Nos. 23-235, 23-236

In the Supreme Court of the United States

U.S. FOOD AND DRUG ADMINISTRATION, ET AL.,

Petitioners,

v.

ALLIANCE FOR HIPPOCRATIC MEDICINE, ET AL.,

Respondents.

DANCO LABORATORIES, L.L.C.,

Petitioners,

v.

ALLIANCE FOR HIPPOCRATIC MEDICINE, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Jewish Coalition for Religious Liberty (JCRL) is a nondenominational organization of Jewish communal and lay leaders. JCRL is devoted to ensuring that First Amendment jurisprudence enables the flourishing of diverse religious viewpoints and practices in the United States. JCRL is concerned that the novel "religious-veto" view of religious liberty promoted by some of Petitioner's amici in this case, if accepted, would make it more difficult for sincere religious adherents to obtain accommodations in future cases. JCRL advocates for religious liberty protections that allow religious adherents to practice their faith while fully participating in American life and coexisting with their neighbors. JCRL has an interest in preserving this traditional view of religious liberty by rebutting the novel "religious-veto" theory presented by Petitioner's amici in this case.

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus, its members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Religious liberty is fundamental to the American ideal.[2] By accommodating a wide variety of religious beliefs, America has thrived as a "Nation of unparalleled pluralism and religious tolerance." *See Salazar v. Buono*, 559 U.S. 700, 723 (2010) (Alito, J. concurring).[3] While, in certain circumstances, religious liberty protections do require accommodations to protect Americans' right to exercise their faith, they do not—and must not—otherwise invalidate laws like the APA that safeguard those without similar objections. Unfortunately, that sort of sweeping invalidation, extending far beyond any conceivably necessary religious accommodation, is exactly what some of Petitioner's amici ask this Court to do. They urge this Court, in the name of religious liberty, to ignore the APA and allow the FDA

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[2] Letter From George Washington to the Hebrew Congregation in Newport, Rhode Island, 18 August 1790, FOUNDERS ONLINE, https://bit.ly/2ZqkLLu (last visited July 13, 2020) ("[T]he Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support. . . . [In this country] every one shall sit in safety under his own vine and fig tree, and there shall be none to make him afraid.").

[3] *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.").

to arbitrarily and capriciously adopt new regulations that may endanger the health of millions of Americans—objectors and nonobjectors alike.

Petitioner's amici do not even attempt to point to any existing precedent or theory to support their claim, relying instead on vague appeals to religious interests. There is no basis for this Court to eliminate the protections of the APA wholesale simply because that statute makes it more difficult for an agency to adopt a rule that some religious adherents would prefer. This Court should reject the novel "religious-veto" theory which would ultimately contract religious liberty for everyone.

Traditional free exercise protections take several forms. They may prohibit government entities from targeting religious activity,[4] require state actors to treat religious conduct as favorably as comparable secular conduct,[5] or prevent the government from substantially burdening religious activity unless doing so is necessary to further a compelling government interest.[6] These traditional free exercise protections require the state to accommodate religious exercise, but they do not otherwise prevent government entities from enforcing laws aimed at protecting Americans who lack religious objections.[7]

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[4] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

[5] *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

[6] *Holt v. Hobbs*, 574 U.S. 352 (2015).

[7] *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972) (creating a religious accommodation to exempt Amish parents from having

Such protections help ensure that religious adherents can fully participate in civil society without having to abandon their faith.[8] Importantly, they protect religious adherents without entirely negating laws that play an important role in protecting public health and safety.[9]

In the past, religious supporters of a right to abortion have advocated a novel conception of religious liberty that is incompatible with this traditional understanding. In their view, the fact that some religions may allow or even require women to obtain abortions should lead to a general constitutional right to abortion. *See* Brief for 178

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to send their children to formal high-school while confirming that, "[n]othing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes … .").

[8] *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (finding it unconstitutional for the government to force a religious adherent to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."); *Braunfeld v. Brown*, 366 U.S. 599, 616 (1961) (Stewart, J. dissenting) ("Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand.")

[9] *Fulton v. City of Philadelphia, Pa.*, No. 19-123, 2021 WL 2459253, at *9 (U.S. June 17, 2021) ("CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else"); *id.* at *20 (Alito, J. concurring) ("the text of the Free Exercise Clause gives a specific group of people (those who wish to engage in the 'exercise of religion') the right to do so without hindrance").

