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.

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

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

V.

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

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

Brief of the Knights of Columbus as *amicus curiae* in support of Petitioners

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INTERESTS OF AMICUS CURIAE[1]

The Knights of Columbus ("the Order") is a religiously based fraternal beneficiary society founded at St. Mary's Church in New Haven, Connecticut in 1882 by Father Michael J. McGivney. He sought to promote the Catholic faith by encouraging men to exercise Christ's love in their homes, at the workplace, and in public society, and by caring for widows and orphans.

Since its founding, the Order has fought vigorously to protect the right to free religious exercise. Its commitment to this essential liberty stems from its deeply held Catholic faith, which teaches that all people are created in the image of God and must be free to seek God and to act in accord with their conscience. The Order's commitment to religious freedom also stems from its own history. It was founded in the latter half of the Nineteenth Century and grew as the Ku Klux Klan and other anti-Catholic groups explicitly and sometimes violently sought to restrict Catholics' religious exercise.

Consistent with this commitment, the Order opposed the persecution of Catholics in Mexico in the 1920s, Jews in Germany in the 1930s, and religious groups under threat in other places, including in the Soviet bloc. Continuing this tradition, the Order is now supporting and advocating for persecuted Christians in the Middle East.

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[1] All parties 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 amicus funded its preparation or submission.

The Knights of Columbus underwrote the litigation in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), a case recognizing the fundamental right of parents to direct the education and upbringing of their children.[2] Moreover, many early members of the Order sought public office to help bring an end to anti-Catholicism.

Today, the Knights of Columbus remains a faith-filled Catholic organization, committed to its core principles of Charity, Unity, Fraternity, and Patriotism. The Order now has about two million members worldwide, with the greatest number living in the United States.

As part of its Christian mission, the Order contributes substantial time and money to charitable causes in the United States and abroad. In 2018, the Order donated nearly $186 million and 77 million service hours (equal to $1.9 billion of volunteer time) to charity.

The Knights of Columbus submits this amicus brief to preserve religious liberty for two reasons. First, the accommodation to the federal contraception mandate coerces self-insured religious employers, including the Order, to violate their religious convictions by imposing a group health plan that provides employees with contraceptives, abortion-inducing drugs, sterilization, and related counseling, which is in direct opposition to the exercise of the Catholic faith. Second, the decision below wrongly allows executive agencies to misappropriate

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[2] See *Conflict in Paradise: The Oregon Knights of Columbus vs. the Ku Klux Klan, 1922-1925*, Faith Patterns (Dec. 2, 2014), https://perma.cc/B5JA-X6BN.

Congressional power, creating a dangerous precedent that undermines all Americans' fundamental liberties, particularly their First Amendment religious liberties.

SUMMARY OF ARGUMENT

> [A]n agency literally has no power to act . . . unless and until Congress confers power upon it.

La. Pub. Servs. Comm'n v. *FCC*, 476 U.S. 355, 357 (1986).

> [T]he form matters and plays a role in this scheme. . . . If the form were meaningless, the Government would not require it and perpetuate this rancorous dispute with religious organizations around the country.

Priests for Life v. *U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 20 and n.5 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

* * *

The Respondents invoke the first proposition above as an attack on the Final Rule at issue in this case. Br. in Opp., No. 19-454 at 23. It actually points the other way. In fact, this fundamental principle—*federal agencies only have the powers Congress delegated them*—is the key to finally resolving the years-long, seemingly intractable fight over the accommodation to the federal contraception mandate in Petitioners' favor.

This brief contends that the Third Circuit erred when it held that the accommodation does not substantially burden religious exercise under the Religious Freedom Restoration Act ("RFRA").[3] It

[3] *Amicus*' analysis focuses on the Third Circuit's treatment of whether the accommodation substantially burdens the religious exercise of self-insured employers like the Little Sisters and the

erred not because it failed "to accept [ministries'] characterization of the regulatory scheme on its face," *Geneva Coll.* v. *Sec'y, U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 436 (3d Cir. 2015). Rather, it erred because it accepted the *government's* characterization of the regulatory scheme as gospel.

In the decision below, as in *Geneva College*, ministries offered two reasons why they could not comply with the accommodation:

First, the accommodation makes them complicit in the provision of contraceptive coverage because it ***hijacks*** a ministry's own group health plan, making its plan a conduit for delivering contraceptive coverage to plan participants. See *id.* at 438; Br. for Little Sisters at 1, *Pennsylvania* v. *Trump*, 930 F.3d 543 (3d Cir. 2019) (No. 19-1129), https://perma.cc/7ZHU-QUGX.

Second, the accommodation is not an "opt out" because it forces a ministry to execute a document that ***triggers*** its TPA's duty to deliver contraceptive services. See *Geneva*, 778 F.3d at 435; Br. for Little Sisters at 17, *Pennsylvania*, *supra*.

The Third Circuit rejected these arguments because it accepted representations from HHS, Labor, and Treasury ("agencies") about how their accommodation works without checking these representations against the underlying statutes. It accepted their claim that the accommodation was an "opt out" because it accepted their claim that Congress had granted them power to conscript TPAs into providing contraceptives without using objecting

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Knights of Columbus. It does not address the accommodation as applied to employers with fully-insured plans.

employers' plans or forcing objecting employers to amend their plans.

Had the Third Circuit merely done what it promised to do—"objectively assess" "how the regulatory measure actually works"—it would have recognized that the accommodation did not *and could not* work the way the agencies had claimed. ERISA and the ACA make clear that the agencies were wrong to claim the power to implement the accommodation without involving objecting employers, and the Third Circuit was wrong to believe them.

