No. 17-6086

In the Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, where Executive Branch action burdens the free exercise of religion, Congress' delegation of power should be strictly construed.

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit law firm dedicated to the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among many others, in lawsuits across the country and around the world.

The Becket Fund frequently represents religious people who seek to vindicate their constitutional rights against government overreach, both as individuals or in community with others. See, *e.g.*, *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015) (prisoner appearance regulation); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012) (ministerial exception). In particular, the Becket Fund has long sought, both as amicus and merits counsel, to protect religious and other Americans against encroachment on their First Amendment rights by unelected government officials. See, *e.g.*, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (Attorney General used delegated authority under Controlled Substances Act to deny accommodation to religious group); *Agency for Int'l Dev.* v. *All. for Open Soc'y Int'l*, 570 U.S. 205 (2013) (USAID used delegated authority under the Leadership Act to mandate

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund the preparation or submission of the brief. All parties have consented to the filing of this brief.

grantee speech concerning prostitution); *Burwell* v. *Hobby Lobby*, 134 S. Ct. 2751 (2014) (HHS used delegated authority under the Affordable Care Act to impose contraceptive mandate on religious business owners); *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (HHS used delegated authority under the Affordable Care Act to impose oft-revised contraceptive mandate on nonprofit religious organizations); *Harvest Family Church* v. *Fed. Emergency Mgmt. Agency*, No. 17A649 (application withdrawn Jan. 4, 2018) (FEMA used delegated authority under the Stafford Act to issue guidance categorically excluding houses of worship from disaster aid grant program; guidance rescinded after the Court called for a response to Texas churches' emergency application for injunction); *Chabad of Key West, Inc.* v. *Fed. Emergency Mgmt. Agency*, No. 4:17-cv-10092-JLK (S.D. Fla., complaint filed Dec. 4, 2017) (parallel case involving Florida synagogues).

The Becket Fund believes that at stake in this litigation is not only the scope of SORNA liability that may be imposed upon criminal defendants, but also the ability of religious people to engage in religious activity without undue interference by unelected government officials. It therefore submits this brief to urge the Court to adopt a rule of strict construction against delegation with respect to Executive Branch actions that burden the free exercise of religion.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The East German Constitution protected all the same core civil and political rights ours does. Every citizen had the right, "in accordance with the principles of [that] Constitution, to express his opinion

freely and publicly."[2] The freedom of the press was guaranteed, as was the right to assemble.[3] The Constitution even protected the "right to profess a religious belief and to engage in religious activities."[4] In fact, many more rights were protected in the East German Constitution than our own, including the right to a job, the right to a residence, and the right to leisure and recreation.[5]

But of far more practical importance than these human rights guarantees were the structural provisions that allocated political power. For instance, the German Democratic Republic was defined as a "political organization * * * under the leadership of the working class and its Marxist-Leninist party."[6] The powers of the East German people were delegated to a single

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[2] Verfassung der Deutschen Demokratischen Republik, Artikel 27(1) (Staatsverlag der Deutschen Demokratischen Republik, Berlin 1976, 8th ed. 1989) ("Jeder Bürger der Deutschen Demokratischen Republik hat das Recht, den Grundsätzen dieser Verfassung gemäß seine Meinung frei und öffentlich zu äußern.").

[3] *Id.*, Artikel 27(2) (press); Artikel 28 (assembly).

[4] *Id.*, Artikel 39(1) ("Jeder Bürger der Deutschen Demokratischen Republik hat das Recht, sich zu einem religiösen Glauben zu bekennen und religiöse Handlungen auszuüben.").

[5] *Id.*, Artikel 24(1) (job); Artikel 37 (residence); Artikel 34 (leisure and recreation).

[6] *Id.*, Artikel 1 ("Sie ist die politische Organisation der Werktätigen in Stadt und Land unter der Führung der Arbeiterklasse und ihrer marxistisch-leninistischen Partei.").

state organ: "The alliance of all powers of the People finds its organized expression in the National Front of the German Democratic Republic."[7] And the National Front was in turn designated as the locus where all of the parties and mass organizations in East Germany "unified * * * all the powers of the People."[8]

This concept of political power delegated to a single organ of government was consistent with the principle of constitutional law, widely adopted within the Warsaw Pact countries, of the "unity of state power."[9] And the doctrine of unity of state power directly correlated with personal constitutional and civil rights that proved to be "illusory."[10]

Our own Constitution is premised instead on the separation of powers, and that has made all the difference. By distributing power among both federal and state sovereigns, and among three separate branches within the federal government, the Founders sought to prevent tyranny. See The Federalist No. 47, at 336 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same

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[7] *Id.*, Artikel 3(1) ("Das Bündnis aller Kräfte des Volkes findet in der Nationalen Front der Deutschen Demokratischen Republik seinen organisierten Ausdruck."

