**Nos. 19-15072, 19-15118, and 19-15150**

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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THE STATE OF CALIFORNIA, ET AL.,

*Plaintiffs-Appellees*,

v.

ALEX M. AZAR II IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

*Defendants-Appellants*,

and

THE LITTLE SISTERS OF THE POOR, JEANNE JUGAN RESIDENCE,

*Intervenor-Defendant-Appellant*,

and

MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

*Intervenor-Defendant-Appellant*.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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# BRIEF OF *AMICI CURIAE* CONSTITUTIONAL LAW SCHOLARS SUPPORTING INTERVENOR-DEFENDANT-APPELLANT AND REVERSAL

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## IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

*Amici*, listed in Appendix A, are constitutional law scholars who possess an acute interest in a reasoned development of constitutional doctrine. They write to aid the Court in interpreting and applying First Amendment principles.

[1] The parties' counsel were timely notified of and consented to this brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity, other than *amici curiae* or their counsel, made a monetary contribution to the preparation and submission of this brief..

## SUMMARY OF ARGUMENT

Lurking behind the regulatory issues presented by this appeal is a concerted effort to displace the Religious Freedom Restoration Act ("RFRA") with a novel approach that would trivialize a law's burden on religion. The Court should not indulge it.

In "an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). To aid in this analysis, Congress enacted RFRA[2]—a sensible framework for balancing religious freedom and third-party interests implicated by religious exemptions to neutral, generally applicable laws. In so doing, Congress restored the compelling interest test to claims that a facially-neutral law of general applicability "substantially burdens" the free exercise of religion—a test that had been abandoned by the Supreme Court in *Employment Division v. Smith*, 494 U.S. 872 (1990).[3] Thus, RFRA creates a statutory exemption from neutral and generally applicable laws that substantially burden sincere religious beliefs unless the government can establish its require-

[2] 42 U.S.C. § 2000bb *et seq*.

[3] *See* 42 U.S.C. § 2000bb(b)(1) ("The purposes of this chapter are: (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.").

ment meets the exacting "strict scrutiny" standard. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003).

Time and again, the Supreme Court has held that Congress's weighted balance in favor of religious freedom is constitutional. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2785; *Cutter*, 544 U.S. at 719–21. Some of RFRA's critics in academia, however, contend the Establishment Clause bans any religious exemption that "requires people to bear the burden of religions to which they do not belong and whose teachings they do not practice."[4] Indeed, it is not an exaggeration to characterize these critics' position—like that of the States challenging the Final Rules at issue here[5]—as a backdoor attempt to neutralize RFRA in all cases

[4] *See* Frederick Mark Gedicks, *Exemptions from the 'Contraception Mandate' Threaten Religious Liberty*, WASH. POST (Jan. 15, 2014). *See also* Micah Schwartzman, Nelson Tebbe, & Richard Schragger, *The Costs of Conscience*, Public Law and Legal Theory Research Paper Series 2018-14, University of Virginia Law School (Mar. 2018) (hereinafter "*Costs of Conscience*"); Micah Schwartzmann, Richard Schragger & Nelson Tebbe, Holt v. Hobbs *and Third Party Harms*, BALKANIZATION BLOG (Jan. 22, 2015) https://balkin.blogspot.com/2015/01/holt-v-hobbs-and-third-party-harms.html; Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.–C.L. L. REV. 343 (2014); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for* Hobby Lobby *Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC, 51 (2014).

[5] RFRA's detractors have suggested the Final Rules (and the Interim Final Rule before them) only accentuate the third-party harms present within this exemption because the Rules accommodate "moral as well as religious convictions." *See* Micah Schwartzman, Nelson Tebbe, & Richard Schragger, *The Costs of Conscience and the Trump Contraception Rules*, TAKE CARE BLOG (Mar. 8, 2018)

involving abortion, contraception, and certain applications of anti-discrimination law. Yet nothing in *Smith* prevents the Congress from reinstating the accommodation scheme that was widely respected in such cases as *Sherbert v. Verner*, 374 U.S. 398 (1968) and *Wisconsin v. Yoder*, 406 U.S. 205(1972).

The critics' argument suffers from several analytical defects that can be remedied by (1) a proper constitutional understanding of RFRA's relationship to the Establishment Clause; (2) an accurate understanding of how the Religion Clauses safeguard third-party interests; and (3) the correct application of these understandings to the Final Rules.

