**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.

COMMONWEALTH OF PENNSYLVANIA AND STATE OF NEW JERSEY,

*Respondents.*

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

*Petitioners,*

v.

COMMONWEALTH OF PENNSYLVANIA AND STATE OF NEW JERSEY,

*Respondents.*

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

## BRIEF OF PROFESSOR MARTIN S. LEDERMAN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

MARTIN S. LEDERMAN
*Counsel of Record*
600 New Jersey Avenue, NW
Washington, D.C. 20001
(202) 662-9937
Martin.lederman@law.georgetown.edu

April 8, 2020

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases:**

**Constitutional Provisions:**

**Statutes and Other Congressional Materials:**



**Regulatory Materials:**

**Miscellaneous:**

## INTEREST OF *AMICUS CURIAE*[1]

Amicus is Professor from Practice at the Georgetown University Law Center and Senior Fellow of the GULC Supreme Court Institute. He has for many years taught and written on constitutional and statutory protection for religious liberty, including on the Religious Freedom Restoration Act.

## SUMMARY OF ARGUMENT

I. The Affordable Care Act does not delegate to the Health Resources and Services Administration the authority to exempt employers from their obligations to ensure coverage for their employees of the categories of preventive care HRSA has identified as essential to women's health, including access to effective contraceptive methods. Nothing in the text, purpose or structure of the ACA suggests that Congress intended to empower HRSA—an agency whose mission is to "provide health care to people who are geographically isolated, economically, or medically vulnerable"—to have a virtually unbounded authority to promulgate exemptions it deems "appropriate" (U.S. Br. 15) for reasons unrelated to women's health, including (but not limited to) deferring to employers' religious beliefs. Therefore the ACA does not authorize HRSA's new Religious and Moral Exemption rules.

II. The Religious Freedom Restoration Act does not require or authorize the Religious Exemption rule, either.

---

[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus made a monetary contribution to its preparation or submission. All parties have lodged blanket consents to the filing of amicus curiae briefs.

A. Because most objections to the Departments' existing religious "accommodation" process are based upon legal mistakes about how that accommodation operates, few, if any, employers would be able to demonstrate that it substantially burdens their religious exercise, even if courts must defer to the employers' own views of what constitutes religiously prohibited complicity in their employees' contraceptive use. And even if some employers would be able to demonstrate a substantial burden, the Religious Exemption rule extends far more broadly, to cover many employers who would not be inclined or able to make such a showing. That rule therefore extends far beyond what RFRA requires.

B. Moreover, even in cases where employers could establish a substantial burden, the existing accommodation would not violate RFRA because it is the least restrictive means of furthering the compelling state interest in ensuring that women can employ effective forms of contraception, which will in turn prevent the health problems and abortions associated with unwanted pregnancies. Widespread employer use of the Religious Exemption, by contrast, would significantly harm many women, and "in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014) (citation omitted).

The Government argues that this otherwise compelling interest is undermined by the fact that some women whose employers use "church plans" cannot be guaranteed contraception coverage under the accommodation. This Court's precedents in Free Exercise cases, however—cases that Congress intended RFRA's test to incorporate—explain why the modest

underinclusiveness resulting from the law's idiosyncratic treatment of church plans does not call into question the compelling nature of the Government's interest in securing women's ability to use effective contraception. Those cases demonstrate that a government's conferral of a circumscribed exemption for certain religious persons or entities does not ordinarily undermine the Government's compelling rationale for not offering a much broader religious exemption. Moreover, acceptance of the Government's underinclusiveness argument would be deeply inconsistent with our Nation's tradition of religious accommodations and would significantly discourage governments from the common practice of creating discrete, tailored exemptions, such as for houses of worship.

C. Nor does RFRA *authorize* HRSA to promulgate the Religious Exception rule, especially not where the existing accommodation suffices to prevent most or all RFRA violations while continuing to ensure that almost all women receive comprehensive preventive care. Where two legal obligations are potentially in tension with one another, agencies, like courts, should strive "to give effect to both," *Morton v. Mancari*, 417 U.S. 535, 551 (1974), to the greatest possible extent. The Religious Exemption rule, however, would gratuitously subjugate the ACA's preventive-care protections in order to prevent nonexistent or rare RFRA violations. Moreover, construing RFRA to authorize such broad exemptions in cases where RFRA does not require them would raise serious constitutional concerns as a result of the significant harms it would inflict on many women.

## ARGUMENT

### I. The Affordable Care Act Does Not Authorize the Departments' Religious and Moral Exemption Rules

The preventive-services provision of the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. 18001 *et seq*., requires qualifying group health plans and health-insurance issuers to provide coverage to beneficiaries for certain preventive services without "cost sharing requirements." 42 U.S.C. 300gg-13(a). "[W]ith respect to women," in particular, Congress assigned the Health Resources and Services Administration [HRSA] the responsibility to identify, in "comprehensive guidelines," the particular "preventive care and screenings" that such plans and issuers must provide without cost. *Id.* 300gg-13(a)(4).

In August 2011, HRSA issued such guidelines, specifying that the "preventive care and screenings" for women that plans and issuers must cover include, *inter alia*, screening for gestational diabetes; testing for human papillomavirus; lactation support and counseling; and "[a]ll Food and Drug Administration approved contraceptive methods [and] sterilization procedures." HRSA, *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 2011), https://bit.ly/2V5K7L8.

