EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, *et al.*, **Plaintiffs,** **v.** **DONALD J. TRUMP, *et al.*,** **Defendants.**	**Case No. 2:17-cv-4540-WB** **Hon. Wendy Beetlestone**

AMICUS CURIAE BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

NANCY B. G. LASSEN, ESQUIRE
WILLIG, WILLIAMS & DAVIDSON
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103
(215) 656-3638
nlassen@wwdlaw.com

JOSHUA MATZ
(*Pro Hac Vice* pending)
TALIA NISSIMYAN
(*Pro Hac Vice* pending)
KAPLAN HECKER & FINK LLP
350 Fifth Avenue, Suite 7110
New York, NY 10118
(212) 763-0883
jmatz@kaplanhecker.com
tnissimyan@kaplanhecker.com

Attorneys for Proposed Amici
Church-State Scholars

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PAGE(S)

REGULATIONS

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICI CURIAE

Amici are Church-State scholars with expertise in the Religion Clauses. Here, Plaintiffs challenge the Religious Exemption Rule on statutory and constitutional grounds. This Court previously granted a preliminary injunction solely on the basis of Plaintiffs' APA claims and did not reach Plaintiffs' constitutional claims. Nonetheless, Defendants and some of their *amici* in the Third Circuit advance arguments bearing on the Establishment Clause claims in this litigation. *Amici* submit this brief to explain why the Religious Exemption Rule does, in fact, violate the Establishment Clause. That is an independent basis on which to grant summary judgment.

A full list of *amici* is attached as an appendix to this brief.

INTRODUCTION & SUMMARY OF ARGUMENT

The United States has a long tradition of religious accommodation. When laws impose burdens on the free exercise of religion, the government often provides accommodations out of respect for liberty of conscience. There are, however, well-established limits on the accommodation of religion. Under the Establishment Clause, the government may not craft accommodations in ways that have the purpose of promoting religion above all other interests, or that shift substantial hardship to third parties. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (holding that the government is required to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"). As the Supreme Court explained in *Estate of Thornton v. Caldor*, "[t]he First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform to his own religious necessities." 472 U.S. 703, 710 (1985) (internal citation omitted).

Religious conformity, however, is precisely what the government's Religious Exemption Rule requires. That rule grants a categorical exemption to for-profit and non-profit corporations

that object on religious grounds to paying for insurance that includes contraceptive coverage. The Religious Exemption Rule would force employees of objecting corporations into health care plans that impose costs on employees based on the religious convictions of their employers. As a result, and as this district court and one other have already concluded, tens of thousands of women across the country will be deprived of contraceptive coverage to which they are otherwise statutorily entitled. These women will be compelled to conform with—and pay for—the employers' religious practice.

This is precisely the type of overt religious favoritism barred by the Constitution. Unlike the preexisting accommodation regime that the Supreme Court considered in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), *Wheaton College v. Burwell*, 573 U.S. 958 (2014), and *Zubik v. Burwell*, 136 S. Ct. 1557 (2016)—which guaranteed employees would receive contraceptive coverage from insurers—the Religious Exemption Rule ignores the interests of employees. In so doing, it manifests an unyielding preference for religious interests over any conceivable secular interest and foreseeably shifts serious burdens to third parties.

Defendants and their *amici* in the Third Circuit advance several arguments meant to defeat the application of the Establishment Clause. As we will explain, none succeeds. Under settled Supreme Court precedent, the Religious Exemption Rule is subject to—and in flagrant violation of—the rule that accommodations must be structured in a manner that accounts for third-party interests. For that reason, summary judgment may be granted on the ground that the Religious Exemption Rule violates the Establishment Clause.

ARGUMENT

THE RELIGIOUS EXEMPTION RULE VIOLATES THE ESTABLISHMENT CLAUSE

A. The Establishment Clause Prohibits Accommodations That Shift Substantial Burdens to Third Parties

Consistent with free exercise values, there is a robust tradition of religious accommodation in this nation. In our pluralistic society, accommodation laws recognize the vital role of religion in many people's lives and help to "avoid[] unnecessary clashes with the dictates of conscience." *Gillette v. United States*, 401 U.S. 437, 453 (1971). Religious exemptions from neutral and generally applicable laws are thus widespread in our society.

