Nos. 19-431, 19-454

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR
SAINTS PETER AND PAUL HOME, *Petitioner*
v.
PENNSYLVANIA, ET AL., *Respondents.*

DONALD J. TRUMP, PRESIDENT OF THE
UNITED STATES, ET AL., *Petitioners*
v.
PENNSYLVANIA, ET AL., *Respondents*.

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

BRIEF OF CHURCH-STATE SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are Church-State scholars with expertise in the Religion Clauses and a professional interest in the development of the law. They submit this brief to identify Establishment Clause principles that strongly support Respondents' position and afford an independent basis on which to affirm the judgment below. A full list of *Amici* is attached as an appendix.[1]

SUMMARY OF ARGUMENT

The United States has a long tradition of religious accommodation. When laws impose burdens on the free exercise of religion, government often provides accommodations out of respect for liberty of conscience. There are, however, settled limits on the accommodation of religion. Under the Establishment Clause, government may not craft accommodations in ways that have the purpose of promoting religion above all other interests, or that shift substantial hardship to third parties. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (holding that the government is required to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"). As this Court explained in *Estate of Thornton v. Caldor*, "[t]he First Amendment . . . gives no one the right to insist that

[1] Pursuant to Sup. Ct. R. 37.6, *Amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amici* and their counsel—contributed money intended to fund preparing or submitting the brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing.

in pursuit of their own interests others must conform to his own religious necessities." 472 U.S. 703, 710 (1985).

The religious exemption at issue offends those longstanding constitutional requirements. *See* 45 C.F.R. § 147.132 ("Religious Exemption"). It grants a categorical exemption to for-profit and non-profit corporations that object on religious grounds to paying for insurance that includes contraceptive coverage. In practice, the Religious Exemption would force employees of objecting corporations into health care plans that impose costs on employees based on the religious convictions of their employers. As a result, tens of thousands of women across the country will be deprived of contraceptive coverage to which they are otherwise statutorily entitled. These women will predictably be compelled to conform with—and pay a hefty price for—their employers' religious practice.

This is precisely the type of overt religious favoritism barred by the Constitution. Unlike the preexisting accommodation regime that the Supreme Court considered in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014)*, Wheaton College v. Burwell*, 573 U.S. 958 (2014), and *Zubik v. Burwell*, 136 S. Ct. 1557 (2016)—which guaranteed employees would receive seamless, cost-free contraceptive coverage from insurers—the Religious Exemption completely ignores the interests of employees. In so doing, it manifests an unyielding preference for religious interests over any conceivable secular interest and foreseeably shifts serious burdens to third parties.

This *amicus* brief sets forth the precedents and principles supporting the third-party harm principle. It then considers and rejects arguments advanced by Petitioners and certain of their *amici* meant to defeat application of those authorities here. Next, it shows why the Religious Exemption is inconsistent with the Establishment Clause. Finally, it addresses the relationship between the Establishment Clause and the Religious Freedom Restoration Act (RFRA), demonstrating why the Religious Exemption compliance with RFRA must be assessed separately from its compliance with the Establishment Clause.

Our bottom line is simple. The Establishment Clause prohibits the government from shifting substantial burdens to an identifiable class of third parties as the price of accommodating religious objectors. That is the regulatory equivalent of taxing non-adherents to support the faithful—and it is injurious to religious freedom and equality. Yet that is exactly what the Religious Exemption requires.

Certain *amici* supporting Petitioner object that accounting for third-party harms will too broadly thwart the government from accommodating religious objections. That is mistaken. Most accommodations do not impose significant harms on nonbeneficiaries. *E.g., Holt v. Hobbs*, 574 U.S. 352 (2015). While some religious exemptions may carry costs—*e.g.*, providing kosher meals to inmates—such costs are widely distributed across the taxpaying public rather than shifted to a discrete class of third parties. Finally, where exemptions do offend the third-party harm principle, this Court has never upheld them, except in cases involving the institutional autonomy of religious congregations and

non-profits to control their leadership and membership. Simply put, the third-party harm principle is not only consistent with free exercise rights, but is essential to protecting the religious freedom of all parties affected by government accommodations.

As this Court's precedents make clear, the Constitution respects religious freedom and equality by limiting any accommodation that shifts substantial burdens to an identifiable class of third parties. Vindicating that vital principle here would protect adherents and non-adherents alike. Abandoning it would risk destroying settled constitutional limits on governmental accommodation of religion—even when exemptions function to oppress non-adherents while exalting religious interests above all other values.