Accordingly, the Departments of Health and Human Services, Labor, and Treasury, which are responsible for implementing the preventive-services mandate, issued rules requiring health-insurance plans and insurers to subsidize such services without cost to female plan beneficiaries (and female dependents of beneficiaries). *See, e.g.*, 45 C.F.R.

147.130(a)(1)(iv) (HHS rule).

At the same time, those Departments purported to "provide" HRSA "additional discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned"—in particular, to promulgate a discrete exemption from the contraceptive-coverage requirement for churches and their auxiliaires. 76 Fed. Reg. 46,623 (Aug. 3, 2011). HRSA included such an exemption in a footnote to its 2011 guidelines. HRSA 2011 Guidelines, *supra*, n.**. This "Church Exemption," as amended in 2013, *see* 78 Fed. Reg. 8461 (Feb. 6, 2013), remained in effect until it was superseded by the "Religious Exemption" at issue in this case. No party ever challenged HRSA's authority to establish that exemption.

In 2017, the Departments published interim rules that *required* HRSA to amend its guidelines to include two far broader contraception-coverage exemptions—a directive HRSA promptly heeded. *See* 82 Fed. Reg. 47,835 (Oct. 13, 2017) (directing that HRSA "must not" support the specified required coverage for religious objectors and "will exempt" the specified entities "from any guidelines' requirements that relate to the provision of contraceptive services"; *id.* 47,861-62 (similar as to moral objectors); HRSA, *Women's Preventive Services Guidelines* at n.** (Dec. 2019), https://bit.ly/2Xjsl9N.

HRSA's expanded exemption resulted in the two rules challenged here. The new "Religious Exemption" rule, 45 C.F.R. 147.132(a)(1), affords a covered employer or plan the right to exclude contraceptive coverage if it "objects, based on its sincerely held religious beliefs, to its establishing, maintaining,

providing, offering, or arranging for (as applicable): (i) Coverage or payments for some or all contraceptive services; or (ii) A plan, issuer, or third party administrator that provides or arranges such coverage or payments." *Any* private employer—even a publicly traded corporation—or educational institution may unilaterally implement this exemption. And if it does so, its employees will no longer be guaranteed the cost-free access to such HRSA-prescribed preventive care the plain text of Section 300gg-13(a) requires.

A new "Moral Exemption" rule affords the same broad category of plans and employers (other than publicly traded corporations) the power to exclude contraceptive coverage if the entity "objects" to any of the same listed actions "based on its sincerely held moral convictions." 45 C.F.R. 147.133(a)(2).

HRSA asserts authority to establish these two new exemptions by virtue of the women's preventive care provision itself. According to the Government, , Section 300gg-13(a)(4) empowers HRSA to establish *any* "appropriate exemptions" from that provision's coverage requirements. U.S. Br. 15.

Although the Government also asserts that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb, *et seq.*, authorizes (indeed, requires) the Religious Exemption rule, *see infra* Part II, the Moral Exemption rule depends entirely on this reading of Section 300gg-13(a)(4). Accordingly, unless the Court holds that the Departments promulgated that rule in violation of the Administrative Procedure Act (a question on which amicus expresses no view), the Court must decide whether Congress delegated to HRSA such a virtually unbounded authority to exempt employers, plans and insurers from *any* women's

preventive care coverage requirements (not merely contraception coverage).

The Government makes little effort to defend its assertion that Congress made such an unbounded delegation to HRSA to grant non-health-based exemptions. It relies almost exclusively on two minor textual differences between Section 300gg-13(a)(4) and the immediately preceding paragraph, Section 300gg-13(a)(3), which specifies the cost-free coverage that plans and issuers must provide "with respect to infants, children, and adolescents." Those textual distinctions, however, cannot fairly be read to grant HRSA vast latitude to grant automatic exemptions to broad categories of employers, with the effect of selectively denying coverage for women's preventive care.[2]

It is especially implausible to think Congress would have chosen *HRSA* as the entity empowered to exercise such extraordinary discretion. That agency's singular mission to "provide health care to people who

---

[2] First, the Government notes that the women's preventive care provision—unlike the children's care provision—refers to guidelines supported by HRSA "for purposes of this paragraph." U.S. Br. 16. Congress obviously included that concluding clause, however, merely to signal that HRSA would have to promulgate women's care guidelines because it had not previously done so (whereas it had already published children's care guidelines).

Second, the Government observes that the children's care provision, unlike the women's care provision, refers to "*evidence-informed* preventive care and screenings." *Id.* 16-17. Plainly, however, Congress did not mean to suggest that HRSA's guidelines for women's preventive services need *not* be "evidence-informed," and did not exclude that modifier from Section 300gg-13(a)(4) as an indirect means of affording HRSA unlimited authority to choose which employers and plans must comply with Section 300gg-13(a)'s mandate.

are geographically isolated, economically, or medically vulnerable." HRSA, *Agency Mission* (Sept. 2019), https://bit.ly/2XiYvCg. HRSA officials have no expertise regarding how to balance asserted religious and moral obligations and convictions against women's needs for access to preventive care.[3]

The Government notes (U.S. Br. 17-20) that the "Church Exemption," which HRSA added to its guidelines in 2011, *see supra* at 5, likewise was predicated upon Congress's alleged delegation to HRSA in Section 300gg-13(a)(4). Just as Section 300gg-13(a)(4) does not authorize the current Religious and Moral Exemptions, however, neither did it authorize HRSA to establish the Church Exemption.[4]

Importantly, that does *not* mean a church must subsidize or otherwise facilitate its employees' use of contraception. Even if this Court were to hold that the Religious Exemption rule is invalid, a church with a religious objection to its involvement in contraceptive coverage would still be able to take advantage of the "accommodation" the Departments established in

---

[3] Nor did the Departments themselves act as if Congress had afforded HRSA authority to exercise its own expert judgment about religion. Instead, they *directed* HRSA to include the exemptions in its guidelines. *See supra* at 5.