But it is beyond question that rules purporting to accommodate religion must comply with the Establishment Clause. The Supreme Court has so held, explicitly and repeatedly: "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 706 (1994) ("[Religious] accommodation is not a principle without limits."). One such limitation is the third-party-harm rule, which provides that religious exemptions may not be structured in a manner that shifts substantial burdens to nonbeneficiaries without any consideration of their interests. *See Cutter*, 544 U.S. at 710 ("An accommodation *must* be measured so that it does not override other significant interests." (emphasis added)); *Caldor*, 472 U.S. at 710 (holding that an accommodation "contravenes a fundamental principle of the Religion Clauses" when it provides "unyielding weighting in favor of [religious] observers").

The third-party-harm rule has deep roots. "Ardent accommodationists, strict separationists, and many in between agree that the Establishment Clause precludes permissive accommodations

that shift the material costs of practicing a religion from the accommodated believers to those who believe and practice differently." Frederick M. 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, 361-62 (2014). Indeed, this principle flows naturally from the original public meaning of the Establishment Clause, which precludes government from requiring one person to support another's religion. *See McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005). Prominent members of the Founding generation condemned laws that compelled people to give financial support or to observe the tenets of a government-established religion to which they did not belong. *See, e.g.,* James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 4 (1785) ("[T]he Bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions."); Thomas Jefferson, *Draft of Bill Exempting Dissenters from Contributing to the Support of the Church* (Nov. 30, 1776).

Adhering to that understanding, the Supreme Court has constrained the government's ability to structure religious accommodations in a manner that shifts substantial costs to third parties. The leading case is *Estate of Thornton v. Caldor, Inc.*, which struck down a statute that granted every employee an absolute right to be free from work on his or her Sabbath—even when doing so "would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees." 472 U.S. at 709-10. Noting the absence of any exceptions in the statute, the Supreme Court observed that "religious concerns automatically control over all secular interests" in the "absolute and unqualified" statute. *Id.* at 709. Quoting Judge Learned Hand, the Court held that this "unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental

principle of the Religion Clauses . . . . 'The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.'" *Id.* at 710 (quoting *Otten v. Balt. & O.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)). *Caldor* thus held that an accommodation cannot stand under the Establishment Clause if it forces third parties to "'conform their conduct,'" to "'religious necessities,'" *id.*, especially if it creates an "absolute duty" that favors the interests of religious believers "over all other interests." *Id.* at 709-10.

Twenty years later, the Supreme Court unanimously affirmed this reading of *Caldor*. In *Cutter v. Wilkinson*, it upheld the Religious Land Use and Institutionalized Persons Act (RLUIPA) against a facial challenge under the Establishment Clause. 544 U.S. at 714. RLUIPA imposes on state prisons the same compelling interest test RFRA imposes on the federal government. *Id.* at 712. In a unanimous decision, and relying explicitly on *Caldor*, the Supreme Court held that RLUIPA is permissible because it requires that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Id*. at 720. Explaining that its "decisions indicate[d] that an accommodation must be measured so that it does not override other significant interests," *id.* at 722, the Court quoted *Caldor* with approval:

> In *Caldor*, the Court struck down a Connecticut law that 'arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath.' We held the law invalid under the Establishment Clause because it 'unyielding[ly] weigh[ted]' the interests of Sabbatarians 'over all other interests.'

Id. at 722 (citations omitted). *Cutter* added that if RLUIPA were applied in a manner that discounted or ignored third-party interests, the law would become vulnerable to as-applied challenges: "Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning

of an institution, the facility would be free to resist the imposition. In that event, adjudication in as-applied challenges would be in order." *Id*. at 726.

