No. 19-431

In the
Supreme Court of the United States

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

Petitioner,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONER

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April 24, 2020

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REPLY BRIEF

Respondents' brief reinforces the absurdity of deciding this landmark religious liberty dispute without the religious believers. Respondents' arguments depend on mischaracterizing the nature of the Little Sisters' objections, narrowing the protections of the Religious Freedom Restoration Act (RFRA), and minimizing the interests of those who benefit from the expanded exemption. Respondents nonetheless insist that the Little Sisters lack standing, albeit only as an afterthought. In a scant page-and-a-half of briefing, they offer no coherent reason why the Little Sisters lack standing to fight for a reading of RFRA broad enough to protect them or to defend an exemption that grants them enduring protection for their sincerely held religious beliefs. Nor can respondents justify the Third Circuit's unnecessary ruling when they do not dispute the government's appellate standing.

On the merits, respondents' arguments fare no better and reinforce the importance of bringing this long-simmering dispute to a close. From the outset, the government recognized that the contraceptive mandate trod on religiously sensitive terrain and could tolerate exemptions. Accordingly, the government exempted a subset of religious objectors and tens of thousands of secular employers. Nonetheless, for years, the federal government demanded that religious orders like the Little Sisters and other religious adherents comply with the mandate through various regulatory accommodations. Even after this Court held in *Burwell* v. *Hobby Lobby* that the contraceptive mandate and its massive fines imposed substantial burdens on religious freedom, the federal government insisted that

religious objectors submit the forms that it needed to hijack their plans or face the same massive penalties. Now that the federal government has finally recognized that the way to stop violating RFRA is to stop denying religious objectors an exemption offered to countless others, respondents have sought to prolong the dispute and the interference with religious exercise.

This Court should put a definitive end to those efforts. Respondents' contention that the regulatory "accommodation" satisfies RFRA is deeply flawed. They cannot deny that the burdens of non-compliance are massive, and their effort to dismiss the burdens of compliance indulges the precise second-guessing of sincerely-held religious beliefs that *Hobby Lobby* and a host of precedents forbid. Their vision of RFRA as authorizing only the least accommodating accommodation defies statutory text and Congress' evident intent to restore religious freedom by protecting it broadly. Their miserly view of the government's authority under the Affordable Care Act would foreclose even the original church exemption. And their procedural arguments depend on double standards that treat government efforts to constrain liberty more favorably than government efforts to promote liberty and accommodate religion. From start to finish, respondents' arguments ignore this Court's teaching that government efforts to relieve burdens on religious exercise "follow[] the best of our traditions." *Zorach* v. *Clausen*, 343 U.S. 306, 313-14 (1952).

I. The Little Sisters Have Appellate Standing.

Respondents address the Little Sisters' standing as an afterthought, on the final page-and-a-half of their

57-page brief. They relegate the issue for good reason, as their arguments are groundless.

Respondents first observe that even intervenors must have appellate standing. Resp.Br.55. The Little Sisters have never suggested that intervenors who "go it alone" on appeal are excused from satisfying Article III. But it is well settled that courts need not gratuitously probe intervenors' standing when another party seeking the same or greater relief has unquestioned appellate standing. See, *e.g.*, *Rumsfeld* v. *FAIR*, 547 U.S. 47, 52 n.2 (2006). Whether the Little Sisters have appellate standing is therefore immaterial, for respondents do not dispute that the government had standing to seek review both in the Third Circuit and here. Respondents resist that conclusion, insisting that "consolidated cases retain their separate identities." Resp.Br.56. But whether consolidated or not, when two parties appeal the same judgment, one party with unquestioned appellate standing suffices, as this Court's cases squarely establish. See, *e.g.*, *Horne* v. *Flores*, 557 U.S. 433, 446 (2009); *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008) (plurality op.); *McConnell* v. *FEC*, 540 U.S. 93, 233 (2003).[1]

In all events, the same factors that led a unanimous Third Circuit panel to conclude that the Little Sisters could intervene in this litigation amply justify