Organizations as Amici Curiae in Support of Respondents at app. a, *Planned Parenthood of Se. Pa. v. Casey*, Nos. 91-744, 91-902, 505 U.S. 833 (1992). The "right" that such advocates propose would not be limited to protecting the religious exercise of objectors. Instead, it would prohibit states from pursuing their interest in protecting the lives of unborn children, *even in instances that would not impact adherents' exercise of their faith*.[10] The proponents of such a right thus do not seek to ensure that they can fully participate in society without compromising their religious exercise; they seek to yoke the rest of society to their theological preferences.

The version of religious liberty promoted by some of Petitioner's amici in this case is closely related to that novel theory. *See* Brief for National Council of Jewish Women et. al., as Amici Curiae, *FDA, v. Alliance for Hippocratic Medicine*, NO 23-235 ("National Council Brief"). Those amici are requesting a religious veto in this case as surely as previous amici did when they asked courts to completely invalidate abortion regulations that conflicted with their faith.

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[10] *See e.g.*, Brief for American Jewish Congress, et. al., as Amici Curiae at 4, *Webster v. Reprod. Health Servs.*, No. 88-605, 492 U.S. 490 (1989) ("given the dramatically contrasting religious views about whether and when abortion is permitted or required, state statutes drastically curtailing access to abortion unacceptably interfere with constitutionally protected religious and private conscience."); *id.* at 8 ("the right of privacy and the right to religious liberty exclude the state from personal decisions about the critical issues of family life, reproduction and child-reading.").

Only, rather than asking this Court to nullify an abortion regulation, they are asking it to suspend the APA.

Petitioner's amici do not suggest that they should be granted exemptions from FDA regulations that conflict with their faith.[11] Rather, they urge this court to ignore the APA and allow the FDA to implement new regulations nationwide without satisfying the requirements of that statute, heedless of the fact that doing so would make every American vulnerable to the consequences of arbitrary and capricious regulations. *See* National Council Brief at 8, 19.

Amici's assertion is particularly egregious in this case where the lower court found that the FDA's arbitrary and capricious regulations might endanger American's health and safety. *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210, 256 (5th Cir. 2023). It is possible, though by no means certain, that a religious objector might be able to maintain that she is entitled to an accommodation allowing her to take a potentially dangerous drug. However, there is no precedent which suggests that such an objector can subject all Americans to that danger by withdrawing the protections of the APA from every American including those who do not share her faith.

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[11] We do not take a position here as to whether such an individualized accommodation would be appropriate given that such a request is not before the Court.

This novel “religious-veto” view of religious liberty is inconsistent with this Court’s precedents and, if given credence, would make it more difficult to protect religious exercise in the future. At first glance, a doctrine that would grant religious adherents an eraser that would allow them to entirely negate laws that conflict with their faith—extending beyond protecting their own religious exercise—might seem appealing to religious liberty advocates. However, such a novel and imperious regime would quickly prove untenable, especially in a large and religiously diverse country. Under the religious-veto view, no law—not even one that serves functions as important as the Administrative Procedure Act—would be safe from negation. In the long term, the untenable implications of the novel “religious-veto” view would diminish protections for religious exercise.

In *Employment Division, Department of Human Resources of Oregon v. Smith*, this Court worried that applying the then-existing system of religious accommodations might be “courting anarchy.” 494 U.S. 872, 888 (1990). Amicus vigorously disagrees that granting religious accommodations poses such a risk and believes the Court should overrule *Smith*. However, the novel religious-veto view would legitimize such concerns.

This case provides an ideal example of that threat. Under the novel view, successful religious objectors would empower a federal agency to adopt regulations that might endanger millions of Americans. Faced with such staggering consequences,

courts may adopt standards for granting relief that are less favorable to religious adherents than those that currently pertain. Fortunately, religious vetoes are not what the First Amendment or this Court's precedents require.

Even if courts continued to apply something resembling the current standards, religious liberty proponents would be less likely to prevail under the religious-veto approach than they are under the existing religious-accommodation approach. Currently, the government can only burden an adherent's religious exercise if it can show that "the asserted harm of granting specific exemptions to *particular religious claimants*" is of the highest magnitude.[12] That analysis, which is favorable to religious objectors, only makes sense so long as the remedy is an individual exemption. Under the religious-veto approach, courts would have to analyze the harm of completely negating a law because exemptions would no longer be limited to the specific objectors.