Following the path marked by *Caldor* and *Cutter*, recent Supreme Court decisions have emphasized that the presence of third-party harms is crucial to analysis of religious accommodations. In *Burwell v. Hobby Lobby Stores, Inc.*, the Court granted a religious exemption to contraceptive coverage requirements. 573 U.S. at 691. The Court's analysis rested, however, on the assumption that this exemption would impose no burdens on third parties, including female employees and female dependents of employees who were otherwise entitled to contraceptive coverage under their existing health insurance policies. *Id.* at 2760 ("[T]he effect of the HHS-created accommodation on the women employed by Hobby Lobby . . . would be precisely zero."). Less than one year later, in *Holt v. Hobbs*, the Court granted an exemption from a prison grooming policy, holding that state prison officials had failed to show that the requested accommodation posed any safety or security risks. 135 S. Ct. 853 (2015). In a concurring opinion, Justice Ginsburg sharpened the point by noting that "accommodating petitioner's religious belief . . . would not detrimentally affect others who do not share the petitioner's belief." *Id.* at 867 (Ginsburg, J., concurring).

The third-party-harm rule has also shaped other dimensions of the Supreme Court's religion jurisprudence. In *United States v. Lee*, for example, the Court refused to grant an employer a religious exemption from social security taxes because, among other reasons, doing so would shift an onerous burden to employees. 455 U.S. 252, 261 (1982) ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."). And in *Trans World Airlines, Inc. v. Hardison*, the Supreme Court interpreted Title VII of the Civil Rights Act of 1964 to require accommodation of religious practices *only* when

resulting burdens on employers and other employees are *de minimis*. 432 U.S. 63, 85 (1977). As several courts subsequently noted, the holding in *Hardison* was based partly in "the prohibitions of the Establishment Clause." *Turpen v. Missouri-Kansas-Texas R.R.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *see also Hudson v. W. Airlines, Inc.*, 851 F.2d 261, 265 (9th Cir. 1988); *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 136 (3d Cir. 1986).

Together these precedents give the government broad latitude to create religious accommodations that do not shift substantial burdens or that spread costs across the public at large. *See* Micah Schwartzman, Nelson Tebbe, & Richard Schragger, *The Costs of Conscience*, 106 Ky. L.J. 781, 798-805 (2018) [hereinafter *Costs of Conscience*]. But it may not shift significant hardship to a discrete class of third parties. Doing so is the regulatory equivalent of taxing one group to support another's faith. Moreover, giving priority to religion over all contrary interests can function to *prefer*, rather than merely *accommodate*, religious belief. *See* Ira Lupu & Robert Tuttle, *Secular Government, Religious People* 234-35 (2014). The third-party-harm rule avoids that result by placing limits on religious accommodations.[1]

B. The Religious Exemption Rule Is Subject to Establishment Clause Limitations, Including the Third-Party-Harm Rule

There should be no doubt that the Establishment Clause applies to the Religious Exemption Rule, which seeks to accommodate religious objectors by shifting the cost and burden of obtaining contraceptive coverage to employees. Nonetheless, on appeal before the Third Circuit, Defendants and their *amici* raised three arguments in an effort to subvert the third-party-harm rule, and are

[1] *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), which involved tax exemptions for nonprofits, is not to the contrary. *Walz* permitted a tax exemption because it was not specific to religious organizations and because the resulting costs were both evenly diffused over the entire body of taxpayers and negligible for any individual taxpayer. *Caldor* and *Cutter*, in contrast, addressed substantial burdens shifted to a discrete class of third-party nonbeneficiaries.

expected to do so again here: first, they contend that the rule applies not to religious accommodations, but only to religious preferences; second, they assert that the baseline for assessing burden shifting is a world without government regulation; and finally, they maintain that RFRA somehow displaces the Establishment Clause. These arguments are without merit.

a. The Third-Party-Harm Rule Applies to Accommodations

The Supreme Court has made clear that the Establishment Clause rule against third-party harms applies fully to religious exemptions, such as the Religious Exemption Rule, that lift government-imposed burdens on religious exercise. Some *amici*, however, disagree with that conclusion and assert that "[t]he government does not establish religion by leaving it alone."[2] In their view, the government enjoys a constitutionally unbounded prerogative to lift burdens on religious practice that the government itself has created (accommodations), but may not provide an advantage for religious believers (preferences). These *amici* add that the Religious Exemption Rule is an accommodation, not a preference, and thus cannot violate the Establishment Clause as interpreted in *Caldor* and *Cutter*.[3] To support this assertion, they cite *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), and *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

There is a straightforward response to this argument, which is that a unanimous Supreme Court squarely rejected it in *Cutter v. Wilkinson*. As explained above, *Cutter* involved a challenge to RLUIPA, which the Court described as "alleviat[ing] exceptional *government-created burdens*

[2] Br. of *Amici Curiae* Constitutional Law Scholars Supporting Intervenor-Def.-Appellant and Reversal 14, *Pennsylvania v. Trump*, Nos. 17-3752, 18-1253, 19-1129, 19-1189 (3d Cir. Feb. 2, 2019) (citation omitted) [hereinafter Constitutional Law Scholars Br.].

