No. 19-431

# In The Supreme Court of the United States

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

*Petitioner,*

v.

THE COMMONWEALTH OF PENNSYLVANIA AND THE STATE OF NEW JERSEY, ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF OF AMICUS CURIAE FIRST LIBERTY INSTITUTE IN SUPPORT OF THE PETITION

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## INTEREST OF AMICUS CURIAE

First Liberty Institute is a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans.[1] First Liberty provides *pro bono* legal representation to individuals and institutions of all faiths—Catholic, Islamic, Jewish, Native American, Protestant, the Falun Gong, and others.

Over the past seven years, First Liberty has represented multiple faith-based organizations that hold sincere religious objections to portions of the Contraceptive Mandate. Accordingly, First Liberty has a strong interest in the outcome of this litigation. Government compulsion to violate one's conscience or sincerely held religious beliefs threatens religious individuals' ability to participate in the marketplace on terms equal to others. Because First Liberty represents a broader range of religious perspectives than those of the particular plaintiffs in this case, its interest in free religious exercise reaches beyond this particular dispute. Precedent that tramples on the right of conscience for individuals of one faith impacts all others.



[1] Attorneys from First Liberty Institute authored this brief as amicus curiae. No attorney for any party authored any part of this brief, and no one apart from amicus curiae made any financial contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief and were timely notified.

## SUMMARY OF ARGUMENT

When a religious observer's beliefs prevent him from complying with a law, the believer is not the instigator of the conflict between him and the government. Rather, the believer is simply caught between the inconsistent demands of two rightful authorities—that is, between earthly and spiritual sovereigns. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1515–16 (1990). With this in mind, the Court should protect the interests of religious minorities in conflict with the wider society," *id.* at 1515, and "make religious oppression all the more impossible," *id*. at 1516.

By contrast, the decision below manifests an aggressive effort to compel the religious objector to assimilate with popular secular beliefs. In its decision, the Third Circuit functionally repealed the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb–2000bb-4, by deeming that religious beliefs deserve Accommodation only when those beliefs are perceived as reasonable, accommodating them is convenient, and the decision to accommodate them is consistent with the court's policy preferences. In so doing, the decision below converts the federal courts into instruments of religious oppression, ready to intervene when the executive branch is no longer willing to oppress religious dissenters itself.

The lower court's RFRA analysis grossly erred, because it (1) converted the substantial burden analysis

into a search for theological truth, (2) rendered RFRA categorically inapplicable when religious objections compete with third party interests, and (3) applied wildly disparate administrative deference standards best explained by substantive policy preference rather than good faith statutory interpretation.

## ARGUMENT

### I. By impermissibly evaluating the rationality of the employers' sincere religious belief, the Third Circuit converted RFRA's substantial burden analysis into a search for theological truth.

The Third Circuit's substantial burden analysis impermissibly dissected the merits of the objecting employers' sincere religious beliefs rather than determining whether the Contraceptive Mandate[2] substantially burdened those beliefs. Doubling down on its previously vacated decision in *Geneva College v. Secretary of the United States Department of Health and Human Services*, 778 F.3d 422 (3d Cir. 2015),[3] the Third Circuit

[2] 45 C.F.R. § 147.130 (promulgated under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA")).

[3] *See Geneva Coll.*, 778 F.3d at 437–38 ("[T]he submission of the self-certification form does not make the [employers] 'complicit' in the provision of contraceptive coverage."), *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Real Alts., Inc. v. Sec'y of U.S. Dep't of HHS*, 867 F.3d 338, 356 n.18 (3d Cir. 2017) ("*Geneva* is no longer controlling[.]").

concluded that the Accommodation does not substantially burden the employers' religious beliefs, because the court believed the Accommodation process does not actually make the employers morally complicit in providing contraceptive coverage. *Pennsylvania v. President of the United States*, 930 F.3d 543, 573 (3d Cir. 2019). However, a given religious belief's truth has no bearing on the substantiality of the burden placed upon it. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691 (2014); *Sharpe Holdings, Inc. v. U.S. Dep't of HHS*, 801 F.3d 927, 938 (8th Cir. 2015) ("[I]t is not within the judicial function to determine whether a religious belief or practice comports with the tenets of a particular religion."), *vacated and remanded sub nom. U.S. Dep't of HHS v. CNS Int'l Ministries*, 136 S. Ct. 2006 (2016). Instead, government substantially burdens religious beliefs when it exerts substantial pressure on a religious adherent to modify his behavior and, thus, to violate his sincere religious beliefs, regardless of whether the court agrees that the religious belief is true. *Thomas v. Review Bd.*, 450 U.S. 707, 717–18 (1981); *see Hobby Lobby*, 573 U.S. at 691 (finding substantial burden where the government imposes heavy monetary penalties on a believer for not complying with regulations that violate his religious convictions).

