Nos. 17-3752, 18-1253, 19-1129 and 19-1189

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

COMMONWEALTH OF PENNSYLVANIA AND STATE OF NEW JERSEY,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, ALEX M. AZAR II, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, STEVEN T. MNUCHIN, U.S. DEPARTMENT OF THE TREASURY, RENE ALEXANDER ACOSTA, U.S. DEPARTMENT OF LABOR, AND THE UNITED STATES OF AMERICA,

Defendants-Appellants,

and

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

Intervenor-Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF *AMICI CURIAE* CONSTITUTIONAL LAW SCHOLARS SUPPORTING INTERVENOR-DEFENDANT-APPELLANT AND REVERSAL

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[1] The parties' counsel were timely notified of and consented to this brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity, other than *amici curiae* or their counsel, made a monetary contribution to the preparation and submission of this brief.

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SUMMARY OF ARGUMENT

Lurking behind the Administrative Procedure Act issues presented by this appeal is an effort to supplant the Religious Freedom Restoration Act ("RFRA") with a novel, one-sided constitutional argument that would trivialize a law's burden on religion. The Court should not indulge it.

"[I]n a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). On one side, "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation." *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990). On the other, "some religious practices [must] yield to the common good." *United States v. Lee*, 455 U.S. 252, 259 (1982). Because the Constitution contemplates "play in the joints" between the Establishment Clause and the Free Exercise Clause, *see*, *e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 713–14, 719–20, 728 (2005) (per Ginsburg, J.) (citation and internal quotation marks omitted), Congress was left to determine a sensible framework that courts could apply to balance

religious freedom and third-party interests implicated by religious exemptions to neutral, generally applicable laws.

To that end, Congress enacted RFRA.[2] Time and again, the Supreme Court has applied Congress's weighted balance in favor of religious freedom and recognized it as constitutional. *See Hobby Lobby*, 134 S. Ct. at 2785; *Cutter*, 544 U.S. at 719–21.

Some scholars contend, however, that the Establishment Clause bans religious exemptions that "require[] people to bear the burden of religions to which they do not belong and whose teachings they do not practice."[3] Indeed, it is not an overstatement to characterize the

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[2] 42 U.S.C. § 2000bb *et seq*.

[3] *See* Frederick Mark Gedicks, *Exemptions from the 'Contraception Mandate' Threaten Religious Liberty*, WASH. POST (Jan. 15, 2014). *See also* Micah Schwartzman, Nelson Tebbe, & Richard Schragger, *The Costs of Conscience*, Public Law and Legal Theory Research Paper Series 2018-14, University of Virginia Law School (Mar. 2018) (hereinafter "*Costs of Conscience*"); Micah Schwartzmann, Richard Schragger & Nelson Tebbe, Holt v. Hobbs *and Third Party Harms*, BALKANIZATION BLOG (Jan. 22, 2015) https://balkin.blogspot.com/2015/01/holt-v-hobbs-and-third-party-harms.html; Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.–C.L. L. REV. 343 (2014); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for* Hobby Lobby *Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC, 51 (2014).

scholars' position—one echoed in the position of states challenging the Final Rules at issue here[4]—as an attempt to render RFRA unconstitutional as applied to third-party interests involving abortion, contraception, and certain applications of anti-discrimination law.

This argument suffers from several analytical defects that can be remedied by (1) a proper constitutional understanding of RFRA in relation to the Establishment Clause; (2) an accurate understanding of the relationship between the Religion Clauses and the safeguarding of third-party interests; and (3) the correct application of these understandings to the Final Rules.

First, RFRA incorporates Establishment Clause limits on religious accommodations. It applies equally to all religions and takes into account the government's interest in protecting third parties when that interest is compelling. Suggesting, as these scholars do, that RFRA

[4] The scholars have suggested the Final Rules (and the Interim Final Rule before them) only accentuate the third-party harms present within this exemption because the Rules accommodate "moral as well as religious convictions." *See* Micah Schwartzman, Nelson Tebbe, & Richard Schragger, *The Costs of Con-science and the Trump Contraception Rules*, TAKE CARE BLOG (Mar. 8, 2018) https://takecare blog.com/blog/the-costs-of-conscience-and-the-trump-contraception-rules. But the proper Establishment Clause remedy is to extend exemptions to religious-like objections. *See Welsh v. United States*, 398 U.S. 333, 351–61 (1970) (Harlan, J., concurring in result).

poses an Establishment Clause problem because religious exemptions, not government entitlements, are the "baseline" of rights, or because the compelling-interest requirement is "too stringent," or because RFRA does not account for the context in which a person other than the federal government is objecting to a religious exemption,[5] lacks any support in—and is contrary to—the Religion Clauses. More fundamentally, arguing that RFRA should not apply when abortion, contraception, or anti-discrimination laws are at issue is a *political* argument for the *political* branches. It is not an argument for distorting Establishment Clause jurisprudence, which, as the Supreme Court recently confirmed, "must be interpreted by reference to historical practices and understandings." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (internal quotations omitted).

