Nos. 19-431, 19-454

In the Supreme Court of the United States

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

v.

COMMONWEALTH OF PENNSYLVANIA
AND STATE OF NEW JERSEY,
Respondents.

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

v.

COMMONWEALTH OF PENNSYLVANIA
AND STATE OF NEW JERSEY,
Respondents.

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

BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS [CORRECTED]

STEVEN M. FREEMAN
DAVID L. BARKEY
ADL (Anti-Defamation League)
605 Third Ave.
New York, NY 10158
(212) 885-7733

RICHARD B. KATSKEE
Counsel of Record
SARAH R. GOETZ
Americans United for Separation of Church and State
1310 L St. NW, Ste. 200
Washington, DC 20005
(202) 466-3234
katskee@au.org

(Additional counsel listed on inside cover)

ELLIOT M. MINCBERG
DIANE LAVIOLETTE
People For the American Way Foundation
1101 15th St. NW, Ste. 600
Washington, DC 20005
(202) 467-4999

DIANA KASDAN
JOEL DODGE
Center for Reproductive Rights
199 Water St., 22nd Floor
New York, NY 10038
(917) 637-3600

NIMRA H. AZMI
Muslim Advocates
P.O. Box 34440
Washington, DC 20043
(202) 897-2622

CINDY NESBIT
The Sikh Coalition
50 Broad St., Ste. 504
New York, NY 10004
(212) 655-3095

JOSHUA S. HOUSTON
Texas Impact
Texas Interfaith Center
200 E. 30th St.
Austin, TX 78705
(512) 472-3903

SUHAG A. SHUKLA
SAMIR KALRA
Hindu American Foundation
910 17th St. NW, Ste. 316A
Washington, DC 20006
(202) 223-8222

Counsel for Amici Curiae

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BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*

Amici are religious and civil-rights organizations that represent diverse faiths and beliefs but are united in respecting the important but distinct roles of religion and government in our Nation. Constitutional and statutory protections work hand-in-hand to safeguard religious freedom for all, ensuring that government does not interfere in private matters of conscience, promote or disparage any denomination, provide preferential benefits to believers, or impose on anyone the costs or burdens of another's religious exercise. *Amici* write to explain why the challenged Rules violate fundamental First Amendment protections for religious freedom and hence are not authorized, let alone required, by the Religious Freedom Restoration Act (42 U.S.C. 2000bb *et seq.*).[1]

Amici are:

- Americans United for Separation of Church and State.
- ADL (Anti-Defamation League).
- American Ethical Union.
- Bend the Arc: A Jewish Partnership for Justice.
- Center for Reproductive Rights.

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to fund the brief's preparation or submission. The parties' consents to *amicus* briefs are on file with the Clerk's office.

- Covenant Network of Presbyterians.
- Freedom From Religion Foundation, Inc.
- General Synod of the United Church of Christ.
- Global Justice Institute, Metropolitan Community Churches.
- Hindu American Foundation.
- Interfaith Alliance Foundation.
- Jewish Council for Public Affairs.
- Jewish Social Policy Action Network.
- Men of Reform Judaism.
- Methodist Federation for Social Action.
- Muslim Advocates.
- National Council of Churches.
- People For the American Way Foundation.
- Reconstructionist Rabbinical Association.
- Religious Coalition for Reproductive Choice.
- Sikh Coalition.
- Texas Impact.
- Texas Interfaith Center for Public Policy.
- Union for Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Women's Health Amendment to the Patient Protection and Affordable Care Act and the ACA's implementing regulations require that employer-provided health plans cover preventive care for women, including all FDA-approved methods of contraception, without cost-sharing. See 42 U.S.C. 300gg-13(a)(4); 26 C.F.R. 54.9815-2713(a)(1)(iv); 29 C.F.R. 2590.715-2713(a)(1)(iv); 45 C.F.R. 147.130(a)(1)(iv). This requirement guarantees insurance coverage for medical services that the government has determined are essential to women's health and well-being. See Institute of Medicine, *Clinical Preventative Services for Women: Closing the Gaps* 102–110 (2011).

Since 2013, the regulations have exempted houses of worship. See 45 C.F.R. 147.132(a)(1)(i)(A). And religiously affiliated entities have similarly been entitled to an accommodation (that is to say, an exemption), which is available to them on giving notice that they want one.[2] In those situations, the government arranges for the coverage to be provided to the objecting entities' employees without cost to or participation by the entities themselves. See 45 C.F.R. 147.131(c) and (d). Under *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the latter accommodation was

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[2] Though it has become common shorthand to use "accommodation" to mean the ability to refuse to provide the coverage on giving notice so that the government may ensure continuity of coverage, and "exemption" to mean not having to provide notice that would allow the government to make those separate arrangements, a religious accommodation is simply an exemption from legal requirements on religious grounds. See generally *Corp. of Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987). *Amici* therefore use the terms interchangeably.

extended to closely held for-profit businesses. The resulting system sought to balance individuals' and employers' religious objections against the ACA's mandate that women have access to contraceptive care without cost-sharing.

Through the rulemaking challenged here, the government has sought to upset that balance by establishing religious and moral exemptions that effectively nullify the contraceptive-coverage requirement's protections for hundreds of thousands of women. The Religious Exemption (45 C.F.R. 147.132) permits employers to exempt themselves in a way that disrupts the government's arrangements for coverage to be provided by other means. And objecting entities that had availed themselves of the preexisting accommodation may revoke notice of their objections, thus requiring the government to curtail its separate provision of the coverage. See 45 C.F.R. 147.131(c)(4). The companion Moral Exemption (45 C.F.R. 147.133) broadly exempts employers (other than publicly traded for-profit companies) that have objections based on "moral convictions."

