Nos. 19-431 and 19-454

IN THE

Supreme Court of the United States

THE LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA AND STATE OF NEW JERSEY, *et al.*,

Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA AND STATE OF NEW JERSEY, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE* OF PROFESSORS OF CRIMINAL LAW, FORMER STATE ATTORNEYS GENERAL, AND FORMER UNITED STATES DEPARTMENT OF JUSTICE OFFICIALS IN SUPPORT OF RESPONDENTS

SARAH M. WASTLER
WILLKIE FARR & GALLAGHER LLP
1875 K Street NW
Washington, DC 20006

WESLEY R. POWELL
Counsel of Record
ALLISON A. BERKOWITCH
M. ANNIE HOUGHTON-LARSEN
CIARA A. COPELL
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000
wpowell@willkie.com

Counsel for Amici Curiae

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are professors of criminal law, former state attorneys general, and former United States Department of Justice Officials who, through their many years of public service and/or scholarship, have sought to preserve the critical balance between effective law enforcement and respect for civil liberties.

As professionals dedicated to studying and upholding the rule of law, *Amici* recognize and steadfastly support *both* (i) the guarantee of religious liberty secured by the First Amendment to the United States Constitution and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*. (1993), and (ii) the power of Congress to enact legislation in furtherance of compelling government interests. *Amici* believe that the opt-out accommodation provided to certain non-profit organizations and closely held for-profit entities to the contraceptive coverage requirement imposed by the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 and its implementing regulations (the "Contraceptive Coverage Guarantee"), provides the least restrictive means of balancing both the sincerely held religious beliefs of those objecting employers and the

[1] This brief is filed with the written consent of all parties pursuant to the Court's Rule 37.3(a). Copies of the requisite consent letters have been filed with the Clerk. Pursuant to the Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *Amici* or their members made any monetary contribution to the preparation or submission of this brief.

compelling government interest of ensuring that women have access to contraceptives without cost sharing. *See* Coverage of Certain Preventative Services Under the Affordable Care Act, 80 Fed. Reg. 41,318 (July 14, 2015) (this notification and opt-out procedure is referred to herein as the "Accommodation").

Notwithstanding the appropriate balance of interests achieved by the Accommodation, following this Court's decision in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), the Department of the Treasury, Department of Labor, and Department of Health and Human Services (together, the "Agencies" or "Petitioners") promulgated rules which, *inter alia*, permit all private employers to opt out of the Contraceptive Coverage Guarantee without specific notice to the government if the employer holds a sincere religious objection (the "Religious Exemption" or the "Exemption").[2] *See* 83 Fed. Reg. 57,536 (Nov. 15, 2018). As a result of the Exemption, tens of thousands of women (at a minimum) are likely to lose contraceptive coverage under their health plans. *See Pennsylvania v. President U.S.*, 930 F.3d 543, 562 (3d Cir. 2019) (noting that the Agencies' own predictions estimate that between 70,500 and 126,400 women

[2] In addition to the Religious Exemption, the Agencies promulgated a second exemption which would allow any nonprofit or closely held entity to self-exempt because of "sincerely held moral convictions." 83 Fed. Reg. 57,592 (Nov. 15, 2018) (the "Moral Exemption"). Petitioners do not claim that RFRA justifies the Moral Exemption and, as a result, this brief only addresses the Religious Exemption. Nevertheless, *Amici* agree that the Moral Exemption is also procedurally improper and not authorized by the ACA as set forth in the States' Brief. *See generally*, Res. Br.

nationwide will lose contraceptive coverage as a result of the Religious Exemption); *see also* Brief of *Amici* Am. Assoc. of Univ. Women et al. in Support of Appellees, at *2–3, *Pennsylvania v. President U.S.*, 930 F.3d 543 (3d Cir. 2019) (estimating that more than a million women could lose contraceptive coverage as a result of the Exemptions, including approximately 500,000 women who work for religiously affiliated hospitals, 600,000 women who attend religiously affiliated universities and colleges, and 17,000 women who work for privately held for-profit corporations that have already opposed the Contraceptive Coverage Guarantee).

Petitioners now seek to defend their promulgation of the Religious Exemption against numerous challenges on the grounds that RFRA required (or at least authorized) the Agencies' adoption of the Exemption. Petitioners' argument is premised on an expansive interpretation of RFRA which *Amici* believe—based on their scholarship and professional experience—threatens the rule of law. If accepted, this novel interpretation of RFRA would allow executive agencies to unilaterally thwart the legislative will of Congress and confer unbounded immunity from federal law on individuals or entities that lodge religious objections.

Accordingly, *Amici* submit this brief in support of the States ("Respondents") to express their view that RFRA does not delegate authority to executive agencies to independently create religious exemptions to rules of general applicability and that the Accommodation does not constitute a substantial burden under RFRA.

Amici

Matthew Charity is a Professor of Law and Human Rights at Western New England University.

Marc Falkoff is a Professor of Law at Northern Illinois University College of Law.

Ilene Jaroslaw served as an Assistant United States Attorney for the Eastern District of New York from 1991 to 2013.

