Nos. 19-431 and 19-454

In the Supreme Court of the United States

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

v.

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

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

v.

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

On Writs of Certiorari to the U.S. Court of Appeals for the Third Circuit

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

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QUESTIONS PRESENTED

The questions presented are as follows:

1. Whether the agencies had authority under the ACA and the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb et seq., to expand the conscience exemption to the contraceptive-coverage mandate.

2. Whether the agencies' promulgation of the interim rules without notice and an opportunity for public comment rendered procedurally invalid the final rules that the agencies later issued after notice and an opportunity for public comment.

3. Whether the court of appeals erred in affirming a nationwide preliminary injunction barring implementation of the final rules.

The Court should consider an alternate ground on which this case can be resolved:

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

[1] *Amicus* Cato Institute proposed adding this same supplemental question in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), http://bit.ly/2J81Uw2.

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INTEREST OF *AMICI CURIAE*[2]

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

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

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

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

objecting religious groups should be exempted from the contraceptive mandate, regardless of their organizational structure.

SUMMARY OF ARGUMENT

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

This holding relied on a critical assumption: the original accommodation offered to religious nonprofits was lawful. *Zubik v. Burwell* did not decide this question. 136 S. Ct. 1557, 1560 (2016). A judgment for the Respondents would require executive agencies to continue enforcing the accommodation. But the judiciary cannot force the Departments to implement a regulation that is itself *ultra vires*. The Court can resolve this case on alternate grounds. Specifically, the Departments lack the interpretive authority to craft a religious "accommodation" pursuant to the ACA's "preventive care" mandate.

Amici addressed this same question in 2016. *See* Brief for the Cato Inst. as *Amicus Curiae* in Support of Petitioners, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). In that case, the last administration *exempted* "houses

of worship and their integrated auxiliaries" from the contraceptive mandate. Other religious nonprofits, like the Little Sisters of the Poor, received the less-protective accommodation. Why? Because the Departments found that houses of worship were "*more likely* than other employers to employ people who are of the same faith and/or adhere to the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. 39,870, 39,887 (July 2, 2013). According to the Departments, the Little Sisters' employees were "*less likely* than individuals in plans of religious employers to share their employer's . . . faith and objection to contraceptive coverage on religious grounds." *Id.* This conclusory assertion was the *only* contemporaneous justification for the policy.[3]

At base, the ACA did not delegate to the Departments the authority to draw that arbitrary distinction between religious groups and resolve this "major question." The rulemaking here was not premised on health, financial, or labor-related criteria. Rather, the Department made subjective determinations of which employees more closely adhere to their employers' religious views. The "authority claimed by" the Departments was "beyond [their] expertise and incongruous with the statutory purposes and design." *Gonzales v. Oregon*, 546 U.S.

[3] *See* Brief for the Private Petitioners at 1 (Noting that "the federal government drew the line at religious orders called to services beyond contemplation—here, providing services to the sick and elderly.")

243, 267 (2006). If "Congress wished to assign that question to an agency, it surely would have done so expressly." *Id.*

Had Congress intended to give the Departments discretion to decide which religious institutions should be subject to the mandate, it would have legislated to that effect. "It is especially unlikely that Congress would have delegated this decision to" the Departments, "which ha[ve] no expertise in crafting" religious accommodations "of this sort" without clear statutory guidance. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citing *Gonzales,* 546 U.S. at 266–67). In light of the narrow "breadth of the authority" that Congress has given to the executive branch over this controversial issue of religious liberty, the Court is not "obliged to defer . . . to the agency's expansive construction of the statute." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

If Pennsylvania is correct, and the new exemptions cannot go into effect, the Court will still have to decide what alternate regime complies with RFRA. The Court cannot just consider the expanded exemptions in a vacuum and call it a day. Indeed, the Third Circuit's reading of RFRA returns religious minorities to the precarious position they occupied after *Employment Div. v. Smith*. 494 U.S. 872 (1990).

Finally, executive agencies have an independent obligation to comply with RFRA. They need not wait for a judicial declaration before alleviating burdens on free exercise. RFRA only authorizes a single administrative remedy when the enforcement of a statute substantially burdens the free exercise of

religion: an exemption. RFRA does not empower the Departments to tinker with the machinery of faith.

The expanded exemptions offered to houses of worship were a reasonable effort to comply with the executive's duty to faithfully execute RFRA. Because of RFRA, all sincere religious objectors must be fully exempted from the contraceptive mandate.

