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

BRIEF FOR PETITIONER

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March 2, 2020

QUESTIONS PRESENTED

Since 2011, federal courts have repeatedly considered whether forcing religious objectors to provide health plans that include contraceptive coverage violates the Religious Freedom Restoration Act (RFRA). Over and over again, this Court has reviewed these cases on an emergency basis or on the merits. Yet it has never definitively resolved the RFRA dispute. In 2016, an eight-Justice Court in *Zubik* v. *Burwell* did not reach the RFRA question and instead remanded for the parties to try to reach a resolution, on the evident assumption that the executive branch possessed the power to provide broader accommodations and/or exemptions. After months of negotiations (and an intervening election), the agencies finally agreed to promulgate new rules providing a broader exemption, seemingly bringing an end to this long-running dispute.

Those new rules were challenged, however, by several states, resulting in a nationwide injunction on the theory that RFRA and the Affordable Care Act not only do not require, but do not even *allow*, the religious exemption rules. That nationwide injunction has stagnated other cases, and it conflicts with the judgments of many courts that have issued final orders affirmatively *requiring* comparable exemptions under RFRA. The rights of religious objectors—including the Little Sisters' right to defend an exemption—remain very much at issue.

The questions presented are:

1. Whether a litigant who is directly protected by an administrative rule and has been allowed to intervene to defend it lacks standing to appeal a decision

invalidating the rule if the litigant is also protected by an injunction from a different court.

2. Whether the federal government lawfully exempted religious objectors from the regulatory requirement to provide health plans that include contraceptive coverage.

PARTIES TO THE PROCEEDING

Petitioner is the Little Sisters of the Poor Saints Peter and Paul Home.

Respondents are the Commonwealth of Pennsylvania; the State of New Jersey; Donald J. Trump, President of the United States of America; Alex M. Azar, Secretary of the U.S. Department of Health & Human Services; the U.S. Department of Health & Human Services; Eugene Scalia, Secretary of the U.S. Department of Labor; the U.S. Department of Labor; Steven Tener Mnuchin, Secretary of the U.S. Department of the Treasury; and the U.S. Department of the Treasury.

CORPORATE DISCLOSURE STATEMENT

Petitioner does not have any parent entities and does not issue stock.

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INTRODUCTION

For the better part of a decade, the Little Sisters have been resisting a contraceptive mandate that would require them to violate deeply rooted religious beliefs that all concede to be sincere. From the beginning, the federal government recognized that its mandate intruded on religiously sensitive areas and thus exempted some religious employers. And from the outset, the federal government recognized that the mandate was not some kind of categorical imperative that admitted of no exceptions. Not only a subset of religious employers, but thousands of non-religious employers with millions of employees were exempted from the mandate. Yet despite these other exemptions, the federal government drew the line at religious orders called to services beyond contemplation—here, providing services to the sick and elderly. For the Little Sisters and others like them, the government insisted on a form of compliance with the contraceptive mandate via a series of ever-evolving so-called "accommodations."

The Little Sisters steadfastly objected to these various alternative mechanisms for complying with the mandate. The government equally steadfastly insisted that the Little Sisters take concrete steps that, by the government's own admission, would constitute compliance with the mandate to provide their employees with cost-free access to contraceptives. The litigation proceeded all the way to this Court, where the federal government made crystal-clear that it could not accomplish its goal of ensuring "seamless coverage" without the cooperation of the Little Sisters and their plan. That concession made clear that as long as the government insisted on some form of compliance and

some degree of contraceptive coverage through the Little Sisters' plan, the only way to satisfy the Little Sisters' objection (and the only path to RFRA compliance) was to give the Little Sisters an exemption, like purely religious orders (and countless secular employers) had long enjoyed.

The executive branch finally got the message and exempted the Little Sisters. But the courts below resisted that resolution and enjoined the rule exempting the Little Sisters while denying them standing to fight for the rule. That extraordinary decision is wrong at every turn. The Little Sisters obviously have standing to defend a rule that finally grants them the exemption they have labored for years to obtain. And the question on the merits should not have been close. This Court has already found that the contraceptive mandate imposes a substantial burden on religious exercise. And subsequent events have only made clearer that the various forms of the accommodation were just various options for complying with the mandate and furnishing contraceptives seamlessly via the Little Sisters' plan. The Little Sisters' continued resistance to those accommodations reflects not any obstinacy, but the constancy of their beliefs. The simple reality is that when the government intrudes on deeply sensitive religious beliefs through a mandate that admits of exceptions (both religious and non-religious), the way to eliminate the burden is to extend the exemption. The federal government did just that here and in doing so "follow[ed] the best of our traditions." *Zorach* v. *Clausen*, 343 U.S. 306, 313-314 (1952). The decision below rejecting that effort defies those traditions and cannot stand.