[8] *Id.*, Artikel 3(2) ("In der Nationalen Front der Deutschen Demokratischen Republik vereinigen die Parteien und Massenorganisationen alle Kräfte des Volkes * * *").

[9] Ruti Teitel, *Post-Communist Constitutionalism: A Transitional Perspective*, 26 Colum. Hum. Rts. L. Rev. 167, 169 (1994).

[10] *Ibid.*

hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."). And by preventing one branch of the federal government from giving its power to another, the non-delegation doctrine protects, or ought to protect, the Founders' careful design.

The problem presented by this appeal is that the modern administrative state—constitutionally speaking, a relatively recent phenomenon—does not fit neatly into the Framers' model. As a practical matter, modern Executive Branch agencies often make law, that is, rules that bind private and public conduct, even though they are part of the Executive Branch rather than the Legislative Branch.

And when Executive Branch officials make law, they often ride roughshod over personal civil rights, including specifically First Amendment and other protections for the free exercise of religion. The Court need look no further than its own docket in the last several years to see multiple examples of administrative agencies exercising delegated powers that have given short shrift to free exercise. Thus, just as concentration of power in one state organ in East Germany meant that government officials were free to ignore personal constitutional rights, concentrating both legislative and executive powers in Executive Branch officials means administrative agencies can pick and choose which personal constitutional rights to honor.

This structural problem can be mitigated with a structural solution rooted in founding-era understandings of the nature of the judicial role. As Professors

Chapman and McConnell have observed, in the founding era courts used a principle of equitable interpretation to narrow the application of rules that infringed on natural rights—the predecessors to our now-codified civil rights. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1706 (2012).

The same principle ought to hold today in the context of Executive Branch regulatory action: where a rule, guidance, or other Executive Branch action threatens to impinge on personal constitutional rights against the government, that rule can be invalidated under a strict construction of the law it is promulgated under.

Adopting this approach would not only comport with judicial practice at the founding, but it would also be consistent with this Court's longstanding practice of treading carefully where personal constitutional rights are implicated, as demonstrated by precedents in areas as disparate as the waiver of constitutional rights, the major questions doctrine, and *Bose* constitutional facts.

Strictly construing laws to invalidate Executive Branch actions that impinge on personal constitutional rights would ensure that no one may join together powers the Constitution has made separate. And that would help preserve individual liberty.

ARGUMENT

I. Where Executive Branch actions burden free exercise rights, delegations of power should be strictly construed.

The Court has not yet applied nondelegation doctrine in the context of free exercise rights.[11] Guidance is available, however, in both history and this Court's precedents. Founding-era understandings of how to construe executive actions that interfered with natural rights, and this Court's careful treatment of constitutional rights in a variety of other contexts, confirm that delegation of authority from Congress to the Executive Branch should be narrowly construed where the Executive Branch action at issue burdens free exercise rights.[12]

A. For the Framers, Executive Branch actions that interfered with core civil rights would have been subject to narrow construction.

1. During the founding era, and in the authorities the Founders relied on, the legislative power was seen

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[11] Arguably, however, the religious freedom of the defendants in *A.L.A. Schechter Poultry Corporation* v. *United States*, 295 U.S. 495 (1935) was an unspoken issue lurking beneath the surface of that case. The defendants ran a kosher slaughterhouse under rabbinic supervision. That Nazi Germany had very recently issued executive decrees banning all forms of kosher slaughter cannot have been entirely unknown to the Justices.

[12] This principle would not apply to cases where an Executive Branch official *accommodated* religion rather than burdening it.

as the power to make the laws, rules, and regulations—terms used interchangeably—that bind and govern society. See Larry Alexander & Saikrishna Prakash, Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated, 70 U. Chi. L. Rev. 1297, 1305-06 (2003). Thus, for instance, William Blackstone characterized the legislative power as the "power of making laws" to "prescribe the rule of civil action." 1 William Blackstone, Commentaries *52. Similarly, Montesquieu saw the legislative power as the power to enact "temporary or perpetual laws, and amend[ ] or abrogate[ ] those that have already been enacted." Montesquieu, The Spirit of the Laws 182 (Thomas Nugent trans., 1900) (1748).

