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

In the United States Court of Appeals for the Third Circuit

COMMONWEALTH OF PENNSYLVANIA and
STATE OF NEW JERSEY,
Plaintiffs-Appellees.

v.

PRESIDENT, UNITED STATES OF AMERICA; SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY, U.S. DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE TREASURY; SECRETARY, U.S. DEPARTMENT OF LABOR; AND U.S. DEPARTMENT OF LABOR,
Defendants-Appellants,

and

THE LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,
Intervenor-Defendant-Appellant,

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF FOR STATES OF TEXAS, ALABAMA, ARKANSAS, GEORGIA, IDAHO, LOUISIANA, MISSOURI, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

Counsel listed on inside cover

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

KYLE D. HAWKINS
Solicitor General

JASON R. LAFOND
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
jason.lafond@oag.texas.gov

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Introduction

Amici are the States of Texas, Alabama, Arkansas, Georgia, Idaho, Louisiana, Missouri, Nebraska, Oklahoma, South Carolina, and West Virginia. They have a substantial interest in ensuring that courts and the federal government respect religious beliefs by accommodating religious objections to generally applicable laws and avoid second-guessing religious adherents' line-drawing about what conduct is prohibited to them as sinful or immoral. As a prominent authority on religious freedom has observed, "[i]n a pervasively regulated society," exemptions from generally applicable laws for religious objectors "are essential to religious liberty." 1 Douglas Laycock, *Religious Liberty* xvii (2010). The amici States' interest in protecting religious exercise from governmental intrusion is particularly notable when it overlaps with Congress's own interest as expressed in the Religious Freedom Restoration Act (RFRA), a bipartisan enactment about the respect due to religious adherents in our pluralistic society. That is the case here, as the challenged exemptions to administrative-agency directives are necessary for the agency to pursue its objectives in the manner least restrictive of religious liberty.[1]

Many religious employers around the country are driven by their faith to care for their employees by providing them health insurance. But some employers hold the sincere belief that it is incompatible with their religious convictions to provide health

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[1] Consistent with the Supreme Court's usage of the singular noun "the Government" to describe the relevant executive-branch entities, *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (per curiam), this brief uses the singular noun "the agency" to refer to the relevant regulatory entities. *See* JA.62 (describing the relevant entities).

insurance when it means contracting with a company that then, by virtue of that very relationship, becomes obligated to provide contraceptives that the employers regard as abortifacients. The reasonableness of such line-drawing about one's moral complicity in enabling conduct regarded as sinful is fundamentally a religious question, not a legal question. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014).

Before the agency's contraceptive mandate underlying this dispute, a religious employer could abide by the religious belief at issue here by offering health insurance without engaging in an insurance relationship that would obligate coverage for contraceptives. The agency's contraceptive mandate, however, made some employers unable to abide by that religious belief without violating federal regulations and incurring substantial financial liability.

The original supposed "accommodation" offered by the agency—submitting a form certifying one's religious objection—did not relieve the burden on religious exercise for many employers. Under that supposed "accommodation," if a religious employer provided notice of its objection to contraceptive coverage and continued to engage a company to issue or administer health insurance for its employees, then and only then would that insurance-administering company be legally required to cover contraceptives, some of which the religious employers regard as killing human life. *See E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 454 (5th Cir. 2015) (insurer or third-party administrator "must . . . provide . . . payments" only where the religious employer maintains the mandated "insured" or "self-insured" plan giving rise to the coverage), *vacated*, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam). As many

religious employers interpret their respective faiths, that conduct gives rise to complicity in sin, as their provision of notice of an objection is a necessary step in what they see as the taking of a human life.

Thus, the Supreme Court strongly signaled in *Zubik* and *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), that this supposed accommodation was insufficient. In response, the agency laudably switched course. The agency issued revised rules that now allow religious and moral objectors to claim an exemption that removes them from the machinery of the contraceptive-coverage scheme. As the agency concluded, the changes in the most recent rule "ensure that proper respect is afforded to sincerely held religious objections in rules governing this area of health insurance and coverage, with minimal impact on [the agency's] decision to otherwise require contraceptive coverage." JA.883. The district court's injunction of that sensible accommodation is fatally flawed. It misunderstands the role of the agency in accommodating religious belief. *See infra* Part I. And it disregards RFRA's substantive mandate, in the same way the Supreme Court has already found problematic. *See infra* Part II.

