No. 19-431

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 AND
THE STATE OF NEW JERSEY, *et al.*,
Respondents.

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

BRIEF FOR AMICUS CURIAE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONER

KEVIN R. PALMER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

MATTHEW T. MARTENS
Counsel of Record
KEVIN GALLAGHER
MATTHEW E. VIGEANT
CHRISTOPHER W. DANELLO
AARON J. FRIEDMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
matthew.martens@
wilmerhale.com

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

Page(s)

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICUS CURIAE[1]

The Christian Legal Society (CLS) is a nonprofit, nondenominational association of Christian attorneys, law students, and law professors with members in every state and chapters on 90 law school campuses. CLS's legal advocacy division, the Center for Law and Religious Freedom, works to protect all citizens' right to be free to exercise their religious beliefs. CLS was instrumental in the passage of the Religious Freedom Restoration Act (RFRA) and the subsequent defense of RFRA's constitutionality and proper application in the courts. Because the Health and Human Services (HHS) contraceptive mandate sharply departs from our nation's historic, bipartisan tradition of respecting religious conscience, CLS believes that it represents a grave attempt by the government to diminish all Americans' religious liberty.

The questions presented in this case are of substantial importance to CLS, which has a commitment to religious liberty, not just for itself and its constituents, but for Americans of all faith traditions. While members of CLS may differ in their views regarding whether the general use of contraceptives is acceptable or whether certain contraceptives act as abortion-inducing drugs, they agree that the nation's historic, bipartisan commitment to religious liberty requires that the government respect the religious beliefs of those faith traditions whose religious beliefs prohibit participating in

---

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of amicus curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no person, other than amicus curiae or its counsel, made any monetary contribution to the preparation or submission of this brief.

the use or provision of contraceptives, including abortion-inducing contraceptives. CLS writes in support of Petitioner's position because the lower court's decision fails to respect basic principles of religious liberty.

Beyond the specific issue presented in this case, CLS is gravely concerned about the approach taken by the lower court to resolving the religious liberty issue presented. Under the guise of evaluating whether the regulations at issue imposed a substantial burden on objectors' exercise of their religious faith, the Third Circuit in fact evaluated the religious reasoning that leads objectors like Petitioner to believe that the HHS scheme renders them complicit in the provision of contraceptives in contravention of their faith. The religious reasoning underlying a religious objector's belief is beyond the competence or purview of the courts to review. If left unchecked, the lower court's interpretation of RFRA as allowing courts to second-guess religious reasoning and beliefs will have far-reaching and detrimental consequences for religious liberty.

SUMMARY OF ARGUMENT

The Court has repeatedly and uniformly admonished that the First Amendment prohibits courts from acting as ecclesiastical tribunals judging the reasonableness or orthodoxy of an organization's or person's religious beliefs. *See Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine … the plausibility of a religious claim." (citations omitted)); *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether" someone who has religious qualms with a law has "correctly perceived the

commands of [his] faith."). Despite this constitutional mandate, the Third Circuit, through an improper application of the substantial burden test, informed Petitioner that authorizing a third party to provide contraceptive coverage in its stead does not make it complicit in a moral evil, Petitioner's convictions to the contrary notwithstanding.

If left unchecked, the Third Circuit's decision will place courts nationwide in a position to determine as a matter of law whether the religious beliefs of the parties before them are not only sincerely held but also, in the courts' view, reasonable. Because the Third Circuit's substantial burden test makes civil courts the ultimate authority on religious or moral orthodoxy, the Court should issue a writ and ultimately reverse the Third Circuit's decision.

No party here disputes that Petitioner, a congregation of Roman Catholic women, sincerely holds religious objections both to providing health insurance that offers certain contraceptives *and* to taking actions required to avail themselves of the "accommodation" that obligates others to provide contraception in their stead. In Petitioner's view, each option makes it morally complicit in the provision of contraceptives against its religious beliefs.

The court below erred by focusing on the activity of third parties rather than Petitioner's role in enabling such activity. Although the court acknowledged that its role was to determine whether the HHS "accommodation" creates a substantial burden on an objector's religious beliefs, the panel in fact analyzed objectors' religious reasoning and the correctness of their belief that acting pursuant to the HHS regulatory "accommo-

dation" scheme would make them morally complicit in the provision of contraceptives. Pet. App. 45a-47a.