Sheri Lynn Johnson is the James and Mark Flanagan Professor of Law at Cornell Law School.

Ellen Kreitzburg is a Professor of Law and Director of the Center for Social Justice and Public Service at Santa Clara University School of Law.

Laurie L. Levenson is a Professor of Law and holds the David W. Burcham Chair in Ethical Advocacy at Loyola Law School Los Angeles, and served as an Assistant United States Attorney for the Central District of California from 1981 to 1989 where she was Chief of Criminal Appeals from 1986 to 1988.

David M. Louie served as Attorney General of the State of Hawaii from January 2011 to December 2014.

Barry Scheck is a Professor of Law at the Benjamin N. Cardozo School of Law and Co-Founder & Special Counsel at the Innocence Project.

Kim A. Taylor-Thompson is a Professor of Clinical Law at the New York University School of Law.

SUMMARY OF THE ARGUMENT

In connection with the passage of the ACA in 2010, Congress enacted the Women's Health Amendment, 42 U.S.C. § 300gg-13(a)(4), with the express purpose of ensuring access to preventive care without cost sharing. The Agencies adopted implementing regulations which, consistent with Congress's intent, guaranteed coverage of all Food and Drug Administration approved contraceptive methods for women free of cost sharing. The Agencies also created the Accommodation, which provided a mechanism for certain employers with religious objections to opt out of complying with the Contraceptive Coverage Guarantee. Following this Court's decision in *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014), the Accommodation was expanded to include closely held for-profit employers with sincere religious objections to covering contraception. In *Hobby Lobby*, the Court acknowledged the Accommodation as a viable alternative to compliance with the Contraceptive Coverage Guarantee, holding that the Accommodation would "not impinge on the plaintiff's religious beliefs" while continuing to serve "HHS's stated interest equally well." *Id.* at 731.

Following *Hobby Lobby*, the Accommodation itself was subject to numerous RFRA challenges. Notably, each Court of Appeals to consider the question—save one—found that the Accommodation does not violate RFRA. In *Zubik*, this Court granted certiorari to answer the question of whether the

Accommodation violates RFRA. 136 S. Ct. at 1560. But, rather than resolve the issue, the Court remanded the cases to allow the parties to negotiate a solution while "ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage." *Id.* (internal quotations omitted).

In 2017, the Agencies upended the balance of interests achieved through the Accommodation by adopting the Religious Exemption, which gave all private entities the option to opt out of the Contraceptive Coverage Guarantee without specific notice. Unlike the Accommodation, the Exemption—if implemented—would undermine women's access to preventive care, contravening the Women's Health Amendment and this Court's directive in *Zubik*.

Petitioners now ask the Court to uphold the Exemption on the basis that adoption of the Exemption was required, or at the very least authorized, by RFRA. But Petitioners' argument is grounded in an expansive reading of RFRA which is inconsistent both with the text of the statute and the body of jurisprudence construing it. Crediting Petitioners' construction of the statute would have dire consequences for the rule of law and the proper functioning of government.

RFRA does not support the Agencies' adoption of the Exemption for two independent reasons:

First, RFRA does not delegate expansive rulemaking authority to executive agencies to create prophylactic exemptions to federal laws of general applicability on the theory that the federal laws could

impinge on some hypothetical religious believers' free exercise. Such an interpretation of RFRA is inconsistent with the plain text of RFRA and a substantial body of case law construing the statute, both which make clear that courts are to be the arbiters of individualized claims of substantial burden by religious believers. Reading RFRA as a delegation of independent rulemaking authority would transform RFRA from a shield into a sword and grant executive agencies the power to undermine Congress's legislative authority.

Second, contrary to the Agencies' assertion, the Agencies' unilateral determination that the Accommodation imposes a substantial burden on some employers' free exercise is not sufficient to invoke the compelling interest inquiry under RFRA. Whether the Accommodation constitutes a substantial burden is an objective question to be answered by the courts. And the vast majority of courts that have considered the question already have determined that the Accommodation does *not* impose a substantial burden on objecting employers' free exercise of religion under well-settled RFRA case law. To credit the Agencies' boundless interpretation of substantial burden would grant religious objectors a veto over any and all federal laws and threaten the proper functioning of our government.

ARGUMENT

I. The Agencies' Theory That RFRA Delegates Independent Rulemaking Authority Threatens The Rule Of Law.

Petitioners argue that RFRA grants executive agencies the authority "to modify its implementation to avoid a violation of RFRA" whenever "an agency determines that its mode of implementing federal law would substantially and unnecessarily burden a person's exercise of religion." Gov't Br. at 27; *accord* L.S. Br. at 21 ("RFRA not only permits, but affirmatively requires the government to exempt objecting religious employers from the contraceptive mandate."). But, as Respondents correctly note, "petitioner agencies point to no provision of RFRA providing them independent rulemaking authority and identify no prior regulation promulgated solely in reliance on RFRA." Res. Cert. Pet. Opp. at 23. Indeed, Petitioners' assertions ignore both the plain text of the statute and a plethora of judicial decisions which plainly recognize that Congress tasked courts, and not executive agencies, with adjudication and application of RFRA. Interpreting RFRA to authorize or require such independent rulemaking authority will permit agencies to overrule congressional intent and improperly transform RFRA from a shield into a sword.

a. RFRA Does Not Delegate Unfettered Authority To Create Religious Exemptions To Federal Law.