Summary of the Argument

The amici States agree with appellants that the open-ended grant of agency discretion in 42 U.S.C. § 300gg-13(a) by itself authorizes the rulemaking at issue here. Appellants' Br. 39-49; Intervenor-Appellant's Br. 41-46. And that provision, enacted in the Affordable Care Act (ACA), is not even the only relevant statute. Congress also enacted—by an overwhelming, bipartisan margin—RFRA, 42 U.S.C. § 2000bb *et seq.* Remarkably, however, the district court questioned the agency's very authority to comply with RFRA when issuing regulations. And the district court

ultimately held that, even if agencies do have authority to comply with RFRA, that authority would not justify the exemption rules here. Both aspects of the ruling below are seriously misguided.

I. First, the district court wrongly viewed RFRA as presenting a "quintessentially judicial task[]" and as a "fundamentally a remedial measure" for courts, not agencies, to implement. JA.100-104, 109.n23. But RFRA specifically applies to federal agencies and thus authorizes them to comply. *See infra* Part I.A. RFRA's authorization of a judicial remedy does not foreclose the executive branch's independent obligation to follow the law. *See infra* Part I.B. And nothing about section 300gg-13(a)'s *grant* of broad rulemaking authority to the agency somehow conflicts with or repeals RFRA's more specific direction to accommodate religious beliefs substantially burdened by government action. *See infra* Part I.C.

II. The district court wrongly held that, "even if" RFRA authorizes the agency to "act, through regulation, to relieve [a prohibited] burden" on religious exercise, the exemption rules here go beyond any such authority. JA.109. To the contrary, the exemption rules here are within the agency's authority to comply with RFRA, as well as its broad authority under section 300gg-13(a).

The agency's prior attempt at an accommodation of religious belief refused to exclude all religious objectors, equally, from the contraceptive mandate. That attempt betrayed a lack of proper respect for RFRA. The host of religious objectors to the prior rule included theological seminaries, schools and colleges, orders of nuns, and charities caring for indigent elderly and orphans. The burden that the prior rule imposed if those actors wished to conform their conduct to their sincere religious

beliefs was substantial indeed, and it was not the most narrowly tailored way of furthering some compelling governmental interest. The agency thus belatedly corrected course and provided the same exemption previously afforded by the Obama Administration to some (but not all) religious objectors and to even non-religious employers (such as small businesses) for secular reasons. The prior supposed accommodation did not relieve the substantial burden on sincerely held religious beliefs and thus was no accommodation at all. Thus, the agency was correct and well within its authority to find another solution.

ARGUMENT

I. The Agency Must Account for RFRA in Its Rulemaking.

The district court stumbled out of the gate. It refused to accept the basic proposition that an agency has authority to comply with RFRA. The district court dismissed the agency's authority to "determine what RFRA demands with respect to the ACA," JA.102, suggesting that "RFRA does not permit an agency to create exemptions to regulations absent a *judicial* determination" of a prohibited burden, JA.109 n.23 (emphasis added). Thus, the district court viewed RFRA as allowing only an *ex post* court challenge to relieve a prohibited burden on religious exercise, rather than *ex ante* agency action to avoid a prohibited burden. JA.102-103. On that remarkable view, the agency has no business even trying to accommodate religious objections to its regulatory actions.

Although the district court proceeded to analyze RFRA's substance in the alternative—i.e., "even if the Agencies . . . must act" as that law demands, JA.109—this

Court should be clear that the district court's first-line conclusion is meritless. An agency has authority to comply with the law, and RFRA is just as much part of the binding law as is ACA. RFRA directly limits government action, including agency action like the contraceptive mandate. *See infra* Part I.A. Contrary to the district court's reasoning, RFRA's creation of a judicial remedy does not somehow negate the statute's direction that agencies avoid prohibited burdens in the first place. *See infra* Part I.B. Finally, nothing about section 300gg-13(a) enacted by ACA comes close to showing that Congress denied the agency discretion to accommodate religious burdens. *See infra* Part I.C.