Second, allowing selective, "significant" (but not compelling) third-party interests to trump RFRA in the name of the Establishment Clause misstates Religion Clause jurisprudence. The Supreme Court's cases distinguish between religious *exemptions*—which do not violate the Constitution—and religious *preferences* that may (though not

[5] *See Costs of Conscience* at 17–18.

always) violate the Establishment Clause. Preferences entail state action, exemptions do not.[6] The scholars that gloss over this distinction do so by re-characterizing landmark Supreme Court decisions like *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) and *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970). By conflating religious exemptions with religious preferences, "the Government could turn all regulations into entitlements to which nobody could object on religious grounds." *Hobby Lobby*, 134 S. Ct. at 2781, n.37. This conflation could even threaten the longstanding, widely embraced statutory practice of exempting individuals and entities from being forced to provide or pay for abortions.

Third, the argument for contriving an Establishment Clause bypass around RFRA proves itself to be an exercise in special pleading. Despite two opportunities to do so, the Supreme Court in neither *Hobby Lobby* nor *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (*per curiam*) held that "seamless" coverage of abortifacients and contraceptives is a

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[6] *See* Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?*, 106 KTY. L. J. 603 (2018) (hereinafter "*Discretionary Religious Exemptions*").

compelling interest that justifies denying the *same* religious exemption to the Little Sisters of the Poor that is already possessed by for-profit corporations, small businesses, those with "grandfathered" health-insurance plans, and those religious organizations the federal government already deemed exempt. "RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally." *Id.* at 2786 (Kennedy, J., concurring). The Final Rules merely resolve the very under-inclusiveness that would have caused HHS's prior denial of a religious exemption to the Little Sisters to fail the RFRA analysis. An exemption that satisfies RFRA does not become constitutionally suspect simply because some do "not *like* the compelling interest test."[7]

Congress did not exempt the Affordable Care Act ("ACA") from RFRA (as it could have). At long last, HHS has recognized and applied RFRA to the substantial burden faced by the Little Sisters and other nonprofits. The efforts of some scholars and the Plaintiff States to

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[7] *See* Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 251 (1995) (emphasis in original).

circumvent that framework in the name of third-party interests is unmoored from the Constitution and would upend our nation's venerable tradition of religious accommodation.

I. RFRA Is a Constitutionally Acceptable, Legislative Judgment About How to Account Adequately for Third-Party Interests Raised by Religious Exemptions.

When Congress enacted RFRA, it manifested the "solicitousness" *Smith* anticipated regarding the social value of religious exercise and respected the primacy of the democratic process in harmonizing religious exemptions with other social values.[8] RFRA is consistent with this nation's long tradition of safeguarding religious exercise through democratically-enacted exemptions.

Even as some framers debated whether the Constitution compelled certain religious exemptions, "there is virtually *no evidence* that anyone thought [regulatory exemptions] were constitutionally prohibited or that they were part of an establishment of religion."[9]

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[8] *See*, *e.g.*, Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 44–45 (2014); William K. Kelly, *The Primacy of Political Actors in Accommodation of Religion*, 22 U. HAW. L. REV. 403 (2000).

[9] Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1796 (2006) (emphasis added).

Indeed, RFRA and the "baseline" of religious freedom it ensures follows from the founders' political philosophy, best articulated by James Madison: "It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. *This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society*."[10]

RFRA's structure harmonizes the right of free exercise and other compelling interests. At once, it supersedes all prior, inconsistent federal law, presumptively applies to all future federal law, and applies to the implementation of federal law (like the HHS mandate and the Final Rules).[11] But, if Congress—perhaps out of concern for third-party interests—does not want RFRA to apply to a given statute, it can simply exempt the statute from RFRA.[12] Similarly, RFRA will only protect religious exercise when it is "substantially" burdened by

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[10] James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *reprinted in* 8 The Papers of James Madison 1784–86, at 295 (Robert A. Rutland et al. eds., 1973) (emphasis added); *see also* Kevin Seamus Hasson, *Framing a Nation Under God: The Political Philosophy of the Founders* in BELIEVERS, THINKERS, AND FOUNDERS: HOW WE CAME TO BE ONE NATION UNDER GOD 115–29 (2016).

