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 Writs of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF FOR THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; THE LUTHERAN CHURCH–MISSOURI SYNOD; AND SAMARITAN'S PURSE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Amici will address the following question: Whether the federal government lawfully exempted religious objectors from the regulatory requirement to provide health plans with contraceptive coverage.

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INTERESTS OF AMICI CURIAE[1]

Amici are a diverse group of religious organizations committed to defending the integrity of the Religious Freedom Restoration Act (RFRA). Some *amici* actively participated in the effort to enact RFRA in 1993 and to amend it in 2001. We submit this brief out of a shared concern that the dangerous conception of third-party harm invoked by the Third Circuit threatens to undermine RFRA as a meaningful defense for the free exercise of religion.

SUMMARY OF ARGUMENT

Third-party burdens are no reason to strike down the final rule or to misconstrue RFRA. Congress enacted RFRA to establish a robust defense for the exercise of religion. That protection does not depend on the absence of a burden on others, especially when nearly any adjustment of benefits afforded by the regulatory state can be construed as a "burden" on someone. Reading a no-burden requirement into RFRA would effectively negate its protections whenever religious freedom is controversial.

Instead, RFRA prescribes a balancing test that accounts for third-party harms when deciding whether a government-imposed burden on religious exercise is justified by a compelling interest pursued through narrowly tailored means. Treating every third-party

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[1] Pursuant to Supreme Court Rule 37.3(a), *amici* state that all parties have submitted their written consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

burden as a sufficient reason to deny a claim for religious accommodation distorts RFRA. Third-party burdens cannot act as a freestanding *per se* defense to a RFRA claim, or religious institutions like Little Sisters of the Poor would lose the legal protections that the statute guarantees.

Nor does the Establishment Clause require courts to deny a religious accommodation when it burdens a non-adherent. Repeatedly, this Court's decisions affirm that the Establishment Clause allows lawmakers to enact religious exemptions but not religious preferences. An exemption lifts a burden that the law imposes on religious exercise, while a preference grants religious people or institutions an absolute or unyielding legal right that is indifferent to competing interests. RFRA is plainly a religious exemption. Applying it to lift the burdens imposed by the contraceptive mandate is fully consistent with the Establishment Clause. Since that is also all the final rule does, it too comports with the First Amendment.

Finally, the third-party burdens identified by the Third Circuit and the respondents are so trivial or speculative as to reveal the principle of third-party harm as an attack on the free exercise of religion. The States have not identified a single employee who stands to lose contraceptive coverage if the final rule goes into effect. A total loss of coverage is unlikely. Even if an employer claims a religious exemption from the mandate, employees have multiple options for getting contraceptive coverage without compelling an objecting employer like Little Sisters to provide it. Nor do States suffer genuine injuries from the final rule. Increased financial responsibilities caused by an adjustment in a federal benefit program are not a legal

detriment to States, which have no right to the indirect cost savings of enforcing the mandate against objecting religious employers. And the risk of more unintended pregnancies cannot be attributed to the final rule, given that any assertion of proximate causation is implausible.

ARGUMENT

I. The Possibility of Third-Party Harm Does Not Invalidate a Claim for Accommodation Under RFRA.

A. The Third Circuit Voided the Final Rule Based on a Misconceived Application of Third-Party Harm.

These cases mark the third time that the applicability of RFRA to regulations under the Affordable Care Act (ACA) has come before the Court. See *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (per curiam). Briefly recounting the essential elements of that long-running dispute is useful to understand how third-party harm bears on the question presented.

1. The ACA directs that an employer's health plan must include insurance for "preventive care and screenings" for women without "any cost sharing requirements." 42 U.S.C. § 300gg-13(a). Implementing regulations go further, requiring most large employers to include coverage for all FDA-approved contraceptives in their employee healthcare plans. See 45 C.F.R. § 147.130(a)(1)(iv) (U.S. Department of Health & Human Services); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (U.S. Department of Labor); 26 C.F.R. § 54.9815-2713(a)(1)(iv) (U.S. Department of the Treasury).

These regulations include exemptions for "grandfathered health plans," employers with fewer than 50 employees, and some religious employers. See *Hobby Lobby*, 573 U.S. at 698–99. Other religious employers, not within the regulatory exemptions, challenged these regulations under RFRA.

Hobby Lobby held that RFRA applied to closely-held corporations that religiously object to the contraceptive mandate, to the extent it requires them to cover Plan B or other abortifacients. *Id.* at 691–93. Because the penalties for noncompliance are "severe," the Court readily concluded that the contraceptive mandate imposes a "substantial burden" on the religious exercise of objecting employers. *Id.* at 720, 719. The government did not satisfy RFRA's compelling interest test. Even if the government's interest in providing contraceptive insurance were deemed compelling, see *id.* at 728, enforcing the mandate against objecting employers was not the least-restrictive means of advancing that interest. *Ibid.* Instead, the Court allowed the objecting corporations to use the same accommodation available to nonprofits—to "self-certify that [the employer] opposes providing coverage for particular contraceptive services." *Id.* at 731. Extending the accommodation in this way would have "zero" effect on female employees of the objecting employers because they "would still be entitled to all FDA-approved contraceptives without cost sharing." *Id.* at 693. But the Court added that this resolution did not necessarily "compl[y] with RFRA for purposes of all religious claims." *Id.* at 731.