Petitioners' theory is that "[i]n RFRA, Congress instructed agencies to avoid imposing substantial

burdens on religious exercise that they determine are unnecessary to any compelling governmental interest." Gov't Br. at 27. Petitioners base their theory on tenuous textual references to "the implementation" of "all Federal law" by the "government." 42 U.S.C. §§ 2000bb-1(a)-(b), 2000bb-3(a). But Petitioners' theory is directly contradicted by the history surrounding the enactment of RFRA, the plain text of the statute, and numerous judicial decisions interpreting and applying RFRA.

Congress passed RFRA in 1993 in reaction to this Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which held that the First Amendment does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws. In enacting RFRA, Congress intended to adopt "a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 (2006). The legislative history surrounding RFRA's adoption is replete with statements reflecting Congress's intent to return *to the courts* the power to adjudicate claims that a facially neutral law substantially burdens an individual's free exercise of their religion. *See, e.g.*, *Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong. 45–46 (1992) (statement of Oliver S. Thomas) ("The bill expresses no opinion on the merits of particular free exercise claims but rather leaves such decisions to the courts after consideration of all pertinent facts and circumstances."); *id.* at 148 (statement of Michael P. Farris) ("The reason a widely divergent group supports the bill is because it stands

for a principle, and a principle alone, and does not invade the province of making judicial decisions, which, of course, properly belong to the courts."); *id.* at 187 (statement of Nadine Strossen and Robert S. Peck) ("The Religious Freedom Restoration Act would again make the courts a bulwark of religious liberty."); S. Rep. No. 103–111, at 9 n.30 (1993) ("For example, it would remain for the courts to determine whether or not a facially neutral statute which prohibits killing animals that is applied so as to substantially burden the ability of a religion's adherents to engage in animal sacrifice meets the compelling interest standard."); H.R. Rep. No. 103-88, at 7 (1993) ("In terms of the specific issue addressed in *Smith*, this bill would not mandate that all states permit the ceremonial use of peyote, but it would subject any such prohibition to the aforesaid balancing test. The courts would then determine whether the State had a compelling governmental interest in outlawing bona fide religious use by the Native American Church and, if so, whether the State had chosen the least restrictive alternative required to advance that interest.").

Moreover, the plain text of RFRA provides that the proper mechanism for adjudicating and remedying a claim of substantial burden is a judicial proceeding: "A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). Courts have consistently interpreted the plain text of RFRA as delegating the power to adjudicate and remedy claims under RFRA to the courts. *See, e.g.*, *Pennsylvania v. President U.S.*, 930 F.3d at 572 ("RFRA authorizes a

cause of action for government actions that impose a substantial burden on a person's sincerely-held religious beliefs and provides a *judicial* remedy via *individualized adjudication*." (emphasis added)); *California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 427 (9th Cir. 2019) (*California IV*) ("RFRA appears to charge the *courts* with determining violations."); *Gonzales*, 546 U.S. at 434 (holding RFRA "plainly contemplates that courts would . . . consider whether exceptions are required under the test set forth by Congress").

Further, all courts that have directly considered the question of whether RFRA grants independent rulemaking authority to executive agencies have met this theory with skepticism. *See Pennsylvania v. President U.S.*, 930 F.3d at 572 ("Even 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."); *California IV*, 941 F.3d at 427 (questioning "whether RFRA delegates to any government agency the authority to determine violations and to issue rules addressing alleged violations"); *California v. Health & Human Servs.*, 351 F. Supp. 3d 1267, 1293 (N.D. Cal. 2019) (*California III*) ("The court questions the Little Sisters' contention that RFRA effected a wholesale delegation to executive agencies of the power to create exemptions to laws of general applicability in the first instance, based entirely on their own view of what the law requires."), *aff'd*, *California IV*.

b. The Exemption Undermines Congress's Intent To Provide Contraceptive Coverage To Women.

To accept the Agencies' theory—that RFRA delegates to executive agencies the power to create broad exemptions to federal law whenever an agency independently determines that the law could theoretically impose a substantial burden on a hypothetical religious believer—deprives Congress of its constitutional authority to enact legislation to achieve government interests. The Exemption perfectly illustrates these dangers.