[11] 42 U.S.C. § 2000bb-3(a)-(b).

[12] *Id.* at § 2000bb-3(b).

government action. Even then, the government may still substantially burden religious exercise when its action, "appli[ed] . . . to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[13]

Rather than resolve every conceivable conflict between religious claims and other values, Congress tasked the judiciary with applying—not distorting—RFRA's framework to particular cases. The Supreme Court has consistently "reaffirmed . . . the feasibility of case-by-case consideration of religious exemptions to generally applicable rules." *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436–37 (2006). Despite the efforts of some academics to contend the Establishment Clause, *ex ante*, takes this harmonizing off the table here in light of *Cutter*,[14] "[n]othing in [*Cutter*] suggested that courts were not up to the task" of balancing. *See id.* As RFRA does not possess an unyielding preference for religious exercise over any other interest, avoids denominational favoritism, and accounts for third-party

[13] *Id.* at §§ 2000bb(b), 2000bb-1(a) & (b).

[14] *See Costs of Conscience* at 12.

interests, RFRA's framework does not violate the Establishment Clause. *See*, *e.g.*, *Cutter*, 544 U.S. at 719–20 (holding so in the context of the Religious Land Use and Institutionalized Persons Act, which possesses the same framework as RFRA).

Even the scholars now urging a ban on religious exemptions that allegedly cause "substantial" third-party harms concede that "RFRA seems *facially* to comply with the Establishment Clause."[15] Notably, in their most recent article on the issue, *Costs of Conscience*, these scholars avoid casting any explicit constitutional doubt on RFRA. Instead, the scholars seek to undermine the wisdom of RFRA considering third-party harms within its analysis of a compelling interest pursued through the least-restrictive means, *see Hobby Lobby*, 134 S. Ct. at 2781 n.37; *see also Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015).[16] Putting aside the fact that "the *wisdom* of Congress's judgment" in establishing RFRA "is not [a judicial] concern," *Hobby Lobby*, 134 S. Ct. at 2785 (emphasis added), the scholars' objections to

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[15] Gedicks & Van Tassell, *RFRA Exemptions from the Contraception Mandate*, 49 HARV. C.R. – C.L. L. REV. at 348.

[16] *See*, *e.g.*, *Costs of Conscience* at 17–19.

considering third-party interests within the RFRA framework do not give rise to an Establishment Clause violation.[17]

A. THE PROPER "BASELINE" OF RIGHTS IS RELIGIOUS LIBERTY, NOT GOVERNMENT BENEFITS.

The first objection the scholars make to RFRA's application of third-party interests is that "regulatory baselines" that identify the "entitlements" owed to particular third-parties need to be established *before* religious exemptions can be considered, not after.[18]

This objection is not within the Establishment Clause's cognizance. "[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious

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[17] RFRA's consideration of third-party harms as a facet of the compelling-interest analysis is commonplace in constitutional law. *See*, *e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (explaining the "fundamental object" of banning race discrimination in public accommodations "was to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments") (internal quotation marks and citation omitted); *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 625 (1984) (the compelling interest in "eradicating discrimination against its female citizens" exists because sex discrimination "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.").

[18] *See*, *e.g.*, *Costs of Conscience* at 14–19.

activity." *Walz*, 397 U.S. at 668; *see also Town of Greece*, 134 S. Ct. at 1819 (confirming the Establishment Clause "must be interpreted by reference to historical practices and understandings") (internal quotation marks and citation omitted). Accordingly, "establishing" religion requires some form of government action:

> [T]he government does not establish religion by leaving it alone. . . . In the case of a religious exemption, the government has never altered the status quo ante. . . . With an exemption, the Court does not deny that third parties may have suffered a harm. Rather, the Court is saying that if there was such incidental harm, it was not caused by the government.[19]

Because the Establishment Clause is not implicated in the absence of state action,[20] it is incoherent to suggest the Clause protects "regulatory baselines"[21] when a religious claimant seeks to restore the *pre-regulation* status quo. Indeed, the chronology of the exemption protected by the Final Rules here proves the point: the ACA promised, via HHS regulation, a new government entitlement that disturbed previously unregulated religious liberty. That baseline having been

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[19] *See Discretionary Religious Exemptions* at 17–18.

