**Nos. 19-431 & 19-454**

IN THE
# Supreme Court of the United States

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,
*Petitioner*,
v.
COMMONWEALTH OF PENNSYLVANIA, ET AL.,
*Respondents*.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
*Petitioners*,
v.
COMMONWEALTH OF PENNSYLVANIA, ET AL.,
*Respondents*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF OF AMICUS CURIAE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICUS CURIAE[1]

The Foundation for Moral Law (hereinafter "the Foundation") is an Alabama-based–legal organization dedicated to defending religious liberty and promoting a strict reading of the Constitution as intended by its Framers. The Foundation believes that religious liberty is the God-given right of all people claimed in the Declaration of Independence and protected by the First Amendment. The Foundation also believes that the Framers intended for the judicial branch to be the least dangerous of all three branches. The Foundation has an interest in this case because it believes the Framers' intent for the Free Exercise Clause was to grant religious accommodations to people from generally applicable laws, except under very limited circumstances that are not present in this case. The Foundation also believes that separation of powers and the rule of law are threatened when federal district courts grant nationwide injunctions.

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[1] Pursuant to Rule 37.3, *Amicus* has notified all parties of intent to submit this Brief and has requested consent from all parties. All parties have consented. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

Legislative power binds every person within the legislature's jurisdiction, but judicial power binds only the parties in the case before the court. When a federal district judge issues a nationwide injunction, the judge binds not only the parties in the case but also, in effect, the entire nation. Thus, nationwide injunctions are inherently legislative in nature instead of judicial, exceeding the limits placed on the judicial branch by Article III of the United States Constitution and violating the doctrine of separation of powers. This court recently granted certiorari in *Seila Law, LLC v. Consumer Financial Protection Bureau* (No. 19-7) to address the question of whether concentrating so much power in one largely unaccountable individual violates the separation of powers. But federal district judges can abuse their power through the practice of nationwide injunctions even more than the Director of the CFPB can. The Court should therefore not only grant the Solicitor General's request to consider the propriety of a nationwide injunction in this case, but it should also consider Justice Thomas's question from *Trump v. Hawaii* concerning whether nationwide injunctions are constitutional at all.

Moreover, the religious freedom issues in this case are governed not only by the Religious Freedom Restoration Act but also by the Free Exercise Clause of the First Amendment. Because Congress passed the RFRA in response to this Court's free exercise jurisprudence, it is appropriate in this case to

consider the Free Exercise Clause in addition to RFRA. The Framers of the First Amendment viewed religious freedom as an unalienable, God-given right. Consequently, the Free Exercise Clause demands even more rigorous protection for religious freedom than RFRA provides. Under an originalist view of the Free Exercise Clause, it was completely proper for the government to create religious and moral exceptions for Obamacare's contraceptive mandate, and the Little Sisters of the Poor Saints Peter and Paul Home (hereinafter "the Little Sisters") were entitled to the kinds of religious accommodations that the Trump administration tried to create.

Because these cases involve one of the most important safeguards for constitutional freedoms (the separation of powers doctrine), and because they involve the protection of our most cherished civil liberty (religious freedom), this Court should grant the petitions for writs of certiorari.

## ARGUMENT

### I. Nationwide injunctions violate the doctrine of separation of powers.

During the Court's last term, Justice Thomas issued a masterful concurrence casting severe doubt on the constitutionality of nationwide injunctions and urging the Court to consider the issue. *Trump v. Hawaii*, 138 S.Ct. 2392, 2424 (2018) (Thomas, J., concurring). The Solicitor General argues (quite well) that the nationwide injunction in this case was inappropriate and suggests that he is willing to

discuss the constitutionality of nationwide injunctions altogether. Petition for Writ of Certiorari at 32-35, *Trump v. Pennsylvania* (No. 19-454). *Amicus* urges the Court to take this opportunity to consider the constitutionality of nationwide injunctions because they appear to violate the doctrine of separation of powers.

One of the fundamental distinctions between legislative power and judicial power is this: the legislature has the power to bind every person within its jurisdiction, but the judiciary has the power to bind only the people in the case before it. Alexander Hamilton described legislative power this way: "The legislature ... prescribes the rules by which the duties and rights *of every citizen* are to be regulated." *The Federalist* No. 78 (Alexander Hamilton) (emphasis added). In contrast, this Court has defined "judicial power" as "the power of a court to decide and pronounce a judgment and carry it into effect *between persons and parties who bring a case before it for decision*." *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (citations and quotation marks omitted) (emphasis added). Quoting Montesquieu, James Madison warned, "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for THE JUDGE would then be THE LEGISLATOR." *The Federalist* No. 47 (James Madison).