[4] Respondents suggest that the Constitution required the Church Exemption (but *not* the more recent Religious and Moral Exemptions) because "when a house of worship maintains that its internal affairs—from employment relationships to property ownership—are religiously informed, the First Amendment dictates that the civil legal system is not to interfere." Resp. Br. 35. But there is no such comprehensive constitutional immunity that precludes operation of the "civil legal system" writ large to all of the "internal affairs" of houses of worship—a proposition that could dramatically transform the law.

2013, *see* 45 C.F.R. 147.131(b); 78 Fed. Reg. 39,874 (July 2, 2013), and thereby avoid any such obligation. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 698-699, 730-731 (2014) (describing the accommodation). In that case, other actors—typically the third-party administrator (TPA) of a self-insured employee plan—would independently provide the employees with separate contraception coverage *outside* the auspices of the church and the plan it offers its employees. *See* 45 C.F.R. 147.131(d), (e).

Indeed, because a self-insured employee plan established and maintained by a church is generally exempt from regulation under the Employee Retirement Income Security Act of 1974 (ERISA), *see* 29 U.S.C. 1002(33)(A); *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1656 (2017), the government cannot even *require* the TPA of such a "church plan" to provide separate contraceptive coverage if the employer uses the accommodation. Instead, the government can only offer to compensate the TPA in order to induce it to provide separate coverage.[5]

---

[5] In a handful of cases, a church plan's TPA might refuse to voluntarily provide such coverage. The Government acknowledges that in such cases it lacks an effective means of ensuring contraception coverage for the employees in question. *See* U.S. Br. 4. Where that happens, the employer could not possibly be "complicit" in employees' contraception use because those employees will not receive ACA-guaranteed coverage at all. This describes the situation of petitioner Little Sisters: Its church plan TPA, Christian Brothers, refuses to provide contraceptive coverage. *See* Decl. of Mother Superior Marie Vincente ¶ 15, D. Ct. Doc. 19-2; *see also Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1218 (10th Cir. 2015) (Baldock, J., dissenting in part) (Little Sisters has failed to meet "the burden of establishing that their opting out will presently cause someone to provide contraceptive coverage to their plan

The accommodation regulations would thereby "effectively exempt[]" an objecting church from the contraceptive-coverage requirement, *Hobby Lobby*, 537 U.S. at 698. The vast majority of churches—even those that have religious objections to their employees' use of contraception—would presumably conclude that the religious accommodation thereby ameliorates any possible concern they might otherwise have about "complicity" in such conduct.

## II. RFRA Neither Requires Nor Authorizes the Religious Exemption Rule

If the Court concludes that the ACA affords HRSA authority to promulgate any "appropriate" exemptions to the women's preventive care guarantee of Section 300gg-13(a)(4), that would resolve the dispute here in the Departments' favor. In that case there would be no reason for the Court to address whether the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb, *et seq*., *also* requires (or authorizes) the "Religious Exemption"[6]—a question with far greater and more uncertain implications, as RFRA applies to all federal laws. 42 U.S.C. 2000bb-3(a). If, however, the Court concludes that the ACA does not authorize the exemptions, then (and only then) it would have to address the Government's alternative RFRA theory.

RFRA provides that the federal government may not substantially burden a person's exercise of religion unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a

---

beneficiaries"). Therefore it is unclear why Little Sisters has standing to challenge the contraception rule.

[6] The parties agree that RFRA neither requires nor authorizes the Moral Exemption rule.

compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

The Department's "Religious Exemption" rule would afford employers automatic, self-executing exemptions overwhelmingly—perhaps exclusively—in cases where RFRA does not require them. Nor does RFRA independently *authorize* an agency to grant exemptions that RFRA does not require, at least where, as here, such exemptions would be inconsistent with another federal law and would significantly harm third parties.

### A. The Rule Does Not Alleviate a Substantial Burden on the Religious Exercise of Most, If Not All, of the Employers It Exempts

RFRA does not require the Religious Exemption rule unless, at a minimum, that rule would eliminate a substantial burden that federal law would otherwise impose on the religious exercise of the exempted employers and plans *even if they invoked the contraceptive "accommodation*." According to the Government, "[t]he accommodation does not eliminate the substantial burden that the contraceptive-coverage mandate imposes on certain employers with conscientious objections." U.S. Br. 23. It is unlikely, however, that the accommodation imposes a substantial burden on the religious exercise of any but a tiny percentage—at most—of the employers and plans in question.

### 1. Most objectors' assertions of a substantial burden are predicated upon mistakes of law about how the accommodation operates

In the wake of this Court's decision in *Hobby Lobby*, approximately 122 nonprofit entities raised RFRA objections to the accommodation. 83 Fed. Reg. 57,575 (Nov. 15, 2018). The nature of the alleged burden on religious exercise was the same in each of those objector's cases: they alleged a sincere religious belief that employees' use of some or all forms of contraception is sinful and that the accommodation required them to be complicit in that wrongdoing—"to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Hobby Lobby*, 573 U.S. at 686.

The Government understandably has not challenged the sincerity of those entities' religious views of what constitutes proscribed "complicity." And courts may not second-guess whether someone's "religious beliefs are mistaken" concerning what types of assistance violate the actor's religious obligations. *Id.* at 725.