This Court firmly established this principle in *Hobby Lobby* by holding that the Contraceptive Mandate imposed a substantial burden on employers' religious exercise without asking whether those beliefs were true or "reasonable." *See* 573 U.S. at 720. The

employers in *Hobby Lobby* sincerely believed 1) that they could not facilitate abortions, 2) that certain forms of contraception act as abortifacients, and 3) therefore, if they provided insurance covering those contraception methods, they would be facilitating abortion. *Id.* at 701–03, 720. The Contraceptive Mandate imposed a heavy monetary penalty if the employers acted consistently with these religious beliefs and, thus, refused to comply with the Contraceptive Mandate. *Id.* at 720. Such consequences, the Court concluded, substantially burdened the employers' religious exercise. *Id*. at 720–21. In carefully discussing the employers' belief that the Mandate made them complicit in abortion, the Court afforded proper deference to the employer:

> This belief implicates a difficult and important question of religion and moral philosophy, namely, 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. . . . It is not for us to say that their religious beliefs are mistaken or insubstantial.

*Hobby Lobby*, 573 U.S. at 724–25. As a result, in finding a substantial burden, the Court did not ask whether it is true that the challenged contraceptive methods are abortifacients or that insuring them facilitates abortion. *See id.*

Thus, the Third Circuit was required to analyze two questions: 1) whether the employers' belief that

the Accommodation made them complicit in abortion was sincerely held, and then 2) whether the penalty imposed for not complying with the Mandate or the Accommodation amounted to a substantial burden. *See id.*; 42 U.S.C. § 2000bb-1. Instead, under the guise of evaluating the burden's substantiality, the Third Circuit inappropriately analyzed whether the employers' belief that the Accommodation process made them complicit was reasonable—that is, whether that belief is accurate. *Pennsylvania*, 930 F.3d at 573 ("The religious objectors who oppose the Accommodation mechanism disapprove of 'what follows from' filing the self-certification form[,] . . . [but] 'the actual provision of contraceptive coverage is by a third party,' so any possible burden from the notification procedure is not substantial." (quoting *Geneva Coll.*, 778 F.3d at 439–40, 442)).

But *Hobby Lobby* unequivocally explained that courts may not reject a RFRA claim because the connection between what the religious parties must do and "the end that they find to be morally wrong" is "too attenuated." 573 U.S. at 723–24 ("This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)."). Providing the religious employers' belief "reflects an honest conviction," courts cannot determine whether

those "religious beliefs are mistaken." *Id.* at 725 (citations omitted); *see Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *Thomas*, 450 U.S. at 714 ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); *Sharpe Holdings, Inc.*, 801 F.3d at 941 (explaining that *Hobby Lobby* instructs the courts to accept plaintiffs' assertion that self-certification under the Accommodation process would violate their sincerely held religious beliefs); *Real Alts., Inc.*, 867 F.3d at 375 (Jordan, J., dissenting) ("When the Individual Plaintiffs say . . . that it is at odds with their religious beliefs to purchase a plan which uses their money to offer products and services they believe to be morally abhorrent, I think we are supposed to believe them."); *Priests for Life v. U.S. Dep't of HHS*, 808 F.3d 1, 19 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of rehearing *en banc*) ("Judicially second-guessing the correctness or reasonableness (as opposed to the sincerity) of plaintiffs' religious beliefs is exactly what the Supreme Court in *Hobby Lobby* told us not to do.").