[3] This argument rests on many of the same premises as *amici*'s claim that the Religious Exemption Rule involves no "state action." *See* Constitutional Law Scholars Br. 22-26.

on private religious exercise." 544 U.S. at 720 (emphasis added). Even though the *Cutter* Court viewed the relevant burdens as "government-created," it held that any accommodations under RLUIPA still had to survive Establishment Clause review. Indeed, in the very next sentence, the Court relied on *Caldor* to hold that RLUIPA is permissible under the Establishment Clause *only* because it requires courts to account for the interests of third-party nonbeneficaries. *Id*. If the Establishment Clause did not apply to exemptions like RLUIPA that purport to "leave religion alone," then it would have been unnecessary to invoke *Caldor* or, indeed, to consider third-party interests at all. The only sound reading of *Cutter* is that the Establishment Clause applies to religious exemptions, and it does so because an obvious way for the government to violate religious neutrality is by lifting regulations under circumstances that burden third parties or disregard their interests. Doing so favors the religious beliefs of employers at the expense of employees who adhere to different religious beliefs or none at all.

What, then, to make of *Amos* and *Hosanna-Tabor*, both of which allowed exemptions that could substantially burden third parties? The answer is that these cases concerned the institutional autonomy of religious congregations and religious non-profits to control their own leadership and membership. *Hosanna-Tabor* held that houses of worship are exempt from anti-discrimination law when making employment decisions about clergy and other "ministerial" employees. 565 U.S. at 181-82. The Court grounded this "ministerial exception" in both the Free Exercise and Establishment Clauses, holding that houses of worship have a right against government interference with ecclesiastical decisions concerning internal governance. *Id.* at 188. Similarly, *Amos* rejected an Establishment Clause challenge to § 702 of Title VII, 42 U.S.C. § 2000e-1(a), which allows religious organizations to discriminate on the basis of religious affiliation in employment decisions related to their religious activities. 483 U.S. at 330.

Hosanna-Tabor and *Amos* are exceptions to the rule, not statements of it. This is presumably why no opinion in *Hobby Lobby* even mentioned *Amos* in any discussions of third-party harm. *See also Hosanna-Tabor*, 565 U.S. at 200-01 (Alito, J., concurring) ("Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith.").

To be sure, the majority in *Amos* suggested sympathy for the distinction between accommodations and preferences. *See* 483 U.S. at 337 ("A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." (emphasis in original)). But Justice O'Connor rejected that distinction while writing separately in *Amos*. *See Amos*, 483 U.S. at 347 (O'Connor, J., concurring in the judgment) ("This distinction seems to me to obscure far more than to enlighten. Almost any government benefit to religion could be recharacterized as simply 'allowing' a religion to better advance itself, unless perhaps it involved actual proselytization by government agents."). And in *Cutter*, the Court expressly embraced Justice O'Connor's analysis. Not only did it apply the third-party-harm rule to an exemption that lifts "government-created burdens on private religious exercise," but it cited Justice O'Connor's concurrence while doing so. 544 U.S. at 720; Frederick M. Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 Vand. L. Rev. En Banc 51, 61-62 (2014).[4]

[4] Justice O'Connor was right to warn about the incoherence of a distinction between accommodations and preferences. As an extreme example, imagine a state that permitted ritualistic beatings by providing a religious exemption from all statutes criminalizing assault and battery. The exemption could be framed as an accommodation rather than a preference, or "government leaving religion alone." But this exemption would reasonably be seen by many as a religious

In short, *Cutter* clearly applied the Establishment Clause to a religious exemption that lifts government-imposed burdens—just as the Religious Exemption Rule does—and it did so in reliance on *Cutter* and Justice O'Connor's *Amos* concurrence. The only plausible explanation is that *Amos* and *Hosanna-Tabor* are exceptional decisions that protect the right of churches and other religious organizations to control their leadership and membership without government interference—an exception not implicated in this litigation.[5]

b. The Baseline for Third-Party-Harm Analysis Includes Statutory Protections, Such as Those Conferred by the ACA

In determining whether an exemption shifts substantial burdens to third parties, courts take into account the loss of any existing statutory protections. Put differently, the "baseline" for such analysis includes existing rights like the contraceptive coverage requirements promulgated under the ACA.[6]

---

preference. And we suspect most would think it unconscionable to make non-believers bear this burden as the price of accommodation.