*First*, RFRA incorporates Establishment Clause limits on religious accommodations. It applies equally to all religions and takes into account the government's interest in protecting third parties when that interest is compelling. The critics object to RFRA on supposed Establishment Clause grounds on the odd view that government entitlements (rather than constitutional protections) are the "baseline" of rights, even though the Constitution gives that priority of place to the rights of individuals to practice their religious faiths. They also object to the ostensible "strictness" of the RFRA's compelling state interest even though that

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https://takecareblog.com/blog/the-costs-of-conscience-and-the-trump-contraception-rules. But the proper Establishment Clause remedy is to extend exemptions to religious-like objections. *See Welsh v. United States*, 398 U.S. 333, 351–61 (1970) (Harlan, J., concurring in result).

too only marks a return to the prior learning in both *Sherbert* and *Verner*, which was well defended by Justice Blackmun in his prescient dissent in *Smith*. *See* 494 U.S. 872, 909–10 (1990); *see also* Richard A. Epstein, *The Defeat of the Contraceptive Mandate in Hobby Lobby: Right Result, Wrong Reason*, CATO SUPREME COURT REV. 35, 41–42 (2013 Term). Nor is there any reason to dilute the protection afforded under RFRA because a private party, and not the government is making the protest. A uniform standard is the only way to protect the statute from being gutted with a succession of third party claims.

More fundamentally, arguing that RFRA should not apply when abortion, contraception, or anti-discrimination laws are at issue is a *political* argument for the *political* branches. It is not an argument for distorting Establishment Clause jurisprudence, which, as the Supreme Court recently confirmed, "must be interpreted by reference to historical practices and understandings." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (internal quotations omitted).

*Second*, allowing selective, "significant" (but not compelling) third-party interests to trump RFRA under the false flag of the Establishment Clause misstates Religion Clause jurisprudence. The Supreme Court's cases distinguish between religious *exemptions*—which do not violate the Constitution—and religious *preferences* that may (though not always) violate the Establishment Clause.

Preferences entail State action, exemptions do not.[6] RFRA's critics gloss over this distinction by re-characterizing landmark Supreme Court decisions like *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) and *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), which defended exemptions from Social Security contributions and the tax laws, respectively. Ignoring the distinction between exceptions and preferences "could turn all regulations into entitlements to which nobody could object on religious grounds." *Hobby Lobby*, 134 S. Ct. at 2781, n.37. Indeed, this conflation could even threaten the longstanding, widely embraced statutory practice of exempting individuals and entities from being forced to provide or pay for abortions.

*Third*, the argument for contriving an Establishment Clause bypass around RFRA is an unprincipled exercise in special pleading, which disregards the clear import of the Supreme Court's decisions in *Hobby Lobby* nor *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (*per curiam*). Both cases held the "seamless" coverage of abortifacients and contraceptives is *not* a compelling interest that justifies denying the *same* religious exemption to the Little Sisters of the Poor that is already given to for-profit corporations, small businesses, entities with "grandfathered" health-

[6] *See* Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?*, 106 KTY. L. J. 603 (2018) (hereinafter "*Discretionary Religious Exemptions*").

insurance plans, and those religious organizations the federal government has already deemed exempt. "RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally." *Id.* at 2786 (Kennedy, J., concurring). The Final Rules resolved this under-inclusiveness. An exemption that satisfies RFRA does not become constitutionally suspect simply because the determined opponents of RFRA do "not *lik*e the compelling interest test."[7]

Congress did not exempt the Affordable Care Act ("ACA") from RFRA (as it could have). At long last, HHS has recognized and applied RFRA to the substantial burden faced by the Little Sisters and other nonprofits. The efforts of the Plaintiff States and RFRA's critics in academia to circumvent that framework in the name of third-party interests is unmoored from the Constitution and would upend our nation's venerable tradition of religious accommodation that Congress, through RFRA, consciously sought to restore.

## I. RFRA IS A CONSTITUTIONALLY ACCEPTABLE, LEGISLATIVE JUDGMENT OF HOW TO TREAT THIRD-PARTY OBJECTIONS TO RELIGIOUS EXEMPTIONS.

When Congress enacted RFRA, it manifested the "solicitousness" *Smith* anticipated regarding the social value of religious exercise and, at the same time, it respected the primacy of the democratic process in harmonizing religious

[7] *See* Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 251 (1995) (emphasis in original).

exemptions with other social values.[8] RFRA is consistent with this nation's long tradition of safeguarding religious exercise through democratically-enacted exemptions.