Even so, the judiciary need not defer to a litigant's *mistaken view about how a law operates*—a purely legal, not a religious, question. And as the Government itself previously explained, *see* U.S. *Zubik* Br. 36-40, the objectors' claims that the accommodation required them to be complicit in the use of contraception were predicated upon inaccurate understandings of "how the accommodation actually works." *Id.* at 37. If, for example, an entity's religion forbids "*providing the coverage* [for purchase of contraception] that the mandate requires," Little Sisters Br. 36 (emphasis

added), then the accommodation does not impose a substantial burden on its religious exercise because it does not, in fact, require an employer to provide coverage. Nor does it require an eligible employer to subsidize, facilitate, endorse, or otherwise participate in the use of contraception to which it has religious objections.

The Government has made little, if any, effort to question the views it previously offered to this Court about how the accommodation operates. It does, however, note that some objectors believe the accommodation "commandeers their own health care plans to provide coverage," U.S. Br. 23. But as the government itself has explained, that is simply not so: Indeed, for employers with "insured" plans or church plans—the vast majority of the objecting employers—the contraception coverage offered pursuant to the accommodation is not at all connected to the employee health plans they offer. *See* U.S. *Zubik* Br. 15-18, 38-39 & nns. 15-16.[7]

---

[7] Where an employer uses a "self-insured" employee insurance plan other than a church plan—as only three of the 37 *Zubik* petitioners did—the accommodation process requires the third-party plan administrator (TPA) to make payments for contraception (after which the government reimburses the TPA with a reduction in ACA exchange user fees). U.S. *Zubik* Br. 16-17. In such a case (and only in such a case), ERISA would treat the TPA's payments as being part of the same ERISA plan that the employer offers to employees. But that is not remotely akin to using a room in the employer's place of business, or hijacking or "commandeering" its airplane. *See* Marty Lederman, *The* Zubik *oral argument (Part I): Of substantial burdens and "hijacking,"* Balkinization, Mar. 24, 2016, https://bit.ly/3e1Uzf4. Neither the government nor the TPA uses any of the employer's property in such a case—the "plan" is merely a legal construct, a set of legal rules under ERISA. And neither the employer nor the plan pays

The Government also vaguely suggests (U.S. Br. 23) that the accommodation requires objecting employers "to facilitate notification to the health plan issuer or third-party administrator that will, upon receiving such notification, provide contraceptive coverage in connection with their plans." The Government appears to be referring to the unexceptional fact that in many cases the issuer or the TPA will come to learn of the employer's decision to invoke the accommodation and will, in turn, become independently responsible for providing coverage. It is unlikely many employers would conclude that a mere notification of a refusal to facilitate certain conduct would render them morally responsible for the independent actions of actors who thereafter act in lieu of the objector. But in any event, and as the Government itself previously explained, the fact that one person's "opt-out" results in arrangements between the government and third parties to do what the objector is exempted from doing is *legally* insufficient to establish a RFRA "substantial burden," just as the government's operation of its internal functions does not establish a cognizable burden regardless of its impact on religious practices. U.S. *Zubik* Br. 42-51 (discussing *Bowen v. Roy*, 476 U.S. 693 (1986), and *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)). *Accord Priests for Life v. HHS*, 808 F.3d 1, 26 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc) ("RFRA does

---

for anything, directly or indirectly. In any event, in the unlikely case an employer has a religious objection to such a scheme despite its own noninvolvement in the provision of contraceptive coverage, it could then simply switch to offering its employees use of an insured plan, in which case the plan "issuer," an insurance company, would make the contraceptive payments outside the auspices of the plan itself, even as a technical ERISA matter. *See* U.S. *Zubik* Br. at 39 n.16.

not authorize religious organizations to dictate the independent actions of third-parties.") (citation and internal quotation marks omitted).

The Government also cites to a footnote in *Priests for Life* in which then-Judge Kavanaugh noted that the accommodation not only requires the objecting organization to opt out of involvement, but also to *identify* to the Government the issuer or TPA who might then provide the coverage. U.S. Br. 23 (citing 808 F.3d at 25 n.11). Even if there were some employers who considered such identification of their contractual partners a form of prohibited complicity, *but see* U.S. *Zubik* Br. 36 (noting that none of the 37 objecting parties objected to that identification requirement), that would, at most, only raise a question concerning whether RFRA's "less-restrictive-alternative" prong would require the Government to determine the issuer's or TPA's identity in another manner in such unusual cases. It would not be a basis for a total exemption from the accommodation, let alone for the Religious Exemption rule, which allows countless employers to automatically deny coverage to their employees even if they do not have religious duties to refrain from identifying their issuers or TPAs.

Accordingly, the Government was right when it explained to this Court four years ago that the accommodation is unlikely to substantially burden even the small group of employers and other entities that raised RFRA objections to it.

**2. In any event, the Religious Exemption rule applies to many employers that could not satisfy RFRA's "substantial burden" requirement**

Even if a few employers would be able to demonstrate that the accommodation would impose a substantial burden on their religious exercise, the Religious Exemption rule extends far more broadly to cover many employers who would or could not make such a showing.

The Religious Exemption applies, inter alia, to any employer that "*objects, based on its sincerely held religious beliefs*," to establishing, maintaining, providing, offering, or arranging" for "[a] plan, issuer, or third party administrator that provides or arranges such coverage or payments." 45 C.F.R. 147.132(a)(2) (emphasis added).

