No. 19-454

In the Supreme Court of the United States

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

v.

PENNSYLVANIA, ET AL.,
Respondents.

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

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or *amici curiae*, *e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Matal v. Tam*, 137 S. Ct. 1744 (2017).

The ACLJ has vigorously opposed the federal contraception mandate ("mandate") since it was first imposed on the country by regulatory fiat over seven years ago. Through litigation, public advocacy, and in formal comments filed with federal agencies, the ACLJ has argued that the mandate, including the numerous faulty regulatory attempts to accommodate religious objections to it, violated both the First Amendment and federal law, most notably, the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*.

The ACLJ represented a total of thirty-two individuals and for-profit corporations in seven legal

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[1] Counsel of record for the parties received timely notice of the intent to file this brief and emailed written consent to its filing. No counsel for any party in this case authored this brief in whole or in part. No person or entity, aside from *Amicus*, their members, or their respective counsel, made a monetary contribution to the preparation or submission of this brief.

actions against the mandate,[2] and submitted *amicus* briefs with this Court in support of the religious claimants in both *Hobby Lobby v. Burwell*, 573 U.S. 682 (2014), and *Zubik v. Burwell,* 136 S. Ct. 1557 (2016).

Now that the government has, at long last, offered an authentic accommodation of religious exercise with respect to the mandate, the ACLJ believes the religious exemption at issue in this case should be upheld and the lower court's decision reversed.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

In holding that the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ("RFRA"), does not require or authorize the religious exemption at issue in this case, the Third Circuit committed profound error on an issue of national importance, *i.e.*, the protection of religious freedom.

In accord with our country's longstanding commitment to respecting the rights of religious conscience, Petitioners in this case have, under RFRA,

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[2] *Gilardi v. United States HHS*, 733 F.3d 1208 (D.C. Cir. 2013); *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *O'Brien v. U.S. HHS*, 766 F.3d 862 (8th Cir. 2014); *Am. Pulverizer Co. v. U.S. HHS*, No. 6:12-cv-03459-MDH (W.D. Mo.); *Lindsay v. U.S. HHS*, No. 1:13-cv-01210 (N.D. Ill.); *Bick Holdings, Inc. v. U.S. HHS*, No. 4:13-cv-00462-AGF (E.D. Mo.); *Hartenbower v. U.S. HHS*, No. 1:13-cv-2253 (N.D. Ill.).

[3] This brief is also submitted on behalf of more than 415,000 supporters of the ACLJ as an expression of their support for the principles of religious freedom at stake in this case.

granted a religious exemption to certain entities whose religious convictions will not allow them to pay for or provide contraceptive drugs and services in their health plans. That exemption does not just allow objecting entities to decline to pay for drugs they find morally and religiously objectionable, it allows them to avoid being morally complicit in providing those same drugs by executing a "self-certification form" that would trigger such coverage (the so-called "accommodation).

The court below incorrectly held that RFRA does not support Petitioners' actions.

First, despite well-established precedent forbidding courts to make theological judgments about a religious claimant's understanding of what he can or cannot do according to his own religious judgment, the Third Circuit substituted its own judgment of moral complicity for that of the entities which claim that executing a "self-certification form" makes them complicit in wrongdoing.

Second, the court improperly invoked the "burden" the religious exemption could have on nonbeneficiaries. Invoking alleged harm on third parties in the religious freedom context, however, could render RFRA meaningless. While this Court has previously passed on the question of whether the contraception mandate is supported by a compelling governmental interest, nothing in the Third Circuit's decision supports the notion that provision of cost-free contraceptive services by an objecting religious claimant is a governmental interest of the highest order.

Finally, the court below dodged the question of whether RFRA *authorizes* the government to grant a religious exemption even if RFRA does not *require* it.

In sum, the Third Circuit has wrongly thwarted the efforts of Petitioners to truly accommodate the religious exercise of employers pursuant to RFRA and our country's longstanding commitment to the flourishing of religious freedom. Left undisturbed, the decision of the court below will impede future governmental efforts to respect the rights of religious conscience—the first freedom provided for in the Bill of Rights and the substantive right protected by RFRA.

The petition should be granted.

ARGUMENT

I. Governmental accommodations of religious exercise, like those granted by the religious exemption in this case, are a well-established historical practice of this country.