Federal law confirms that the accommodation works by "hijacking" an objecting ministry's plan. Under ERISA and the ACA, the contraception mandate simply cannot apply to a TPA outside of a plan established by, contributed to by, and associated with an employer. And the fines the government uses to enforce the mandate can be levied only against the employer that sponsors the plan.

ERISA also confirms that the accommodation forces a ministry to "trigger" its TPA's obligations to provide contraceptives under its plan. Then-Judge Kavanaugh was right: the accommodation forces a ministry to execute a document, and that "form matters." *Priests for Life*, 808 F.3d at 20 (Kavanaugh, J., dissenting from the denial of rehearing en banc). Whether the ministry sends a form to its TPA or to HHS, Labor *needs this form* because it is constrained by the rules that Congress established in ERISA for group health plans. Congress determined that: (1) a TPA cannot take on fiduciary responsibility for providing mandated benefits unless it is appointed as a plan administrator; (2) a TPA cannot become a plan administrator unless it is designated as such the

under ERISA 3(16)(ii); (3) a TPA cannot be designated as a plan administrator under this provision unless it is so named in the plan instrument; and (4) only the plan sponsor (i.e. the objecting ministry) can create or amend its group health plan.

This means that the accommodation cannot work the way the Third Circuit claimed in *Geneva College*, an assumption that was central to the court's RFRA analysis in the decision below. Under both the original accommodation and the amended accommodation process devised in the wake of this Court's *Wheaton College* decision, the agencies *must* "hijack" an objecting employer's group health plan and *must* force the ministry to "trigger" its TPA's duty to provide contraceptive coverage. Absent these two steps, the agencies have no power from Congress to enforce the mandate against a ministry's TPA.

But the Third Circuit's task in this case should have been even easier. The Little Sisters told the Third Circuit that the agencies, when they came before this Court in *Zubik*, had abandoned the very claims that served as the foundation for the substantial burden analysis in *Geneva College*.

Yet the Third Circuit took no notice. It simply copied and pasted the substantial burden analysis from *Geneva College* and reaffirmed its position that "nothing" had happened since that decision that "would require us—or anyone else—to conclude that our reasoning in that opinion was incorrect." *Real Alternatives* v. *Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 356 n.18 (3d Cir. 2017) (cited at *Pennsylvania* v. *Trump*, 930 F.3d 543, 573 n.30 (3d Cir. 2019)). In doing so, the Third Circuit advanced a myth, now prevalent in eight circuits, that Labor has

the power to rewrite an employer's plan instrument to advance an administration's policy goals. Not only does this idea find no support in ERISA's text; it undermines ERISA's fundamental premise that employers and beneficiaries need only read their plan documents to understand how their health plans work.

The Court should use this opportunity to correct the flawed substantial burden analysis in the decision below. But the ERISA analysis proposed here would not only correct the Third Circuit's substantial burden analysis; it also offers an efficient basis for resolving the entire case at hand.

If ERISA demonstrates that the accommodation substantially burdens religious exercise under RFRA, then ERISA proves that the agencies had "good cause" to issue an Interim Final Rule ("IFR"), which means the decision below erred in finding the Final Rule procedurally defective under the Administrative Procedure Act ("APA"). For the same reasons, ERISA also shows that the agencies had a solid basis for concluding that the Final Rule's religious exemption was necessary to carry out the agencies' statutory obligations under RFRA. That means the decision below also erred in finding the Final Rule substantively invalid under the APA.

Though the Respondents have presented this matter as an APA case, this is a RFRA case within an APA case. And because the RFRA question turns on the "nature and scope of the authority granted by Congress to the agenc[ies]," *La. Pub. Servs. Comm'n*, 476 U.S. at 357, this is really, at its heart, an ERISA case.

For all these reasons, the Knights of Columbus urges the Court to examine the accommodation under ERISA, hold that the accommodation substantially burdens religious exercise, and on that basis reverse the decision below.

ARGUMENT

I. *Geneva College* got the substantial burden question wrong because the Third Circuit failed to "objectively assess" "how the regulatory measure actually works."

The decision below relies on the Third Circuit's conclusion in *Geneva College* that the accommodation does not substantially burden religious exercise under RFRA. *Pennsylvania*, 930 F.3d at 573. Thus, before looking to whether the Third Circuit got the substantial burden question right in the decision below, this Court should consider whether *Geneva College* was right when it was decided.

It was not. The Third Circuit got the substantial burden question wrong in 2015 because it failed to make good on its promise to "objectively assess whether the appellees' compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive coverage." *Geneva*, 778 F.3d at 435. It failed to make "an assessment of how the regulatory measure actually works." *Id.* at 436.

This task necessarily involves testing the parties' representations about how the accommodation works against the statutes the agencies have relied on to create and enforce the contraception mandate and the accommodation. This is a critical task, for "an agency literally has no power to act . . . unless and until

Congress confers power upon it." *La. Pub. Servs. Comm'n*, 476 U.S. at 357.

Thus, before rejecting ministries' "hijack" argument, a court must ask, *what law (if any) confers power on the agencies to order TPAs to provide contraceptive services outside of an objecting ministry's plan?*

Likewise, before rejecting ministries' "trigger" argument, a court must ask, *what law (if any) confers power on Labor to unilaterally appoint a ministry's TPA as a plan administrator for contraceptive services?*

The only law that might confer these powers is ERISA, as the agencies have acknowledged that their "authority to require the TPA to provide contraceptive coverage derives from ERISA." Gov't Br. at 38, *Zubik* v. *Burwell*, 136 S. Ct. 1557 (No. 14-1418), https://perma.cc/A63A-V7HY.[4]

A close look at ERISA confirms the two longstanding objections ministries have made against the accommodation. First, the accommodation must piggyback on the objecting ministry's plan, because the agencies do not have the power to enforce the mandate outside of an employer-sponsored group health plan.