Neither exemption should stand. Though government may, and in some circumstances must, grant religious exemptions from general legal requirements, "accommodation is not a principle without limits." *Board of Educ.* v. *Grumet*, 512 U.S. 687, 706 (1994). This Court has made clear that religious exemptions are permissible only when they alleviate substantial government-imposed burdens on religious exercise (see *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 613 n.59 (1989); *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 334 (1987)), and only when they do not detrimentally affect nonbeneficiaries (see *Cutter* v. *Wilkinson*, 544 U.S. 709,

720 (2005); *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 709–710 (1985)). Otherwise, they are unconstitutional preferences for religion. And because no statute can authorize what the Constitution forbids, RFRA incorporates these constitutional mandates (see 42 U.S.C. 2000bb-1(a); *Cutter*, 544 U.S. at 720).

The Religious Exemption runs roughshod over these requirements. It authorizes broad exemptions without regard to whether an entity demonstrates (or even asserts) that the preexisting accommodation substantially burdens religious exercise—which it does not, as virtually every circuit has concluded. And in the name of accommodating employers, it strips employees, spouses, and dependents of the insurance coverage to which they are entitled by law, imposing on them substantial costs and burdens to obtain the critical healthcare that should be available to them without cost-sharing—in effect making them underwrite objectors' religious choices.

The Moral Exemption is likewise invalid, either because it is broader than the Religious Exemption, in which case it is *ultra vires*, or because it is just the Religious Exemption by another name, in which case the exemptions exhibit the same defects.

When challenges to the preexisting accommodation for religiously affiliated entities came before this Court in *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016), the Court instructed the parties to attempt "to arrive at an approach * * * that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'" *Id.* at 1560 (citation omitted). The Rules fail miserably: They broadly exempt objectors on the bare possibility that some religious exercise

somewhere might be burdened, and in dereliction of this Court's directive and the government's statutory duty to ensure that women receive contraceptive coverage without cost-sharing.

ARGUMENT

I. THE RELIGIOUS EXEMPTION VIOLATES THE ESTABLISHMENT CLAUSE AND IS NEITHER REQUIRED NOR AUTHORIZED BY RFRA.

A. The Establishment Clause Limits Permissible Accommodation.

1. Religious exemptions that are granted in the absence of substantial government-imposed burdens on religious exercise violate the Establishment Clause.

When official action substantially burdens religious exercise, the government may ameliorate those burdens (see, *e.g.*, *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984)), subject to, among other restrictions, a prohibition against materially harming third parties (see Section I.A.2, *infra*). But "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988).

An "accommodation of religion, in order to be permitted under the Establishment Clause, must lift 'an identifiable burden on the exercise of religion'" that the government itself has imposed. *County of Allegheny*, 492 U.S. at 613 n.59 (quoting *Amos*, 483 U.S. at 348 (O'Connor, J., concurring in the judgment)); see also *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 15 (1989) (plurality opinion) (accommodations impermissible if they "cannot reasonably be seen as removing a

significant state-imposed deterrent to the free exercise of religion"); *Wallace* v. *Jaffree*, 472 U.S. 38, 84 (1985) (O'Connor, J., concurring in the judgment) (to be permissible, accommodation must lift "state-imposed burden on the free exercise of religion" other than any burdens resulting from operation of Establishment Clause). When burdens on religious exercise are insubstantial or nonexistent, exemptions from legal requirements amount to unconstitutional governmental promotion of religion. See *County of Allegheny*, 492 U.S. at 613 n.59; *Amos*, 483 U.S. at 334–335; see also *Cutter*, 544 U.S. at 720. For they impermissibly "create[ ] an incentive or inducement (in the strong form, a compulsion) to adopt [the benefited religious] practice or conviction." Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 686 (1992). And granting a religious exemption without first objectively determining that there exists a substantial, government-imposed burden on the claimant's religious exercise would impermissibly "single out a particular class of [religious observers] for favorable treatment and thereby have the effect of implicitly endorsing a particular religious belief." *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 145 n.11 (1987).

2. Religious exemptions that detrimentally affect third parties violate the Establishment Clause.

The rights to believe and practice one's faith, or not, are sacrosanct. But they do not extend to imposing on others by operation of law the costs and burdens of one's beliefs. Government should not, and under the Establishment Clause cannot, favor the religious beliefs of some at the expense of the rights,

beliefs, and health of others. For if religious exemptions detrimentally affect nonbeneficiaries, they unconstitutionally prefer the benefited religious beliefs and their adherents.

Thus, in *Caldor*, this Court invalidated a state law requiring employers to accommodate Sabbatarians in all instances, because "the statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." 472 U.S. at 709. The Court held that "unyielding weighting in favor of Sabbath observers over all other interests" had "a primary effect that impermissibly advances a particular religious practice." *Id.* at 710. Similarly, in *Texas Monthly*, the Court invalidated a sales-tax exemption for religious periodicals in part because it "burden[ed] nonbeneficiaries" by making them underwrite the "benefit bestowed on subscribers to religious publications." 489 U.S. at 18 n.8 (plurality opinion). See generally James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶¶ 3, 15 (1785), *reprinted in Everson* v. *Bd. of Educ.*, 330 U.S. 1, 63–72 (1947) (appendix to dissent of Rutledge, J.) (requiring support for another's faith infringes "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience").

Free-exercise jurisprudence likewise reflects this fundamental limitation. In *United States* v. *Lee*, 455 U.S. 252, 261 (1982), this Court rejected an Amish employer's request for an exemption from paying social-security taxes because it would "operate[ ] to impose the employer's religious faith on the employees." In *Braunfield* v. *Brown*, 366 U.S. 599, 608–609 (1961), the Court refused an exemption from Sunday-closing laws because it would have provided Jewish businesses with "an economic advantage over their

competitors who must remain closed on that day." And in *Prince* v. *Massachusetts*, 321 U.S. 158, 170 (1944), the Court denied an exemption from child-labor laws to allow minors to distribute religious literature because while "[p]arents may be free to become martyrs themselves * * * it does not follow [that] they are free, in identical circumstances, to make martyrs of their children." In contrast, the Court recognized a Seventh-Day Adventist's right to an exemption from a restriction on unemployment benefits in *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963), because the exemption would not "serve to abridge any other person's religious liberties." And the Court exempted Amish parents from state truancy laws in *Wisconsin* v. *Yoder*, 406 U.S. 205, 235–236 (1972), only after they demonstrated the "adequacy of their alternative mode of continuing informal vocational education" to meet their children's educational needs.