In order to deny its employees contraception coverage, therefore, an employer need only *have* a religious objection to having any involvement in or connection with an insurance plan, issuer or TPA that provides such coverage. According to the Departments, it is not even necessary for such an employer to give the Government a certification or notice acknowledging that it plans to exercise the exemption, let alone to explain how (or whether) the accommodation would substantially burden its religious exercise. 83 Fed. Reg. 57,558 (Nov. 15, 2018).

An employer might, for example, simply begin to deny its employees any contraception coverage based solely upon a sincere belief that its employees' use of contraception is sinful or religiously discouraged. Under the terms of the Departments' Religious

Exemption rule, it would not matter whether the employer has religious obligations to avoid any involvement in such coverage—or, more to the point, to refrain from using the accommodation. The rule, in other words, does not require an employer to believe, to attest, or to explain how the accommodation would substantially burden its religious exercise.

The rule therefore could result in countless self-executing exemptions beyond the 122 or so entities that brought RFRA claims challenging the accommodation, *see id.* at 57,575, all of which were at least compelled to allege facts in support of their substantial-burden allegations. For example, the Departments estimate that approximately 209 entities used the accommodation, very few of which alleged that it violated their rights under RFRA. *Id.* at 57,576. Those entities now would be able to exercise an unconditional exemption, as long as they have a sincere, religiously based objection to their employees' use of contraception. So, too, could the 87 closely held for-profit companies that filed suit challenging the original requirement. In the wake of this Court's decision in *Hobby Lobby*, very few of those companies alleged that invoking the accommodation would substantially burden their religious exercise, *see* 82 Fed. Reg. 47,818 (Oct. 13, 2017), yet under the new rule all of them would be entitled to the complete exemption they originally sought. And even though *no* publicly traded companies filed RFRA challenges to the contraception requirement, many such companies could now exercise the exemption if their leadership opposed employees' contraception use on sincere religious grounds. *See* 45 C.F.R. 147.132(a)(1)(i)(D) (extending exemption eligibility to "[a] for-profit entity that is not closely held").

The new rule, therefore, affords exemptions far beyond what RFRA requires.

### B. The Accommodation Satisfies RFRA's "Compelling Interest" Test

In *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam), the Government convincingly explained (U.S. *Zubik* Br. 54-72) why, even if some of the petitioners there could establish that compliance with the Departments' accommodation would continue to impose a substantial burden on their exercise of religion, the accommodation would not violate RFRA because requiring the petitioners to comply with it was the least restrictive means of furthering a compelling state interest—namely, "ensuring that women receive the full and equal benefits of preventive health coverage guaranteed by the Affordable Care Act, including coverage of contraception and other services of particular importance to women's health," *id.* 54-55.

The only five Justices to reach the question in *Hobby Lobby* likewise concluded that the Government has a "compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." 573 U.S. at 737 (Kennedy, J., concurring); *accord id.* at 761-764 (Ginsburg, J., dissenting); *see also id.* at 728 (majority opinion) (reserving that question).

Those Justices, and the Government in *Zubik*, were correct. If an employee plan provides cost-free contraceptive coverage *or* the employer exercises the accommodation, female employees (and employees' female beneficiaries) will have greater access to effective contraception—which will in turn decrease their risks

of unintended pregnancies. *See id.* at 693 (where an employer uses the accommodation the usual effect on female employees "would be precisely zero"). In stark contrast, most of the women who work for employers exercising the new Religious Exemption will not enjoy such access. Therefore they are more likely to use less effective forms of contraception (or sometimes forgo contraception altogether), with an inevitable increase in the health problems and abortions associated with unwanted pregnancies. As then-Judge Kavanaugh observed:

> It is not difficult to comprehend why a majority of the Justices in *Hobby Lobby* (Justice Kennedy plus the four dissenters) would suggest that the Government has a compelling interest in facilitating women's access to contraception. About 50% of all pregnancies in the United States are unintended. The large number of unintended pregnancies causes significant social and economic costs. To alleviate those costs, the Federal Government has long sought to reduce the number of unintended pregnancies, including through the Affordable Care Act by making contraceptives more cheaply and widely available. It is commonly accepted that reducing the number of unintended pregnancies would further women's health, advance women's personal and professional opportunities, reduce the number of abortions, and help break a cycle of poverty that persists when women who cannot afford or obtain contraception become pregnant unintentionally at a young age.

*Priests for Life*, 808 F.3d at 22–23 (Kavanaugh, J., dissenting from denial of rehearing en banc); *see also id.* at 23 n.9 (noting that about 40 percent of all unintended pregnancies end in abortion).

In some cases, religious exemptions causing such third-party harms would raise serious Establishment Clause concerns.[8] At a minimum, however, the government has a compelling interest, for purposes of RFRA, in not causing such harms, in light of the "fundamental principle of the Religion Clauses" that "[t]he 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." *Estate of Thornton v. Caldor, Inc.*, 473 U.S. 703, 710 (1985) (*quoting Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (L. Hand, J.).

Thus, as this Court reaffirmed in *Hobby Lobby*, "in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'" 573 U.S. at 729 n.37 (*quoting Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)).

That principle follows directly from the Court's Free Exercise jurisprudence in the era preceding *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990)—a body of precedent Congress intended to "restor[e]" (as a statutory matter) when it enacted RFRA's compelling-interest test.[9]

---

[8] *See* Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 Yale L.J.F. 416, 436-437 & n.110 (2016) (Lederman), https://bit.ly/2JOPaue.