In enacting the ACA, Congress determined that insurance coverage for women's preventive services was "critically important," 155 Cong. Rec. S28841 (Dec. 1, 2009) (statement of Sen. Boxer), so important, in fact, that Congress passed the Women's Health Amendment to the ACA, "which added to the ACA's minimum coverage requirements a new category of preventive services specific to women's health." *Hobby Lobby*, 573 U.S. at 741–42, 768 (Ginsburg, J., dissenting) (explaining that Congress enacted the Amendment in response to the "compelling interest[]" of furnishing women with comprehensive preventive care through employer-based health plans). A "core purpose" of the Amendment was "providing free contraceptive services." *California IV*, 941 F.3d at 426. Indeed, courts have unanimously interpreted the Women's Health Amendment to endow women with a right to contraceptive coverage. *See California III*, 351 F. Supp. 3d at 1285 ("[T]his court knows of no Supreme Court, court of appeal or district court decision that did not presume that the ACA requires specified categories of health insurance plans and

issuers to provide contraceptive coverage at no cost to women."); *see also Zubik*, 136 S. Ct. at 1559 ("Federal regulations require petitioners to cover certain contraceptives as part of their health plans."); *California v. Azar*, 911 F.3d 558, 566 (9th Cir. 2018) (*California II*) (ACA and its regulations "require group health plans to cover contraceptive care without cost sharing").

Unlike the Accommodation—which attempts to accommodate religious objectors "*while still meeting* the ACA's mandate that women have access to preventative care," *California IV*, 941 F.3d at 427—the Exemption falls short of the ACA's mandate. The Exemption provides no mechanism by which female employees and beneficiaries can continue to receive contraceptive coverage without cost sharing. *See Pennsylvania v. President U.S.*, 930 F.3d at 562, 574 (citing Agencies' impact analysis, which acknowledges that between 70,500 and 126,400 women nationwide will lose contraceptive coverage as a result of their employers invoking the Exemption, and observing that if enforced, the Exemption will "frustrate [women's] right to obtain contraceptives"); *California III*, 351 F. Supp. 3d at 1294 (observing the Exemption "has the effect of depriving female employees, students and other beneficiaries connected to exempted religious objectors of their statutory right under the ACA to seamlessly-provided contraceptive coverage at no cost").

Petitioners try to dismiss the detrimental impact that the Exemption will have on objectors' female employees, asserting that the Exemption "simply leaves [women] in the same place they would have been if the government had not regulated the

religious objector in the first place." Gov't Br. at 30.[3] In other words, it "simply" *reverses* the deliberate congressional act of enacting the Contraceptive Coverage Guarantee. "No tradition, and no prior decision under RFRA, allows a religious-based exemption when the accommodation would be harmful to others—here, *the very persons the contraceptive coverage requirement was designed to protect*." *Hobby Lobby*, 573 U.S. at 764 (Ginsburg., J., dissenting) (emphasis added).

Tellingly, in adopting the Exemption, the Agencies expressly disclaimed the compelling government interest that Congress established in enacting the contraceptive mandate. *See* 83 Fed. Reg. 57,536, 57,546 (Nov. 15, 2018) ("Although the Departments previously took the position that the application of the Mandate to certain objecting employers was necessary to serve a compelling governmental interest, the Departments have concluded, after reassessing the relevant interests . . . that it does not."). Petitioners continue to disclaim the compelling government interest of providing contraceptive coverage to women without out-of-pocket costs in the instant litigation. *See, e.g.*, Gov't Cert. Pet. at 23 ("[A]pplication of the mandate to objecting entities neither serves a compelling governmental interest nor is narrowly tailored to any such interest."); Gov't Br. at 26 ("[A]pplying the

[3] Ironically, Petitioners rely on *Hobby Lobby* to defend their disregard of the impact on third parties, *see* Gov't Br. at 30, but the *Hobby Lobby* Court *reaffirmed* that RFRA's application "*must* take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Hobby Lobby*, 573 U.S. at 730 n.37 (emphasis added).

mandate or accommodation to other religious objectors was not necessary to satisfy a compelling governmental interest.").

The Agencies' thwarting of congressional will is even more egregious because Congress previously considered—and rejected—a so-called "conscience amendment," which would have permitted any employer to deny coverage based on its asserted "religious beliefs and moral convictions." 158 Cong. Rec. S539 (Feb. 9, 2012); *see id*. at S1162–S1173 (Mar. 1, 2012) (debate and vote). In rejecting the amendment, Congress declined to "[p]ut the personal opinion of employers and insurers over the practice of medicine," *see id*. at S1127 (Feb. 29, 2012) (statement of Sen. Mikulski), and instead resolved to "l[eave] health care decisions—including the choice among contraceptive methods—in the hands of women, with the aid of their health care providers." *Hobby Lobby*, 573 U.S. at 747 (Ginsburg., J., dissenting). Congress expressly rejected the very principles and interests the Exemption promotes. The Agencies nonetheless elected to promulgate the Exemption and, in so doing, disregarded Congress's intent and threaten the rule of law.

c. Petitioners' Expansive Reading Of RFRA Would Transform It From A Shield Into A Sword.

Petitioners' attempt to use RFRA as a basis for creating exemptions to laws of general applicability—while unprecedented—is not isolated. Rather, it is consistent with a broader effort to use RFRA to undermine civil rights protections. This campaign perverts the purpose and scope of RFRA, which was

enacted to shield *individuals* from religious persecution on a case-by-case basis, not as a mechanism by which federal agencies can enact sweeping exemptions to valid federal laws on the basis of theorized religious objections.