ARGUMENT

I. THE RELIGIOUS EXEMPTION VIOLATES THE ESTABLISHMENT CLAUSE

A. The Establishment Clause Prohibits Accommodations That Shift Substantial Burdens to Third Parties

Consistent with free exercise values, there is a robust tradition of religious accommodation in this Nation. Accommodation laws recognize the vital role of religion in many people's lives and help to "avoid[] unnecessary clashes with the dictates of conscience." *Gillette v. United States*, 401 U.S. 437, 453 (1971).

But it is beyond question that rules purporting to accommodate religion must comply with the Establishment Clause. This Court has so held, explicitly and repeatedly: "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 706 (1994) ("[Religious] accommodation is not a principle without limits.").

One such limitation is a third-party harm principle, which provides that religious exemptions may not be structured in a manner that shifts substantial burdens to nonbeneficiaries without any consideration of their interests. *See Cutter*, 544 U.S. at 710 ("An accommodation *must* be measured so that it does not override other significant interests." (emphasis added)); *Caldor*, 472 U.S. at 710 (holding that an accommodation "contravenes a fundamental principle of the Religion Clauses" when it provides "unyielding weighting in favor of [religious] observers").

The third-party harm principle has deep roots. As two scholars note, "[a]rdent accommodationists, strict separationists, and many in between agree that the Establishment Clause precludes permissive accommodations that shift the material costs of practicing a religion from the accommodated believers to those who believe and practice differently." Frederick M. Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of*

Religion, 49 Harv. C.R.-C.L. L. Rev. 343, 361-62 (2014).

This principle flows naturally from the original public meaning of the Establishment Clause, which precludes government from requiring one person to support another's religion. *See McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005). Prominent members of the Founding generation condemned laws that compelled people to give financial support or to observe the tenets of a government-established religion to which they did not belong. *See, e.g.*, James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 4 (1785) ("[T]he Bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions."); Thomas Jefferson, *Draft of Bill Exempting Dissenters from Contributing to the Support of the Church* (Nov. 30, 1776).

Adhering to that understanding, this Court has recognized clear constitutional limits on structuring religious accommodations in a manner that shifts substantial costs to third parties.

The leading case is *Estate of Thornton v. Caldor, Inc.*, which struck down a statute that granted every employee an absolute right to be free from work on his or her Sabbath—even when doing so "would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees." 472 U.S. at 709-10. Noting the absence of any exceptions, the Court observed that "religious concerns automatically control over all secular interests" in the "absolute and unqualified" statute.

Id. at 709. Quoting Judge Learned Hand, the Court held that this "unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses . . . . 'The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.'" *Id.* at 710 (quoting *Otten v. Balt. & O.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)).

Caldor thus held that an accommodation cannot stand under the Establishment Clause if it forces third parties to "'conform their conduct'" to "'religious necessities,'" especially if it creates an "absolute duty" that favors the interests of religious believers "over all other interests," *id.* at 709-10.

Twenty years later, the Court unanimously affirmed this reading of *Caldor*. In *Cutter v. Wilkinson*, it upheld the Religious Land Use and Institutionalized Persons Act (RLUIPA) against a facial challenge under the Establishment Clause. 544 U.S. at 714. RLUIPA imposes on state land-use authorities and prisons the same compelling interest test RFRA imposes on the federal government. *Id.* at 712. Relying on *Caldor*, the Court unanimously held that RLUIPA is permissible because it requires that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Id.* at 720. Explaining that its "decisions indicate[d] that an accommodation must be measured so that it does not override other significant interests," *id.* at 722, the Court quoted *Caldor* with approval:

> In *Caldor*, the Court struck down a Connecticut law that 'arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath.' We held the law invalid under the Establishment Clause because it 'unyielding[ly] weigh[ted]' the interests of Sabbatarians 'over all other interests.'

Id. at 722 (citations omitted). *Cutter* added that if RLUIPA were applied in a manner that discounted or ignored third-party interests, the law would become vulnerable to as-applied challenges: "Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. In that event, adjudication in as-applied challenges would be in order." *Id.* at 726.

