Nos. 19-431 and 19-454

IN THE
SUPREME COURT OF THE UNITED STATES

THE LITTLE SISTERS OF THE POOR
SAINTS PETER AND PAUL HOME, *PETITIONER*,
v.
THE COMMONWEALTH OF PENNSYLVANIA AND THE STATE OF NEW JERSEY, ET AL., *RESPONDENTS*.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *PETITIONERS*,
v.
THE COMMONWEALTH OF PENNSYLVANIA AND THE STATE OF NEW JERSEY, ET AL., *RESPONDENTS*.

On Petitions for a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit

BRIEF FOR THE CATO INSTITUTE AND JEWISH COALITION FOR RELIGIOUS LIBERTY AS *AMICI CURIAE* SUPPORTING PETITIONERS

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SUPPLEMENTAL QUESTION PRESENTED

The Court should grant certiorari and add a supplemental question:

Whether the Departments of HHS, Labor, and Treasury have the interpretive authority to craft a religious "accommodation" pursuant to the ACA's "preventive care" mandate.[1]

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[1] *Amicus* Cato Institute proposed adding this same supplemental question in *Little Sisters of the Poor v. Burwell*, No. 15-105, http://bit.ly/2J81Uw2 (cert-stage), the case that was consolidated into *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

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INTEREST OF *AMICI CURIAE*[2]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing individual liberty and free markets. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. Cato has been indefatigable in its opposition to laws and regulations that go beyond constitutional or statutory authority, regardless of the underlying policy merits.

The Jewish Coalition for Religious Liberty is a nondenominational organization of Jewish communal and lay leaders seeking to protect the ability of all Americans to freely practice their faith. JCRL also aims to foster cooperation between Jewish and other faith communities in an American public square in which all supporters of freedom are free to flourish.

Amici submit this brief to alert the Court to another ground for resolving this case: the Departments of HHS, Treasury, and Labor lacked the interpretive authority and "expertise" to issue the original accommodation. This *ultra vires* executive action granted some religious groups a full exemption and afforded others a mere accommodation. All objecting religious groups should be exempted from the contraceptive mandate, regardless of their organizational structure.

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[2] Rule 37 statements: All parties were timely notified and filed blanket consents to the filing of *amicus* briefs. No counsel for any party authored any part of this brief and no person or entity other than *amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

The court below ruled that the Departments of HHS, Treasury, and Labor (the "Departments") lacked "the authority" to promulgate the expanded exemptions. *Pennsylvania v. President of the United States*, 930 F.3d. 543, 555 (3d Cir. 2019). Specifically, it concluded that the Affordable Care Act (ACA) did not delegate to the executive "the discretion to wholly exempt actors of its choosing from providing the guidelines [contraceptive] services." *Id.* at 570. The court thus affirmed the district court's nationwide injunction, which required the government to continue enforcing the original accommodation.

This holding relied on a critical assumption: that the original accommodation offered to religious nonprofits was lawful. *Zubik v. Burwell* did not decide this question. 136 S. Ct. 1557, 1560 (2016). If certiorari is granted here, however, the Court may need to resolve that exact issue. A judgment for the Respondents would require executive agencies to continue enforcing the accommodation. But of course the judiciary cannot force them to implement a regulation that is itself *ultra vires*. The Court should thus grant cert. and add a supplemental question:

> Whether the Departments of HHS, Labor, and Treasury have the interpretive authority to craft a religious "accommodation" pursuant to the ACA's "preventive care" mandate.

Amicus Cato proposed this same question in 2016—*see* Brief for the Cato Inst. as *Amicus Curiae* in Support of Petitioners, *Little Sisters of the Poor v. Burwell*, No. 15-105, http://bit.ly/2J81Uw2 (cert-stage), decided *sub nom*. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016)—and the answer is still no.

The prior administration *exempted* "houses of worship and their integrated auxiliaries" from the contraceptive mandate. Other religious nonprofits, like the Little Sisters of the Poor, received the less-protective accommodation. Why? Because the houses of worship were "*more likely* than other employers to employ people who are of the same faith and/or adhere to the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. 39,870, 39,887 (July 2, 2013) (emphasis added). According to the agencies, the Little Sisters' employees were "*less likely* than individuals in plans of religious employers to share their employer's . . . faith and objection to contraceptive coverage on religious grounds." *Id.* This conclusory assertion was the *only* contemporaneous justification for the policy.

