Nos. 19-431 & 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, ET AL.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET. AL., PETITIONER
v.
THE COMMONWEALTH OF PENNSYLVANIA, ET AL.

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

BRIEF OF THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., THE COALITION FOR JEWISH VALUES, ASMA T. UDDIN, PASTOR ROBERT SOTO, AND IMAM OSSAMA BAHLOUL AS *AMICI CURIAE* SUPPORTING PETITIONER

GENE C. SCHAERR
Counsel of Record
ERIK S. JAFFE
JOSHUA J. PRINCE*
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

QUESTIONS PRESENTED

This brief addresses only the second question presented in No. 19-431:

2. Whether the federal government lawfully exempted religious objectors from the regulatory requirement to provide health plans that include contraceptive coverage?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION AND INTERESTS OF AMICI[1]

The Third Circuit effectively held that government agencies are forbidden from policing their own potential violations of the Religious Freedom Restoration Act (RFRA) absent specific prior congressional authorization. This novel theory endangers the continued vitality of religious minorities nationwide. Such minorities face unique challenges to the right to practice their religions—challenges that range from overt hostility to others considering their beliefs "strange, or even silly." *Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Burwell*, 799 F.3d 1315, 1318 (10th Cir. 2015) (Hartz, J., dissenting from the denial of rehearing en banc). More often, however, these challenges are indirect and more analogous to the systemic challenges that hinder other minority groups who lack both the resources and the political power to respond to violations of their rights through the courts or political channels.

Through RFRA, Congress responded to the reality that religious minorities can "lose the right to practice their faith for many reasons short of

---

[1] All parties have filed blanket consents for the filing of amicus briefs. No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund its preparation or submission. No person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

open persecution" and bigotry.[2] Before the decision below, RFRA empowered the federal executive branch *and* the federal courts to actively protect religious minorities from these challenges unless any burden that government action would impose on religious practice could satisfy strict scrutiny. The Third Circuit eliminated the executive path by cabining RFRA as a judicial remedy exclusively. Pet. App. 43a. If allowed to stand, all future attempts to have religious conduct be exempted from applicable laws, short of costly litigation, will be futile. And religious minorities will have to wait until they actually suffer a substantial burden—or at least until such a burden is likely enough to create a ripe claim—before they can bring a claim.

Amici include the International Society for Krishna Consciousness, Inc. (ISKCON)[3] and the Coalition for Jewish Values,[4] two minority religious

---

[2] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 216 (1994).

[3] *Amicus* the International Society for Krishna Consciousness, Inc. (ISKCON) is a monotheistic, or Vaishnava, tradition within the broad umbrella of Hindu culture and faith. There are approximately 500 ISKCON temples worldwide, including 50 in the United States. ISKCON has suffered discrimination in the United States and has sought judicial relief based on the First Amendment. ISKCON has successfully pressed before this Court its constitutional rights to engage in religious practice. See, *e.g.*, *Lee* v. *Int'l Soc. for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) (per curiam).

[4] *Amicus* the Coalition for Jewish Values represents over 1000 traditional, Orthodox rabbis in matters of American public policy and advocates for classical Jewish ideas and standards. Its policymakers are six traditional Orthodox rabbis who have

organizations. *Amici* also include Asma T. Uddin,[5] Pastor Robert Soto,[6] and Imam Ossama Bahloul,[7] a group of believers in minority faiths that will be

---

served the Jewish and greater American communities for decades as leaders, scholars, and opinion makers.

[5] *Amicus* Asma T. Uddin is a religious liberty lawyer and scholar working for the protection of religious expression for people of all faiths in the United States and abroad. Ms. Uddin is a leading advocate for Muslim religious freedom and has worked on religious liberty cases at every level of the federal judiciary from the Supreme Court to federal district courts. She has defended claimants as diverse as Evangelicals, Sikhs, Muslims, Native Americans, Jews, Catholics, and members of the Nation of Islam. She is the author of the recent book, Asma T. Uddin, *When Islam Is Not A Religion: Inside America's Fight For Religious Freedom* (2019).

[6] *Amicus* Pastor Robert Soto is a Lipan Apache religious leader and feather dancer. The Lipan Apache tribe has lived in Texas and Northern Mexico for over 300 years. Pastor Soto and his tribe have been subject to religious discrimination by the federal government related to their use of eagle feathers in a traditional Lipan Apache religious ceremony. See *McAllen Grace Brethren Church* v. *Salazar*, 764 F.3d 465 (5th Cir. 2014).