Following the path marked by *Caldor* and *Cutter*, recent decisions have emphasized that the presence of third-party harms is crucial to analysis of religious accommodations. In *Burwell v. Hobby Lobby Stores, Inc.*, the Court granted a religious exemption to contraceptive coverage requirements. 573 U.S. at 691. The Court's analysis rested, however, on the explicit assumption that this exemption would impose no burdens on third parties, including female employees and female dependents of employees who were otherwise entitled to contraceptive coverage under existing policies. *Id.* at 693 ("[T]he effect of the HHS-created accommodation on the women employed by Hobby Lobby . . . would be precisely zero.").

Less than one year later, in *Holt v. Hobbs*, the Court granted an exemption from a prison grooming policy, holding that state prison officials had failed to show that the requested accommodation posed any safety or security risks. 574 U.S. 352 (2015). In a concurring opinion, Justice Ginsburg sharpened the point by noting that "accommodating petitioner's religious belief . . . would not detrimentally affect others who do not share the petitioner's belief." *Id.* at 370 (Ginsburg, J., concurring).

The third-party harm principle has also shaped other dimensions of the Court's religion jurisprudence. In *United States v. Lee*, for example, the Court refused to exempt a religious employer from social security taxes because, among other reasons, doing so would shift an onerous burden to employees. 455 U.S. 252, 261 (1982) ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."). And in *Trans World Airlines, Inc. v. Hardison*, the Supreme Court interpreted Title VII of the Civil Rights Act of 1964 to require accommodation of religious practices only when resulting burdens on employers and other employees are *de minimis*. 432 U.S. 63, 85 (1977). As several courts subsequently noted, the holding in *Hardison* was based partly in "the prohibitions of the Establishment Clause." *Turpen v. Missouri-Kansas-Texas R.R.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *see also Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 136 (3d Cir. 1986) ("As for excessive entanglement of government and religion, the statute does not pose the danger of bringing about any interplay of the sort the Establishment Clause seeks to avoid.").

Together, these precedents give the government broad latitude to create religious accommodations that do not shift substantial burdens or that spread costs across the public at large. But the government may not shift significant hardship to a discrete class of third parties. Doing so is the regulatory equivalent of taxing one group to support another's faith. *See* Micah Schwartzman, Nelson Tebbe, & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781, 784-88 (2018). Moreover, giving priority to religion over all contrary interests can function to prefer, rather than merely accommodate, religious belief. *See* Ira Lupu & Robert Tuttle, *Secular Government, Religious People* 234-35 (2014). The third-party harm principle avoids that result by placing limits on religious accommodations.[2]

B. The Religious Exemption Must Comply with the Establishment Clause

There should be no serious doubt that the Establishment Clause applies to the Religious Exemption, which seeks to accommodate religious objectors by shifting the cost and burden of obtaining contraceptive coverage to employees. Nonetheless, Petitioners and their *amici* raise two arguments in an effort to subvert the third-party harm principle

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[2] *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), which involved tax exemptions for non-profits, is not to the contrary. *Walz* permitted a tax exemption because it was not specific to religious organizations and because the resulting costs were both evenly diffused over the entire body of taxpayers and negligible for any individual taxpayer. *Caldor* and *Cutter*, in contrast, addressed substantial burdens shifted to a discrete class of third-party nonbeneficiaries.

and defeat its application here: first, they contend that the principle applies not to religious *accommodations*, but only to religious *preferences*; and second, they assert that the baseline for assessing burden-shifting is a world without any government regulation. These arguments are without merit.

i. The Third-Party Harm Principle Applies to Religious Accommodations

Under this Court's cases, the Establishment Clause principle against third-party harms applies fully to religious exemptions, such as the Religious Exemption, that lift government-imposed burdens on religious exercise. Some *amici*, however, disagree with that conclusion and assert that "[t]he government does not establish religion by leaving it alone." [3] In their view, the government enjoys a constitutionally unbounded prerogative to lift burdens on religious practice that the government itself has created (*accommodations*); the Establishment Clause applies, if at all, only to government action that provides a specific advantage for religious believers (*preferences*). These *amici* add that the Religious Exemption is an accommodation, not a preference, and thus cannot violate the Establishment Clause as interpreted in *Caldor* and *Cutter*. [4] To support this assertion, they cite

[3] Brief of *Amici Curiae* Constitutional Law Scholars Supporting Petitioners 12 [hereinafter Constitutional Law Scholars Br.].

[4] This argument rests on many of the same flawed premises as *amici*'s claim that the Religious Exemption involves no "state action." *See* Constitutional Law Scholars Br. 18-21.