Zubik involved the applicability of RFRA to employers with sincere religious objections to the

contraceptive mandate *and* the self-certification procedure. 136 S. Ct. at 1559. The employers objected that the procedure effectively seized the employer's own health care plan to make available the objectionable contraceptive coverage—a fact the government later admitted. See Supplemental Brief for Respondents at 16, 17, *Zubik*, 136 S. Ct. 1557 (No. 14-1418). Post-argument briefing disclosed the possibility of a voluntary settlement. The employers confirmed that "contract[ing] for a plan that does not include coverage for some or all forms of contraception" would not infringe their religious exercise. *Zubik*, 136 S. Ct. at 1560 (citation omitted). The government conceded, in turn, that it could modify the self-certification procedure "while still ensuring that the affected women receive contraceptive coverage seamlessly." *Ibid.* (citation omitted). Accordingly, the Court vacated multiple court of appeals decisions and remanded for the parties "to arrive at an approach going forward that accommodates [the employers'] religious exercise while at the same time ensuring that women covered by [their] health plans 'receive * * * contraceptive coverage.'" *Ibid.* (citation omitted).

The Agencies responded to *Zubik* (and sought to end years of litigation) by issuing the final rule at issue here. It exempts certain employers from the contraceptive mandate when an employer "objects, based on its sincerely held religious beliefs" to participating in or facilitating "[c]overage or payments for some or all contraceptive services or * * * [a] plan, issuer, or third party administrator that provides or arranges such coverage or payments." 45 C.F.R. § 147.132(a)(2). This rule is intended to "expand the exemptions * * * while maintaining the [self-certification] accommodation as

an option for providing contraceptive coverage." 83 Fed. Reg. 57,536, 57,544 (Nov. 15, 2018) (codified at 45 C.F.R. pt. 147). Offering both an expanded exemption and the self-certification accommodation satisfies the government's interest in contraceptive coverage "without forcing entities to choose between compliance with either the Mandate or the accommodation and their religious beliefs." *Ibid.*

2. The Third Circuit held below that "RFRA does not require" an exemption for employers with sincere religious objections to the self-certification procedure. Little Sisters App. 43a. Central to its reasoning was the court's perceived duty to "take adequate account of the burdens a requested [religious] accommodation may impose on non-beneficiaries." *Id.* at 45a (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005)). The court worried that exempting employers like Little Sisters "would impose an undue burden on non-beneficiaries—the female employees who will lose coverage for contraceptive care." *Id.* at 47a. By the court's reckoning, "thousands of women may lose contraceptive coverage if the Rule is enforced and frustrate their right to obtain contraceptives." *Id.* at 48a. Quoting the principal dissent in *Hobby Lobby*, the court concluded that RFRA does not demand that result: "No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others." *Id.* at 47a–48a (quoting *Hobby Lobby*, 573 U.S. at 764 (Ginsburg, J., dissenting)).

The notion that third-party harm negates a claim under RFRA for relief from the contraceptive mandate has appeared in other lower court decisions. See *California* v. *U.S. Dep't of Health & Human Servs.*, 941

F.3d 410, 428 n.3 (9th Cir. 2019) (labeling the final rule "particularly troublesome given that it has an immediate detrimental effect on the employer's female employees"), *petition for cert. filed*, No. 19-1053 (Feb. 19, 2020); *Korte* v. *Sebelius*, 735 F.3d 654, 719 (7th Cir. 2013) (Rovner, J., dissenting) ("[B]y exempting a corporation from a statute that grants a particular right to the corporation's employee * * * on the ground that the mandate impinges on the religious rights of the corporate owners, the court is depriving the third party of a right that Congress meant to give him.").

But that notion has no basis in RFRA itself. Automatically negating a claim for religious accommodation whenever there is a burden on third parties would eviscerate the statute. Congress enacted RFRA as a meaningful security for religious freedom. But that security would be meaningless if the statute applied only in the rare circumstance when a religious accommodation affects no one else.

B. The Only Defense Under RFRA Is that the Government Satisfies the Compelling Interest Test.

1. RFRA's requirements are clear. The Federal Government "may substantially burden a person's exercise of religion *only if* it demonstrates that application of the burden to the person * * * is in furtherance of a compelling governmental interest; and * * * is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b) (emphasis added). The phrase "only if" is significant. Satisfying this test is "[t]he only exception recognized by the statute." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418,

424 (2006). When the government does not meet the compelling interest test, RFRA "mandat[es] consideration * * * of exceptions to 'rule[s] of general applicability.'" *Id.* at 436 (quoting 42 U.S.C. § 2000bb-1(a)).