[7] *Amicus* Dr. Ossama Bahloul is the Resident Scholar of the Islamic Center of Nashville (ICN) and a member of the Fiqh Council of North America, a group of recognized and qualified Islamic Scholars who accept the Qur'an and authentic Sunnah as the primary sources of Islam. ICN, one of the oldest mosques in Tennessee, runs the Nashville International Academy, a religious school that provides its children with the academic, emotional, social and spiritual growth they need—all in an Islamic environment. Prior to joining ICN, Dr. Bahloul was the imam at the Islamic Center of Murfreesboro, an Islamic community that has been subjected to religious discrimination and relied on judicial intervention to ensure its members would be able to continue to worship.

especially burdened by the Third Circuit's untenable approach. They understand that RFRA—properly interpreted as allowing *both* government agencies and courts to protect religious beliefs—is central to the ability of *Amici* and other religious minorities to practice their faiths. Accordingly, *Amici* urge the Court to reverse the decision below and, in so doing, to correct the Third Circuit's misinterpretation of this critical law.

STATEMENT

This is the latest in a long line of cases at the intersection of religious beliefs and the Woman's Health Amendment to the Affordable Care Act. Pet. App. 9a. This case involves a regulation of the Department of Health and Human Services (HHS) that exempts a broad group of religious objectors from a requirement that employers provide contraception to the women in their employ. 45 C.F.R. 147.132; Pet. 11-12. The preliminary version of the regulation was quickly challenged by a group of states and enjoined by the district court, as was the final rule that reaffirmed the preliminary version. Pet. 16-17 (final rule addressing the challenge to 83 Fed. Reg. 57,536, 57,540 (Nov. 15, 2018)).

The final rule was adopted after HHS concluded that previous accommodations to the contraceptive mandate failed to provide sufficient protections to religious beliefs under RFRA. 83 Fed. Reg. 57,545-57,548. In affirming the district court, the Third Circuit employed, among other things, "the novel theory that RFRA affords the government no leeway

to alleviate potential burdens on religious exercise, but instead may be invoked only upon a showing of a RFRA violation." Pet. 18; see also Pet. App. 43a ("RFRA authorizes * * * and provides a judicial remedy via individualized adjudication.").

SUMMARY OF ARGUMENT

Recognizing that neutral laws of general applicability "may burden religious exercise as surely as laws [directly] intended to interfere with religious exercise," Congress passed RFRA to protect the "unalienable right" to free exercise of religion. 42 U.S.C. 2000bb(a)(1)-(2). RFRA thus forbids the government from substantially burdening a person's free exercise of his or her religion unless it can satisfy strict scrutiny. 42 U.S.C. 2000bb-1(a).

I. RFRA explicitly allows religious litigants to assert it as either a "claim or defense" in court. *Id.* (c). But nothing in the statute limits the government from acting preemptively to avoid costly litigation by exempting a religiously motivated action from statutes and regulations that would otherwise burden it. In this regard, RFRA acts both as a shield and a sword.

Properly applied, RFRA provides significant protections to religious minorities, who—lacking resources and political power—are more acutely affected by statutes and regulations than other groups. The decision below, which held that governments cannot limit RFRA violations by affirmatively declining to burden a person's religion in the first instance, thus does great harm to the ability of religious minorities to practice their religions.

II. Real-world examples of the government burdening religious practice without a compelling interest and in a way that fails to be the least restrictive means are legion. Statutes and regulations have substantially burdened more-common religious beliefs—such as the Sabbath worship at issue in *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963), and elsewhere—and less-common beliefs, such as those held by Orthodox Hasidic Jews, Rastafarians, Wiccans, and Native Americans. And they have been employed against religious groups for such things as leaving food, water, and medical supplies in places where people had died. In these cases, the application—or lack thereof—of strict scrutiny to the facts at issue made all the difference.

In each instance in which RFRA applied, if the government had simply declined to substantially burden a religious belief in the first instance by creating an exemption, religious minorities, the courts, and the government could have avoided costly litigation. And for religious minorities, who often lack the resources to bring claims on their own, the government's decision to exempt religious practices from general rules under RFRA could well be the only means of relief.

Yet the decision below strips that option from federal agencies. If RFRA's express prohibition on governments substantially burdening religion means that only *courts* can step in to remedy an injury that RFRA prohibits, then for religious minorities, RFRA's protection will often be too little, too late.