The employers whose exemptions are at issue in this litigation have a sincere religious belief that the Accommodation makes them complicit in providing contraception, which they believe they cannot morally do. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the

ACA, 82 Fed. Reg. 47,792, 47,798 (Oct. 13, 2017). As was true about the employers in *Hobby Lobby* who could not comply with the Contraceptive Mandate without violating their religious beliefs and incurred a penalty for noncompliance, *see* 573 U.S. at 720, the Accommodation also requires the religious employers who object to it to violate their beliefs or incur a penalty for noncompliance, *see*, *e.g.*, *Sharpe Holdings, Inc.*, 801 F.3d at 942. Hence, the Accommodation imposes a substantial burden on religious exercise, and in holding to the contrary the Third Circuit defied binding precedent almost perfectly on point.

Beyond this, the Third Circuit went so far as to make a blanket determination that no employer can claim that the Accommodation infringes on their religious exercise, *Pennsylvania*, 930 F.3d at 574 ("[N]or is there a basis to conclude the Accommodation process infringes on the religious exercise of *any* employer.") (emphasis added), despite binding precedent demanding that courts analyze RFRA claims specifically with respect to each individual objector. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) ("RFRA expressly adopted the compelling interest test 'as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972),'" in which the Court "looked beyond broadly formulated interests and scrutinized the asserted harm of granting specific exemptions to *particular religious claimants*.") (quoting 42 U.S.C. § 2000bb(b)(1)) (internal citations omitted) (emphasis added).

Unfortunately, the Third Circuit's analysis follows an ominous pattern of finding religious beliefs not substantially burdened because the court does not believe the beliefs are true. About two years ago, the Third Circuit found that the same Contraceptive Mandate and Accommodation posed no substantial burden to the religious exercise of employees. In that case, the court could barely conceal its disdain as it described the employees' religious convictions. *See Real Alts., Inc.*, 867 F.3d at 359 ("The Real Alternatives Employees characterize their purchase of insurance as *somehow* enabling the provision of contraceptives, thereby substantially burdening their religious exercise.") (emphasis added). The court reasoned that the insurance company mediated the employees' actions under the ACA, and, thus, that any link between the decision to sign up for insurance and the provision of contraceptives is "far too attenuated to rank as substantial." *Id.* at 360 (quoting *Hobby Lobby*, 573 U.S. at 760 (Ginsburg, J., dissenting) (internal quotation marks omitted)). The court overtly dismissed the employees' religious beliefs, explaining, "No matter how sincerely held their beliefs may be, we cannot accept at face value that subscribing to the plan imposes a '*substantial* burden.'" *Id.* at 365.

By converting the substantial burden analysis into a test of theological truth, the court below creates a rule that only those religious convictions it finds reasonable are entitled to RFRA protection. Such a rule gravely endangers religious liberty, because popular religious beliefs need no law to protect them. That is, if

only popular religious beliefs receive religious liberty, religious liberty does not exist at all. The religious dissenter can no longer look to the New World for the promise of freedom. It is vital that the Supreme Court grant the petition to correct these grave errors lest the lower courts persist in ignoring *Hobby Lobby* and destroying RFRA's critical protection of religious dissenters.

## II. By incorporating the "undue burden" abortion standard, the Third Circuit inverted the notion of least restrictive means to conclude that the presence of third party harm invalidates RFRA.

By manipulating the substantial burden analysis in both *Real Alternatives* and the decision below, the Third Circuit avoided applying the strict scrutiny standard it knows would have ensured the religious objectors would prevail. However, the lower court's boldness in this case grew when it abruptly introduced, without proper citation, the "undue burden" standard used to decide challenges to abortion regulations.[4] The court wrote: "Furthermore, the Religious Exemption

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[4] In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court found that the Constitution included a personal liberty guaranteed by the Due Process Clause for a woman to terminate the life of her unborn child, thus forcing every state to legalize abortion before fetal viability. *Id.* at 163–64. Since *Roe*, the Court developed the "undue burden" standard to assess abortion restrictions. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846–47, 874 (1992); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

and the new optional Accommodation would impose an undue burden on nonbeneficiaries—the female employees who will lose coverage for contraceptive care." *Pennsylvania*, 930 F.3d at 574. By refusing to follow RFRA when third parties would allegedly be affected, the Third Circuit's opinion advanced the dangerous and legally incorrect idea that third party "harm" supersedes RFRA's protections for religious objectors—virtually nullifying RFRA.[5]