RFRA "applies to all Federal law, and the implementation of that law." 42 U.S.C. § 2000bb-3(a). Congress did not "explicitly exclude[ ] such application" when adopting the ACA. *Id.* § 2000bb-3(b); accord 83 Fed. Reg. at 57,543 ("Congress * * * left the ACA subject to RFRA."). Regulations implementing the contraceptive mandate are subject to RFRA. It follows that the government must satisfy the compelling interest test with respect to the application of the contraceptive mandate to Little Sisters and other objecting employers, or the government must accommodate their religious exercise through individual exceptions. See *O Centro*, 546 U.S at 434 ("RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.").

2. RFRA accounts for harms to third parties through its balancing test rather than through a categorical rule. See *Hobby Lobby*, 573 U.S. at 729 n.37 (third-party harm is a "consideration [that] will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest"). Third-party harm may bolster the intensity of the government's compelling interest or narrow the range of appropriate accommodations. Compulsory vaccination laws are one example. See *Prince* v. *Massachusetts*, 321 U.S. 158, 166–67 (1944) ("The right to practice religion freely does not include liberty to expose the community or the

child to communicable disease or the latter to ill health or death.").

But allowing third-party burdens to decide a RFRA claim subverts the statute's command to apply "the most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997). By making third-party harm a freestanding defense, a court substitutes that single interest for the factually sensitive balancing test prescribed by Congress. And by denying a RFRA accommodation claim whenever a regulation is framed as an entitlement that benefits third parties, making any religious accommodation a denial of the entitlement and thus a "harm," the third-party harm theory renders the statute "meaningless." *Hobby Lobby*, 573 U.S. at 729 n.37. Under this theory, any government-mandated entitlement satisfies RFRA's compelling interest test because laws conferring widespread benefits always (on this account) advance a compelling interest through the least restrictive means. Resulting burdens on religious exercise—no matter how severe—are simply brushed aside.

C. Treating Third-Party Harm as a Freestanding Defense to a RFRA Claim Squarely Conflicts with *Hobby Lobby*.

Hobby Lobby rejected the categorical rule that an exemption is not allowed under RFRA when it would disadvantage third parties. "Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals." *Ibid.* As the Court

pointed out, this principle would empower the government to defeat a RFRA claim by "framing any * * * regulation as benefiting a third party." *Ibid.* Even the principal dissent read the majority opinion to hold that "disadvantages that religion-based opt-outs impose on others[ ] hold no sway * * * when there is a 'less restrictive alternative.'" *Id.* at 740 (Ginsburg J., dissenting).

The decision below flouted *Hobby Lobby*. Where it rejects third-party harm as an independent consideration outside the compelling-interest test, the Third Circuit regarded third-party harm as a sufficient reason to void the final rule. Little Sisters App. 47a–48a. The decision below thus cited third-party harm to circumvent RFRA.

The decision below likewise suggests that footnote 37 in *Hobby Lobby*—however detailed and well-reasoned—has been inadequate to deter lower courts from invoking third-party harm to defeat RFRA's protections. A more direct repudiation of that mischievous idea is needed.

II. The Establishment Clause Does Not Bar the Government From Accommodating the Exercise of Religion Whenever It Burdens Others.

A. The Establishment Clause Allows the Government to Protect the Free Exercise of Religion by Accommodating Religious Belief and Practice.

1. The Third Circuit's reliance on third-party burdens to invalidate the final rule has its roots in a misinterpretation of the Establishment Clause. The

court of appeals cited *Cutter* v. *Wilkinson* for the principle that "courts must take adequate account" of third-party burdens. *Id.* at 45a (quoting 544 U.S. at 720). But the Third Circuit misread this line. *Cutter* mentions third-party harm to explain why the Religious Land Use and Institutionalized Persons Act (RLUIPA) satisfies the Establishment Clause—not to require an independent consideration of third-party harm in every case involving a religious accommodation. *Cutter* explains that RLUIPA avoids the "shoals" of Establishment Clause precedent by taking "adequate account" of third-party burdens and applying the statute "neutrally among different faiths." 544 U.S. at 720.

The decision below suggests that granting objecting employers relief under RFRA would violate the Establishment Clause. Some academics seeking to minimize RFRA have pursued this argument forcefully. See, *e.g.*, 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, 357–59 (2014); Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines:* Hobby Lobby's *Puzzling Footnote 37*, *in The Rise of Corporate Religious Liberty* 323–41 (Micah Schwartzman et al. eds., 2016); Micah Schwartzman et al., *The Costs of Conscience*, 106 Ky. L.J. 781, 782 (2018); Ira C. Lupu & Robert W. Tuttle, *Secular Government, Religious People* 236 (2014).[2]

[2] These writings criticize the self-certification accommodation, rather than the final rule. See Gedicks & Van Tassell, 49 Harv. C.R.-C.L. L. Rev. at 351. But in arguing that RFRA does not permit the government to accommodate an employer's sincere

A leading article contends that "by shifting the material costs of accommodating anticontraception beliefs from the employers who hold them to their employees who do not, RFRA exemptions from the Mandate violate an Establishment Clause constraint on permissive accommodation." Gedicks & Van Tassell, 49 Harv. C.R.-C.L. L. Rev. at 349. This conclusion flies in the face of numerous decisions under the Free Exercise Clause. Repeatedly, this Court has held 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 of Fla.*, 480 U.S. 136, 144–45 (1987).