[5] While *amici* have objected that the government must treat all religious believers the same, nothing in law or logic suggests that for-profit corporations and churches must be treated the same. Indeed, *Hosanna-Tabor* is inexplicable except as a case about the unique prerogatives of churches and other houses of worship. And if *amici*'s principle were adopted, it would discourage the government from providing religious exemptions even when most clearly desirable, lest they be extended without limit to every corporate entity that can assert a religious belief. *See, e.g.*, *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 464 (N.Y. 2006) ("To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than to promote, freedom of religion.").

[6] *See Costs of Conscience* at 794-98; Nelson Tebbe, Micah Schwartzman, & Richard Schragger, *When Do Religious Accommodations Burden Others?*, *in The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* 335-37 (Susanna Mancini & Michel Rosenfeld eds., Cambridge U. Press, 2018); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 Colum. L. Rev. 1453, 1483–89 (2015).

Applying that understanding here, tens of thousands of women will be burdened under the Religious Exemption Rule with the loss of contraceptive coverage as the price of accommodating their employers' religious beliefs. These women will have to pay significantly more for preventive health care than employees who are not affected by the challenged regulations. Those costs matter for Establishment Clause purposes: but for the government's exemptions, employees would not have to bear these costs.

Both the government and some of its *amici*, however, have argued that nobody will suffer from any government-created burden. Here is the government's explanation for that counter-intuitive conclusion:

> If some third parties do not receive contraceptive coverage from private parties whom the government chooses not to coerce, that result exists in the absence of governmental action—it is not a result the government has imposed. Calling that result a governmental burden rests on an incorrect presumption: That the government has an obligation to force private parties to benefit those third parties, and that the third parties have a right to those benefits.

Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57592, 57606 (Nov. 15, 2018); *see also* Constitutional Law Scholars Br. 13-17.

In sum, the government imagines that its decision to grant an exemption creates a world in which employees affected by the exemption were never entitled to contraceptive coverage in the first place. The government giveth and the government taketh away *in a single breath*, before anyone can claim to suffer burdens as a result of the decision to eliminate statutory protections.

This circular logic is foreclosed by *United States v. Lee*, 455 U.S. 252 (1982). There, an Amish employer claimed a religious exemption from paying Social Security taxes. *Id.* at 254-55. Under the government's analysis, *Lee* should have been an easy case: because the Free Exercise Clause preemptively excepted the employer from the statutory requirement to pay social security

taxes, his employees were never entitled to the benefits to begin with and thus could not complain about any resulting reduction in their benefits. But the Court did not analyze the issue that way, concluding instead:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.

Id. at 261. In this passage, *Lee* explicitly presumed that employees were entitled to their full social security benefits and the requested accommodation would therefore have burdened them by depriving them of those benefits. The same logic applies to this case, where the Religious Exemption Rule will shift burdens to women who do not share the employer's religious beliefs about contraception, depriving them of a benefit to which they are otherwise entitled.

More generally, in evaluating religious exemptions, the Court has always worked from a baseline that incorporates the protections of civil and criminal law; it has not assumed that if the Free Exercise Clause applies, there is no loss of protection to start with and thus no resulting harm to any group covered by the relevant law. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) (explaining the harms that could result from widespread exceptions to civil rights law protecting gay men and lesbians); *Tony & Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290 (1985) (rejecting religious exemption from minimum wage and other provisions under the Fair Labor Standards Act); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (rejecting religious exemption from prohibition on race discrimination in public accommodations under Civil Rights Act of 1964). Religious exemptions, whether under RFRA or under the free exercise test that *Lee* applied and RFRA was meant to restore, cannot be justified by pretending that those who lose statutory protections have not

suffered real and tangible losses, whether in the form of social security benefits, minimum wage guarantees, prohibitions on discrimination in public accommodations, or mandated health insurance coverage.[7]