American political writings during the colonial period took a similar view. A 1763 letter published in a Boston newspaper observed that Montesquieu had been critical of "entrusting the same gentlemen with legislative and judiciary power, or the power of making laws and judging of them after they are made." Letter by T.Q., Boston Gazette & Country J. (Apr 18, 1763), reprinted in 1 American Political Writing during the Founding Era 1760-1805 19, 20 (Charles S. Hyneman and Donald S. Lutz eds., 1983). Another early American author, describing the practices of the Saxons, equated "legislative authority" with "ma[king] laws and regulations." Demophilus, The Genuine Principles of the Ancient Saxon, or English Constitution, in 1 American Political Writing 340, 345 (Hyneman and Lutz eds., 1983) (1776). And a foundational account of the Massachusetts state constitutional convention characterized legislative power as that which "mak[es] laws, or prescrib[es] such rules of action to every individual in the state." Theophilus Parsons,

The Essex Result, in 1 American Political Writing 480, 492 (Hyneman and Lutz eds., 1983) (1778).

The same view of the nature of legislative power prevailed during the ratification debates. For example, Alexander Hamilton rhetorically asked, "What is a LEGISLATIVE power, but a power of making LAWS?" The Federalist No. 33, at 245 (A. Hamilton) (B. Wright ed. 1961). Likewise, he noted in Federalist No. 75 that the "essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of the society." The Federalist No. 75, at 476 (A. Hamilton). See also The Federalist No. 47, at 338 (J. Madison) ("The magistrate in whom the whole executive power resides cannot of himself make a law.").

The founding generation would therefore very likely have viewed modern-day agency rulemaking as an exercise of the legislative power.[13] And that would mean that courts had a duty to temper that power if it seeped beyond its proper bounds. See The Federalist No. 78, at 469-70 (A. Hamilton) (Clinton Rossiter ed., 1961). (observing that courts would be "of vast importance in mitigating the severity and confining the operation of [unjust and partial] laws").

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[13] Where Executive Branch action strays into the realm of legislative power, the Constitution's requirements of bicameralism and presentment also apply. See *INS* v. *Chadha*, 462 U.S. 919, 951 (1983) ("the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.").

That baseline assumption—that courts would exercise their interpretive powers to ease the impact of unreasonable laws—also appeared in the writings of Blackstone: "[W]here some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament." 1 Blackstone, Commentaries *91. Blackstone's view regarding "collateral matter" was mainstream. For example, scholars view Sir Edward Coke's opinion in the famous *Dr. Bonham's Case* not as an early example of judicial review, but rather of equitable interpretation. See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1690-91 & n.60 (2012) (reviewing scholarly assessments of *Dr. Bonham's Case*, (1610) 77 Eng. Rep. 638 (C.P.); 8 Co. Rep. 107a). And this judicial practice was by no means confined to the English side of the Atlantic: To protect liberty, early American "courts engaged in equitable interpretation to construe statutes to avoid abrogating basic due process norms." *Id.*, 121 Yale L.J. at 1706.

2. The history of natural rights jurisprudence also points towards strict construction. At the time of the founding, English and American courts did not shy away from invoking natural rights in reaching their decisions. But today, founding-era natural rights have been largely codified as private civil rights. Thus how founding-era courts treated natural rights can serve as a rough historical analogue for how courts today deal with private civil rights.

As Professor McConnell has remarked, "unenumerated natural rights [we]re protected through some combination of political self-control on the part of the

political branches (reinforced by the separation of powers) and equitable interpretation by the courts, which entails the narrow construction of statutes so as to avoid violations of natural rights." Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2010 Cato Sup. Ct. Rev. 13, 18. Thus, "courts had the power to engage in equitable interpretation, under which statutes were interpreted narrowly so as to avoid violating the law of nature." *Id.* at 21. This created a legal environment where "natural rights control in the absence of sufficiently explicit positive law to the contrary," which can be viewed "as a clear statement rule for abrogating unenumerated natural rights." *Id.* at 18.

