No. 19-431

IN THE

Supreme Court of the United States

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

Petitioner,

v.

THE COMMONWEALTH OF PENNSYLVANIA
AND THE STATE OF NEW JERSEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS; NATIONAL ASSOCIATION OF EVANGELICALS; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; THE LUTHERAN CHURCH–MISSOURI SYNOD; CHURCH OF GOD IN CHRIST, INC. AND COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES IN SUPPORT OF PETITIONER

ALEXANDER DUSHKU
R. SHAWN GUNNARSON
Counsel of Record
JAMES C. PHILLIPS
KIRTON | MCCONKIE
36 South State Street, Suite 1900
Salt Lake City, Utah 84111
(801) 328-3600
sgunnarson@kmclaw.com

Counsel for Amici Curiae

QUESTION PRESENTED

Amici will address the following question: Whether the federal government lawfully exempted religious objectors from the regulatory requirement to provide health plans with contraceptive coverage.

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INTERESTS OF *AMICI CURIAE*[1]

Amici are a diverse group of religious organizations committed to defending the integrity of the Religious Freedom Restoration Act (RFRA). Some *amici* actively participated in the effort to enact RFRA in 1993 and to amend it in 2001. We are submitting this brief out of a concern that the Third Circuit's decision, unless reviewed and reversed, will severely diminish RFRA's effectiveness as a protection for religious communities and people of faith.

SUMMARY OF ARGUMENT

The need for review is compelling because the Third Circuit's decision conflicts with *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (per curiam) and *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Like them, this case asks whether RFRA protects religious employers such as Petitioner Little Sisters of the Poor Peter and Paul Home (Little Sisters) from federal regulations requiring most large employers to include contraceptive coverage in their healthcare plans. See 45 C.F.R. 147.130(a)(1)(iv) (U.S. Department of Health & Human Services); 29 C.F.R. 2590.715-2713(a)(1)(iv) (U.S. Department of Labor); 26 C.F.R. 54.9815-2713(a)

1. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *amici* certify that counsel of record for all parties received notice of the intent to file this brief at least 10 days before it was due and have consented to this filing.

(1)(iv) (U.S. Department of the Treasury). In holding that RFRA offers no relief, App. 48a, the decision below contradicts this Court's precedents.

The Third Circuit's departures from the principle of vertical precedent are evident. Where *Zubik* encourages the government and religious objectors to identify a compromise approach that would end years of litigation, the decision below voided the rule that the government adopted in a good faith effort to comply with *Zubik*'s mandate. The decision below deepened that conflict by relying on a prior circuit decision that *Zubik* vacated. Left unreviewed, the Third Circuit's decision will thwart *Zubik*'s effort to facilitate a voluntary compromise.

Conflicts between the decision below and *Hobby Lobby* are direct and no less troubling.

The Third Circuit interpreted RFRA's substantial burden requirement as an invitation to probe the reasonableness of petitioner's religious objection. But *Hobby Lobby* forecloses that inquiry. It holds that under RFRA a substantial burden depends on how much force the government exerts, not on whether the religious objection is persuasive or even plausible.

Another grave conflict appears in the Third Circuit's treatment of third-party harm as a sufficient reason to deny a RFRA claim. *Hobby Lobby* rejects that notion. It explains that RFRA's compelling-interest test carefully balances religious freedom with competing interests, including third-party harm. By allowing third-party harm to supplant Congress's balancing test, the decision below urgently calls for review.

The multiple conflicts created by the decision below present "one of the strongest possible grounds" for review. Stephen M. Shapiro *et al.*, *Supreme Court Practice* 4–20 (11th ed. 2019). By disregarding *Zubik* and *Hobby Lobby*, the court of appeals transgressed a cardinal principle of our federal system—that "a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto* v. *Davis*, 454 U.S. 370, 375 (1982) (per curiam); see also Joseph Story, *Commentaries on the Constitution of the United States* § 167 (Carolina Acad. Press 1987) (1833) ("[J]udicial decisions of the highest tribunal * * * are considered, as establishing the true construction of the laws, which are brought into controversy before it.").