There are additional problems with the notion that the Religious Exemption Rule does not disturb a statutory entitlement. People conduct their lives on the assumption that they are entitled to the benefits and safe harbors statutes promise them, and rightly so. Respect for that expectation is threaded throughout the law in principles of reliance and estoppel. Here, tens of thousands of people are currently receiving contraceptive coverage but would lose it if the Religious Exemption Rule goes into effect. It blinks reality to pretend that they would suffer no loss in that circumstance.

c. RFRA Does Not Alter or Displace Establishment Clause Requirements

Finally, Defendants and some *amici* have suggested that the only applicable requirements here are derived from RFRA, not the Establishment Clause. *See* Br. for Fed. Appellants 49-60, *Pennsylvania v. Trump*, Nos. 17-3752, 18-1253, 19-1129, 19-1189 (3d Cir. Feb. 15, 2019); Constitutional Law Scholars Br. 9-13. Not so.

First, this case is a challenge to the Religious Exemption Rule, not to RFRA. Under *Caldor* and *Cutter*, the Establishment Clause applies directly to the exemption at issue. *See, e.g.*, *Cutter*, 544 U.S. at 726. That includes the third-party harm limitation.

[7] We recognize that in *Hobby Lobby*, the Supreme Court cautioned, in dicta, that the existence of burdens on third parties cannot justify failing to consider whether alternative regulations might reduce burdens on religious free exercise. Otherwise, as the Court explained, "[b]y 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." 573 U.S. at 729 n.37. This logic, though, is fully consistent with treating statutory benefits as part of the baseline for measuring harms to third parties under the Establishment Clause. If those benefits are trivial or incidental, the government cannot use them as an excuse to avoid its responsibilities under RFRA. And even if third-party harms are significant, the government may be required under RFRA to adopt lesser restrictive means which avoid or mitigate them. *See id*. at 728-30.

Second, Defendants have contended that the Religious Exemption Rule is permitted *by the ACA itself*, separate and apart from any role that RFRA might play. *See* Br. for Fed. Appellants 39-49. With respect to that argument, there is plainly no basis for suggesting that RFRA somehow displaces or alters the Establishment Clause and its constitutional analysis.

Third, Plaintiffs have shown why it is both procedurally and substantively erroneous to treat the Religious Exemption Rule as justified (or required) by RFRA itself. *See* Mem. of Law In Supp. Pl.'s Mot. For Summ. J. 15-20; *see also* Resp. Br. of Appellees 70-88, *Pennsylvania v. Trump*, Nos. 17-3752, 18-1253, 19-1129, 19-1189 (3d Cir. Mar. 18, 2019).

Finally, even if the Religious Exemption Rule is based on a RFRA analysis, the government's assertion of what constitutes its compelling interests cannot make the Establishment Clause disappear. That point is critical because the government's conception of its own "compelling interests" under RFRA may exclude substantial costs on third parties that independently violate the Establishment Clause.

This litigation proves the point. In *Hobby Lobby*, the government stated that it had a compelling interest in requiring contraceptive coverage. 573 U.S. at 726-27. Now the government disclaims that interest. Br. for Fed. Appellants 52. But the existence of a compelling interest is not the measure of an Establishment Clause claim. The question is whether the Religious Exemption Rule will protect the religious beliefs of employers by shifting substantial costs to women who believe differently, forcing them to pay for—and thus, if they lack the funds, to conform to—their employers' religious beliefs about contraception. This is the very type of religious favoritism held to violate the Establishment Clause in *Caldor*.