Even as some framers debated whether the Constitution compelled certain religious exemptions, "there is virtually *no evidence* that anyone thought [regulatory exemptions] were constitutionally prohibited or that they were part of an establishment of religion."[9] Indeed, RFRA and the "baseline" of religious freedom it ensures follows from the founders' political philosophy, best articulated by James Madison: "It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. *This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society*."[10]

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[8] *See, e.g.*, Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 44–45 (2014); William K. Kelly, *The Primacy of Political Actors in Accommodation of Religion*, 22 U. HAW. L. REV. 403 (2000).

[9] Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1796 (2006) (emphasis added).

[10] James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *reprinted in* 8 The Papers of James Madison 1784–86, at 295 (Robert A. Rutland et al. eds., 1973) (emphasis added); *see also* Kevin Seamus Hasson, *Framing a Nation Under God: The Political Philosophy of the Founders* in BELIEVERS, THINKERS, AND FOUNDERS: HOW WE CAME TO BE ONE NATION UNDER GOD 115–29 (2016).

RFRA's structure harmonizes the right of free exercise and other compelling interests. It supersedes all prior, inconsistent federal law; it presumptively applies to all future federal law; and it applies to the implementation of federal law (like the HHS mandate and the Final Rules).[11] If Congress does not want RFRA to apply to a given statute (whether out of a concern for a third-party's interest or for other reasons), it can simply exempt that statute from RFRA's grasp.[12] Even as it stands, RFRA only protects religious exercise when the exercise is "substantially" burdened by government action. Even then, the government may still substantially burden religious exercise when its action, "appli[ed] . . . to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling govern-mental interest."[13]

Rather than resolve every conceivable conflict between religious claims and other values, Congress tasked the judiciary with applying—not distorting—RFRA's framework to particular cases. The Supreme Court has consistently "reaffirmed . . . the feasibility of case-by-case consideration of religious exemptions to generally applicable rules." *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436–37 (2006). Despite the claims of some critics that the Establish-

[11] 42 U.S.C. § 2000bb-3(a)-(b).

[12] *Id.* at § 2000bb-3(b).

[13] *Id.* at §§ 2000bb(b), 2000bb-1(a) & (b).

ment Clause, *ex ante*, takes this harmonizing off the table here in light of *Cutter*,[14] "[n]othing in [*Cutter*] suggested that courts were not up to the task" of balancing. *See id.* Because RFRA does not embody an unyielding preference for religious exercise over any other public or private interest and because it both avoids denominational favoritism and gives adequate protection for third-party interests, RFRA's framework does not violate the Establishment Clause. *See, e.g.*, *Cutter*, 544 U.S. at 719–20 (holding so in the context of the Religious Land Use and Institutionalized Persons Act, which possesses the same framework as RFRA).

Even RFRA's critics, who urge a ban on religious exemptions that allegedly cause "substantial" third-party harms, concede that "RFRA seems *facially* to comply with the Establishment Clause."[15] Notably, in their most recent article on the issue, *Costs of Conscience*, Professors Schwartzman, Tebbe, and Schragger avoid casting any explicit constitutional doubt on RFRA. Instead, they seek to undermine the wisdom of Congress's decision to address third-party harms through RFRA's analysis of a compelling interest pursued through the least-restrictive means, *see Hobby Lobby*, 134 S. Ct. at 2781 n.37; *see also Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015).[16] Putting aside the fact that "the *wisdom* of Congress's

[14] *See Costs of Conscience* at 12.

[15] Gedicks & Van Tassell, *RFRA Exemptions from the Contraception Mandate*, 49 HARV. C.R. – C.L. L. REV. at 348.

[16] *See, e.g.*, *Costs of Conscience* at 17–19.

judgment" in establishing RFRA "is not [a judicial] concern," *Hobby Lobby*, 134 S. Ct. at 2785 (emphasis added), the critics' objections to considering third-party interests within the RFRA framework do not give rise to an Establishment Clause violation.[17]

### A. THE PROPER "BASELINE" OF RIGHTS IS RELIGIOUS LIBERTY, NOT GOVERNMENT BENEFITS.

The first objection RFRA's academic critics make to RFRA's alleged effect on third-party interests is that "regulatory baselines" that identify the "entitlements" owed to particular third-parties (*e.g.*, the alleged "entitle[ment] to insurance coverage for all forms of contraception approved by the FDA") need to be established *before* religious exemptions can be considered, not after.[18]

This objection has no place under the Establishment Clause. "[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the

[17] RFRA's consideration of third-party harms as a facet of the compelling-interest analysis is commonplace in constitutional law. *See*, *e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (explaining the "fundamental object" of banning race discrimination in public accommodations "was to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments") (internal quotation marks and citation omitted); *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 625 (1984) (the compelling interest in "eradicating discrimination against its female citizens" exists because sex discrimination "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.").