The Third Circuit's decision also holds national importance. RFRA applies to every aspect of federal law—including the contraceptive mandate. Yet without this Court's intervention, the decision below will defeat "the government's admirable effort to accommodate religious liberty." Pet. 2. The court of appeals has affirmed a nationwide injunction blocking the enforcement of a regulatory accommodation that seeks to end *eight* years of litigation. Review is needed to bring finality to this corrosive dispute. Beyond that, the lower court's misreading of RFRA threatens to undercut every sort of claim under the statute, both within the Third Circuit and elsewhere. In fact, the Ninth Circuit recently followed the Third Circuit's lead in a nearly identical case. Given the national importance of the questions presented, review is warranted even without the conflicts we describe. A final decision by a federal appellate court that hollows out the Nation's

leading civil rights law protecting religious freedom should not be permitted to stand.

ARGUMENT

I. The Decision Below Conflicts in Principle with *Zubik* v. *Burwell*.

A. The Third Circuit voided a regulatory accommodation that conscientiously followed this Court's directions in *Zubik*. By doing so, the decision below ignored *Zubik*'s limitations on litigation regarding the application of the contraceptive mandate to religious employers. A brief review of *Zubik* and subsequent developments puts that conflict into sharp relief.

Following oral argument in *Zubik*, this Court ordered supplemental briefing. See *Zubik*, 194 L. Ed. 2d 599 (Mar. 29, 2016). The government conceded that the mandate "could be modified" to accommodate sincere religious objections raised by Little Sisters and other religious employers to the self-certification procedure. See Suppl. Brief of Respondents at 14–15, *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418). The employers agreed that a modification could remove the burden on their religious exercise. See Suppl. Brief of Petitioners at 1, *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418).

These assurances, amounting to a "substantial clarification and refinement" of the parties' positions, led the Court to vacate the lower-court judgments and to remand. *Zubik*, 136 S. Ct. at 1560. The Court directed that "the parties on remand should be afforded

an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage." *Ibid.* (internal quotation marks omitted). To facilitate that approach, the courts of appeals were instructed to "allow the parties sufficient time to resolve any outstanding issues between them." *Ibid.* And since the litigation itself registered the employers' religious objections, the Court barred the government from "impos[ing] taxes or penalties on petitioners for failure to provide the relevant notice." *Id.* at 1561.

Both the fourth interim final rule (IFR) and the final rule reflect the government's effort to comply with *Zubik*'s remand instructions. As the IFR noted, *Zubik* "instructed the parties to consider alternative accommodations for the objecting plaintiffs, after the Government suggested that such alternatives might be possible." 82 Fed. Reg. 47,792, 47,799 (Oct. 13, 2017). In keeping with that suggestion, the relevant federal agencies concluded that "the most appropriate approach to resolve these concerns is to expand the exemptions * * * while maintaining the accommodation as an option for providing contraceptive coverage, without forcing entities to choose between compliance with either the Mandate or the accommodation and their religious beliefs." 83 Fed. Reg. 57,536, 57,544 (Nov. 15, 2018). This approach satisfies petitioner's objections. Although some critics quibble that expanding the exemption and making the accommodation optional will reduce access to contraception, the government responded that it "has other means available to it for increasing women's

access to contraception," including "means [that] are less restrictive of religious exercise" than enforcing the contraceptive mandate against religious objectors. *Id.* at 57,551. Adopting a less restrictive means of making contraception accessible is necessary because the government acknowledged that forcing a religious employer to choose between its faith and the contrary terms of the mandate or the accommodation "imposes a substantial burden on religious exercise under RFRA." *Id.* at 57,546.