Civil courts have no judicial role in such an evaluation, either under the First Amendment or RFRA. Rather, the Court's decisions confine judicial review of whether an adherent's religious beliefs prohibit compliance with government regulation to the "'narrow function'" of inquiring whether those beliefs "reflect[] 'an honest conviction.'" *Hobby Lobby*, 573 U.S. at 725 (quoting *Thomas*, 450 U.S. at 716). In other words, the adherent alone defines the tenets of his or her religious observance. Courts may determine only the sincerity of religious beliefs, not their validity. Even religious beliefs that some reasonable observers would view as implausible are entitled to protection if sincerely held. *See id.* at 724.

Once a court determines that an objector sincerely believes that some government-mandated action or prohibition is contrary to his or her religious beliefs, the only burden question for the court is whether a substantial governmental sanction attaches to disobedience of the law. If so, the substantial burden inquiry ends there.

Here, however, the Third Circuit improperly inquired into not only the sincerity, but also the validity, of Petitioner's beliefs under the guise of a substantial burden analysis. The panel examined whether objectors' beliefs are reasonable rather than whether the burden placed on those beliefs is substantial. In so doing, the court moved from the role of legal arbiter to that of moral philosopher, and thus improperly moved from a role of constitutional necessity to one of constitutional incompetence. It is not for courts "to say that

the [religious] line" objectors drew "was an unreasonable one." *Thomas*, 450 U.S. at 715.

Rather than evaluate the substantial financial penalties the government placed on an objector's adherence to their religious belief, the Third Circuit measured the ease with which an objector could violate that belief by participating in the "accommodation" scheme. This is not the inquiry RFRA requires. To the contrary, "the question that RFRA presents" is whether the challenged government action "imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs." *Hobby Lobby*, 573 U.S. at 724 (emphasis omitted).

If allowed to stand, the lower court's flawed interpretation of RFRA will have far-reaching adverse consequences on religious liberty. It is critical that this Court re-affirm the correct substantial burden test. If allowed to stand, the modified substantial burden analysis employed by the Third Circuit panel could incentivize regulators to add "accommodations" that do not actually accommodate the exercise of sincerely held religious beliefs. This country has a longstanding tradition of providing robust religious exemptions. *Infra* Part II.B. Accommodations-in-name-only would undermine the important interests in protecting religious liberty that have been recognized by Congress and this Court.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S SUBSTANTIAL BURDEN PRECEDENT

A. It Is Undisputed That Petitioner Sincerely Believes That The "Accommodation" Makes It Complicit In Moral Evil

Substantial burden on an objector's religious exercise is evaluated on the basis of the objector's own sincerely held religious belief. *E.g.*, *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014). This Court has stated repeatedly that "it is not for us to say" whether a party's religious beliefs "are mistaken or insubstantial." *Id.* at 725. When a party determines that certain conduct violates its religious beliefs, a court's "'narrow function … is to determine' whether the line drawn 'reflects an honest conviction.'" *Id.* (citation omitted). Here, it is undisputed that Petitioner believes that preparing documentation that obligates third parties to provide contraception to its employees immerses it in behavior it views as morally evil.

Under the Affordable Care Act (ACA), HHS promulgated regulations requiring group health plans and health insurance issuers to provide "preventive care and screenings" relating to women's health. 45 C.F.R. § 147.130(a)(1)(iv). HHS also issued guidelines requiring employers to provide "coverage, without cost sharing, for '[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.'" 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012); *see* 29 C.F.R. § 2590.715-2713(a). Any employer who fails to comply with this contraceptive mandate faces stiff financial penalties. 26 U.S.C. §§ 4980D(b), 4980H(a), (c). The regulations exempted a

narrow group of churches and closely-related organizations, but religious nonprofit organizations like Petitioner did not qualify for the exemption. 45 C.F.R. § 147.131(a).

The regulations provided an alternative way to comply with the contraceptive mandate, called an "accommodation," for organizations like Petitioner (referred to herein as the "Accommodation"). 78 Fed. Reg. 39,870, 39,871-39,872 (July 2, 2013); 29 C.F.R. § 2590.715-2713A. To comply with the Accommodation, an organization must certify using one of two methods. The first method is for the objector to submit an EBSA Form 700 Certification directly to its third-party administrator (TPA), certifying that it is a religious nonprofit entity that religiously objects to providing abortifacient or contraceptive care required by the contraceptive mandate. 29 C.F.R. § 2590.715-2713A(a)-(b). The second method is for the objecting organization to submit notice to HHS, providing the organization's name, its religious objections to complying with the mandate, and, importantly, providing its insurance plan name and type and its TPA's name and contact information. 79 Fed. Reg. 51,092, 51,094-51,095 (Aug. 27, 2014); 80 Fed. Reg. 41,318, 41,323 (July 14, 2015); 29 C.F.R. § 2590.75-2713A(b)(1)(ii)(B). Upon receiving the form or notice, the administrator would then provide the contraceptives. 78 Fed. Reg. at 39,874, 39,879, 39,892-39,893.