Second, the structure and text of ERISA 3(16) reveal that the accommodation does not work unless the objecting employer executes a document that designates its TPA as its plan administrator for

[4] This accords with the agencies' admission that they cannot enforce the mandate against the TPA of a self-insured plan that is exempt from ERISA. 83 Fed. Reg. 57,536, 57,547 (Nov. 15, 2018); see also 80 Fed. Reg. 41,318, 41,323 n.22 (July 14, 2015).

contraceptive services. This must happen because Congress only gave Labor the power to designate a new plan administrator under limited circumstances that do not apply here.

This statutory analysis applies equally to the original accommodation (whereby the ministry sends EBSA Form 700 to its TPA) and the amended accommodation process created after this Court's *Wheaton College* decision (whereby the ministry sends a notice to HHS). The new notice process is still subject to ERISA 3(16). Either the objecting employer amends its plan instrument to designate its TPA as its plan administrator, or else the TPA never becomes responsible for providing contraceptive services.

This statutory analysis confirms that the ministries objecting to the accommodation have been right all along: the accommodation is not an "opt out"; it is an "opt in" that substantially burdens religious exercise under RFRA.

If the law is so clear, how did the Third Circuit miss it? It is not that the Third Circuit interpreted ERISA differently. Rather, its mandate decisions suggest that the court simply failed to engage with the text of ERISA. Instead, immediately after declaring that it would not "accept [the ministries'] characterization of the regulatory scheme on its face," *Geneva*, 778 F.3d at 436 (quoting *Mich. Cath. Conf.* v. *Burwell*, 755 F.3d 372, 385 (6th Cir. 2014)), the Third Circuit accepted the *government's* account as gospel. It also relied heavily on decisions from the Seventh, Sixth, and D.C. Circuits that had likewise eschewed statutory analysis in favor of the government's talking points. *Id.* at 437-40.

The agencies told the courts of appeals that they had powers Congress never gave them. The Seventh, Sixth, and D.C. Circuits uncritically accepted their claims, and the Third Circuit followed suit.

Finally, this part examines why the Third Circuit got the substantial burden analysis wrong and why it is crucial that this Court resolve this case by comparing what the Third Circuit said about the agencies' power to implement the accommodation with federal law.

A. Under ERISA, the accommodation must commandeer an objecting ministry's existing health plan.

The Third Circuit erred when it accepted the D.C. Circuit's conclusion that the agencies have the power to force a TPA to deliver contraceptive services outside of an objecting ministry's existing group health plan. *Geneva*, 778 F.3d at 438 n.13.

No federal law grants the agencies such power. ERISA and the ACA allow only one conclusion: given that the mandate only applies to group health plans, and given that group health plans can only be established by employers, the mandate *must* work by compelling TPAs to provide contraceptive services as part of the objecting ministry's own health plan.

First, the ACA's Preventive Health Services Mandate, the statute HRSA used to create the contraception mandate, does not apply to TPAs but only to "group health plans." 42 U.S.C. § 300gg-13(a).[5]

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[5] Although the ACA also imposes the contraception mandate on "health insurance issuer[s]," *id.* § 300gg-13(a), this brief does not address that aspect of the mandate, see *supra* note 3.

The agencies stated as much in their RFI: "If an employer has a self-insured plan, the statutory obligation to provide contraceptive coverage falls only on the plan." 81 Fed. Reg. 47,741, 47,744 (July 22, 2016).

Second, only employers can establish and maintain the "group health plans" that are subject to the mandate. Statutes governing each of the three agencies align on this point. The Public Health Service Act defines a "'group health plan' [as] an *employee* welfare benefit plan [as defined in ERISA § 3(1), codified at 29 U.S.C. § 1002(1)] to the extent that the plan provides medical care . . . to *employees* or their dependents." 42 U.S.C. § 300gg-91(a)(1) (emphases added). ERISA likewise governs "*employee* welfare benefit plans," which it defines as "any plan, fund or program . . . established or maintained *by an employer* . . . for the purpose of providing for its participants or their beneficiaries . . . medical . . . care or benefits." 29 U.S.C. § 1002(1) (emphases added). Finally, the Internal Revenue Code defines a group health plan as "a plan (including a self-insured plan) of, or contributed to by, an *employer* . . . to provide health care (directly or otherwise) to the *employees*, former *employees*, . . . or others associated or formerly *associated with the employer*." 26 U.S.C. § 5000(b)(1) (emphases added).

Third, the mandate's penalty also points to its plan-centric nature. Because only employers have group health plans, the penalty for failing to comply with the contraception mandate—$36,500 per covered employee per year—is imposed on the "employer" that maintains a non-compliant "group health plan." 26 U.S.C. § 4980D(a), (b)(1), (e)(1).

In sum, under ERISA and the ACA, the contraception mandate *cannot* apply to a TPA outside of an employer-maintained plan. And the fines the government uses to enforce the mandate can be levied only against the employer that sponsors the plan.

The fact that the agencies claimed otherwise is irrelevant. Nor does it matter that, as the Third Circuit emphasized, "virtually all of our sister circuits" accepted the agencies' claims. *Real Alternatives*, 867 F.3d at 358. For neither an executive agency nor a court has the constitutional power to change or ignore the legal structure that Congress has established.