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987), and *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

There is a straightforward response to this argument, which is that a unanimous Court rejected it in *Cutter v. Wilkinson*. As explained above, *Cutter* involved a challenge to RLUIPA, which the Court described as "alleviat[ing] exceptional *government-created* burdens on private religious exercise." 544 U.S. at 720 (emphasis added). Even though the *Cutter* Court viewed the relevant burdens as "government-created," it held that any accommodations under RLUIPA still had to survive Establishment Clause review. Indeed, in the very next sentence, the Court relied on *Caldor* to hold that RLUIPA is permissible under the Establishment Clause *only* because courts are required to account for the interests of third-party nonbeneficaries. *Id.* If the Establishment Clause did not apply to exemptions like those under RLUIPA that purport to "leave religion alone," then it would have been unnecessary to invoke *Caldor* or, indeed, to consider third-party interests at all.

The only sound reading of *Cutter* is that the Establishment Clause applies to religious exemptions, not only so-called religious "preferences." That makes perfect sense: an obvious way for the government to violate religious neutrality is by lifting regulations for religious objectors under circumstances that burden third parties or totally disregard their interests.

As an extreme example, imagine a state that permitted ritualistic beatings by providing a religious exemption from all statutes criminalizing assault and battery. The exemption could be framed as an accommodation rather than a preference, or "government leaving religion alone." But many would reasonably see this exemption as a religious preference. And we suspect most would think it unconscionable to make non-believers bear this burden as the price of accommodation.

Some *amici* attempt to cast doubt on *Cutter*'s articulation of the third-party harm principle by asserting that it "appears to rest on a misreading of . . . *Caldor*." Brief of *Amici Curiae* United States Conference of Catholic Bishops Supporting Petitioners 14 [hereinafter "Catholic Bishops Br."]. They assert that *Caldor* concerned a religious preference, not an accommodation, and that the *Cutter* Court made a mistake in citing it. *See* Constitutional Law Scholars Br. 15-16. The argument is doubly misplaced. First, although the distinction proposed by these *amici* is often incoherent, the provision at issue in *Caldor* is easily understood as an exemption rather than a preference. It "attempt[ed] to lift a burden on religious practice," *Caldor*, 472 U.S. at 712 (O'Connor, J., concurring), by exempting religious observers from working during their Sabbath, as certain employers could newly require under Connecticut's revised Sunday-closing laws, *id.* at 705-06; *see also* Costs of Conscience at 791-92 & n.46. Second, in any event, the *Cutter* Court itself plainly considered the provision at issue in *Caldor* to be an accommodation and expressly relied on *Caldor* in affirming the applicability of the third-party harm

principle to accommodations. *Amici* offer no sound basis to disregard that clear holding.

What, then, to make of *Amos* and *Hosanna-Tabor*, both of which allowed exemptions that could substantially burden third parties? The answer is that these cases concerned the institutional autonomy of religious congregations and religious non-profits to control their own leadership and membership. *Hosanna-Tabor* held that houses of worship are exempt from anti-discrimination law when making employment decisions about clergy and other "ministerial" employees. 565 U.S. at 181-82. The Court grounded this "ministerial exception" in both the Free Exercise and Establishment Clauses, holding that houses of worship have a right against government interference with ecclesiastical decisions concerning internal governance. *Id.* at 188. Similarly, *Amos* rejected an Establishment Clause challenge to § 702 of Title VII, 42 U.S.C. § 2000e-1(a), which allows religious organizations to discriminate on the basis of religious affiliation in employment decisions. 483 U.S. at 330.

Hosanna-Tabor and *Amos* are exceptions to the rule, not statements of it. This is presumably why no opinion in *Hobby Lobby* even mentioned *Amos* while discussing third-party harm. *See also Hosanna-Tabor*, 565 U.S. at 200-01 (Alito, J., concurring) ("Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith.").

To be sure, the majority in *Amos* suggested sympathy for the distinction between accommodations and preferences. *See* 483 U.S. at 337 ("A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." (emphasis in original)). But Justice O'Connor rejected that distinction while writing separately in *Amos*. *See Amos*, 483 U.S. at 347 (O'Connor, J., concurring in the judgment) ("This distinction seems to me to obscure far more than to enlighten. Almost any government benefit to religion could be recharacterized as simply 'allowing' a religion to better advance itself, unless perhaps it involved actual proselytization by government agents."). And in *Cutter*, the Court expressly embraced Justice O'Connor's analysis of the issue. Not only did it apply the third-party harm principle to an exemption that lifts "government-created burdens on private religious exercise," but it cited Justice O'Connor's concurrence while doing so. 544 U.S. at 720; Frederick M. Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 Vand. L. Rev. En Banc 51, 61-62 (2014).