A. RFRA compels agencies to avoid substantial burdens on religion while implementing generally applicable legislation.

Even apart from the discretion conferred by section 300gg-13(a) itself, the agency had authority to consider and accommodate religious and moral objections to its contraceptive mandate because RFRA demands it.[2] The district court's miserly

[2] The district court concluded that the agency's "moral" exemption must fail because "RFRA protects a person's 'exercise of religion,' and does not speak to broader moral convictions." JA.100 n.22. But the Supreme Court has treated Congress's use of the terms "religion" or "religious" in granting exemptions from generally applicable laws as including "moral, ethical, or religious beliefs about what is right and wrong," which are a "held with the strength of traditional religious convictions." *Welsh v. United States*, 398 U.S. 333, 340 (1970) (plurality op.). There is no reason to think that RFRA was not using this wider view of "religion," itself a statutorily undefined term, *see* 42 U.S.C. § 2000cc-5(7)(A). To the contrary, "when a statute uses the very same terminology as an earlier statute—especially in the very same field, such as [exemptions from generally applicable laws]—it is reasonable to believe that the terminology bears a consistent meaning." Antonin Scalia & Bryan A. Garner, *Reading Law* 323 (2012). And "laws dealing with the same subject

reading of RFRA—as creating a right that can be enforced only by courts, after religious exercise has been substantially burdened—is contrary to text and precedent. Agencies, no less than courts, must accommodate religious objections as directed by RFRA.

1. RFRA is a purposely broad statute. *See Hobby Lobby*, 573 U.S. at 693 ("Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty."). It commands that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the burden furthers "a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b). It goes on to define "government" as including every "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." *Id.* § 2000bb-2(1).

RFRA's plain text thus imposes a mandatory duty on federal agencies to avoid prohibited religious burdens, in "an exercise of general legislative supervision over federal agencies." Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 211 (1994); *accord Hobby Lobby*, 573 U.S. at 695 ("As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work . . . ."). Agencies have statutory authority to issue rules to implement RFRA, including "exemptions," 42 U.S.C.

. . . should if possible be interpreted harmoniously." *Id.* at 252. In any event, whatever RFRA's support for the moral-objection rule, the agency independently has discretion under section 300gg-13(a), as appellants explain.

§ 2000bb-4, as Congress's direction to an agency inherently confers statutory authority to comply.

This case presents a paradigmatic example of the type of agency action that inspired RFRA. RFRA proceeded from two premises relevant to this case: (1) "'facially neutral laws" like the agency's contraceptive mandate had, "throughout much of our history, . . . severely undermined religious observance'"; and (2) "legislative or administrative" bodies are often "unaware of, or indifferent to," and sometimes "hostile" towards, "minority religious practices." Laycock & Thomas, 73 Tex. L. Rev. at 211, 216-17 (quoting Senate Comm. on the Judiciary, *Religious Freedom Restoration Act of 1993*, S. Rep. No. 103-111 5 (1993)). In one famous instance, OSHA responded to *Employment Division v. Smith*, 494 U.S. 872 (1990), which largely repudiated the prior method of analyzing free-exercise claims, by eliminating accommodations exempting the Amish and Sikhs from requirements concerning the wearing of hard hats. *See* Ruth Marcus, *Reins on Religious Freedom?*, Wash. Post (Mar. 9, 1991). OSHA's action was cited by one of RFRA's primary co-sponsors as an inspiration for the law. *See* Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Sub. Comm. On Civil & Const. Rights of the Comm. on the Judiciary, 102nd Cong., 2nd Sess. 122-23 (1991) (testimony of Congressman Stephen J. Solarz). And OSHA now relies on RFRA as the basis for its renewed exemption, despite there being nothing in OSHA's enabling statute providing for religious exemptions. *See* OSHA, *Exemption for Religious Reason from Wearing Hard Hats*, STD

01-06-005 (June 20, 1994). Numerous other agencies similarly rely on RFRA to accommodate religious exercise in their rulemaking.[3]

2. Contrary to the district court's view that the question is "distinctly undetermined," JA.109 n.23, it does not appear that any court prior to this case had questioned that agencies must account for RFRA's commands while implementing other applicable laws. That is no surprise for at least two reasons.