Equitable interpretation in the context of natural rights "was predicated on the charitable assumption that the legislature likely did not intend, by the use of broad language not explicitly addressed to the point at issue, to violate the law of nature." McConnell, *The Ninth Amendment in Light of Text and History*, 2010 Cato Sup. Ct. Rev. at 22. And that charitable assumption did not trample on the legislative power, as one American judge observed in 1784: "When the judicial make these distinctions, they do not controul the Legislature; they endeavour to give their intention its proper effect." *Ibid.* (quoting *Rutgers* v. *Waddington* (N.Y. City Mayor's Ct. 1784)). See also Philip Hamburger, Judicial Duty 344-57 (2008) (describing early American cases applying equitable interpretation, particularly the *Rutgers* case).

It is thus consistent with how founding-era courts saw their judicial duty to allow for equitable interpretations of law to avoid interfering with core personal rights—the latter-day incarnation of natural rights—

in particular cases. And a strict construction of laws that potentially burden core personal rights is also consistent with the wider practice of this Court to seek to harmonize laws rather than to read conflicts into them. See, *e.g., Epic Systems Corp.* v. *Lewis*, No. 16-285, 2018 WL 2292444, at *8 (May 21, 2018) (courts must harmonize potentially conflicting laws absent express Congressional command).

B. This Court has recognized in a variety of contexts that government actions burdening core private rights are forbidden absent express law strictly construed.

Blackstone observed "that the English Constitution required that no subject be deprived of core private rights except in accordance with the law of the land." *Dep't of Transp.* v. *Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1244 (2015) (Thomas, J., concurring) (citing 1 Commentaries 129, 134, 137–138). True to that tradition, this Court often prohibits government infringement of core private rights absent an express law, strictly construed. The Court has consistently sought to tread lightly where core constitutional and civil rights are concerned. We offer some examples below.

1. ***Waiver of constitutional rights.*** This Court has long held that even constitutional rights can be waived. See Jason Mazzone, *The Waiver Paradox*, 97 Nw. U. L. Rev. 801, 801 (2003) (noting that under Supreme Court doctrine, various constitutional criminal protections can be waived or bargained away). Yet, before such a waiver can occur, a high standard for finding that a party waived constitutional rights is applied. See, *e.g.*, *Tague* v. *Louisiana,* 444 U.S. 469, 470

(1980) ("This Court has always set high standards of proof for the waiver of constitutional rights.") (quoting *Miranda* v. *Arizona*, 384 U.S. 436, 475 (1966)). Further, under the doctrine of unconstitutional conditions, constitutional rights cannot be waived for a government benefit, whereas non-constitutional rights can be so forfeited. See *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) ("[E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, * * * [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."). See also Mazzone, at 807-08 ("the Supreme Court has invalidated a wide range of government efforts to compel individuals to forego constitutional rights as the condition for receiving governmental benefits").

2. ***Injunctive relief.*** In seeking a preliminary injunction, a plaintiff must show irreparable harm. See *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). But that all changes in the context of constitutional rights as plaintiffs have a much lower hurdle to clear: "When an alleged deprivation of a constitutional right is involved, * * * most courts hold that no further showing of irreparable injury is necessary." Charles Alan Wright et al., 11A Federal Practice & Procedure § 2948.1. In *Elrod* v. *Burns*, Justice Brennan declared that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." 427 U.S. 347, 373 (1976) (plurality op.) Since then, lower courts have applied this standard in various constitutional contexts. See Beatrice Catherine Franklin, *Irreparability, I Presume? On As-*

suming Irreparable Harm for Constitutional Violations in Preliminary Injunctions, 45 Colum. Hum. Rts. L. Rev. 623, 635-44 (2014) (collecting cases in the areas of speech, other First Amendment rights, Fourth and Eighth Amendment rights, and Fourteenth Amendment rights).

3. ***Constitutional facts under* Bose.** Normally, federal appellate courts defer to a lower court's factual findings under a "clearly erroneous" standard of review. See *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986). But when examining a "constitutional fact"—facts necessary to the constitutional analysis of a claim—the Court has instead required appellate courts to "make an independent examination of the whole record." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). The "constitutional fact doctrine" has been viewed by scholars as "truly foundational to our constitutional system and essential to the judicial protection of constitutional rights" because it "serves as the cornerstone of our system of separation of powers." Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 Ariz. L. Rev. 289, 290-91 (2017).