The decision below conflicts with *Zubik* by neglecting its directive to let the parties resolve their differences voluntarily. That conflict is apparent by contrasting the decision below with the vacate-and-remand precedent cited in *Zubik*. Following this Court's remand in *Madison County* v. *Oneida Indian Nation of New York*, 562 U.S. 42, 42 (2011) (per curiam), the Second Circuit reversed its earlier decision because of a party's changed legal position. See *Oneida Indian Nation of New York* v. *Madison Cty.*, 665 F.3d 408, 414 (2d Cir. 2011). And following a remand in *Kiyemba* v. *Obama*, 559 U.S. 131, 132 (2010) (per curiam), the D.C. Circuit noted that "[i]n compliance with the Supreme Court's *mandate* we held further proceedings." *Kiyemba* v. *Obama*, 605 F.3d 1046, 1047 (D.C. Cir. 2010) (emphasis added). But the D.C. Circuit reinstated its earlier judgment because the government admitted that the information that this Court relied on when remanding the case on "was not completely accurate." *Ibid.*

Unlike *Madison County*, the Third Circuit here did not reverse its earlier decision once the government changed its legal position. And unlike *Kiyemba*, the

Third Circuit appears not to have regarded the remand order in *Zubik* as a mandate at all. Instead, the court invoked a decision that this Court vacated to justify rejecting the government's defense of a regulatory accommodation that *Zubik* all but invited.

Lower courts have no authority to reopen legal issues that this Court has decided. Yet the decision below presumed that *Zubik* was mistaken. Where *Zubik* rests on an understanding that the Affordable Care Act permits the government to accommodate religious employers, the lower court ruled that the statute contains no such authority. See App. 38a–43a. And even though *Zubik* remanded for the government to identify a less restrictive means of applying its mandate, the court of appeals held that RFRA does not require the relief that Little Sisters seeks. See App. 48a. Fortified with these conclusions, the Third Circuit determined that there was no room for the parties to negotiate any outcome besides the pre-*Zubik* self-certification process. See *ibid.* ("[T]he status quo prior to the new Rule, with the Accommodation, did not infringe on the religious exercise of covered employers, nor is there a basis to conclude the Accommodation process infringes on the religious exercise of any employer."). By this logic, neither the Court's vacate-and-remand order in *Zubik* nor the regulatory solutions that closely tracked the positions presented to this Court in *Zubik* had any legal foundation.

For these reasons, the decision below conflicts at least in principle with *Zubik*.

That conflict is especially troubling because the Third Circuit's decision vitiated the vacate-and-remand

device used in *Zubik*. This device allows the Court to resolve cases without a decision on the merits when a party makes an admission that opens the door to voluntary settlement. Unless lower courts allow parties to resolve their differences on the terms contemplated by such a remand order, that device will become largely ineffective.

B. The Third Circuit further departed from the principle of vertical precedent by relying on a decision that this Court vacated. In *Zubik*, the Court "vacate[d] the judgments below," 136 S. Ct. at 1560, including the Third Circuit's decision in *Geneva College* v. *Secretary U.S. Department of Health & Human Services*, 778 F.3d 422 (3d Cir. 2015). Yet the decision below treated *Geneva College* as valid precedent because, in its view, *Zubik* "vacated our judgment in *Geneva* but did not attack our reasoning." *Real Alts., Inc.* v. *Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 356 n.18 (3d Cir. 2017). On that basis, the court of appeals quoted *Geneva College* to bolster its critical ruling that "the submission of the self-certification form does not make the [employers] 'complicit' in the provision of contraceptive coverage." App. 46a (quoting *Geneva College*, 778 F.3d at 438).

The Third Circuit's reliance on *Geneva College* was no mere technical flaw. It resurrected a precedent that *Zubik* deliberately cleared away. In doing so, the decision below transgressed the vital principle of adherence to this Court's vacatur orders. A decision by this Court "vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as

the sole law of the case." *O'Connor* v. *Donaldson*, 422 U.S. 563, 577 n.12 (1975). By resisting that principle, the Third Circuit's decision is at odds with *Zubik*.

II. The Decision Below Directly Conflicts with *Burwell* v. *Hobby Lobby Stores, Inc.*

A. The Third Circuit likewise ignored *Hobby Lobby's* interpretation and application of RFRA's substantial burden standard.

