Nos. 19-431, 19-454

In the Supreme Court of the United States

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

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

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

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INTEREST OF THE AMICI CURIAE[1]

The *Amici* are the States of Texas, Alabama, Alaska, Arizona, Arkansas, Georgia, Louisiana, Missouri, Montana, Oklahoma, South Dakota, South Carolina, Tennessee, Utah, and West Virginia. They have a substantial interest in ensuring that courts and the federal government respect religious beliefs by accommodating religious objections to generally applicable laws and avoid second-guessing religious adherents' line-drawing about what conduct is prohibited to them as sinful or immoral. As a prominent authority on religious freedom has observed, "[i]n a pervasively regulated society," exemptions from generally applicable laws for religious objectors "are essential to religious liberty." 1 Douglas Laycock, *Religious Liberty* xvii (2010). The amici States' interest in protecting religious exercise from governmental intrusion is particularly notable when it overlaps with Congress's own interest as expressed in the Religious Freedom Restoration Act (RFRA), a bipartisan enactment ensuring respect for religious adherents in our pluralistic society. That is the case here, as the challenged exemptions to administrative-agency directives are necessary for the agency to pursue its objectives in the manner least restrictive of religious liberty.[2]

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[1] In accordance with Supreme Court Rule 37.2(a), amici provided notice to the parties' attorneys more than ten days before filing. No counsel for any party authored this brief, in whole or in part, and no person or entity other than amici contributed monetarily to its preparation.

[2] Consistent with this Court's usage of the singular noun "the Government" to describe the relevant executive-branch

Many religious employers around the country are driven by their faith to care for their employees by providing them health insurance. But some employers believe sincerely that it is incompatible with their religious convictions to provide health insurance when it means contracting with a company that then, because of that relationship, becomes obligated to provide contraceptives that the employers regard as abortifacients. The reasonableness of such line-drawing about one's moral complicity in enabling conduct regarded as sinful is fundamentally a religious question, not a legal one. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014).

Before the agency's contraceptive mandate underlying this dispute, a religious employer could abide by the religious belief at issue here by offering health insurance without engaging in an insurance relationship that would obligate coverage for contraceptives. The agency's contraceptive mandate, however, made some employers unable to abide by that religious belief without violating federal regulations and incurring substantial financial liability.

The original supposed "accommodation" the agency offered—submitting a form certifying one's religious objection—did not relieve the burden on religious exercise for many employers. Under that supposed "accommodation," if a religious employer provided notice of its objection to contraceptive coverage and continued to engage a

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entities, *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (per curiam), this brief uses the singular noun "the agency" to refer to the relevant regulatory entities.

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

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

disregards RFRA's substantive mandate, in the same way this Court has already found problematic.

SUMMARY OF ARGUMENT

I. The questions presented in the petitions are ripe for this Court's review. Indeed, the Court granted review of a similar question arising from the contraceptive mandate once before in *Zubik*. Rather than answer that question, however, the Court remanded so that the agency and the religious objectors could reach an amicable settlement. The result was the religious exemption that the District Court enjoined. With the lower courts here having upset the Court's best laid plans, the Court should proceed to answer these important questions once and for all.

II. The Court should grant review to correct the Circuit Court's multiple errors. The amici States agree with the petitioners that the open-ended grant of agency discretion in 42 U.S.C. § 300gg-13(a) by itself authorizes the rulemaking here. Little Sisters of the Poor Pet. 27-29; United States Pet. 16-20. And that provision, enacted in the Affordable Care Act (ACA), is not even the only relevant statute. Congress also enacted—by an overwhelming, bipartisan margin—RFRA, 42 U.S.C. § 2000bb, *et seq.* The Circuit Court, however, vitiated the agency's very authority to proactively account for RFRA when issuing regulations. And the Circuit Court ultimately held that, even if agencies have authority to comply with RFRA, that authority would not justify the exemption rules here. Both aspects of the ruling below are seriously misguided.