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[1] Respondents' reliance (at 56-57) on *Hall* v. *Hall*, 138 S. Ct. 1118, 1125-1128 (2018), and *Butler* v. *Dexter*, 425 U.S. 262, 267 n.12 (1976), is therefore misplaced. The former involved finality; the latter involved preservation of constitutional issues; neither questioned the well-established rule that there is no need for duplicative appellate standing.

their standing to appeal. As Judge Hardiman explained for that panel, the Little Sisters have "concrete" and "significantly protectable" interests in this case, which concerns the validity of a religious exemption for which they have "litigated * * * for [seven] years." *Pennsylvania* v. *President*, 888 F.3d 52, 58 (3d Cir. 2018). The Little Sisters therefore have "a direct stake in the outcome of the case" sufficient to satisfy Article III. *Hollingsworth* v. *Perry*, 570 U.S. 693, 705 (2013) (citation and internal quotation marks omitted).

Echoing the different Third Circuit panel below, respondents argue that the Little Sisters no longer retain these interests because of the Colorado injunction. Resp.Br.55-56. But the Colorado injunction is premised on the view that the "accommodation" violates RFRA. LSP.Br.26. The Little Sisters thus have a concrete interest in resisting respondents' efforts to have this Court adopt the opposite view.

Finally, respondents do not dispute that the Colorado injunction protects the Little Sisters only if they retain their current plan. Instead, respondents assert (at 56) that the Little Sisters "forfeited" this obvious basis for appellate standing in the Third Circuit by asserting it at oral argument instead of in their reply brief. But the Third Circuit had no forfeiture concerns, and regardless, "standing to litigate cannot be * * * forfeited." *Virginia House of Delegates* v. *Bethune-Hill,* 139 S. Ct. 1945, 1951 (2019).

Respondents' real agenda seems to be to convert a landmark dispute about religious exercise into an intramural squabble among governments. That view has no support in Article III or common sense. This

dispute has always been about the religious liberty of the Little Sisters and other religious adherents. To decide this case with religious believers relegated to the sidelines would be *Hamlet* without the Prince.

II. RFRA Requires—And Both RFRA And The ACA Empower—The Government To Grant The Religious Exemption To The Contraceptive Mandate.

On the merits, respondents contend that the government lacked authority to promulgate the religious exemption. See Resp.Br.29-52. In their view, the "accommodation" already fully remedies the RFRA problem that the contraceptive mandate creates, and the government is powerless to go any further in accommodating religious exercise. That position is deeply flawed. The "accommodation" was just one more government effort to hijack plans and force the Little Sisters and other religious adherents to comply with a government mandate to which they sincerely object. Both the contraceptive mandate and the equally mandatory "accommodation" are enforced by the same draconian penalties—penalties that this Court has already found impose a substantial burden on religious exercise—and the numerous exemptions for both religious and non-religious employers doom any effort to satisfy strict scrutiny. The "accommodation" thus was a RFRA *violation*, not a RFRA "remedy." But even if the accommodation did not affirmatively violate RFRA, the government would still have authority under both RFRA and the ACA to provide the straightforward remedy of simply exempting all religious objectors, and not just "churches."

A. Respondents' Claim That The "Accommodation" Complies With RFRA Is Deeply Flawed.

1. Respondents' principal argument is that RFRA neither requires nor even permits the religious exemption because "[t]he accommodation does not fall afoul of RFRA." Resp.Br.36-37. In their view, "the accommodation does not compel any action that facilitates the provision of contraception by an objecting employer, and therefore does not substantially burden religious exercise." *Id.* at 38. That argument reflects a fundamental misconception of both how the "accommodation" works and how courts should properly assess RFRA claims.

As this Court explained in *Hobby Lobby*, the contraceptive mandate substantially burdens religious exercise because it threatens religious objectors with "severe" "economic consequences" if they "do not yield to" "demands that they engage in conduct that seriously violates their religious beliefs." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720-721 (2014). When the government demands someone take affirmative action forbidden by their sincerely held religious beliefs "or else," the substantial burden analysis properly focuses on the "or else," *i.e.*, the burdens of non-compliance. To focus instead on whether the actions demanded for compliance really violate the objectors' religion would be to ask a "question that the federal courts have no business addressing"—namely, "whether the religious belief asserted * * * is reasonable." *Id.* at 724.