First, in addition to the above-quoted provisions, RFRA expressly provides that it "applies to all Federal law and the implementation of that law, whether statutory or otherwise," unless a later statute "explicitly excludes . . . application" of RFRA. 42 U.S.C. § 2000bb-3(a)-(b). So every command "of general applicability" in a federal statute, 42 U.S.C. § 2000bb-1(a), must be read to "include heightened protection for religious freedom," Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 Mich. L. Rev. 1903, 1921 (2001). When, for example, ACA commands the agency to provide for the specifics of how health insurers must cover preventive care, 42 U.S.C. § 300gg-13(a), that command must be read with RFRA's concomitant prohibition on substan-

[3] *See, e.g.*, U.S. Citizenship and Immigration Services, *Special Immigrant and Nonimmigrant Religious Workers*, 73 Fed. Reg. 72276-01, 72283 (Nov. 26, 2008); Employment and Training Administration, *Notice of Availability of Funds and Solicitation for Grant Applications (SGA) To Fund Demonstration Projects*, 73 Fed. Reg. 57670-01, 57674 (Oct. 3, 2008); Federal Aviation Administration, *Commercial Routes for the Grand Canyon National Park*, 64 Fed. Reg. 37191-01, 37191 (July 9, 1999); *see also Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act*, 31 Op. O.L.C. 162 (2007).

tially burdening religious exercise. The agency therefore must accommodate religious exercise as provided by RFRA just as if ACA itself commanded such accommodation.

Confirming that point, the Supreme Court has long recognized that no agency may "apply the policies of [one] statute so single-mindedly as to ignore other equally important congressional objectives." *Local 1976, United Bhd. of Carpenters & Joiners of Am., AFL v. NLRB*, 357 U.S. 93, 111 (1958). "Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *S. S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). "The problem is to reconcile the two, if possible, and to give effect to each." *FTC v. A.P.W. Paper Co.*, 328 U.S. 193, 202 (1946). Thus, "[i]n devising" the contraceptive mandate, the agency was "obliged to take into account another equally important Congressional objective"—avoiding substantial burdens on religious exercise—and work to avoid any "potential conflict." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984) (quotation marks and alterations omitted).

An analogous example drives this home. In 1978, Congress enacted the "American Indian Religious Freedom Act," which provided that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians." 42 U.S.C. § 1996. In stark contrast

to RFRA, this law merely expressed "a sense of Congress"; it did "not confer special religious rights on Indians" or "change any existing . . . law." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988) (quotation marks omitted). Even then, however, agencies were required to account for this policy in implementing other laws. *See, e.g.*, *Conservation Law Found. v. FERC*, 216 F.3d 41, 50 (D.C. Cir. 2000); *N.M. Navajo Ranchers Ass'n v. ICC*, 702 F.2d 227, 230 (D.C. Cir. 1983) (per curiam). *A fortiori*, agencies must account for RFRA's far more forceful commands.

B. A private right of action to enforce RFRA against agencies does not imply that agencies lack authority to comply with RFRA in the first instance.

The district court read RFRA, a statute designed "to provide very broad protection for religious liberty," *Hobby Lobby*, 573 U.S. at 693, as applying only *ex post*—merely providing an opportunity for those whose religious exercise has already been burdened to spend time and money asking courts for exemptions from generally applicable laws. *See* JA.102 ("Despite Defendants' contention that the Agencies may determine what RFRA demands with respect to the ACA, RFRA provides, to the contrary, that it is the courts that are charged with determining RFRA's application."); JA.103 ("RFRA specifically provides only for 'Judicial Relief,' 42 U.S.C.A. § 2000bb-1(c), thereby committing interpretative authority to the courts—not to agencies.").

That view loses sight of first principles. The primary purpose of enacting a statute is to guide behavior *ex ante*. *See* Ward Farnsworth, *The Legal Analyst* 6 (2007)

("Legislatures make general rules for the future . . . ."). Thus, "[a] statutory directive binds *both* the executive officials who administer the statute *and* the judges who apply it in particular cases." *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 439 (1992). RFRA is expressly directed towards administrative agencies. *See* 42 U.S.C. §§ 2000bb-1(a)-(b), 2000bb-2(1). It is inconceivable that Congress intended to deviate from the default operation of statutes and instead have agencies ignore RFRA until they are haled into court and ordered to comply.

The district court placed too much weight on RFRA's private right of action, reasoning that Congress's provision for private enforcement meant that RFRA commits to the courts alone "the task of determining whether generally applicable laws violate a person's religious exercise." JA.102. Congress has not, however, "provide[d] only for judicial relief." JA.103 (quotation marks omitted; capitalization altered). Rather, Congress provided agencies with authority to issue and modify rules under their enabling statutes and the Administrative Procedure Act. *See* 5 U.S.C. § 500 *et seq.* And Congress then told those agencies that, in using their powers, they "shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). That scheme manifestly provides administrative authority to avoid and relieve religious burdens from agency rulemaking. Of course, if an agency ignores RFRA's command, then the private right of action becomes relevant. But the district court viewed RFRA's private right of action exactly backwards. The whole point of the threat of judicial relief is to procure obedience *ex ante*.