A. First, the Circuit Court wrongly viewed RFRA as allowing an agency accommodation only if a court would find a RFRA violation in a particular case. *See* Little Sisters of the Poor Pet. App. 43a-44a. But RFRA specifically applies to federal agencies and thus authorizes them to seek to accommodate religion. And nothing about section 300gg-13(a)'s *grant* of broad rulemaking authority to the agency somehow conflicts with or repeals RFRA's more specific direction to accommodate religious beliefs substantially burdened by government action.

B. The Circuit Court wrongly held that, "[e]ven assuming that RFRA provides statutory authority for the Agencies to issue regulations to address religious burdens the Contraceptive Mandate may impose on certain individuals, RFRA does not require the enactment of the Religious Exemption to address this burden." Little Sisters of the Poor Pet. App. 43a. To the contrary, the exemption rules here are within the agency's authority to comply with RFRA, as well as its broad authority under section 300gg-13(a).

The agency's prior attempt at an accommodation of religious belief refused to exclude all religious objectors, equally, from the contraceptive mandate. That attempt betrayed a lack of proper respect for RFRA. The host of religious objectors to the prior rule included theological seminaries, schools and colleges, orders of nuns, and charities caring for indigent elderly and orphans. The burden that the prior rule imposed if those actors wished to conform their conduct to their sincere religious beliefs was substantial indeed, and it was not the most narrowly tailored way of furthering some compelling

governmental interest. The agency thus belatedly corrected course and provided the same exemption already afforded by the Obama Administration to some (but not all) religious objectors and to even non-religious employers (such as small businesses) for secular reasons. The prior supposed accommodation did not relieve the substantial burden on sincerely held religious beliefs and thus was no accommodation at all. So the agency was correct and well within its authority to find another solution.

ARGUMENT

I. The Questions Presented are Ripe for this Court's Review.

Questions surrounding the need for and proper scope of exemptions to the agency's contraceptive mandate have garnered the Court's attention several times in the past decade. Indeed, the Court has already granted review on the question at the heart of this case. The Court did not answer the question then; it should do so now. There is nothing to gain by delay.

In *Hobby Lobby*, the Court held that the agency's contraceptive mandate violates RFRA so far as it requires religious objectors to provide insurance coverage for contraceptives. 573 U.S. at 720-32. The Court warned that, while the self-certification accommodation at issue here would obviate the objection in that case (employer-provided coverage for contraceptives) it may not "compl[y] with RFRA for purposes of all religious claims." *Id.* at 731. Then, in *Wheaton College*, the Court recognized that "[t]he Circuit Courts have divided on" the propriety of the accommodation, and the Court enjoined enforcement of the self-certification requirement

against the plaintiff there until "final disposition of appellate review." 134 S. Ct. at 2807. Finally, in *Zubik*, the Court granted certiorari to answer the following question:

> Whether the [contraceptive mandate] and its "accommodation" violate [RFRA] by forcing religious nonprofits to act in violation of their sincerely held religious beliefs, when the Government has not proven that this compulsion is the least restrictive means of advancing any compelling interest.

Pet. for Certiorari i, *Zubik*, No. 14-1418 (U.S. May 29, 2015).

The Court recognized "the gravity of the dispute" in *Zubik*. 136 S. Ct. at 1560. But the Court did not answer the question presented, because it believed that the agency and the religious objectors could reach a compromise that would allow for coverage of a religious objector's employees without requiring any involvement of the objectors. *Id.* at 1560-61; *see also Zubik v. Burwell*, No. 14-1418, 2016 WL 1203818, at *2 (U.S. Mar. 29, 2016).

The parties reached the compromise envisioned by the Court. But the District Court blocked implementation of that compromise nationwide and the Circuit Court affirmed. Thus, nearly four years to the day after the Court granted in *Zubik*, the same weighty questions of the interaction between RFRA and ACA remain. The Court should again grant review and finish what was started in *Zubik*.

II. The Circuit Court Wrongly Barred the Compromise Facilitated by the Court in *Zubik*.

The Circuit Court's decision to affirm the injunction barring the compromise reached in the wake of *Zubik* is clearly wrong and works an injustice on religious objectors nationwide. In RFRA, Congress set forth a policy of broad protection for religious exercise and Congress commanded agencies to accommodate this policy in their rule-making. The agency fulfilled this Congressional command by promulgating a bright-line exemption from its contraceptive mandate for religious objectors.