[18] *See*, *e.g.*, *Costs of Conscience* at 14–19.

sovereign in religious activity." *Walz*, 397 U.S. at 668; *see also Town of Greece*, 134 S. Ct. at 1819 (confirming the Establishment Clause "must be interpreted by reference to historical practices and understandings") (internal quotation marks and citation omitted). Accordingly, "establishing" religion requires some form of government action:

> [T]he government does not establish religion by leaving it alone. . . . In the case of a religious exemption, the government has never altered the status quo ante. . . . With an exemption, the Court does not deny that third parties may have suffered a harm. Rather, the Court is saying that if there was such incidental harm, it was not caused by the government.[19]

Because the Establishment Clause is not implicated in the absence of State action,[20] it is incoherent to suggest the Clause protects "regulatory baselines"[21] when a religious claimant seeks to restore the *pre-regulation* status quo. Indeed, the chronology of the exemption protected by the Final Rules here proves the point: the ACA promised, via HHS regulation, a new government entitlement to contraception and abortifacients that overrode previously-protected religious liberty. RFRA only evaluates the propriety of returning the religious claimant to the prior baseline. This approach is consistent with Madison's understanding of

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[19] *See Discretionary Religious Exemptions* at 17–18.

[20] *Id.*

[21] *Cf. Costs of Conscience* at 17.

religious rights and duties as "precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[22]

The Supreme Court illustrated in *Amos* how religious liberty serves as the proper baseline for evaluating government entitlements. There, the Court rejected an as-applied Establishment Clause challenge to Title VII's exemption of religious employers from the statute's general prohibition of religious discrimination. *See* 483 U.S. at 329–30. This exemption allowed the religious employer in *Amos* to terminate a building custodian based on his religion—a clear third-party harm, but one the Supreme Court nevertheless found insufficient to override the statute's religious exemption. Like RFRA, the purpose of Title VII's religious exemption is to "lift[] a regulation that burdens the exercise of religion." *Id.* at 338.

*Amos* further explained that this purpose is distinct from an advancement of religion that might violate the Establishment Clause. Unlike statutes that "delegate[] governmental power to religious employers and convey[] a message of governmental endorsement of religious discrimination," *id.* at 337 n.15 (internal quotation marks and citation omitted), Title VII's statutory religious exemption restores the "baseline" of rights the religious claimant and the third-party

[22] *See supra* n.10; *see also* Ronald J. Colombo, *An Antitrust Approach to Corporate Free Exercise Claims*, 91 ST. JOHN'S L. REV. 1, 49 n.260 (2018) ("It is only because of government's interference . . . that the conflict between rights even arises.").

respectively possessed before the government imposed its regulation. No government action occurs when a private party takes action involving a third-party. *See id.* ("Undoubtedly, the [third-party's] freedom of choice in religious matters was impinged upon, but it was the Church . . . and not the Government, who put him to the choice of changing his religious practices or losing his job.").

Just as Title VII's prohibitions cannot be considered without its provision for religious exemptions, the ACA cannot be evaluated without looking at RFRA. By its own terms, RFRA applies to any subsequent federal statute—and administrative implementation of that statute—unless Congress expressly says otherwise. Congress did not do that here, and RFRA's incorporation into the ACA ensures the "baseline" protection of religious liberty is not disturbed by the ACA. Like the Title VII exemption in *Amos*, RFRA merely lifts, in certain circumstances, a government-imposed burden on religion. Restoring that pre-burden baseline does not "require that the [religious] exemption come packaged with benefits to secular entities." *Id.* at 338; *see also Harris v. McRae*, 448 U.S. 297, 316 (1980) (upholding the Hyde Amendment and concluding the government was under no obligation to "remove those [obstacles to a right, there, the right to abortion] not of its own creation"). Just so here: removing the burden of the HHS mandate does not violate the Establishment Clause. *See also id.* at 315–17 (the statutory religious exemption at issue, as here, leaves third parties with "the same range of [insurance] choice[s]

. . . as [they] would have had if Congress had chosen to subsidize no health care costs at all.").

### B. COMPLAINING THAT THE COMPELLING INTEREST TEST IS "TOO STRINGENT" TO ACCOUNT FOR THIRD-PARTY INTERESTS HAS NO BASIS IN SUPREME COURT JURISPRUDENCE.

The second objection raised by RFRA's detractors is that Congress' choice to account for third-party harms within the compelling-interest test imposes an analysis that "is too stringent and also inconsistent with precedent."[23] The Supreme Court's cases support no such contention.