ARGUMENT

I. The Decision Below, Which Enjoined the Expanded Exemptions, Declined to Consider the Accommodation's Legality

The Third Circuit affirmed the district court's nationwide injunction. That decision, in effect, forced the Departments to continue implementing the original accommodation—a regulation that the administration determined burdens the free exercise of religion. The Third Circuit, however, declined to resolve the legality of the accommodation.[4] The panel found that this "issue . . . is not before us." *Pennsylvania*, 903 F.3d at 570 n.26.[5]

But if the original accommodation is unlawful, then

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[4] *See* Brief for the Private Petitioners at 34 ("In all events, the Third Circuit plainly erred in failing to recognize that the 'accommodation' violates RFRA.").

[5] In a related case, the Ninth Circuit concluded that the "accommodation process likely does not substantially burden the exercise of religion and hence does not violate RFRA." *California v. HHS*, 941 F.3d 410, 428 (9th Cir. 2019). That decision also did not consider whether the agencies had the requisite interpretive authority to craft the accommodation.

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

Neither the government nor the Little Sisters of the Poor raised this threshold question—and with good reason. If the expanded exemptions are valid, then there is no reason to dwell further on the obsolete accommodation. That executive action can be "swept into the dustbin of repudiated [regulatory] principles." *See Morrison v. Olson*, 487 U.S. 654, 725 (1988) (Scalia, J., dissenting). But if the expanded exemptions are invalid, then the Court will have to return to *Zubik*'s unresolved issue: was the accommodation valid? The answer is still no, for the reasons *Amicus* Cato advanced in 2016. *See* Brief for the Cato Inst., et al., as *Amici Curiae* Supporting Petitioners, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), http://bit.ly/2P5tzSa. Religious nonprofits, like the Little Sisters, are entitled to the only administrative remedy available under RFRA: the full exemption offered to houses of worship.

II. The Departments, Which Created the Accommodation Out of Whole Cloth, Are Not Entitled to Deference

The ACA authorized HHS to make healthcare-related decisions, Treasury to make financial-related decision, and Labor to make employment-related

decisions. 78 Fed. Reg. at 39,892. But the text, structure, and history of the ACA do not convey even the slightest hint that these Departments can make the delicate judgment to deny certain religious groups an exemption from a mandate that burdens their free exercise. There is no indication that Congress intended the Departments to make *any* decisions regarding questions of faith—let alone rank religious nonprofits based on their religiosity. And with nothing approaching a clear statement, the Departments lacked the requisite authority to make such significant determinations. *See King*, 135 S. Ct. at 2489 (citations omitted). The ACA simply did not authorize the Departments to resolve this "major question." The accommodation should not be reviewed deferentially.

A. The ACA Did Not Authorize the Accommodation

The ACA requires that all qualified employers provide, "with respect to women . . . preventive care . . . as provided for . . . by the Health Resources and Service Administration." 42 U.S.C. § 300gg-13(a)(4). Congress did not define what constitutes "preventive care." HRSA, a subsidiary agency, recommended that "preventive care" be interpreted to include all FDA-approved contraceptives. HHS agreed.

Facing a wave of public outrage, HHS belatedly acknowledged that its interpretation would force millions of people to violate their faith. In response,

the Departments adjusted their regulations.[6] First, they exempted certain "religious employer[s]"—houses of worship and their auxiliaries—from the contraceptive mandate altogether. 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). Second, religious nonprofits that the Departments deemed insufficiently religious to qualify for the exemption would receive an "accommodation." The Departments promulgated this alternative scheme for second-class religious groups to comply with the mandate: employers were required to turn over information about their insurers to the government and execute instruments allowing their health plan to distribute contraceptives.

What statutes authorized the exemption and the accommodation? Section 300gg-13(a)(4), standing by itself, supplies no intelligible principle that allows the Departments to tinker with the machinery of faith. The government instead purported to rely on a series of 80 statutes delegating authority to the Departments. 78 Fed. Reg. at 39,892. *See also* Josh Blackman, *Gridlock*, 130 Harv. L. Rev. 241, 256–57 (2016) (discussing the statutes). But in their combined 80,000+ words, these four-score provisions do not reference religion.[7]

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

[7] The Solicitor General argues that the "text [of Section 300gg-13(a)(4)] allows HRSA ample authority to develop guidelines that account for sincere conscience-based objection to contraceptive coverage." Brief for the Federal Petitioners at 11. Likewise, the Little Sisters contend that Section 300gg-13(a)(4) "grants considerable discretion to the executive" to establish

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

How does an organization qualify for an exemption? That decision turns entirely on the organizational form of the religious entity. A nonprofit ministry may merely be "accommodated" even as it engages in *precisely* the same religious exercise as an exempted "integrated auxiliary." It would be unthinkable, for example, if the Bureau of Prisons provided kosher meals to Orthodox Jewish prisoners only, but denied them to Reform Jewish prisoners who