OPINIONS BELOW

The Third Circuit's opinion is reported at 930 F.3d 543 and reproduced at Pet.App.1a-53a. The district court's opinion granting a preliminary injunction is reported at 351 F. Supp. 3d 791 and reproduced at Pet.App.57a-137a. The district court's earlier opinion granting a preliminary injunction is reported at 281 F. Supp. 3d 553 and reproduced at Pet.App.138a-192a.

JURISDICTION

The Third Circuit issued its opinion on July 12, 2019. Petitioner timely filed a petition for writ of certiorari on October 1, 2019, which this Court granted on January 17, 2020. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory provisions are reproduced in the appendix to this brief: 5 U.S.C. 553(b)-(c), 5 U.S.C. 559, 5 U.S.C. 706, 42 U.S.C. 2000bb, 42 U.S.C. 2000bb-1, 42 U.S.C 2000bb-2, 42 U.S.C. 2000bb-3, 42 U.S.C. 2000cc-3, 42 U.S.C. 2000cc-5. The relevant provisions of the Patient Protection and Affordable Care Act of 2010 and the relevant regulation at issue in this case are reproduced in Appendix G to Petition No. 19-431.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. RFRA

Congress enacted RFRA in 1993 "to provide very broad protection for religious liberty." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014); see

42 U.S.C. 2000bb *et seq*. RFRA accordingly commands that the "Government shall not substantially burden a person's exercise of religion" except in narrow circumstances based on the strongest of government interests. 42 U.S.C. 2000bb-1(a). Unless Congress creates an "explicit[]" exception, RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." *Id.*, 2000bb-3(a)-(b). Congress has never enacted such an exception. Thus, if a federal law or regulation imposes a substantial burden on a claimant's exercise of religion, RFRA obligates the government to refrain from imposing the burden unless the government can prove that "application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.*, 2000bb-1(b). This Court has recognized that this test is "exceptionally demanding." *Hobby Lobby*, 573 U.S. at 728.

RFRA's enactment followed directly from this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), which held that the Free Exercise Clause of the First Amendment "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" *Id.* at 879 (citation omitted). Through RFRA, Congress imposed an obligation on all parts of the federal government to avoid imposing religious burdens, and prescribed that strict scrutiny would apply to "all cases where free exercise of religion is substantially burdened," 42 U.S.C. 2000bb(b)(1), "even if the burden results from a rule of general applicability," 42 U.S.C. 2000bb-1(a).

RFRA defines "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(a). Congress specifically instructed that this inclusive definition "be construed in favor of a broad protection of religious exercise." 42 U.S.C. 2000cc-3(g); see also *Hobby Lobby*, 573 U.S. at 725 ("it is not for [courts] to say that * * * religious beliefs are mistaken or insubstantial"). RFRA thus provides "even broader protection for religious liberty than was available" under this Court's pre-*Smith* Free Exercise Clause jurisprudence. *Hobby Lobby*, 573 U.S. at 695 n.3.

2. The Contraceptive Mandate and the Government's Ensuing Efforts to Address Religious Objections

In 2010, Congress enacted the ACA "to increase the number of Americans covered by health insurance and decrease the cost of health care." *NFIB* v. *Sebelius*, 567 U.S. 519, 538 (2012); see Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119. To that end, the ACA requires many employers to offer "a group health plan or group health insurance coverage" with "minimum essential coverage." 26 U.S.C. 4980H, 5000A. As relevant here, "with respect to women," such coverage must include "preventive care and screenings" without any "cost sharing requirements." 42 U.S.C. 300gg-13(a)(4).

This preventive-care mandate does not apply to all employers. Employers with 50 or fewer employees need not offer health insurance at all, and so need not comply with the preventive-care mandate. See 26 U.S.C. 4980H(c)(2); Kaiser Family Found., *Employer Health Benefits 2019 Annual Survey* 44 (2019),

https://bit.ly/2RwgORl (Kaiser Survey) ("most firms in the country are small" and "only 56% of small firms offer health benefits"). Furthermore, more than 20% of large employers are exempt from the preventive-care mandate through the ACA's exception for "grandfathered health plans"—*i.e.*, plans that pre-dated the ACA and the preventive-care mandate and have not made certain disqualifying changes since March 2010. See 42 U.S.C. 18011; Kaiser Survey 207 (noting that 22% of firms offered at least one grandfathered health plan in 2019). Employers that do not fall into those sizable categories must comply with the preventive-care mandate or face substantial fines. See 26 U.S.C. 4980D(a)-(b) (non-compliant plans must pay daily fines of $100 per employee); 26 U.S.C. 4980H(a), (c)(1) (failure to offer health plans incurs annual fines of $2,000 per employee).