In short, "the limits [on religious exercise] begin to operate whenever activities begin to affect or collide with liberties of others or of the public." *Prince*, 321 U.S. at 177 (Jackson, J., concurring). "[Y]our right to swing your arms ends just where the other man's nose begins." *Hobby Lobby*, 573 U.S. at 746 (Ginsburg, J., dissenting) (quoting Zechariah Chafee, *Freedom of Speech in War Time*, 32 Harv. L. Rev. 932, 957 (1919)).

Indeed, in only one narrow category of circumstances has this Court *ever* upheld religious exemptions that burdened third parties in any meaningful way—namely, when core Establishment and Free Exercise Clause protections for ecclesiastical authority were directly implicated. In *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171, 196 (2012), the Court held that the Americans with Disabilities Act could not be enforced in a way

that would interfere with a church's selection of its ministers. And in *Amos*, 483 U.S. at 330, 339, the Court upheld, under Title VII's statutory religious exemption, a church's firing of an employee who was not in religious good standing. These exemptions did not amount to impermissible religious favoritism under the Establishment Clause because they embodied the First Amendment's "special solicitude" for the rights of churches to select their clergy, govern themselves, and control their internal operations. *Hosanna-Tabor*, 565 U.S. at 189.

Concerns over noninterference with ecclesiastical authority have no bearing here, as the challenged Rules do not apply to churches, which are already exempt from the contraception-coverage requirement under 45 C.F.R. 147.131(a) (2015). As this Court has explained, if the special solicitude for churches "were not confined," the result would be "inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).

B. RFRA Incorporates These Constitutional Requirements.

No statute may forbid what the Constitution requires or require what it forbids. See, *e.g.*, *Clark* v. *Martinez*, 543 U.S. 371, 380–381 (2005). Hence, RFRA can authorize religious exemptions only when the government has substantially burdened a claimant's religious exercise and granting the exemption would not detrimentally affect third parties. See *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 302 (2000) ("[T]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."

(quoting *Lee* v. *Weisman*, 505 U.S. 577, 587 (1992)). Indeed, Congress made the first of these requirements an express statutory prerequisite; and this Court has interpreted RFRA and its sibling, the Religious Land Use and Institutionalized Persons Act (42 U.S.C. 2000cc *et seq.*), to incorporate the second.[3]

Although RFRA provides important protections for religious exercise, it does not—and as a constitutional matter cannot—authorize religious exemptions that fail to account for the Establishment Clause's constraints. Rather, RFRA sets the legal test for determining whether exemptions are authorized: Consistent with the constitutional mandates and the Act's text, it requires individualized assessments both of asserted burdens on religious exercise and of costs shifted to third parties.

1. RFRA does not and cannot authorize religious exemptions in the absence of substantial government-imposed burdens on religious exercise.

What the Establishment Clause mandates, RFRA sets as an express statutory prerequisite: To assert a colorable claim, a claimant must first demonstrate that the "[g]overnment [has] substantially burden[ed the] person's exercise of religion." 42 U.S.C. 2000bb-1.

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[3] RFRA and RLUIPA employ virtually identical language and serve the same congressional purpose. Compare 42 U.S.C. 2000bb-1, with 42 U.S.C. 2000cc-1. Accordingly, they apply "the same standard" (*Holt* v. *Hobbs*, 574 U.S. 352, 358 (2015) (citation omitted)), and decisions under one apply to the other (see, *e.g.*, *Grace United Methodist Church* v. *City of Cheyenne*, 451 F.3d 643, 661 (10th Cir. 2006); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1226–1227 (11th Cir. 2004)).

a. Before 1990, this Court interpreted the Free Exercise Clause to require a compelling governmental interest and narrow tailoring whenever official action substantially burdened religious exercise. See, *e.g.*, *Sherbert*, 374 U.S. at 406–407. In *Employment Division* v. *Smith*, 494 U.S. 872, 878–879 (1990), however, the Court held that neutral, generally applicable laws are presumptively constitutional and subject to rational-basis review only, even if the legal requirements fall more heavily on some people because of their religion. Congress responded by enacting RFRA to restore the Court's pre-*Smith* free-exercise jurisprudence as a statutory test for religious accommodations. See 42 U.S.C. 2000bb(b); *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006); S. Rep. No. 103-111, at 8–9 (1993).

In so doing, Congress necessarily—and quite consciously—adopted into RFRA the Establishment Clause's prohibitions recognized in pre-*Smith* free-exercise law. See, *e.g.*, 139 Cong. Rec. 26,178 (1993) (statement of Sen. Kennedy) ("The act creates no new rights for any religious practice or for any potential litigant. Not every free exercise claim will prevail, just as not every claim prevailed prior to the Smith decision."); *id.* at 26,180 (statement of Sen. Hatch) (RFRA "is consistent with the case law developed by the Court prior to the Smith decision" and "does not require the Government to justify every action that has some effect on religious exercise.").

b. Whether legal requirements substantially burden a claimant's religious exercise is a question of law to be determined by the courts, not the claimants themselves. For as this Court explained in *Lyng*:

> A broad range of government activities * * * will always be considered essential to the

> spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. * * * The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.