Consistent with that trend, in October 2017, the DOJ issued guidance advising that "[i]n formulating rules, regulations, and policies, administrative agencies should also proactively consider potential burdens on the exercise of religion and possible accommodations of those burdens." Off. Att'y Gen., *Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty*, 7 (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/1001891/download (the "Guidance"). Relying on the Guidance's expansive interpretation of RFRA and the novel position that RFRA gives federal agencies the right to unilaterally create exemptions to federal laws, RFRA has been "aggressively invoked" "to justify harmful policies and undermine critical civil rights protections." National Women's Law Center, *The Hobby Lobby "Minefield" in the Trump Era: Continued Harm, Misuse and Unwarranted Expansion*, 3 (Oct. 2019), https://nwlc.org/wp-content/uploads/2019/11/Report_TheHobbyLobbyMinefield.pdf. For example, RFRA has been invoked as a basis for promulgating regulations that would permit individual health care providers' religious beliefs to dictate patient care. *See, e.g.*, Ensuring Equal Treatment of Faith-Based Organizations, 85 Fed. Reg. 2974 (Jan. 17, 2020). RFRA has also been cited as a basis for regulations that would make it easier for religious entities to discriminate on the basis of race, color, national origin, age, disability, and sex,

including pregnancy, gender identity, sexual orientation, and sex-stereotyping. *See* Office of the Assistant Secretary for Financial Resources; Health and Human Services Grants Regulation, 84 Fed. Reg. 63,831, 63,832 (Nov. 19, 2019). These actions are just a few examples of the dangerous consequences likely to result if the Court permits RFRA to be used as justification for prophylactic executive rulemaking.

II. Crediting Petitioners' "Moral Complicity" Theory Of Substantial Burden Would Impermissibly Expand RFRA And Threaten The Rule Of Law.

Petitioners further argue that the Agencies were required to use the authority delegated to them under RFRA to promulgate the Religious Exemption because the Accommodation "does not eliminate the substantial burden that the contraceptive-coverage mandate imposes on certain employers with conscientious objections." Gov't Br. at 23. Petitioners contend that "some employers hold the sincere religious belief that participating in a process by which their employees receive contraceptive coverage makes them complicit in providing that coverage," *id.* (internal citation omitted); L.S. Br. at 34–35, and that this subjective belief is *all that is required* to establish a violation of RFRA. Gov't Br. at 24–25; L.S. Br. at 37–39. This argument, however, ignores the text of the statute and the role granted to courts by Congress in adjudicating and enforcing the statute. As demonstrated by the decisions of numerous courts to consider the issue, any burden imposed by the Accommodation is *de minimis* at most. The Court's acceptance of Petitioners' moral complicity theory of

"substantial burden" would impermissibly expand RFRA and threaten the rule of law.

a. Substantial Burden Is An Objective Legal Question To Be Answered By The Courts.

Petitioners seek to invoke RFRA's compelling interest review based entirely on a subjective belief that objecting employers are substantially burdened by the Accommodation. Petitioners assert that RFRA forecloses any further inquiry. *See* L.S. Br. at 38 ("And to the extent it turns on the notion that religious employers are simply mistaken in their belief that the regulatory mechanism makes them complicit in moral wrongdoing, it is foreclosed by RFRA and this Court's precedent interpreting it. Indeed, if there is 'any fixed star' in interpreting RFRA, 'it is that no official, high or petty, should second-guess religious adherents about the degree of complicity that makes them morally culpable under their religion.'"); Gov't Br. at 24. But this argument fundamentally misunderstands RFRA. Petitioners wrongly conflate the requirements of subjective religious belief (which is not subject to scrutiny) and substantial burden (which surely is).

By its plain text, RFRA prohibits only those burdens on a person's religious exercise that are so significant to be considered *substantial*:

> Government shall not *substantially burden* a person's exercise of religion even if the burden results from a rule of general applicability . . . Government may *substantially burden* a person's

> exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1 (emphasis added); *see also United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (requiring courts to "give effect . . . to every clause and word" of a statute).

RFRA's legislative history further clarifies that Congress intentionally modified "burden" with "substantial" to ensure that *de minimis* burdens would not satisfy the statute. Early versions of the proposed statute did not modify or clarify the weight of the burden on religious exercise. *See, e.g.*, S. 2969, 102d Cong. § 3 (1992) ("Government shall not *burden* a person's exercise of religion" unless it satisfies the compelling interest test (emphasis added)); H.R. Rep. No. 103-88, at 10 (1993) ("[The] government cannot burden a person's free exercise of religion, even if the burden results from a rule of general applicability." (emphasis added)). After much floor debate, Senators Edward Kennedy and Orrin Hatch suggested the Kennedy-Hatch Amendment, which would insert "substantial" or "substantially" to modify every use of "burden" in the bill. 139 Cong. Rec. 26,180 (1993). Both Senators explained that the Amendment was "intended to clarify the compelling interest required by the Religious Freedom Act applies only where there is a *substantial* burden placed on the individual free exercise of religion." *Id.* (emphasis added). The Senate passed the Kennedy-Hatch Amendment, *id.*,

and adopted the version of RFRA with the modifying "substantial" language. *See id.* at 26,416. The House passed RFRA in the same form. *See id*. at 27,240–41. And on November 16, 1993, President Clinton signed RFRA into law.