In November 2018, the government modified the contraceptive mandate regulations described above by issuing a new rule. *See* 83 Fed. Reg. 57,536, 57,540 (Nov. 15, 2018). This new rule (referred to herein as the "Religious Exemption") expanded the religious exemption to apply to a broader group of religious objectors, including Petitioner. The district court below,

however, issued a nationwide preliminary injunction prohibiting enforcement of the new rule and effectively compelling the resurrection of the previously-existing regulatory scheme (including the Accommodation). *See* Pet. App. 126a-137a. The Third Circuit upheld this nationwide preliminary injunction, holding that there was no "basis to conclude the Accommodation process infringes on the religious exercise of any employer." *See* Pet. App. 48a-53a. If allowed to stand, the Third Circuit's decision means that Petitioner will be forced to comply with the Accommodation.

Petitioner objects, on religious grounds, to complying with the Accommodation. Petitioner genuinely believes that utilizing the Accommodation would make it complicit in sin, give the appearance of involvement in sin (itself a sin), and grievously impair its ability to bear witness to the sanctity of human life. The court below unduly minimized required participation in the Accommodation scheme by Petitioner and other similarly situated objectors, focusing excessively on the activity of others rather than on the burden placed on objectors by being required to submit the accommodation form. *See* Pet. App. 46a ("Here, through the Accommodation process, the actual provision of contraceptive coverage is by a third party, so any possible burden from the notification procedure is not substantial."). In this case, however, Petitioner objects to the activity in which the regulations mandate that *it participates*: filling out the accommodation forms. This is not an objection to the actions of third parties.

And, more fundamentally, this Court's precedents do not allow the courts to analyze the inconsistency of the law with objectors' conscience. *See Hobby Lobby*, 573 U.S. at 724-725; *Employment Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 887 (1990); *Hernan-*

dez v. *Commissioner*, 490 U.S. 680, 699 (1989); *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981). To the contrary, this Court's precedents establish that it is for the objector alone to define the tenets of its religious observance. *Smith*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.").

B. The Third Circuit Misconstrues The Substantial Burden Test

In holding that RFRA does not require the Religious Exemption, the Third Circuit misapplied this Court's precedent for analyzing claims under RFRA and misconstrued the substantial burden test. First, the court improperly evaluated the reasonableness of an objector's belief that participating in the Accommodation scheme would violate its religion. Second, instead of evaluating whether the Accommodation would impose a substantial burden on an objector's adherence to its sincerely held religious beliefs, the court focused on the incidental administrative burden of participating in the Accommodation in violation of those beliefs.

1. The Third Circuit impermissibly questioned the reasonableness of Petitioner's religious beliefs

As the Court has repeatedly emphasized, the reasonableness or truth of religious belief is beyond the competence and purview of the courts. *See, e.g.*, *Hobby Lobby*, 573 U.S. at 724 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine … the plausibility of a religious claim." (citations omitted)); *Hernandez*, 490 U.S. at 699

("It is not within the judicial ken to question … the validity of particular litigants' interpretations of [their] creeds.").

Similarly, it is not for the courts to engage in "difficult and important question[s] of … moral philosophy," including "the circumstances under which it is immoral for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Hobby Lobby*, 573 U.S. at 686. Where a religious objector believes that performing an act will violate his or her religious beliefs, and that belief is sincerely held, courts must accept the objector's belief. *Id.*; *see also New Doe Child #1* v. *Congress of the U.S.*, 891 F.3d 578, 586-587 (6th Cir. 2018) ("Sincerity is distinct from reasonableness. *Hobby Lobby* teaches that once plaintiffs allege that certain conduct violates their sincerely held religious beliefs as they understand them, it is not within the court's purview to question the reasonableness of those allegations." (citations omitted)). The sincerity of Petitioner's belief, and the beliefs of many other individuals and organizations, that participating in the Accommodation would violate their religion is not in dispute.[2]