The court of appeals improperly revisited an issue resolved by this Court in *Hobby Lobby*, 573 U.S. at 682. It holds that the same regulatory mandate that affects Little Sisters in this case substantially burdens the religious exercise of objecting employers. Pointing to the multi-million-dollar fines the government was authorized to exact for noncompliance, the court concluded that "[i]f these consequences do not amount to a substantial burden, it is hard to see what would." *Id.* at 691.

Little Sisters faces the same financial risks. Its operation of a single home in Pittsburgh with 67 employees subjects Little Sisters to annual fines of $2,445,500 for failure to comply with the mandate. See 26 U.S.C. 4980D(a)–(b) (noncompliant health care plans subject to daily fines of $100 per employee). Yet the court below spent pages analyzing whether the mandate substantially burdens Little Sisters' religious exercise. See App. 44a–47a. Revisiting that question failed to give *Hobby Lobby* conclusive effect.

True, *Hobby Lobby* reserved the question whether the self-certification process contested by Little Sisters here "complies with RFRA for purposes of all religious claims." 573 U.S. at 731. But the Court reached that question as part of its analysis of RFRA's least-restrictive-means standard—not as part of its substantial burden analysis. See *id.* at 728–31. The Third Circuit discussed the validity of the final rule and its self-certification predecessor without acknowledging *Hobby Lobby*'s starting point that the contraceptive mandate imposes a substantial burden on objecting religious employers. See App. 44a–45a.[2]

The court of appeals did not avoid this conflict by shifting focus to the adequacy of different religious accommodations. See App. 45a–46a. RFRA treats the issue of substantial burden separately from the adequacy of any government accommodation under the least-restrictive-means standard. See 42 U.S.C. 2000bb-1(b). Since *Hobby Lobby* decides the issue of substantial burden with respect to the contraceptive mandate, the court of appeals contradicted this Court by reaching the opposite conclusion.

The Third Circuit further rejected *Hobby Lobby* by invoking the substantial-burden standard as a license to assess the weight of Little Sisters' religious objection. See App. 44a n.28 (insisting on the authority to conduct

2. *Zubik* noted in passing that the Court there did not "decide whether [religious employers'] religious exercise has been substantially burdened." 136 S. Ct. at 1560. But *Hobby Lobby* had already decided that the regulatory mandate challenged in *Zubik* and here imposed a substantial burden on religious exercise. See *Hobby Lobby*, 573 U.S. at 691.

an "objective evaluation of the nature of the claimed burden and the substantiality of that burden") (quoting *Real Alts.*, 867 F.3d at 356). *Hobby Lobby* rebuffs that intrusive approach, but the court below tried to justify it anyway by quoting at length from a prior decision that *Zubik* vacated. The religious objection was invalid, the court said, because the self-certification form that Little Sisters cannot submit in good conscience actually "'does not trigger or facilitate'" contraceptive coverage or "make the [employers] 'complicit' in the provision of contraceptive coverage." App. 45a–46a (quoting *Geneva Coll.*, 778 F.3d at 437–48). Having downplayed Little Sisters' theological concerns, the court concluded that "any possible burden from the notification procedure is not substantial." App. 46a (citing *Geneva Coll.*, 778 F.3d at 442).

By sitting in judgment on Little Sisters' religious objection, the decision below directly collides with *Hobby Lobby*. It rejects any attempt to "tell [objecting employers] that their beliefs are flawed." 573 U.S. at 724. Under RFRA, a reviewing court's "narrow function" is to decide whether the religious objection expresses "an honest conviction." *Id.* at 725 (quoting *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)). Because there is no dispute that Little Sisters' religious objections to the contraceptive mandate and the self-certification process are sincere, RFRA does not authorize further judicial inquiry into the content of those objections. Yet the Third Circuit brushed aside Little Sisters' objection to the self-certification form as insubstantial. See App. 45a–46a.[3] That conclusion

3. Even if the factual basis for Little Sisters' religious objection were relevant, their concern with complicity is well-founded. The government has conceded that submitting the self-

cannot be reconciled with *Hobby Lobby*, which held that RFRA precludes a court from asking "whether the religious belief asserted in a RFRA case is reasonable." 573 U.S. at 724.[4]

The decision below contradicts *Hobby Lobby*'s holdings on RFRA's substantial burden standard twice over. The Third Circuit neglected the Court's holding that the contraceptive mandate imposes a substantial burden on religious exercise, and it rejected Little Sisters' religious objection as insubstantial. The court of appeals further deepened these conflicts by relying on a decision that the Court vacated in *Zubik*.