ARGUMENT

I. RFRA, By Design, Provides Needed Protections to Religious Minorities.

The decision below, which casts RFRA only as a "judicial remedy," is grievously wrong in a way that would most acutely hinder the free exercise rights of religious minorities. Pet. App. 43a. RFRA forbids the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. 2000bb-1(a). If a rule substantially burdens a person's exercise of religion, that person is entitled to an exemption from the rule unless the government satisfies strict scrutiny by "demonstrat[ing] that application of the burden *to the person*[8]—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* 2000bb-1(b) (emphasis added). RFRA, by design, "operates as a sweeping 'super-statute,' cutting across all other federal statutes * * * and modifying their reach."[9] In recognizing this design, this Court has held that RFRA provides "very broad protection for religious

---

[8] See Tanner Bean, *"To the Person": RFRA's Blueprint for a Sustainable Exemption Regime*, 2019 BYU L. Rev. 1, 4 (addressing the significance of RFRA's "to the person" provision in "vindicating the religious liberties of minority groups").

[9] Michael S. Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995); see also Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 211 (1994) (explaining how RFRA was Congress' way of supervising the implementation of federal law against religious groups).

liberty." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014).

1. Rather than applying RFRA's plain language as authorizing—and even requiring—court and government cooperation in avoiding the substantial burdening of religion, the decision below casts RFRA solely as a "judicial remedy." Pet App. 43a. This holding eviscerates one path through which religious minorities may seek protections. Whereas before, religious minorities could rely on RFRA to seek to prevent governments from encroaching on their rights in the first instance,[10] under the decision below, federal agencies—at least when contraceptives and the Affordable Care Act are involved—are forbidden from taking the first step.

The logical conclusion of the decision below, then, is to affirmatively *require* governments who lack explicit authorization to provide exemptions to act in ways that will substantially burden religious beliefs pending a court order. This is true even if an agency reasonably believes such actions would violate RFRA if they were ever challenged in federal court.

But it is not difficult to see how expansive and harmful this holding could be. If RFRA is, as the Third Circuit held, merely a "cause of action for government actions that impose a substantial burden on * * * religious beliefs," Pet. App. 43a, then people of faith

[10] The lack of resources that limits the ability. of religious minorities to seek *congressional* or *judicial* protections will similarly limit their ability to seek agency accommodations. But removing this path altogether will only further hinder their ability to seek redress, and there is value in leaving multiple paths available.

must *first* suffer the harm—or the harm must be likely enough to satisfy this Court's ripeness test—before seeking to vindicate their rights in court.

Thus, were this Court to affirm the decision below, it would gut RFRA's core and force religious minorities—both here and in other cases—to wait until their religious practices are substantially burdened to bring a case.

2. That position is untenable. The holding below ignores that RFRA allows governments to intervene by declining to substantially interfere with religious beliefs without first waiting for a court order.

Indeed, Congress passed RFRA precisely to protect those minority religions that, because of the discrete and insular status of their adherents, cannot obtain protections through the typical political channels. Although *Amici* might differ on the need for the particular exemption here, the value that stems from agencies building RFRA-based exceptions into regulations transcends the particular circumstances at issue.

RFRA itself makes clear that its purpose is to "restore the compelling interest test" by guaranteeing its application "in *all* cases where [the] free exercise of religion is substantially burdened." 42 U.S.C. 2000bb(b)(1) (emphasis added). Thus, it is no exaggeration to say that, after *Smith,* the preservation of strict scrutiny in free exercise cases—now through RFRA—is necessary for the preservation of a pluralistic society. See generally *Emp't Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 903 (1990) (O'Connor, J., concurring in the judgment); *United*

States v. *Ballard*, 322 U.S. 78, 87 (1944) (The Founding Fathers "were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views.").

3. Strict scrutiny's ability to protect religious minorities is beyond dispute. Indeed, as members of this and other Courts have repeatedly recognized, when courts do not understand a religion, they are more likely to undervalue both the religion itself and the importance of any given religious practice. Thus, when a religious minority's rights depend on a court's understanding of the religion, adherents correctly worry that their rights will turn on that misunderstanding. See *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 336 (1987); see *id.* at 343 (Brennan, J., concurring) ("While a church may regard the conduct of certain functions as integral to its mission, a court may disagree."). And when, as with several *Amici,* a group's religious "practices do not fit nicely into traditional categories," the need for heightened protections is even more acute. *Spencer* v. *World Vision, Inc.*, 633 F.3d 723, 732 n.8 (9th Cir. 2011) (O'Scannlain, J., concurring).