At base, the ACA did not delegate the authority to draw that arbitrary distinction and resolve this "major question." The fact that the rulemaking here was premised not on health, financial, or labor-related criteria, but on subjective determinations of which employees more closely adhere to their employers' religious views, "confirms that the authority claimed by" the agencies "is beyond [their] expertise and incongruous with the statutory purposes and design." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). If "Congress wished to assign that question to an agency, it surely would have done so expressly." *Id.*

Had Congress intended to give the Departments discretion to decide which religious institutions should be subject to the mandate, it would have legislated to that effect. "It is especially unlikely that Congress would have delegated this decision to" the agencies, "which ha[ve] no expertise in crafting"

religious accommodations "of this sort" without clear statutory guidance. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citing *Gonzales,* 546 U.S. at 266–67). In the light of the narrow "breadth of the authority" that Congress has given to the executive branch over this controversial issue of religious liberty, the Court is not "obliged to defer . . . to the agency's expansive construction of the statute." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

If Respondents are correct, and the new exemptions cannot go into effect, the Court will still have to decide what alternate regime complies with RFRA. The Court cannot just consider the expanded exemptions in a vacuum and call it a day.

Finally, executive agencies have an independent obligation to comply with RFRA. They need not wait for a judicial declaration before alleviating burdens on free exercise. The only administrative remedy for those whose free exercise is substantially burdened by the enforcement of the statute is an exemption, not a half-hearted accommodation. And the expanded exemptions offered to houses of worship were a reasonable effort to comply with the executive's duty to faithfully execute RFRA. Under the ACA and RFRA, all sincere religious objectors must be fully exempted from the contraceptive mandate.

ARGUMENT

I. In Enjoining the Expanded Exemptions, the Court Below Declined to Consider the Accommodation's Legality

The Third Circuit affirmed the district court's nationwide injunction. That decision, in effect, forced the Departments to continue implementing the

original accommodation. (The incumbent administration determined that the contraceptive mandate substantially burdened the free exercise of religion). The Third Circuit, however, declined to determine the legality of the accommodation. The panel found that this "issue . . . is not before us." *Pennsylvania v. President of the United States*, 930 F.3d. 543, 570 n.26 (3d Cir. 2019).[3]

But even assuming for argument's sake that the expanded exemption is unlawful, if the original accommodation is also unlawful, then the judiciary could not require the executive branch to continue enforcing that accommodation. In other words, if Pennsylvania is correct and the new expanded exemptions cannot go into effect, then the Court still has to decide what alternate regime complies with RFRA. The Court cannot simply consider the expanded exemptions in a vacuum and call it a day.

Neither the government nor the Little Sisters of the Poor raised this threshold question—and with good reason. If the expanded exemptions are valid, then there is no reason to dwell further on the obsolete accommodation. That executive action can be "swept into the dustbin of repudiated [regulatory] principles." *See Morrison v. Olson*, 487 U.S. 654, 725 (1988) (Scalia, J., dissenting). But if the expanded exemptions are invalid, then the Court will have to return to *Zubik*'s unresolved issue: was the

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[3] Between the filing of the cert. petitions and this brief, the Ninth Circuit concluded that the "accommodation process likely does not substantially burden the exercise of religion and hence does not violate RFRA." *California v. Little Sisters of the Poor*, 19-15072, 2019 WL 5382250 at *11. That decision also did not consider whether the agencies had the requisite interpretive authority to craft the accommodation.

accommodation valid? The answer is still no, for the reasons *Amicus* Cato advanced in 2016.[4] Religious nonprofits, like the Little Sisters, would then be entitled to the only administrative remedy available: the full exemption offered to houses of worship.

II. The Agencies Created the Accommodation Out of Whole Cloth and Thus Deserve No Deference

The ACA authorized HHS to make healthcare-related decisions, Treasury to make financial-related decision, and Labor to make employment-related decisions. 78 Fed. Reg. at 39,892. But neither the text, structure, or history of the ACA conveys even the slightest hint that these agencies can make the delicate judgment to deny certain religious groups an exemption from a mandate that burdens their free exercise. There is no indication that Congress intended the agencies to make *any* decisions regarding religiosity—much less to pick and choose among religious nonprofits. And with nothing approaching a clear statement, the agencies lacked the requisite authority to make such significant determinations. *King*, 135 S. Ct. at 2489) (citations omitted). The ACA simply did not authorize the agencies to resolve this "major question"—so the accommodation should not be reviewed deferentially.