The rulemaking at issue in this case provides a religious exemption to certain entities from having to comply with the contraception mandate—a mandate imposed on those very same entities through prior rulemaking.[4] The granting of such exemptions is fully consistent with the long and well-established history in this country of governmental accommodation of religious beliefs and practices.

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[4] For a comprehensive history of the contraception mandate and the (previous, faulty) attempts to accommodate employers objecting to the mandate on religious grounds, *see* Pet. at 2-8.

"The pursuit of religious liberty was one of the most powerful forces driving early settlers to the American continent and remained a powerful force at the time of the founding of the American republic." Brett G. Scharffs, *The Autonomy of Church and State*, 2004 B.Y.U.L. Rev. 1217, 1230 (2004). Even before the ratification of the Constitution, "tension between religious conscience and generally applicable laws, though rare, was not unknown." *City of Boerne v. Flores*, 521 U.S. 507, 557 (1997) (O'Connor, dissenting). The resolution of conflicts over matters such as "oath requirements, military conscription, and religious assessments" demonstrates that "Americans in the Colonies and early States thought that, if an individual's religious scruples prevented him from complying with a generally applicable law, the government should, if possible, excuse the person from the law's coverage." *Id*. Exemptions were understood as "a natural and legitimate response to the tension between law and religious convictions." Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466 (1990).

In 1775, for example, the Continental Congress passed a resolution exempting individuals with pacifist religious convictions from military conscription:

> As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed

> brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.

Id. at 1469 (citation omitted).

Thus, even when the country was in dire need of men to take up arms to fight for independence, our forefathers knew that conscience is inviolable and must be honored. They understood that to conscript men into military service against their religious conscience would have undermined the very cause of liberty to which they pledged their lives, fortunes, and sacred honor.

The care and concern for religious freedom prior to the ratification of the Constitution was the underlying and animating principle of the religion clauses of the First Amendment:

> The core value of the religion clauses is liberty of conscience in religious matters, an ideal which recurs throughout American history from the colonial period of Roger Williams to the early national period of the Founders. All three traditions of church and state—Enlightenment, pietistic, and political centrist—regarded religious liberty as an inalienable right encompassing both belief and action and as an essential cornerstone of a free society.

A. Adams & C. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1664 (1989).[5]

Examples of this truth are seen most clearly in the writings of the Founding Fathers themselves. James Madison, the Father of the Constitution, opined that "[c]onscience is the most sacred of all property," and that man "has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them." *Property* (March 29, 1792), in *The Founders' Constitution*, Vol. 1, Doc. 23 (P. Kurland & R. Lerner eds. 1987). He understood that one's duty to the "Creator . . . . is precedent, both in order of time and in degree of obligation, to the claims of Civil Society." *A Memorial and Remonstrance Against Religious Assessments* (1785), in *The Sacred Rights of Conscience*, 309 (D. Dreisbach & M.D. Hall eds. 2009). "The Religion . . . of every man must be left to the conviction and conscience of every man," preventing efforts to "degrade[] from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." *Id*.

George Washington, the Father of the Country, noted that "the establishment of Civil and Religious Liberty was the Motive that induced me to the field of battle." Michael Novak & Jana Novak, *Washington's*

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[5] The states at the time of the founding were similarly concerned with the preservation of religious liberty and conscience. "Between 1776 and 1792, every state that adopted a constitution sought to prevent the infringement of 'liberty of conscience,' 'the dictates of conscience,' 'the rights of conscience,' or the 'free exercise of religion.'" *A Heritage of Religious Liberty*, *supra*, at 1600-01.

God, 111 (2006). In his famous 1789 letter to the Quakers, he wrote:

> The conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit.

Letter to the Annual Meeting of Quakers (1789), in *The Papers of George Washington*, 266 (Dorothy Twohig ed. 1993).

Thomas Jefferson observed that "[n]o provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority." *To the Society of the Methodist Episcopal Church at New London, Connecticut* (Feb. 4, 1809). Like Madison, Jefferson understood the right of conscience to be a *pre-political* one, *i.e.*, one that could not be surrendered to the government as a term of the social contract: "[O]ur rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God." *Notes on the State of Virginia*, in *The Basic Writings of Thomas Jefferson*, 157-58 (Philip S. Foner ed., 1944).