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faith-based exemptions. Brief for the Private Petitioners at 41. *Amici* do not see anything in the text of the ACA that delegates authority to carve out exemptions for religious groups. This authority can *only* be delegated by RFRA.

are "less likely" to adhere to stringent dietary restrictions. *See United States v. Sec'y, Fla. Dep't of Corrections*, 2015 WL 1977795 at *14 (S.D. Fla. Apr. 30, 2015) ("RLUIPA requires consideration of the sincerity of the prisoner's belief, not whether a particular belief is supported by specific religious law or doctrine."). The government lacks the authority to favor "true" believers over casual observers. And even if the ACA somehow granted that power—setting aside whether such a delegation would survive judicial review—the Departments lack the expertise to determine which groups possess the requisite religiosity to warrant an exemption. The distinction between exemption and accommodation turns *solely* on that policy judgment.

Moreover, the ACA does not empower the Departments to exempt some religious groups and burden others. There is no congressional delegation involving the "specific provision" and "particular question" at issue here. *City of Arlington v. FCC*, 569 U.S. 290, 322–323 (2013) (Roberts, C. J., dissenting) (citation omitted). The government cannot point to *any* "legislative delegation to [the Departments] on a particular question" involving religiosity. *Id.* (quoting *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984) (emphasis in original). Indeed, nowhere in the 900+ page ACA, or its legislative history, is there any indication that Congress wanted the executive branch to resolve this *major* question: is a religious ministry sufficiently religious to merit an exemption?[8]

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[8] Courts "apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its

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

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

The ACA does not authorize unelected administrators to pick and choose which religious nonprofits have to violate their faiths' teachings and which do not. Profound questions of religious teaching are not the sort of issues Congress quietly delegates to federal agencies. *See Gonzales v. Oregon*, 546 U.S. at 266–67. The ACA's text should leave the Court "confident that Congress could not have intended to

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legislative power by transferring that power to an executive agency." *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting). *See also Paul v. United States*, 140 S. Ct. 342 (Mem) (2019) (Kavanaugh, J.) (noting that "Justice Rehnquist [in *AFL–CIO v. Am. Petroleum Inst*., 448 U.S. 607 (1980)] and Justice Gorsuch [in *Gundy*] would not allow . . . congressional delegations to agencies of authority to decide major policy questions—even if Congress expressly and specifically delegates that authority."). Congress did not delegate discretion to determine which religious groups could be burdened. And if it had, such a statute would violate the nondelegation doctrine. *See* Brief for the Cato Inst., et al., as *Amici Curiae*, *DHS v. Reg. of the Univ. of Cal.* (2019) 10–15, http://bit.ly/32ACej6 (discussing relationship between the major-questions and nondelegation doctrines).

delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Brown & Williamson*, 529 U.S. at 160.

Absent an express delegation by Congress, the Departments simply have no power to force some religious groups to violate religious teaching, while exempting others. Any claim to the contrary is "not sustainable." *See Oregon*, 546 U.S. at 267. The question of which forms of birth control constitute "preventive care" is interstitial to the ACA.[9] This statute, however, does not embrace the far broader question of which religious groups should have their religious exercise burdened by the regulatory mandate.

The Departments improvised, and crudely bifurcated religious groups. And their justification for doing so reflects the federal government's strange, home-brewed approach to protecting free exercise. "It is especially unlikely that Congress would have delegated this decision to" the Departments, "which ha[ve] no expertise in crafting" regulations on free exercise without any statutory guidance. *King*, 135 S. Ct. at 2489 (citing *Gonzales,* 546 U.S. at 266–67). Indeed, "one might claim" a "background canon of interpretation": decisions with enormous social consequences "should be made by democratically elected Members of Congress rather than by unelected

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[9] *Paul*, 140 S. Ct. at 342 (Kavanaugh, J.) ("Congress could delegate to agencies the authority to decide less-major or fill-up-the-details decisions.").

agency administrators." *Brown & Williamson*, 529 U.S. at 190 (Breyer, J., dissenting).

To find that Section 300gg-13(a)(4) in particular affords the Departments the interpretive authority to balance religious liberty and public health, "one must not only adopt an extremely" broad interpretation of what providing "preventive care" entails, "but also ignore the plain implication of Congress's" long-standing commitment to the protection of religious liberty. Had Congress intended to give the Departments discretion to decide which religious institutions should be subject to the mandate, it would have legislated to that effect. Indeed, questions concerning conscience led to some of the more finely tuned and controversial compromises leading to the ACA's enactment.[10] But the text and history of 42 U.S.C. § 300gg-13 are entirely silent on the question presented in this case. The Court can reasonably infer that the Departments lacked the interpretive authority to craft these regulations.