If a judge has the power to grant nationwide injunctions, then he or she can bind not only the parties in a particular case, but the entire nation as

well. In the present case, the dispute was supposedly between several states and the federal government. However, by prohibiting the federal government from implementing the IFR's anywhere in the nation, one unelected federal judge decided a matter between the federal government and the People of the United States.

Thomas Jefferson warned that considering judges "as the ultimate arbiters of constitutional questions ... would place us under the despotism of an Oligarchy." Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *available at* https://founders.archives.gov/documents/Jefferson/98-01-02-1540. If Jefferson was concerned that one *branch* of government could become despotic if it could determine the final meaning of the Constitution, then he would have been even more shocked at the notion that one *judge* within the judicial branch could bind the entire country with a decision at the trial level. Vesting such legislative power in one person resembles more of a dictatorship than an oligarchy.

It is true that a district judge's decision is subject to reversal by an appellate court. However, appellate courts often employ the abuse-of-discretion standard of review to matters in which trial courts have discretion, such as injunctions. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). If this Court fails to hold that trial courts lack the power to bind the entire nation, then nationwide injunctions will have a level of insulation similar to what decisions of

administrative agencies have now. Several Justices of this Court have expressed concerns about that issue in recent years. *See, e.g.*, *Kisor v. Wilkie*, 139 S.Ct. 2400, 2425 (2019) (Gorsuch, J., concurring in part and concurring in judgment) (criticizing *Auer* deference); *Michigan v. Environmental Protection Agency*, 135 S.Ct. 2699, 2712 (2015) (Thomas, J., concurring) (questioning the constitutionality of *Chevron* deference); *City of Arlington v. Federal Commc'ns Comm'n*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting) (warning of the separation-of-powers violations that follow with granting too much deference to the administrative state).

The same concern is present in this case. As our Declaration of Independence states that to secure our God-given rights, "[g]overnments are instituted among Men, *deriving their just powers from the consent of the governed*." *The Declaration of Independence* para. 2 (U.S. 1776) (emphasis added). Nationwide injunctions are incompatible with this principle. A decree that binds every person within a jurisdiction must come from the People's representatives in that jurisdiction. In contrast, the judges that issue nationwide injunctions are unelected, giving the People no voice in a decree that will bind all of them.

Moreover, as Attorney General Barr has observed, "Congress set clear geographic limits on lower-court jurisdiction," but nationwide injunctions give "a single judge the unprecedented power to render irrelevant the decisions of every other judge in the

country." William Barr, Remarks to the American Law Institute on Nationwide Injunctions (May 21, 2019). In other words, by issuing nationwide injunctions, federal judges not only exclude the people within their geographic limits from having a voice, but they also impose their decrees on people living outside their geographic limits. One person wielding this much power is not adjudication. It is tyranny.

Less than a month ago, this Court granted certiorari to answer the question of whether the vesting of substantial executive authority in a single director of the Consumer Financial Protection Bureau (hereinafter "CFPB") violates the doctrine of separation of powers. *Seila Law LLC v. Consumer Financial Protection Bureau*, No. 19-7 (U.S. Oct. 18, 2019) (mem.). The CFPB is controlled by one director, who is appointed by the President and confirmed by the Senate. 12 U.S.C. 5491(b)(1)-(2). The Director serves for a term of five years but cannot be fired by the President except for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3). As Justice Kavanaugh observed while a judge on the D.C. Circuit:

> "The Director of the CFPB wields enormous power over American businesses, American consumers, and the overall U.S. economy. The Director unilaterally implements and enforces 19 federal consumer protection statutes, covering

everything from home finance to student loans to credit cards to banking practices.

The Director *alone* may decide what rules to issue. The Director *alone* may decide how to enforce, when to enforce, and against whom to enforce the law. The Director *alone* may decide whether an individual or entity has violated the law. The Director *alone* may decide what sanctions and penalties to impose on violators of the law.

Because the CFPB is an independent agency headed by a single Director and not by a multi-member commission, the Director of the CFPB possesses more unilateral authority—that is, authority to take action on one's own, subject to no check—than any single commissioner or board member in any other independent agency in the U.S. Government. Indeed, other than the President, the Director enjoys more unilateral authority than any other official in any of the three branches of the U.S. Government.

That combination—power that is massive in scope, concentrated in a single person, and unaccountable to the President—triggers the important constitutional question at issue in this case."