The critics' argument relies on a misreading of *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985),[24] which invalidated a religious preference on Establishment Clause grounds; specifically, a Connecticut statute that "permitted employees who observe a Sabbath to demand that their employer accommodate the employee's religious practice."[25] All the critics of the compelling-interest test claim is that "[i]t seems improbable that the state had a compelling interest" in *Caldor*.[26] That misses the point. *Caldor* involved a religious preference, not a religious exemption. Moreover, an Establishment Clause violation was found because the government entered a wholly private dispute and took the side of the

[23] *Costs of Conscience* at 18.

[24] *Id.*

[25] *See Discretionary Religious Exemptions* at 2–3, 5–12 (analyzing *Caldor*).

[26] *Costs of Conscience* at 18.

religious claimant by imposing an "*unyielding* weighting in favor of Sabbath observers over all other interests." 472 U.S. at 709–10 (emphasis added). The balancing inherent to RFRA makes it improper to characterize the Final Rules as exhibiting an "unyielding" religious preferences.

More importantly, the Supreme Court has never held that significant third-party harms that fall short of a compelling state interest are strong enough to overcome a substantial religious burden. Rather, the Supreme Court will uphold religious exemptions even when the government has a compelling interest if the government has not pursued that interest through the means least-restrictive to religious liberty. *See, e.g.*, *Holt*, 135 S. Ct. at 864–65. *Hobby Lobby* explained the consequences of bypassing the compelling-interest test simply because a third-party claim finds it too hard to satisfy. *See* 134 S. Ct. at 2781 n.37 ("By framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless."). To be sure, "there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA." *O Centro*, 546 U.S. at 436. But no such "instance" exists here.

When, as here, the religious exemption at issue is of a "longstanding" type, the sort of exemption that led Congress to enact RFRA, *and* when "the

Government has not offered evidence demonstrating that granting . . . an exemption would cause *the kind of . . . harm recognized as a compelling interest*," *id.* at 437 (emphasis added), an "instance in which a need for uniformity precludes the recognition of [RFRA] exemptions" does not exist, *see id.* at 436. RFRA's critics do not contradict these provisos from *O Centro*, and tellingly so. As this language confirms, whenever the Supreme Court faces a claim that some lesser interest might require "uniform" application of a general law, RFRA notwithstanding, the Court *still* insists that any challengers demonstrate a compelling state interest. Constitutional law simply provides no basis to skirt that test.[27]

Here, the exemption provided by the Final Rules simply gives to the objecting nonprofits the *same*, pre-existing exemption afforded to churches and their integrated auxiliaries.[28] This exemption is the *raison d'etre* of RFRA. *See* The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary, 102 CONG. REG. 192 (1992) (statement of Nadine Strossen) (explaining that "[i]n the aftermath of the *Smith* decision, it was easy to imagine

[27] Indeed, even *United States v. Lee*, which RFRA's critics rely on in support of the argument that regulatory entitlements should be understood to precede religious liberty, applied—as the critics concede—the compelling interest analysis. *See Costs of Conscience* at 16 (citing *Lee*, 455 U.S. at 258). Moreover, *Hobby Lobby* distinguished *Lee* from the situation here. *See Discretionary Religious Exemptions* at 16 n.90.

[28] *See* Gedicks & Van Tassell, *RFRA Exemptions from the Contraception Mandate*, 49 HARV. C.R.-C.L. L. REV. at 380–81.

how religious practices and institutions would have to abandon their beliefs in order to comply with generally applicable, neutral laws. At risk were such familiar practices as . . . permitting religiously sponsored hospitals to decline to provide abortion or contraception services."); 139 CONG. REC. 9685 (1993) (statement of Rep. Hoyer) (explaining that RFRA is "an opportunity to correct . . . injustice[s]" like a "Catholic teaching hospital [that] lost its accreditation for refusing to provide abortion services"). And finally, as the critics all but concede in complaining that the compelling-interest test is too "stringent" to satisfy, there has been no showing that "seamless" insurance coverage of abortifacients and contraceptives is a compelling interest pursued through the means least-restrictive on religious exercise. Skipping over the compelling-interest step guts RFRA's carefully calibrated three-stage framework.

### C. AN ESTABLISHMENT CLAUSE CLAIM REQUIRES STATE ACTION.

The final objection RFRA's critics make to considering third-party harms within the RFRA framework is that "the government will not always be the party objecting to a religious exemption."[29] The critics cite this very litigation as proof positive, claiming that "[t]he interest of those burdened by a religious accommodation need not coincide with the government's interests, whether or not compelling, to warrant protection under the Establishment Clause. After all, the Establishment

[29] *Costs of Conscience* at 18.