A. The Circuit Court Misjudged the Agency's Authority to Accommodate Religious Objectors.

1. RFRA compels agencies to avoid substantial burdens on religion while implementing generally applicable legislation.

Even apart from the discretion section 300gg-13(a) itself confers, the agency may consider and accommodate religious objections to its contraceptive mandate because RFRA demands it. The Circuit Court's miserly reading of RFRA—as creating a right that an agency may protect only if a religious objector could satisfy a court that the agency has already violated RFRA—conflicts with text and precedent. Agencies, no less than courts, may seek to accommodate religious objections.

RFRA is a purposely broad statute. *See Hobby Lobby*, 573 U.S. at 693 ("Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty."). It commands that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability,"

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

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

The contraceptive mandate is a quintessential example of the type of agency action that inspired RFRA. And the agency's enjoined exemption is precisely what Congress sought to encourage.

RFRA proceeded from two premises relevant here: (1) "'facially neutral laws'" like the agency's contraceptive mandate had, "'throughout much of our history, . . . severely undermined religious observance'"; and (2) "legislative or administrative" bodies are often "unaware of, or indifferent to," and sometimes "hostile" towards, "minority religious practices." Laycock & Thomas, 73 Tex. L. Rev. at 211, 216-17 (quoting Senate

Comm. on the Judiciary, *Religious Freedom Restoration Act of 1993*, S. Rep. No. 103-111 5 (1993)).

In one famous instance, OSHA responded to *Employment Division v. Smith*, 494 U.S. 872 (1990), which largely repudiated the prior method of analyzing free-exercise claims, by eliminating accommodations exempting the Amish and Sikhs from requirements concerning the wearing of hard hats. *See* Ruth Marcus, *Reins on Religious Freedom?*, Wash. Post (Mar. 9, 1991). One of RFRA's primary co-sponsors cited OSHA's reaction as an inspiration for the law. *See* Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Sub. Comm. On Civil & Const. Rights of the Comm. on the Judiciary, 102nd Cong., 2nd Sess. 122-23 (1991) (testimony of Congressman Stephen J. Solarz). And OSHA now relies on RFRA as the basis for its renewed exemption, despite there being nothing in OSHA's enabling statute providing for religious exemptions and no court having ever found a RFRA violation. *See* OSHA, *Exemption for Religious Reason from Wearing Hard Hats*, STD 01-06-005 (June 20, 1994). Many other agencies similarly look to RFRA proactively to accommodate religious exercise in their rulemaking.[3]

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[3] *See, e.g.*, U.S. Citizenship and Immigration Servs., *Special Immigrant and Nonimmigrant Religious Workers*, 73 Fed. Reg. 72276-01, 72283 (Nov. 26, 2008); Emp't and Training Admin., *Notice of Availability of Funds and Solicitation for Grant Applications (SGA) To Fund Demonstration Projects*, 73 Fed. Reg. 57670-01, 57674 (Oct. 3, 2008); Fed. Aviation Admin., *Commercial Routes for the Grand Canyon National Park*, 64 Fed. Reg. 37191-01, 37191 (July 9, 1999); *see also Application of the Religious Freedom Restoration Act to the*

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

Confirming that point, this Court has long recognized that no agency may "apply the policies of [one] statute so single-mindedly as to ignore other equally important congressional objectives." *Local 1976, United Bhd. of Carpenters & Joiners of Am., AFL v. NLRB*, 357 U.S. 93, 111 (1958). "Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *S. S.S. Co. v. NLRB*, 316 U.S. 31, 47

Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, 31 Op. O.L.C. 162 (2007).

(1942). "The problem is to reconcile the two, if possible, and to give effect to each." *FTC v. A.P.W. Paper Co.*, 328 U.S. 193, 202 (1946). Thus, "[i]n devising" the contraceptive mandate, the agency was "obliged to take into account another equally important Congressional objective"—avoiding substantial burdens on religious exercise—and work to avoid any "potential conflict." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984) (quotation marks and alterations omitted).