In short, *Cutter* clearly applied the Establishment Clause to a religious exemption that lifts government-imposed burdens—just as the Religious Exemption does—and it did so in reliance on *Caldor* and Justice O'Connor's *Amos* concurrence. The only plausible explanation is that *Amos* and *Hosanna-Tabor* are exceptional decisions that protect the right of churches and other religious

organizations to control their leadership and membership without government interference—an exception not implicated in this litigation.[5]

ii. The Baseline for Third-Party Harm Analysis Includes Existing Statutory Protections and Requirements

In determining whether an exemption shifts substantial burdens to third parties, courts take into account the loss of any existing statutory protections. Put differently, the "baseline" for such analysis may include existing rights like the contraceptive coverage requirements promulgated under the ACA.[6]

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[5] While some Petitioner-side *amici* object that the government must treat all religious believers the same, nothing in law or logic suggests that for-profit corporations and churches must be treated the same. By its own terms, *Hosanna-Tabor* is inexplicable except as a case about the unique prerogatives of churches and other houses of worship. And if *amici*'s principle were adopted, it would discourage the government from providing religious exemptions even when most clearly desirable, lest they be extended without limit to every corporate entity that can assert a religious belief. *See Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 464 (N.Y. 2006) ("To hold that any religious exemption that is not all-inclusive renders a statute nonneutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than to promote, freedom of religion.").

[6] *See Costs of Conscience* at 794-98; Nelson Tebbe, Micah Schwartzman, & Richard Schragger, *When Do Religious Accommodations Burden Others?, in The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* 335-37 (Susanna Mancini & Michel Rosenfeld eds., Cambridge U. Press, 2018); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 Colum. L. Rev. 1453, 1483–89 (2015).

Applying that understanding here, tens of thousands of women will unquestionably be burdened under the Religious Exemption with the loss of contraceptive coverage as the price of accommodating their employers' religious beliefs. These women will have to pay significantly more for preventive health care than employees who are not affected by the challenged regulations.

Those costs matter for Establishment Clause purposes: But for the government's exemptions, employees would not have to bear these costs.

The government and some of its *amici*, however, argue that nobody will suffer from any government-created burden. Here is the government's explanation for that counter-intuitive conclusion:

> If some third parties do not receive contraceptive coverage from private parties whom the government chooses not to coerce, that result exists in the absence of governmental action—it is not a result the government has imposed. Calling that result a governmental burden rests on an incorrect presumption: That the government has an obligation to force private parties to benefit those third parties, and that the third parties have a right to those benefits.

Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57592, 57606 (Nov. 15, 2018); *see also* Constitutional Law Scholars Br. 11-14.

In sum, the government imagines that its decision to grant an exemption creates a world in which employees affected by the exemption were never entitled to contraceptive coverage in the first place. The government giveth and the government taketh away *in a single breath*, before anyone can claim to suffer burdens as a result of the decision to eliminate statutory protections.

This circular logic is foreclosed by *United States v. Lee*. There, an Amish employer claimed a religious exemption from paying Social Security taxes. 455 U.S. at 254-55. Under the government's analysis, *Lee* should have been an easy case: because the Free Exercise Clause preemptively excepted the employer from the statutory requirement to pay social security taxes, his employees were never entitled to the benefits to begin with and thus could not complain about any resulting reduction in their benefits. But the Court did not analyze the issue that way. Instead, it approached the issue using a baseline that incorporated the employees' statutory benefits:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the

> employer's religious faith on the employees.

Id. at 261.

In this passage, *Lee* explicitly presumed that employees were entitled to their full social security benefits and the requested accommodation would therefore have burdened them by depriving them of those benefits. The same logic applies here. The Religious Exemption will predictably shift burdens to women who do not share their employer's religious beliefs about contraception, depriving them of a benefit to which they are otherwise entitled.

More generally, in evaluating religious exemptions, the Court has always worked from a baseline that incorporates the protections of civil and criminal law; it has not assumed that if the Free Exercise Clause applies, there is no loss of protection to start with and thus no resulting harm to any group covered by the relevant law. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) (explaining the material and dignitary harms that could result from widespread exceptions to civil rights law protecting gay men and lesbians); *Tony & Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290 (1985) (rejecting a religious exemption from minimum wage and other provisions under the Fair Labor Standards Act); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (rejecting a religious exemption from the prohibition on race discrimination in public accommodations under the Civil Rights Act of 1964).