In this case, under the religious-veto view, a court would have to determine whether Congress had a compelling interest in ensuring that the FDA acted reasonably before approving potentially harmful drugs. The answer to that question would almost certainly resolve in Congress's favor. If a court were to apply the traditional framework to facts similar to those in this case, it would only have to determine

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[12] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (emphasis added).

whether the government had a compelling interest in denying a particular religious adherent an accommodation to take a potentially dangerous drug before universal approval. It is not clear how a court would resolve that question, but the religious adherent is less certain to lose than she would be under the test that follows from the novel approach.

In order to avoid weakening clearly established religious liberty protections, this Court should resist the invitation to adopt the religious-veto approach.

ARGUMENT

I. Religious Liberty Protections Require Government Actors to Accommodate Religious Objectors, They Cannot be Used to Entirely Prevent the Government From Protecting Americans' Health and Safety.

A. Religious liberty protections help religious adherents flourish by allowing them to exercise their faith while fully participating in public life.

Religious liberty protections safeguard the American ideal of religious pluralism. They do so by granting religious adherents accommodations from some laws that would otherwise interfere with their

ability to exercise their faith.[13] The consequence of this traditional accommodationist view of religious liberty is to enable the coexistence and mutual flourishing of religious adherents and their neighbors who are either secular or follow other faiths.[14]

This Court has enforced free exercise protections in several ways. For example, it has held that, under the First Amendment, "a law targeting religious beliefs as such is never permissible." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 533. For that reason, denying religious organizations access to public benefits solely because of their faith is "odious to our Constitution." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017).

Second, the Court has held that facially neutral laws that prohibit certain activities but provide some exceptions cannot "treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-97 (2021) (emphasis in original). If a law contains

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[13] *Sherbert*, 374 U.S. at 415-16 (Stewart, J. Concurring) ("the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief").

[14] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). ("As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be."); *id.* ("Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity" to "the Inquisition, as a means to religious and dynastic unity … .").

accommodations for secular objections, it must grant similar accommodations to those who object for religious reasons. *Id.*; *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68-69 (2020) (enjoining "severe restrictions on the applicants' religious services" because houses of worship were treated more harshly than comparable secular facilities without sufficient justification).

As a final example, in some instances, government entities may not substantially burden religious exercise unless doing so is necessary to further a compelling government interest. *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682 (2014) (holding that the department of Health and Human Services' abortifacient mandate violated RFRA as applied to religious objectors because the government had not proven that applying the mandate to them was the least restrictive means of furthering a compelling government interest); *Holt v. Hobbs*, 574 U.S. 352 (2015) (holding that a prison's grooming policy violated RLUIPA insofar as it prevented a Muslim prisoner from growing a beard in accordance with his faith).

While those examples demonstrate that this Court has offered robust protection for religious liberty, those doctrines do not prevent the state from applying its laws to nonobjecting citizens. In *Wisconsin v. Yoder*, this Court held that Wisconsin could not require Amish parents with religious objections to send their children to formal high schools. 406 U.S. at 234. However, the court was quick

to point out that its holding did not "undermine the general applicability of the State's compulsory school-attendance" law. *Id.* at 236. The Amish religious objectors would receive an exemption, but that would not prevent the State from applying the law to other parents who did not share their religious objection. In *Burwell*, this Court held that RFRA required the Department of Health and Human Services to offer an accommodation to religious objectors. It did not prohibit the agency from enforcing the abortifacient mandate against non-objecting businesses. 573 U.S. at 730-36. In *Holt*, this Court held that "the Department's grooming policy violates RLUIPA insofar as it prevents petitioner from growing a ½–inch beard in accordance with his religious beliefs." 574 U.S. at 369. It did not hold that every prisoner, even those with no religious objections, was entitled to grow such a beard. Most recently, in *Fulton*, this Court held that the city of Philadelphia had to grant Catholic Social Services a religious accommodation. It did not hold that the city had to drop its non-discrimination policy entirely. 141 S. Ct. 1868, at 1882 ("CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else."); *id.* at 1897 (Alito, J., concurring) ("the text of the Free Exercise Clause gives a specific group of people (those who wish to engage in the 'exercise of religion') the right to do so without hindrance").

The Court should maintain this traditional theory of religious liberty—which allows believers of

all faiths as well as non-believers to coexist and flourish in the public square by accommodating religious practice.

B. This Court should reject the invitation to substitute a mistaken religious-veto view of religious liberty in place of the traditional accommodation-based understanding.