A. The ACA Did Not Authorize the Accommodation

The ACA requires that all qualified employers provide "with respect to women . . . preventive care

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[4] *See* Brief for Cato Inst. & Indep. Women's Forum as *Amici Curiae* Supporting Petitioners, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418 *et al.*), http://bit.ly/2P5tzSa (merit-stage).

. . . as provided for . . . by the Health Resources and Service Administration." 42 U.S.C. § 300gg-13(a)(4). Congress did not define what constitutes "preventive care." A subsidiary agency of HHS recommended that "preventive care" be interpreted to include all FDA-approved contraceptives. HHS agreed.

Facing a wave of public outrage, HHS belatedly acknowledged that its interpretation would force millions of people to violate their faith. In response, the agencies adjusted their regulations.[5] First, they exempted certain "religious employer[s]"—houses of worship and their auxiliaries—from the contraceptive mandate altogether. 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). Second, religious nonprofits the agencies deemed insufficiently religious to qualify for the exemption would receive an "accommodation." The agencies promulgated an alternative regulatory mechanism for these second-class religious groups to comply with the mandate: employers were required to turn over information about their insurers to the government and execute instruments allowing their health plan to distribute contraceptives.

What statutes authorized the exemption and the accommodation? Section 300gg-13(a)(4), standing by itself, supplies no intelligible principle that allows the agencies to tinker with religious modifications. The government instead purported to rely on a series of 80 statutes delegating authority to the Departments of HHS, Treasury, and Labor. 78 Fed. Reg. at 39,892. *See* Josh Blackman, *Gridlock*, 130 Harv. L. Rev. 241, 256–57 (2016). But in their combined nearly 90,000 words,

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[5] For the history of contraceptive-mandate accommodations and exemptions, *see* Josh Blackman, *Unraveled: Obamacare, Religious Liberty, and Executive Power* 29–66 (2016).

these four-score provisions make absolutely no reference to religion.

The agencies could only justify the different treatment for religious employers on policy grounds. They determined that "houses of worship and their integrated auxiliaries . . . are *more likely* than other employers to employ people who are of the same faith and/or adhere to the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,887 (emphasis added). Other religious groups, like the Little Sisters of the Poor, received the less protective accommodation. Why? Because, according to the agencies, their employees "are *less likely* than individuals in plans of religious employers to share their employer's . . . faith and objection to contraceptive coverage on religious grounds." *Id.* (emphasis added). This conclusory assertion—the *only* contemporaneous justification for the policy—shows how out-of-their-league the agencies were.

Eligibility for exemption turns entirely on the organizational form of the religious entity; a nonprofit ministry may merely be "accommodated" even as it engages *in precisely the same religious exercise* as an exempted "integrated auxiliary." It would be unthinkable, for example, for the Bureau of Prisons to provide kosher meals to Orthodox Jewish prisoners only, denying them to Reform Jewish prisoners who are "less likely" to adhere to stringent dietary restrictions. *See United States v. Sec'y, Fla. Dep't of Corrections*, 2015 WL 1977795 at *14 (S.D. Fla. Apr. 30, 2015) ("RLUIPA requires consideration of the sincerity of the prisoner's belief, not whether a particular belief is supported by specific religious law

or doctrine."). The government lacks the authority to favor "true" believers over casual observers. And even if the ACA somehow granted that power—setting aside whether this delegation would survive judicial review—the agencies lack the expertise to determine the degree of religiosity that warrants an exemption. But the distinction between exemption and accommodation turns *solely* on that policy judgment.