Indeed, "[s]ince the framing of the Constitution," this Court "has approved legislative accommodations for a variety of religious practices." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 723 (1994) (Kennedy, J., concurring in judgment) (citing *Selective Draft Law*

Cases, 245 U.S. 366, 389-90 (1918), and *Gillette v. United States,* 401 U.S. 437 (1971) (military draft exemption for religious objectors); *Zorach v. Clauson*, 343 U.S. 306 (1952) (program permitting public school children to leave school for one hour a week for religious observance and instruction); and *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327 (1987) (exemption of religious organizations from Title VII's prohibition of religious discrimination)). Such solicitude for religious practices "respects the religious nature of our people and accommodates the public service to their spiritual needs." *Zorach*, 343 U.S. at 314.

In sum, "[t]he victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State." *Girouard v. United States*, 328 U.S. 61, 68 (1946). And it is the longstanding commitment to that principle which has animated the "happy tradition" in our country "of avoiding unnecessary clashes with the dictates of conscience." *Gillette*, 401 U.S. at 453.

II. The Religious Freedom Restoration Act: background and scope.

After this Court reconfigured the First Amendment's Free Exercise Clause in the oft-criticized decision of *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872 (1990),[6]

[6] *See*, *e.g.*, Michael W. McConnell, *Free Exercise, Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109 (1990); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the*

Congress acted decisively. Pursuant to the country's longstanding history of protecting the rights of religious exercise, it adopted the Religious Freedom Restoration Act. In a display of unanimity seldom seen in our current day, the Senate passed RFRA by a 97-3 vote, after the House passed a similar bill by a unanimous voice vote.[7] The lead sponsors in the Senate were Senators Edward Kennedy and Orrin Hatch.[8]

The coalition of forces that supported RFRA involved a diverse group of religious and political organizations, including "Christians, Jews, Muslims, Sikhs, Humanists, and secular civil liberties organizations," as well as groups "from the political left and the political right."[9] In fact, according to one commentator, "the groups most active in pushing for passage of the 1993 RFRA were ideologically left of center."[10] Though it's more than doubtful that that same coalition exists today, what cannot be doubted is that RFRA was inspired by a broadly supported desire to protect religious believers, organizations, and entities from being burdened by the government in the

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Amicus Brief That Was Never Filed, 8 J.L. & Relig. 99 (1990); Michael Stokes Paulsen, "Justice Scalia's Worst Opinion," Public Discourse (April 17, 2015) (*available at*: https://tinyurl.com/y553f6ro).

[7] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 210 (1994).

[8] *Id*. at 211.

[9] *Id*. at 210-11.

[10] Travis Gasper, *A Religious Right to Discriminate:* Hobby Lobby *and "Religious Freedom" as a Threat to the LGBT Community*, 3 TEX. A&M L. REV. 395, 416 (2015)

exercise of their sincerely held beliefs—a principle that finds its roots in the founding of the country and the Constitution.

RFRA—described as "the most important congressional action with respect to religion since the First Congress proposed the First Amendment"[11]—authorizes religious exemptions from complying with *any* federal law, or *any* implementation thereof, that is not specifically excluded from RFRA's reach. 42 U.S.C. § 2000bb–3(a) (the statute "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993"). The sweeping breadth of RFRA is why it has been described as a "super-statute."[12] While RFRA is not *necessitated* by the Free Exercise Clause as this Court has interpreted it—in fact, it was adopted in the wake of a prior decision of this Court limiting the Clause's reach and scope, *see Hobby Lobby*, 573 U.S. at 693-96 (discussing RFRA's history)—the law furthers, and expands upon, the same underlying interests, *i.e.*, the preservation and protection of religious exercise. "By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required." *Id.* at 706. This was well within the federal government's authority and purview.

While the courts are charged with adjudicating private claims under the statute—*see Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546

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[11] Laycock & Thomas, at 243.

[12] Michael Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995).

U.S. 418, 434 (2006) (RFRA "plainly contemplates that courts would . . . consider whether exceptions are required under the test set forth by Congress")—the executive branch, bound by RFRA, is charged with the authority (in fact, *the obligation*) to see to it that the "implementation" of federal law meets RFRA's demands. Indeed, the executive branch's duty to operate in line with RFRA is no different than its duty to comply with other federal laws, including, of course, constitutional commands.

III. The Third Circuit erred in denying that the regulatory religious exemption at issue in this case is not supported by RFRA.

Notwithstanding RFRA's sweeping restrictions on federal action that substantially burden religious exercise—a law firmly grounded in our country's longstanding tradition of honoring religious beliefs and practice—the court below held that the religious exemption at issue in this case is neither authorized nor compelled by RFRA. The Third Circuit was wrong.