[20] *Id.*

[21] *Cf. Costs of Conscience* at 17.

disrupted by a newly-enacted regulatory benefit, RFRA evaluates the propriety of returning the religious claimant to the prior baseline. This syllogism is consistent with Madison's understanding of religious rights and duties as "precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[22]

The Supreme Court illustrated in *Amos* that religious liberty as the proper baseline in the face of government entitlements. There, the Court rejected an as-applied Establishment Clause challenge to Title VII's exemption of religious employers from the statute's general prohibition of religious discrimination. *See* 483 U.S. at 329–30. This exemption allowed the religious employer in *Amos* to terminate a building custodian based on his religion—a clear third-party harm, but one the Supreme Court nevertheless found insufficient to block the statute's religious exemption. Like RFRA, the purpose of Title VII's religious exemption is to "lift[] a regulation that burdens the exercise of religion." *Id.* at 338.

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[22] *See supra* n.10; *see also* Ronald J. Colombo, *An Antitrust Approach to Corporate Free Exercise Claims*, 91 ST. JOHN'S L. REV. 1, 49 n.260 (2018) ("It is only because of government's interference . . . that the conflict between rights even arises.").

Amos further explained that this purpose is distinct from an advancement of religion that violates the Establishment Clause. Unlike statutes that "delegate[] governmental power to religious employers and convey[] a message of governmental endorsement of religious discrimination," *id.* at 337 n.15 (internal quotation marks and citation omitted), Title VII's statutory religious exemption restores the "baseline" of rights the religious claimant and the third-party respectively possessed before the government regulated. No government action occurs when a private party takes action involving a third-party. *See id.* ("Undoubtedly, the [third-party's] freedom of choice in religious matters was impinged upon, but it was the Church . . . and not the Government, who put him to the choice of changing his religious practices or losing his job.").

Just as Title VII's prohibitions cannot be considered without its provision for religious exemptions, the ACA cannot be considered without RFRA. By its own terms, RFRA applies to any subsequent federal statute—and administrative implementation of that statute—unless Congress expressly says otherwise. Congress did not do that here, and RFRA's incorporation into the ACA ensures the "baseline" of

rights protects religious liberty. Like the Title VII exemption in *Amos*, RFRA merely lifts, in certain circumstances, a government-imposed burden on religion. Restoring that pre-burden baseline does not "require that the [religious] exemption come packaged with benefits to secular entities." *Id.* at 338; *see also Harris v. McRae*, 448 U.S. 297, 316 (1980) (upholding the Hyde Amendment and concluding the government was under no obligation to "remove those [obstacles to a right, there, the right to abortion] not of its own creation"). Just so here: Lifting the HHS mandate's burden does not violate the Establishment Clause. *See also id.* at 315–17 (the statutory religious exemption at issue, as here, leaves third parties with "the same range of [insurance] choice[s] . . . as [they] would have had if Congress had chosen to subsidize no health care costs at all.").

B. COMPLAINING THAT THE COMPELLING INTEREST TEST IS "TOO STRINGENT" TO ACCOUNT FOR THIRD-PARTY INTERESTS HAS NO BASIS IN SUPREME COURT JURISPRUDENCE.

The scholars' second objection to accounting for third-party harms within the compelling-interest test is that the analysis "is too stringent

and also inconsistent with precedent."[23] The Supreme Court's cases support neither contention.

The scholars' point on precedent relies solely on a misreading of *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985),[24] which invalidated a religious preference on Establishment Clause grounds; specifically, a Connecticut statute that "permitted employees who observe a Sabbath to demand that their employer accommodate the employee's religious practice."[25] All the scholars say in support of their attack on the compelling-interest test is that "[i]t seems improbable that the state had a compelling interest" in *Caldor*.[26] That misses the point. *Caldor* involved a religious preference, not a religious exemption. Moreover, an Establishment Clause violation was found because the government entered a wholly private dispute and took the side of the religious claimant by imposing an "*unyielding* weighting in favor of Sabbath observers over all other interests." 472 U.S. at 709–10

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[23] *Costs of Conscience* at 18.