Amici are unaware of any other decision reading a statute's private right of action to mean that an agency subject to the statute must ignore its commands until a

court says otherwise. The Administrative Procedure Act, for instance, provides generally for private enforcement of federal rights against federal agencies. *See* 5 U.S.C. § 702. On the district court's view, that provision deprives agencies of the ability to give forethought to what those federal rights require. Rather, federal rights would be protected only piecemeal, as each person aggrieved by agency action sues and receives relief in a particular case. That is not how the law works.

C. The district court wrongly concluded that section 300gg-13(a) withholds from the agency the discretion to accommodate religion.

The district court further concluded that section 300gg-13(a) "prohibits [the agency] from exempting entities" from the agency's contraceptive mandate. JA.100. But nothing in section 300gg-13(a) prohibits or conflicts with the agency's authority to craft religious exemptions.

To the contrary, the statute is a command to insurers to act in accordance with a broad, open-ended *grant* to the agency of rulemaking authority. Section 300gg-13(a) provides:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for . . . with respect to women, such additional preventive care and screenings . . . *as provided for* in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

42 U.S.C. § 300gg-13(a) (emphasis added). As appellants demonstrate, the use of "as provided" in this provision bestows substantial discretion on the agency to develop guidelines, including by accommodating religious objections. Appellants' Br. 39-49; Intervenor-Appellant's Br. 41-46.

Consider an analogous use of language. Imagine parents leaving their children with a babysitter with the instruction that "the children shall complete their chores as provided by the babysitter." And imagine that the babysitter believes that the yard needs raking. No one would think that the parents' instruction somehow prevented the babysitter, upon concluding that the yard needs raking, from exempting an individual child from that chore if, for instance, that child was sick or injured. The district court's contrary reading bears no resemblance to the common understanding of the language used in section 300gg-13(a).

The district court's reading makes even less sense given that RFRA is "a rule of interpretation for future federal legislation." Laycock & Thomas, 73 Tex. L. Rev. at 211. Congress's background direction in RFRA to accommodate religious burdens makes it even less defensible to read the open-ended "as provided for" language in section 300gg-13(a) as somehow foreclosing the agency from offering religious exemptions. RFRA itself directs that future legislation should *not* be interpreted as changing that default rule unless the later statute "explicitly excludes . . . application" of RFRA, which is not true here. 42 U.S.C. § 2000bb-3(b).

Nor could section 300gg-13(a) possibly overcome the high standard for a repeal by implication of RFRA. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007). Nothing about a statutory *grant* of agency discretion irreconcilably forecloses the agency from including religious accommodations in the resulting rulemaking. *See id.* Indeed, the Obama Administration conceded in *Zubik* that it is "feasible" for contraceptive coverage to "be provided to petitioners' employees,

through petitioners' insurance companies, without any [objected-to] notice from petitioners." 136 S. Ct. at 1560. The district court's overreading of section 300gg-13(a) wrongly and prejudicially narrowed the scope of the agency's discretion to accommodate religious burdens.

II. Requiring Religious Objectors to Participate in the Provision of Contraceptives Would Violate RFRA.

After questioning the agency's authority to even consider RFRA, the district court went on to hold that, "even if" RFRA authorizes the agency to "act, through regulation, to relieve [a prohibited] burden" on religious exercise, the exemption rules here go beyond any such authority. JA.109. That was also error.

The agency's prior rule, which refused to equally exclude all religious objectors from the contraceptive mandate, betrayed a lack of proper concern for federal religious-liberty protections. All persons in our Nation have a right to believe in a divine creator and divine law. "For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts." *Hobby Lobby*, 573 U.S. at 736 (Kennedy, J., concurring).

The religious objectors to the prior rule included theological seminaries, schools and colleges, orders of nuns, and charities caring for indigent elderly and orphans. They all have avowedly religious missions.[4] The heavy burden that the prior mandate

[4] The district court's focus on the agency's inclusion of objecting for-profit, publicly traded employers in the exemption, *see* JA.108-109, is a red herring. As the agency acknowledged, such an exemption is unlikely to ever to be used. *See* JA.908-909. But that is no reason to not account for the possibility. *See Sure-Tan*, 467 U.S. at 903 (agency must avoid any "*potential* conflict") (emphasis added). In any event,

imposed if those actors wished to conform their conduct to their sincere religious beliefs risked detracting from the vigor with which they are able to serve their communities. RFRA requires agencies to take account of the important interests of these vital institutions, and doing so requires what the agency belatedly provided in the current rule: an exemption like that already afforded to similar religious objectors and even to non-religious employers for secular reasons.