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

2. The Circuit Court wrongly concluded that section 300gg-13(a) withholds from the agency the discretion to accommodate religion.

The Circuit Court further concluded that the mandate in section 300gg-13(a) "forecloses such exemptions" from the agency's contraceptive mandate. Little Sisters of the Poor Pet. App. 40a. But nothing in section 300gg-13(a) prohibits or conflicts with the agency's authority to craft religious exemptions.

To the contrary, the statute is a command to insurers to comply with a broad, open-ended *grant* to the agency of rulemaking authority. Section 300gg-13(a) provides:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for . . . with respect to women, such additional preventive care and screenings . . . *as provided for* in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

42 U.S.C. § 300gg-13(a) (emphasis added). The use of "as provided" in this provision bestows substantial discretion on the agency to develop guidelines, including by accommodating religious objections. *See* United State Pet. 17-20.

Consider an analogous use of language. Imagine legislative counsel leaving his children with a babysitter with the instruction that "the children shall complete their chores as provided by the babysitter." And imagine that the babysitter believes that the yard needs raking.

No one would think that the parent's instruction somehow prevented the babysitter, upon concluding that the yard needs raking, from exempting an individual child from that chore if, for instance, that child was sick or injured. The Circuit Court's contrary reading bears no resemblance to the common understanding of the language used in section 300gg-13(a).

The court's reading makes even less sense given that RFRA is "a rule of interpretation for future federal legislation." Laycock & Thomas, 73 Tex. L. Rev. at 211. Congress's background direction in RFRA to accommodate religious burdens makes it even less defensible to read the open-ended "as provided for" language in section 300gg-13(a) as somehow foreclosing the agency from offering religious exemptions. RFRA itself directs that future legislation should *not* be interpreted as changing that default rule unless the later statute "explicitly excludes . . . application" of RFRA, which is not true here. 42 U.S.C. § 2000bb-3(b).

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

wrongly and prejudicially narrowed the scope of the agency's discretion to accommodate religious burdens.

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

Having set forth its exceedingly narrow view of an agency's ability to accommodate RFRA's policies, the Circuit Court then held that, "[e]ven assuming that RFRA provides statutory authority for the Agencies to issue regulations to address religious burdens the Contraceptive Mandate may impose on certain individuals, RFRA does not require the enactment of the Religious Exemption to address this burden." Little Sisters of the Poor Pet. App. 43a. That was also error.

The agency's prior rule, which refused to equally exclude all religious objectors from the contraceptive mandate, betrayed a lack of proper concern for federal religious-liberty protections. All persons in our Nation have a right to believe in a divine creator and divine law. "For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts." *Hobby Lobby*, 573 U.S. at 736 (Kennedy, J., concurring).

The religious objectors to the prior rule included theological seminaries, schools and colleges, orders of nuns, and charities caring for indigent elderly and orphans. They all have avowedly religious missions. The heavy burden that the prior mandate imposed if those actors wished to conform their conduct to their sincere religious beliefs risked detracting from the vigor with which they serve their communities. RFRA requires agencies to consider the important interests of these vital

institutions. And doing so requires what the agency belatedly provided in the current rule: an exemption like that already afforded to similar religious objectors and even to non-religious employers for secular reasons.

The Circuit Court compounded its error by concluding that the agency's prior accommodation—requiring some, but not all, religious objectors to file a certification that would trigger contraceptive coverage by their respective insurance companies—satisfies RFRA. The prior accommodation did not exempt objecting employers from the mandate to provide the objected-to insurance. Instead, the result of the certification was the provision of contraceptives to the employers' employees seamlessly through the employers' insurance plan. The prior accommodation thus required many religious objectors to participate in the provision of contraceptives in way that they sincerely believe makes them complicit in the use of abortifacients that take human life. As a result, it was no accommodation at all. Under the previous rule, religious exercise remained substantially burdened without a compelling interest or narrow tailoring. Thus, the agency was right—and indeed was required—to find another solution.