Simply put, religious exemptions—whether under RFRA or the pre-*Smith* test applied in *Lee*—

cannot be justified by pretending that those who lose statutory protections could not possibly have suffered real and tangible losses. That is true for a wide range of losses: social security benefits, minimum wage guarantees, prohibitions on discrimination in public accommodations, or mandated insurance coverage.[7]

There are additional problems with the notion that the Religious Exemption does not disturb a statutory entitlement. People conduct their lives on the assumption that they are entitled to the benefits and safe harbors that statutes promise them, and rightly so. Respect for that expectation is threaded throughout the law in principles of reliance and estoppel. Here, tens of thousands of people are currently receiving contraceptive coverage but would lose it if the Religious Exemption goes into effect. It blinks reality to pretend that they would suffer no loss in that circumstance—and that the loss would not result directly from government action

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[7] We recognize that in *Hobby Lobby*, the Supreme Court cautioned, in dicta, that the existence of burdens on third parties cannot justify failing to consider whether alternative regulations might reduce burdens on religious free exercise. Otherwise, as the Court explained, "[b]y framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless." 573 U.S. at 729 n.37. This logic, though, is fully consistent with treating statutory benefits as relevant to measuring harms to third parties under the Establishment Clause. If those benefits are trivial or incidental, the government cannot use them as an excuse to avoid its responsibilities under RFRA. And even if third-party harms are significant, the government may be required under RFRA to adopt less restrictive means which avoid or mitigate them. *See id.* at 728-30.

improperly privileging religious interests over all others.

C. The Religious Exemption Violates the Establishment Clause

The Religious Exemption fails Establishment Clause scrutiny for two independent reasons. First, it operates as an unyielding preference of the kind explicitly barred by *Caldor*. Second, it shifts substantial costs to third parties. Either failure alone is fatal, and the combination confirms that the Religious Exemption is invalid.

i. The Religious Exemption Generates an Unyielding Preference in Favor of Religious Adherents

Like the law invalidated in *Caldor*, the Religious Exemption is "absolute and unqualified." 472 U.S. at 710. It takes no account of the harms it will inevitably impose. It provides no exceptions, no process for considering any harms that flow from accommodation, and no possible alternative to reduce harms to affected employees. It provides no judicial review to resolve those conflicts, as RFRA and RLUIPA do. Instead, it is a categorical mandate: if an employer chooses to take advantage of the exemption, employees and their dependents automatically lose their right to contraceptive coverage. It therefore calls for "unyielding weighting in favor of [religious] observers over all other interests," *id.* at 703, and lacks any provision or means to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries," *Cutter*, 544 U.S. at 720.

As *Cutter* made clear, the Constitution requires that any accommodation be "measured so that it does not override other significant interests." *Id.* at 710. That is an easy requirement to meet. The vast majority of accommodation rules protect particular, narrowly defined conduct where third-party harms are nonexistent or easily managed (*e.g.*, allowing uniformed officers to wear religiously prescribed clothing). In crafting such rules, the government can anticipate potential conflicts and minimize the impact on third-party interests. If it does so in a proper manner, the rule is "measured" under *Cutter* and is therefore constitutional. *Id.*

Precisely the opposite is true for laws or regulations with a broad scope of application such as the Religious Exemption. When a law or regulation will apply to thousands of people and when its terms are both categorical and costly, it is impossible to account in advance for all relevant third-party interests—as is constitutionally required. That is, the agency cannot ensure the law is "measured so that it does not override other significant interests." *Id.* The most the agency can do is provide a mechanism for consideration of those interests on a case-by-case basis as particular situations arise.

The Religious Exemption does not provide any such mechanism. Where a regulation such as this one lacks any means for future consideration of third-party harms, "religious concerns automatically control over all secular interests." *Caldor*, 472 U.S. at 709; *id.* at 712 (O'Connor, J., concurring) (explaining that Title VII is constitutional because it requires only "reasonable rather than absolute accommodation"). Regardless of whether the

Religious Exemption is statutorily authorized by RFRA, it is precisely the kind of absolute and unqualified regulation that works an establishment by assigning an unyielding priority to the religious interests of employers over the interests of thousands of burdened employees.

ii. The Religious Exemption Impermissibly Shifts Harms to Third-Party Nonbeneficiaries

In addition, the Religious Exemption requires a burden-shifting of the kind this Court has repeatedly rejected: the Religious Exemption shifts costs to thousands of women who will lose their statutory right to contraceptive coverage.

