every "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." *Id.* § 2000bb-2(1).

RFRA's plain text therefore imposes a mandatory duty on federal agencies to avoid prohibited religious burdens in "an exercise of general legislative supervision over federal agencies." Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 211 (1994); *accord Hobby Lobby*, 573 U.S. at 695 ("As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work . . . ."). Agencies have statutory authority to issue rules to implement RFRA, including "exemptions," 42 U.S.C. § 2000bb-4, as Congress's direction to an agency inherently confers statutory authority to comply.

The contraceptive mandate is a quintessential example of the type of agency action that inspired RFRA.[3] And the agency's enjoined exemption is precisely what Congress sought to encourage. RFRA proceeded from two premises relevant here: (1) "'facially neutral laws'" like the agency's contraceptive mandate had,

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[3] *See* Hearing on S. 2969 Before the Comm. on the Judiciary, 102d Cong., 2nd Sess. 192 (1992) (written testimony of Nadine Strossen, President of ACLU) (discussing the need for RFRA because without it "familiar practices as the sacramental use of wine, kosher slaughter, the sanctity of the confessional . . . permitting religiously sponsored hospitals to decline to provide abortion or contraception services" were "[a]t risk").

"'throughout much of our history, . . . severely undermined religious observance'"; and (2) "legislative or administrative" bodies are often "unaware of, or indifferent to," and sometimes "hostile" towards, "minority religious practices." Laycock & Thomas, 73 Tex. L. Rev. at 211, 216-17 (quoting Senate Comm. on the Judiciary, *Religious Freedom Restoration Act of 1993*, S. Rep. No. 103-111, at 5 (1993)).

In one famous instance, OSHA responded to *Employment Division v. Smith*, 494 U.S. 872 (1990), which largely repudiated the prior method of analyzing free exercise claims, by eliminating accommodations exempting the Amish and Sikhs from requirements concerning the wearing of hard hats. *See* Ruth Marcus, *Reins on Religious Freedom?*, Wash. Post (Mar. 9, 1991). One of RFRA's primary co-sponsors cited OSHA's reaction as an inspiration for the law. *See* Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Sub. Comm. on Civil & Const. Rights of the Comm. on the Judiciary, 102d Cong., 2nd Sess. 122-23 (1991) (testimony of Congressman Stephen J. Solarz). And OSHA now relies on RFRA as the basis for its renewed exemption, despite there being nothing in OSHA's enabling statute providing for religious exemptions and no court having ever found a RFRA violation. *See* OSHA, *Exemption for Religious Reason from Wearing Hard Hats*, STD 01-06-005 (June 20, 1994). Many other agencies similarly look to RFRA proactively to accommodate religious exercise in their rulemaking.[4]

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[4] *See*, *e.g.*, U.S. Citizenship and Immigration Servs., *Special Immigrant and Nonimmigrant Religious Workers*, 73 Fed. Reg. 72276-01, 72283 (Nov. 26, 2008);

Along with the above-quoted provisions, RFRA expressly provides that it "applies to all Federal law and the implementation of that law, whether statutory or otherwise," unless a later statute "explicitly excludes . . . application" of RFRA. 42 U.S.C. § 2000bb-3(a)-(b). So every command "of general applicability" in a federal statute, *id.* § 2000bb-1(a), must be read to "include heightened protection for religious freedom," Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 Mich. L. Rev. 1903, 1921 (2001). When, for example, the ACA commands the agency to provide for the specifics of how health insurers must cover preventive care, 42 U.S.C. § 300gg-13(a), one must read that command with RFRA's concomitant prohibition on substantially burdening religious exercise. The agency therefore must accommodate religious exercise just as if the ACA itself commands that accommodation.

Confirming that point, this Court has long recognized that no agency may "apply the policies of [one] statute so single-mindedly as to ignore other equally important congressional objectives." *Local 1976, United Bhd. of Carpenters & Joiners of Am., AFL v. NLRB*, 357 U.S. 93, 111 (1958). "Frequently the entire scope of

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Emp't and Training Admin., *Notice of Availability of Funds and Solicitation for Grant Applications (SGA) To Fund Demonstration Projects*, 73 Fed. Reg. 57670-01, 57674 (Oct. 3, 2008); Fed. Aviation Admin., *Commercial Routes for the Grand Canyon National Park*, 64 Fed. Reg. 37191-01, 37191 (July 9, 1999); *see also Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act*, 31 Op. O.L.C. 162 (2007).

Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *S. S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). "The problem is to reconcile the two, if possible, and to give effect to each." *FTC v. A.P.W. Paper Co.*, 328 U.S. 193, 202 (1946). Thus, "[i]n devising" the contraceptive mandate, the agency was "obliged to take into account another equally important Congressional objective"—avoiding substantial burdens on religious exercise—and work to avoid any "potential conflict." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984) (quotation marks and alterations omitted).

An analogous example drives this home. In 1978, Congress enacted the "American Indian Religious Freedom Act," which provides that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians." 42 U.S.C. § 1996. In stark contrast to RFRA, this law merely expresses "a sense of Congress"; it did "not confer special religious rights on Indians" or "change any existing . . . law." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988) (quotation marks omitted). Even so, agencies must account for this policy in implementing other laws. *See*, *e.g.*, *Conservation Law Found. v. FERC*, 216 F.3d 41, 50 (D.C. Cir. 2000); *N.M. Navajo Ranchers Ass'n v. ICC*, 702 F.2d 227, 230 (D.C. Cir. 1983) (per curiam). Even more so, agencies must account for RFRA's express command to accommodate religion.

2. The district court and Respondents read RFRA, a statute designed "to provide very broad protection for religious liberty," *Hobby Lobby*, 573 U.S. at 693, as applying only ex post—merely providing an opportunity for those whose religious exercise has already been burdened to spend time and money asking courts for exemptions from generally applicable laws. *See* Little Sisters of the Poor Pet. App. 110a ("Despite Defendants' contention that the Agencies may determine what RFRA demands with respect to the ACA, RFRA provides, to the contrary, that it is the courts that are charged with determining RFRA's application."); *id.* at 112a ("RFRA specifically provides only for 'Judicial Relief,' 42 U.S.C.A. § 2000bb-1(c), thereby committing interpretative authority to the courts—not to agencies.").

That view loses sight of first principles. The primary purpose of enacting a statute is to guide behavior ex ante. *See* Ward Farnsworth, *The Legal Analyst* 6 (2007) ("Legislatures make general rules for the future . . . ."). Thus, "[a] statutory directive binds *both* the executive officials who administer the statute *and* the judges who apply it in particular cases." *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 439 (1992) (emphasis in original). RFRA is expressly directed towards administrative agencies. *See* 42 U.S.C. §§ 2000bb-1(a)-(b), 2000bb-2(1). It is inconceivable that Congress intended to deviate from the default operation of statutes and instead have agencies ignore RFRA until they are haled into court and ordered to comply.

The district court placed too much weight on RFRA's private right of action, reasoning that Congress's provision for private enforcement meant that RFRA commits to the courts alone "the task of determining whether generally applicable laws violate a person's religious

exercise." Little Sisters of the Poor Pet. App. 110a. Congress has not, however, "provide[d] only for judicial relief." *Id.* at 112a (quotation marks omitted; capitalization altered). Rather, Congress provided agencies with authority to issue and modify rules under their enabling statutes and the Administrative Procedure Act. *See* 5 U.S.C. §§ 500, et seq. And Congress then told those agencies that, in using their powers, they "shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). That scheme manifestly provides administrative authority to avoid and relieve religious burdens from agency rulemaking. Of course, if an agency ignores RFRA's command, then the private right of action becomes relevant. But the district court viewed RFRA's private right of action exactly backwards. The whole point of the threat of judicial relief is to procure obedience ex ante.

Amici are unaware of any other decision reading a statute's private right of action to mean that an agency subject to the statute must ignore its commands until a court says otherwise. The Administrative Procedure Act, for instance, provides generally for private enforcement of federal rights against federal agencies. *See* 5 U.S.C. § 702. On the district court's view, that provision deprives agencies of the ability to give forethought to what those federal rights require. Rather, federal rights would be protected only piecemeal, as each person aggrieved by agency action sues and receives relief in a particular case. That gets the rule of law exactly backwards.