B. The court of appeals also embraced an approach to third-party harm under RFRA that *Hobby Lobby* repudiated.

The Third Circuit ruled that third-party harm is a consideration for any claim under RFRA. App. 45a ("The Supreme Court has directed that, when considering a requested accommodation to address the burden, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.") (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005)).

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certification form enables employees to receive contraceptive coverage from the employer's own health care plan. See Brief of Respondents at 38, *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418).

4. *Hobby Lobby* also rejected a judicial inquiry into the plausibility of a RFRA claimant's religious objection as offensive under the First Amendment. See 573 U.S. at 724–25 (citing *Employment Div., Dept. of Human Resources of Oregon* v. *Smith*, 494 U.S. 872, 887 (1990); *Thomas*, 450 U.S. at 715).

The court of appeals then rejected the agencies' final rule in part because it "would impose an undue burden on * * * the female employees who will lose coverage for contraceptive care." App. 47a. Remarkably, the Third Circuit supported this conclusion by quoting the *dissenting* opinion in *Hobby Lobby*. See App. 47a–48a (quoting 573 U.S. at 764 (Ginsburg, J., dissenting)). With that faulty premise, the court held that the pre-*Zubik* religious accommodation adequately satisfies RFRA because it "provides a means for an observer to adhere to religious precepts and simultaneously allows women to receive statutorily-mandated health care coverage." App. 45a.[5]

Granting notions of third-party harm power to derail any RFRA claim directly conflicts with *Hobby Lobby*. It held that RFRA does not give the government "an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals." 537 U.S. at 729 n.37. Although courts applying RFRA must account for the effect of a religious accommodation on others, such effects "will often inform" the application of the compelling-interest and least-restrictive-means analysis. *Ibid.* But this concern for the impact of a religious accommodation on others has a logical stopping point:

> [I]t could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved

5. The decision below also pointed to the avoidance of third-party harm as a reason for finding that the nationwide injunction serves the public interest. See App. 49a.

> through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties.

Ibid. Allowing third-party harm to defeat a RFRA claim, outside the compelling-interest test, would render RFRA "meaningless." *Ibid.* The government—or anyone else challenging the assertion of RFRA, for that matter—could evade the statute by "framing any Government regulation as benefitting a third party," thereby transforming the regulation into an entitlement "to which nobody could object on religious grounds." *Ibid.*

The decision below flouted this Court's interpretation of RFRA. Where *Hobby Lobby* rejects third-party harm as a consideration independent of the compelling-interest test, the Third Circuit treated it as a sufficient reason to deny Little Sisters' RFRA claim. By relying on the dissenting opinion in *Hobby Lobby* to justify an elevated role for third-party harm, the court of appeals expressed its disagreement conspicuously. See App. 47a–48a (quoting 573 U.S. at 764 (Ginsburg, J., dissenting)).

III. The Question Presented Holds National Importance.

A. The conflicts between the decision below and this Court's precedents are far from merely technical; they go to the foundation of RFRA's legal framework. Leaving that decision unreviewed threatens to undermine the Nation's leading civil rights statute protecting religious freedom.

RFRA's demands are unambiguous. The federal government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person * * * is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling interest." 42 U.S.C. 2000bb-1(b) (punctuation altered and subsections removed). The decision below corrupted this framework, first, by allowing a court to question the plausibility of a religious objection and, second, by supplanting the compelling-interest test with an outcome-determinative inquiry into third-party harm.