4. ***Major questions doctrine.*** Strict construction of laws potentially infringing core private rights in the context of nondelegation concerns also resembles this Court's major questions doctrine. Note, *Major Questions Objections*, 129 Harvard L. Rev. 2191, 2203 (2016) ("it is better to characterize the major question cases as occasions where the Court thought it necessary to engage in vaguely equitable intervention"). Just as the Court refuses to defer to agencies in the realm of "major question," see Josh Blackman, *Gridlock*, 130 Harvard L. Rev. 241, 261-65 (2016), so too

should the Court refuse to defer to agencies in the realm of nondelegation and the infringement of constitutional rights. And adopting such a rule of construction would enable agencies to be treated no better than Congress, to which the Court applies the constitutional avoidance canon. See Ilan Wurman, *Constitutional Administration*, 69 Stanford L. Rev. 359, 415 (2017). See also *id.* ("Deploying all the tools of statutory construction to determine what power Congress actually intended to delegate empowers our elected representatives and serves the same republican purpose served when courts determine whether Congress has transgressed the limits of the powers "We the People" delegated to Congress in the Constitution.").

5. ***Constitutionally-inspired nondelegation canons.*** As Professor Sunstein has noted, although the Court has not directly enforced the nondelegation doctrine since 1935, it has promulgated a host of nondelegation canons of construction that "represent a salutary kind of democracy-forcing minimalism, designed to ensure that certain choices are made by an institution with a superior democratic pedigree." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 317 (2000). "Indeed," he argues, these "nondelegation canons turn out to be a contemporary incarnation of the founding effort to link protection of individual rights, and other important interests, with appropriate institutional design." *Id.*

According to Professor Sunstein, the Court has adopted several "constitutionally inspired nondelegation canons":

(1) agencies are not permitted to construe statutes so as to raise serious constitutional doubts;

(2) agencies are not allowed to interpret ambiguous provisions to preempt state law;

(3) agencies not allowed to apply statutes retroactively; and

(4) the rule of lenity.

Id. at 331-32 (collecting cases).[14]

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As history and this Court's consistent practice show, where core constitutional and civil rights are at stake, courts ought to proceed carefully. In the context of Executive Branch actions that burden free exercise, that means that courts should strictly construe legislation against delegation of power to the Executive Branch.

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[14] In the same vein, Dean Manning suggests that "[a]n independent judicial check upon agency interpretive authority would insert a layer of security against unwise or oppressive agency lawmaking" and "promote the separation of powers objective of preserving liberty by dispersing government authority." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 682-83 (1996). Requiring agencies "to speak more precisely in order to bind an independent interpreter" would mean that agencies "would have a harder time adopting policies contrary to the public interest." *Id.* at 683.

II. Strict nondelegation is needed to protect free exercise rights, particularly for religious minorities.

A. Administrative rulemaking is uniquely unresponsive to religious concerns.

As the Court's religious liberty docket demonstrates, administrative agencies, unlike legislatures, do not always feel compelled to balance important religious liberty concerns with other societal interests.

As an initial matter, the administrative process intentionally dodges the normal give-and-take of the political process. It was designed that way, largely to eliminate what was seen as the problem of having to accommodate minority interests. Woodrow Wilson, one of the early leading advocates for increased administrative authority, fretted that public opinion was "meddlesome" and that it was too hard to persuade "a voting majority of several million heads." Philip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal,* 90 Notre Dame L. Rev. 1919, 1946-47 & n.79 (2015) (quoting Woodrow Wilson, *The Study of Administration*, 2 Pol. Sci. Q. 197, 208 (1887)). To Wilson, the primary trouble came not in the *number* of heads but in the diverse *types* of heads: democracy required persuading "the mind, not of Americans of the older stocks only, but also of Irishmen, of Germans, [and] of negroes." *Id.* at 1947 & n.80 (quoting Wilson, 2 Pol. Sci. Q. at 209). Unfortunately, Wilson's anti-democratic views have persisted. In 2011, a former Director of the Office of Management and Budget publicly advocated that the country "need[s] less democracy," and that the "serious problems facing our country" could

best be solved by making "our political institutions * * * less democratic." Peter Orszag, *Too Much of a Good Thing,* New Republic (Sept. 14, 2011), https://newrepublic.com/article/94940/peter-orszag-democracy.