It is against this backdrop that the importance of RFRA—particularly for religious minorities—becomes even more stark. It defines religious exercise broadly to include "*any* exercise of

religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000bb-2(4) (adopting the definition found at 42 U.S.C. 2000cc-5(7)(A) (emphasis added)). It then forbids *the government*—including the relevant agencies here—from substantially burdening the exercise of religion. 42 U.S.C. 2000bb-1(a). By expanding important protections to all religious exercise, then, regardless of the centrality of a given practice, RFRA righted a significant wrong. It removed from governmental consideration the ability—to borrow from Justice Brennan—to "disagree" with a religion on the centrality of a belief or practice to the faith. See *Amos*, 483 U.S. at 343 (Brennan, J., concurring). No longer can "governments or courts * * * inquire into the centrality to a faith of certain religious practices—dignifying some, disapproving others." *Haight* v. *Thompson*, 763 F.3d 554, 566 (6th Cir. Cir. 2014). And a court's consideration that a litigant's beliefs are "strange, or even silly," can no longer be used as a reason to deny protecting those beliefs. *Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Burwell*, 799 F.3d 1315, 1318 (10th Cir. 2015) (Hartz, J., dissenting from the denial of rehearing en banc).

Consider just one example of how courts have misunderstood a religious minority's beliefs in a way that directly hindered the ability of its members to practice their religion. Adherents of *Amicus* ISKCON practice Sankirtan, which "enjoins its members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna

religion." *Heffron* v. *Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 645 (1981). As *Amici* have highlighted elsewhere,[11] even this Court has struggled to understand how to protect that unfamiliar practice. Compare *Int'l Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 685 (1992) (holding that an airport could ban ISKCON adherents from soliciting funds), with *Lee* v. *Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 830, 831 (1992) (per curiam) (holding that an airport could not).

Besides simply being misunderstood, religious minorities, more than other religious groups, often lack both resources and public support, so they rely more heavily on the law to protect their right to live out their faith. When even the law discriminates against them, there is often nowhere else for them to turn. They are then left surrounded by a community that misunderstands, under-appreciates, and sometimes even conveys hostility[12] towards them—and lacking the financial resources,[13] or even

---

[11] Brief of Church of the Lukumi Babalu Aye, Inc. et al. as Amici Curiae Supporting Petitioners at 8-9, *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418).

[12] See, *e.g.*, Pew Research Center, *Many Americans See Religious Discrimination in U.S.—Especially Against Muslims*, https://www.pewresearch.org/fact-tank/2019/05/17/many-americans-see-religious-discrimination-in-u-s-especially-against-muslims/ (last visited Mar. 7, 2020) (finding that in 2019 82% of Americans say Muslims are subject to discrimination, compared to only 50% of Americans say Evangelical Christians are subject to discrimination).

[13] See, *e.g.*, Pew Research Center, *How Income Varies Among U.S. Religious Groups*, https://www.pewresearch.org/fact-

representation by members of the religious group in the political branches[14] to vindicate their rights.

Statistical data highlight RFRA's importance to religious minorities: They show that, unlike other religious groups, religious minorities often have fewer resources and less public support,[15] so they must rely more heavily on the law to protect their right to live out their faith. This unfortunate reality, coupled with religious minorities' lack of financial or political resources, is reason alone to allow government officials broad leeway to employ exemptions.

Too often, however, the government does not. Without affirmative government action, expensive litigation becomes the only way that religious minorities can secure their rights.[16]

---

tank/2016/10/11/how-income-varies-among-u-s-religious-groups/ (last visited Mar. 7, 2020) (finding that some religious minorities rank among the lowest in household income of U.S. religious groups).

[14] See, *e.g.*, Kristen Bialik, *For the fifth time in a row, the new Congress is the most racially and ethnically diverse ever*, Pew Research Center (Feb. 8, 2019), https://www.pewresearch.org/fact-tank/2019/02/08/for-the-fifth-time-in-a-row-the-new-congress-is-the-most-racially-and-ethnically-diverse-ever/ (finding that only two Native Americans have seats in the House of Representatives, making up 1% of the House)

[15] See Robert P. Jones et al., *What It Means to Be American: Attitudes in an Increasingly Diverse America Ten Years After 9/11*, at 5-6 (2011), https://www.brookings.edu/wp-content/uploads/2016/06/0906_american_attitudes.pdf (addressing favorability ratings of minority religions among different groups).

[16] And because RFRA no longer applies to state laws, "religious minorities will have to think carefully about where

Recent empirical studies also highlight how even the courts regularly fail to provide needed RFRA protections to religious minorities. Muslims, for example, are much less likely than other religious groups to successfully vindicate their rights in court.[17] And when, as with many Native American religions, the structure of a religion is "less formal than many western religions," *Stately* v. *Indian Cmty. Sch. of Milwaukee, Inc.*, 351 F. Supp. 2d 858, 867 (E.D. Wis. 2004), or perhaps when a religious group has less clearly defined beliefs, the risk that RFRA will be improperly applied—or determined not to apply at all[18]—is only amplified.