2. It is a truism that "the government's license to grant religion-based exemptions from generally applicable laws is constrained by the Establishment Clause." *Hobby Lobby*, 573 U.S. at 765 n.25. But those constraints are grounded in "historical practices and understandings." *Town of Greece, N.Y.* v. *Galloway*, 134 S. Ct. 1811, 1819 (2014) (quoting *Cty. of Allegheny* v. *ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part)).

Exemptions from general laws for the protection of religious exercise have been an accepted part of our constitutional order "beginning with pre-Revolutionary colonial times." *Walz* v. *Tax Comm'n of New York*, 397 U.S. 664, 676–77 (1970). "As early as early as 1670–80," colonial governments in Rhode Island,

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religious objections to the contraceptive mandate, these authors illuminate the reasoning behind the third-party burden principle relied on by the decision below. See Little Sisters Pet. App. 45a.

North Carolina, and Maryland exempted Quakers from bearing arms. Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise Clause*, 103 Harv. L. Rev. 1409, 1468 (1990). By accommodating the free exercise of religion, RFRA "follows the best of our traditions." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952).

B. Religious Exemptions Like RFRA Are Valid Under the Establishment Clause.

1. The Establishment Clause does have one relevant constraint on laws accommodating religion. Lawmakers may enact religious exemptions but not religious privileges. See generally Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?*, 106 Ky. L.J. 603 (2018) (explaining that the Court's religious accommodation decisions affirm the validity of religious exemptions but condemn religious preferences). A religious preference gives religion an absolute right that takes no account of competing interests. A religious exemption, by contrast, lifts a burden of the government's own making. An exemption thus serves the "permissible legislative purpose" of seeking "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 335 (1987).

The leading decision on religious exemptions is *Amos*. It arose when The Church of Jesus Christ of Latter-day Saints discharged a building custodian because he was no longer a church member in good

standing. *Id.* at 330. In defense, the church invoked Title VII's exemption for religious employers, 42 U.S.C. § 2000e-1(a), which a unanimous Court held to be valid under the Establishment Clause. 483 U.S. at 340. Section 2000e-1(a) lifts Title VII's obligation to avoid religious discrimination in employment, thereby leaving religious organizations free "to define and carry out their religious missions" as they see fit. *Id.* at 335. It did not matter that the statute "singles out religious entities for a benefit." *Id.* at 338. The Court explained that "[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Ibid.*

Amos does not stand alone. At least five other decisions of this Court have rebuffed Establishment Clause challenges to religious exemptions. See *Cutter*, 544 U.S. 709 (sustaining RLUIPA); *Gillette* v. *United States*, 401 U.S. 437 (1971) (upholding religious exemption from military draft for those opposing war); *Walz*, 397 U.S. at 664 (sustaining property tax exemptions for religious organizations); *Zorach*, 343 U.S. at 306 (affirming validity of local public school policy enabling pupils voluntarily to attend religion classes away from school grounds); *The Selective Draft Law Cases*, 245 U.S. 366 (1918) (upholding military draft exemption for clergy, seminarians, and pacifists).

2. The notion that the Establishment Clause precludes a religious exemption if it burdens a nonclaimant appears to rest on a misreading of *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985). *Caldor* arose from a Connecticut statute providing that "[n]o person who states that a particular day of the week is

observed as his Sabbath may be required by his employer to work on such day." *Id.* at 706. Thornton was a department store employee who requested Sundays off to observe his Sabbath and invoked the statute. The store refused and challenged the statute under the Establishment Clause. *Id.* at 707, 710–11.

The Court struck down the statute as a religious preference. By rigidly altering common-law contract rights, which had long granted employers flexibility to manage their workplaces, the statute failed to account for how an employer could respond "if a high percentage of an employer's workforce asserts rights to the same Sabbath." *Id.* at 709. Rather, the law granted an "unyielding weighting in favor of Sabbath observers over all other interests." *Id.* at 710. Disregard for legitimate competing interests contradicted the Establishment Clause, the Court explained, because "government * * * must take pains not to compel people to act in the name of any religion." *Id.* at 708.

Few other religious preferences have come before the Court, and they have all failed constitutional scrutiny. See *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982) (Massachusetts law granting churches and schools a "unilateral and absolute power" to deny a liquor license to businesses within a 500-foot radius); *Torcaso* v. *Watkins*, 367 U.S. 488, 490 (1961) (Maryland law excluding from public office anyone who would not profess a belief in God puts the state's "power and authority * * * on the side of one particular sort of believers"). *Caldor* stands alongside *Torcaso*, and *Larkin*, just as *Amos* stands with *Cutter* and *O Centro*.

In distinguishing a religious preference from a religious exemption, third-party burdens are not the decisive consideration. Religious preferences offend the Establishment Clause because they involve "an absolute right" or a "mandatory accommodation" that does not admit "exceptions for special circumstances regardless of the hardship." *Hobbie*, 480 U.S. at 145 n.11. The constitutional defect lies in omitting to consider competing interests, a defect that foists "an unacceptable burden on [others]." *Ibid.*; accord *Amos*, 483 U.S. at 337 n.15 (criticizing the statute in *Caldor* because it "required accommodation by the employer regardless of the burden which that constituted for the employer or other employees"). Also, a religious preference impermissibly gives "the force of law" to religiously motivated acts and makes nonbelievers "legally obligated" to comply with religious standards, or it makes unfavorable treatment of the noncompliant "required by statute." *Amos*, 483 U.S. at 337 n.15.