*PHH Corp. v. Consumer Financial Protection Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

If the Court is concerned that concentrating this much power in one individual may constitute a separation of powers violation, then it should have no trouble concluding that the same problem exists when one federal judge *alone* may bind the entire nation with a stroke a pen. Like the CFPB Director, a federal district judge is appointed by the President and confirmed by the Senate and then becomes unaccountable to the People. Congress's ability to remove a federal district judge is even more limited than the ability to remove the CFPB Director, since judges are appointed for life for good behavior and require two thirds of the Senate to concur for removal. The CFPB Director has the power to bind nearly all American *businesses* on the subject of the economy, but a federal district judge through a nationwide injunction can bind all the American *People* on any subject arising under federal law.

Thus, if the Court was concerned enough in *Seila Law* to grant certiorari, then it should be all the more concerned in this case and do the same.

## II. The Third Circuit's decision violates not only the Religious Freedom Restoration Act but also the Free Exercise Clause.

In its opinion below, the Third Circuit failed to give religious freedom the respect it deserved. First, the Third Circuit questioned whether federal law permits a federal agency to create religious and

moral exemptions from Obamacare's contraception mandate. *Pennsylvania v. Trump*, 930 F.3d 543, 572 (3d Cir. 2019). Second, it concluded that the Obama administration's accommodation was good enough for religious adherents with objections to the contraceptive mandate. *Id.* at 573. Third, it concluded that the Trump administration's IFR's imposed an "undue burden" on female employees who would lose contraceptive coverage. *Id.* at 574.

The Solicitor General and the Little Sisters have argued thoroughly that the Third Circuit's analysis of the Religious Freedom Restoration Act was incorrect. Petition for Writ of Certiorari at 20-31, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania* (No. 19-431); Petition for Writ of Certiorari at 20-26, *Trump v. Pennsylvania* (No. 19-454). *Amicus* argues that there is an even more fundamental religious-freedom law that addresses this issue: the Free Exercise Clause of the First Amendment.

Although the parties have based their arguments on the Religious Freedom Restoration Act instead of the Free Exercise Clause, this Court has held that it may consider issues that are "inextricably linked" with those raised by the parties. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 n.8 (2005). As this Court has recognized, Congress's intent for the Religious Freedom Restoration Act was to restore the standard of review for religious liberty cases to that announced in *Sherbert v. Verner*, 374 U.S. 398 (1963), which was altered by *Employment*

*Division v. Smith*, 494 U.S. 872 (1990). *City of Boerne v. Flores*, 521 U.S. 507, 515 (1997). Since Congress passed RFRA in an attempt to be faithful to the Free Exercise Clause, it is incredibly difficult to argue that the two laws can be separated. Even within the last year, Justices Alito, Thomas, Gorsuch, and Kavanaugh suggested that *Smith* should be reconsidered. *Kennedy v. Bremerton Sch. Dist.*, 139 S.Ct. 634, 637 (2019) (statement of Alito, J., respecting denial of certiorari). Presumably, overruling *Smith* would return us to the *Sherbert* standard—which is exactly what RFRA was intended to do. Thus, the two issues appear to be inextricably linked.

But unlike *Sherbert* and even RFRA, *Amicus* believes that the Free Exercise Clause gives freedom of religion even more protection than the strict-scrutiny test affords. Such protection is warranted for this reason: religious liberty is not a product of political compromise, but it is the gift of God. Consequently, it is an unalienable right.

James Madison, the principal architect of the First Amendment, said in his Memorial and Remonstrance,

> "[W]e hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.' The Religion then of every man

must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. 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 degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance."

James Madison, *A Memorial and Remonstrance* (June 20, 1785).

Madison's argument reflects the logic of the Declaration of Independence: our Creator gave us rights that pre-exist the State, and people form governments in order to secure those rights. *See The Declaration of Independence* para. 2 (U.S. 1776). Consequently, the government may not take away the rights that it was created to secure in the first place—one of which is free exercise of religion.

It should be no surprise then that Madison believed that "the free exercise right should prevail 'in every case where it does not trespass on private rights or the public peace.'" Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harvard L. Rev. 1409, 1464 (1989) (quoting Letter from James Madison to Edward Livingston (July 10, 1822), in 9 *The Writings of James Madison* 98, 100 (G. Hunt ed. 1901)). After engaging in a thorough analysis of Madison's view of religious liberty, Professor Michael McConnell concluded,

> "If the scope of religious liberty is defined by religious duty (man must render to God 'such homage as he believes to be acceptable...to him'), and if the claims of civil society are subordinate to the claims of religious freedom, it would seem to follow that the dictates of religious faith must take

> precedence over the laws of the state, even if they are secular and generally applicable."