C. The Religious Exemption Rule is Unconstitutional

The Religious Exemption Rule fails Establishment Clause scrutiny for two independent reasons: First, it operates as an unyielding preference of the kind explicitly barred by *Caldor*. Second, it shifts substantial costs to third parties. Either failure alone is fatal and the combination confirms that the Religious Exemption Rule is invalid.

a. The Religious Exemption Rule Generates an Unyielding Preference in Favor of Religious Adherents

Like the law invalidated in *Caldor*, the Religious Exemption Rule is "absolute and unqualified." 472 U.S. at 710. It takes no account of the harms it will inevitably impose. It provides no exceptions, no process for considering any harms that flow from accommodation, and no possible alternative to reduce harms to affected employees. It provides no judicial review to resolve those conflicts, as RFRA and RLUIPA do. Instead, it is a categorical mandate: if an employer chooses to take advantage of the exemption, employees and their dependents automatically lose their right to contraceptive coverage. It therefore calls for "unyielding weighting in favor of [religious] observers over all other interests," *id.* at 703, and lacks any provision or means to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries," *Cutter*, 544 U.S. at 720.

As *Cutter* made clear, the Constitution requires that any accommodation be "measured so that it does not override other significant interests." *Id.* at 710. That is an easy requirement to meet. The vast majority of accommodation laws protect particular, narrowly defined conduct where harms are nonexistent or easily managed (*e.g.*, allowing uniformed officers to wear religiously prescribed clothing). In crafting such laws, the legislature can anticipate potential conflicts and minimize the impact on third-party interests. If it does so in a proper manner, the law

is "measured" under *Cutter* and is therefore constitutional. *Id.*

Precisely the opposite is true for laws or regulations with broad scope of application such as the Religious Exemption Rule. When a law or regulation will apply to thousands of people and its consequences will be wide-ranging, it is *impossible* to account in advance for all relevant third-party interests—as is constitutionally required. That is, the agency cannot possibly ensure the law is "measured so that it does not override other significant interests." *Id*. The most the agency can do is provide a mechanism for consideration of those interests as particular situations arise.

The Religious Exemption Rule does not provide any such mechanism. Where a regulation such as this one lacks any means for future consideration of third-party harms, "religious concerns automatically control over all secular interests." *Caldor,* 472 U.S. at 709; *see also Cutter*, 544 U.S. at 720 (upholding RLUIPA because it required officials to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"); *Caldor*, 472 U.S. at 712 (O'Connor, J., concurring) (explaining that Title VII is constitutional because it requires only "reasonable rather than absolute accommodation"). Regardless of whether the Religious Exemption Rule is statutorily authorized by RFRA, it is precisely the kind of absolute and unqualified regulation that works an establishment by assigning an unyielding priority to the religious interests of employers over the interests of thousands of burdened employees.

b. The Religious Exemption Rule Impermissibly Shifts Harms to Third-Party Nonbeneficiaries

In addition, the Religious Exemption Rule requires a burden shifting of the kind the Supreme Court has emphatically rejected. Defendants have framed a zero-sum world: either women have access to contraceptive care, or employers are free to exercise their religion by refusing to provide contraceptive coverage. Yet, in unburdening employers' free exercise, the

Religious Exemption Rule shifts costs to thousands of women who will lose their statutory right to contraceptive coverage.

Evidence of harms is incontestable. "The Final Rules estimate that at least 70,500 women will lose coverage. . . . Thus, the only serious disagreement is not whether the States will be harmed, but how much." *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 828 (E.D. Pa. 2019) (internal citation omitted); *see also California v. Dep't of Health & Human Servs.*, 351 F. Supp. 3d 1267, 1297 (N.D. Cal. 2019) ("The Final Rules themselves estimate that tens of thousands of women nationwide will lose contraceptive coverage, and suggest that these women may be able to obtain substitute services at Title X family-planning clinics."). These women would be denied their statutory and regulatory entitlement to contraceptive coverage without cost sharing for themselves, their spouses, and their dependents. To obtain the coverage and care the ACA provides all others, they will be forced to bear substantial costs out of pocket that they would not incur in the absence of the exemption. *See Pennsylvania*, 351 F. Supp. 3d at 827-29. This is a direct burden that would not exist without exemption from contraceptive coverage requirements, and it would harm thousands. *See Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 607–608 (7th Cir. 2015) (describing the harm to women of loss of contraception coverage without cost sharing); *Priests for Life v. U.S. Dep't of Health and Human Services*, 772 F.3d 229, 259–262 (D.C. Cir. 2015) (same). The externalized financial cost will be substantial for most employees. Su-Ying Liang et. al., *Women's Out-of-Pocket Expenditures and Dispensing Patterns for Oral Contraceptive Pills Between 1996 and 2006*, 83 Contraception 528, 531 (2011); *see also* Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies without Cost-Sharing*, 14 Guttmacher Pol'y Rev. 7, 9-10 (2011).