[24] *Id.*

[25] *See Discretionary Religious Exemptions* at 2–3, 5–12 (analyzing *Caldor*).

[26] *Costs of Conscience* at 18.

(emphasis added). The balancing inherent to RFRA belies characterizing the Final Rules as "unyielding" religious preferences.

More importantly, the Supreme Court has never said that third-party harms can be so significant that, even if they are not compelling, they can still overcome a substantial religious burden. Rather, the Supreme Court will uphold religious exemptions when the government has a compelling interest, but that interest was not pursued through the means least-restrictive to religious liberty. *See*, *e.g.*, *Holt*, 135 S. Ct. at 864–65. *Hobby Lobby* explained the consequences of bypassing the compelling-interest test simply because a third-party claim finds it too hard to satisfy. *See* 134 S. Ct. at 2781 n.37 ("By framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless."). To be sure, "there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA." *O Centro*, 546 U.S. at 436. But no such "instance" exists here.

When, as here, the religious exemption at issue is of a "longstanding" type, the sort of exemption that led Congress to enact

RFRA, *and* when "the Government has not offered evidence demonstrating that granting . . . an exemption would cause *the kind of . . . harm recognized as a compelling interest*," *id.* at 437 (emphasis added), an "instance in which a need for uniformity precludes the recognition of [RFRA] exemptions" does not exist, *see id.* at 436. The scholars do not contend with these provisos from *O Centro*, and tellingly so: As this language confirms, even when the Supreme Court has considered the possibility that another interest might require "uniform" application of a general law, RFRA notwithstanding, the Court *still* insists on a demonstrated compelling interest. Constitutional law simply provides no basis to skirt that test.[27]

Here, the exemption provided by the Final Rules simply gives to the objecting nonprofits the *same*, pre-existing exemption afforded to churches and their integrated auxiliaries—an exemption that, notably, the scholars seeking to sidestep the compelling-interest analysis do not

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[27] Indeed, even *United States v. Lee*, which the scholars rely on in support of the argument that regulatory entitlements should be understood to precede religious liberty, applied—as the scholars concede—the compelling interest analysis. *See Costs of Conscience* at 16 (citing *Lee*, 455 U.S. at 258). Moreover, *Hobby Lobby* distinguished *Lee* from the situation here. *See Discretionary Religious Exemptions* at 16 n.90.

oppose.[28] This exemption is of the same kind that gave life to RFRA. *See* The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary, 102 CONG. REG. 192 (1992) (statement of Nadine Strossen) (explaining that "[i]n the aftermath of the *Smith* decision, it was easy to imagine how religious practices and institutions would have to abandon their beliefs in order to comply with generally applicable, neutral laws. At risk were such familiar practices as . . . permitting religiously sponsored hospitals to decline to provide abortion or contraception services."); 139 CONG. REC. 9685 (1993) (statement of Rep. Hoyer) (explaining that RFRA is "an opportunity to correct . . . injustice[s]" like a "Catholic teaching hospital [that] lost its accreditation for refusing to provide abortion services"). And finally, as the scholars all but concede in complaining that the compelling-interest test is too "stringent" to satisfy, and as will be discussed further, there has been no showing that "seamless" insurance coverage of abortifacients and contraceptives is a compelling interest pursued through the means least-restrictive on religious exercise. Skipping over the compelling-interest analysis is unjustified.

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[28] *See* Gedicks & Van Tassell, *RFRA Exemptions from the Contraception Mandate*, 49 HARV. C.R.-C.L. L. REV. at 380–81.

C. AN ESTABLISHMENT CLAUSE CLAIM REQUIRES STATE ACTION.

The final objection the scholars make to considering third-party harms within the RFRA framework is that "the government will not always be the party objecting to a religious exemption."[29] The scholars cite this very litigation as proof positive, claiming that "[t]he interest of those burdened by a religious accommodation need not coincide with the government's interests, whether or not compelling, to warrant protection under the Establishment Clause. After all, the Establishment Clause protects the religious freedom of private individuals, not only state actors."[30] Establishment Clause jurisprudence does not support this argument.[31]

The authority the scholars identify in support of this argument is *Caldor*, which "was brought by private employers. And," the scholars claim, the private employers "did not need to allege that their interests

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[29] *Costs of Conscience* at 18.