Of course in some situations agencies provide thirty days of notice and comment for certain types of rules. But even this democracy-lite aspect of the administrative process is widely understood as often little more than a "charade." David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine,* 2001 Sup. Ct. Rev. 201, 231 (2001). "No administrator in Washington" truly relies on notice-and-comment; it is rather "a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues." E. Donald Elliott, *Re-Inventing Rulemaking,* 41 Duke L. J. 1490, 1492 (1992). The resulting reality is that "administrators [are] almost entirely insulated from the public" and unreached by the dialogue and debate that invigorates and guides the democratic process. Hamburger, 90 Notre Dame L. Rev. at 1940. What is more, "[e]ntire categories of lawmaking—such as the interpretation done through guidance, manuals, letter opinions, briefs, etc.—does not really require notice, let alone comment." *Ibid.*

This exclusion of American citizens from the decision-making process "comes with a distinctively hard edge for many religious Americans," "particularly * * * the relatively orthodox." Hamburger, 90 Notre Dame L. Rev. at at 1921, 1928. Agency officials simply are not "as sensitive to religious sensibilities as are representative lawmakers." *Id.* at 1921. They are not only insulated from "political pressures," but also

infused with a "self-conscious rationalism and scientism" making them "relatively indifferent * * * to religious concerns." *Ibid.;* see also Eugene Volokh, *A Common-Law Model for Religious Exemptions,* 46 UCLA L. Rev. 1465, 1487 n.57 (1999) (noting "agencies' tunnel vision" in weighing religious matters "alongside their more traditional concerns"). This contributes to an "insensitivity of governmental bureaucracy," which has been a "continual and disturbing source of imposition" upon religious Americans, especially "religious minorities." Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases,* 76 U. Colo. L. Rev. 1021, 1025 (2005).

Forced to appeal to indifferent and unresponsive administrators, "individuals or groups whose religious liberty is burdened by * * * administrative regulation" have significantly reduced "leverage * * * to induce government bureaucrats to accommodate religious practices." W. Cole Durham, Jr. *et al., Traditionalism, Secularism, and the Transformative Dimensions of Religious Institutions,* 1993 BYU L. Rev. 421, 450 (1993). This may have been of little moment a hundred years ago, but "in the modern bureaucratic state, where government regulation increasingly pervades all social space," religious considerations are heavily disadvantaged, burdened by "a mass of administrative rules and guidelines," and "often sacrificed to lower order bureaucratic values such as administrative efficiency." *Ibid.* This Court perhaps best summarized—and rejected—agencies' sometimes blinkered decisionmaking in *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, noting the "classic rejoinder of bu-

reaucrats throughout history" when asked for religious exemptions: "If I make an exception for you, I'll have to make one for everybody, so no exceptions." 546 U.S. 418, 436 (2006).

By contrast, although Congress can and does also overlook religious liberty interests, "Congress is far more sensitive to religious sensibilities than administrators." Hamburger, 90 Notre Dame L. Rev. at 1943. Thus, "for purposes of religious liberty, a congressional veto on executive lawmaking is no substitute for the Constitution's requirement of congressional legislation, subject to an executive veto." *Ibid.* Especially given that executive control is limited given the number of "administrators mak[ing] binding regulations in more or less 'independent' agencies, with varying degrees of formal independence from political control." *Id.* at 1944.

B. As this Court's cases demonstrate, government officials often use delegated powers to burden religious exercise.

In just the past couple of decades, a number of religious liberty cases before this Court and in the lower courts clearly illustrate how delegated authority tends to lead unelected officials to burden religious exercise.

In *O Centro*, for example, United States Customs officials seized a small religious group's shipment of sacramental tea made from two Amazonian plants, one of which contained a hallucinogen listed under the Controlled Substances Act. 546 U.S. at 425. The customs inspectors also "threatened the [small religious group] with prosecution." *Ibid.* This Court upheld the sect's religious rights under RFRA. *Id.* at 423. In

reaching its decision, the Court noted that the Attorney General had been delegated power under the Controlled Substances Act to provide a waiver to the religious group, but had chosen not to. *Id.* at 432-33.

Several other cases stem from the contraceptive mandate regulations issued by government agencies under the Affordable Care Act ("ACA"). The ACA itself made no mention of a contraceptive mandate. Instead, the ACA required certain employers to provide health insurance to their employees that included coverage for "preventative care and screenings" for women. 42 U.S.C. § 300gg-13(a)(4); 29 U.S.C. § 1185d.