ERISA does not give the agencies the power to require a ministry's TPA to deliver contraceptive services outside of the ministry's existing plan. The only way to oblige the TPA to deliver contraceptive services under the accommodation is by "hijacking" an objecting ministry's group health plan—just as ministries have argued all along.

B. Under ERISA, the accommodation must force an objecting ministry to trigger its TPA's duty to deliver contraceptive services.

The Third Circuit also erred when it rejected the ministries' "trigger" argument based on Judge Posner's conclusion in *Notre Dame* that Labor has the power to "treat[] and designate[] the third-party administrator as the plan administrator under ERISA." *Geneva*, 778 F.3d 438 (citing *Notre Dame*, 743 F.3d at 555).

The legal analysis centers on ERISA 3(16), which lies at the center of the accommodation regulation, 29

C.F.R. 2510.3-16(b). The central statutory questions are two-fold. First, how does ERISA 3(16) define the term "plan administrator"? Second, under what circumstances has Congress conferred on Labor the power to designate a TPA as a plan administrator?

Under ERISA, the "plan administrator" is the party with "fiduciary" responsibility for implementing an employee benefit plan and for keeping the plan in compliance with federal law. See 29 U.S.C. § 1002(14)(A). This term is crucial because a ministry's TPA can only be held legally responsible for delivering contraceptive services if the TPA has been designated a plan administrator in the ministry's plan instrument. Labor's regulation confirms that this designation must take place under both the original and the amended accommodations. 29 C.F.R. 2510.3-16(b).

Outside of the accommodation, TPAs almost never serve as plan administrators. They only carry out non-discretionary tasks—mostly processing claims and payments—on behalf of the plan sponsor.[6]

Congress controls the appointment of a plan administrator through ERISA 3(16),[7] which sets out three simple rules. First, by default, the administrator is the "plan sponsor,"—i.e. the employer who created the group health plan. 29 U.S.C. § 1002(16)(A)(ii). Second, the plan sponsor can override this default by

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[6] See 83 Fed. Reg. at 57,566 ("[I]t is the Departments' understanding that third party administrators are not typically designated as plan administrators, and, therefore, would not normally act as plan administrators, under section 3(16) of ERISA.").

[7] Codified at 29 U.S.C. § 1002(14)(A).

designating another plan administrator in "the terms of the instrument under which the plan is operated." *Id.* § 1002(16)(A)(i). Third, Congress gave Labor power to override these first two rules when the plan sponsor "cannot be identified." *Id.* § (16)(A)(iii).[8]

The third provision is key because it shows that Congress considered whether, and under what circumstances, to grant Labor power to override an employer's plan instrument and designate a new plan administrator. Congress conferred that power under narrow circumstances that do not apply here. Under the principle of *expressio unius est exclusio alterius*,[9] section 1002(16)(A)(iii) undermines the agencies' claim that Congress granted Labor the "broad rulemaking authority" to designate a plan administrator when, as here, the plan sponsor *can* be identified. 80 Fed. Reg. 41,318, 41,323 (July 14, 2015).

The accommodation might still work as the Third Circuit described if Congress had authorized Labor to *change* a plan or *create new* plan instruments. That seems to be what Judge Posner was after when he claimed that, under the accommodation, the government creates "new contracts" through "governmental plan instrument[s]," "to which [objecting employers are] not a party." *Wheaton Coll.*, v. *Burwell*, 791 F.3d 792, 796 (7th Cir. 2015); see also

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[8] If a plan sponsor cannot be identified, the plan is called an "orphan plan." See DOL, *Report of the Working Group on Orphan Plans* (Nov. 8, 2002), https://perma.cc/672T-HD6M.

[9] See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 107 (2012); see also *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 232 (2011) ("If all three [grounds for liability] were intended, it would be strange to mention specifically only two, and leave the third to implication.").

Priests for Life, 772 F.3d at 255 (positing that Labor has the "authority to author a plan instrument or designate a particular writing as a plan instrument").

But Congress never gave Labor this power. First, this theory is precluded by the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys* v. *United States*, 485 U.S. 759, 778 (1988) (plurality opinion). Section 1002(16)(A)(iii) is "entirely redundant" if Congress had *already* given Labor the power to rewrite or create plan instruments that override the plan sponsor's choice as to who would serve as plan administrator under the employer's plan.

Second, this Court has consistently held that Congress gave employers the exclusive power to create and amend plan instruments. It is the exclusive role of the employer, as plan sponsor, to create an employee benefit plan by establishing a written instrument that sets out a plan's "basic terms and conditions." *Cigna Corp.* v. *Amara*, 563 U.S. 421, 437 (2011) (citing 29 U.S.C. §§ 402, 1102). This accords with the general principle that ERISA "is built around reliance on the face of written plan documents." *US Airways, Inc.* v. *McCutchen*, 569 U.S. 88, 101 (2013).

This Court has been just as clear that the employer alone is responsible for amending its plan. Under ERISA, the employer's plan instrument must explain how it will amend its plan. *Cigna Corp.*, 563 U.S. at 437. These amendment procedures "must be followed for the valid adoption of an amendment." *Overby* v. *Nat'l Ass'n of Letter Carriers*, 595 F.3d 1290, 1295 (D.C. Cir. 2010) (citing *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 85 (1995)). Statements in documents not issued by the plan sponsor "do not

themselves constitute the terms of the plan." *Cigna Corp.*, 563 U.S. at 438 (emphasis omitted).

This Court has scrupulously protected the rules that Congress created to guarantee that employers and beneficiaries can know how their health plans work by reading the written plan document. That guarantee would crumble if this Court acquiesces in the myth, currently accepted in eight circuits, that Congress granted Labor the power to rewrite an employer's group health plan in the service of an administration's policy goals.