485 U.S. at 452.

It follows that the inquiry cannot be resolved by deference to claimants' assertions but instead requires objective assessment by, in the first instance, the officials from whom a religious accommodation is requested, and, ultimately, by the courts. See, *e.g.*, *EEOC* v. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 588 (6th Cir. 2018) ("Most circuits * * * have recognized that a party can sincerely believe that he is being coerced into engaging in conduct that violates his religious convictions without actually, as a matter of law, being so engaged."), *cert. granted on unrelated issue*, 139 S. Ct. 1599 (2019); *Mahoney* v. *Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011). For the question is one not of religious doctrine or belief, but of the nature and extent of legal rights. See generally *Lyng*, 485 U.S. at 452.

c. To be sure, courts must not "troll[ ] through a person's or institution's religious beliefs" (*Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)) or evaluate "the relative merits of differing religious claims" (*Lee*, 455 U.S. at 263 n.2 (Stevens, J., concurring in the judgment)). But just because someone feels that a belief is burdened by governmental action does not give rise to a legally cognizable claim. For courts

are not just permitted but required—by RFRA and the Establishment Clause constraints that it embodies—to evaluate whether, as an objective legal matter, a claimant's religious exercise is substantially burdened.

In *Bowen* v. *Roy*, 476 U.S. 693, 696, 702–703 (1986), for example, this Court concluded that a Free Exercise Clause claimant was not substantially burdened by his child's being assigned a Social Security number, notwithstanding his sincere belief that she would be spiritually harmed. "[C]laims of religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the Government. Not all burdens on religion are unconstitutional." *Id.* at 702.

And in *Lyng*, the Court acknowledged the claimants' belief that building a road through sacred land posed an "extremely grave" threat to Native American religious practices. 485 U.S. at 451. Yet the Court concluded that "[w]hatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Id.* at 451–452; see also *Hernandez* v. *C.I.R.*, 490 U.S. 680, 699 (1989) (while it "is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, * * * [we] have doubts whether the alleged burden imposed * * * is a substantial one"); *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 303–305 (1985) (no burden on free exercise where challenged law did not actually require performance of specific action to which claimants objected).

Those cases are, of course, staples of the pre-*Smith* free-exercise jurisprudence that RFRA encompasses. See generally p. 12, *supra*.

d. To require less under RFRA would make every bare assertion of a substantial burden trigger strict-scrutiny review. Consequently, either strict scrutiny would cease to be strict, because Congress never intended for every RFRA claim to succeed, or each individual would become arbiter in her own cause—a law unto herself—and the concept of the rule of law would be nullified (see *Smith*, 494 U.S. at 879; *Lyng*, 485 U.S. at 452; Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 Geo. Wash. L. Rev. 94, 100–101 (2017) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment." (quoting The Federalist No. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961)))).

e. Relatedly, lower courts have recognized that while religious practices need not be "central to" an adherent's system of belief (42 U.S.C. 2000cc-5(7)(A)) to give rise to RFRA claims, there must be a sufficient "nexus" between claimants' religious beliefs and the regulated activity to demonstrate that the government is "forc[ing them] to engage in conduct that their religion forbids or . . . prevent[ing] them from engaging in conduct their religion requires" (*Mahoney*, 642 F.3d at 1121–1122 (citation omitted)); see also *Abdulhaseeb* v. *Calbone*, 600 F.3d 1301, 1325 (10th Cir. 2010) (Gorsuch, J., concurring) (no triable issue on substantial burden where RLUIPA complainant described "only a moderate impediment to—and not a constructive prohibition of—his religious exercise").

Because religion is "comprehensive in nature" (*Africa* v. *Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981)), some adherents view themselves as guided by religion in all aspects of life and ascribe religious motivations to virtually every undertaking (see *Henderson* v. *Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001)). But RFRA was not intended to exempt them from all law. See p. 12, *supra*. Requiring claimants to show a burdened religious obligation or prohibition, rather than merely a religious motivation for conduct that they wish to be exempted from the law, is the only sensible way to construe RFRA's statutory prerequisite of a substantial burden on religious exercise.

f. The courts are well-equipped to conduct these legal inquiries, which are not much different from other legal determinations in religious-accommodation cases, whether under RFRA or otherwise.

For example, courts must regularly determine whether religious beliefs are sincere. See, *e.g.*, *Holt* v. *Hobbs*, 574 U.S. 352, 369 (2015) (proper to investigate whether inmate is using religious claim to "cloak illicit conduct"); *Thomas* v. *Review Bd.*, 450 U.S. 707, 715–716 (1981) (free-exercise plaintiffs must show "honest conviction" that government is requiring them to act contrary to their religion); see also *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 17 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc); *United States* v. *Quaintance*, 608 F.3d 717, 722 (10th Cir. 2010) (Gorsuch, J.). And as this Court recognized in *Hobby Lobby*, "Congress was confident of the ability of the federal courts to weed out insincere claims." 573 U.S. at 718. Similarly, courts must determine not just whether a religious institution calls an employee a "minister," but also whether the employee's role in carrying out the

organization's mission makes her a "minister" as a legal matter for purposes of the ministerial exception. See *Hosanna-Tabor*, 565 U.S. at 190–191; *id.* at 198, 202–203 (Alito, J., concurring). Such legal determinations are commonplace.

2. RFRA does not and cannot authorize religious exemptions that detrimentally affect third parties.

Again, because RFRA cannot require what the Establishment Clause forbids (*Santa Fe*, 530 U.S. at 302), and because Congress intended to incorporate the Establishment Clause's limitations into RFRA (see Section I.B.1.a, *supra*), it should not be read to afford exemptions that would materially harm nonbeneficiaries if a constitutionally permissible construction is possible (see *Clark*, 543 U.S. at 380–381). For the Religion Clauses "give[ ] no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Caldor*, 472 U.S. at 710 (quoting *Otten* v. *Baltimore & Ohio R.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (Hand, J.)). When nonbeneficiaries would be detrimentally affected, religious exemptions are forbidden. *Cutter*, 544 U.S. at 722; *Caldor*, 472 U.S. at 709–710.