Congress, of course, can develop intricate frameworks to accommodate different types of religious employers—subject to the limits of the First

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

Amendment and RFRA. The tax code, for example, distinguishes between houses of worship and religious nonprofits: the former are not required to apply for tax-exempt status, and the latter must complete a simple form. *See* Blackman, *Gridlock*, *supra*, at 259–60. However, such particularized frameworks become *ultra vires* when imposed by agencies that lack the authorization and expertise to act.

Ultimately, the accommodation was created by Departments that lacked the "expertise" to resolve this "major question" of social, "economic and political significance." *See id.* at 256–65. The basis of the distinction between the exemption and accommodation is a delicate, value-laden judgment. The blunderbuss accommodation, however, is far beyond the permissible bounds of the Departments' interpretive authority.

C. The Accommodation Should Not Be Reviewed Deferentially

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

(*King*) or the regulation of tobacco (*Brown & Williamson*). If an exception to *Chevron* exists for major questions, the accommodation must qualify.

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

In sum, the Departments lack the "expertise" to make such a decision in the first instance. *King*, 135 S. Ct. at 2489 (citing *Util. Air Regulatory Group v. EPA,* 134 S. Ct. 2427, 2444 (2014)). *Cf. Gonzales*, 546 U.S. at 266–67 ("The structure of the [Controlled Substances Act], then, conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise.")). In light of the narrow "breadth of the authority" that Congress afforded the executive branch over this controversial issue, the Court is not "obliged to defer . . . to the agency's expansive construction of the statute." *Brown & Williamson*, 529 U.S. at 160.

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

The Departments determined "that the [expanded] religious exemption was independently authorized by RFRA." SG *Petition* at 11 (citing 83 Fed. Reg. at 57,544–57,548). Alternatively, they concluded that, "even if RFRA does not compel" the new regulation,

the "expanded exemption rather than the existing accommodation is the most appropriate administrative response to the substantial burden identified by the Supreme Court in *Hobby Lobby*." *Id.* (citing 83 Fed. Reg. 57,536, 57,544–57,545 (Nov. 15, 2018)).

The Third Circuit disagreed. It concluded that RFRA does not "authorize or require" the expanded exemptions. *Pennsylvania*, 930 F.3d. at 569–570. Indeed, the lower court declared that "Congress has deemed the courts the adjudicator of private rights of actions under RFRA." *Id.* at 572 (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006)). Therefore, the judiciary "owe[s] the Agencies no deference when reviewing determinations based upon RFRA." *Id.* The panel analogized RFRA to the Agricultural Worker Protection Act (AWPA), in which "Congress 'expressly established the Judiciary and not the [agency] as the adjudicator of private rights of action arising under the statute.'" *Id.* (quoting *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990)).[11] In other words, the courts have the first and last word on RFRA. The Ninth Circuit reached a similar conclusion. *California v. HHS*, 941 F.3d 410, 427 (9th Cir. 2019) ("As a threshold matter, we question whether RFRA delegates to any government

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

agency the authority to determine violations and to issue rules addressing alleged violations. At the very least, RFRA does not make such authority explicit.").

This position is premised on an all-too-common misconception of the judicial role. Courts can certainly declare the law's meaning. But they do not have a monopoly on interpreting statutes like RFRA. The president has a duty to take care that the Departments he supervises faithfully execute the laws. U.S. Const. art. II, § 3.[12] In this case, the executive branch had to assess whether the old regulations substantially burdened religious exercise. When people of faith objected to an enforcement action, the executive branch had an initial obligation to resolve the impasse. If that process worked out, then judicial services would not be needed. But if that mediation fails, then—and only then—does the Court become "the adjudicator of private rights of actions under RFRA." *See O Centro*, 546 U.S. at 434. In other words, long before RFRA-related conflicts give way to litigation, the executive branch has a duty to achieve its goals through less-burdensome means.[13] Though statutory in nature, this

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[12] *See* Brief for the Federal Petitioners at 27 ("Accordingly, where an agency determines that its mode of implementing federal law would substantially and unnecessarily burden a person's exercise of religion, the Executive Branch has the authority—consistent with the responsibility to 'take [c]are that the [l]aws be faithfully executed,' U.S. Const. art. II, § 3—to modify its implementation to avoid a violation of RFRA.").