C. Instead of reviewing ERISA, the Third Circuit accepted the agencies' claims and adopted other circuits' conclusions.

If the statutes cabining the agencies' power to implement the accommodation are so straightforward, *how did the Third Circuit miss it?* It is not just that the court interpreted ERISA *differently—Geneva Coll*ege did not cite ERISA at all. The Third Circuit rejected ministries' substantial burden arguments because it uncritically accepted the agencies' representations (and other circuits' assumptions) about how the accommodation works, without checking these representations against the underlying statutes.

The Third Circuit rejected the ministries' "hijack" argument in a footnote. Without reviewing any statute or regulation, the court concluded that the ministries' substantial burden claim was "unavailing." *Geneva*, 778 F.3d at 438 n.13. The court's only citation in this footnote is to the D.C. Circuit's *Priests for Life* decision, which held that "contraceptive services are not provided to women because of Plaintiffs' contracts[]; they are provided

because federal law requires . . . TPAs to provide insurance beneficiaries with coverage for contraception." *Priests for Life*, 772 F.3d at 253.

The Third Circuit's treatment of the ministries' "trigger" argument was lengthier, but equally deficient. First, it asserted that a TPA's legal obligation to deliver contraceptive services to a ministry's plan beneficiaries exists *independent of any action* taken by the ministry:

> As Judge Posner has explained, this is not a situation where the self-certification form enables the provision of the very contraceptive services that the appellees find sinful. Rather, "[f]ederal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured plans, to cover contraceptive services." *Notre Dame*, 743 F.3d at 554. Thus, federal law, not the submission of the self-certification form, enables the provision of contraceptive coverage.

Geneva, 778 F.3d at 437. This pivotal conclusion about "federal law" does not actually cite any federal law. Instead, the opinion simply notes that the Sixth and D.C. Circuits had also adopted "Judge Posner's logic." *Id*. at 437-38.

But "Judge Posner's logic" is irreconcilable with ERISA's plain text for the reasons discussed above. Still, the agencies have advanced this interpretation, and lower courts have uncritically accepted it, time and again. See, *e.g.*, Gov't Br. at 16, *Geneva*, 778 F.3d 422, https://perma.cc/G6KK-NF4J (arguing that ministries "need only attest to their religious beliefs

and step aside") (citations and internal quotation omitted).

In the alternative, the Third Circuit stated that even if a TPA's duty to deliver contraceptives arises only *after* a ministry invokes the accommodation, there is no trigger because it is the government, not the employer, that creates the contractual obligation:

> [T]he regulations specific to . . . self-insured plan[s] . . . in no way cause the appellees to facilitate or trigger the provision of contraceptive coverage. . . . The eligible organization has no effect on the designation of the plan administrator; instead, it is *the government* that treats and designates the third-party administrator as the plan administrator under ERISA.

Geneva, 778 F.3d at 438 (citing *Notre Dame*, 743 F.3d at 555).

The Third Circuit's reliance on the Seventh, Sixth, and D.C. Circuits might be defensible if *those* courts had objectively assessed how the regulatory measure works. But they did not.

Judge Posner's opinion in *University of Notre Dame* v. *Sebelius* was the first appellate opinion on the accommodation and it became the template for every other circuit that sided with the government. 743 F.3d 547 (7th Cir. 2014). For example, *Notre Dame* was the first to accept the government's characterization of the accommodation as an "opt out," *Notre Dame*, 743 F.3d at 550 at 609. That phrase went

judicially viral and was invoked over 200 times by five other circuits.[10]

The *Notre Dame* court styled the accommodation as an "opt out" because it assumed that Congress had granted the agencies power to "enlist[], draft[], conscript[] substitute providers" into providing contraceptive coverage after a ministry invokes the accommodation. *Notre Dame*, 743 F.3d at 548. The court denied that ministries' plans remained a "conduit" for contraceptive coverage, instead declaring that "the government . . . uses private . . . health plan administrators as *its agents* to provide medical services." *Id.* at 556.

These pronouncements cited no legal authority. Indeed, there is none. As discussed above, the notion of an agency "conscripting" TPAs is alien to ERISA's scheme.

After *Notre Dame* came *Michigan Catholic Conference*, which agreed with the Seventh Circuit that a TPA must "provid[e] contraceptive coverage to [a ministry's] employees pursuant to independent obligations under federal law," even while it acknowledged that the mandate only applies to insurers and group health plans. 755 F.3d at 388, n.12. The Sixth Circuit did not mention ERISA once.

Next came *Priests for Life*, where the D.C. Circuit claimed that the accommodation "designate[s] the relevant [TPA] as plan administrator under section

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[10] *Little Sisters of the Poor* v. *Burwell*, 794 F.3d 1151 (10th Cir. 2015) (123 times); *Priests For Life*, 772 F.3d 229 (44 times); *Geneva*, 778 F.3d 422 (5 times); *Cath. Health Care Sys.* v. *Burwell*, 796 F.3d 207 (2d Cir. 2015) (25 times); *Mich. Cath.* v. *Burwell*, 807 F.3d 738 (6th Cir. 2015) (8 times).

3(16) of ERISA" without "amend[ing] or alter[ing] Plaintiffs' own plan instruments." 772 F.3d at 255. It denied that the accommodation "require[s] the self-insured Plaintiffs to name their TPAs as ERISA plan fiduciaries"; it claimed that Labor has "authority to author a plan instrument or designate a particular writing as a plan instrument." *Id.* at 254, 255. Like the decisions on which it relied, the D.C. Circuit made no effort to reconcile these claims with ERISA's text.