Clause protects the religious freedom of private individuals, not only state actors."[30] Establishment Clause jurisprudence rejects this argument.[31]

RFRA's detractors seek to buttress their argument by pointing to *Caldor*, which "was brought by private employers," and in which, the critics claim, the private employers "did not need to allege that their interests were compelling for government purposes, only that they were significantly burdened as a result of the government's religious accommodation."[32] These contentions are *non sequiturs*. Although "the commercial burden on Caldor Stores gave it standing to raise the Establishment Clause defense[,] *it was the statute* requiring private parties to assist Thornton in his religious duties that crossed the boundary between church and state, thus violating the Establishment Clause."[33] Unlike here, where the Final Rules *lift* a burden imposed on religious exercise by the HHS mandate pursuant to the ACA, Thornton was "actively empowered" by the Connecticut statute "to

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[30] *Id.*

[31] Moreover, the division between third-party harms and societal interests is artificial. "[O]ne might simply say that compelling state interests just exactly are third party interests of adequate gravity. Whose interests is the government protecting in resisting a religious accommodation if not those of third parties?" Marc O. DeGirolami, *Free Exercise By Moonlight*, 53 SAN DIEGO L. REV. 105, 133 (2016).

[32] *Costs of Conscience at 18.*

[33] *See Discretionary Religious Exemptions* at 10 (emphasis added).

demand the assistance of private parties to secure the observance of his Sabbath. That is 'state action.'"[34]

The *Amos* Court distinguished *Caldor* in the same way: "*Connecticut had given the force of law* to the employee's designation of a Sabbath day and required accommodation by the employer regardless of the burden which that constituted for the employer or other employees." *Amos*, 483 U.S. at 337 n.15 (emphasis added). In *Amos*, there was no State action; the harm to the janitor was caused by his own church. *Id.* In *Caldor*, there was State action; the harm to the department store was caused by the Connecticut statute. The Establishment Clause (indeed, the entire Bill of Rights) is not there to protect private parties from other private parties. It is there to protect private parties from the Government.

The Supreme Court's decision in *Walz* reinforces *Amos*'s distinction between a religious exemption and a religious preference. By a vote of 8 to 1, the Court held that a municipality's property tax exemption for houses of worship did not violate the Establishment Clause because granting an exemption "is simply sparing the exercise of religion from the burden of property taxation levied on [others]." *Walz*, 397 U.S. at 673. Had the municipality in *Walz* enacted a preference, it would have "transfer[red] part of its revenue to churches." *Id.* at 675. Instead, it "simply abstain[ed] from demanding that the church support the state."

[34] *Id.*

*Id*. There is no basis to claim that an Establishment Clause violation exists when the government is not taking some action to affirmatively advance religion.

"As [the Supreme Court] ha[s] said before, [its] cases will not tolerate the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as authorization or encouragement." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999) (internal quotation marks and citation omitted). The same is true when federal action is at issue, and the RFRA critics who oppose the Final Rules' religious exemption offer no basis to revolutionize constitutional law by applying its restraints to private conduct.

* * *

Ultimately, the critics' objections to the application of RFRA boil down to this: They—and the States that echo their third-party harm arguments—disagree with how Congress chose to account for religious interests relative to other competing social values. Overturning religious exemptions "favors a much larger role for government in the lives of religious people and organizations, thereby shrinking that part of civil society for church-state separation and the desired religious self-governance. Whether such an expansion is good or bad is not the issue here. Rather, the question is who has the authority to make that decision and how it is made."[35] As Professor Alexander Bickel put it, "by right, the idea of

[35] *Discretionary Religious Exemptions* at 18.

progress is common property;" it is not the judiciary's to define.[36] No argument consistent with the historical practices and traditions protected by the Establishment Clause has been made to authorize this Court to undermine the congressional judgment RFRA embodies.

## II. THERE IS NO CONSTITUTIONAL BASIS TO CLAIM THAT DISCRETIONARY RELIGIOUS EXEMPTIONS VIOLATE THE CONSTITUTION SIMPLY BECAUSE OF "SIGNIFICANT" THIRD-PARTY INTERESTS.

Conscious of the insurmountable challenges to upending RFRA via the Establishment Clause, the academicians opposing the Little Sisters' hard-won exemption seek to reinterpret the Constitution's Religion Clauses more generally. According to their novel, revisionist view, the Supreme Court has supposedly "explicitly and repeatedly recognized" that substantial, not compelling, third-party harms give rise to Establishment Clause limits on religious exemptions.[37] Not so. The "Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144–45 (1987).