This Court expressly rejected the notion that third-party harm invalidates RFRA; rather, when courts consider the burdens a requested Accommodation may impose on nonbeneficiaries, "[t]hat consideration will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest." *Hobby Lobby*, 573 U.S. at 729 n.37. That is, whether accommodating religious beliefs creates externalities to third parties may be relevant in assessing RFRA's compelling interest and least restrictive means elements, but it does not justify circumventing RFRA altogether. As this Court further explained, "[I]t could not reasonably be maintained that any burden on religious exercise . . . is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties." *Id.* RFRA, by its nature,

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[5] Notably, to the extent the Third Circuit would find the religious exemption from the Contraceptive Mandate to unduly burden abortion access, it would tend to validate the employers' belief that complying with the Mandate makes them complicit in providing abortion.

creates a balancing test among competing interests. *See* 42 U.S.C. § 2000bb(a)(5) ("[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."). RFRA would have no meaning if it only applied where no other interest competed with the religious objector's interest.

Simply, RFRA still applies even when granting an exemption to the religious observer means that the observer will no longer be obligated to a third party. Indeed, the notion that third party harm vetoes any interest in religious toleration is a prevalent deception RFRA opponents advance,[6] but RFRA is by nature a burden-shifting standard. *See* 42 U.S.C. § 2000bb(a)(5). Therefore, in structuring and passing RFRA, Congress accepted the consequence that religious tolerance may sometimes affect third parties. RFRA's balancing test operates to ensure that relevant interests on both sides receive consideration—once a religious objector establishes a substantial burden to his sincerely held religious belief, the burden shifts to the government to fulfill strict scrutiny by demonstrating that it pursues a compelling interest by the least restrictive means (a showing that incorporates the government's interest in protecting third parties). *See* 42 U.S.C. § 2000bb-1;

[6] See generally, the Equality Act, H.R. 5, 116th Cong. (2019) which says, "The Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.) shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title." *Id.* at § 1107.

*Hobby Lobby*, 573 U.S. at 729 n.37. Thus, the Third Circuit's view that RFRA does not apply if it imposes an "undue burden" on third parties essentially inverts the analysis—invalidating any religious Accommodation that does not use the means least restrictive to third parties. Such analysis is incorrect.

More broadly, this case's procedural posture bears mention here. At this late stage in the enduring Contraceptive Mandate conflict, the federal government has conceded that refusing to exempt the objecting employers is not narrowly tailored to serve a compelling interest. Pet. for Writ of Cert. at 23, *President of the U.S. v. Pennsylvania* (No. 19-454) ("But, as the agencies found, application of the mandate to objecting entities neither serves a compelling governmental interest nor is narrowly tailored to any such interest."). That concession should be the end of this arduous battle to force nuns to insure contraception. Instead, the Third Circuit thwarted a hard-fought armistice by empowering individual states, who are wholly extraneous to the RFRA analysis,[7] to force the federal government to continue action it concedes illegally burdens religious exercise in order to save the states a few hypothetical pennies. *Pennsylvania*, 930 F.3d at 560–61 ("[T]he States expect to spend more money due to the [broad exemptions]."). The Third Circuit accepts this justification to distort RFRA but, once again, it must ignore *Hobby Lobby* to do so. *Hobby Lobby*, 573 U.S. at 730 ("[The government's] view that RFRA can never

[7] *Cf. City of Boerne v. Flores*, 521 U.S. 507, 511 (1997) (finding RFRA unconstitutional to the extent it applied to the states).

require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law.").

Yet, even without the federal government's concession, it is certainly applicable here, as it was in *Hobby Lobby*, that "the Contraceptive Mandate presently does not apply to tens of millions of people," *Hobby Lobby*, 573 U.S. at 700 (internal quotation marks and citation omitted), and "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited," *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal quotation marks, alteration, and citation omitted). The federal government has exempted many entities from providing contraception without any Accommodation process.[8] Thus, the government has no justification to force religious employers to comply with either the Contraceptive Mandate or the Accommodation against their sincere religious beliefs. At this point, under RFRA, the federal government must offer an exemption, not merely the Accommodation, to all religious objectors who demonstrate a substantial burden.