Employees who lose coverage under the Religious Exemption Rule and cannot afford the

contraceptive services to which they would otherwise be entitled under the ACA will be forced to bear myriad non-monetary costs as well. These burdens are considerable, including the risk of unplanned pregnancy and the consequent health risks to mothers and their children. *See Pennsylvania*, 351 F. Supp. 3d at 828 ("Disruptions in contraceptive coverage will lead to women suffering unintended pregnancies and other medical consequences."); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012) [hereinafter *Group Health Plans*]; *see also* Br. of Guttmacher Inst. & Professor Sara Rosenbaum as Amicus Curiae in Supp. Gov't 21-22, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 & *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356 (U.S. Jan. 28, 2014). Reducing access to contraceptives also restricts their use for treatment of non-reproductive health issues. *Pennsylvania*, 351 F. Supp. 3d at 828-29; *Group Health Plans*, 77 Fed. Reg. at 8727-28. Finally, when some women are denied contraceptive coverage, all women suffer from the greater gender disparities that result.[8] These are only a few illustrative examples of the harms that will flow from the Religious Exemption Rule.

In light of these harms, there can be no doubt that the Religious Exemption Rule will shift significant burdens to employees who do not object to contraception but work for employers who do. Those employees and their dependents will bear these costs as the price of

[8] *Cf. Group Health Plans*, 77 Fed. Reg. at 8728:

> Researchers have shown that access to contraception improves the social and economic status of women. Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force. . . . [O]wing to reproductive and sex-specific conditions, women use preventive services more than men, generating significant out-of-pocket expenses for women. The Departments aim to reduce these disparities by providing women broad access to preventive services, including contraceptive services.

accommodating their employers' religious convictions. The Framers opposed forcing non-adherents to pay a small tax in order to support others' beliefs. Yet the Religious Exemption Rule goes much further, forcing a nationwide subset of Americans to surrender their rights to preventive health care in order to benefit another subset of Americans opposed to contraception. The Establishment Clause forbids this. *See Kiryas Joel*, 512 U.S. at 725 (Kennedy, J., concurring in the judgment) ("There is a point . . . at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment." (citing *Caldor*, 472 U.S. at 709-10)).

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that this Court may grant summary judgment with respect to the Religious Exemption Rule.

Dated: June 7, 2019

Respectfully Submitted,

By: */s/ Joshua Matz*
JOSHUA MATZ (*Pro Hac Vice* pending)
TALIA NISSIMYAN (*Pro Hac Vice* pending)
KAPLAN HECKER & FINK LLP
350 Fifth Avenue | Suite 7110
New York, NY 10118

By: */s/ Nancy B. G. Lassen, Esquire*
NANCY B. G. LASSEN (Local Counsel)
WILLIG, WILLIAMS & DAVIDSON
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103

Attorneys for Proposed Amici Church-State Scholars

APPENDIX A:

LIST OF *AMICI CURIAE*

Caroline Mala Corbin
Professor of Law
University of Miami School of Law

Katherine Franke
Sulzbacher Professor of Law
Columbia University

Frederick Mark Gedicks
Guy Anderson Chair & Professor of Law
Brigham Young University Law School

Sarah Barringer Gordon
Arlin M. Adams Professor of Constitutional Law and Professor of History
University of Pennsylvania Law School

Steven K. Green
Fred H. Paulus Professor of Law
Director of the Center for Religion, Law & Democracy
Willamette University

Leslie Griffin
William S. Boyd Professor of Law
UNLV School of Law

Ira C. Lupu
F. Elwood and Eleanor Davis Professor Emeritus of Law
George Washington Law School

Richard C. Schragger
Perre Bowen Professor of Law
University of Virginia School of Law

Micah Schwartzman
Joseph W. Dorn Research Professor of Law
University of Virginia School of Law

Elizabeth Sepper
Professor of Law
Washington University School of Law

Nomi Stolzenberg
Nathan and Lilly Shapell Chair in Law
USC Gould School of Law

Nelson Tebbe
Professor of Law
Cornell Law School