The most recently promulgated exemption to the contraceptive mandate goes no further than RFRA requires. The district court's contrary conclusion rests entirely on its misreading a footnote in *Hobby Lobby*. According to the district court, the Supreme Court, evaluating a "conscience amendment" to ACA that failed in Congress and that purportedly would have provided the same blanket exemption that the agency now provides, said that such an exemption "extended more broadly than the . . . protections of RFRA." JA.106 (quoting *Hobby Lobby*, 573 U.S. at 719 n.30). But the agency's current rule does *not* "create[] precisely th[e] blanket exemption" evaluated by the Supreme Court. JA.106-107. To the contrary, the failed conscience amendment would have allowed an objecting employer "to deny *any* health service" without regard to a compelling interest or narrow tailoring. *Hobby Lobby*, 573 U.S. at 719 n.30 (emphasis added). But the agency's rule is targeted at one specific health service—contraception—and was promulgated only after considering the burden on religion, the presence or absence of a compelling interest, and how

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that part of the exemption is severable, *see* 45 C.F.R. § 147.132, so it cannot justify sinking the entire rule.

best to narrowly tailor the contraceptive mandate to accomplish the government's goals. It is different from the conscience amendment in every way that matters.

The district court compounded its error by concluding that the agency's prior accommodation—requiring some, but not all, religious objectors to file a certification that would trigger contraceptive coverage by their respective insurance companies—satisfied RFRA. The prior accommodation did not exempt objecting employers from the mandate to provide the objected-to insurance. Instead, the result of the certification was the provision of contraceptives to the employers' employees seamlessly through the employers' insurance plan. The prior accommodation thus required many religious objectors to participate in the provision of contraceptives in way that they sincerely believe makes them complicit in the use of abortifacients that take human life. As a result, it was no accommodation at all. Under the previous rule, religious exercise remained substantially burdened in the absence of a compelling interest or narrow tailoring. Thus, the agency was correct—and indeed was required—to find another solution.

A. Requiring religious objectors to participate in the provision of contraceptives places a substantial burden on religious practice.

1. The threatened civil penalties are facially substantial.

Hobby Lobby addressed the conundrum faced by employers with sincere religious objections to providing health insurance that covers contraceptives: "If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as $1.3 million per

day" in penalties. 573 U.S. at 691. "If these consequences do not amount to a substantial burden," the Court held, "it is hard to see what would." *Id.*

Without the current exemption rule, many employers will face that dilemma. Those employers either must provide coverage or file a notification of their religious objection with the agency or the insurer. *Hobby Lobby* requires an accommodation of the former. The latter is the "accommodation" originally offered by the agency. But that "accommodation" does not result in an exemption from the mandate to provide the objected-to insurance. Instead, the result of the notification is the provision of contraceptives to the religious employer's employees seamlessly through the employer's group health plan, paid for by the insurer or third-party administrator. That is no accommodation at all for the relevant religious employers.

Those employers sincerely believe that, if they comply with the contraceptive mandate, including its "accommodation" option for compliance, they will be morally complicit in facilitating or participating in the provision of contraception or abortions in violation of their religious beliefs. If they do not comply, they will be forced to pay onerous financial penalties for adhering to that religious conviction.

The substance and sincerity of the objectors' religious beliefs are not disputed. The severe financial consequences for noncompliance are also beyond question. *E.g.*, 26 U.S.C. § 4980D; *id.* § 4980H. That is enough to establish a substantial burden under RFRA. *See Hobby Lobby*, 573 U.S. at 691.

2. Courts may not second-guess the religious objectors' belief that any participation in the provision of contraceptives makes the religious objectors complicit.

The district court's conclusion that the prior "accommodation" imposed no substantial burden turns on characterizing the nature of employers' religious *objection* as insubstantial. *See* JA.107-108. Although the district court viewed RFRA as protecting only religious beliefs that a judge finds substantial, the Supreme Court has instructed that "it is not for us to say that [petitioners'] religious beliefs are mistaken or insubstantial." *Hobby Lobby*, 573 U.S. at 725. After *Hobby Lobby*, there is no doubt that the contraceptive mandate and its prior "accommodation" substantially burdened employers' religious exercise.