[30] *Id.*

[31] Moreover, the division between third-party harms and societal interests is artificial. "[O]ne might simply say that compelling state interests just exactly are third party interests of adequate gravity. Whose interests is the government protecting in resisting a religious accommodation if not those of third parties?" Marc O. DeGirolami, *Free Exercise By Moonlight*, 53 SAN DIEGO L. REV. 105, 133 (2016).

were compelling for government purposes, only that they were significantly burdened as a result of the government's religious accommodation."[32] These contentions are *non sequiturs*. Although "the commercial burden on Caldor Stores gave it standing to raise the Establishment Clause defense[,] *it was the statute* requiring private parties to assist Thornton in his religious duties that crossed the boundary between church and state, thus violating the Establishment Clause."[33] Unlike here, where the IFR *lifts* a burden imposed on religious exercise by the HHS mandate pursuant to the ACA, Thornton was "actively empowered" by the Connecticut statute "to demand the assistance of private parties to secure the observance of his Sabbath. That is 'state action.'"[34]

The *Amos* Court explained *Caldor* in the same way: "*Connecticut had given the force of law* to the employee's designation of a Sabbath day and required accommodation by the employer regardless of the burden which that constituted for the employer or other employees." *Amos*, 483 U.S. at 337 n.15 (emphasis added).

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[32] *Costs of Conscience at 18.*

[33] *See Discretionary Religious Exemptions* at 10 (emphasis added).

[34] *Id.*

The Supreme Court's decision in *Walz* reinforces *Amos*'s distinction between a religious exemption and a religious preference. By a vote of 8 to 1, the Court held that a municipality's property tax exemption for houses of worship did not violate the Establishment Clause because granting an exemption "is simply sparing the exercise of religion from the burden of property taxation levied on [others]." *Walz*, 397 U.S. at 673. Had the municipality in *Walz* enacted a religious preference, it would have "transfer[red] part of its revenue to churches." *Id.* at 675. Instead, it "simply abstain[ed] from demanding that the church support the state." *Id.* There is no basis to claim that an Establishment Clause violation exists when the government is not taking some affirmative action toward religion.

"As [the Supreme Court] ha[s] said before, [its] cases will not tolerate the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as authorization or encouragement." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999) (internal quotation marks and citation omitted). The same is true when federal action is at issue, and the scholars opposing the Final Rules' religious exemption offer no basis to

revolutionize constitutional law by applying its restraints to private conduct.

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Ultimately, the scholars' objections to the application of RFRA boil down to this: They—and the states that echo their third-party harm arguments—disagree with how Congress chose to account for religious interests over other competing social values. Overturning religious exemptions "favors a much larger role for government in the lives of religious people and organizations, thereby shrinking that part of civil society for church-state separation and the desired religious self-governance. Whether such an expansion is good or bad is not the issue here. Rather, the question is who has the authority to make that decision and how it is made."[35] As Professor Alexander Bickel put it, "by right, the idea of progress is common property;" it is not the judiciary's to define.[36] No argument consistent with the historical practices and traditions protected by the Establishment Clause has been made to

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[35] *Discretionary Religious Exemptions* at 18.

[36] Alexander M. Bickel, THE SUPREME COURT AND THE IDEA OF PROGRESS 181 (1978).

authorize this Court to undermine the congressional judgment RFRA embodies.

II. THERE IS NO CONSTITUTIONAL BASIS TO CLAIM THAT DISCRETIONARY RELIGIOUS EXEMPTIONS VIOLATE THE CONSTITUTION SIMPLY BECAUSE OF "SIGNIFICANT" THIRD-PARTY INTERESTS.

Perhaps in light of the insurmountable challenges to upending RFRA via the Establishment Clause, the scholars opposing the Little Sisters' hard-won exemption seek to reinterpret the Religion Clauses in general. Under their revisionist take on the Religion Clauses, the Supreme Court has supposedly "explicitly and repeatedly recognized" that substantial, not compelling, third-party harms give rise to Establishment Clause limits on religious exemptions.[37] Not so. The "Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144–45 (1987).

Hosanna-Tabor, for example, held that the First Amendment's "ministerial exception" to federal antidiscrimination statutes barred a retaliation claim from a fourth-grade teacher at a Lutheran school.

[37] *See Costs of Conscience* at 7.

Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C. 565 U.S. 171, 195–96 (2012). There is no doubt that third-party harm was present in *Hosanna-Tabor*: The *only* reason the employee there could not sue her employer for violating the Americans With Disabilities Act's retaliation prohibition was because her employer was a religious organization and she qualified as a "minister." While "[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important[, . . .] so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196. Like in RFRA, the Court confirmed that the ministerial exception can be applied "to other circumstances." *See id.* No part of *Hosanna-Tabor* suggests that the mere presence of substantial third-party harm acts to defeat religious exemptions, and the scholars set forth no framework for how to balance substantial third-party harms against religious burdens in particular cases.[38]

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[38] The scholars opposing the RFRA framework purport to distinguish *Hosanna-Tabor* (and *Amos*) from the handling of third-party harms in other cases because they rest on "powerful free exercise and associational interests that generate a range of statutory and constitutional protections against liability" that, apparently, only "religious organizations" enjoy. *See Costs of Conscience* at 13. This distinction is contrived. *Hosanna-Tabor* never even mentions *Amos*—a

Further, *Amos*, *Walz*, and other cases[39] demonstrate a distinction between a religious *exemption* that lifts a government-imposed burden on religious exercise, and a statutory religious *preference*.[40] This distinction not only explains how, as discussed above, *Amos* harmonized its holding with *Caldor*, *see* 483 U.S. at 337 n.15—it explains the myriad, long-accepted ways in which Congress and the judiciary have "lift[ed] [] regulation[s]" that burden free exercise without any

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strong indication that the Court has not adopted the scholars' confining of these two cases. Indeed, while the ministerial exception certainly guards against "government interference with an internal church decision that affects the faith and mission of the church itself," *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 n.2 (2017) (internal quotation marks and citation omitted) (explaining *Hosanna-Tabor*), that only speaks to the substantial burden such government action imposes upon religion. This distinction does not at all suggest that religious liberty rights turn upon whether the claimant at issue is a "religious organization" (however that phrase is defined). *See*, *e.g.*, *Hobby Lobby*, 134 S. Ct. at 2768–74 (surveying the U.S. Code and pre-*Smith* free-exercise jurisprudence and finding no principled basis to conclude that for-profit corporations cannot have their religious exercise substantially burdened within the meaning of RFRA).

[39] *See Discretionary Religious Exemptions* at 6 ("In addition to *Amos*, the Court has on six other plenary reviews turned back an Establishment Clause challenge to a discretionary religious exemption) (citing *Cutter*, 544 U.S. at 720; *Gillette v. United States*, 401 U.S. 437, 448-60 (1971); *Walz*, 397 U.S. at 673–75; *Zorach v. Clauson*, 343 U.S. 306, 308–15 (1952); *Aver v. United States*, 245 U.S. 366, 374 (1918); *Goldman v. United States*, 245 U.S. 474, 476 (1918)).

[40] *See Discretionary Religious Exemptions* at 13–15.

constitutional infirmities, *see id.* at 338. Indeed, in *not a single case* has the Supreme Court ever overturned a religious exemption on Establishment Clause grounds.

Other longstanding examples of accepted religious exemptions where third-parties experience harm abound. For example, 170,000 Vietnam War draftees received conscientious objector deferments, even as the selective service exemption for these objectors was facially limited to those with a belief in a "Supreme Being" and the granting of an objection sent a third-party to war in the objector's place.[41] Indeed, the structure of conscientious objections in Vietnam made it possible to determine affected third-parties.[42] Such objections date back to the American Revolution. At no point have such objections been thought to violate the Establishment Clause.

Another example is the priest-penitent privilege. This privilege is recognized throughout the United States and "[n]either scholars nor courts question the legitimacy of the privilege, and attorneys rarely

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[41] *See* James W. Tollefson, THE STRENGTH NOT TO FIGHT: AN ORAL HISTORY OF CONSCIENTIOUS OBJECTORS OF THE VIETNAM WAR 7 (1993).

[42] *See* William P. Marshall, *Third-Party Burdens and Conscientious Objection to War*, 106 KTY. L. J. 661 (2018).

litigate the issue," even as the privilege imposes an obstacle on a third-party's search for truth. *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1532 (9th Cir. 1997) (internal quotation marks and citation omitted).