*Hosanna-Tabor*, for example, held that the First Amendment's "ministerial exception" to federal antidiscrimination statutes barred a retaliation claim from a

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[36] Alexander M. Bickel, THE SUPREME COURT AND THE IDEA OF PROGRESS 181 (1978).

[37] *See Costs of Conscience* at 7.

fourth-grade teacher at a Lutheran school. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C. 565* U.S. 171, 195–96 (2012). There is no doubt that a discrete third-party harm was present in *Hosanna-Tabor*: the *only* reason the employee there could not sue her employer for violating the Americans With Disabilities Act's retaliation prohibition was because her employer was a religious organization and she qualified as a "minister." While "[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important[, . . .] so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196. Like in RFRA, the Court confirmed that the ministerial exception can be applied "to other circumstances." *See id.* No part of *Hosanna-Tabor* suggests that the mere presence of substantial third-party harm acts to defeat religious exemptions, and RFRA's detractors set forth no framework for balancing substantial third-party harms against religious burdens in particular cases.[38]

[38] The critics opposing the RFRA framework purport to distinguish *Hosanna-Tabor* (and *Amos*) from the handling of third-party harms in other cases because they rest on "powerful free exercise and associational interests that generate a range of statutory and constitutional protections against liability" that, apparently, only "religious organizations" enjoy. *See Costs of Conscience* at 13. This distinction is contrived. *Hosanna-Tabor* never even mentions *Amos*—a strong indication that the Court has not adopted the critics' narrow reading of these two cases. Indeed, while the ministerial exception certainly guards against "government interference with an internal church decision that affects the faith and mission of the church itself," *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 n.2 (2017) (internal quotation marks and citation omitted) (explaining

Further, *Amos*, *Walz*, and other cases[39] demonstrate a distinction between a religious *exemption* that lifts a government-imposed burden on religious exercise, and a statutory religious *preference*.[40] This distinction not only explains how, as discussed above, *Amos* harmonized its holding with *Caldor*, *see* 483 U.S. at 337 n.15—it explains the myriad, long-accepted ways in which Congress and the judiciary have "lift[ed] [] regulation[s]" that burden free exercise without any constitutional infirmities, *see id.* at 338. Indeed, there is *not a single case* in which the Supreme Court has ever overturned a religious exemption on Establishment Clause grounds.

Other longstanding examples of accepted religious exemptions where third-parties experience harm abound. For example, 170,000 Vietnam War draftees received conscientious objector deferments, even as the selective service

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*Hosanna-Tabor*), that only speaks to the substantial burden such government action imposes upon religion. This distinction does not at all suggest that religious liberty rights turn upon whether the claimant at issue is a "religious organization" (however that phrase is defined). *See*, *e.g.*, *Hobby Lobby*, 134 S. Ct. at 2768–74 (surveying the U.S. Code and pre-*Smith* free-exercise jurisprudence and finding no principled basis to conclude that for-profit corporations cannot have their religious exercise substantially burdened within the meaning of RFRA).

[39] *See Discretionary Religious Exemptions* at 6 ("In addition to *Amos*, the Court has on six other plenary reviews turned back an Establishment Clause challenge to a discretionary religious exemption) (citing *Cutter*, 544 U.S. at 720; *Gillette v. United States*, 401 U.S. 437, 448-60 (1971); *Walz*, 397 U.S. at 673–75; *Zorach v. Clauson*, 343 U.S. 306, 308–15 (1952); *Aver v. United States*, 245 U.S. 366, 374 (1918); *Goldman v. United States*, 245 U.S. 474, 476 (1918)).

[40] *See Discretionary Religious Exemptions* at 13–15.

exemption for these objectors was facially limited to those with a belief in a "Supreme Being" and even though the granting of an exemption sent a third-party to war in the objector's place.[41] Indeed, the structure of conscientious objections in Vietnam made it possible to determine affected third-parties.[42] Such objections date back to the American Revolution. At no point have such objections been thought to violate the Establishment Clause.

Another example is the priest-penitent privilege. This privilege is recognized throughout the United States and "[n]either scholars nor courts question the legitimacy of the privilege, and attorneys rarely litigate the issue," even as the privilege imposes an obstacle on a third-party's search for truth. *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1532 (9th Cir. 1997) (internal quotation marks and citation omitted).