McConnell, *supra*, at 1453.

Consequently, religious exemptions from neutral laws of general applicability, except under extremely limited circumstances, are probably what the Founders had in mind. *See id.* at 1511-13. *Smith* falls short of this standard.

Moreover, under Madison's view, the Free Exercise Clause's requirements appear to be even more robust than the RFRA's. For instance, the RFRA requires a court to assess whether a religious practice is "substantially burdened." *See* 42 U.S.C. § 2000 bb-1. Such an evaluation necessarily requires a court to distinguish between religious doctrines that are *substantially* important and those that are *less* important. Even theologians within the same denominations disagree on those questions. Instead of making courts the arbiters of theological questions, Madison's analysis was simpler: if you believe you owe a duty to your Creator and the State stands in your way, then you get an exemption unless you are trampling the private rights of another or breaching the public peace.

In this case, one cannot seriously contend that the President and the Little Sisters are breaching the public peace. Moreover, this Court has rejected the argument that people accrue private rights as beneficiaries of programs where changes are frequent and flexibility is required. *See Flemming v.*

*Nestor*, 363 U.S. 603 (1960) (rejecting the argument that people accrue rights under the Social Security Act). Such is the case here. Frequent changes to healthcare laws and programs make it difficult for any "right" to accrue. Moreover, even if any such right accrued, it is not an unalienable right like religious freedom. Any clash between the two must be resolved in favor of religious liberty.

Furthermore, RFRA's strict-scrutiny test will uphold governmental action as long as there is a compelling state interest and the government's action is the least restrictive alternative. 42 U.S.C. § 2000bb-1(b). This framework necessarily requires the judiciary to decide which governmental interest is "legitimate," which is "substantial," and which is "compelling." This is more of a philosophical exercise rather than disciplined constitutional analysis. The same holds true for the least-restrictive-means prong. Well-intended as the strict-scrutiny test may be, it is still a malleable standard. *See* Brett Kavanaugh, *Two Challenges for the Judge as an Umpire*, 92 Notre Dame L. Rev. 1907, 1919 (2017) ("My concern is that these vague and amorphous tests can at times be antithetical to impartial judging and to the vision of the judge as an umpire."). The Founders wanted more certainty to safeguard the unalienable right of religious freedom than "vague and amorphous tests" provide. Thus, *Amicus* believes that the Free Exercise Clause is even more demanding than the Religious Freedom Restoration Act in its protection of religious liberty.

Viewed in that light, there is no question that the Third Circuit erred gravely. Even if the Religious Freedom Restoration Act does not permit the Executive Branch to create religious exemptions, the Free Exercise Clause requires that a generally applicable law not be enforced as to a person with sincere religious objections. It is also not for the government to make theological evaluations as to whether a person's religious beliefs should be satisfied or not.[2] Furthermore, the limits of the Free Exercise Clause should not be evaluated by whether there is an *undue burden* on another person, as the Third Circuit did. Rather, the inquiry should focus on whether an exemption would violate the *private rights* of a third person or breach the *public peace*. If the answers to these questions are "no," then the right to free exercise of religion prevails.

The government complied with the demands of the Free Exercise Clause by creating exemptions for those like the Little Sisters, who had religious objections to Obamacare's contraception mandate. The Little Sisters were constitutionally exempt from having to comply with the Obama administration's

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[2] As Justice Story wrote, "The rights of conscience are, indeed, beyond the just reach of any human power. They are given by God, and cannot be encroached upon by human authority, with a criminal disobedience to the precepts of natural, as well as of revealed, religion." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1870 (1833).

accommodations. The Third Circuit's decision to the contrary is due to be reversed.

## CONCLUSION

When a federal district judge issues a nationwide injunction, he becomes a one-man Congress. Article III vests a court branch with the power to bind the parties in the case before it—not the entire nation. That power rests with the legislative branch alone.

Moreover, not even Congress's legislative power can abridge the right to free exercise of religion, which is an unalienable right given ultimately by our Creator. The Free Exercise Clause requires the federal government to find a solution like the Trump administration's IFR's, and protects the Little Sisters' right to an exemption from the contraception mandate.

This Court should grant certiorari to defend separation of powers and religious freedom.

Respectfully submitted,

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