Moreover, the ACA does not empower the Departments to distinguish among religious groups, exempting some while burdening others. There is no congressional delegation involving the "specific provision" and "particular question" at issue here. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1881 (2013) (Roberts, C.J., dissenting) (citation omitted). The government cannot point to *any* "legislative delegation to [the Departments] on a particular question [involving religiosity]." *Id.* (quoting *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984)) (emphasis in original). Indeed, nowhere in the 900+ page ACA, or its legislative history, is there any indication that Congress wanted the executive branch to resolve this *major* question: is a religious ministry sufficiently religious to merit an exemption?[6]

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[6] Courts "apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency." *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting). Congress would violate the nondelegation doctrine if it granted discretion to determine which religious groups could be burdened. *See* Brief for the Cato Inst., et al., as *Amici Curiae*, *DHS v. Regents of the Univ. of Cal.*, Nos. 18-587, 18-588 & 18-589 (U.S. Aug. 26, 2019), http://bit.ly/32ACej6 (discussing relationship between the major-questions and nondelegation doctrines).

Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). The narrow source of their statutory authority could not hide a mouse, let alone the 800-pound gorilla that is religious liberty. *Id.*

B. The Accommodation Was Created by Agencies That Lacked "Expertise" to Answer This "Major Question" of Social, "Economic and Political Significance"

The ACA does not authorize unelected administrators to pick and choose which religious nonprofits have to violate their faiths' teachings and which do not. Profound questions of religious teaching are not the sort of issues Congress quietly delegates to federal agencies. *See Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006). The ACA's text should leave the Court "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Brown & Williamson*, 529 U.S. at 160.

Absent express delegation by Congress, the agencies simply have no power to force some religious groups to violate religious teaching, while exempting others. Any claim to the contrary is irrational and "not sustainable." *Oregon*, 546 U.S. at 267. The question of which forms of birth control constitute "preventive care" is interstitial to the ACA, but that law does not embrace the far broader question of which religious groups should have their religious exercise burdened by the regulatory mandate.

"It is especially unlikely that Congress would have delegated this decision to" the Departments, "which ha[ve] no expertise in crafting" religious

accommodations "of this sort" without clear statutory guidance. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citing *Gonzales,* 546 U.S. at 266–67). The agencies' justifications for their bifurcation of religious groups reflects their strange home-brewed approach to protecting religious exercise. "It is especially unlikely that Congress would have delegated this decision to" HHS, Labor, and Treasury, "which ha[ve] no expertise in crafting" regulations on free exercise without any statutory guidance. *King*, 135 S. Ct. at 2489 (citing *Gonzales,* 546 U.S. at 266–67). Indeed, "one might claim" a "background canon of interpretation" to the effect that decisions with enormous social consequences "should be made by democratically elected Members of Congress rather than by unelected agency administrators." *Brown & Williamson*, 529 U.S. at 190 (Breyer, J., dissenting) .

To find that Section 300gg-13(a)(4) in particular affords the Departments the interpretive authority to balance religious liberty and public health, "one must not only adopt an extremely" broad interpretation of what providing "preventive care" entails, "but also ignore the plain implication of Congress's" long-standing commitment to the protection of religious liberty. *See Brown & Williamson*, 529 U.S. at 160; *See United States v. Lee*, 455 U.S. 252, 260 (1982) ("Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system."). Had Congress intended to give the agencies discretion to decide which religious institutions should be subject to the mandate, it would have legislated to that effect. Indeed, questions concerning conscience led to some of the more finely tuned and controversial

compromises leading to the ACA's enactment.[7] But the fact that the text and history of 42 U.S.C. § 300gg-13 are entirely silent on the issue should be dispositive proof that the Departments lacked the interpretive authority to craft the regulations in the way they did.

Congress, of course, can develop intricate frameworks to accommodate different types of religious employers—subject to the limits of the First Amendment and RFRA. The tax code, for example, distinguishes between houses of worship and religious non-profits: the former are not required to apply for tax-exempt status, and the latter must complete a simple form. *See* Blackman, *Gridlock*, *supra*, at 259–60. However, such particularized frameworks become *ultra vires* when imposed by agencies with neither the authorization nor the expertise to act.

Ultimately, the accommodation was created by agencies that lacked the "expertise" to resolve this "major question" of social, "economic and political significance." *See id.* at 256–65. The basis of the distinction between the exemption and accommodation is a delicate, value-laden judgment, one that cannot be made within the permissible bounds of the agencies' interpretive authority.