Thus, in interpreting RFRA and RLUIPA, this Court has afforded saving constructions that build in the Establishment Clause's safeguards: "[C]ourts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" (*Cutter*, 544 U.S. at 720 (citing *Caldor*, 472 U.S. at 709–710)) to ensure that the accommodation "does not override other significant interests" (*id.* at 722).

Indeed, with respect to exemptions from the very contraceptive-coverage requirement at issue here, every member of the Court in *Hobby Lobby* authored or joined an opinion acknowledging that "detrimental effect[s]" on nonbeneficiaries must be considered. See 573 U.S. at 729 n.37; *id.* at 693 ("Nor do we hold * * * that * * * corporations have free rein to take steps that impose 'disadvantages * * * on others' or that require 'the general public [to] pick up the tab.'" (citation omitted)); *ibid.* (approving accommodation where effect on women "would be precisely zero"); *id.* at 739 (Kennedy, J., concurring) (religious exercise must not "unduly restrict other persons * * * in protecting their own interests"); *id.* at 745 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting) ("Accommodations to religious beliefs or observances * * * must not significantly impinge on the interests of third parties."); *see also Holt*, 574 U.S. at 370 (Ginsburg, J., concurring) (accommodation permissible because it "would not detrimentally affect others who do not share petitioner's belief"); *Priests for Life*, 808 F.3d at 25 (Kavanaugh, J., dissenting from denial of rehearing en banc) (accommodations permissible when they "would not * * * 'unduly restrict' third parties" (citing Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2532 (2015))).

3. RFRA authorizes only individualized, objective determinations respecting substantial burdens and third-party harms.

Because RFRA does not and cannot authorize accommodations unless a claimant's religious exercise is substantially burdened and the accommodation would not detrimentally affect third parties, application of the Act requires individualized assessments of these

constitutionally mandated prerequisites. Hence, RFRA cannot be read to delegate authority to enact broad, general exemptions for anyone who wants one, regardless of whether the prerequisites are met for each individual claimant.

RFRA's plain language supports this conclusion: "A person whose religious exercise has been burdened in violation of this section" may seek relief in a judicial proceeding. 42 U.S.C. 2000bb-1(c). RFRA thus authorizes causes of action, individualized adjudication, and potential remedies solely for claimants who first establish that their own religious exercise is substantially burdened by the challenged official action. 42 U.S.C. 2000bb-1(a).

Relatedly, because whether RFRA's prerequisites are satisfied is a legal question, it is committed to the courts, and agency determinations are subject to *de novo* review. See *Gonzales*, 546 U.S. at 434 ("RFRA * * * plainly contemplates that *courts* would recognize exceptions—that is how the law works. * * * RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress."); cf. *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649 (1990) (declining to defer to agency's interpretation of labor law where Congress "expressly established the Judiciary and not the [agency] as the adjudicator of private rights of action arising under the statute.").

That makes sense, because RFRA's statutory prerequisites embody constitutional proscriptions, and an agency cannot be the last word on constitutional questions. See, *e.g.*, *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 131–132 (2015) (Thomas, J., concurring) (Congress lacks authority to "issue a judicially binding interpretation of the Constitution," and, "[l]acking

the power itself, it cannot delegate that power to an agency"); *Miller* v. *Johnson*, 515 U.S. 900, 922–923 (1995). Thus, in *Hobby Lobby*, the Court did not defer to executive-branch views when analyzing whether the contraceptive-coverage requirement violated RFRA. See 573 U.S. at 720–736.

C. The Religious Exemption Violates These Requirements.

Without satisfying RFRA's statutory prerequisites and the constitutional mandates on which they are premised, the challenged Religious Exemption licenses all nonprofits, universities, insurance companies, closely held businesses, publicly traded corporations, and individuals to avoid complying with the preexisting regulatory accommodation's simple expectation that objectors must ask for an exemption in order to receive one. See 45 C.F.R. 147.131(c)–(d), 147.132(a)–(b). The Rule thus goes well beyond what RFRA authorizes or the Establishment Clause permits.[4]

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[4] To the extent that petitioners suggest that the challenged Religious Exemption and the preexisting exemption for houses of worship must stand or fall together, they are mistaken. The houses-of-worship exemption was created to "respect[ ] the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011); accord 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013). It is grounded not in some general notion of accommodation but in the Religion Clauses' "special solicitude" for the ecclesiastical authority of houses of worship (see Section I.A.2, *supra*). The government routinely draws distinctions between churches and non-church entities on the same theory. See, *e.g.*, *Hosanna-Tabor*, 565 U.S. at 189 (recognizing exemption for ministerial employees of church-schools from employment-discrimination law); 2 U.S.C. 1602(8)(B)(xviii) (exempting churches from Lobbying Disclosure Act's registration requirements); 26 U.S.C. 6033(a)(3)(A)(i), (iii)

1. The Religious Exemption impermissibly provides exemptions without a showing that the objector's religious exercise is substantially burdened.

a. As just explained, RFRA does not, and as a constitutional matter cannot, grant general rulemaking authority to provide religious exemptions in gross and without a showing that the particular claimant's religious exercise is substantially burdened. Yet the Religious Exemption does just that: Objectors do not have to show, or even assert, substantial burdens on their religious exercise. Indeed, they do not even have to provide bare legal notice that they plan to take the exemption. So the government has no way to identify RFRA claimants or differentiate sincere objections from sham excuses for not following the law—much less to determine whether an objector's religious exercise is substantially burdened as a legal matter. The Department of Health and Human Services instead affords veto power over a congressional mandate, thus also making each citizen a "judge in his own cause." See Gedicks, 85 Geo. Wash. L. Rev. at 100 (quoting The Federalist No. 10).