[9] In *Hobby Lobby*, the Court remarked, without deciding, that perhaps "RFRA did more than merely restore the balancing test used in the *Sherbert* [*v. Verner*, 374 U.S. 398 (1963)] line of [Free Exercise] cases; it provided even broader protection for religious liberty than was available under those decisions." 573 U.S. at 695 n.3; *but see id.* at 706 n.18 (stating that "[f]or present purposes, it is unnecessary to adjudicate" whether RFRA's "least restrictive

From 1961 to 1990, the Court rejected virtually all claims for exemptions to generally applicable laws in commercial settings (including in cases involving an employment relationship), even while purporting to apply the sort of heightened scrutiny RFRA now requires.[10] In some such cases, where granting a religious exemption to one party would necessarily harm others, the Court held that the government had a compelling interest in avoiding such third-party harms, even where there were few such harmed parties.

In *Bob Jones University v. United States*, 461 U.S. 574 (1983), for example, two universities sought Free Exercise exemptions from the Internal Revenue Service's denial of tax-exempt status to schools that

---

means" test "went beyond what was required by our pre-*Smith* decisions"). This suggestion, based upon a dictum in *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997), was mistaken, as amicus has explained in detail elsewhere. *See* Lederman, 125 Yale L.J.F. at 428-433; Brief of Amici Religious Liberty Scholars Gordon et al., in *Zubik* at 5-13. Indeed, the prospect of enacting RFRA was bleak until important several religious organizations (including the U.S. Conference of Catholic Bishops) and leading House members—concerned that RFRA might be construed to require religion-based exemptions to abortion restrictions—were given sufficient assurance that the statute would merely "'turn the clock back' to the day before *Smith* was decided." H.R. Rep. No. 103-88, at 15 (1993) (statement of Reps. Hyde, Sensenbrenner, McCollum, Coble, Canady, Inglis, and Goodlatte); *see also id.* at 8 (Judiciary Committee explanation that it was "absolutely clear [RFRA] does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with free exercise jurisprudence, including Supreme Court jurisprudence, under the compelling governmental interest test prior to *Smith*"); S. Rep. No. 103-111, at 12 (1993) (similar).

[10] *See* Lederman, 125 Yale L.J.F. at 435-436 & nns. 105-108 (citing cases).

discriminated among students on the basis of race—a rule that burdened the universities' adherence to their religious commitments to racial segregation. The Court concluded that the burden on religious liberty was "'essential to accomplish an overriding governmental interest'" *id.* at 603 (quoting *United States v. Lee*, 455 U.S. 252, 257 (1982)), notwithstanding that an exemption would have affected only a small number of African-American students—viz., those who would have chosen to attend the tiny remainder of the nation's schools that had retained discriminatory practices for religious reasons.

So, too, here, the United States has a compelling interest in denying religious exemptions that would prevent many women from being able to afford to use forms of contraception that would most effectively prevent unwanted pregnancies.[11]

---

[11] The Solicitor General notes that some women who work for exempted employers might be able to obtain cost-free contraception elsewhere. U.S. Br. 26-27. Even if that were so, however, it would not affect the Government's continuing compelling interest in ensuring coverage for the majority of women who receive health insurance under plans offered by such employers, as the Government itself explained in *Zubik*. U.S. *Zubik* Br. at 76-78; *see also id.* at 83 (describing the inadequacy of contraceptive coverage under Title X of the Public Health Service Act, 42 U.S.C. 300 *et seq*.).

Notably, the Government does *not* argue that the hypothetical (but unrealistic) prospect of further congressional appropriations might offer a "less restrictive" way of furthering the Government's compelling interests. Amicus has previously explained why such an argument would be unavailing under RFRA. *See* Lederman, 125 Yale L.J.F. at 433-440; Brief of Amici Religious Liberty Scholars Gordon et al., in *Zubik* at 13-26.

The Government it offers only a single counter-argument: According to the Solicitor General, the previous "Church Exemption" caused, and the Departments' existing treatment of "church plans" still causes, such "'appreciable damage'" to comprehensive contraception coverage that the Government's interest in securing such coverage for women cannot be deemed "compelling" for RFRA purposes. Pet. Br. 25-26 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993)).

The objecting plaintiffs in *Hobby Lobby* made a similar underinclusiveness argument. *See* Resp. Br. in *Hobby Lobby*, No. 13-354, at 50-51, 55-56 & n.26; Pet. Br. in *Conestoga Wood,* No. 13-356, at 59-60. Yet five Justices rejected it (and no Justices embraced it). There is no reason for the Court to upset that judgment here.[12]

---

[12] Although it not resolve the "compelling interest" question, the opinion for the Court in *Hobby Lobby* adverted to a different underinclusiveness consideration that the Solicitor General does not invoke here—the fact that the ACA's "grandfathering provision," 42 U.S.C. 18011, allows a phasing-in period before a plan must provide *any* preventive care coverage. 573 U.S. at 727. As Justice Ginsburg noted, however, *id.* at 764 (Ginsburg, J., dissenting), this isn't so much an exemption as it is a transition provision (one that ends when a plan is amended in other common ways), and the percentage of employees in grandfathered plans is steadily declining—from about 56% of employees in 2011 to 13% or fewer today. *See* Kaiser Family Found. & Health Research & Educ. Trust, Employer Health Benefits: 2019 Annual Survey, at 209 (2019), https://bit.ly/34hEjSZ. The grandfathering provision therefore does not call into question the compelling nature of any of the preventive care requirements of the ACA, which include not only the women's health provisions but also those requiring coverage of, e.g., measles immunizations, colorectal cancer screening, and preventive care and screenings for infants and

Consider, first, HRSA's previous "Church Exemption." As explained in Part I, *supra*, the Government claims that the women's preventive-care provision itself, Section 300gg-13(a)(4), authorized HRSA to establish the Church Exemption as well as any other employer-specific exemptions HRSA deems "appropriate." If the Government is right about that, then there is no need for the Court to address RFRA at all. But if the Government is mistaken about whether Section 300gg-13(a)(4) affords HRSA such broad discretionary authority, then the ACA did not authorize the Church Exemption, either, in which case it cannot be held out as the basis for undermining *Congress's* effort to comprehensively guarantee women affordable access to preventive-care services.