B. Section 300gg-13(a) does not withhold agency discretion to accommodate religion.

The decision below purported to avoid RFRA's commands by reading section 300gg-13(a) to foreclose any

exceptions to the mandate. Little Sisters of the Poor Pet. App. 40a. The Court should reject that view because nothing in section 300gg-13(a) prohibits or conflicts with the agency's authority to craft religious exemptions.

Properly read, section 300gg-13(a) grants the agency broad and open-ended rulemaking authority. It commands insurers to comply with various requirements "*as provided for* in comprehensive guidelines" issued by the agency. 42 U.S.C. § 300gg-13(a) (emphasis added). The only natural reading of that language leads to the conclusion that Congress has bestowed substantial discretion on the agency to develop comprehensive guidelines—and those guidelines can and should accommodate religious objections. *See* United States Br. 15-16.

Consider an analogous use of language. Imagine legislative counsel leaving his children with a babysitter with the instruction that "the children shall complete their chores as provided by the babysitter." And imagine that the babysitter believes that the yard needs raking. No one would think that the parent's instruction somehow prevented the babysitter, upon concluding that the yard needs raking, from exempting an individual child from that chore if, for instance, that child was sick or injured. The contrary readings below bear no resemblance to the common understanding of the language used in section 300gg-13(a).

The Third Circuit's reading makes even less sense given that RFRA is "a rule of interpretation for future federal legislation." Laycock & Thomas, 73 Tex. L. Rev. at 211. Congress's background direction in RFRA to accommodate religious burdens makes it even less defensible to read the open-ended "as provided for" language in section 300gg-13(a) as somehow foreclosing the agency from offering religious exemptions. RFRA itself directs

that future legislation should not be interpreted as changing that default rule unless the later statute "explicitly excludes . . . application" of RFRA, which is not true here. 42 U.S.C. § 2000bb-3(b).

Nor could section 300gg-13(a) possibly overcome the high standard for a repeal by implication of RFRA. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007). Nothing about a statutory grant of agency discretion irreconcilably forecloses the agency from including religious accommodations in the resulting rulemaking. *See id.* Indeed, the federal government conceded in *Zubik* that it is "feasible" for contraceptive coverage to "be provided to petitioners' employees, through petitioners' insurance companies, without any [objected-to] notice from petitioners." 136 S. Ct. at 1560. The Third Circuit's overreading of section 300gg-13(a) wrongly and prejudicially narrowed the scope of the agency's discretion to accommodate religious burdens.

II. Requiring Religious Objectors to Participate in Providing Contraceptives Violates RFRA.

The decision below then held that, "[e]ven assuming that RFRA provides statutory authority for the Agencies to issue regulations to address religious burdens the Contraceptive Mandate may impose on certain individuals, RFRA does not require the enactment of the Religious Exemption to address this burden." Little Sisters of the Poor Pet. App. 43a. Yet that is exactly what a proper understanding of RFRA requires.

The Third Circuit compounded its error by concluding that the agency's prior accommodation—requiring some, but not all, religious objectors to file a certification that would trigger contraceptive coverage by their respective insurance companies—satisfies RFRA. The prior accommodation did not exempt objecting

employers from the mandate to provide the objected-to insurance. Instead, the result of the certification was the provision of contraceptives to the employers' employees seamlessly through the employers' insurance plans. The prior accommodation thus required many religious objectors to participate in the provision of contraceptives in way that they sincerely believe makes them complicit in the use of abortifacients that take human life. As a result, it was no accommodation at all. Under the previous rule, religious exercise remained substantially burdened without a compelling interest or narrow tailoring. Thus, the agency was right—and indeed was required—to find another solution.

A. Requiring religious objectors to participate in providing contraceptives places a substantial burden on religious practices.

Little Sisters of the Poor and many others cannot comply with both their sincere religious convictions and the prior accommodation's certification requirement. As a result, RFRA's limits on the federal government's ability to burden religion kick in. As *Hobby Lobby* shows, determining whether a law or regulation burdens religion requires only an examination of the consequences of noncompliance. 573 U.S. at 720-26. Here, the threatened monetary fines accompanying the contraceptive mandate are substantial. The burden, therefore, is clear.