Relatedly, the scheme imposed by the Religious Exemption does not provide an administrative record sufficient for judicial review of any actual grant or denial of an accommodation. Rather, it all but ensures an *in*adequate record, so that courts will be unable to

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(exempting churches from obligations for nonprofits to register with IRS and submit annual informational tax filings); 29 U.S.C. 1003(b)(2) (exempting church plans from ERISA). The numerous classes of entities—including publicly traded for-profit corporations—exempted here are not situated similarly to houses of worship.

perform the *de novo* review that RFRA commits to them (see *Gonzales*, 546 U.S. at 434).

And there is every reason to believe that RFRA's nexus requirement often will *not* be satisfied by objecting entities. Though exemptions are purportedly afforded "to the extent of" objecting entities' religious beliefs (45 C.F.R. 147.132(a)), objectors need not even *state* those beliefs, precluding genuine inquiry into whether the exemption taken is tailored to any actual, legally cognizable burden on religious exercise.

In that regard, many entities have explained that they have religious objections to just a small subset of contraceptive methods. See, *e.g.*, *Hobby Lobby*, 573 U.S. at 701–702 (describing claimants' objection to covering "four FDA-approved contraceptives"). Yet there is no assurance that they will limit their refusals to provide coverage to what they regard as religiously forbidden. And overbroad exclusions are not just possible, but likely: Insurance companies will almost certainly offer off-the-shelf "objector" policies that are not specifically tailored to each employer's actual religious objections but instead exclude *all* coverages that might draw *any* objections. For that is the most cost-effective, administratively efficient way to ensure that no business is stuck covering anything to which it objects.

What is more, the government extends the Religious Exemption to whole classes of entities, without a basis to conclude that all class members—or any—are genuinely substantially burdened by the preexisting regulatory accommodation. It exempts insurance companies, for example, despite "not know[ing] that issuers with qualifying religious objections exist." 83 Fed. Reg. 57,536, 57,566 (Nov. 15, 2018). And it exempts publicly traded corporations without pointing

to even one that has asked for that; without describing what religious exercise or a burden thereon might be for a public company; and without identifying who might assert substantial burdens, or how, on behalf of shareholders. See *id.* at 57,562–63. These omissions are noteworthy because, as this Court explained in *Hobby Lobby*, "the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable." 573 U.S. at 717.

The government generically asserts that agencies have latitude to make rules to avoid RFRA violations in the first instance, and to modify existing regulations concerning religious exemptions as they see fit. See Gov't Br. 27–31. But whatever authority agencies might have under RFRA to accommodate religious objectors, they cannot do so in a manner that (i) ignores RFRA's statutory and constitutional prerequisites, (ii) provides no mechanism for individualized determinations of those prerequisites, and (iii) denies meaningful judicial review.

b. Nor, in all events, could the substantial-burden prerequisite be satisfied here. The courts of appeals have been nearly unanimous in concluding—both before and after this Court's decisions in *Hobby Lobby* and *Zubik*, and including in this case—that being required to provide notice that one is availing oneself of a religious exemption is not a cognizable substantial burden on religious exercise, even if the government will then provide the objected-to insurance coverage another way.[5]

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[5] See, *e.g.*, Pet. App. 39a–41a; *California* v. *U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 428–429 (9th Cir. 2019)

Petitioners urge, however, that the substantial-burden inquiry should be satisfied once an objector asserts a sincere belief that following the preexisting accommodation requirement makes the claimant complicit in providing contraceptive coverage at odds with its religious beliefs (see Gov't Br. 22–25; Little Sisters Br. 34–39)—though we note that the Rule does not require even that much, as objectors may silently take the exemption. To be sure, courts cannot second-guess the correctness of a claimant's beliefs—they cannot say, "your belief that providing notice makes you

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(accommodation process "likely does not substantially burden" religious exercise); *Real Alternatives, Inc.* v. *Secretary Dep't of Health & Human Servs.*, 867 F.3d 338, 359–366 (3d Cir. 2017); *Eternal Word Television Network, Inc.* v. *Secretary of U.S. Dep't Health & Human Servs.*, 818 F.3d 1122, 1148–1151 (11th Cir. 2016); *Michigan Catholic Conference & Catholic Family Servs.* v. *Burwell*, 807 F.3d 738, 749–750 (6th Cir. 2015); *Catholic Health Care Sys.* v. *Burwell*, 796 F.3d 207, 218–26 (2d Cir. 2015); *Little Sisters of the Poor Home for the Aged* v. *Burwell*, 794 F.3d 1151, 1180–1195 (10th Cir. 2015); *East Tex. Baptist Univ.* v. *Burwell*, 793 F.3d 449, 459–463 (5th Cir. 2015); *University of Notre Dame* v. *Burwell*, 786 F.3d 606, 611–615 (7th Cir. 2015); *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 252–256 (D.C. Cir. 2014). But see *Dordt Coll.* v. *Burwell*, 801 F.3d 946, 949–950 (8th Cir. 2015).

Though in vacating and remanding all these decisions this Court declined to decide whether the objecting entities' religious exercise was substantially burdened (see *Zubik*, 136 S. Ct. at 1560), in *Hobby Lobby* the Court had previously explained that, "[a]t a minimum, * * * [the notification requirement] does not impinge on the plaintiffs' religious belief that providing insurance coverage for [certain contraceptives] violates their religion, and it serves HHS's stated interests equally well." 573 U.S. at 731; see also *Wheaton Coll.* v. *Burwell*, 134 S. Ct. 2806, 2808 (2014) (Sotomayor, J., dissenting) (explaining that Court "expressly rel[ied] on the availability of the religious-nonprofit accommodation" to reach holding in *Hobby Lobby*).

morally complicit is wrong as a theological matter." But insubstantiality as a *legal* matter is, and must of necessity be, an altogether different consideration. See *Lyng*, 485 U.S. at 452.