The Court's most recent reasoned RFRA decision, *Hobby Lobby*, is illustrative. Faced with the government's position "that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception …) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated," the Court explained that courts "have no business addressing "whether the religious belief asserted in a RFRA case

[2] *See* Pet. App. 33a.

is reasonable." 573 U.S. at 723-724. The petitioners, the Court explained, believed that complying with the contraceptive mandate was "connected to the destruction of an embryo in a way that is sufficient to make it immoral for them" to comply. *Id.* at 724. The Court did not analyze whether the contraceptive mandate was *in fact* immoral or connected to the destruction of an embryo; rather, it noted that the determination of whether these beliefs were "flawed" was not for courts to make. *Id.*

Despite paying lip service in a footnote to these long-settled principles (*see* Pet. App. 44a n.28), the circuit court here based its RFRA analysis on *Geneva College* v. *Secretary, Department of Health & Human Services*, a fatally flawed decision that this Court vacated in *Zubik*.[3] The Third Circuit's substantial burden analysis does exactly what courts are prohibited from doing: it evaluates whether participating in a government program *in fact* will violate an objector's religious beliefs. Relying on *Geneva College*, the Third Circuit here framed its substantial burden inquiry as whether participation without the Religious Exemption would make Petitioner and other objectors "trigger," "facilitate," or be "complicit" in the grave moral wrong—*i.e.*, the provision of contraceptive and abortifacient coverage. *See* Pet. App. 45a-46a (quoting *Geneva Coll.*, 778 F.3d at 437-438). Applying this approach, the Third Circuit concluded that because the Accommodation did not require religious objectors to directly provide con-

[3] *See* 778 F.3d 442 (3d Cir. 2015), *vacated by Zubik* v. *Burwell*, 136 S. Ct. 1557, 1561 (2016) (per curiam). Although this Court vacated *Geneva College* in *Zubik* without expressing a "view on the merits," 136 S. Ct. at 1560, *Geneva College*'s reasoning is inconsistent with this Court's prohibition on questioning the reasonableness of religious beliefs.

traceptives and abortifacients, "any possible burden … is not substantial." Pet. App. 46a.

But this approach is incorrect and contrary to this Court's directive. By requiring objectors to show that compliance would cause them to "trigger" or "facilitate" a moral wrong in order to satisfy the substantial burden inquiry, the Third Circuit implicitly held that objectors cannot reasonably believe that they would violate their religion merely by signing the self-certification. But it is not for courts to evaluate the truth or logic of an objector's religious beliefs about what would make them complicit in an immoral act. *See Thomas*, 450 U.S. at 714 ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit … protection."). Nor is it for courts to toil to understand why, from the perspective of moral theology, signing a document that the objector believes makes it morally complicit in the provision of contraceptives and abortifacients is any different from a simple declaration that the objector objects to providing contraceptives and abortifacients on religious grounds. *Compare* Pet. App. 46a (dismissing religious objectors' claimed burden under the Accommodation mechanism as insubstantial in part because "the actual provision of contraceptive coverage is by third parties"), *with Thomas*, 450 U.S. at 714 (rejecting lower court's analysis of whether religious objector's beliefs were "consistent").

The government implemented the Religious Exemption because Petitioner and other objectors asserted that participating in the Accommodation would make them complicit in a grave wrong that violates their religious beliefs. The Third Circuit was required to accept these sincerely held assertions. Its refusal to do so, and decision to instead analyze whether *in fact*

the Accommodation would violate an objector's religious beliefs under the guise of determining whether an objector's religious beliefs will be substantially burdened is contrary to this Court's precedent.

2. The Third Circuit's analysis improperly focused on the administrative burdens of complying with the Accommodation, instead of the significant penalties for refusing to participate in the Accommodation scheme in accordance with objectors' religious beliefs

Where a law or policy affects religious exercise, the Court has made clear that the RFRA substantial burden analysis focuses on the degree of burden imposed on *adhering* to, and acting in accordance with, religious belief. *See Hobby Lobby*, 573 U.S. at 724 ("[T]he question that RFRA presents" is whether the challenged government action "imposes a substantial burden on the ability of the objecting parties to conduct business *in accordance* with *their* religious beliefs." (first emphasis added)); *Thomas*, 450 U.S. at 718 (explaining that a burden is substantial to the extent it "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs"). That is, a religious believer's exercise of religion is substantially burdened if the law presents the believer with the choice of either violating his or her religious beliefs or suffering a substantial penalty. *Hobby Lobby*, 573 U.S. at 726; *see also Holt* v. *Hobbs*, 574 U.S. 352, 361 (2015).