A. The religious exemption lifts a substantial burden on the religious exercise of those entities who object to the accommodation.

First, with respect to RFRA's substantial burden prong, the Third Circuit is incorrect that religious claimants who object to the so-called "accommodation," based on their sincerely held religious beliefs, are not substantially burdened by it. Relying on a Third Circuit decision vacated by this Court, *Geneva Coll. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d

Cir. 2015), *vacated and remanded sub nom. Zubik*, 136 S. Ct. 1557, the court below held that because third parties are charged with providing the contraceptive coverage, and not the objecting employer, "the submission of the self-certification form does not make the [employers] 'complicit' in the provision of contraceptive coverage." Pet. App. 39a.

That approach, however, conflicts with *Hobby Lobby*. In that case, the government agencies argued that the "connection between what the objecting parties must do . . . and the end they find to be morally wrong . . . is simply too attenuated" to constitute a substantial burden. 573 U.S. at 723. Specifically, the government asserted, "[c]overage would not itself result in the destruction of an embryo," and insisted that "[t]hat would occur only if an employee chose to take advantage of the coverage and to use one of the four methods [of contraception] at issue." *Id.*

This Court, however, rejected the government's second-guessing of the religious claimants' analysis of their complicity, holding that this approach "dodges the question RFRA presents": namely, evaluating the substantial burden imposed by the government on the objecting parties' ability to exercise "*their religious beliefs*"—not what a court or executive agency considers their religious beliefs to entail. *Id.* at 724 (emphasis in original). The complicity analysis used by "HHS . . . in effect tell[s] the plaintiffs that their beliefs are flawed," but "the federal courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable." *Id.*

Indeed, what this Court wrote in *Hobby Lobby* applies with equal force here: "in these cases, the [religious claimants] sincerely believe that [the submission of the self-certification form] demanded by the HHS regulations lies on the forbidden side of the line, and *it is not for us to say that their religious beliefs are mistaken or insubstantial*. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction,' and there is no dispute that it does." *Id.* at 725 (citation omitted) (emphasis added).

That courts have no business scrutinizing a religious objector's understanding of his own moral complicity is hardly a new proposition. "Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim." *Id*. at 724 (quoting *Smith*, 494 U.S. at 887). The religious claimants who oppose the accommodation have drawn a line between actions they find "to be consistent with [their] religious beliefs" and actions they believe to be "morally objectionable." *Id*. at 725 (citing *Thomas v. Review Bd. of Indiana Employment Security Div*., 450 U.S. 707, 715 (1981)). It is not for the Third Circuit, or any other court, "to say that the line [they] drew was an unreasonable one.'" *Id*. (quoting *Thomas*, 450 U.S. at 715).

For these reasons, the Third Circuit's observation that "under Free Exercise jurisprudence, we examine the "conduct of the objector," and not what "follows from" that conduct, is meritless. Pet. App. 40a. As this Court noted in *Hobby Lobby*, "the circumstances under which it is wrong for a person 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*," is "a difficult and important question of religion and moral philosophy," that the Third Circuit was without authority to decide under RFRA. 573 U.S. at 724 (emphasis added).

In sum, the court below paid little heed to a multitude of precedents in holding that a religious objection to complying with the contraception mandate by means of the "accommodation" cannot, as a matter of law, amount to a substantial burden under RFRA. An employer that fails to comply with the contraception mandate *directly* (through provision of objectionable drugs and services in the employer's health plan) or *indirectly* (by submitting the self-certification form) faces steep monetary penalties that could eventually drive it out of existence.[13] That is more than enough to demonstrate a substantial burden in this context, and Petitioners' efforts to lift that burden through the religious exemption challenged in this case is more than justified under RFRA.