The data confirm the sad truth that religious minorities suffer the most when courts fail to curb discrimination by broadly protecting religious beliefs, be it through RFRA or other channels. History "demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such

---

they can live." Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 San Diego L. Rev. 163, 166 n.15 (2016).

[17] *See, e.g.*, Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 Notre Dame L. Rev. 1371, 1386 (2013) ("[C]laimants from other religious communities were nearly twice as likely to prevail as Muslims.").

[18] This sad truth applies even to well-known religious minorities, and there are those who would deny religious freedom to, for example, Muslim Americans by taking the absurd position that Islam is not a religion at all. Asma T. Uddin, *The Latest Attack on Islam: It's Not a Religion*, N.Y. Times (Sept. 26, 2018), https://www.nytimes.com/2018/09/26/opinion/islamophobia-muslim-religion-politics.html (highlighting the rise of such arguments).

as the Jehovah's Witnesses and the Amish."[19] Jehovah's Witnesses, for example, have been on the receiving end of government discrimination and persecution for refusing to salute or pledge allegiance to the American flag, an act they consider the equivalent of worshiping a graven image in violation of the Ten Commandments. *Minersville Sch. Dist.* v. *Gobitis*, 310 U.S. 586, 591-592, 592 n.1 (1940).[20] RFRA's protections push back against that historical tide of discrimination against such religious groups by requiring the government (i.e., the majority) to grant exemptions to all religions if it cannot satisfy strict scrutiny.

When even the courts fail to properly apply RFRA, religious minorities suffer more than other religious groups because the courts are often their last hope. And if the decision below stands, the courts will suddenly be their *sole* hope for protection.

Thus, RFRA's protections are vital to members of minority faiths such as *Amici*, and any decision that limits RFRA's ability to defend against governmental intrusion does them real violence. RFRA is designed to act both as a sword—permitting governments to affirmatively prevent their own RFRA violations—and as a shield—allowing religious parties to seek judicial

---

[19] *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment).

[20] See also Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 152-155 (2018) (exploring a string of similar cases involving violations of the rights of Jehovah's Witnesses in state courts).

help if they don't. The decision below destroys the sword to the great detriment of religious minorities.

II. Experience Provides Countless Real-World Examples of How RFRA—Properly Applied—Can Benefit Religious Minorities.

Experience has shown in practice what could only be predicted in the years after *Smith*: "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."42 U.S.C. 2000bb(a)(2). This congressional finding is as important as it is intuitive. But the truth it conveys goes further still—just as neutral laws can burden the free exercise of religion, RFRA's ability to prevent substantial government interference with religious beliefs largely depends on its own broad and neutral application to major and minority religions alike. History provides many examples of how seemingly neutral laws can rob religious minorities of much needed protection.

A. Strict scrutiny—whether mandated by RFRA or its state counterparts—benefits religious minorities.

Cases in which religious exemptions have been sought are legion, as are cases in which they have been denied.

1. Consider first the string of cases challenging the constitutionality of blue laws. These cases provide some pre-RFRA examples of how the lack of a strict-scrutiny requirement can directly interfere with the religious beliefs and practices of minority religions. Blue laws were seemingly neutral laws that required

all commercial activities to cease on Sundays. These laws were especially burdensome to religious minorities who observed their Sabbath day on Saturday. Under a state's blue law, a religious minority would have to refrain from work on Sunday, and under their religious beliefs, they would be forbidden from working from sundown Friday to sundown Saturday evening. *McGowan* v. *Maryland*, 366 U.S. 420, 578 (1961) (Douglas, J., dissenting); *Braunfeld* v. *Brown*, 366 U.S. 599, 601 (1961).

In *Braunfeld*, this Court rejected a free exercise claim challenging Pennsylvania's blue law. This rejection prompted Justice Brennan to dissent, and he asked directly what "compelling interest" was enough to justify applying blue laws against Orthodox Jewish citizens. *Id.* at 613-614 (Brennan, J., concurring in part and dissenting in part). In the end, he found the proffered interests to be "more fanciful than real." *Id.* at 615. Had the compelling-interest test—later adopted in *Sherbert* v. *Verner*, 374 U.S. 398, 406-408 (1963) and then resurrected by Congress in RFRA, 42 U.S.C. 2000bb(b)(1)—been applied, the result could have been much different: There can be no serious argument that the government had a compelling interest in forcing Orthodox Jews to rest on Sunday when they were already resting—as their faith required—on Saturday. And by no stretch of the imagination can a categorical ban on commercial activities one day of the week be cabined as the "least restrictive" way to further whatever interest the government did have.