Respondents have little choice but to pursue that forbidden tack and question whether compliance with

the contraceptive mandate via the regulatory accommodation really violates the Little Sisters' religious beliefs because the penalties for non-compliance—the "or else" if the Little Sisters refuse to take compelled action forbidden by their beliefs—is the exact same set of penalties this Court already found to be a substantial burden in *Hobby Lobby*. The government's consistent view that the "accommodation" is a means of complying with the mandate is fully reflected in the penalties. To invoke the "accommodation," religious objectors must do more than register their objections. The government demands that religious objectors take affirmative steps to execute paperwork that the government deems necessary for the provision of "seamless" contraceptive coverage to their employees. LSP.Br.8-11. Failing to take those compelled steps puts religious objectors in non-compliance with the contraceptive mandate and exposes them to same "severe" "economic consequences" found obviously substantial in *Hobby Lobby*, 573 U.S. at 720-721.[2]

To be sure, the affirmative acts that the "accommodation" demands differ from those that the mandate itself demands. But the fact remains that the Little Sisters still sincerely believe that compliance requires actions forbidden by their religious beliefs. It is irrele-

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[2] Both the compelled actions and the massive penalties readily distinguish this case from the objection to the state's use of social security numbers in *Bowen* v. *Roy*, 476 U.S. 693 (1986). The Court distinguished between (1) objections to the government's *internal* use of social security numbers and (2) compelled actions of the governed. A majority found the latter *would* trigger constitutional scrutiny even where the burden was forgone benefits, rather than, as here, massive penalties.

vant that respondents and the court below could comprehend the Little Sisters' objection to the contraceptive mandate, but cannot fathom their objection to the accommodation. Secular authorities have often doubted religious adherents' views of undue complicity. Thomas More's contemporaries thought him unduly rigid, but he nonetheless "went to the scaffold rather than sign a little paper for the King." *East Tex. Baptist Univ.* v. *Burwell*, 807 F.3d 630, 635 (5th Cir. 2015) (Jones, J., dissenting from denial of rehearing en banc). Having conceded the sincerity of the Little Sisters' religious beliefs, see, *e.g.*, Resp.Br.1, 37, respondents are in no position to tell the Little Sisters that they misunderstand Catholic doctrine concerning whether they are forbidden from signing a piece of paper for the sovereign.

2. In all events, the Little Sisters' concerns with complicity are hardly mysterious or idiosyncratic. The facts that the government demanded the paperwork, punished non-compliance with the same penalties as for non-compliance with the contraceptive mandate, and viewed the accommodation as a means of compliance were no accident. The accommodation requires those who utilize it "to submit [a] form precisely because the form is part of the process by which the Government ensures that the religious organizations' insurers provide contraceptive coverage to the organizations' employees." *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 20 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of rehearing en banc). After all, "if the form were meaningless, why would the Government require it," let alone threaten those who fail to submit it with millions of dollars in penalties? *Ibid.*

Indeed, respondents themselves emphasize that compliance via the "accommodation" would "ensur[e] seamless access to contraceptive coverage." Resp.Br.45; see also *id.* at 43, 46, 47. And as the federal government has admitted (repeatedly), "seamless" is just another way of saying that coverage would be provided through the religious objector's own plan infrastructure. See, *e.g.*, U.S. Br. at 38, 75, *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (conceding that "accommodation" guarantees that coverage is provided as "part of the same 'plan'"—not a "separate" plan—and "'in a seamless manner'"); Tr. of Oral. Arg. at 60-61, *Zubik*, *supra* (No. 14-1418) (Solicitor General agreeing that government "want[s] the coverage for contraceptive services to be provided * * * in the one insurance package"); U.S.Br.23 (acknowledging that the "accommodation" "commandeers * * * health plans to provide coverage, and requires them to facilitate notification to the health plan issuer or third-party administrator that will * * * provide contraceptive coverage in connection with their plans").[3]