Geneva College cited these three cases a combined twenty times, 778 F.3d at 435-43, and claimed that *Notre Dame* "analyzes the mechanics of the accommodation." *Id.* at 435 n.10. These decisions were the basis for the Third Circuit's amazing conclusion that a ministry's decision to invoke the accommodation "has no effect on the designation of the plan administrator"; the "purported causal connection is nonexistent." *Id.* at 438. Though it pledged to "objectively assess" "how the regulatory measure actually works," *id.* at 435, 436, *Geneva College* did not cite ERISA once.

The Third Circuit's deference to sister circuits contributed to an echo chamber that became ever more confident and disconnected from federal law as time went on. Four months after *Geneva College*, the Fifth Circuit cited the Third Circuit in support of its claim that TPAs are "*already required by law*" to provide contraceptive coverage before ministries either "complet[e] Form 700 or submit[] a notice to HHS." *ETBU* v. *Burwell*, 793 F.3d 449, 459 and n.38 (5th Cir. 2015) (emphasis added).

The next month, Judge Posner went even further in the Seventh Circuit's *Wheaton College* decision, writing: "What had been Wheaton's plan, so far as

emergency contraception was concerned, the Affordable Care Act made the government's plan when Wheaton refused to comply with the Act's provision on contraception coverage." 791 F.3d at 800. Under the accommodation, Judge Posner ventured, "new contracts are created," through "governmental plan instrument[s]," "to which [objecting employers are] not a party." *Id.* at 796, 800. Judge Posner insisted that "the government isn't using the college's plans" because contraception coverage was being provided through the "government's plan." *Id.* at 800, 801.

But there is no such thing as a "governmental plan instrument." The phrase does not appear in any federal statute or regulation, and had never before appeared in a published opinion.

Geneva College belongs to a strain of decisions that rejected RFRA claims based on government assertions without foundation in law. Though *Zubik* vacated many of the worst decisions in this strain, their lineage survives through opinions like the one below.

II. The decision below compounded *Geneva College's* errors by ignoring the agencies' concessions in *Zubik*, which confirm this statutory analysis.

Geneva College was wrong when it was decided. A straightforward look at ERISA shows that Congress did not give the agencies the power they had claimed for themselves. But the Third Circuit was doubly wrong in its next two mandate decisions, which it decided after the agencies in *Zubik* retreated from two

key premises of *Geneva College*'s substantial burden analysis.[11]

First, the agencies admitted that the contraceptive services provided by a TPA under the accommodation are "*part of the same 'plan' as the coverage provided by the employer*," confirming that the accommodation hijacks employers' plans. Second, the agencies admitted that a TPA becomes "legally responsible for complying with the contraceptive-coverage requirement *only after* the organization itself opts out," confirming that the accommodation forces a ministry to trigger its TPA's duty to comply with the mandate.

The Little Sisters highlighted these admissions to the Third Circuit, but the court ignored them. Instead, it reaffirmed its position that "nothing" had happened since 2015 to cause it or any other court to revisit Judge Posner's conclusion in *Notre Dame*, adopted in *Geneva College,* that the accommodation does not substantially burden religious exercise because Congress gave Labor the power to conscript TPAs into providing contraceptive services.

These concessions are important for three reasons. First, they confirm the statutory analysis provided in Part One. Second, these concessions mean that the decision below is *even worse* than *Geneva College* because after *Zubik* it was clear that *even the previous administration* had abandoned the premises the

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[11] For an in-depth discussion of the government's concessions in *Zubik*, and their implications for the litigation over the mandate's accommodation, see Mark L. Rienzi, *Fool Me Twice:* Zubik v. Burwell *and the Perils of Judicial Faith in Government Claims*, 2016 Cato Sup. Ct. Rev. 123, 132-42 (2016).

courts of appeals had relied on in rejecting ministries' substantial burden arguments.

Finally, the agencies' concessions in *Zubik* contradict the Respondents' claim here that the agencies "reversed course" when they issued an IFR in 2017 that expanded the mandate's religious employer exemption. To the contrary, the Final Rule now before the Court is merely the logical extension of the concessions the agencies made under the previous administration about how the accommodation does and must work under federal law.

The fact that it took the agencies until 2017 to reconcile their regulations with these concessions does not make the Final Rule illegal under the APA.

A. The agencies admitted that the accommodation hijacks an objecting ministry's plan.

By the time the agencies came before this Court in *Zubik*, they had briefed twenty-six cases in the courts of appeals and convinced eight of nine circuits to reject ministries' "hijack" argument on the basis that a TPA's obligations under the accommodation arise out of "new contracts" "to which [objecting employers are] not a party." *Wheaton*, 791 F.3d at 796; see also *Geneva*, 778 F.3d at 438 n.13 (denying that the accommodation uses a ministry's plan to provide contraceptive access).

Before this Court, however, the agencies abandoned that pretense. They conceded:

> If the objecting employer has a self-insured plan . . . the contraceptive coverage provided by its TPA is, as a formal ERISA matter, *part of*

> *the same "plan" as the coverage provided by the employer*.

Gov't Br. at 38, *Zubik*, *supra* (emphasis added). The government's Supplemental Brief reaffirmed this point: "If an employer has a self-insured plan, the statutory obligation to provide contraceptive coverage falls only on the plan." Gov't Suppl. Br. at 16, *Zubik*, *supra*, https://perma.cc/9BEL-HCT7.