Evidence of harms is incontestable. "The Final Rules themselves estimate that tens of thousands of women nationwide will lose contraceptive coverage." *California v. Health & Human Servs.*, 351 F. Supp. 3d 1267, 1297 (N.D. Cal. 2019). These women would be denied their statutory and regulatory entitlement to seamless contraceptive coverage without cost sharing for themselves, their spouses, and their dependents. To obtain the coverage and care the ACA provides all others, they will be forced to bear substantial costs out of pocket that they would not incur in the absence of the exemption. *See id.* This is a direct burden that would not exist without exemption from contraceptive coverage requirements, and it would irreparably harm thousands. *See Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 607–608 (7th Cir. 2015) (describing the irreparable harm to women of loss of contraception coverage without cost sharing); *Priests for Life v. U.S. Dep't of Health and*

Human Servs., 772 F.3d 229, 259–262 (D.C. Cir. 2015) (same). The externalized financial cost will be substantial for most employees. Su-Ying Liang et. al., *Women's Out-of-Pocket Expenditures and Dispensing Patterns for Oral Contraceptive Pills Between 1996 and 2006*, 83 Contraception 528, 531 (2011); *see also* Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies without Cost-Sharing*, 14 Guttmacher Pol'y Rev. 7, 9-10 (2011).

Employees who lose coverage under the Religious Exemption and cannot afford the contraceptive services to which they would otherwise be entitled under the ACA will be forced to bear myriad non-monetary costs as well. These burdens are considerable, including the risk of unplanned pregnancy and the consequent health risks to mothers and their children. *See Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 828 (E.D. Pa. 2019) ("Disruptions in contraceptive coverage will lead to women suffering unintended pregnancies and other medical consequences."); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012) [hereinafter *Group Health Plans*]. Reducing access to contraceptives also restricts their use for treatment of non-reproductive health issues. *Pennsylvania*, 351 F. Supp. 3d at 828-29; *Group Health Plans*, 77 Fed. Reg. at 8727-28. Finally, when some women are denied contraceptive coverage, all

women suffer from the greater gender disparities that result.[8]

In light of these and other harms, there can be no doubt that the Religious Exemption will shift significant burdens to employees who do not object to contraception but work for employers who do. Those employees and their dependents will bear these costs as the price of accommodating their employers' religious convictions. The Framers opposed forcing non-adherents to pay a small tax in order to support others' beliefs. Yet the Religious Exemption goes further, forcing many women across America to surrender their rights to insurance coverage of preventive health care in order to benefit another subset of Americans opposed to contraception. The Establishment Clause forbids this. *See Kiryas Joel*, 512 U.S. at 725 (Kennedy, J., concurring) ("There is a point . . . at which an accommodation may impose a

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[8] *Cf. Group Health Plans*, 77 Fed. Reg. at 8728:

> Researchers have shown that access to contraception improves the social and economic status of women. Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force. . . . [O]wing to reproductive and sex-specific conditions, women use preventive services more than men, generating significant out-of-pocket expenses for women. The Departments aim to reduce these disparities by providing women broad access to preventive services, including contraceptive services.

burden on nonadherents so great that it becomes an establishment." (citing *Caldor*, 472 U.S. at 709-10)).

II. RFRA DOES NOT ALTER OR DISPLACE THE ESTABLISHMENT CLAUSE

As should now be clear, the Establishment Clause strongly supports and independently requires affirmance of the judgment below. Petitioners and certain *amici*, however, insist that the Establishment Clause has no relevance to this case because any third-party harm issues are wholly subsumed within the RFRA analysis. *See* Resp. Br. 31 (describing third-party harm principle under First Amendment and RFRA as "analogous"); Constitutional Law Scholars Br. 5 ("RFRA incorporates Establishment Clause limits on religious accommodations."); Catholic Bishops Br. 13 ("Religious Exemptions Like RFRA Are Valid Under the Establishment Clause").

This reasoning is faulty. The third-party harm principle embodied in the Establishment Clause is not obviated by RFRA. In arguing otherwise, Petitioners and their *amici* misapprehend this Court's decision in *Cutter* and delegate the Judiciary's responsibility to uphold the Establishment Clause to the very branches of government that the Clause exists to restrain.