To avoid this result, the Third Circuit looked past the consequences of noncompliance and purported to judge the beliefs of those whose exercise of religion is burdened. The Third Circuit made a purportedly legal judgment about the substantiality of the connection between religious objectors' executing the certification and the termination of human life. Little Sisters of the Poor Pet. App. 46a. Because the objectors were not taking human

life, the Third Circuit concluded, the certification requirement imposed no burden. *Id.*

The Third Circuit badly misunderstood its role and RFRA. Where religion is involved, a court may not decide what is or is not a substantial connection between what may be an otherwise neutral act and evil. What makes a believer complicit in sin is a quintessentially religious question. If a court had the power to decide such a matter for all people, religious freedom would be a hollow shell. Thus, RFRA's burden analysis does not require or permit a court to look beyond the consequences of failing to comply with a law or regulation.

1. The fines religious objectors would face are facially substantial.

Hobby Lobby addressed the conundrum faced by employers with sincere religious objections to providing health insurance that covers contraceptives: "If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as $1.3 million per day" in penalties. 573 U.S. at 691. "If these consequences do not amount to a substantial burden," the Court held, "it is hard to see what would." *Id.*

Without the current exemption rule, many employers will face that dilemma. Those employers either must provide coverage or file a notification of their religious objection with the agency or the insurer. *Hobby Lobby* requires an accommodation of the former. The latter is the "accommodation" originally offered by the agency. But that "accommodation" does not result in an exemption from the mandate to provide the objected-to insurance. Instead, the result of the notification is the provision of contraceptives to the religious employer's employees seamlessly through the employer's group health plan,

paid for by the insurer or third-party administrator. That is no accommodation at all for the relevant religious employers.

Those employers sincerely believe that, if they comply with the contraceptive mandate, including its "accommodation" option for compliance, they will be morally complicit in facilitating or participating in the provision of contraception or abortions in violation of their religious beliefs. If they do not comply, they will be forced to pay onerous financial penalties for adhering to that religious conviction.

The substance and sincerity of the objectors' religious beliefs are not disputed. The severe financial consequences for noncompliance are also beyond question. *E.g.*, 26 U.S.C. § 4980D; *id.* § 4980H. That is enough to establish a substantial burden under RFRA. *See Hobby Lobby*, 573 U.S. at 691; *cf. Priests for Life v. U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 17 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of rehearing en banc) ("[J]udges in RFRA cases may question only the sincerity of a plaintiff's religious belief, not the correctness or reasonableness of that religious belief.")

2. Courts may not second guess the religious objectors' belief that any participation in providing contraceptives makes the religious objectors complicit in sin.

The Third Circuit's conclusion that the prior "accommodation" imposes no substantial burden turns on characterizing employers' religious objection as insubstantial. *See* Little Sisters of the Poor Pet. App. 46a. Although the decision below viewed RFRA as protecting only religious beliefs that a court finds substantial, this Court instructs that "it is not for [courts] to say that [an

objector's] religious beliefs are mistaken or insubstantial." *Hobby Lobby*, 573 U.S. at 725. After *Hobby Lobby*, there is no doubt that the contraceptive mandate and its prior "accommodation" substantially burdened employers' religious exercise.

Despite this Court's most recent instructions in *Hobby Lobby*,[5] the decision below accepted Respondents' invitation to assess the validity of a religious conviction. The court held that the burden on the objectors' religious exercise was insubstantial because their complicity—filing a certification that triggers an independent obligation on a third party to provide contraceptive coverage—was too attenuated. In reaching this decision, it doubled down on its prior holding that this supposed accommodation does "not impose a substantial burden." *Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 356 n.18 (3d Cir. 2017).

Whether or not an act is too far removed from sin to itself be sinful is a quintessential *religious* question. A court's assessment of these beliefs intrudes upon the dignity of adherents' convictions about profound religious concepts such as facilitation and complicity. It subjects those beliefs to judicial review, and it asks courts to determine the substantiality of the reasons of faith animating a believer's desired exercise of religion—rather than the substantiality of the governmental burden on that religious exercise. That assessment is not the inquiry RFRA requires or allows.

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[5] This Court has repeated this guidance many times. *See Thomas v. Review Bd. Of Ind. Emp't. Sec. Div.*, 450 U.S. 707 (1981) (holding that the courts may not decide that religious objector's objection is merely philosophical rather than religious).

1. What constitutes complicity is debated by religious scholars and experts. It is not a question for the government to decide.