3. The crucial question, then, is whether a legal accommodation of religion confers an absolute preference on religion or lifts a burden that another law imposes. To decide that, one must identify the correct baseline—whether to gauge the legal effect of an accommodation before or after the law restricts the exercise of religion.

Amos conclusively answers that question. It held that courts should ask whether an exemption increases the capacity of a religious organization "to propagate its religious doctrine" or otherwise practice religion relative to the law that existed "prior to the passage" of the legal mandate that interfered with religion. *Id.* at 337. *Amos* rejected the argument that "an

exemption statute will always have the effect of advancing religion." *Id.* at 335. Any advancement of religion in *Amos* was "fairly attributed" to the Church of Jesus Christ. *Id.* at 337. It was the church, not the government, that compelled the custodian to "chang[e] his religious practices or los[e] his job." *Id.* at 337 n.15. Since the proper baseline was the pre-1964 legal regime that did not regulate religious employers, the history of Title VII's religious exemption was immaterial. "There was simply no need to consider the scope of the § 702 exemption until the 1964 Civil Rights Act was passed." *Id.* at 338. From the correct historical perspective, the 1972 amendment expanding the scope of the exemption did not confer a new benefit but merely returned the church to the condition it enjoyed under the common law. *Id.* at 332 n.9.

Some academic proponents of the third-party harm principle disagree. They assert that "[f]or permissive accommodations, this baseline can only be the distribution of relevant burdens and benefits for religious exercise immediately preceding enactment of the accommodation." Gedicks & Van Tassell, 49 Harv. C.R.-C.L. L. Rev. at 371. Then, ignoring that RFRA was enacted long before the contraceptive mandate, they argue that the mandate "marks the baseline for measuring whether such [religious] exemptions shift costs from the accommodated employers to employees who do not share their employer's religious * * * beliefs." *Id.* at 374. Elsewhere, these authors defend their chosen baseline as a reflection of so-called "positive liberty, under which loss of a generally available legal entitlement constitutes an economic or other burden on those deprived of it." Gedicks & Van Tassell, *Of Burdens and Baselines*, at 335. That a pro-regulation

baseline—one with new and constantly expanding burdens on religion—will diminish religious freedom is shrugged off. These authors ask rhetorically "what 'religious freedom' means, or realistically *can* mean, in a regulatory state marked by radical religious and moral pluralism." *Ibid.* The answer, they suggest, is not much.

But a post-regulation baseline contradicts *Amos*, which unambiguously holds that courts should judge the effect of a religious exemption by the law that existed "prior to the passage" of the legal mandate interfering with religion. 483 U.S. at 337. Even worse, a post-regulation baseline thwarts the First Amendment's guarantee of "the free exercise" of religion. U.S. Const. Amend. I. Like other constitutional rights, this language establishes a baseline of freedom from government intervention. "[T]he evolution of the United States * * * from [a] libertarian to [a] regulatory" society does not alter that baseline. Gedicks & Van Tassell, *Of Burdens and Baselines*, at 326. Nor does a false association with the "jurisprudence enshrined in *Lochner v. New York*." *Id.* at 332. A rigid liberty of contract was a judicial contrivance, but a right to exercise religion free from government intervention is not. That right follows from the Constitution's text and history.

Fixing the baseline at the correct point illuminates whether a law is a permissible religious exemption or a forbidden religious preference. An exemption lifts a legal burden imposed on religious practice at the baseline. A preference grants religious practice an absolute or unyielding legal right, without *any* consideration for competing interests.

What does not matter under the Establishment Clause is whether a law burdens non-adherents. Both religious exemptions and religious preferences affect those who do not benefit from the challenged law. The custodian in *Amos* lost his job for falling short of his employer's religious standards, just as Thornton's employer and fellow employees incurred greater burdens in scheduling and working weekends because of the statute struck down in *Caldor*. It is the distinction between exemptions and preferences—not the bare fact of a burden on non-adherents—that matters.

4. It is important, as well, not to overstate the burdens occasioned by accommodating the exercise of religion. Withholding protections or benefits that the law accords to others can be framed as harm. It is generally true that "religious believers have no constitutional right to inflict significant harm on nonconsenting others." Douglas Laycock, *A Syllabus of Errors*, 105 Mich. L. Rev. 1169, 1171 (2007). The freedom of religion does not include the unqualified right to burden third parties in ways that our legal traditions have long considered harm. Even the sincerest religious practice may have to give way to compelling governmental interests, such as safeguarding national security, public safety, and health.