In *Cutter*, the Court rejected a facial challenge to RLUIPA on Establishment Clause grounds. 544 U.S. at 714. The Court recognized, as it had many times before, that there is "'room for play in the joints'" between the two Religion Clauses and that certain legislative action is "neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause." *Id.* at 719 (quoting *Walz*, 397

U.S. at 669). Because RLUIPA served to "alleviate[] exceptional government-created burdens on private religious exercise"—but was measured to account for burdens on third parties—the statute fit "within the corridor between the Religion Clauses" and was not barred by the Establishment Clause "[o]n its face." *Id.* at 719-20.

The Court did not say, however, that RLUIPA would *always* survive Establishment Clause scrutiny as applied. While upholding RLUIPA on its face, the *Cutter* Court was careful to note that there may be accommodations under the statute that "impose unjustified burdens on other[s]," in which case "as-applied challenges would be in order." 544 U.S. at 726.

This holding rests on an understanding of how laws like RLUIPA and RFRA do (and do not) account for third-party harms.

RFRA provides that the government may substantially burden the exercise of religion only where application of the law in question "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb-1(b). Within this framework, burdens on third parties find expression in "the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest." *Hobby Lobby*, 573 U.S. at 729 n.37.[9]

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[9] The *amici* who seek to minimize the continued role of the Establishment Clause recognize this point. *See* Constitutional Law Scholars Br. 5 (RFRA "takes into account the government's

Because third-party harms are addressed by RFRA only within the "compelling interest" standard, it is the government—at least, in the first instance—that will identify when third-party harms are a matter of governmental concern. There is no guarantee in any particular case that the government will do so, or will do so in a manner that assigns proper weight to the relevant set of third-party harms. Nor is there any guarantee that the government's understanding of its own compelling interests will not change over time. In some cases, the government may align itself with a party seeking accommodation—and may therefore devalue or ignore the interests of burdened third parties in assessing its own interests under RFRA.[10]

This litigation is case in point. In *Hobby Lobby*, the government argued that it had a compelling interest in ensuring female employees had access to cost-free contraception coverage under the ACA. 573 U.S. at 726-27. The government now disclaims that

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interest in protecting third parties when that interest is compelling"); Catholic Bishops Br. 8 ("Third-party harm may bolster the intensity of the government's compelling interest or narrow the range of appropriate accommodations.").

[10] To be sure, the Judiciary ultimately serves as a check on the government's interpretation of RFRA. And for the reasons ably articulated by Respondents, the government's word is not final in defining the set of interests that bear on the "compelling interest" inquiry. *See* Resp. Br. at 42-45. Even where the government disclaims an interest in enforcing its own statutes or regulations, a court may properly reach a contrary conclusion in its assessment of whether the RFRA standard is met. That all said, where the government disavows an interest in protecting the third parties burdened by a religious accommodation, the Establishment Clause will inevitably have a greater role to play.

interest, insisting instead that the ACA simply directs the agency to develop guidelines regarding the scope of coverage for women's preventive services while balancing those health needs against "the effect on the religious beliefs of providers of group health plans." Resp. Br. 9 (referring to Religious Exemption as "good policy"). Because the Religious Exemption was the product of agency rulemaking which seized on RFRA as a source of affirmative rulemaking authority, the litigant who is defending the exemption against legal challenge is the very litigant whose interest RFRA examines to determine if the exemption was required in the first place.

It is precisely in cases like this one where the Establishment Clause provides a legal bulwark that extends beyond RFRA. The government may not eliminate third party burdens from the constitutional analysis by setting them aside or devaluing them in its own RFRA analysis. As this Court made clear in *Caldor* and *Cutter*, the Judiciary has an independent obligation to ensure that the political branches respect the third-party harm principle—even when those branches of government would prefer not to do so.

Put differently, when it enacted RFRA and adopted a "compelling government interest" test, Congress did not set the standard for compliance with the Establishment Clause. Such extraordinary power does not belong to the political branches. *Cf. City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.").

Treating RFRA as the final word on the Establishment Clause is not only inconsistent with the separation of powers, but it is also dangerous. On that view, the government could effectively guarantee that *any* accommodation passes constitutional muster by identifying a "government interest" that excludes or demeans the interests of burdened third parties. When the government ignores substantial burdens inflicted or shifted by a religious accommodation, it does not follow that the Constitution is similarly indifferent. The Court should vindicate that principle here.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that this Court should affirm the judgment below.

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