To be sure, even in the absence of an exemption, churches would still be able to make use of the Departments' accommodation, and most of them provide their employees benefits under "church plans." Because the Government cannot *guarantee* that every church-plan TPA will voluntarily agree to provide cost-free contraception coverage in cases where an employer (including a church) invokes the accommodation, *see supra* at 9 n.5, the Government is correct when it claims that *some* women covered by church plans will not receive such coverage. U.S. Br. 26. The Government does not offer any estimate of the size of the class of employees who might not receive such coverage. Even so, it invokes the prospect of some such non-coverage in the church-plan context as the principal basis for the Departments' current view that guaranteeing women's coverage cannot be a "compelling" interest. *See* 83

---

children. *See* Marty Lederman, Hobby Lobby *Part IV: The Myth of Underinclusiveness*, Balkinization (Jan. 21, 2014), https://bit.ly/39TdfKR.

Fed. Reg. 57,547 (Nov. 15, 2018) (asserting, without elaboration, that the accommodation "effectively left employees of *many* non-exempt religious nonprofit entities without contraceptive coverage" (emphasis added)).

The underinclusiveness resulting from this idiosyncratic treatment of church plans, however, does not call into question the compelling nature of the Government's broader interest in securing the ability of most women to obtain effective. The Government's own brief in *Zubik* (*see* pp. 67-71) thoroughly identified the flaws in the Government's current underinclusiveness argument. Two points, both further elaborated by the Government in that earlier brief, are most salient here:

*First*, this Court's Free Exercise precedents in the era before *Smith*—which Congress intended the "compelling interest" test in RFRA to incorporate (*see supra* note 9)—demonstrate that a government's conferral of a limited exemption for certain religious persons or entities does not ordinarily undermine the Government's compelling rationale for not affording a much broader religious exemption (at least absent any sect-discrimination, which is not present here).

In *United States v. Lee*, 455 U.S. 252 (1982), for example, the Court rejected a Free Exercise claim for an exemption to a requirement that employers submit social security taxes, even though Congress had already crafted a more circumscribed religious exemption. *Id.* at 260-261. *Accord Hernandez v. Comm'r*, 490 U.S. 680, 699-700 (1989); *see also Gillette v. United States*, 401 U.S. 437, 461-462 (1971) (Government's denial of conscientious objector exemptions to those with religious objections to fight in a particular war was

"strictly justified by substantial governmental interests," notwithstanding that Congress had exempted a smaller category of those with religious objections to *all* wars).

The Solicitor General disregards such precedents. Instead, he relies solely upon this Court's 2006 RFRA decision in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, claiming that it is "directly analogous" to this case. U.S. Br. 26. In *O Centro*, the Court held that an existing statutory exemption from requirements of the Controlled Substances Act, 21 U.S.C. 801 et seq., for tribal members who use peyote in religious ceremonies, "fatally undermine[d]" the denial of a similar exemption to the União do Vegetal (UdV) church for the ceremonial use of *hoasca* tea.

The two cases are not closely analogous, however. In *O Centro*, the Government had failed to offer any evidence that "the particular use at issue …—the circumscribed, sacramental use of *hoasca*" by a 130-member sect—would actually cause the harms ordinarily associated with the use of hallucinogens. 546 U.S. at 432. The exception Congress had already codified, for tribal use of peyote in analogous circumscribed circumstances, confirmed that such a sacramental use of hallucinogens would not necessarily result in the sorts of harms to the compelling interests that supported the broader ban on controlled substances. *Id.* at 433-35. Here, by contrast, there is no question that the Departments' Religious Exemption *will* cause harms whenever employers exercise it: the denial of cost-free coverage will mean that fewer women will regularly use the most effective forms of contraception, thereby resulting in more unwanted pregnancies.

Moreover, even if the UdV's use of *hoasca* tea in *O Centro* did risk some of the harm the Government identified, that potential impact on the Government's interest was minuscule in comparison to the possible harms associated with the peyote exemption Congress had already conferred, due to a marked difference in scale: "If such use is permitted in the face of the congressional findings . . . for hundreds of thousands of Native Americans practicing their faith," explained Chief Justice Roberts, "it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs." 546 U.S. at 433.

Here, by contrast, the ratio is inverted: Although the Government has not specified how many women covered by church plans are (or might be) denied coverage under the accommodation, the new Religious Exemption would surely affect far more employees and beneficiaries, especially in light of its breadth and the fact that many employers—including both closely held and publicly traded for-profit companies—could simply deny coverage without making any showing to the Government of any burden on their religious exercise. *See supra* at 16-17. As the Government itself warned in *Zubik*, such an exemption—even *before* the new rule's extension to publicly traded corporations—would thus "extinguish the statutory rights of millions of people." U.S. *Zubik* Br. 68. *O Centro* certainly does not suggest that, in such circumstances, a circumscribed "church plan" gap fatally undercuts the Government's overwhelming interest in avoiding that far greater harm to its asserted interests. *See also* Baptist Joint Committee for Religious Liberty Br. in *Zubik* at 36-37 (written by Prof. Douglas Laycock).