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[3] Respondents dispute whether "any contraceptive coverage provided by" the Little Sisters' third party administrator "through the accommodation would be part of the 'same "plan"' as their other health coverage" because the Little Sisters use a self-insured church plan. Resp.Br.41 (citation omitted). The Little Sisters thoroughly debunked this argument in *Zubik*. See Pet'rs' Reply Br. at 6-10, in Nos. 15-35, 15-105, 15-119, & 15-191. In short, even with respect to self-insured church plans, the government still deems submission of the paperwork necessary and contemplates, in its own regulations, the existence of only one plan. See, *e.g.*, 78 Fed. Reg. 39,870, 39,876 (July 2, 2013) (explaining that there will *not* be "two separate health insurance policies (that is, the group health insurance policy and the individual contraceptive coverage policy)").

In short, the government's consistent characterization of the "accommodation" as a means of complying with the contraceptive mandate is not just semantics. See Resp.Br.40-41. It is a candid admission of what the "accommodation" actually demands: facilitation of the provision of the objectionable coverage by hijacking the objecting employer's own plan. It therefore should come as no surprise that religious objectors do not share respondents' view that taking the steps required by the "accommodation" would not require them to do what their faith forbids.

3. Respondents' effort to defend the "accommodation" as the least restrictive means to further a compelling interest is, if anything, less persuasive. The mandate's numerous exemptions for countless employers, religious and secular, some for reasons no more compelling than administrative convenience, doom any effort to defend the accommodation under that "exceptionally demanding" standard. *Hobby Lobby*, 573 U.S. at 728.

Under that standard, "[i]f a less restrictive means is available for the Government to achieve its goals," it is not optional, "the Government must use it." *Holt* v. *Hobbs*, 574 U.S. 352, 365 (2015) (citation omitted). And even assuming the government has a compelling interest in ensuring cost-free access to contraceptives, the government candidly acknowledges that it has ample means at its disposal to accomplish that objective without coercing the aid of religious objectors. Not only can "many women * * * obtain such coverage through the health plans of other family members," but "existing federal, state, and local programs provide free or subsidized contraceptives to low-income

women." U.S.Br.26-27 (citing *Hobby Lobby*, 573 U.S. at 728-730); accord U.S. Br. at 65, *Zubik*, *supra* (No. 14-1418); see also 84 Fed. Reg. 7714, 7734 (Mar. 4, 2019) (clarifying broader access to subsidized contraceptives).

Respondents protest that these alternatives are not as "seamless" as providing the coverage through the religious objector's own plan infrastructure. Resp.Br.45. At the outset, respondents' insistence that the coverage is and must be "seamless" eviscerates their substantial burden argument. After all, if the "accommodation" ensures that their plans provide "seamless" contraceptive coverage, religious objectors can hardly be faulted for having complicity concerns. At any rate, RFRA's concern is with minimizing government's restrictions on religious liberty, not with maximizing government efficiency. Hence, RFRA imposes a "least restrictive alternative" requirement, rather than a "most efficient means" safe harbor.

Respondents cannot evade that requirement by redefining the governmental interest as "seamlessness" itself. For one thing, respondents themselves do not appear to put the same imperative on "seamlessness" since Pennsylvania imposes no comparable mandate under state law. Moreover, as the federal government has correctly recognized, it cannot plausibly claim a compelling interest in "seamless" contraceptive coverage when tens of thousands of employers—religious and secular—are not required to furnish contraceptives seamlessly for reasons as non-compelling as administrative convenience. See U.S.Br.25-26; 83 Fed. Reg. 57,536, 57,546-57,548 (Nov. 15, 2018); *Hobby Lobby*, 573 U.S. at 693.

Respondents counter that the government has some compelling interests—*e.g.*, "raising an army"—that admit of exceptions. Resp.Br.44. But notwithstanding that compelling interest—one actually enumerated in the Constitution—the government still exempts conscientious objectors. If the government refused to do so, while simultaneously exempting thousands of others for their own convenience, the government would surely lose a RFRA challenge, and not because it lacked a compelling interest in raising an army. RFRA focuses on the government's "marginal interest in enforcing the [law] *in these cases*," *Hobby Lobby*, 573 U.S. at 727 (emphasis added), and where the government exempts others with religious objections and some with an interest in maintaining their grandfathered plan, it cannot satisfy RFRA's demanding standard.