1. Requiring religious objectors to participate in providing contraceptives places a substantial burden on religious practice.

a. The threatened civil penalties are facially substantial.

Hobby Lobby addressed the conundrum faced by employers with sincere religious objections to providing health insurance that covers contraceptives: "If the

owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as $1.3 million per day" in penalties. 573 U.S. at 691. "If these consequences do not amount to a substantial burden," the Court reasoned, "it is hard to see what would." *Id.*

Without the current exemption rule, many employers will face that dilemma. Those employers either must provide coverage or file a notification of their religious objection with the agency or the insurer. *Hobby Lobby* requires an accommodation of the former. The latter is the "accommodation" originally offered by the agency. But that "accommodation" does not create an exemption from the mandate to provide the objected-to insurance. Instead, the result of the notification is the provision of contraceptives to the religious employer's employees seamlessly through the employer's group health plan, paid for by the insurer or third-party administrator. That is no accommodation at all for the relevant religious employers.

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

None dispute the substance and sincerity of the objectors' religious beliefs. The severe financial consequences for noncompliance are also beyond question. *E.g.*, 26 U.S.C. § 4980D; *id.* § 4980H. That is enough to

establish a substantial burden under RFRA. *See Hobby Lobby*, 573 U.S. at 691.

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

The Circuit Court's conclusion that the prior "accommodation" imposes no substantial burden turns on characterizing employers' religious *objection* as insubstantial. *See* Little Sisters of the Poor Pet. App. 46a. Although the Circuit Court viewed RFRA as protecting only religious beliefs that a court finds substantial, this Court instructs that "it is not for [courts] to say that [an objector's] religious beliefs are mistaken or insubstantial." *Hobby Lobby*, 573 U.S. at 725. After *Hobby Lobby*, there is no doubt that the contraceptive mandate and its prior "accommodation" substantially burdened employers' religious exercise.

Despite this Court's instructions in *Hobby Lobby*, the Circuit Court accepted plaintiffs' invitation to assess the validity of a religious conviction. That assessment intrudes upon the dignity of adherents' convictions about profound religious concepts such as facilitation and complicity. It subjects those beliefs to judicial review, and it asks courts to determine the substantiality of the reasons of faith animating a believer's desired exercise of religion—rather than the substantiality of the governmental burden on that religious exercise. That assessment is not the inquiry RFRA requires.

Federal courts have no business resolving a "difficult and important question of religion and moral philosophy,

namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of [what the person believes to be] an immoral act by another." *Id.* at 724.

The notion of "complicity" that many employers express about the "accommodation" is not uncommon. Indeed, it was the very question at the heart of *Hobby Lobby*. *See* 573 U.S. at 724. To take another well-publicized example, Pope John Paul II ordered Catholic churches in Germany to cease certifying that pregnant women considering abortion had received church counseling because that certification was a "necessary condition" in a woman's procuring an abortion. *See* Letter from His Holiness Pope John Paul II to the Bishops of the German Episcopal Conference ¶ 7 (Jan. 11, 1998), *available in English translation at* https://perma.cc/6G2A-2DGN.[4] The Pope described the status of the certificate and whether it made "ecclesiastical institutions . . . co-responsible for the killing of innocent children" as "a pastoral question with obvious doctrinal implications." *Id.* ¶ 4-5. The prior accommodation, which required a certification from an employer to facilitate the

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

provision of contraceptives to that employer's employees differs, if at all, only in degree, from the certification considered by the Pope. Complicity here is a religious, not legal, question.

The Circuit Court held that the burden on the objectors' religious exercise was insubstantial because their complicity—filing a certification that triggers an independent obligation on a third party to provide contraceptive coverage—was too attenuated. In reaching this decision, it doubled down on its holding in *Zubik*, that the accommodation does "not impose a substantial burden." *Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 356 n.18 (3d Cir. 2017). But that is no different and no more appropriate than a court telling the Pope that the German churches were not complicit in abortion because their certifications merely allowed services that a third party will provide. Or, closer to home, telling the plaintiffs in *Hobby Lobby* that the burden on their religious exercise was insubstantial because merely providing coverage for contraceptives was too attenuated from their employees' independent decision to use an abortifacient.