Another example—this time addressing a seemingly neutral grooming policy in Texas—further

highlights the benefits that strict scrutiny, properly applied, provides to religious minorities. In *A.A. ex rel. Betenbaugh* v. *Needville Indep. Sch. Dist.*, a Native American boy challenged a grooming policy that required young boys to keep their hair cut closely. 611 F.3d 248, 253 (5th Cir. 2010). The boy and his family had a deeply held religious belief that forbade him from cutting his hair. *Id.* at 263. Before he started school, he had never cut his hair. *Id.* at 254. Naming hygiene, safety, and security as its justifications, the school district refused to make an exception to its policy. *Id.* at 253-254. Although those same concerns applied to female students, they were not subject to the haircutting requirement. *Id.* at 271-272. Citing Texas' Religious Freedom Restoration Act (TRFRA)—which mirrors the federal RFRA[21]—the Fifth Circuit found that the school district lacked a compelling interest in applying the grooming policy to the plaintiff. *Ibid.*

These two examples highlight two different worlds. In *Braunfeld*, a generally applicable law burdened the free exercise of Orthodox Jews. Without a constitutional or statutory test for exemption, their challenge failed. *Braunfeld*, 366 U.S. at 608-609. In contrast, the Fifth Circuit in *Betenbaugh* correctly applied TRFRA in a way that recognized that religious beliefs do "not invariably fall before generic rules" and

[21] Just as RFRA responded to this Court's decision in *Smith*, multiple states enacted statutes like TRFRA in response to *City of Boerne* v. *Flores,* 521 U.S. 507 (1997) and subsequent congressional actions in its wake. *Betenbaugh*, 611 F.3d at 259.

"must respond to specific circumstances." *Betenbaugh,* 611 F.3d at 272-273.

These examples are not unique—neutrally applicable laws regularly burden religious minorities.[22] And while religious adherents may not always come across as sympathetic or as deserving as the Native American boy, RFRA, its state counterparts, or statutes like the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc *et seq.*,[23] where applicable—protect their right to follow their faiths. As others have aptly said, "Free exercise belongs not only to nobles but also to rascals; when it is possible, we should accommodate

---

[22] See, *e.g.*, *Goldman* v. *Weinberger*, 475 U.S. 503, 504 (1986) (military rule banning headgear burdened practice of wearing yarmulkes); see also *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 345 (1987) (neutrally applicable prison rules burden multiple aspects of Muslim faith); *Benning* v. *Georgia*, 864 F. Supp. 2d 1358, 1360, 1365-1366 (M.D. Ga. 2012) (rule forbidding facial hair in prison substantially burdened Orthodox Jews).

[23] RLUIPA, like RFRA, similarly applies the compelling-interest test. 42 U.S.C. 2000cc-1(a); *Holt* v. *Hobbs*, 135 S. Ct. 853, 860, 864 (2015). The need to apply statutorily mandated exemptions to religious minorities does not turn on the applicable statute. As a string of cases addressing RLUIPA claims brought by incarcerated persons shows, religious minorities are vulnerable no matter their status. *Yellowbear* v. *Lampert*, 741 F.3d 48 (10th Cir. 2014) (Gorsuch, J.) (religious use of a sweat lodge); *Abdulhaseeb* v. *Calbone*, 600 F.3d 1301 (10th Cir. 2010) (denial of halal diet to Islamic prisoner); *Baranowski* v. *Hart*, 486 F.3d 112, 123 (5th Cir. 2007) (failure to provide kosher menu to "Torah-observant Jew"). Although in prison the interest is often more compelling and the least-restrictive means more restrictive that does nothing to absolve the relevant parties—including the Courts—of the need to apply the test neutrally and fairly.

even those who do not make it easy for us."[24] RFRA's central promise protects even religious minorities from statutes or regulations that substantially burden their religious beliefs or practices.

B. To adequately protect the religious beliefs of religious minorities, courts and the executive agencies must both provide RFRA's required exemptions.

As mentioned above, *nothing* in RFRA forbids the executive branch from affirmatively granting exemptions from statutes, rules, and regulations. But far too often, federal agencies fail to do so, requiring instead that litigants go through the expensive process of affirmatively asserting their rights in federal court.[25]

It does not have to be this way. Instead, a better path for believers everywhere would be for executive agencies always to do what HHS did here: provide an exemption where the failure to do so would, in court, likely result in a loss for the government.