[13] *See* Brief for the Federal Petitioners at 30 ("When a party brings suit alleging that the government has violated RFRA, therefore, a court must resolve those legal claims for itself. It does

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

For example, the previous administration exempted houses of worship and their auxiliaries from the contraceptive mandate. 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). But the executive branch lacks the inherent authority to suspend the enforcement of disfavored laws. The original exemption could *only* be premised on the authority delegated by RFRA. If the Third Circuit's mode of analysis is correct, the Departments would have had to force houses of worship to comply with the contraceptive mandate until a court issued an injunction.

Regrettably, the Third Circuit's reading of RFRA returns religious minorities to the precarious position they occupied after *Smith*. 494 U.S. at 890 (acknowledging that the Free Exercise Clause placed religious minorities "at a relative disadvantage"). RFRA required the federal government to avoid burdening religious exercise. By placing this obligation on executive-branch Departments, Congress granted an important protection to religious minorities. But the decision below prevents RFRA from serving this purpose. Indeed, the Third Circuit's precedent held that the federal government is not even "authorized" to consider how its regulation would impact religious Americans. This reading of RFRA does not restore religious freedom; it restores *Smith*.

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not follow, however, that the government lacks any discretion about how to avoid violations in the first place.").

Finally, the Third Circuit suggested that the original exemption for houses of worship may have been premised on the Free Exercise Clause, and not RFRA.[14] The court explained that "Supreme Court precedent dictates a narrow form of exemption for houses of worship." *Pennsylvania*, 930 F.3d at 570 n.26 (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (describing that case as reaffirming "a ministerial exception precluding application of employment legislation to a religious institution to respect churches' internal autonomy").

That position fails on its own terms. The ministerial exemption does not apply across the board to *all* employees at houses of worship. The contraceptive-mandate exemption applies to *all* employees, regardless of their function in the ministry. Celibate nuns and married nurses were treated the same. Moreover, as a threshold matter, it is not clear that such a requirement would run afoul of the Free Exercise Clause. *See*, *e.g.*, *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 81–89 (Cal. 2004) (finding state contraceptive mandate to be consistent with *Smith*, 494 U.S. 872).

The previous administration's executive action was lawful only if the Departments exercised statutory departmentalism and adopted a regulation to avoid running afoul of RFRA. *But cf.* Blackman, *Gridlock*, *supra*, at 256 ("The executive branch has maintained throughout the entire course of the *Zubik* litigation

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[14] The Ninth Circuit declined to consider the legality of the original exemption. *California v. HHS*, 941 F.3d at 426–427.

that the accommodation does not impose a substantial burden on free exercise in violation of RFRA."). However, the accommodation is unlawful precisely because it arbitrarily maintained burdens on those deemed insufficiently religious.

The only available remedy for those whose free exercise is substantially burdened by the enforcement of the statute is an exemption, not a half-hearted accommodation. *See* Blackman, *Gridlock*, *supra*, at 254–256 (contrasting the different ways in which the executive branch and Congress can accommodate RFRA violations). The expanded exemptions were a reasonable way to accomplish that goal.[15]

CONCLUSION

The decision below is emblematic of a recent trend in the federal courts: (1) one administration adopts a discretionary policy that is not compelled by statute; (2) the next administration concludes that the discretionary policy is—or very likely may be—unlawful and thus adopts a new policy to avoid burdensome litigation; (3) parties who preferred the original policy nevertheless file suit in districts across the country; (4) one or more judges disagrees with the executive branch about the legality of the reversal and enters a nationwide injunction. This case squarely presents a chance to review this increasing hostility

[15] *See* Brief for the Private Petitioners at 2 ("The simple reality is that when the government intrudes on deeply sensitive religious beliefs through a mandate that admits of exceptions (both religious and non-religious), the way to eliminate the burden is to extend the exemption.").

towards presidential administration.[16]

The Court should reverse the judgment below and hold that the Departments lack authority under the ACA to exempt some religious groups, but merely accommodate others.

Respectfully submitted,

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[16] Another case this Term raises similar issues. *See* Brief for the Cato Inst., et al., as *Amici Curiae*, *DHS v. Regents of the Univ. of Calif.* (Nos. 18-587, 18-588 & 18-589) 24–26, http://bit.ly/32ACej6. *See also* Josh Blackman, *Presidential Maladministration*, 2018 Ill. L. Rev. 397, 423 (2018) ("[W]hen the President's instigation leads to an agency asserting some new power, Article III spider senses should start tingling. This caution should be even more pronounced when the discovery of the new power occurs *after* Congress refused to vest a similar power through bicameralism.").