In the proceedings below, appellees maintained, and the Fifth Circuit agreed, that "FDA's actions were unlawful under the Administrative Procedure Act" because the Agency "overlooked important safety risks" while modifying its regulations. *All. for Hippocratic Med.,* 78 F.4th at 222. The court held that the FDA had likely acted arbitrarily and capriciously because it failed to consider the cumulative effects that its 2016 Amendments might have on the safety of women taking mifepristone. *Id.* at 246. The Court also held that the FDA's decision to eliminate the requirement that mifepristone be prescribed in person was likely arbitrary and capricious because "it did not refer to any literature that affirmatively supported the notion that mifepristone would remain safe and effective even without the in-person dispensing requirement" *Id.* at 240. The Court concluded that "the Medical Organizations and Doctors have made a substantial showing that the 2016 Amendments and 2021 Non-Enforcement Decision were taken without sufficient consideration of the effects those changes would have

on patients," *id.* at 253, and that the "FDA failed to address several important concerns about whether the drug would be safe for the women who use it." *Id.* at 256. The Fifth Circuit therefore affirmed the district court decision enjoining the FDA's new regulations and leaving the previous ones in place.

Petitioner's amici do not seek religious accommodations for the limited number of people whose religious practice might be burdened by that injunction. Instead, they seek to impose their religious convictions on all Americans, denying them the APA's protection, and reinstating the FDA's arbitrary and capricious regulations nationwide. *See* National Council Brief at 8. They maintain that holding the FDA to the strictures of the APA would "interfere with women's ability to follow the teachings of their faith and their own religious beliefs concerning abortion." *Id.* at 17. Therefore, they urge this court to reverse the Fifth Circuit's decision below and to reinstate the FDA's regulations nationwide. *Id.* at 8, 19.

This is not an example of a traditional religious liberty accommodation that allows religious adherents to practice their faith while otherwise allowing laws to serve their intended purpose—in this case protecting Americans' health and safety. This religious-veto view is contrary to this Court's precedent, seems to be more tailored toward achieving societal or political goals than facilitating religious exercise, and could cause substantial harm. This Court should reject the invitation to head down that novel path.

C. This Court should reject the novel concept of religious liberty because adopting that approach would undermine existing Free Exercise rights.

i. Presented with the consequences of completely invalidating laws that burden any religious adherent's faith, courts might refrain from even considering granting relief in all but the most extreme of cases.

In *Employment Division v. Smith*, this Court shrunk the reach of the First Amendment's Free Exercise protections due to the fear that extending such protection to religiously neutral and generally applicable laws would be "courting anarchy." 494 U.S. at 888. The Court claimed that, "we cannot afford the luxury of deeming *presumptively invalid,* as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order … ." *Id.* (emphasis in original). The *Smith* Court worried that granting accommodations to religiously neutral laws "would be to make the professed doctrines of religious belief superior to the law of the land … ." *Id.* at 879.

In order to mitigate its concerns, the *Smith* Court announced that it would no longer apply the

protections of the Free Exercise Clause to generally applicable and religiously neutral laws. This significantly limited the number of cases in which courts would even consider granting religious liberty accommodations. Under the novel religious-veto view, the potential harms are far greater, and therefore courts may respond by even further limiting the types of cases in which relief might be granted.

As Amicus has maintained, over the last thirty years, this Court has proven itself capable of granting religious exemptions to generally applicable laws without facing the consequences *Smith* feared.[15] In applying statutes such as RFRA and RLUIPA, this Court has demonstrated that it can exempt religious adherents without unduly disrupting the government's ability to pursue its interests or maintain stability. *Holt*, 574 U.S. at 352 (unanimously exempting a Muslim inmate from a prison's grooming requirement in order to allow him to wear a religiously obligatory beard). That system of religious accommodation is effective and proven. In determining whether to grant an accommodation, courts scrutinize "the asserted harm of granting specific exemptions to particular religious claimants" and then weigh the "marginal interest in enforcing the challenged government action in that particular context." *Id.* at 362-63 (quotation omitted). By

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[15] *See* Brief for Jewish Coalition for Religious Liberty, as Amicus Curiae Supporting Respondents at 15-19, *Fulton v. City of Philadelphia, Pa.*, No. 19-123, 2021 WL 2459253 (U.S. Aug. 16, 2019).

ensuring that religious accommodations are appropriately targeted, courts can lessen the possibility of such accommodations interfering with state action that is the least restrictive means of furthering a compelling government interest. When such an accommodation is deemed appropriate, it is only granted to the objecting individual. Limiting the accommodation to "particular religious claimants" minimizes the disruption that such accommodations cause and maximizes the likelihood that they can be granted.