Despite the Supreme Court's instructions in *Hobby Lobby*, the district court accepted plaintiffs' invitation to assess the validity of a religious conviction. That assessment intrudes upon the dignity of adherents' convictions regarding profound religious concepts such as facilitation and complicity. It subjects those beliefs to judicial review, and it asks courts to determine the substantiality of the reasons of faith animating a believer's desired exercise of religion—rather than the substantiality of the governmental burden on that religious exercise. That assessment is not the inquiry required by RFRA.

Federal courts have no business resolving a "difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of [what the person believes to be] an immoral

act by another." *Id.* at 724. But that is exactly what the district court did, in establishing its own views on "complicity." *See* JA.109.

The notion of "complicity" that many employers express regarding the "accommodation" is not uncommon. Indeed, it was the very question at the heart of *Hobby Lobby*. *See* 573 U.S. 724. To take one well-publicized example, Pope John Paul II ordered Catholic churches in Germany to cease certifying that pregnant women considering abortion had received church counseling because such certification was a "necessary condition" in a woman's procuring an abortion. *See* Letter from His Holiness Pope John Paul II to the Bishops of the German Episcopal Conference ¶ 7 (Jan. 11, 1998), *available in English translation at* https://perma.cc/6G2A-2DGN.[5] The Pope described the status of the certificate and whether it made "ecclesiastical institutions . . . co-responsible for the killing of innocent children" as "a pastoral question with obvious doctrinal implications." *Id.* ¶ 4-5. The prior accommodation, which required a certification from an employer to facilitate the provision of contraceptives to that employer's employees differs, if at all, only in degree, from the certification considered by the Pope. Complicity here is a religious, not legal, question.

[5] "In the late 1990s, Germany allowed abortions within the first 12 weeks of pregnancy for health-related reasons if the pregnant woman received state-mandated counseling. Representatives from Catholic churches in Germany agreed to act as counselors. After counseling, a church had to issue a certificate stating that the pregnant woman had received counseling." *Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Services*, 756 F.3d 1339, 1343 (11th Cir. 2014) (W. Pryor, J., concurring).

The district court concluded that the burden on the objectors' religious exercise was insubstantial because their complicity—filing a certification that triggers "an independent obligation on a third party" to provide contraceptive coverage—was too attenuated. JA.108 (quotation marks omitted). But that is no different and no more appropriate than a court telling the Pope that the German churches were not complicit in abortion because their certifications merely allowed services to be provided by a third party. Or, closer to home, telling the plaintiffs in *Hobby Lobby* that the burden on their religious exercise was insubstantial because merely providing coverage for contraception was too attenuated from their employees' independent decision to use an abortifacient. In fact, that is what the agency argued in *Hobby Lobby*: "that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated." 573 U.S. at 723. The Supreme Court rejected that argument as asking the wrong question. What is too attenuated to trigger complicity is "a difficult and important question of religion and moral philosophy" "that the federal courts have no business addressing." *Id.* at 724; *see also Priests for Life v. U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 19-20 (D.C. Cir. 2015) (per curiam) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (responding eloquently to the same conclusion reached by the district court here).

B. There is no compelling interest in mandating contraceptive coverage, let alone requiring the participation of religious objectors in the coverage scheme.

The contraceptive mandate and the prior accommodation substantially burden religious exercise. They therefore cannot stand without change because they do not serve a compelling interest. RFRA does not define "compelling interest." Congress instead pointed to existing case law, specifically *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963). The standard that Congress incorporated is a highly protective one. *Yoder* subordinates religious liberty only to "interests of the highest order," 406 U.S. at 215, and *Sherbert* only to avoid "the gravest abuses, endangering paramount interests," 374 U.S. at 406 These cases explain "compelling" with superlatives: "paramount," "gravest," and "highest."

The education of children is important, and the first two years of high school are important—but not sufficiently compelling to justify the substantial burden on religious exercise at issue in *Yoder*. Mandating insurance coverage of contraception is no more compelling than educating children. In fact, the Supreme Court has found a compelling interest in only three situations in free-exercise cases. In each, strong reasons of self-interest or prejudice threatened unmanageable numbers of false claims to exemption, and the laws at issue were essential to express constitutional norms or to national survival: racial equality in education, *see Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983), collection of revenue, *see, e.g.*, *Hernandez v. Commissioner*, 490 U.S. 680, 699-700 (1989), and national defense, *see Gillette v.*

United States, 401 U.S. 437, 461-62 (1971). Providing free contraceptives, while important to the goal of reducing unintended pregnancy, does not compare with those interests.