For example, in *Hobby Lobby*, the Court held that the respondents' religious exercise was substantially burdened by a law requiring that they pay "an enormous sum of money" in penalties for adhering to religious beliefs prohibiting the provision of contraceptives

and abortifacients. *See* 573 U.S. at 726. Similarly, in *Wisconsin* v. *Yoder*, one of the Court's cases Congress enacted RFRA to restore, 42 U.S.C. § 2000bb(b)(1), the Court held that the respondent's religious exercise was substantially burdened by the imposition of criminal sanctions for adhering to religious beliefs prohibiting the enrollment of children in secondary school. 406 U.S. 205, 218 (1972).

Here, Petitioner faces a similar choice if the Third Circuit's opinion is allowed to stand: participate in the Accommodation scheme in violation of its religious beliefs or encounter severe penalties. Rather than apply this Court's directly applicable substantial burden precedent by evaluating the substantial financial penalties the government placed on Petitioner's *adherence* to its religious belief, the Third Circuit instead measured the ease with which Petitioner and other objectors could *violate* that belief by participating in the Accommodation scheme. For example, the Third Circuit asserted that completing the paperwork necessary for participating in the Accommodation scheme would not burden the exercise of religion by an objector like Petitioner. *See* Pet. App. 46a ("Here, through the Accommodation process, the actual provision of contraceptive coverage is by a third party, so any possible burden from the notification procedure is not substantial." (internal quotation marks omitted)).

This is not the inquiry RFRA requires. Nowhere did the Third Circuit analyze the degree to which objectors' *adherence* to their religious beliefs by *not* participating in the Accommodation scheme (or otherwise providing coverage for contraceptive and abortifacient coverage) would expose objectors to draconian penalties. It was that analysis which the Court's precedent compels and which the circuit court failed to undertake.

II. THE THIRD CIRCUIT'S FLAWED INTERPRETATION OF RFRA WILL HAVE SWEEPING, DETRIMENTAL CONSEQUENCES FOR RELIGIOUS LIBERTY IF UPHELD

A. The Third Circuit's Substantial Burden Analysis Would Allow Courts To Override Any Sincerely Held Religious Belief

Courts have consistently refrained from evaluating the merits and validity of sincerely held religious beliefs, finding in a variety of contexts that the federal judiciary has "no business" addressing this question. *Hobby Lobby*, 573 U.S. at 724. This judicial restraint is particularly important with regard to review of regulatory schemes and their effects on religious beliefs since "many people hold beliefs alien to the majority of our society—beliefs that are protected by the First Amendment but which could easily be trod upon under the guise of 'police' or 'health' regulations reflecting the majority's view." *Sherbert* v. *Verner*, 374 U.S. 398, 411 (1963) (Douglas, J., concurring). A valid challenge to laws or regulations on religious freedom grounds must be founded on a proper motivation, but courts interpret authentic religious beliefs and practices broadly. *E.g.*, *Hobby Lobby*, 573 U.S. at 710 ("Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within [the] definition" of "exercise of religion."); *Smith*, 494 U.S. at 877 ("[T]he 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons."); *Holt*, 574 U.S. at 358 ("Congress defined 'religious exercise' capaciously" and "mandated that this concept 'shall be construed in favor of a broad protection of religious exercise.'").

When a plaintiff is motivated by a sincere religious belief, the substance of the belief and its centrality to the religion in question become irrelevant. Sincerity of belief does not require that the belief be deeply-held, central to a particular religion, or a core religious principle to "qualify" for the substantial burden analysis. *See Hobby Lobby*, 573 U.S. at 696 ("Congress … defined the 'exercise of religion' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" (quoting 42 U.S.C. § 2000cc-5(7)(A))). Establishing a standard of measurement for belief would create a legal test under which courts could decide which beliefs are "'central' or 'indispensable' to which religions, and by implication which are 'dispensable' or 'peripheral,' and would then decide which government programs are 'compelling' enough to justify 'infringement of those practices.'" *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457 (1988) (rejecting the "prospect of this Court holding that some sincerely held religious beliefs and practices are not 'central' to certain religions, despite protestations to the contrary from the religious objectors"). Such an approach would place a court in the unique position of deference to the strength of a belief only when that belief is deemed to be uncontroverted. Religious belief cannot be judicially measured by how closely it follows any particular creed or religious practice. On the contrary, a valid belief may not comport precisely with the tenets of the adherent's particular faith, as understood by others, and yet it may still be sincere. Thus, for example, in *Thomas*, this Court easily concluded that a Jehovah's Witness who refused to work on tank turrets was entitled to unemployment compensation. Although another member of his faith had "no scruples" about the work, the Court correctly