Perhaps the most pervasive example—and most relevant here—of religious exemptions are the "systematic and all-encompassing" exemptions for individuals that decline to participate in abortions.[43] These widespread exemptions have never been held outside the realm of legislative authority simply because access to a constitutional right is at issue. Indeed, as Senator Ted Kennedy explained when advocating for the Church Amendment, which ensured that certain federal-fund recipients were not obliged to provide abortions and could not discriminate against employees who would not participate in abortions: "*Congress has the authority under the Constitution to exempt individuals from any requirement that they perform medical procedures that are objectionable to their religious convictions.*" 119 CONG. REC. 9602 (1973) (emphasis added). Lacking "seamless" access to abortion

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[43] *See* Mark L. Rienzi, *The Constitutional Right Not To Kill*, 62 EMORY L.J. 121, 147–49 (2012) ("[V]irtually every state in the country has some sort of statute protecting individuals and, in many cases, entities who refuse to provide abortions.").

because of religious exemptions does not constitute constitutionally-cognizable, third-party harm.

In short, contriving a new constitutional doctrine grounded in "substantial" third-party harms would require taking an eraser to well-established religious exemptions. Without any principled framework to sort out why cases involving abortion, contraception, and antidiscrimination laws involve "substantial" third-party harms but, for example, military draft exemptions and the priest-penitent privilege do not, such a test invites the very sort of judicial speculation about "the social importance of all laws" the Supreme Court sought to avoid in *Smith*. *See* 494 U.S. at 890.

III. THE ASSERTED THIRD-PARTY HARM CANNOT CONSTITUTE A COMPELLING GOVERNMENT INTEREST.

This Court must not consider third-party harms abstractly or divorced from the burden they impose on the religious claimant. Rather, this Court must "'scrutinz[e] the asserted harm of granting specific exemptions to particular religious claimants,' and 'look to the marginal interest in enforcing' the challenged government action in that particular context." *Holt*, 135 S. Ct. at 863 (quoting *Hobby Lobby*, 134 S. Ct. at 2779). As Professor Michael Stokes Paulsen has observed, "the

test is an extremely rigorous one, referring to an extremely narrow range of permissible justifications for infringements on religious liberty. Not every legitimate, or even very important, interest of government qualifies."[44]

By granting the Little Sisters and the other nonprofits the *same* exemption that churches, for-profit corporations, "grandfathered" health insurance plans, and small businesses already receive, women working for the Little Sisters are simply restored to the pre-ACA baseline of rights (as those women who worked for exempted for-profit corporations were after *Hobby Lobby*, *see* 134 S. Ct. at 2783). What the Court found acceptable in the face of Establishment Clause challenges in the Hyde Amendment context, *see Harris*, 448 U.S. at 315–17, and in the Title VII context, *see Amos*, 483 U.S. at 337 n.15, holds true here.

Without the Final Rules, objecting nonprofits remain singled out for disparate treatment compared to those many other entities that receive an exemption from the coverage mandate. By virtue of the exemptions offered to churches and other entities and businesses,

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[44] Paulsen, *A RFRA Runs Through It*, 56 MONT. L. REV. at 263 (discussing and citing *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963)).

Congress and HHS have already determined that "seamless" access to abortifacients and contraceptives should be unavailable to tens-of-millions of Americans. Denying the same exemption to the Little Sisters and the other objecting nonprofits, while citing the same regulatory interest Congress and HHS has already decided not to apply to many others, dooms a strict scrutiny defense. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (explaining the government must avoid free-exercise invalidity in regulating by not letting under-inclusiveness do "appreciable damage to [the] supposedly vital interest prohibited"). The Final Rules cure this discrimination.

"RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). That the scholars' third-party harms doctrine would permit this inconsistency confirms why embracing it is unwise and unsupported. The Court should reject this end-run around RFRA.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court vacate the preliminary injunction and remand with instructions for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the following statements are true:

1. This brief complies with the type-volume limitations imposed by Rule 29(a)(5) of the Federal Rules of Appellate Procedure. It contains 6,436 words, excluding the parts of the brief exempted by Federal Rule 32(f).

2. This brief complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Century Schoolbook font.

3. This brief complies with the electronic filing requirements of Local Rule 25.1. The text of this electronic brief is identical to the text of the paper copies, and the latest version of Windows Defender Security has been run on the file containing the electronic version of this brief and no virus has been detected.

4. Pursuant to Local Rule 28.3(d), undersigned counsel certifies he is a member of the bar of this Court.

February 22, 2019 s/ Miles E. Coleman
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the Appellate CM/ECF system on February 22, 2019, which will automatically send notification and a copy of this motion to the counsel of record for the parties.

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