The bottom line is that, when the government has already granted a multitude of exemptions to a mandate regardless of whether those persons have religious objections, it cannot insist that others with religious objections comply through a mechanism that requires them to sacrifice sincerely held beliefs or pay massive penalties. The government thus correctly concluded that the "accommodation" does not cure the RFRA violation that the contraceptive mandate creates, and that RFRA instead compels an exemption for the Little Sisters and other religious objectors.

B. RFRA Empowers The Government To Grant The Religious Exemption And Does Not Require The Least Accommodating Accommodation.

Even if (contrary to fact) the "accommodation" did not affirmatively violate RFRA, the government would still have ample authority to exempt religious adherents from a government obligation that substantially burdens their religious exercise. Respondents insist that the government may not "create exemptions from mandatory laws absent a violation" of RFRA. Resp.Br.36. But there *is* an indisputable RFRA violation here: this Court held the *contraceptive mandate* to violate RFRA in *Hobby Lobby*, and respondents do not ask this Court to revisit that decision. The government thus had an obligation under RFRA to do something to eliminate the substantial burden that the mandate imposes. And the most "straightforward" means of doing so was to create "an exemption" from the mandate. U.S.Br.28 (quoting 83 Fed. Reg. at 57,545); see also 42 U.S.C. 2000bb-4 ("Granting * * * exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter.").[4]

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[4] To the extent respondents suggest that the government must wait for an adjudicated RFRA violation before accommodating religious exercise, see Resp.Br.48, 50, that is both irrelevant (in light of *Hobby Lobby*) and plainly wrong. RFRA imposes the obligation to avoid unnecessary substantial burdens on religion upon the "Government," 42 U.S.C. 2000bb-1(a), which it defines to "include[] a branch, department, agency, instrumentality, and offi-

Respondents insist that agencies are empowered to grant exemptions only if some lesser measure would not suffice to remedy the RFRA problem. In other words, they view exemptions as a remedy of last resort and read RFRA as empowering the government to pursue only the "least accommodating accommodation." That gets statutory text and congressional intent exactly backwards. Far from imposing a requirement that the government's accommodation of religion be as miserly as possible, RFRA allows religious exercise to be substantially burdened only where the government demonstrates doing so is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(b). Nor would respondents' "least accommodating means" command make any sense when the whole point of RFRA was "to provide very broad protection for religious liberty." *Hobby Lobby*, 573 U.S. at 693. See generally, Laycock Amicus Br.

Exemptions were a classic and well-established means of protecting religious liberty when RFRA was enacted. Indeed, exemptions were required in the landmark Supreme Court cases Congress specifically endorsed in RFRA. 42 U.S.C. 2000bb(b)(1); see, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (exemption from mandatory education laws); *Sherbert* v. *Verner*, 374 U.S. 398 (1963) (exemption from disqualification for failure to accept comparable work). Congress then reinforced the importance of exemptions as a preferred means of alleviating substantial burdens, not a

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cial * * * of the United States," 42 U.S.C. 2000bb-2. The government thus not only can, but must, take affirmative action to prevent RFRA violations.

disfavored option of last resort, in RFRA's sister statute, the Religious Land Use and Institutionalized Persons Act. See 42 U.S.C. 2000cc-3(e) ("A government may avoid the preemptive force of any provision of this chapter * * * by providing exemptions from the policy or practice for applications that substantially burden religious exercise[.]").

Respondents' insistence that RFRA authorizes only the least accommodating accommodation is flatly inconsistent not only with RFRA's text and purposes, but with this Court's disposition of *Zubik*. In that case, after full briefing and argument, but without a definitive resolution of whether the regulatory accommodation violated RFRA, this Court remanded to see if the government could craft a more accommodating solution that would obviate the need to decide whether the existing "accommodation" violated RFRA. See *Zubik* v. *Burwell*, 136 S. Ct. 1557, 1560 (2016). By respondents' telling, that remand was an invitation for the government to engage in *ultra vires* action.