*Second*, a holding that the modest church-plan gaps under the accommodation necessitate a categorical exemption under RFRA—not only for all religious nonprofit organizations but also for all religious objectors to contraception, including for-profit corporations—"would be perverse and profoundly at odds with our Nation's traditions … ." U.S. *Zubik* Br. 68. Such a result, the Government explained, "would powerfully *discourage* the government from creating exemptions for houses of worship," and "[i]t is hard to imagine a proposition more deeply inconsistent with RFRA's animating spirit … ." *Id.* Indeed, it would "call into question numerous other provisions of federal law" that "confer benefits on houses of worship and certain related organizations, without extending the same treatment to *all* religious organizations." *Id.* at 70-71. As Professor Laycock wrote for the Baptist Joint Committee (BJC *Zubik* Br. 29, 33):

> This argument is a mortal threat to thousands of specific religious exemptions crafted by legislatures and administrative agencies. Such exemptions are invalid if they discriminate between faiths or denominations. But specific religious exemptions necessarily have boundaries, and if legislatures and agencies cannot define those boundaries, specific exemptions will not be enacted at all. …
>
> If courts do not defer to reasonable efforts to draw such boundaries, specific exemptions in legislation and administrative rulemaking will become politically impossible.

The underinclusiveness argument the Government is now making "would thus be Pyrrhic in the extreme," because "[e]ven if it produced a win for an expansive

religious-liberty claim here, it would create forever after an often insuperable obstacle to legislative protection for religious liberty." *Id.* at 34.

Accordingly, if the Court reaches the question it should hold that the Departments' accommodation satisfies RFRA's "compelling interest" test.

### C. RFRA Does Not Independently Authorize the Religious Exemption Rule

The Government argues in the alternative that even if RFRA does not *require* the Religious Exemption rule, nevertheless RFRA *authorizes* HRSA to promulgate the exemption in order to prevent the imposition of any "substantial burdens" on some employers' religious exercise. U.S. Br. 28-29. That is not correct.

This secondary argument by the Government correctly presumes that the Departments have already adopted a means of ensuring RFRA compliance (i.e., the accommodation) that does not result in significant circumvention of other statutory guarantees. Where that is so, it would be very odd to assume Congress conferred upon HRSA the authority to swap out such a "win/win" resolution for a *different* means of RFRA-compliance that would intrude far more severely on the principal statutory objective Congress assigned to the agency (here, to guarantee women cost-free access to important preventive health care). After all, where there is tension between two legal obligations, Congress presumably intends that agencies, like courts, should strive "to give effect to both," *Morton v. Mancari*, 417 U.S. 535, 551 (1974), to the greatest possible extent.

That describes the Departments' accommodation process to a tee. By contrast, the Religious Exemption rule would gratuitously subjugate the ACA's preventive-care protections in order to prevent nonexistent or rare RFRA violations. There is no reason to think Congress authorized HRSA, an agency specializing in health care, to choose such a means of complying with RFRA.

At the very least, surely Congress would not have authorized an agency to avoid RFRA violations as to a *few* persons by promulgating a rule that exempts a much larger category of persons from compliance with a statutory obligation, even where those additional parties would not be able to demonstrate a substantial burden on their religious exercise. Yet that is what the Religious Exemption would do. *See supra* at 16-17.

Construing RFRA to authorize such broad exemptions in cases where RFRA does not require them would also raise serious constitutional concerns. The Court has not yet conclusively identified all the circumstances in which the Establishment Clause would forbid a government from granting religious exemptions that harm third parties. *See supra* at 20. The Court has made clear, however, that the Constitution permits the state to countenance such third-party harms only, at a minimum, where the exemption in question "alleviates exceptional *government*-created burdens on private religious exercise." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (emphasis added); *accord Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (the exemption must "alleviate significant governmental interference" with the exempted parties' religious exercise); *compare Estate of Thornton*

*v. Caldor, Inc.*, 472 U.S. 703 (1985) (Establishment Clause prohibited a religious exemption that alleviated a religious burden that one group of private parties imposed on others in an employment relationship). Even if the Religious Exemption here might satisfy that test as to *some* parties, it would flunk it as to many other employers that the Departments would empower to deny preventive-health coverage.[13]

---

[13] The Government suggests that RFRA might authorize the Religious Exemption rule, even in cases where the Government is already in compliance with RFRA. in order "to bring to a close the more than five years of litigation over RFRA challenges to the [contraceptive] Mandate," 83 Fed. Reg. 57,545 (Nov. 15. 2018); *accord* U.S. Br. 29. If such a litigation-avoidance rationale were sufficient grounds for conferring religious exemptions to important laws, however, that would afford plaintiffs a ready means of securing exemptions even where RFRA does not require them (including where the law in question does not substantially burden the objectors' religious exercise). Moreover, as this very case demonstrates, such exemptions would not bring litigation to a halt—they would only invite suits raising statutory and constitutional challenges by those parties who are harmed by the religious actors' exercise of those exemptions.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

MARTIN S. LEDERMAN
*Counsel of Record*
600 New Jersey Avenue, NW
Washington, D.C. 20001
(202) 662-9937
Martin.lederman@law.georgetown.edu

April 8, 2020