Religious scholars and experts do not always agree on the interpretation on their founding texts. The ever-increasing number of Christian denominations speaks to the difficulty of such interpretations. G.K. Chesterton once remarked that the history of Christianity is a history of "the monstrous wars about small points of theology, the earthquakes of emotions about a gesture or a word." G.K. Chesterton, *Orthodoxy*, "The Paradoxes of Christianity," 184 (1908). There are intense battles within religion about what is required of the faithful—these arguments have existed since humans had religious texts to debate. Additionally, since religion is a matter of the conscience, what constitutes complicity in one context does not always apply across the board. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981). All of these are reasons for this Court to recognize that the Third Circuit was manifestly incorrect when it inserted its own judgment to find that the burden was insubstantial.

For example, in the early years of Christianity, a debate emerged concerning how or if Christians should partake in the Roman army. Tertullian wrote *De Corona militis* after a Christian soldier was martyred for refusing to wear his military crown at a celebration. A. Cleveland Coxe et al., eds., *Ante-Nicene Fathers: Vol. III. Latin Christianity: Its Founder, Tertullian*, "De Corona," 93 (1885). Tertullian warned against Christians serving in the military, not because of commands against killing, but because of the oath to the emperor, the worship of Mithras in the Roman military, and the habit of sacrificing to idols before battles. *See id.* at 99-103.

Origen and Hippolytus similarly objected to Christians belonging to the military for various theological reasons. *See* John Helgeland, *Christians and the Roman Army A.D. 173-337*, 43 Church Hist. 149, 154-56 (1974). Yet Clement of Alexandria saw the military as just another occupation, and Eusebius of Ceasarea urged Christians to be good soldiers to the Roman leaders. *Id.* at 154, 155. Debates among Christian leaders surrounded many of the early decisions regarding orthodox practice for Christians.

More recently, a leader in the new natural law movement wrote an extended essay about whether a Christian legislator could enact unjust laws without complicity in injustice. *See* John Finnis, *Helping Enact Unjust Laws Without Complicity in Injustice*, 49 Am. J. Juris 11 (2004). In the papal encyclical *Evangelium Vitae* (1995), St. John Paul II said that "in the case of an intrinsically unjust law, such as a law permitting abortion or euthanasia, it is therefore never licit to obey it, or to 'take part in a propaganda campaign in favour of such a law, or vote for it.'" *Id.* § 73.2.

Debate over complicity in euthanasia has continued in the Roman Catholic church. Just last month, Pope Francis rejected the view of some church leaders that a priest may be present during assisted suicide. Flynn, *supra*. While those leaders believed that mere presence should not be seen as "lending implicit support for the practice," the Pope disagreed. *Id.* He rejected the practice and any other "pastoral action that might seem to imply approval of, or cooperation with, assisted suicide." *Id.*

To take another well-publicized example closely analogous to this case, Pope St. John Paul II ordered Catholic churches in Germany to cease certifying that

pregnant women considering abortion had received church counseling because that certification was a "necessary condition" in a woman's procuring an abortion. *See* Letter from His Holiness Pope John Paul II to the Bishops of the German Episcopal Conference ¶ 7 (Jan. 11, 1998), *available in English translation at* https://perma.cc/6G2A-2DGN.[6] The Pope described the status of the certificate and whether it made "ecclesiastical institutions . . . co-responsible for the killing of innocent children" as "a pastoral question with obvious doctrinal implications." *Id.* ¶ 4-5.

During the debates and discussions over this issue, "there was no suggestion that the German bishops or those conducting or staffing the pregnancy counselling agencies were engaging in formal cooperation in abortion." Bishop Anthony Fisher, *Cooperation in Evil: Understanding the Issues*, in *Cooperation, Complicity, and Conscience* 27, 48 (Helen Watt ed., 2005). Similar to the religious objectors here,

> What seemed to have been decisive . . . was (a) the gravity of what was at stake, i.e. innocent unborn human lives, (b) the witness which the German

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[6] "In the late 1990s, Germany allowed abortions within the first 12 weeks of pregnancy for health-related reasons if the pregnant woman received state-mandated counseling. Representatives from Catholic churches in Germany agreed to act as counselors. After counseling, a church had to issue a certificate stating that the pregnant woman had received counseling." *Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1343 (11th Cir. 2014) (W. Pryor, J., concurring).