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[7] *See*, *e.g.*, Brief of Democrats for Life of America and Bart Stupak as *Amici Curiae* in Support of Hobby Lobby and Conestoga, *et al.*, at 1–3, *Sebelius v. Hobby Lobby Stores*, 573 US 682 (2014) (Nos. 13-354 & 13-356). (The Pro-Life Caucus secured the enactment of provisions in the ACA that "could ensure comprehensive health-care coverage while respecting unborn life and the conscience of individuals and organizations opposed to abortion."); Josh Blackman, *Unprecedented: The Constitutional Challenge to Obamacare* 70, 75 (2013) (discussing how protection of conscience was crucial to ACA's enactment).

C. The Accommodation Should Not Be Reviewed Deferentially

Even if the Departments had the authority to pick and choose among religious nonprofits, the accommodation still not should not be reviewed deferentially. *Chevron* deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *King v. Burwell*, 135 S. Ct. at 2488 (quoting *Brown & Williamson*, 529 U.S. at 159). "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id.* There is no such delegation in this case. Surely religious freedom is more important to Congress—and to the nation as a whole—than the payment of tax credits (*King*) or the regulation of tobacco (*Brown & Williamson*). If an exception to *Chevron* exists for major questions, the accommodation must qualify.

Even if a "preventive care" mandate is ambiguous, the accommodation is not a "permissible construction of the statute." *Chevron*, 467 U.S. at 843. "The idea that Congress gave the [Departments] such broad and unusual authority through an implicit delegation in the" ACA's broad purposes "is not sustainable." *Gonzales*, 546 U.S. at 266–67. The accommodation "exceeds the bounds of the permissible." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002).

In sum, the Departments lack the "expertise" to make such a decision in the first instance. *King*, 135 S. Ct. at 2489 (citing *Util. Air Regulatory Group v. EPA,* 134 S. Ct. 2427, 2444 (2014)). *Cf. Gonzales*, 546 U.S. at 266–67 ("The structure of the [Controlled Substances Act], then, conveys unwillingness to cede

medical judgments to an executive official who lacks medical expertise."). In light of the narrow "breadth of the authority" that Congress afforded the executive over this controversial issue, the Court is not "obliged to defer . . . to the agency's expansive construction of the statute." *Brown & Williamson*, 529 U.S. at 160.

III. Executive Agencies Have an Independent Obligation to Remedy RFRA Violations

The Departments here determined "that the [expanded] religious exemption was independently authorized by RFRA." SG Petition at 11 (citing 83 Fed. Reg. 57,536, 57,544–57,548). Alternatively, they concluded that, "even if RFRA does not compel" the new regulation, the "expanded exemption rather than the existing accommodation is the most appropriate administrative response to the substantial burden identified by the Supreme Court in *Hobby Lobby*." *Id.* (citing 83 Fed. Reg. at 57,544–57,545)).

The Third Circuit disagreed. It concluded that RFRA does not "authorize or require" the expanded exemptions. *Pennsylvania v. President of the United States*, 930 F.3d. 543, 569–570 (2019). Indeed, the lower court declared that "Congress has deemed the courts the adjudicator of private rights of actions under RFRA." *Id.* at 572 (citing *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 434 (2006)). Therefore, the judiciary "owe[s] the Agencies no deference when reviewing determinations based upon RFRA." *Id.* The panel analogized RFRA to the Agricultural Worker Protection Act (AWPA), in which "Congress 'expressly established the Judiciary and not the [agency] as the adjudicator of private rights of action arising under the statute.'" *Id.* (quoting *Adams Fruit Co., Inc. v. Barrett*, 494 U.S.

638, 649 (1990)).[8] In other words, the courts have the first and last word on RFRA. The Ninth Circuit reached a similar conclusion. *California v. Little Sisters of the Poor*, 19-15072, 2019 WL 5382250 at *9 (9th Cir. Oct. 22, 2019) ("As a threshold matter, we question whether RFRA delegates to any government agency the authority to determine violations and to issue rules addressing alleged violations. At the very least, RFRA does not make such authority explicit.").