This was an admission that the agencies had misled the Third Circuit when it claimed that, under the accommodation, ministries "need not place contraceptive coverage into the basket of goods and services that constitute their healthcare plans." Gov't Br. at 21, *Geneva*, *supra*. It was also an admission that the Third Circuit erred when it rejected ministries' hijack argument based on the agencies' earlier representations.

B. The agencies admitted that the accommodation forces an objecting ministry to trigger its TPA's duty to provide contraception coverage.

The government's briefing in *Zubik* also retreated from its claim that Labor has power under ERISA to unilaterally appoint TPAs as plan administrators and force them to provide contraceptive services.

This claim played a key role in this Court's *per curiam* decision in *Wheaton College*, which noted that "[t]he Government *contends* that the applicant's [TPA is] required by federal law to provide full contraceptive access regardless whether the applicant completes ESBA Form 700." 134 S. Ct. 2806, 2807 (2014) (emphasis added). *Based on that premise*, the Court reasoned that the agencies *would* be able to

compel Wheaton's TPA to comply with the mandate without requiring Wheaton to give its TPA a form that was "one of the instruments under which [its] plan is operated under ERISA section 3(16)(A)(i)." 29 C.F.R. 2510.3-16(b) (emphasis added).

Unlike the Third Circuit, this Court did not endorse the agencies' position—it never suggested that a simple notice to HHS would be enough, under ERISA 3(16), to turn Wheaton's TPA into its plan administrator.[12] It took no position as to Justices Sotomayor, Ginsburg, and Kagan's concern that this new procedure was legally inadequate because an objecting ministry's TPA "bears the legal obligation to provide contraceptive coverage only upon receipt of a valid self-certification." *Wheaton*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting).

Perhaps aware that the Court had stopped short of endorsing their position, the agencies then developed an amended notice procedure that differed significantly from what the Court had prescribed. First, the agencies' alternative process went beyond *Wheaton College* by requiring an employer to provide its TPA's name and contact information. 80 Fed. Reg. at 41,323.

Second, Labor ensured that even this notice to HHS would not function as a simple "opt out." Labor's updated self-certification form states that "This form *or a notice to the Secretary [of HHS]* is an instrument under which the plan is operated." DOL, EBSA Form

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[12] *Wheaton College* says that "[n]othing *in this order* precludes the Government from relying on this notice . . . to facilitate the provision of full contraceptive coverage under the Act." 134 S. Ct. at 2807 (emphasis added). The Court made no ruling about whether *federal law* precluded the Government from doing so.

700—Certification (Rev. Aug. 2014) (emphasis added), https://perma.cc/3BNS-SAWY. Even under the amended accommodation, Labor still forces a ministry to create a plan instrument that triggers its TPA's obligations as plan administrator under ERISA 3(16)(i).

These additional steps make no sense if, as the Third Circuit held, a ministry's decision to invoke the accommodation "has no effect on the designation of the plan administrator." *Geneva*, 778 F.3d at 438. They make much more sense in light of the agencies' concession in *Zubik* that,

> In the self-insured context, the accommodation regulations designate an objecting employer's TPA as the entity legally responsible for complying with the contraceptive-coverage requirement *only after* the organization itself opts out.

Gov't Br. in Opp. at 22 n.12, *Zubik*, *supra* (emphasis added).

To admit this causal relationship is to admit that the accommodation forces ministries to execute a document that "triggers" contraceptive coverage. The Third Circuit's response, that the TPA's obligation to deliver contraceptive services is ultimately rooted in federal law, is irrelevant. *Geneva*, 778 F.3d at 437 (quoting *Notre Dame*, 743 F.3d at 554). This Court frequently uses the term "trigger" to describe actions taken by individuals or organizations that cause a new set of statutory rules or obligations to apply. See, *e.g.*, *United States* v. *Haymond*, 139 S. Ct. 2369, 2381 (2019) ("the jury's verdict ***triggered*** a statute"); *United States* v. *Davis*, 139 S. Ct. 2319, 2324 (2019) ("weapons also ***trigger*** enhanced penalties); *Ariz.*

Free Enter. Club's Freedom Club PAC v. *Bennett*, 564 U.S. 721, 739 (2011) ("forcing that choice—***trigger*** matching funds, change your message, or do not speak—certainly contravenes . . . the First Amendment" (citation and internal quotation omitted)); *Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 669 (2007) (describing actions "an agency is required by statute to undertake once certain specified ***triggering events*** have occurred").

C. This administration took the previous administration's concessions into account when it decided to create a broader religious employer exemption.

The Respondents claim the agencies "reversed course" when they issued a Final Rule that expanded the religious employer exemption. Br. in Opp., No. 19-431 at 5. This is true in a sense, as "[t]he agencies ha[d] previously contended that the mandate does not impose a substantial burden on entities and individuals," with or without the accommodation. 82 Fed. Reg. 47,792, 47,800 (Oct. 13, 2017). By October 2017, the agencies had "reevaluated [their] position on this question" after taking into account a number of considerations—including their own admissions before this Court in *Zubik*. *Id.*

But it would be wrong to see the Final Rule merely as the result of a change in administration, or even a new narrative about how the accommodation works. Rather, the Final Rule properly accounted for the agencies' own conclusions, made during the previous administration, about how the accommodation does and must work under federal law.

First, the agencies' IFR cited their 2015 concession that the accommodation hijacks ministries' group health plans:

> The agencies have stated in our regulations and court briefings that the existing accommodation with respect to self-insured plans requires contraceptive coverage as part of the same plan as the coverage provided by the employer. . . . As a result, in significant respects, the accommodation process does not actually accommodate the objections of many entities [that] strongly oppose coverage of certain contraceptives in their plans and in connection with their plans.