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[8] In addition to exempting churches and their integrated auxiliaries from the Contraceptive Mandate, the agencies also exempted self-insured plans for church-affiliated not-for-profit organizations, *see* Coverage of Certain Preventive Services Under the ACA, 79 Fed. Reg. 51,092, 51,095 n.8 (Aug. 27, 2014), and grandfathered health plans, *see* 42 U.S.C. § 18011 (2019).

To recap, the Third Circuit did not reach strict scrutiny because it concluded that the Accommodation did not pose a substantial burden to religious belief. If it had reached this stage of the analysis, the strength of strict scrutiny and the federal government's concessions virtually ensured that the States would have lost. Yet, in the course of its reasoning, the Third Circuit created an improper test incorporating the undue burden standard outside its proper context. In so doing, the lower court flipped RFRA on its head by mandating that the government find a means of applying RFRA that is least restrictive on third parties, not least restrictive on religious objectors. This is not the law. Thus, this Court should grant the petition for certiorari to clarify the proper substantial burden analysis.

## III. The Third Circuit's wildly disparate administrative deference standards demonstrate it substituted its own policy decisions for the rule of law.

Finally, in promulgating policy for the nation, the Third Circuit's patent disparity between the deference it afforded the previous administration's Accommodation policy and the deference it afforded the present administration's Accommodation policy demonstrate a profound disregard for the rule of law. In order to deny the hard-won exemptions granted to the Little Sisters and other religious objectors, the Third Circuit had to invert the administrative deference that colored its previous decisions.

As the Third Circuit and other circuits across the country considered challenges to the Accommodation process, the resulting decisions took a deferential tone towards the federal government's Contraceptive Mandate framework. In *Real Alternatives*, the Third Circuit upheld the previous administration's Mandate and Accommodation structure by applying a standard it described as "substantially similar to rational basis review." 867 F.3d at 353. After lauding "the actual and legitimate purpose of the historic respect for religion put forth by the Government," *id.* at 351 n.11, the Third Circuit explained that "[e]ven when noninterference is not strictly required, the Government has discretion to grant certain religious accommodations subject to constitutional limitations," *id.* at 352; *see also id.* at 344 (noting "HRSA's discretion to establish an exemption"); *Geneva Coll.*, 778 F.3d at 441 (describing the regulatory Accommodation as part of the ACA) ("The ACA already takes into account beliefs like those of the appellees and *accommodates* them.").

Other circuits afforded the previous Accommodation structure similar respect and deference. *See*, *e.g.*, *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 608–09 (7th Cir. 2015) ("Cognizant of the religious objections of Catholic and a number of other religious institutions to contraception, and mindful of the dictate of the Religious Freedom Restoration Act, . . . some months after the enactment of the Affordable Care Act the government offered a religious exemption from the contraception guidelines."); *Priests for Life v. U.S. Dep't of HHS*, 772 F.3d 229, 239 (D.C. Cir. 2014) ("The government

designed the accommodation to avoid encumbering Plaintiffs' sincere religious belief that providing, paying for, or facilitating insurance coverage for contraceptives violates their religion."); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 211, 218–19 (2d Cir. 2015); *Mich. Catholic Conference v. Burwell*, 755 F.3d 372, 381 (6th Cir. 2014).

However, once the Trump Administration's HHS decided to develop a structure that better protected religious liberty, the Third Circuit suddenly discovered its teeth, explaining that "we owe the Agencies no deference when reviewing determinations based upon RFRA." *Pennsylvania*, 930 F.3d at 572 (citations omitted). Indeed, the Third Circuit made its double standard unmistakable within the same opinion—according the previous administration's regulatory exemptions deference, while finding that the present administration has no authority to exempt anyone at all. *Compare id.* at 556–57 ("As the Agencies later explained, the exemption for churches and houses of worship is consistent with their special status under longstanding tradition in our society and under federal law.") (quotation and citation omitted) *with id.* at 571 ("Congress demonstrated that exempting specific actors from the ACA's mandatory requirements is its job, not the Agencies."). After years of upholding regulatory exemptions, the court below experienced an epiphany—the ACA actually prohibits regulatory exemptions altogether. *See id.* at 570 ("Nothing from [42 U.S.C.] § 300gg-13(a) gives HRSA the discretion to wholly exempt actors of its choosing from providing the

guidelines services. On the contrary, the mandate articulated in § 300gg-13(a) forecloses such exemptions."). No longer praising the federal government's efforts to preserve religious liberty, the Third Circuit forces the federal government back to the policy of the court's own preference. *See id.* at 574 ("In short, the status quo prior to the new Rule, with the Accommodation, did not infringe on the religious exercise of covered employers, nor is there a basis to conclude the Accommodation process infringes on the religious exercise of any employer.").