This position is premised on an all-too-common misconception of the judicial role. While courts must certainly declare the law's meaning, they do not have a monopoly on interpreting statutes like RFRA. The president has a duty to take care that the laws be faithfully executed, U.S. Const. art II, § 3. Here, the executive branch had to assess whether the old regulations substantially burdened religious exercise. When people of faith objected to an enforcement action, the executive branch had an initial obligation to resolve the impasse. If that process had worked out, then judicial services would not have been needed. But because that mediation failed, then—and only then—did the Court become "the adjudicator of private rights of actions under RFRA." *See O Centro*, 546 U.S. at 434. In other words, long before RFRA-related conflicts give way to litigation, the executive branch has a duty to achieve its goals through less-burdensome means. Though statutory in nature, this

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[8] The comparison between RFRA and AWPA is inapt. Through the latter policy, "Congress established an enforcement scheme independent of the Executive and provided aggrieved farmworkers with direct recourse to federal court where their rights under the statute are violated." *Adams Fruit*, 494 U.S. at 649. RFRA, in contrast, imposes an obligation on the executive branch, independent of any private causes of action.

obligation derives from the Take Care Clause itself. *See* Blackman, *Gridlock*, *supra*, at 254 n.107.

For example, the Obama administration exempted houses of worship and their auxiliaries from the contraceptive mandate. 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). But the executive branch does not have the inherent authority to suspend the enforcement of disfavored laws. The original exemption could *only* be premised on the authority delegated by RFRA. If the Third Circuit's mode of analysis is correct, the agencies would have had to force houses of worship to comply with the contraceptive mandate until a court issued an injunction.

Still, the Third Circuit suggested that the exemption may have been premised on the Free Exercise Clause, and not RFRA.[9] The court explained that "Supreme Court precedent dictates a narrow form of exemption for houses of worship." *Pennsylvania v. President of the United States*, 930 F.3d at 570 n.26 (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012)) (describing that case as reaffirming "a ministerial exception precluding application of employment legislation to a religious institution to respect churches' internal autonomy").

That position fails on its own terms. The ministerial exemption does *not* apply across the board to *all* employees at houses of worship. In contrast, the contraceptive-mandate exemption applies to all employees, regardless of their function. Moreover, as a threshold matter, it is not clear that such a

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[9] The Ninth Circuit declined to consider the legality of the exemption. *California v. Little Sisters of the Poor*, 19-15072, 2019 WL 5382250 at *9.

requirement would run afoul of the Free Exercise Clause. *See*, *e.g.*, *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 81–89 (Cal. 2004) (finding state contraceptive mandate to be consistent with *Employment Div. v. Smith*, 494 U.S. 872 (1990)).

The Obama administration's executive action was lawful only if the agencies engaged in an exercise of statutory departmentalism and adopted a regulation to avoid running afoul of RFRA.[10] However, the accommodation is unlawful precisely because it arbitrarily maintained burdens on those deemed insufficiently religious.

The only available remedy for those whose free exercise is substantially burdened by the enforcement of the statute is an exemption, not a half-hearted accommodation. *See* Blackman, *Gridlock*, *supra*, at 254–256 (contrasting the different ways in which the executive branch and Congress can accommodate RFRA violations). The expanded exemptions were a reasonable way to accomplish that goal.

CONCLUSION

The decision below is emblematic of a recent trend in the federal courts: (1) one administration adopts a discretionary policy that is not compelled by statute; (2) a subsequent administration concludes that the discretionary policy is—or very likely may be—unlawful and thus adopts a new policy to avoid burdensome litigation; (3) parties who preferred the original policy nevertheless file suit in districts across

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[10] *But cf.* Blackman, *Gridlock*, *supra*, at 256 ("The executive branch has maintained throughout the entire course of the Zubik litigation that the accommodation does not impose a substantial burden on free exercise in violation of RFRA.").

the country; (4) one or more judges disagrees with the executive branch about the legality of the reversal and enters a nationwide injunction. The petitions here squarely present a chance to review this increasing hostility towards presidential administration.[11]

The Court should grant certiorari and add a supplemental question about the agencies' authority under the ACA to exempt some religious groups but merely accommodate others.

Respectfully submitted,

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[11] The Court has granted cert. on another case this term that raises similar issues. *See* Brief for the Cato Inst., et al., as *Amici Curiae*, *DHS v. Regents of the Univ. of Cal.*, *supra*, at 24–26, http://bit.ly/32ACej6. *See also* Josh Blackman, *Presidential Maladministration*, 2018 Ill. L. Rev. 397, 423 (2018) ("[W]hen the President's instigation leads to an agency asserting some new power, Article III spider senses should start tingling. This caution should be even more pronounced when the discovery of the new power occurs *after* Congress refused to vest a similar power through bicameralism.").