In fact, the Circuit Court parroted an unsuccessful argument made by the agency in *Hobby Lobby*: "that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated." 573 U.S. at 723. This Court rejected that argument as asking the wrong question. What is too attenuated to trigger complicity is "a difficult and important question of

religion and moral philosophy" "that the federal courts have no business addressing." *Id.* at 724; *see also Priests for Life v. U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 19-20 (D.C. Cir. 2015) (per curiam) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (responding eloquently to the same conclusion reached by the Circuit Court here).

2. There is no compelling interest in mandating contraceptive coverage, let alone requiring the participation of religious objectors in the coverage scheme.

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

The education of children is important, and the first two years of high school are important—but not compelling enough to justify the substantial burden on religious exercise at issue in *Yoder*. Mandating insurance coverage of contraceptives is no more compelling than educating children. In fact, this Court has found a compelling

interest in only three situations in free-exercise cases. In each, strong reasons of self-interest or prejudice threatened unmanageable numbers of false claims to an exemption, and the laws at issue were essential to express constitutional norms or to national survival: racial equality in education, *see Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983), collection of revenue, *see, e.g.*, *Hernandez v. Commissioner*, 490 U.S. 680, 699-700 (1989), and national defense, *see Gillette v. United States*, 401 U.S. 437, 461-62 (1971). Providing free contraceptives, while important to the goal of reducing unintended pregnancy, does not compare with those interests.

Congress did not think the issue of contraceptive coverage important enough to even expressly address in ACA, instead leaving to the agency the decision whether to require such coverage in the first place. At the same time, Congress exempted plans covering millions of people from any potential mandate to cover contraceptives:

> ACA exempts a great many employers from most of its coverage requirements. Employers providing "grandfathered health plans"—those that existed prior to March 23, 2010, and that have not made specified changes after that date—need not comply with many of the Act's requirements, including the contraceptive mandate. 42 U.S.C. §§ 18011(a), (e). And employers with fewer than 50 employees are not required to provide health insurance at all. 26 U.S.C. § 4980H(c)(2).

Hobby Lobby, 573 U.S. at 699. "All told, the contraceptive mandate" before the agency's current rule, did "not

apply to tens of millions of people." *Id.* at 700. Applying *Yoder*'s standard, this Court has held that a governmental interest cannot be compelling unless the government pursues it uniformly across the full range of similar conduct. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993); *see also Fla. Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989). There is no uniformity here, so the contraceptive mandate cannot be said to serve a compelling purpose.

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

3. Assuming there is a compelling interest, requiring the participation of religious objectors in the coverage scheme is not the least restrictive means.

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

concluded that its current rule is the best way "to reconcile" ACA and RFRA, "and to give effect to each." *Id.*

"The least-restrictive-means standard is exceptionally demanding" and requires the government to show "that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases." *Hobby Lobby*, 573 U.S. at 728. And there are less-restrictive alternatives for providing contraceptives to objecting employers' employees. For example, if the government believes that providing some benefit serves a compelling interest, providing that benefit itself should always be less restrictive than requiring religious objectors to do so. This Court flagged this most obvious alternative in *Hobby Lobby*—"for the Government to assume the cost of providing . . . contraceptives . . . to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Id.* That is just what the agency's current rule does, as it makes women whose employers do not provide contraceptive services because of a "sincerely held religious or moral objection" eligible for subsidized contraceptives from government-funded Title X family-planning centers. U.S. Dep't of Health and Human Servs., *Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7714, 7734 (Mar. 4, 2019).[5]

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[5] If providing some benefit directly is cost prohibitive, that fact may factor into whether those means are least restrictive. On the other hand, if the government is not willing to spend the money to provide a benefit directly, that fact suggests providing the benefit does not serve a compelling interest. In any

CONCLUSION

The Court should grant the petitions for a writ of certiorari.

Respectfully submitted.

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event, here there is no question that the agency is ready, willing, and able to provide the benefit directly.

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