B. The lower court's reliance on the "undue burden" on nonbeneficiaries is misguided.

The second flaw in the Third Circuit's RFRA analysis lies in its assertion that a religious exemption "would impose an undue burden on nonbeneficiaries—

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[13] *See Thomas*, 450 U.S. at 718 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

the female employees who will lose coverage for contraceptive care." Pet. App. 41a.[14]

As an initial matter, the notion that an exemption under RFRA can never tolerate a burden on third parties was squarely rejected by this Court in *Hobby Lobby*. In that case, the government suggested that "a plaintiff cannot prevail on a RFRA claim that seeks an exemption from a legal obligation requiring the plaintiff to confer benefits on third parties." 573 U.S. at 729 n.37. The Court responded that while burdens on nonbeneficiaries can be taken into account in evaluating governmental interests and the means to further those interests, it "could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties." *Id*. Indeed, "[b]y framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could

[14] The court below stated that Petitioners "downplayed this burden on women, contradicting Congress's mandate that women be provided contraceptive coverage." Pet. App. 41a. But Congress did *not* mandate contraceptive coverage in the Affordable Care Act. It was the Health Resources and Service Administration, a division of the Department of Health and Human Services, which promulgated the "Women's Preventive Services Guidelines"—guidelines which require "nonexempt employers . . . to provide 'coverage, without cost sharing' for '[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling.'" *Hobby Lobby*, 573 U.S. at 697.

object on religious grounds, rendering RFRA meaningless." *Id*.

Thus, even to the extent third party "burdens" are relevant—a standard never fully articulated by this Court in the RFRA context—the standard for what burdens are "undue" must be high, given RFRA's imposition of strict scrutiny. For example, the third party suffering religious discrimination in *Amos*, did not negate the religious exemption of the employer. Being required to serve (in place of a conscientious objector) in the military in wartime, at risk of life and limb, as in *Gillette*, did not negate the religious exemption. *See Grumet*, 512 U.S. at 724-25 (Kennedy, J., concurring in judgment) (citing *Amos* and *Gillette* as upholding laws under the Establishment Clause despite these "substantial" burdens on third parties). Declining to provide cost-free contraceptive services through an employer's health insurance plan falls well below the third-party burdens at issue—and tolerated—in those, and other, cases.

Moreover, any alleged burdens placed on employees of employers who claim a religious exemption must be considered in their proper context, namely, that inconveniences and burdens to employees are part and parcel of the employment context. A dress code denies the freedom to dress as one chooses. *E.g., Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282 (1977) (employee criticizing workplace dress code). Finite salaries deny employees money beyond their agreed upon pay. *E.g., Comm'r of Internal Revenue v. Kowalski*, 434 U.S. 77, 81 (1977) (amount of salary subject to labor negotiation). Fixed work shifts deny

employees the freedom to work the hours they choose. *E.g., Bhd. of Locomotive Engineers v. Atchison, Topeka & Santa Fe R.R.*, 516 U.S. 152, 158 (1996) (noting fatigue likely to result from 12-hour shifts). The physical layout of an office will deny employees the space, window views, or furniture arrangements they might prefer. *E.g., Kilby v. CVS Pharm., Inc.*, 739 F.3d 1192, 1194 (9th Cir. 2013) (noting role of "business judgment" in determining the "physical layout of the workplace"). That employees do not always get what they deem to be optimum benefits and conditions is not remarkable, but rather a fact of life.[15]

Furthermore, it is a mischaracterization (*see Amos*, 483 U.S. at 337 n.15) to describe religious exemptions as imposing burdens upon third parties. This charge knows no limits. The employee who refuses a Sabbath shift imposes upon his employer or, perhaps, co-workers who need to fill in. *But see Sherbert v. Verner*, 374 U.S. 398 (1963). The parents who remove their Amish child from formal high school education deny that child the instruction that would otherwise be given. *But see Wisconsin v. Yoder*, 406 U.S. 205 (1972). The owners of a kosher deli who refuse to sell pork deny their patrons the option of a ham sandwich. *But see* Jonathan D. Sarna, "Constitutional Dilemma on

[15] And this fact of life takes on special relevance here, where employees of a religious non-profits, for example, must know that their employer is committed to arranging their operations according to the religious principles and convictions. If those employees know that they can be fired at will on the basis of religion, as in *Amos*, surely they wouldn't be shocked to learn that their employer wishes to have no part in being complicit in the provision of drugs and services to which their employer objects on religious grounds.

Birth Control," Forward.com (Mar. 16, 2012) ("We all might agree that kosher delis should not be coerced into selling ham"). And the physician who refuses to perform a "female circumcision," *see* Female Genital Mutilation, WHO media centre fact sheet (Feb. 2014), or an unnecessary amputation, *see* David Brang *et al*., "Apotemnophilia: a neurological disorder," 19 NeuroReport 1305 (2008) (disorder characterized by intense desire for amputation of healthy limb), "imposes" upon the would-be recipients of those procedures (or their parents).