1. RFRA does not invite courts to pass judgment on the relative weight or seriousness of a religious objection. Instead, the statute requires a court to determine whether the contested government act "substantially burden[s]" religious exercise. *Ibid.* This standard obliges a court to determine whether the *law* exerts substantial force or pressure on religious exercise—not whether the claimant's *religious belief* is substantial. See *Hobby Lobby*, 573 U.S. at 725–26.

Even if the statute were unclear on this point, the First Amendment prohibits a court from adjudicating the reasonableness of a RFRA claimant's religious objection, as the Third Circuit did. See App. 45a–46a. "Repeatedly and in many different contexts, [this Court has] warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. The free exercise of religion is incompatible with an official evaluation of religious belief to determine

whether it is sufficiently credible or substantial to warrant legal protection. See *United States* v. *Ballard*, 322 U.S. 78, 86 (1944). A court may not substitute its own understanding of a religious belief or duty for the view sincerely articulated by a believer. See *Hernandez* v. *Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989). And a court does not avoid trespassing into forbidden territory by confining its inquiry to questions of rationality and consistency. See *Thomas*, 450 U.S. at 714. The "very process of inquiry" into the reasonableness or plausibility of religious belief "impinge[s] on rights guaranteed by the Religion Clauses." *NLRB* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979). Declaring that Little Sisters' religious beliefs were mistaken, as the Third Circuit did, App. 45a–46a, presumes an illicit authority to "prescribe what shall be orthodox in * * * religion." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Neither the Third Circuit's probing of petitioner's religious beliefs nor its conclusion that those beliefs were mistaken can be reconciled with the fundamental right to the free exercise of religion.

2. The Third Circuit's other error is no less significant. Denying a RFRA claim because of asserted third-party harm overthrows the balancing test prescribed by Congress. RFRA accounts for harms to third parties through its balancing test rather than through a categorical rule. See *Hobby Lobby*, 537 U.S. at 729 n.37 (third-party harm is a "consideration [that] will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest").

Letting third-party harm compel the outcome of a RFRA claim subverts the statute's command to apply "the most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997). By making third-party harm, however slight, a complete defense, a court substitutes that single interest for a statutory standard prescribed by Congress to "strik[e] sensible balances between religious liberty and competing prior governmental interests." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (quoting 42 U.S.C. 2000bb(a)(5)). And by denying a RFRA claim whenever a regulation is framed as an entitlement that benefits third parties, making any religious accommodation a denial of the entitlement and thus a "harm," the statute becomes "meaningless." *Hobby Lobby*, 573 U.S. at 729 n.37.[6]

3. Nor does the Establishment Clause require a consideration of third-party harm for every RFRA claim. The decision below quotes *Cutter* for the principle that "courts must take adequate account" of third-party burdens. App. 45a (quoting *Cutter*, 544 U.S. at 720). But

6. Elevating third-party harm as a bar to RFRA claims could dilute the application of strict scrutiny elsewhere in federal law. Since claims under RFRA must be "adjudicated in the same manner as constitutionally mandated applications of the test," *O Centro*, 546 U.S. at 430, misreading the statute could misdirect courts into depriving strict scrutiny of its potency under the Constitution. Freedom of speech would be an obvious casualty. If harmful speech no longer deserved protection, the First Amendment's protections would be diminished. See *Snyder* v. *Phelps*, 562 U.S. 443, 458–61 (2011) (demonstration near serviceman's funeral protected); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 352 (1974) (defamatory speech protected).

the court of appeals took this line out of context. *Cutter* refers to third-party harm to explain why the Religious Land Use and Institutionalized Persons Act (RLUIPA) is consistent with the Establishment Clause—not to require a consideration of third-party harm in every case involving a religious accommodation. Specifically, *Cutter* explains that RLUIPA is valid because it "alleviates exceptional government-created burdens on private religious exercise." 544 U.S. at 720.

The same can be said of RFRA. It resembles other statutory exemptions sustained on the principle that when a general regulatory or tax law imposes a burden on a religious belief or practice, lawmakers may lift that burden without violating the Establishment Clause even if doing so burdens others. See, *e.g.*, *Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327 (1987) (a religious exemption for employers in Title VII does not violate the Establishment Clause). See generally Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?*, 106 Ky. L.J. 603, 604 (2018) ("In an unbroken line of cases now spanning a century, the Supreme Court of the United States has ten times rejected the argument that a religious exemption in a larger regulatory or tax framework is an advancement of religion in contravention of the Establishment Clause.").