But not all harms are equal—indeed, not all detriments are harms the law recognizes. "[W]e live in a crowded society, where routine activities both inconvenience those around us and impose significant risks," and "[w]e also have an expansive capacity to define as harmful anything we don't like." *Ibid.* The third-party harm principle commits this error. It casts the final rule as harmful only by wrongly presuming that any additional cost or inconvenience in obtaining

access to contraceptive coverage qualifies as legal harm. Such an expansive conception of harm—especially when considered a sufficient reason to deny a religious accommodation—would "render[ ] RFRA meaningless." *Hobby Lobby*, 573 U.S. at 729 n.37.

Academic proponents of the third-party harm principle contend that a burden on third parties is material if it causes "a noticeable or perceptible increase in the marginal weight of a preexisting burden on identifiable third parties" or if the law creates a burden "where none previously existed." Gedicks & Van Tassell, *Of Burdens and Baselines*, at 365. This definition of materiality assumes a post-regulation baseline that would preclude all legislative accommodations of religious practice, except the accommodation sustained in *Amos*. See *id.* at 371. By this logic, applying RFRA to exempt any religious employer—even a church—from the contraceptive mandate imposes material third-party burdens. "Employees and their families would be deprived of the benefits of the Mandate to which they are otherwise legally entitled." *Id.* at 376.

This argument is faulty in fact and mischievous in law.

It is incorrect to say that an employee whose employer has properly invoked a sincere religious objection under RFRA is "legally entitled" to "the benefits of the Mandate." *Ibid.* The ACA nowhere "explicitly excludes" RFRA as inapplicable. 42 U.S.C. § 2000bb-3(b). It follows that RFRA is an implied term in every provision of the ACA and limits any regulations promulgated under it—including the

contraceptive mandate. See *id.* § 2000bb-3(a). For employees of an employer protected by RFRA, the mandate never comes into effect.

The argument that new regulatory programs create material benefits that religious accommodations cannot displace all but denies lawmakers the authority to protect the free exercise of religion through legislation. Even the *Smith* decision—hardly a high-water mark for free exercise protections—affirms such authority. It acknowledged that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." *Emp't Div., Dep't of Human Resources of Or.* v. *Smith*, 494 U.S. 872, 890 (1990). Proponents of the third-party harm theory would preclude even such democratically accountable protection for the exercise of religion. Congress, in their view, could not engage in legislative line drawing if the results favor religion—no matter how absurd or outrageous the consequences. A law requiring all employers to fund abortions could not exclude churches, for instance, despite the profound infringement on sincere religious beliefs and practices. This overreading of the Establishment Clause diminishes Congress's power to safeguard religious exercise. Not only that, it would wipe out in a single stroke long-standing statutory accommodations and lead to needless political controversy as faith communities felt compelled to oppose legislation they might have supported if it contained appropriate exemptions.

5. The same academics who advocate the third-party harm theory compare a religious exemption under RFRA with "taxing nonadherents to support the

accommodated faith." Gedicks & Van Tassell, *Of Burdens and Baselines*, at 363 (footnote omitted). But the analogy is false. Exempting Little Sisters from the regulatory mandate is unlike a tax supporting an established church. "[T]he essential feature of any tax" is that it "produces at least some revenue for the Government." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 564 (2012). The contraceptive mandate fails this test. Like a tax credit, the mandate requires employers to "spend their own money, not money the State has collected from respondents or from other taxpayers." *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 142 (2011). The exemption embodied in the final rule lifts that obligation but still does not involve money collected or transferred by the state.[3]

Any suggestion that granting Little Sisters relief under RFRA or the final rule would offend the Establishment Clause is refuted by *Amos*, *Cutter*, and *O Centro*—not to mention *Hobby Lobby*. No other statute with RFRA's features has failed scrutiny under the Establishment Clause. And in no other case has the prospect of third-party detriment been a relevant consideration, much less a decisive one. Under this Court's precedents, RFRA and the final rule relying on it amply satisfy the Establishment Clause.

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[3] Even if the analogy between a religious exemption and a tax were convincing, an objecting employee would have no standing to sue based on her status as a taxpayer. Article III almost never supports taxpayer standing, see *Winn*, 563 U.S. at 134, with a narrow exception for certain congressional spending programs recognized in *Flast v. Cohen*, 392 U.S. 83 (1968). But a rule exempting religious employers from the contraceptive mandate "is not tantamount to a religious tax or to a tithe and does not visit the injury identified in *Flast*." *Winn*, 563 U.S. at 142–43.

III. The Argument from Third-Party Harm Threatens the Free Exercise of Religion.

A. The Burdens Credited by the Third Circuit Are Trivial Compared with the Impact on Little Sisters' Religious Freedom.

Even if third-party harm were a relevant factor, the burdens identified by the Third Circuit and the respondents are trivial or unsupported. They carry no real weight, compared with the devastating consequences of forcing Little Sisters to choose between violating its sincere religious beliefs or closing its doors. That incidental burdens would automatically defeat religious liberty under the third-party harm theory illustrates its fatal defects.

1. *Female employees suffer no actionable harm if the disputed regulations make access to contraceptive coverage somewhat more inconvenient or expensive.*

The Third Circuit set aside the final rule, in part, on the ground that it "would impose an undue burden on * * * the female employees who will lose coverage for contraceptive care." Little Sisters App. 47a. Yet the court of appeals failed to identify any particular employees whom the final rule would affect. Nor did the court show how the final rule would impose an actual hardship on those employees.