Since RFRA's passage, courts have consistently given weight to this textual distinction. *See, e.g.*, *Diocese of Cheyenne v. Sebelius*, 21 F. Supp. 3d 1215, 1226 (D. Wyo. 2014) ("Indeed, the initial draft of the RFRA prohibited the government from imposing any burden on religious exercise, but Congress added 'substantially' to clarify that the compelling interest required by the Religious Freedom Act applies only where there is a substantial burden placed on the individual free exercise of religion, and the RFRA does not require the Government to justify every action that has some effect on religious exercise." (internal citations omitted)); *United States v. Sterling*, 75 M.J. 407, 417 (C.A.A.F. 2016) ("Early drafts of RFRA prohibited the government from placing a 'burden' on religious exercise, but Congress added the word 'substantially' before passage to clarify that only some burdens would violate the act."); *see also Korte v. Sebelius*, 735 F.3d 654, 708 (7th Cir. 2013) (Rovner, J., dissenting) ("Congress used the term 'substantially' to modify 'burden,' and the relevant inquiry considers how that burden affects the individual's ability to believe, profess, and practice his religion.").

It is well-settled that whether a generally applicable law imposes a *substantial* burden on a person's religious exercise in violation of RFRA is a legal question for the courts to resolve. *See, e.g.*, *California IV*, 941 F.3d at 428 ("Whether a government action imposes a substantial burden on

sincerely-held religious beliefs is a question of law."); *Real Alternatives, Inc. v. Sec'y of Dep't of Health & Human Servs.*, 867 F.3d 338, 356 (3d Cir. 2017) (same); *Iglesia Pentecostal Casa De Dios Para Las Naciones, Inc. v. Duke*, 718 F. App'x 646, 651 (10th Cir. 2017) (same). Indeed, nine of the ten appellate courts to consider the question have held that whether the Accommodation substantially burdens objectors' religious exercise is an objective, legal question to be answered by the courts. *See California IV.*, 941 F.3d at 429; *Eternal World Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1144–45 (11th Cir.), *vacated*, Nos. 14-12696, 14-12890 & 14-13239, 2016 WL 11503064 (11th Cir. May 31, 2016); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 218 (2d Cir. 2015); *Geneva Coll. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 436 (3d Cir. 2015), *vacated*, 136 S. Ct. 1557 (2016); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 458 (5th Cir. 2015), *vacated*, 136 S. Ct. 1557 (2016); *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738, 747–48 (6th Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016) (mem.); *Grace Schs. v. Burwell*, 801 F.3d 788, 804 (7th Cir. 2015), *vacated*, 136 S. Ct. 2011 (2016) (mem.); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 622 (7th Cir. 2015), *vacated*, 136 S. Ct. 2007 (2016) (mem.); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1176 (10th Cir. 2015), *vacated*, 136 S. Ct. 1557 (2016); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 247 (D.C. Cir. 2014), *vacated*, 136 S. Ct. 1557 (2016). *But see Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 941–42 (8th Cir. 2015), *vacated sub*

nom. Dep't of Health & Human Servs. v. CNS Int'l Ministries, 84 U.S.L.W. 3630 (2016).

That the courts should evaluate whether a burden is substantial is not only well-settled, but well-reasoned. The notion that courts must accept, without further analysis, a religious objector's subjective view of the burden imposed by federal law would gut RFRA of the parameters carefully considered and enacted by Congress and delegate to individuals the task of interpreting federal law. As the Tenth Circuit has recognized, if a plaintiff could "assert and establish that a burden is 'substantial' without any possibility of judicial scrutiny," then "the word 'substantial' would become wholly devoid of independent meaning." *Little Sisters of the Poor Home for the Aged, Denver, Colo.*, 794 F.3d at 1176; *see also Catholic Health Care Sys.*, 796 F.3d at 218 ("RFRA does not speak of a burden which the affected person considers substantial. It requires a substantial burden, and assessing substantiality is a matter for a court."). Petitioners' theory would require courts to accept a religious objector's assertions that the government's challenged conduct imposes a substantial burden on the free exercise of its religion and immunize those assertions from judicial review. *See id.* ("It is true that the Supreme Court noted in *Hobby Lobby* that it is not for us to say that [plaintiffs'] religious beliefs are mistaken or insubstantial. But that observation related to the significance of the particular belief for the religion—not to the burden imposed by the governmental requirement." (internal citations omitted)); *see also Bowen v. Roy*, 476 U.S. 693, 702 (1986) ("[This] Court has steadfastly maintained that claims of religious conviction do not automatically

entitle a person to fix unilaterally the conditions and terms of dealings with the Government.").

In "collaps[ing] the distinction between beliefs and substantial burden[] such that the latter could be established simply through the sincerity of the former," *Catholic Health Care Sys.*, 796 F.3d at 218, Petitioners attempt to rewrite the well-established RFRA analysis that distinguishes between "sincere belief"—a matter of religious belief—on the one hand, and "substantial burden"—a matter of law, on the other. *See Wheaton Coll.*, 134 S. Ct. at 2812 (Sotomayor, J., dissenting) ("*[T]hinking* one's religious beliefs are substantially burdened—no matter how sincere or genuine that belief may be—does not make it so.").

b. The Accommodation Does Not Impose A "Substantial Burden."