But Congress did not specify what "preventive care and screenings" means. Instead, Congress delegated that task to the Health Resources and Services Administration ("HRSA") of the Department of Health and Human Services ("HHS"). 42 U.S.C. § 300gg-13(a)(4). HHS, in turn, asked the quasi-private Institute of Medicine ("IOM"), for recommendations. IOM recommended that HHS define "preventive care" to include, among other things, "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." Committee on Preventive Services for Women, Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gap* 109-10 (2011). The 20 FDA-approved contraceptive methods include both drugs and devices that operate to prevent fertilization of an egg, and drugs and devices that can prevent implantation of a fertilized egg. Food and Drug Administration, Birth Control Guide, http://bit.ly/2prP9QN. Only days after the recommendations were published, HHS adopted them entirely, by means of a post on HRSA's

website. See HRSA, Women's Preventive Services Guidelines, (Oct. 2017) https://www.hrsa.gov/womens-guidelines/index.html; 76 Fed. Reg. 46,621 (Aug. 3, 2011), 77 Fed. Reg. 8,725 (Feb. 15, 2012); 45 C.F.R. § 147.130(a)(1)(iv). Thus, Congress outsourced figuring out what "preventive care and screenings" were to HHS, and HHS outsourced that inquiry to IOM. It is highly unlikely that politically accountable Members of Congress would have created the contraceptive mandate. But HHS had no hesitation rushing in with its delegated power where Congress feared to tread.

As the Court is aware, the agency-created contraceptive mandate resulted in nationwide litigation involving several hundred religious plaintiffs and multiple trips to this Court. See, *e.g.*, *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). *Zubik* v. *Burwell*, 136 S. Ct. 1557, 1560 (2016). After insisting to this Court in *Hobby Lobby* that the version of the mandate at issue there was the least restrictive alternative, and then insisting to this court in *Zubik* that a different version of the mandate was the least restrictive alternative, HHS determined that it was possible to provide both religious freedom and contraceptive coverage, and issued an interim final rule to that effect. See 82 Fed. Reg. 47,792 (Oct. 13, 2017).[15] And the government is also now offering to pay directly for contraceptive coverage by means of its longstanding Title X program. See 83 Fed. Reg. 25,502 (June 1, 2018).

Another case shows how long it can take members of religious minorities to obtain relief from regulatory

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[15] As of this writing, the interim final rule's validity is the subject of appeals in both the Third and Ninth Circuits.

agencies. In 2006, an undercover agent of the United States Fish and Wildlife Service attended a Native American religious ceremony and confiscated religiously-significant eagle feathers from a Lipan Apache religious leader named Pastor Robert Soto. See *McAllen Grace Brethren Church* v. *Salazar*, 764 F.3d 465, 468 (5th Cir. 2014). For the next ten years, Pastor Soto pursued the return of his feathers from the Department of the Interior. He was initially denied possession of the eagle feathers because Department of the Interior regulations promulgated under the Bald and Golden Eagle Protection Act required that he be a member of a federally-recognized tribe, and while the Lipan Apache Tribe was recognized by historians, sociologists, and the State of Texas, it was not recognized by the federal government. *Id.* at 469.

When the case finally reached it, the Fifth Circuit ruled that the Department's regulations likely violated RFRA because the Department did not "demonstrat[e] that a possession ban on all but a select few American Indians" constituted the least restrictive means of achieving a compelling governmental interest. *McAllen*, 764 F.3d at 479-80. In 2016, the Department entered a settlement agreement with Pastor Soto that recognized the rights of Pastor Soto and other members of his congregations to pick up naturally molted feathers from the wild, exchange feathers with other Native Americans, and fashion feathers into objects for ceremonial use. See Settlement Agreement, *McAllen Grace Brethren Church* v. *Jewell*, No. 07-00060 (S.D. Tex. filed June 13, 2016), ECF No. 83-1, https://s3.amazonaws.com/becketpdf/Exhibit-1-Settlement-Agreement-file-stamped.pdf.

Another longstanding regulatory form of discrimination against religious exercise ended earlier this year as a result of litigation. For decades, FEMA had used the power delegated to it under the Stafford Disaster Relief and Emergency Assistance Act to issue non-regulatory guidance denying churches, synagogues, mosques, and other houses of worship access to disaster aid grants. This was so even though federal disaster assistance law specifically prohibits "discrimination on the grounds of race, color, religion" in the distribution of disaster aid. 42 U.S.C. § 5151(a).