1. Consider the experience of *Amicus* Pastor Robert Soto, a member of the Lipan Apache Tribe of Texas.

---

[24] Lund, *supra* note 16, at 170.

[25] *Tagore* v. *United States*, 735 F.3d 324, 326 (5th Cir. 2013) (remanding for RFRA consideration of Sikh belief requiring IRS employee to wear a "kirpan" with a blade longer than federal law allowed); *Ghailani* v. *Sessions*, 859 F.3d 1295 (10th Cir. 2017) (remanding for further consideration of RFRA claim about an inmate's participation in group prayer in high-security prison). See also Bean, *supra*, note 8, at 38-40 (providing more than fifty examples of RFRA cases addressing by the depth of strict-scrutiny analysis).

McAllen Grace Brethren Church v. *Salazar*, 764 F.3d 465, 468 (5th Cir. 2014). Soto's religious practices include worship using eagle feathers. *Id.* at 472. As a general rule, federal law prohibits the taking or possessing of any part of a bald or golden eagle. 16 U.S.C. 668. That law, however, does provide an exception "for the religious purposes of Indian tribes." 16 U.S.C. 668a. To any reasonable person, Soto, a member of an Indian tribe seeking to use eagle feathers for religious purposes, is a member of the very group to which the exemption applies by design.

But the federal government disagreed. Despite the Lipan Apache Tribe's more than 300-year history in Texas, the federal government does not recognize it and interpreted the religious-purposes exception to apply only to "federally *recognized* Indian tribes." *Salazar*, 764 F.3d at 470, 473 (emphasis added). Soto challenged the government's discriminatory interpretation of the feather prohibition. *Id.* at 468. Fortunately, the Fifth Circuit did not sanction this discrimination. But by limiting the application of the religious-purposes exception to federally recognized Indian tribes before it was overturned in Soto's case, the federal agency effectively eliminated a statutorily mandated exception and implicitly told Soto that his religious group was disfavored.

2. Soto's case is far from unique. As mentioned above, our history is filled with examples of state actors failing to adequately recognize and protect the importance of minority religious practices. Any examination of the intersection of religious beliefs with government action highlights the need for the government itself to provide exemptions under RFRA,

and, where appropriate, RLUIPA. These examples are illustrative.

- In *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, the government failed to provide Uniao do Vegetal (UDV)—a religion that uses *hoasca*, a regulated, hallucinogenic tea in its religious practices—with an exception to the Controlled Substances Act ban on all uses of Schedule I drugs. 546 U.S. 418, 430 (2006). The government claimed that the Act "simply admits of no exceptions." *Ibid.* No one was fooled. As the Court recognized, "an exception *has* been made to the Schedule I ban for religious use"—the Native American Church at issue in *Smith* was given an exemption to use peyote in its religious services. *Id.* at 433 (emphasis added). Applying RFRA neutrally, this Court saw no reason to deny the UDV the same exemption it applied to the Native American church. *Ibid.* The Court held that RFRA protected the UDV from the discrimination among religious groups that led to the denial of an exemption granted to other believers. See *id.* at 433-437.

- In *United States* v. *Hoffman*, a group of volunteers "with a charitable organization affiliated with the Unitarian Universalist Church" were charged with entering the Cabeza Prieta National Wildlife Refuge (CPNWR) "without a permit" and "abandoning property"—chiefly food and water—in the refuge. 2020 WL 531943, at *1 (D. Ariz. 2020). CPNWR borders Mexico and has "numerous trails used by migrants." *Id.* at *2. Because of the

harshness of the environment, many migrants have died crossing CPNWR. *Id.* at *1-*2. The volunteers, guided by their religious beliefs, began leaving food, water, and medical supplies in the desert. *Id.* at *1. Here too, the government failed to provide religious exemptions to conduct the volunteers believed their religion required: to "try and save as many lives as possible." *Id.* at *3, *10 (cleaned up). Applying RFRA neutrally to the case before it, the district court found that the government had (1) no compelling interest in applying the regulations against the volunteers and (2) failed to show that it employed the least-restrictive means of furthering whatever interest it did have. *Id.* at *10-*12.