understood that it neither could nor should say "whether the petitioner or his fellow worker more correctly perceived the commands of their common faith." 450 U.S. at 715-716.

A court cannot create a hierarchy of beliefs and then apply the substantial burden test only to some levels of belief. *E.g.*, *Lyng*, 485 U.S. at 457 ("We would accordingly be required to weigh the value of every religious belief and practice that is said to be threatened by any government program."); *Holt*, 574 U.S. at 361-362 (the "'substantial burden' inquiry asks whether the government has substantially burdened religious exercise … not whether the [individual] is able to engage in other forms of religious exercise"). And a court cannot define the universe or scope of the beliefs to which the substantial burden test will be applied. To do so is to define judicially the faith and the beliefs themselves, not to apply the substantial burden test as a matter of law to the beliefs as articulated and established by the individual who holds them.

Once a court has determined that an individual's religious belief is sincere—a point that no one has questioned in relation to Petitioner's beliefs—the next step is a determination of whether the relevant regulation burdens religious exercise in conformity with that belief, not a further evaluation of the belief itself. *Hobby Lobby*, 573 U.S. at 725 ("[O]ur 'narrow function … in this context,'" therefore, "'is to determine' whether the line drawn reflects 'an honest conviction.'" (quoting *Thomas*, 450 U.S. at 716)). Courts simply do not have the authority or competence to parse religious belief as part of a substantial burden analysis. An individual's assertion that a regulation violates his or her religious belief, if that belief is deemed sincere, cannot be subject to further subdivision for the purpose of evaluating the

burden that may be placed on component pieces of the belief.

The approach that the Third Circuit adopted in evaluating the burden on objectors in this case invites just such a forbidden inquiry into religious beliefs. *See* Pet. App. 45a-46a ("[T]he self-certification form does not trigger or facilitate the provision of contraceptive coverage … And the submission of the self-certification form does not make the employers 'complicit' in the provision of contraceptive coverage." (quoting *Geneva Coll.*, 778 F.3d at 437-438) (brackets omitted)). *Geneva College*, which the Third Circuit relied on, avowed that a court need not consider the "coercive effect" of "fines for noncompliance," because the court could itself "dispel[] the notion that the self-certification procedure is burdensome." 778 F.3d at 442. In other words, by concluding that the certification was not "burdensome," the court ruled that the certification was not contrary to Petitioner's religious beliefs. This method of analysis involves courts in reviewing the moral reasoning underlying religious beliefs, rather than the depth of the burden that the regulation would impose—an approach that intrudes into previously inviolable matters of faith. Applied to recent cases involving free exercise—where the burdened religious belief was unquestioned—the resulting modified assessment could lead to a different outcome. *E.g.*, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 425 (2006) ("receiving communion through hoasca," a sacramental tea and a Schedule I controlled substance, was "[c]entral to the [religion's] faith"); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 524 (1993) (finding, without inquiry, that "one of the principal forms of devotion [in the Santeria religion] is an animal sacrifice").

In contrast to the reasoning below, the relevant inquiry for a substantial burden analysis is the substantiality of the *penalty* for refusing to abide by the regulation, not the substantiality of the specific act that a regulation mandates or proscribes. *See Hobby Lobby*, 573 U.S. at 720. If judicial deliberation addresses the act, which may seem objectively minimal, courts will increasingly be placed in a position of estimating the moral burden imposed solely by compliance with the regulation itself, rather than the consequence of adherence to religious beliefs in contravention of the regulation. Such analysis ignores the impossible choice that burdensome regulations present—one must violate his or her religious beliefs or be subject to potentially severe penalties. *See Holt*, 574 U.S. at 361-362. The step between assessing the moral burden on religious belief due to compliance with the regulatory requirement, and a deeper focus on the religious belief itself, is a short one—as this case demonstrates.