This disparity in deference leaves the distinct impression that the court below did not engage in good faith statutory interpretation when it found the ACA to unambiguously preclude administrative exemptions from contraceptive coverage. Moreover, that finding is obviously wrong, given that the ACA is rife with delegation and its preventive services Mandate need not apply to contraception at all. For example, the United States Preventive Services Task Force, responsible for conducting systematic evidentiary reviews of preventive services to determine which services should be included in the Mandate, did not even consider contraceptive methods and counseling when developing the initial preventive services recommendations. *See* Institute for Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 1, 10 (2011) (available at https://doi.org/10.17226/13181) (hereinafter "Closing the Gaps"). Rather, the Contraceptive Mandate originated with the Institute of Medicine ("IOM"), which published a report recommending that HHS add

contraceptive methods to its women's preventive service guidelines. *See Closing the Gaps* at 2, 10; *see also Pennsylvania*, 930 F.3d at 556. Unlike the Task Force, IOM did not conduct systemic, evidentiary analysis in developing its recommendations. *Closing the Gaps* at 6. Rather, it developed its recommendations partly based on input from "stakeholders, researchers, members of advocacy organizations, and the public." *Id.* at 3. IOM specifically highlighted, *inter alia*, the American College of Obstetricians and Gynecologists and the American Academy of Pediatrics as among the advocacy organizations whose recommendations that contraceptives be added to the preventive services Mandate the IOM accepted. *See id.* at 104. These very organizations appeared as *amici* below to advance a position dismissive of the religious objections at issue.[9]

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[9] For example, the organizations stated, "FDA-approved contraceptives are often mischaracterized as 'abortifacients.' However, none of the FDA-approved drugs or devices causes abortion; rather, they prevent pregnancy. Medically speaking, pregnancy begins only upon implantation of a fertilized egg in the uterine lining. Regardless of one's personal or religious beliefs, the medical terms 'abortion' and 'abortifacient' refer to—and should only be used in connection with—the termination of a pregnancy, not the prevention of it." Br. of Health Prof'l Orgs. at 8 n.3 (citations omitted).

This conflict is not about when pregnancy begins, but rather when life begins. The organizations that oppose abortifacients believe that life begins upon conception, or when a sperm fertilizes an egg to create a human life. *See* 82 Fed. Reg. at 47,798. Thus, they believe that contraceptives that prevent implantation of fertilized eggs, thereby killing those human lives, act as abortifacients. It is no matter whether the organizations, the government, or even the Court agrees with this belief. If it is sincere—and no

*See* Br. of Health Prof'l Orgs. at 8 n.3, *Pennsylvania v. President of the U.S.*, 930 F.3d 543 (3d Cir. 2019) (Nos. 17-3752, 18-1253, 19-1129, 19-1189). As a result, the Contraceptive Mandate owes its existence not to the unambiguous language of the ACA but to the input of non-neutral "stakeholders" and "advocacy organizations." *See Closing the Gaps* at 3.

Ultimately, the law cannot produce a workable, consistent standard of deference if a court's statutory interpretations are not made in good faith. To a court employing consistent legal principles, the discretion a law affords an administrative agency does not change based on the person leading the administration. If HHS had the discretion to adopt exemption and accommodation procedures before, then it must have the discretion to adopt exemption and accommodation procedures now.

## CONCLUSION

In its decision below, the Third Circuit assumed the role of a policy-maker and functionally repealed RFRA by finding that religious beliefs deserve accommodation only when the beliefs are acceptable, accommodation is convenient, and the court approves of the policy decisions at issue. Such disregard for religious convictions by the courts will ensure that unpopular

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one has disputed its sincerity—it is entitled to protection under the First Amendment and RFRA.

religious believers are increasingly oppressed. This Court must protect the rule of law.

For these reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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