Finally, the alleged "undue burden" on nonbeneficiaries is hard to square with the fact that a great number of other employers already do not have to provide contraceptive coverage under the Affordable Care Act. *See Hobby Lobby*, 573 U.S. at 698-99. Churches, their auxiliaries, and associations of churches do not have to. *Id*. at 698. Employers with grandfathered plans do not have to. *Id*. at 699. Employers with less than 50 employees do not have to. *Id*. at 699. If the provision of cost-free contraceptive coverage were as dire a governmental interest as the Third Circuit seems to think it is, then it is more than an oddity that Congress did not impose the mandate across the board, on all employers. In the Free Exercise context, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Sherbert*, 374 U.S. at 406. The government must demonstrate "some substantial threat to public

safety, peace, or order" to deny exempting the claimant. *Yoder*, 406 U.S. at 230.[16]

In sum, the alleged "undue burden" on third parties in this context does not override the government's efforts to provide meaningful accommodation to religious claimants that object, on sincerely held religious grounds, to executing the self-certification form as a way of complying with the contraception mandate.

C. Even if RFRA does not *require* the religious exemption, RFRA nonetheless *authorizes* it.

A third and final error in the Third Circuit's decision regarding RFRA is that it failed to address a critical question: does the government have the authority under RFRA to promulgate the religious exemption at issue in this case, even if RFRA does not, at least according to some courts, require it? Because RFRA imposes a floor, not a ceiling, on religious accommodation, the answer to that question must be *yes*.

The executive branch is charged with complying with federal law—including of course the Constitution—in promulgating and implementing federal regulations. Here, in broadening the religious exemption to include entities beyond churches and

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[16] While *Hobby Lobby* observed that features of the Affordable Care Act weighed against the argument that the mandate serves a compelling governmental interest, it did not need to adjudicate that issue, finding instead that the mandate failed RFRA's least-restrictive-means component. 573 U.S. at 727-32.

houses of worship, the government has done nothing more than apply its own understanding of RFRA's purposes and goals to those entities whose religious exercise the government has *itself* substantially burdened by imposition of the contraception mandate. Given our country's longstanding commitment to accommodating religious beliefs and practices—a commitment largely codified in RFRA itself—it would be a dereliction of the federal agencies' duty in this case *not* to provide a religious exemption when those same agencies have come to the conclusion that the mandate, as well as the so-called "accommodation" to complying with it, substantially burden the religious exercise of objecting entities.

No one doubts that the government, facing an individual RFRA claim against the contraception mandate and its "accommodation" in federal court, would have the authority to agree with the arguments posed by the religious claimant and consent to a permanent injunction barring the government from applying the mandate against the claimant. By creating the religious exemption challenged in this action, the government has, in essence, proactively established that litigation position as policy through its rulemaking. So long as governmental actions do not violate the Establishment Clause, *see* 42 U.S.C. § 2000bb-4 ("Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter"), nothing in RFRA impedes the government in affording additional religious freedom in the implementation of federal regulations, such as

here, than might be afforded through a judicial remedy in an individual RFRA case.

Indeed, just as the executive branch should not apply, implement, or enforce a federal regulation that could possibly jeopardize free speech or free exercise liberties protected in the Bill of Rights, it should not apply, implement, or enforce a federal regulation that could jeopardize the protections afforded by RFRA. And just as Congress has been free to act to protect religious practice after this Court denied relief under the Free Exercise Clause,[17] executive agencies should be free under RFRA to act to protect religious practice even where courts have held that RFRA does not require it.

In proactively exempting certain entities that cannot comply with the contraception mandate by executing the self-certification form, Petitioners have furthered the interests of RFRA's goals and purposes—a law they are duty-bound to obey—as well as furthering religious freedom more generally. The government here has lifted a substantial burden on religious exercise it was responsible for imposing in the first place.

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[17] For example, after this Court in *United States v. Lee*, 455 U.S. 252 (1982), denied a free exercise claim by an adherent of the Amish faith over the payment of social security taxes, Congress adopted 26 U.S.C. § 3127, granting the Amish (and others) such an exemption. Also, following this Court's rejection of a free exercise right of an Air Force serviceman to wear a yarmulke while in uniform, *Goldman v. Weinberger*, 475 U.S. 503 (1986), Congress enacted 10 U.S.C. § 774, allowing members of the armed services to wear "religious apparel."

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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