Id. at 47,852.

Second, the agencies conceded, consistent with their position in *Zubik*, that the accommodation forces a ministry to execute a document that triggers its TPA's duty to provide contraceptive services:

> If an eligible organization uses the optional accommodation process through the EBSA Form 700 or other specified notice to HHS, *it voluntarily shifts* an obligation to provide separate but seamless contraceptive coverage to its issuer or third party administrator.

Id. at 47,813 (emphasis added), 83 Fed. Reg. 57,536, 57,570 (Nov. 15, 2018) (same).

These statements accurately reflect the agencies' description in *Zubik* about how the accommodation works. Further, these statements do not just *allow*, they *compel* the agencies' new conclusion that the accommodation is not enough to fulfill their statutory duty under RFRA:

> We believe that the Court's analysis in *Hobby Lobby* extends, for the purposes of analyzing a substantial burden, to the burdens that an entity faces when it religiously opposes participating in the accommodation process or the straightforward Mandate, and is subject to penalties or disadvantages that apply in this context if it chooses neither.

82 Fed. Reg. at 47,800.

The agencies' decision to "reverse course" was a reasonable response to the *Zubik* concessions. For example, the agencies could have reasonably concluded that their description of the accommodation in *Zubik* accounts for the important differences between the Court's *Wheaton College* order and the agencies' amended accommodation. Compare *Wheaton*, 134 S. Ct. at 2807, with 80 Fed. Reg. at 41,323. And if *Wheaton College* sent a "strong signal[] . . . about how to resolve the least restrictive means issue," *Priests for Life*, 808 F.3d at 22 (Kavanaugh, J., dissenting from the denial of rehearing en banc), then *Zubik* was an admission that their accommodation was more burdensome than the notice the Court had envisioned, and that their amended accommodation would therefore not survive strict scrutiny.

The agencies' decision to change policy in light of these admissions was far more reasonable than the Third Circuit's decisions to ignore them. The Little Sisters brought these concessions to the court's attention.[13] But the court just recommitted itself to its substantial burden analysis in *Geneva College*. *Pennsylvania*, 930 F.3d at 573. It erroneously doubled

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[13] See Br. for Little Sisters at 19-20, *Pennsylvania*, *supra*.

down on its conclusion from *Real Alternatives* that "there is nothing that would require us—or anyone else—to conclude that our reasoning in [*Geneva College*] was incorrect." *Real Alternatives*, 867 F.3d at 356 n.18 (cited at *Pennsylvania*, 903 F.3d at 573 n.30).

III. Correcting the Third Circuit's substantial burden analysis would resolve the case at hand.

The statutory analysis in Part One, confirmed by the government's concessions highlighted in Part Two, provides the best and easiest way to resolve this case. What is more, this approach would also end the interminable battle over the mandate's accommodation and correct the errors in the Ninth Circuit's parallel decision, *California* v. *Dep't of Health & Human Servs.*, 941 F.3d 410 (9th Cir. 2019).

It might seem counterintuitive, but looking to the plain text of ERISA would resolve this APA case. Though the decision below is framed as an APA matter, the Third Circuit's RFRA analysis plays a crucial role in both of its APA holdings. Thus, if ERISA helps answer the RFRA question, it addresses the Third Circuit's APA holdings as well.

The Third Circuit first held the Final Rule was procedurally invalid because the agencies "lacked good cause for dispensing with notice of and comment to the IFRs." *Pennsylvania*, 930 F.3d at 567. But two paragraphs later, the court acknowledged that "imminent" harm would meet the APA's "good cause" standard. *Id.*

There is no doubt that a ministry forced to choose between violating its conscience and the mandate's crushing fines is suffering an imminent injury. See

Hobby Lobby Stores, Inc. v. *Sebelius*, 723 F.3d 1114 (10th Cir. 2013), aff'd sub nom. *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Therefore, the agencies satisfied the APA's "good cause" requirement if they had reason to believe that their accommodation was violating the RFRA rights of self-insured ministries.

The same is true of the Third Circuit's second APA holding, that the Final Rule violates the APA's substantial requirements. This conclusion rests on the court's declaration that "RFRA does not demand the Religious Exemption" because "the status quo prior to the new Rule, with the Accommodation, did not infringe on the religious exercise of covered employees." *Pennsylvania*, 930 F.3d at 574. Thus, both the Third Circuit's procedural and substantive APA holdings are wrong if the court's RFRA analysis is wrong.

Furthermore, the Third Circuit's RFRA conclusions are wrong if its substantial burden analysis is wrong. The accommodation cannot pass strict scrutiny because the true least restrictive alternative, "[t]he most straightforward way of [providing contraceptive coverage,] would be for the Government to assume the cost of providing" this coverage directly. *Hobby Lobby*, 573 U.S. at 728.

In short, the Third Circuit's APA analysis is wrong if its RFRA analysis is wrong, and its RFRA conclusion is wrong if ERISA demonstrates that the agencies lack authority to implement the accommodation as an "opt out." Thus, the decision below is wrong because Congress never gave the agencies the power to implement the accommodation

without involving objecting ministries in ways that substantially burden their religious exercise.

For the Little Sisters to prevail, the nuns do not need this Court "to accept [their] characterization of the regulatory scheme on its face." *Geneva*, 778 F.3d at 436. All the Sisters need is for this Court to examine the accommodation in light of federal law and correct the Third Circuit's improper deference to federal agencies.

CONCLUSION

The Knights of Columbus urges the Court to examine the accommodation under ERISA, hold that the accommodation substantially burdens religious exercise, and on that basis reverse the decision below.

Respectfully submitted,

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