That established framework, which this Court and other courts have utilized for thirty years, has allowed religious adherents to flourish and has not unleashed anarchy. In light of that track record, this Court has clarified the limited nature of *Smith*'s reach and applied Free Exercise scrutiny in a number of cases. For example, it has narrowly interpreted what it means for a law to be generally applicable and thus found that few laws qualify for that safe harbor.[16] A majority of the Justices on the Court has even suggested that they would consider reversing *Smith*.[17]

Under the religious-veto approach, however, *Smith*'s critique would have force. That view, under which religious adherents could block the state from pursuing any policy that they objected to—*even as to those Americans who do not share the religious*

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[16] *See, Fulton*, 131 S. Ct. at 1926-28.

[17] Justices Barrett, Kavanaugh, Alito, Thomas, and Gorsuch all joined concurrences suggesting that *Smith* was wrongly decided. *See*, *id*.

objection—could in fact be seen as making "the professed doctrines of religious belief superior to the law of the land." *Smith*, 494 U.S. at 879. Under the novel approach, *Smith*'s supposed danger of "courting anarchy" would actually exist. Recognizing a religious liberty right would no longer have a relatively minor systemic impact, as in the case of exempting one adherent or set of adherents. Instead, each new free exercise right would create an earthquake that would entirely disrupt the legal system. This is highlighted by the relief that Petitioner's amici seek in this case, the nationwide reimposition of FDA regulations that were adopted in an arbitrary and capricious manner.

Faced with these consequences, courts may be tempted to adopt an expansive view of *Smith* to reduce the danger. Even worse, courts may choose to go even further down the path charted by *Smith* and end up interpreting the Free Exercise Clause as applying to vanishingly few cases. The Court should reject the invitation to start down that path and instead continue following the accommodationist path that has proven successful.

ii. Even assuming that courts did not take a step as drastic as further narrowing the scope of the Free Exercise Clause, adopting a religious-veto view in place of a religious-accommodation view would make the calculus that courts undertake when determining whether to grant relief to religious objectors less favorable for such objectors.

Under the current system, the question is not whether the government "has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to" a particular religious objector. *Fulton*, 2021 WL 2459253, at *8. A government entity cannot deny an accommodation by merely showing that its law furthers an important or even compelling interest. Rather it most show that granting a limited exception to a religious objector requesting one "will put those goals at risk." *Id.* at *9.

That analysis would no longer make sense if the Court were to abandon religious accommodations and *entirely invalidate* laws that impinge on any adherent's religious exercise instead. Under that novel system, it would be substantially easier for the

government to show that granting relief to religious adherents would put its goals at risk. And courts would naturally be far more reluctant to grant relief to religious objectors—relief which would utterly vitiate the Government's goals, even as to non-objectors. While the remedy under the novel approach may seem more robust, it goes much further than is necessary to protect religious adherent's religious exercise, it ultimately would make it less likely for a court to grant any relief at all.

iii. The current accommodation-based approach best balances between two important governmental interests: protecting religious exercise and allowing the state to pursue otherwise legitimate interests with minimal interference.

The accommodation-based approach to religious liberty is compatible with *Smith*'s view that, "[v]alues that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process." 494 U.S. at 890. As long as Free Exercise rights are protected by appropriate accommodation, the political process can continue to pursue its ends. The traditional regime recognizes that the state has an interest in applying its laws against non-objecting citizens, even while it has an interest in protecting its religious citizens by granting them exemptions.

Under the accommodation-based approach, the state can satisfy both of those interests simultaneously.

The novel religious-veto approach would declare any area of law that arguably touches on values protected by the Bill of Rights entirely off limits to the political process. Instead of allowing the state's two interests to flourish simultaneously, it would pit them against each other and ensure that where one is satisfied the other is ignored. In this case, that means arguing that the APA's rules should not apply to certain agency regulations if doing so would burden religious liberty interests. Such a heavy-handed, zero-sum approach is not required by the text of the Constitution, American history, this Court's Free Exercise jurisprudence, or any other source of law. Endorsing the novel view would ultimately contract rather than expand religious liberty because it would rightly make courts extremely wary of granting relief in free exercise cases.

CONCLUSION

This Court should ignore arguments urging it to reverse the decision below in order to protect religious liberty.

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