Respondents insist that this Court "order[ed]" the government to consider only those options that would not "affect women's access to approved contraception without cost sharing." Resp.Br.51, 23. That is wrong on multiple levels. In fact, this Court stated only that its opinion should not be read "to affect the ability of the Government" to provide such access if it so chose. *Zubik*, 136 S. Ct. at 1560. Moreover, the government *did* settle on a remedy that it concluded would not hinder women's access to cost-free contraceptives. See U.S.Br.26-27. But whatever the precise scope of the *Zubik* remand, the very fact that this Court invited the

government to do more to accommodate religious exercise without definitively resolving the RFRA issue gives the lie to respondents' atextual and ahistorical view that RFRA empowers the government only to do the absolute minimum to accommodate religious exercise. Once a government policy imposes a substantial burden on religious exercise, as the contraceptive mandate indisputably does, see *Hobby Lobby*, RFRA affirmatively requires the government to eliminate the burden without imposing any ceiling on the accommodation beyond compliance with the Establishment Clause. In short, in enacting RFRA, Congress endeavored to restore religious freedom, not to subject it to a rule of parsimony.

C. The ACA Authorizes The Religious Exemption.

While RFRA provides ample authority for the religious exemption, the ACA itself provides the government with discretion to exempt employers with religious objections to providing certain coverage through their plans. The relevant statutory text provides that, "with respect to women," covered plans must include coverage for "such additional preventive care and screenings * * * as provided for in comprehensive guidelines supported by [HRSA]." 42 U.S.C. 300gg-13(a)(4). Respondents agree that this text grants HRSA substantial discretion in developing guidelines and does not compel the contraceptive mandate. But they insist that HRSA's discretion is limited to "defining" only "*what* preventive services for women must be covered, not *who* must cover them." Resp.Br.29.

That what-not-who distinction not only finds no support in the statutory text (which does not require the guidelines to treat all employers uniformly), but also is flatly inconsistent with how the government has interpreted the ACA for nearly a decade across two administrations. It also would invalidate the church exemption that respondents defend in the very next breath, for the government specifically invoked its discretion under the ACA when it crafted that exemption back in 2011. See 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011); see also 83 Fed. Reg. at 57,541 ("Since the first rulemaking on this subject in 2011, the Departments have consistently interpreted the broad discretion granted to HRSA in [42 U.S.C. 300gg-13(a)(4)] as including the power to reconcile the ACA's preventive-services requirement with sincerely held views of conscience on the sensitive subject of contraceptive coverage.").

Respondents suggest that the church exemption really "rests on" the First Amendment and the "well-established church autonomy doctrine." Resp.Br.15, 34-35. While the Little Sisters certainly welcome respondents' new-found appreciation for religious autonomy, their argument confuses a constitutional limit with a grant of statutory authority.[5] If the ACA really precluded the government from making distinctions concerning *who* must comply with the *what* that

[5] New Jersey's arguments here are in considerable tension with its arguments in another pending case, where it recently urged the Court to construe those same protections narrowly. See, *e.g.*, Br. Amici Curiae of Virginia, et al. (including New Jersey) at 16, *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, No. 19-267 (filed Mar. 11, 2020).

HRSA included in the preventive care mandate, and if the First Amendment requires that churches be exempt from the contraceptive mandate, then the government's only path for constitutional compliance would be to drop the contraceptive mandate *for everyone*. If, by contrast, the ACA is flexible enough to allow *who* distinctions to eliminate that First Amendment problem, then the statute equally empowers the government to draw the same *who* distinctions even where unnecessary for constitutional avoidance. See *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005). In all events, the church exemption is both narrower and broader than anything the First Amendment alone would require, as it fails to exempt religious entities (like the Little Sisters) who would be protected by the religious autonomy doctrine, and exempts non-objecting churches.