Neither *Cutter* nor the Establishment Clause supports the Third Circuit's determination to elevate third-party harm into an outcome-determinative consideration. RFRA is a valid religious exemption that lifts government-imposed burdens from religious

entities, much as the laws did in *Cutter* and *Amos*. RFRA addresses the problem of third-party harm through application of the strict scrutiny standard, which balances any claim for a religious accommodation against competing government interests—including its interest in avoiding or mitigating third-party harm. The Establishment Clause demands nothing more.

B. The decision below threatens the integrity of RFRA within the Third Circuit—and elsewhere.

The errors infecting the decision below will not only affect the disposition of RFRA claims brought by religious employers seeking relief from the contraceptive mandate. As a circuit precedent, the decision below will frustrate many a religious believer or institution seeking the protection that RFRA was enacted to provide.

Nor will the harm remain within the Third Circuit. By entrenching an objectionable strain of pre-*Zubik* precedent, the decision below already appears to be encouraging other lower courts to follow its example:

- Only two weeks ago, the Ninth Circuit cited Third Circuit precedent and followed its interpretation of RFRA's substantial burden test in another decision enjoining the final rule. *California* v. *U.S. Dep't of Health & Human Servs.*, Nos. 19-15072, 19-15118, 19-15150, 2019 WL 5382250, at *11 (9th Cir. Oct. 22, 2019) (citing *Real Alts.*, 867 F.3d at 356 n.18). Two circuits have now affirmed sweeping injunctions blocking the final rule based, in part, on the same defective reading of RFRA.

- A federal district court in Texas cited *Real Alternatives* along with the Third Circuit's vacated decision in *Geneva College* in ruling that an employee did not suffer a substantial burden to his religious exercise under RFRA when required to contribute to a health care plan that included contraceptive coverage. See *Dierlam* v. *Trump*, No. 4:16-CV-307, 2017 WL 7049573, at *5–6 (S.D. Tex. Nov. 21, 2017) (citing *Real Alts.*, 867 F.3d at 356; *Geneva Coll.*, 778 F.3d at 442), appeal docketed, No. 18-20440 (5th Cir. July 10, 2018).

- A member of the Arizona Supreme Court has cited the decision below and other Third Circuit precedent for the principle that RFRA's substantial burden test presents "a legal question for the courts rather than a factual question determined by the sincerity of a person's religious beliefs and the existence of penalties for exercising those beliefs in a manner that violates a law." *Brush & Nib Studio, LC* v. *City of Phx.*, 448 P.3d 890, 939 (Ariz. 2019) (Timmer, J., dissenting) (citing *Penn.* v. *President U.S.*, 930 F.3d 543, 572 n.28 (3d Cir. 2019); *Real Alts.,* 867 F.3d at 356).

These decisions show that the decision below is already influencing other courts to reject RFRA's text and this Court's precedents. With such serious implications for the integrity of RFRA as a bulwark of religious freedom, the questions presented holds genuine national importance.

* * *

Review is imperative. Not only does the Third Circuit's decision conflict with *Zubik* and *Hobby Lobby*, it threatens to reduce one of America's leading civil rights laws to virtual impotence. RFRA was enacted to protect the exercise of religion as one of the Nation's highest values. But the decision below adopted a grudging interpretation of the statute that will, unless reversed, too often deny protection for religious people and institutions. Only this Court's intervention can ensure that RFRA remains a meaningful security for religious freedom.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

ALEXANDER DUSHKU
R. SHAWN GUNNARSON
Counsel of Record
JAMES C. PHILLIPS
KIRTON | MCCONKIE
36 South State Street, Suite 1900
Salt Lake City, Utah 84111
(801) 328-3600
sgunnarson@kmclaw.com

Counsel for Amici Curiae

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