Thus, continued judicial application of a substantial burden analysis that focuses on the regulatory action required or prohibited, rather than focusing on the consequences when adherents act according to their beliefs and contrary to the regulation, is both flawed and dangerous. Such an approach opens the door for an inquiry that this Court has consistently rejected. *E.g.*, *Hobby Lobby*, 573 U.S. at 724 ("Arrogating the authority to provide a binding national answer to this religious and philosophical question, [the government] in effect tell[s] the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step."); *Smith*, 494 U.S. at 887. In determining whether a substantial burden exists, courts could use the reasoning of the court below to question any and all sincerely held beliefs, potentially "rul[ing] that some reli-

gious adherents misunderstand their own religious beliefs." *Lyng*, 485 U.S. at 458.

Sincere religious belief and practice must be free from judicial definition, as it should be free from definition by other branches of government. Otherwise, the government would assume a role in determining permissible religious exercise that has long been expressly forbidden.

B. If The Third Circuit's Decision Is Upheld, It Will Incentivize Regulators To Utilize Similar False "Accommodations" Which Stifle Religious Freedom

Under the Third Circuit's novel and erroneous interpretation of the ACA, the government was not empowered to promulgate the Religious Exemption and RFRA does not compel the government to promulgate the Religious Exemption in order to address the substantial burdens that compliance with the mandate places on religious nonprofits. Pet. App. 38a, 43a. Instead, the Third Circuit returned to the pre-*Zubik* status quo, by finding that the Accommodation satisfies any moral or religious concerns such employers could possibly have. Pet. App. 46a; Pet. App. 48a ("the status quo prior to the new Rule, with the Accommodation, did not infringe on the religious exercise of covered employers, nor is there a basis to conclude the Accommodation process infringes on the religious exercise of any employer"). This decision will incentivize regulators and agencies to use similar "accommodations" to circumvent RFRA and improperly burden the free exercise of religion.

A religious believer's ability to act in accordance with his or her religious beliefs is of utmost importance.

This country has had a tradition of providing religious exemptions dating back to early America when certain religious objectors, predominantly Quakers, were exempted from taking oaths, serving in the military, and removing their hats in court. *See* McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466-1473 (1990). Since *Roe* v. *Wade* was decided in 1973, Congress has passed numerous laws granting exemptions to those who object to abortion on the basis of a religious belief, such as the Church Amendment, which protects hospitals receiving federal funds from forced participating in abortion or sterilization. 42 U.S.C. § 300a-7. Responding to the Supreme Court's decision in *Smith*, Congress enacted RFRA, recognizing "free exercise of religion as an unalienable right" and affirming its conviction that "governments should not substantially burden religious exercise without compelling justification." *Id.* § 2000bb(a)(1), (3). Thus, exemptions for religious reasons are an indelible part of this country's tradition of protecting religious liberty.

Ignoring this tradition of exemptions for religious liberty, the Third Circuit rejected the Religious Exemption and reverted to a so-called "accommodation" that is not in fact an accommodation, but an alternative way to "comply" with the mandate. But by paying more heed to the regulatory mechanism's title than to Petitioner's protestations that compliance with the Accommodation makes it morally complicit in the provision of types of contraceptive coverage that violates its religious beliefs, the Third Circuit somehow concluded that the Accommodation adequately safeguards religious liberty. Because it did not provide a full and appropriate consideration of the Accommodation's substantial burden, the Third Circuit now leaves religious

nonprofits with a false choice: they must either fully comply with the mandate through the Accommodation, betraying their beliefs, or pay a significant penalty. Thus, the mandate's so-called Accommodation, actually curbs religious liberty instead of "accommodating" it.

While a sincere intent to protect religious freedom should be lauded, the Accommodation violates RFRA's recognition of the "free exercise of religion as an unalienable right." 42 U.S.C. § 2000bb(a)(1). The Third Circuit's holding, if left undisturbed, will establish a precedent detrimental to religious liberty by altering the demanding substantial burden test and undermining the purpose of RFRA.

CONCLUSION

This Court should grant certiorari and reverse.

Respectfully submitted.

KEVIN R. PALMER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

MATTHEW T. MARTENS
Counsel of Record
KEVIN GALLAGHER
MATTHEW E. VIGEANT
CHRISTOPHER W. DANELLO
AARON J. FRIEDMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
matthew.martens@
wilmerhale.com

NOVEMBER 2019