Respondents' view that "all governed plans must cover in all instances all identified services," Resp.Br.31, also would call into question the very "accommodation" on which their entire RFRA defense depends. The Third Circuit reconciled its (and respondents') narrow view of the agencies' ACA authority with the "accommodation" by observing that the accommodation does not limit *who* must comply with the contraceptive mandate, but rather "provides a process through which a statutorily identified actor 'shall provide' the mandated coverage." Pet.App.40a n.26. But as the Little Sisters pointed out in their opening brief (at 44), that justifies the "accommodation" under the ACA only at the expense of making the RFRA problem unmistakable. Respondents answer that glaring problem with deafening silence. And understandably so,

for the Third Circuit's explanation of what the "accommodation" offers—a mechanism for the objectors themselves to "'provide' the mandated coverage"—is both entirely correct and entirely inconsistent with the Little Sisters' sincerely held religious beliefs.

Respondents protest (at 49) that Congress would not have given agencies that lack expertise in matters of faith the power to grant religious exemptions. Even setting aside that the same agencies fashioned the church exemption, that observation fundamentally misconceives the government's proper role. Under our constitutional system, *no* government agency (or court) has the need or the power to resolve matters of faith. Rather than having the government employ legions of Talmudic, Biblical and Quranic scholars, our system generally leaves matters of religious doctrine to religious adherents. The government's limited role is to determine whether it can accomplish its secular objectives without demanding that people sacrifice their sincerely-held beliefs. For that limited inquiry, the agencies here are exactly the right entities. And they have concluded that they can ensure that women have cost-free access to contraceptives without requiring employers to violate their beliefs. Respondents provide no basis to second-guess that sound determination.

III. The APA And Remedial Holdings Below Were Flawed.

Respondents' procedural arguments have no more merit than their substantive ones. There was no warrant to enjoin implementation of the religious exemption, let alone to do so on a nationwide basis.

A. The Religious Exemption Does Not Violate The APA.

Respondents maintain that the interim final rule (IFR) that preceded the Final Rule is "invalid" because it did not go through the APA's standard three-step notice-and-comment process. See 5 U.S.C. 553(b)-(c). But virtually everything the government has done in promulgating the contraceptive mandate and refining its efforts to square it with RFRA has been done "without advance notice and comment." Resp.Br.24. As respondents acknowledge, the mandate itself was initially promulgated through a website post without notice and comment, which the government justified by invoking the APA's "good cause" exception and its statutory authority to issue IFRs. *Ibid.*; see also 5 U.S.C. 553(b)(B); 5 U.S.C. 559; 42 U.S.C. 300gg-92; 29 U.S.C. 1191c; 26 U.S.C. 9833. Respondents likewise acknowledge that the government modified the "accommodation" through an IFR. Resp.Br.7-8, 24. And contrary to respondents' assertion (at 24), those are not the "only * * * prior instances" of IFR use in this context, as the government itself confirms. See 75 Fed. Reg. 41,726, 41,729-41,730 (July 19, 2010); U.S.Br.7-8, 40.

Respondents' efforts to distinguish these earlier IFRs fail. They defend the government's good cause to dispense with notice and comment when first demanding compliance with the mandate on the ground that plans operate on annual bases and so needed advance

notice to comply. Resp.Br.24.[6] But that same logic applies with equal force here. As the government recognized in the Fourth IFR, both plan providers and participants had considerable interests in receiving a definitive answer on the scope of the exemption before they made decisions for new plan years. See 82 Fed. Reg. 47,792, 47,814 (Oct. 13, 2017). Respondents likewise defend the government's good cause to act promptly when modifying the "accommodation" in response to this Court's order in *Wheaton College* v. *Burwell*, 573 U.S. 958 (2014). See Resp.Br.24. But they offer no explanation as to why the government could respond with dispatch to *Wheaton College* but not *Zubik*. See 82 Fed. Reg. at 47,799, 47,814 (discussing "the Government's desire to resolve the pending litigation" in light of *Zubik*).

Respondents are thus left advocating for a blatant double standard under which efforts to impose and refine government mandates constitute good cause, but efforts to protect religious liberty do not. If anything, the rule should be precisely the opposite. After all, the whole point of the APA is to protect the governed from arbitrary government action. See 5 U.S.C. 706(2)(A). It thus simply cannot be correct that the APA allows the government to hastily impose new burdens on the governed, but erects roadblocks when the government relaxes those burdens in an effort to protect religious liberty.