If petitioners' view were to prevail—if the substantial-burden analysis were nothing more than a bare sincerity determination followed by absolute deference to the objector's preferences—there would be no limit to the general legal obligations that would fall by the wayside.

For example, in *Thomas*, the Court concluded that a Jehovah's Witness was substantially burdened by being denied unemployment compensation for refusing employment making tank turrets. 450 U.S. at 710–716. The Court properly declined to evaluate the reasonableness of his willingness to manufacture steel for armaments but not to fabricate the weapons themselves. *Ibid.* But surely the Court would have had no trouble concluding that his religious objection to producing weapons of war would not have been substantially burdened—and therefore that he was not exempt from the unemployment law—had the factory instead manufactured picture books of battlefield scenes.

Or consider objections to the military draft: On petitioners' reasoning, the government's system for identifying conscientious objectors by requiring them to check a box on a Selective Service Registration Form would have to survive strict scrutiny, meaning not only that the process must serve a compelling governmental interest but also that there must be no less restrictive way to meet that interest (such as sending registrars to every home and school, or making the draft an opt-in rather than opt-out system lest someone object that marking the form constitutes

complicity in the government's drafting of others). Cf. *University of Notre Dame* v. *Sebelius*, 743 F.3d 547, 556 (7th Cir. 2014) (Posner, J.) (it "seems a fantastic suggestion" that conscientious objectors' religious beliefs would be substantially burdened as a legal matter by fact that someone else would be drafted in their stead), *vacated*, 575 U.S. 901 (2015).

Indeed, if the complicity-in-sin argument here were enough to satisfy the legal test for a substantial burden, it would open the door to innumerable other claims for exemptions from general laws. Some might object to complying with the Fair Labor Standards Act's wage protections (29 U.S.C. 206) because paying the mandated wages gives employees more money to spend on contraceptives. Others might object to paying federal income taxes because some tax dollars may go to the federal healthcare programs that, among other activities, provide contraceptive care to low-income patients. Surely Congress did not intend RFRA to subject these and innumerable other federal programs and requirements to strict-scrutiny analysis for those sorts of claims. Cf. *Jenkins* v. *C.I.R.*, 483 F.3d 90, 93 (2d Cir. 2007) (religious objector to military spending had no right under RFRA to exemption from paying taxes). For nothing like that was countenanced in pre-*Smith* free-exercise jurisprudence. See, *e.g.*, *Lee*, 455 U.S. at 260 (holding that Amish employer had no right to exemption from paying Social Security taxes based on religious objection to Social Security benefits).

Having to request a religious accommodation in order to get it should as a matter of law not constitute a substantial burden on religious exercise. For it is the bare minimum needed for government to retain

lawmaking authority when addressing religious objections to general legal obligations.

2. The Religious Exemption impermissibly harms countless women.

Because the Religious Exemption empowers employers not just to opt out of providing contraceptive coverage but also to interfere with the government's provision of coverage another way, women will be denied the insurance coverage to which they are entitled by law. They will thus have to pay out-of-pocket for critical health services that otherwise would be available to them without cost-sharing, or else forgo needed care altogether. By making employees, spouses, and dependents bear these heavy costs and burdens to accommodate objecting entities, the Exemption violates the Establishment Clause and cannot be authorized by RFRA.

Contraceptives are critical healthcare. Not only do they prevent unintended pregnancies, but they protect the health of women with the "many medical conditions for which pregnancy is contraindicated" (*Hobby Lobby*, 573 U.S. at 737 (Kennedy, J., concurring)). They reduce risks of endometrial and ovarian cancer, treat conditions such as endometriosis, and alleviate severe premenstrual symptoms such as dysmenorrhea. See Am. Coll. of Obstetricians & Gynecologists *Amicus* Br. 13.

But contraceptives are expensive. Without insurance, women may pay hundreds of dollars annually for oral contraceptives, and even more for intrauterine devices or contraceptive implants. See Nat'l Women's Law Ctr. *Amicus* Br. 12. And even small differences in cost between contraceptives may deter women from choosing the most effective and medically appropriate

form for them: Those who must pay more than $50 out-of-pocket, for example, are about seven times less likely to obtain an intrauterine device than are women who would pay less than $50. See Aileen M. Gariepy et al., *The Impact of Out-of-Pocket Expense on IUD Utilization Among Women with Private Insurance*, 84 Contraception e39, e41 (2011).

Indeed, "[t]he evidence shows that contraceptive use is highly vulnerable to even seemingly minor obstacles." *Priests for Life*, 772 F.3d at 265. For example, requiring women to return to the clinic for oral-contraceptive refills every three months rather than providing a year's supply yielded a 30% greater incidence of unintended pregnancies and, correspondingly, a 46% increase in abortions. Diana Greene Foster et al., *Number of Oral Contraceptive Pill Packages Dispensed and Subsequent Unintended Pregnancies*, 117 Obstetrics & Gynecology 566, 570 (2011), https://bit.ly/ 2IKftiS.

Hence, women deprived of contraceptive coverage because of the challenged Rules will face pressure to choose cheaper, often less effective or less medically appropriate contraceptives—or to do without—bringing increased risks of unintended pregnancies, increased risks of serious, potentially life-threatening illnesses, and increased severity of symptoms from otherwise-treatable conditions. And even for those who may as a formal matter have other routes to obtain insurance coverage, the administrative hurdles, additional time, additional expense, and potential need to expose intensely personal details of their medical history or intimate relations are all significant and sometimes decisive deterrents. Thus, while for some women "contraceptives may be available through other sources" (83 Fed. Reg. at 57,551), for

any particular individual that assertion is speculative at best; alternatives may be impracticable or wholly unavailable. Cf. Am. Ass'n of Univ. Women *Amicus* Br. 4–5 (estimating that hundreds of thousands of women stand to lose contraceptive coverage under the Rule).