> bishops were called to give to the sanctity of life, and (c) concern about the corrupting effects on churchworkers, pregnant women and the culture of even this much material cooperation in abortion.

Id.

2. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit . . . protection." *Thomas*, 450 U.S. at 714. Federal courts have no business resolving a "difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of [what the person believes to be] an immoral act by another." *Hobby Lobby*, 573 U.S. at 724. As set out above, the notion of "complicity" that many employers express about the "accommodation" is not uncommon. Indeed, it was the very question at the heart of *Hobby Lobby*. *See id.*

The Court faced a similar question in *Thomas*. Eddie Thomas quit his job at the Blaw-Knox Foundry & Machinery Co. due to his beliefs as a Jehovah's Witness that he was participating in the making of war. 450 U.S. at 710. The Indiana Supreme Court found that Thomas quit because of a philosophical belief, not a religious belief. *Id.* at 714. Particularly as another member of Thomas's church did not agree with his decision. *Id.* at 715. But this Court found that "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the

commands of their common faith. Courts are not arbiters of scriptural interpretation." *Id.* at 716.[7]

In fact, the Third Circuit parroted an unsuccessful argument made by the agency in *Hobby Lobby*: "that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated." 573 U.S. at 723. This Court rejected that argument as asking the wrong question. What is too attenuated to trigger complicity is "a difficult and important question of religion and moral philosophy" "that the federal courts have no business addressing." *Id.* at 724; *see also Priests for*

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[7] Thomas's "request for religious accommodation . . . was based on an objection dependent on the concept—if not the precise language—of complicity: 'Thomas admitted before the referee that he would not object to working for United States Steel or Inland Steel . . . produc[ing] the raw product necessary for the production of any kind of tank . . . [because I] would not be a direct party to whoever they shipped it to [and] would not be . . . chargeable in . . . conscience.' By contrast, working on tank turrets, Thomas believed, would render him a 'direct party to'—that is, someone who aided or assisted—those third parties who contributed to the war effort, soldiers, for example, an effort to which Thomas objected in religious conscience." Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 San Diego L. Rev. 105, 137 (2016) (footnotes omitted) (quoting *Thomas*, 450 U.S. at 715).

Life, 808 F.3d at 19-20 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

Even in the ACA, Congress recognized the difficulty of this line-drawing. Shortly after this Court legalized abortion, Congress enacted the Church Amendment, 42 U.S.C. § 300a-7, which provides that a health care entity receiving certain federal funds may refuse to make its facilities or personnel available to perform or assist on "any sterilization procedure or abortion" if such services are "prohibited by the entity on the basis of religious beliefs or moral convictions." In the ACA, Congress granted a wider protection to more attenuated activities. Section 1303(b)(4) of the Act provides that "No qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, *pay for, provide coverage of, or refer* for abortions." 42 U.S.C. § 18023(b)(4) (emphasis added). Congress thus recognized that for many believers, many activities outside of direct participation can also be sinful.[8]

The Third Circuit's judgment that the certification under the prior accommodation did not burden religion because it was too far removed from the sinful act was not its to make. The court's declaration is no different and no more appropriate than a court telling the Pope that the German churches were not complicit in abortion because their certifications merely allowed services that a third party will provide. Or, closer to home, telling the

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[8] Many States also recognize this common-sense proposition. *See, e.g.*, Ariz. Rev. Stat. § 36-2154; Ark. Code § 20-16-304(4)-(5); Colo. Rev. Stat. § 25-6-102(7), (9); Fla. Stat. § 381.0051(5); 745 Ill. Comp. Stat. 70/4 ; Mo. Rev. Stat. 191.724; Tex. Ins. Code § 1271.007.

plaintiffs in *Hobby Lobby* that the burden on their religious exercise was insubstantial because merely providing coverage for contraceptives was too attenuated from their employees' independent decision to use an abortifacient. Complicity here is a religious, not legal, question.

B. No compelling interest exists that requires mandating contraceptive coverage or the participation of religious objectors in the coverage scheme.