Congress did not think the issue of contraceptive coverage important enough to even expressly address in ACA, instead leaving to the agency the decision whether to even require such coverage. At the same time, Congress exempted plans covering millions of people from any potential mandate to cover contraception:

> ACA exempts a great many employers from most of its coverage requirements. Employers providing "grandfathered health plans"—those that existed prior to March 23, 2010, and that have not made specified changes after that date—need not comply with many of the Act's requirements, including the contraceptive mandate. 42 U.S.C. §§ 18011(a), (e). And employers with fewer than 50 employees are not required to provide health insurance at all. 26 U.S.C. § 4980H(c)(2).

Hobby Lobby, 573 U.S. at 699. "All told, the contraceptive mandate" prior to the agency's current rule, did "not apply to tens of millions of people." *Id.* at 700. Applying *Yoder*'s standard, the Supreme Court has held that a governmental interest cannot be compelling unless the government pursues it uniformly across the full range of similar conduct. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993); *see also Fla. Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989). There is no uniformity here, so the contraceptive mandate cannot be said to serve a compelling purpose.

Because the contraceptive mandate fails to advance a compelling interest, RFRA prohibits it from substantially burdening the religious exercise of objecting employers. The blanket exemption promulgated by the agency is the most straightforward

way to comply with RFRA because it ensures that religious exercise will not be burdened and is easy to administer. Thus, the agency's current rule appropriately "reconcile[s]" ACA and RFRA "and . . . give[s] effect to each." *A.P.W. Paper Co.*, 328 U.S. at 202.

C. Assuming there is a compelling interest, requiring the participation of religious objectors in the coverage scheme is not the least restrictive means.

Even if providing no-cost contraceptives to the employees of religious objectors were deemed a compelling interest, the agency's prior mandate-and-accommodation scheme still violates RFRA because it is not the least restrictive means to accomplish that goal. The current rule takes a path much less restrictive than its predecessors. For this reason too, the agency correctly concluded that its current rule is the best way "to reconcile" ACA and RFRA, "and to give effect to each." *Id.*

"The least-restrictive-means standard is exceptionally demanding" and requires the government to show "that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases." *Hobby Lobby*, 573 U.S. at 728. And there are less-restrictive alternatives for providing contraceptives to objecting employers' employees. The Supreme Court flagged the most obvious alternative in *Hobby Lobby*—"for the Government to assume the cost of providing . . . contraceptives . . . to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Id.* That is just what the agency's current rule does, as it allows "women who are unable to obtain certain family planning services under

their employer-sponsored health coverage due to their employers' religious beliefs or moral convictions" to obtain contraceptives from government-funded Title X family-planning centers. JA.897; *see also* U.S. Dep't of Health and Human Servs., *Compliance with Statutory Program Integrity Requirements*, 83 Fed. Reg. 25502-01 (June 1, 2018).

Conclusion

The Court should reverse the district court's injunction.

Respectfully submitted.

Steve Marshall
Attorney General of Alabama

Leslie Rutledge
Attorney General of Arkansas

Christopher M. Garr
Attorney General of Georgia

Lawrence Wasden
Attorney General of Idaho

Jeff Landry
Attorney General of Louisiana

Eric Schmitt
Attorney General of Missouri

Doug Peterson
Attorney General of Nebraska

Mike Hunter
Attorney General of Oklahoma

Alan Wilson
Attorney General of South Carolina

Patrick Morrisey
Attorney General of West Virginia

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Kyle D. Hawkins
Solicitor General

/s/ Jason R. LaFond
Jason R. LaFond
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
jason.lafond@oag.texas.gov

Counsel for Amici Curiae

Certificate of Service

On February 22, 2019, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with L.A.R. Misc. 113.12; (2) the electronic submission is an exact copy of the paper document in compliance with L.A.R. 31.1(c); and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Jason R. LaFond
Jason R. LaFond

Certificate of Compliance

At least one of the attorneys whose names appear on the brief is a member of the bar of this Court. Further, this brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,380 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Jason R. LaFond
Jason R. LaFond