Perhaps the most pervasive example—and most relevant here—of religious exemptions are the "systematic and all-encompassing" exemptions for individuals that decline to participate in abortions.[43] These widespread exemptions have never

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[41] *See* James W. Tollefson, THE STRENGTH NOT TO FIGHT: AN ORAL HISTORY OF CONSCIENTIOUS OBJECTORS OF THE VIETNAM WAR 7 (1993).

[42] *See* William P. Marshall, *Third-Party Burdens and Conscientious Objection to War*, 106 KTY. L. J. 661 (2018).

[43] *See* Mark L. Rienzi, *The Constitutional Right Not To Kill*, 62 EMORY L.J. 121, 147–49 (2012) ("[V]irtually every state in the country has some sort of statute protecting individuals and, in many cases, entities who refuse to provide abortions.").

been held outside the realm of legislative authority simply because access to a constitutional right is at issue. Indeed, as Senator Ted Kennedy explained when advocating for the Church Amendment, which ensured that certain federal-fund recipients were not obliged to provide abortions and could not discriminate against employees who would not participate in abortions: "*Congress has the authority under the Constitution to exempt individuals from any requirement that they perform medical procedures that are objectionable to their religious convictions*." 119 CONG. REC. 9602 (1973) (emphasis added). Lacking "seamless" access to abortion because of religious exemptions does not constitute constitutionally-cognizable, third-party harm.

In short, devising a new constitutional doctrine grounded in "substantial" third-party harms would require taking an eraser to well-established religious exemptions. Without any principled framework to sort out why cases involving abortion, contraception, and antidiscrimination laws involve "substantial" third-party harms but, for example, military draft exemptions and the priest-penitent privilege do not. Any such a test invites unneeded judicial speculation about "the social importance of all laws" that the Supreme Court sought to avoid in *Smith*. *See* 494 U.S. at 890.

## III. THE ASSERTED THIRD-PARTY HARM CANNOT CONSTITUTE A COMPELLING GOVERNMENT INTEREST.

This Court must not consider third-party harms abstractly, wholly divorced from the burden they impose on the religious claimant. Rather, this Court must "'scrutinz[e] the asserted harm of granting specific exemptions to particular religious claimants,' and 'look to the marginal interest in enforcing' the challenged government action in that particular context." *Holt*, 135 S. Ct. at 863 (quoting *Hobby Lobby*, 134 S. Ct. at 2779). As Professor Michael Stokes Paulsen has observed, "the test is an extremely rigorous one, referring to an extremely narrow range of permissible justifications for infringements on religious liberty. Not every legitimate, or even very important, interest of government qualifies."[44]

By granting the Little Sisters and the other nonprofits the *same* exemption that churches, for-profit corporations, "grandfathered" health insurance plans, and small businesses already receive, women working for the Little Sisters are simply restored to the pre-ACA baseline of rights (as those women who worked for exempted for-profit corporations were after *Hobby Lobby*, *see* 134 S. Ct. at 2783). What the Court found acceptable in the face of Establishment Clause challenges in the Hyde Amendment context, *see Harris*, 448 U.S. at 315–17, and in the Title VII context, *see Amos*, 483 U.S. at 337 n.15, holds true here.

[44] Paulsen, *A RFRA Runs Through It*, 56 MONT. L. REV. at 263 (discussing and citing *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963)).

Without the Final Rules, objecting nonprofits remain singled out for disparate treatment compared to those many other entities that receive an exemption from the coverage mandate. By virtue of the exemptions offered to churches and other entities and businesses, Congress and HHS have already determined that "seamless" access to abortifacients and contraceptives should be unavailable to tens-of-millions of Americans. Denying the same exemption to the Little Sisters and the other objecting nonprofits, while citing the same regulatory interest Congress and HHS has already decided not to apply to many others, dooms a strict scrutiny defense. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (explaining the government must avoid free-exercise invalidity in regulating by not letting under-inclusiveness do "appreciable damage to [the] supposedly vital interest prohibited"). The Final Rules correct this untenable discrimination.

"RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). The third-party harms doctrine proposed by RFRA's critics would tolerate this inconsistency. The Court should reject this end-run around RFRA.

## CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court vacate the preliminary injunction and remand with instructions for further proceedings.

Respectfully submitted,

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# APPENDIX A

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## STATEMENT OF RELATED CASES

This case, 19-15072 has been consolidated with Case Nos. 19-15118 and 19-15150. I certify that I know of no other related cases pending in this court.

*s/ Miles E. Coleman*
MILES E. COLEMAN

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(4) and Fed. R. App. P. 32(a)(7)(B) because it contains 6,472 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

*s/ Miles E. Coleman*
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## CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2019, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

*s/ Miles E. Coleman*
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