Pennsylvania and New Jersey have failed to identify a single female employee who would lose sought-after contraceptive coverage because of the final rule. Nor did the Third Circuit fill that startling evidentiary gap with its bald statement that "the record shows

that thousands of women may lose contraceptive coverage if the Rule is enforced and frustrate their right to obtain contraceptives." *Id.* at 48a. In fact, the record shows something quite different. The Agencies anticipated that only a single employer in the two states, Geneva College, would claim the exemption based on its previous litigation position. But thanks to a permanent injunction, the College is already shielded from the contraceptive mandate. Order, *Geneva Coll.* v. *Azar*, No. 2:12-cv-00207, 2018 WL 3348982 (W.D. Pa. July 5, 2018). Enforcing the final rule in these states does not appear to risk increasing the number of women without contraceptive coverage. See 82 Fed. Reg. 47,792, 47,818 (Oct. 13, 2017); Brief of the Federal Appellants 25–28, *Pennsylvania* v. *President United States*, 930 F.3d 543 (3d Cir. 2019) (No. 17-3752).

We acknowledge that many women desire contraceptive coverage. But applying the final rule does not inexorably deprive them of access to such coverage. Women whose employers claim the exemption under the final rule have multiple alternatives for obtaining the desired coverage.

- A spouse or other family member's health insurance may provide a woman with contraceptive coverage.
- Health insurance exchanges under the Affordable Care Act offer another alternative. This is the same program that allows millions of women to access contraceptive coverage when an employer is entitled to the small-business and grandfathered-plan exceptions. See Brief for the Petitioners 56, *Hobby Lobby*, 573 U.S. 682 (No. 13-354), 2014 WL 173486 (citing 45 C.F.R. § 147.130;

26 U.S.C. § 36B); accord 78 Fed. Reg. 39,870, 39,887 n.49 (July 2, 2013) (health care exchanges "will cover recommended preventive services, including contraceptive services, without cost sharing").

- A woman also may qualify for subsidized coverage of contraception under Title X of the Medicaid Act. Current regulations expand eligibility for this program by permitting consideration of her employer's religious exemption from the mandate as "a good reason why she is unable to pay for contraceptive services." See 42 C.F.R. § 59.2(2).
- State programs administered by Pennsylvania and New Jersey also subsidize contraceptive care for low-income women, even those who already have private health insurance. See Little Sisters App. 18a.

These alternatives make it unlikely that any employee whose employer invokes the final rule will be unable to obtain coverage for contraceptive services. Even if obtaining such coverage through means other than an employer's health care plan entails additional effort or expense, those burdens are incident to an adjustment of government benefits that lies squarely within the government's authority. *Bowen* v. *Gilliard*, 483 U.S. 587 (1987), stressed that "Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level." *Id.* at 604. This discretion arises from the "plenary power to define the scope and the duration of the entitlement to * * * benefits, and to increase, to decrease, or to terminate those benefits based on its appraisal of the relative importance of the recipients'

needs and the resources available to fund the program." *Id.* at 598. Those principles have guided this Court's decisions in similar settings. See, *e.g.*, *Atkins* v. *Parker*, 472 U.S. 115, 129 (1985); *Dandridge* v. *Williams*, 397 U.S. 471, 487 (1970).[4] The same principles govern objections to any incidental effect on an employee's access to contraceptive coverage because her employer invokes the exemption under the final rule.

2. States suffer no actionable harm from the final rule.

The Third Circuit credited the States' argument that applying the final rule will impose irreparable harm on them by leading "financially-eligible women [to] turn to state-funded services for their contraceptive needs." Little Sisters App. 21a–22a. On this basis the court concluded that the States had demonstrated a "concrete financial injury" that supported a preliminary injunction. *Id.* at 22a; accord *id.* at 49a

[4] An employee required to obtain contraceptive coverage from a source besides her employer's health care plan could not object that she has been denied the due process of law. "A welfare recipient is not deprived of due process when the legislature adjusts benefit levels. * * * [T]he legislative determination provides all the process that is due." *Atkins*, 472 U.S. at 129–30 (quoting *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432–33 (1982)). *Atkins* concluded that a previous "entitlement did not include any right to have the program continue indefinitely at the same level." *Id.* at 129. And it makes no difference that a benefit like contraceptive coverage is made available by regulation rather than by statute. See *Johnston* v. *Iowa Dep't of Human Servs.*, 932 F.2d 1247, 1249–50 (8th Cir. 1991) ("Enactment of statutes and promulgation of regulations, where there is no defect in the legislative process, provide all the notice that is due." (citing *Atkins*, 472 U.S. at 130)).

(characterizing state subsidies for contraceptives as indicative of "a likelihood of irreparable harm").

Once again, the Third Circuit's reasoning went awry. States may save costs when the contraceptive mandate reduces the number of its citizens who rely on the state for free or subsidized contraceptive services. But it hardly follows that exempting a comparatively few employers from the mandate imposes an actual injury on the States. States are, after all, the governments primarily responsible for the health of their citizens. Cf. *Metro. Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 756 (1985) ("The States traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" (citation omitted)). States have no legal right to the indirect cost savings of the contraceptive mandate, and its terms may be adjusted to meet federal priorities without incurring federal liability. *Bowen*, 483 U.S. at 604.