After Hurricane Harvey devastated Texas and Hurricane Irma damaged Florida, two lawsuits were filed against FEMA's guidance, one by churches in Texas and another by synagogues in Florida. See *Harvest Family Church* v. *Federal Emergency Management Agency*, No. 17A649 (application withdrawn Jan. 4, 2018) (Texas churches' emergency application for injunction); *Chabad of Key West, Inc.* v. *Federal Emergency Management Agency*, No. 4:17-cv-10092-JLK (S.D. Fla., complaint filed Dec. 4, 2017), ECF No. 1 (Florida synagogues). The Department of Justice defended FEMA's guidance all the way through the lower courts, but once the Court asked the Solicitor General to respond to the Texas churches' application for an injunction, FEMA decided to rescind its guidance instead. Congress subsequently used its legislative power to enact legislation requiring FEMA to treat houses of worship on equal terms to other applicants. See 42 U.S.C. § 5172(a)(3)(C).

All of these cases evince a similar pattern: government bureaucrats cut religious people no slack as to their religious exercise, even though those bureaucrats are enforcing "law" not enacted by the people's

representatives. And while the courts ultimately protected these specific parties' religious liberty, that's not always the case, especially with minority faiths. See Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 Iowa L. Rev. 231 (2012) (finding that, after controlling for other factors, Muslim claimants had a 22% chance of success in religious liberty cases in the federal courts from 1996-2005, whereas non-Muslim claimants had a 38% chance). But see Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. Colo. L. Rev. 1021, 1037 (2005) (finding that while minority faiths had a statistically similar success rate to other faiths in religious liberty claims brought in federal courts, Catholics and Baptist claimants fared worse).

C. Religious minorities in particular are at peril from Executive Branch actions taken with delegated authority.

Delegation of too much legislative authority to agencies places large swaths of lawmaking outside of the political process, resulting in particular harm to religious minorities. Concern over minorities has long been a concern of the Court, with *Carolene Products*' famous footnote four and its doctrinal progeny a prominent example. There, Justice Stone expressed concern about "statutes directed at particular religious * * * minorities," as well as "prejudice against discrete and insular minorities." *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938). Certainly there are religious groups today who are properly classified as "discrete and insular minorities." But "anonymous

and diffuse" religious minorities can be just as threatened. Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 724 (1985). And the size of a religious minority is irrelevant: "It is fundamentally mistaken to suppose that religious liberty is only for *small* religious minorities." Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 Yale L.J. Forum 369, 375 (2016) (emphasis added). The Constitution does not delineate. And historically speaking, "[e]fforts to suppress the practices of large religious minorities create more social conflict than similar efforts to suppress small religious minorities." *Ibid.*

According to Professor Laycock, cultural shifts over the past half century have only exacerbated this trend. Whether "discrete and insular" or "anonymous and diffuse," whether large or small—religious individuals and organizations are much more in the minority today, particularly on social issues. For instance, "the sexual revolution has swept away the former religious majority on sexual matters." Laycock, 125 Yale L.J. Forum at 370. Thus today, "[r]eligious conservatives make the individual-rights arguments of a minority group because they *are* a minority group," even if they still sometimes have local majorities. *Ibid.* (emphasis added).

More generally, in "contemporary America," where "a very diverse society * * * has long tended towards theological liberalism," religious "orthodoxy is apt to be the stance of minorities that seek to preserve their distinctive beliefs in the face of majoritarian pressures to conform to more universal liberal views." Ham-

burger, 90 Notre Dame L. Rev. at 1929. Thus ironically, "in [our] theologically liberal society, orthodoxy is unorthodox." *Ibid.*

As a result, "[o]n many issues, religious Americans and their organizations increasingly cannot muster [popular] support," "[e]specially when they seek to protect relatively orthodox beliefs, or when they want to adhere to religious duties that are not aligned with popular liberal political views, religious Americans often find themselves alone." Hamburger, 90 Notre Dame L. Rev. at 1932-33. This creates a situation where "[t]hose who are sailing with prevailing winds, theological and political, do not suffer much from" being excluded by the administrative lawmaking process. *Id.* at 1933. But "[t]hose who are tacking against prevailing winds * * * have much to fear." *Ibid.*

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Ultimately, however, the current state of affairs is irrelevant to the enduring legal questions the Court will face, because American society is enduringly pluralistic. Regardless of which way the prevailing political winds happen to be blowing at any given moment, religious minorities will always be with us, and one or more of them will be politically disfavored. At a particular point in American history the disfavored religious minority of the day may be Catholics or Mormons or Jews or Sikhs or Santeros or Jehovah's Witnesses or Evangelicals or Muslims. Someone will always be in peril of being the target of unaccountable government officials. The Court can go a long way towards ensuring that those religious minorities are protected by re-

quiring strict construction against delegation with respect to Executive Branch actions that burden religious exercise.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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