Scrutiny of the Accommodation makes clear that the impact, if any, on an objecting employer's free exercise is *de minimis*. A "'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *California IV*, 941 F.3d at 428 (citation omitted).

The only "burden" the opt-out mechanism imposes on objecting employers is a minor administrative task. As this Court has already acknowledged, an objecting employer need only take a single step to "qualify" for the Accommodation: it must "certify that it is a [nonprofit organization or closely

held private company that] 'opposes providing coverage for some or all of any contraceptive services required to be covered . . . on account of religious objections.'"[4] *Hobby Lobby*, 573 U.S. at 698 (quoting 45 CFR § 147.131(b)). Once an employer completes this one-step notice requirement, its obligation to "contract, arrange, pay, or refer for any coverage that includes contraception" is "*extinguishe[d]*" and the employer is "*fully divorce[d]*" from the provision of any contraceptive care its employees may receive. *Priests for Life*, 772 F.3d at 236, 250 (emphasis added). Unsurprisingly, the overwhelming majority of courts to consider this question have agreed that any burden imposed by the Accommodation is, at most, *de minimis*. *See California IV*, 941 F.3d at 429 ("Viewed objectively, completing a form stating that one has a religious objection is not a substantial burden—it is at most a *de minimis* burden."); *California III*, 351 F. Supp. 3d at 1287–88 (agreeing with the *eight* other courts of appeals that "concluded that the accommodation does not impose a substantial burden on objectors' exercise of religion" (collecting cases)). Indeed, this Court itself concluded that the Accommodation "constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty." *Hobby Lobby*, 573 U.S. at 692.

Nor can Petitioners establish substantial burden on the basis of the "severe" "economic consequences" objecting employers would face if they failed to comply with the Accommodation. Gov't Br.

[4] In fact, following *Wheaton*, objecting employers may simply notify HHS of their objection. *See Wheaton Coll.*, 134 S. Ct. at 2807.

at 23; L.S. Br. at 37 ("[T]he consequences of not complying in the government's eyes remain the same draconian penalties as if religious adherents refused to comply with the mandate outright. . . . That is a textbook substantial burden."). Petitioners correctly point out that in *Hobby Lobby*, the Court found the threat of substantial penalties for failure to comply with the Contraceptive Coverage Guarantee easily satisfied the substantial burden test. *See* Gov't Br. at 23; *see also* 537 U.S. at 692 ("If these consequences do not amount to a substantial burden, it's hard to see what would."). But Petitioners are wrong that those same penalties are the correct measure of substantial burden in evaluating the Accommodation. Unlike the petitioners in *Hobby Lobby*, objecting employers can be relieved of the pain of massive fines simply by complying with the opt-out provisions of the Accommodation. Thus, the weight of the fines is not an appropriate measure of the burden imposed by the Accommodation. *See Little Sisters of the Poor Home for the Aged, Denver, Colo.*, 794 F.3d at 1185 ("[T]he purpose of religious accommodation [is] to permit the religious objector both to avoid a religious burden and to comply with the law. If the plaintiffs wish to avail themselves of a legal means—an accommodation—to be excused from compliance with a law, they cannot rely on the possibility of their violating that very same law to challenge the accommodation.").

Nor can the consequences of the opt-out constitute a substantial burden. Petitioners complain that the Accommodation "leaves in place the same 'substantial burden'" on objectors' religious exercise because the notification requirement renders objecting employers "complicit" in providing such coverage. *See* Gov't Br. at 24; L.S. Br. at 34, 36–37.

At bottom, this amounts to an assertion that objecting employers' mere knowledge that their act of opting out will result in the insurance issuers or third-party administrators arranging contraceptive coverage for their employees and beneficiaries constitutes a substantial burden. The actions of these non-objecting third parties cannot be sufficient to establish a substantial burden under RFRA—if it were, it would give religious objectors unbounded authority to impose their religious beliefs as a barrier to non-objectors' compliance with federal law. *See Bowen*, 475 U.S. at 699–700 ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining from [the challenged activity].").

c. Petitioners' Moral Complicity Argument Has No Analogy In The Law.

Petitioners try to bolster their tenuous claim of substantial burden by reference to legal-sounding theories of "complicity" or "facilitation." But Petitioners' moral complicity theory has no basis in criminal law or the common law of agency.

Under both common law and the federal aiding and abetting statute, a person is liable if (and only if) he (i) takes an affirmative act in furtherance of the offense (ii) with the intent of facilitating the offense's

commission. *Rosemond v. United States*, 572 U.S. 65, 70–71 (2014). In order to be criminally liable, the guilty party must "wish to bring about" the crime and "seek by his action to make it succeed." *Id.* at 76. A party who takes an action that is an indisputable step in the causal chain—including with express knowledge that a crime will be committed—is not complicit unless he wished to bring about the illegal result. *See United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). Here, Petitioners do not desire to bring about the receipt of contraceptive care by their employees. As the Third Circuit recognized:

> [s]ubmission of the self-certification form does not make the appellees 'complicit' in the provision of contraceptive coverage. If anything, because the appellees specifically state on the self-certification form that they *object* on religious grounds to providing such coverage, it is a declaration that they will *not be complicit* in providing coverage.