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[6] Respondents suggest that the government waived any "good cause" argument concerning the Fourth IFR in their petition for certiorari. See Resp.Br.18-19. But they ignore that the Little Sisters pressed the issue repeatedly. See Pet. for Cert. 29-30; Cert. Reply 9-10.

In all events, whether the Fourth IFR complied with the APA is a moot point, for the Final Rule was subject to full notice and comment, which remedied any potential procedural defect. See 5 U.S.C. 706; *Shinseki* v. *Sanders*, 556 U.S. 396, 406 (2009). Respondents resist that conclusion, insisting that the agencies did not approach the rulemaking process with "genuine open-mindedness." Resp.Br.28. But the only evidence they offer in support is that the Final Rule is "largely identical" to the Fourth IFR. Resp.Br. 11, 27. That, of course, is commonplace with IFRs; it happened with respect to the contraceptive mandate itself. See 77 Fed. Reg. 8725 (Feb. 15, 2012) (adopting final mandate "without change" even though IFRs drew thousands of objecting comments). While respondents purport to disclaim "an agency * * * obligation to make changes in promulgating a final rule," they argue in the next breath that failing to do so can be used against the agency "in assessing whether the agency has carried its burden of showing open-mindedness." Resp.Br.27. That inconsistency underscores the incoherence of the open-mindedness standard. It is one thing to use open-mindedness as a shorthand for the agency's statutory obligation to consider and respond to comments, but imposing some greater, atextual obligation to revise IFRs is neither justified nor administrable.

Respondents also ignore the incoherence of a position that would remedy the government's supposed APA shortcuts by reimposing the "accommodation" promulgated through the same shortcuts. In the end, what distinguishes the government's latest effort is not the administrative procedures employed, but the

substantive result. After years of offering religious adherents different ways to comply with a mandate that their plans furnish seamless contraceptive coverage, the federal government finally recognized that the only way to stop substantially burdening religious exercise was to stop trying to hijack the plans of religious objectors. In doing so, the government faithfully considered a raft of comments, none of which identified concrete examples of individuals who would lose coverage—much less access—if the religious exemption were broadened. Finalizing the exemption under those circumstances reflects both an open mind and common sense.

B. The Third Circuit Erred In Affirming The Nationwide Injunction.

As the foregoing confirms, the judgment below should be reversed in toto, with religious liberty vindicated nationwide. That is the proper way to fashion a nationwide resolution to a long-simmering dispute that has split the circuits. The nationwide injunction here, in which a single district court deprived countless absent individuals of the final rule's liberty-enhancing benefits based on reasoning that revived a circuit split, is the wrong way. Respondents insist that "any lesser relief would expose [them] to continuing injuries," Resp.Br.55, and point to workers and students crossing state lines, without making any concrete showing that the result of either the exemption or that interstate travel is lost coverage to any particular, identified individuals. That plainly does not justify a nationwide injunction, especially when that injunction undeniably and directly affects the interests

of absent religious adherents and moral objectors across the country.

Respondents emphasize that the Little Sisters obtained an injunction in Colorado. Resp.Br.55-56. But the fact that multiple courts have issued injunctions against the very regulations that the courts below reinstated should have counseled humility, not emboldened a single district court to impose a nationwide remedy. Respondents lament that anything short of a nationwide remedy would have created a "regulatory patchwork," Resp.Br.53, but that patchwork is just the natural consequence of a judiciary system divided into districts and circuits. Cf. *Department of Homeland Sec.* v. *New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of a stay). If that alone justified a nationwide injunction, then they would be the rule, not the exception.

In sum, this extraordinary—and extraordinarily unseemly—effort by two states to block the federal government from providing a religious exemption to a federal mandate should have been the last context in which to grant nationwide relief. Not only are the sovereign interests of Pennsylvania and New Jersey distinctly limited to their boundaries; the federal government sought to relax burdens on the governed and to promote religious liberty. Those salutary efforts should be applauded as "follow[ing] the best of our traditions," not condemned nationwide. *Zorach*, 343 U.S. at 313-314.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted.

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April 24, 2020