To shift these extraordinary costs and burdens to the women who are denied coverage in the name of accommodating employers' religious beliefs cannot be squared with the Establishment Clause's—and hence RFRA's—prohibition against harming third parties. It would transform RFRA from a shield that protects burdened free exercise into a sword that harms the rights of others.

II. THE MORAL EXEMPTION IS SIMILARLY INVALID.

Either the challenged Moral Exemption (45 C.F.R. 147.133) is broader than the Religious Exemption, in which case it is *ultra vires*, or it is just the Religious Exemption by another name, in which case it has the same defects as the Religious Exemption.

The government conceded below that "RFRA provides no support for" the Moral Exemption. Pet. App. 43a n.27. Nor is it authorized by any other statute, as the court below correctly concluded. *Id.* at 38a–43a. Therefore, the Moral Exemption, if it extends beyond religion, violates the Administrative Procedure Act (see *id.* at 38a).

There is strong reason to think, however, that the Moral Exemption is instead just another *religious* exemption that violates the Establishment Clause and exceeds what RFRA authorizes. For it is expressly premised on *Welsh* v. *United States*, a conscientious-objector case in which this Court held that when "purely ethical or moral * * * beliefs function as a

religion in [an individual's] life, such an individual is as much entitled to a 'religious' * * * exemption * * * as is someone who derives his [objection] from traditional religious convictions" (398 U.S. 333, 340 (1970); see 83 Fed. Reg. 57,592, 57,601 (Nov. 15, 2018)). The Rule defines "moral convictions" entitled to the Exemption as those:

> (1) [t]hat the "individual deeply and sincerely holds"; (2) "that are purely ethical or moral in source and content"; (3) "but that nevertheless impose upon him a duty"; (4) and that "certainly occupy in the life of that individual ['a place parallel to that filled by . . . God' in traditionally religious persons," such that one could say "his beliefs function as a religion in his life."

83 Fed. Reg. at 57,604–05 (quoting *Welsh*, 398 U.S. at 339–340).

In other words, the Moral Exemption applies solely to moral convictions that constitute a religion for legal purposes, whether or not they are based in a traditional faith or denomination. Cf. *Torcaso* v. *Watkins*, 367 U.S. 488, 495 & n.11 (1961) (Establishment Clause protects believers and nonbelievers alike and extends to systems of belief based on the existence of God as well as those "founded on different beliefs"); *Fallon* v. *Mercy Catholic Med. Ctr. of Se. Pa.*, 877 F.3d 487, 491 (3d Cir. 2017); *Kaufman* v. *McCaughtry*, 419 F.3d 678, 681–682 (7th Cir. 2005); *Africa*, 662 F.2d at 1031–1036.

Thus, the Moral Exemption is not a secular offset for what otherwise would be the unconstitutional religious preferences of the Religious Exemption. Rather, it is just another version of the Religious Exemption

using less straightforward terminology. But government cannot evade Establishment Clause prohibitions by couching religious favoritism in neutral-sounding language. See *Grumet*, 512 U.S. at 699 ("identification here of the [favored] group * * * in terms not expressly religious" "does not end" judicial inquiry into whether statute affords unconstitutional preference); *Larson* v. *Valente*, 456 U.S. 228, 246 n.23 (1982) (law that distinguished between characteristics of religions rather than identifying disfavored faith by name was unconstitutional denominational preference); see also *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993) (incorporating Establishment Clause prohibition against denominational preferences into free-exercise jurisprudence and explaining that both Religion Clauses "forbid[ ] subtle departures from neutrality," protecting against "governmental hostility which is masked, as well as overt" (quoting *Gillette* v. *United States*, 401 U.S. 437, 452 (1971)).

Because under *Welsh* the moral codes covered by the Religious Exemption are religions as a matter of law, they are already covered by the Religious Exemption. And vice versa.[6] Hence, by either name the Rules are unconstitutional religious preferences for the reasons explained in Section I, *supra*.

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[6] The caveat is that the Religious Exemption covers publicly traded companies but the Moral Exemption does not. Compare 83 Fed. Reg. at 57,562, with 83 Fed. Reg. at 57,593. Consequently, even if the Moral Exemption were a secular counterweight to the Religious Exemption, it would be inadequate: Religious objections would be treated more favorably than their putative secular analogues, in derogation of the Establishment Clause.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

STEVEN M. FREEMAN
DAVID L. BARKEY
ADL (Anti-Defamation League)
605 Third Ave.
New York, NY 10158
(212) 885-7733

ELLIOT M. MINCBERG
DIANE LAVIOLETTE
People For the American Way Foundation
1101 15th St. NW, Ste. 600
Washington, DC 20005
(202) 467-4999

NIMRA H. AZMI
Muslim Advocates
P.O. Box 34440
Washington, DC 20043
(202) 897-2622

JOSHUA S. HOUSTON
Texas Impact
Texas Interfaith Center
200 E. 30th St.
Austin, TX 78705
(512) 472-3903

RICHARD B. KATSKEE
Counsel of Record
SARAH R. GOETZ
Americans United for Separation of Church and State
1310 L St. NW, Ste. 200
Washington, DC 20005
(202) 466-3234
katskee@au.org

DIANA KASDAN
JOEL DODGE
Center for Reproductive Rights
199 Water St., 22nd Floor
New York, NY 10038
(917) 637-3600

CINDY NESBIT
The Sikh Coalition
50 Broad St., Ste. 504
New York, NY 10004
(212) 655-3095

SUHAG A. SHUKLA
SAMIR KALRA
Hindu American Foundation
910 17th St. NW, Ste. 316A
Washington, DC 20006
(202) 223-8222

Counsel for Amici Curiae

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