Geneva Coll., 778 F.3d at 438–39.

Intention is also required under the law of agency. A principal is liable for the tort of its agent only if (1) the principal authorized such conduct; (2) the principal "apparently authorized" such conduct; or (3) the agent has inherent power arising from the nature of the agency relationship. Restatement (First) Agency § 140 (Am. Law Inst. 1933). Under the Accommodation, objecting employers do not authorize the provision of contraceptives by explicitly opting out of the requirement (in fact, they have unequivocally

directed that their plans *exclude* coverage for these services).

d. Petitioners' Interpretation Of "Substantial Burden" Would Grant Religious Objectors Unbounded Immunity From Federal Law And Erode The Proper Functioning Of Government.

Leaving aside the myriad legal deficiencies of Petitioners' expansive interpretation of "substantial burden," the policy implications of Petitioners' position, if adopted by this Court, would be both widespread and profound.

The Agencies' interpretation of RFRA would mean that anytime a religious objector had a "sincere belief" that a federal law burdened its religious exercise, that belief would automatically qualify as a "substantial burden" under RFRA. Such an expansive reading of RFRA would grant religious believers an unfettered veto over laws of general applicability, impairing the functioning of government and harming third parties those laws were designed to protect. *See Hobby Lobby*, 573 U.S. at 770 (Ginsburg, J., dissenting) (describing how an expansive reading of RFRA would permit religious believers to avoid compliance with anti-discrimination laws). Indeed, in recent years, claimants have advanced religious objections under RFRA as a basis to defend against an anti-discrimination lawsuit for terminating an employee on the basis of her transgender status[5] and

[5] *Equal Emp't Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 589 (6th Cir. 2018).

to evade prosecution for crimes, including kidnapping,[6] food-stamps fraud and money laundering,[7] possessing and distributing drugs,[8] and criminal trespass.[9] Most recently, several pastors in Texas have sought to invalidate a "stay at home" order designed to protect Texas residents from the coronavirus on the basis that the order violates their free exercise of religion. *See* Emergency Petition for Writ of Mandamus, *In re Steven Hotze*, No. 20-0249 (Tex. Mar. 30, 2020). Although *Hotze* is not a RFRA case, it is a powerful example of how the unfettered right to claim a religious exemption over a law of general applicability could impose untold harm on society.

Moreover, in the instant litigation, the substantial burden alleged by Petitioners boils down to a requirement that objecting employers provide truthful information to the government. All branches of state and federal government—including law enforcement agencies, taxing authorities, and public

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[6] *United States v. Epstein*, 91 F. Supp. 3d 573, 580 (D.N.J. 2015), *aff'd sub nom. United States v. Stimler*, 864 F.3d 253 (3d Cir. 2017), *vacated in part sub nom. United States v. Goldstein*, 902 F.3d 411 (3d Cir. 2018).

[7] *United States v. Jeffs*, No. 2:16-cr-82, 2016 WL 6745951, at *1 (D. Utah Nov. 15, 2016).

[8] *See United States v. Anderson*, 854 F.3d 1033, 1034–35 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 461 (2017); *United States v. Comrie*, 842 F.3d 348, 349 (5th Cir. 2016); *United States v. Christie*, 825 F.3d 1048, 1052–53 (9th Cir. 2016); *see also Oklevueha Native Am. Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012, 1014 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 510 (2016) (mem.) (unsuccessfully seeking a declaration that RFRA exempted plaintiffs from federal drug laws in anticipation of prosecution).

[9] *United States v. Kelly*, No. CR 2:18-022, 2019 WL 4017424, at *1 (S.D. Ga. Aug. 26, 2019).

health administrators—rely on the receipt of truthful information to perform their essential functions. *See, e.g.*, the U.S. Census; approximately 150 types of Securities and Exchange Commission filing forms; state unemployment application forms; passport application form; annual tax returns. Accepting Petitioners' assertion—that providing truthful information as part of a routine government process where the objector has a religious objection to the government's use of the information imposes a substantial burden on a person's or entity's religious exercise—would open the door to a host of similar claims from individuals and entities seeking immunity from the provision of truthful information necessary for the performance of essential government functions. In the view of *Amici*, the potential consequences of such an outcome are dire.

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit should be upheld.

Respectfully submitted,

SARAH M. WASTLER
WILLKIE FARR
& GALLAGHER LLP
1875 K Street NW
Washington, DC 20006

WESLEY R. POWELL
Counsel of Record
ALLISON A. BERKOWITCH
M. ANNIE HOUGHTON-LARSEN
CIARA A. COPELL
WILLKIE FARR
& GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000
wpowell@willkie.com

Counsel for Amici Curiae