- In *Singh* v. *McHugh*, a member of the Sikh faith sought a religious exemption from "Army uniform and grooming standards." 185 F. Supp. 3d 201, 204 (D.D.C. 2016). Before seeking judicial assistance, he unsuccessfully sought an accommodation that would have allowed him to "enroll in ROTC with his articles of faith intact"—"his turban, unshorn hair, and beard." *Id.* at 204-205. The district court ultimately held that the defendants failed to satisfy strict scrutiny, and the accommodation was granted. *Id.* at 232-233. Even then, however, the Army failed to change its regulations, and Singh had to bring at least two more lawsuits before they did. *Singh* v. *Carter*, 168 F. Supp. 3d 216 (D.D.C. 2016); *Singh* v. *McConville*, 187 F. Supp. 3d 152 (D.D.C. 2016).

- In *LaPlant* v. *Mass. Dep't of Corr.*, 89 F. Supp. 3d 235, 244 (D. Mass. 2015), a Wiccan inmate sought to have communal Wiccan prayer with other Wiccan inmates "on the actual days of the New, Waxing, and Waning Moons." The defendants, who would have allowed such worship "at a time different than the one mandated by the faith," failed to show a compelling interest in allowing that practice only on the days they offered. *Ibid.*

Each of these cases required court intervention before the government allowed a RFRA exemption. But the court order did not by its own force turn acceptable conduct into a RFRA violation. Instead, the violation predated the order. Slightly adjusting the facts in each of these cases shows the wisdom in letting government agencies accommodate religious minorities—be it through an individual accommodation requested by a particular religion or a *regulatory* exemption—from the start. In each case, the government should have recognized its obligations under RFRA and afforded the religious groups an exemption. Instead, the agency's insistence on applying otherwise applicable laws to those acting as their religious beliefs required led to costly litigation that burdened the litigants, the courts, and the federal government itself.

3. Here, the government's decision to exempt religious groups from the contraceptive mandate is commendable. But it does not present a one-time issue. To protect the rights of religious minorities, federal agencies should police their own conduct to determine if it violates RFRA whenever it seeks to

substantially burden religious conduct. 42 U.S.C. 2000bb-1(a).[26]

To be sure, *Amici* are not suggesting that all religious conduct should be free from government regulation. But where applying an applicable law against a person would substantially burden her rights, the government should at least pause and apply the RFRA test. If the government truly has a compelling reason to apply federal law in that instance, and there is no less-restrictive means of furthering that interest, then the law will be enforced. But if not, governments should take the steps necessary to protect the religious beliefs so as to avoid violating RFRA.

Under the Third Circuit's new theory, the executive branch is foreclosed from following that path absent explicit statutory authority. This is wrong. A more rational reading of RFRA would allow governments the ability to affirmatively avoid RFRA violations in the first place. At very least, this Court could recognize that RFRA allows the executive branch to exercise its discretion to not enforce a law against a religious minority if the enforcement of that law would substantially burden free exercise rights. And this point is even more pressing when, as here, the burden that the agency is trying to lift comes not from a statute, but from guidance imposed *by the agency*.

---

[26] After seeking to apply RFRA in good faith, agencies may still reach the wrong result. In those instances, costly litigation may well be necessary after all. The risk of this, however, is lowered by agencies seeking to accommodate religious conduct at the outset.

But RFRA goes much further. As others have aptly argued,[27] the fact that RFRA applies to the "implementation" of all federal law is itself direct authorization for exemptions such as the one here. 42 U.S.C. 2000bb-3(a).

In sum, stripping federal agencies of the authority to prevent their own RFRA violations will have dramatic and injurious effects on religious minorities. To protect the continued ability of religious minorities to live their religions free from government-imposed substantial burdens, this Court should reverse the decision below.

---

[27] Gov't. Br. 27 (RFRA authorizes agencies to "modify [their] implementation [of federal law] to avoid a violation of RFRA"); Little Sisters Br. 4 ("[I]f a federal law or regulation imposes a substantial burden on a claimant's exercise of religion, RFRA *obligates* the government to refrain from imposing the burden" unless it can satisfy the compelling-interest test.) (emphasis added); Amicus Br. of 92 Members of Congress at 15-17.

CONCLUSION

Before the Third Circuit's novel theory, RFRA served both as a sword—by allowing governments to make exceptions to applicable statutes and regulations—and as a shield, by allowing religious organizations and people of faith to invoke it in individual adjudications. By hampering one of RFRA's vital ways to protect religious expression, the Third Circuit has endangered the rights of religious minorities. This Court should correct that grave error.

Respectfully submitted,

GENE C. SCHAERR
Counsel of Record
ERIK S. JAFFE
JOSHUA J. PRINCE*
SCHAERR | JAFFE LLP
1717 K Street NW
Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com
*Not yet admitted in D.C. Practicing under the supervision of D.C. attorneys under rule 49(c)(8).

March 9, 2020