Pennsylvania and New Jersey likewise complain that the final rule injures them by increasing the financial risk of more unintended pregnancies. See Little Sisters App. 19a ("[W]omen who do not seek or qualify for state-funded contraceptives may have unintended pregnancies. Public funds are used to cover the costs of many unintended pregnancies."); accord *id.* at 25a (accepting the States' contention that "the loss of contraceptive coverage may also result in unintended pregnancies for which the States will bear associated health care costs").

But the final rule cannot be reasonably charged with causing an increase in the number of unintended pregnancies. Constructing a causal chain connecting

the final rule, an estimated growth in the number of unintended pregnancies, and an increase in the States' costs involves too many links and too many unresolved questions. Federal courts do not entertain legal claims without evidence of proximate causation. See *Associated Gen. Contractors of Cal., Inc.* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983); accord *Holmes* v. *Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 287 (1992) (Scalia, J., concurring) (endorsing the rule that "the injury have been proximately caused by the offending conduct" on the ground that "[l]ife is too short to pursue every human act to its most remote consequences"). Any connection between the final rule and increased financial burdens on Pennsylvania and New Jersey from a future increase in unintended pregnancies is remote and speculative. The States cannot claim injury—much less irreparable injury—on that basis.

That the Third Circuit cited these speculative burdens as a reason to void the final rule suggests skepticism if not hostility toward the exercise of religion. Accepting the pernicious principle of third-party harm essentially allowed the court to flip the values expressed by Congress. Where RFRA expresses a commitment to religious freedom as one of the Nation's highest values, the court below cast aside that value in deference to the States' flimsy allegations of third-party harm. That conclusion, plainly contrary to RFRA and the free exercise of religion it protects, should be reversed.

B. Treating Third-Party Harm as a Sufficient Reason to Deny a Religious Accommodation Undermines the Free Exercise of Religion.

At bottom, the third-party harm principle is an assault on the free exercise of religion.

No other constitutional right becomes powerless when vindicating it would "detrimentally affect others." *Holt* v. *Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring). Applying this notion would seriously diminish the right of free speech. See, *e.g.*, *Snyder* v. *Phelps*, 562 U.S. 443, 458–61 (2011) (demonstration near serviceman's funeral protected); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 352 (1974) (defamatory speech protected). Nor would any other constitutional or statutory right retain any meaning if it could be vindicated only when doing so affects no one else. Statutory protections against discrimination often burden property, contract, and association rights. Yet it would be ridiculous to argue that civil rights laws barring discrimination apply only when no one is burdened. The same is true for civil rights laws safeguarding religious exercise. The idea that third-party harm automatically defeats RFRA's religious protections—an absurdity demanded of no other right of similar stature—evinces hostility toward religious liberty.

The right to the free exercise of religion is not absolute, of course. RFRA's balancing test ensures that other interests are accounted for. But religious freedom cannot be limited by a boundless concept of third-party harm that essentially asks whether a particular religious exercise has unanimous assent. After all,

"[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy * * * and to establish them as legal principles to be applied by the courts." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943). A right that exists only when it bothers no one is no right at all.

This weaponized conception of third-party harm would cripple or nullify the entire range of religious exemptions in federal law. RLUIPA follows the same legal standard that animates RFRA. See 42 U.S.C. § 2000cc(a)(1). Although requiring a state prison to let a Muslim prisoner grow a short beard does not affect anyone else, *Holt*, 135 S. Ct. at 867 (Ginsburg, J., concurring), requiring the same prison to provide kosher food for Jewish inmates might come at the expense of better quality food for the general inmate population or reductions in other programs. The Church Amendment, 42 U.S.C. § 300a-7(c)(1), which entitles physicians with religious or moral objections not to perform abortions, reduces the number of physicians available to perform those procedures. Title VII's exemption for religious employers no doubt places third parties at a disadvantage by eliminating a cause of action for employment discrimination. 42 U.S.C. § 2000e-1(a). Religious exemptions from the Fair Housing Act, 42 U.S.C. § 3607, Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681(3), and the Americans with Disabilities Act, 42 U.S.C. § 12187, would be equally vulnerable.[5]

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[5] Religious exemptions under state law would be subject to the same objection. See, *e.g.*, Conn. Gen. Stat. § 52-571b (state RFRA); Fla. Stat. § 761.01 *et seq.* (same); 775 Ill. Comp. Stat. 35/1 *et seq.* (same).

The principle of third-party harm accepted by the Third Circuit and pressed by the States thus carries sweeping implications. Pressed to its logical limit, that principle would undermine the Religion Clauses of the First Amendment and overturn long-established provisions of federal and state law. None of these results can be defended. Religious exemptions like RFRA and the final rule are fully consistent with the Establishment Clause. See *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984) (The First Amendment "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."). The Third Circuit was wrong to conclude otherwise.

CONCLUSION

The Third Circuit's judgment should be reversed.

Respectfully submitted,

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