The contraceptive mandate and the prior accommodation substantially burden religious exercise. They therefore cannot stand without change because they do not serve a compelling interest. RFRA does not define "compelling interest." Congress instead invoked existing case law, specifically *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963). The standard that Congress incorporated is a highly protective one. *Yoder* subordinates religious liberty only to "interests of the highest order," 406 U.S. at 215, and *Sherbert* only to avoid "the gravest abuses, endangering paramount interests," 374 U.S. at 406. These cases explain "compelling" with superlatives: "paramount," "gravest," and "highest." The education of children is important, and the first two years of high school are important—but not compelling enough to justify the substantial burden on religious exercise at issue in *Yoder*.

Mandating insurance coverage of contraceptives is no more compelling than educating children. In fact, this Court has found a compelling interest in only three situations in free-exercise cases. In each, strong reasons of self-interest or prejudice threatened unmanageable numbers of false claims to an exemption, and the laws at issue were essential to express constitutional norms or

to national survival: racial equality in education, *see Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983), collection of revenue, *see*, *e.g.*, *Hernandez v. Commissioner*, 490 U.S. 680, 699-700 (1989), and national defense, *see Gillette v. United States*, 401 U.S. 437, 461-62 (1971). Providing free contraceptives, while important to the goal of reducing unintended pregnancy, does not compare with those interests. Congress did not think the issue of contraceptive coverage important enough to even expressly address it in the ACA, instead leaving to the agency the decision whether to require such coverage in the first place.

At the same time, Congress exempted plans covering millions of people from any potential mandate to cover contraceptives: The ACA exempts a great many employers from most of its coverage requirements. Employers providing "grandfathered health plans"—those that existed prior to March 23, 2010, and that have not made specified changes after that date—need not comply with many of the Act's requirements, including the contraceptive mandate. 42 U.S.C. § 18011(a), (e). And employers with fewer than 50 employees are not required to provide health insurance at all. 26 U.S.C. § 4980H(c)(2); *see also Hobby Lobby*, 573 U.S. at 699. "All told, the contraceptive mandate" before the agency's current rule, did "not apply to tens of millions of people." *Hobby Lobby*, 573 U.S. at 700. Applying *Yoder*'s standard, this Court has held that a governmental interest cannot be compelling unless the government pursues it uniformly across the full range of similar conduct. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993); *see also Fla. Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989). There is no uniformity here, so the contraceptive mandate cannot be said to serve a compelling purpose.

Because the contraceptive mandate fails to advance a compelling interest, RFRA prohibits it from substantially burdening the religious exercise of objecting employers. The blanket exemption promulgated by the agency is the most straightforward way to comply with RFRA because it ensures that the contraceptive mandate will not burden religious exercise and is easy to administer. Thus, the agency's current rule appropriately "reconcile[s]" the ACA and RFRA "and . . . give[s] effect to each." *A.P.W. Paper Co.*, 328 U.S. at 202.

C. Even if the mandated provision of contraceptives was a compelling interest, requiring religious objectors to participate in the coverage scheme is not the least restrictive means of furthering that interest.

Even if one were to deem providing no-cost contraceptives to the employees of religious objectors a compelling interest, the agency's prior mandate-and-accommodation scheme still violates RFRA because it is not the least restrictive means to accomplish that goal. The current rule takes a path much less restrictive than its predecessors. For this reason too, the agency correctly concluded that its current rule is the best way "to reconcile" the ACA and RFRA, "and to give effect to each." *Id.*

"The least-restrictive-means standard is exceptionally demanding" and requires the government to show "that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases." *Hobby Lobby*, 573 U.S. at 728. And there are less-restrictive alternatives for providing contraceptives to objecting employers' employees. For example, if the government believes that providing some benefit serves a compelling

interest, providing that benefit itself should always be less restrictive than requiring religious objectors to do so.

This Court flagged this most obvious alternative in *Hobby Lobby*—"for the Government to assume the cost of providing . . . contraceptives . . . to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Id.* That is just what the agency's current rules do, as they make women whose employers do not provide contraceptive services because of a "sincerely held religious or moral objection" eligible for subsidized contraceptives from government-funded Title X family-planning centers. U.S. Dep't of Health and Human Servs., *Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7714, 7734 (Mar. 4, 2019).[9]

[9] If providing some benefit directly is cost prohibitive, that fact may factor into whether those means are least restrictive. On the other hand, if the government is not willing to spend the money to provide a benefit directly, that fact suggests providing the benefit does not serve a compelling interest. In any event, here there is no question that the agency is ready, willing, and able to provide the benefit directly.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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