Congress did not define "preventive care" in the ACA, but rather left that "important and sensitive decision" to agency determination. *Hobby Lobby*, 573 U.S. at 697. In particular, the ACA provides that a group health plan or group health issuer must offer women "such additional preventive care and screenings * * * as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" (HRSA), a component of the Department of Health and Human Services (HHS). 42 U.S.C. 300gg-13(a)(4). Congress also granted HHS and the Departments of Labor and the Treasury the power to

administer this statutory provision.[1] Thus, the Secretary of each of those agencies "may promulgate such regulations as may be necessary or appropriate to carry out" the preventive-care mandate, as well as "any interim final rules as the Secretary determines are appropriate." See 42 U.S.C. 300gg-92 (HHS); 29 U.S.C. 1191c (Labor); 26 U.S.C. 9833 (Treasury).

Since 2010, these agencies have defined the substance and scope of the preventive-care mandate through multiple rulemakings and website postings. In July 2010, the agencies issued an interim final rule (IFR) that clarified the preventive-care mandate's cost-sharing requirements, while explaining that HHS—through HRSA—would issue preventive-care guidelines by August 1, 2011. See 75 Fed. Reg. 41,726, 41,728 (July 19, 2010) (First IFR).

Under the Administrative Procedure Act (APA), agencies must ordinarily provide advance notice of a proposed administrative rule and an opportunity for public comment, and then must respond to comments before finalizing the rule. See 5 U.S.C. 553(b)-(c). However, the APA also authorizes interim rules with immediate effect when authorized by law or justified by circumstances. See 5 U.S.C. 553(b)(3)(B) (full notice-and-comment procedures not required "when the agency for good cause finds * * * that notice and public procedure * * * are impracticable, unnecessary, or contrary to the public interest"). The agencies invoked that authority with respect to the First IFR, making it

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[1] The preventive-care mandate is part of the Public Health Service Act, 42 U.S.C. 201 *et seq.* It is also incorporated into the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (29 U.S.C. 1001 *et seq.*), see 29 U.S.C. 1185d, and the Internal Revenue Code, see 26 U.S.C. 9815(a)(1).

effective immediately at the end of the comment period—*i.e.*, before they could consider comments. See 75 Fed. Reg. at 41,726.

In August 2011, the agencies issued a second IFR, which amended the First IFR. See 76 Fed. Reg. 46,621 (Aug. 3, 2011) (Second IFR). The agencies again found both a statutory basis and "good cause" not to follow ordinary notice-and-comment procedures and instead made the Second IFR effective immediately and provided a post-promulgation period for public comments. See *id.* at 46,621, 46,624.

The Second IFR gave affected employers one year to comply with the preventive-care mandate and required them to cover items in HRSA's preventive-care guidelines. See 76 Fed. Reg. at 46,623. Without notice and comment, HRSA simultaneously posted guidelines on its website. HRSA, *Women's Preventive Servs. Guidelines*, U.S. Dep't of Health & Human Servs. (Aug. 2011), https://perma.cc/A8G8-NUMW (*HRSA Guidelines*). Of central importance here, for certain employers, HRSA's guidelines mandated coverage of all female contraceptives approved by the Food and Drug Administration (FDA). See *HRSA Guidelines*, *supra*. The guidelines thus mandate coverage for, among other things, sterilization and four contraceptive methods that many "who believe that life begins at conception regard * * * as causing abortions." *Hobby Lobby*, 573 U.S. at 698 n.7.

The agencies recognized from the outset that by requiring employers to provide for zero-cost contraceptives, including some widely viewed as abortifacients, the mandate was intruding into sensitive matters of deeply held religious convictions. Accordingly, the

agencies invoked their statutory authority to administer the preventive-care mandate and determined that "it is appropriate * * * to provide HRSA the discretion to exempt from its guidelines group health plans maintained by certain religious employers"—namely, "churches," "their integrated auxiliaries," "conventions or associations of churches," and "the exclusively religious activities of any religious order." 76 Fed. Reg. at 46,623, 46,625. The exceedingly narrow scope of that exemption prompted multiple lawsuits and thousands of public comments from parties seeking an expanded religious exemption, but the agencies finalized the Second IFR in February 2012 "without change." 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012); see also, *e.g.*, Compl., *Belmont Abbey Coll.* v. *Sebelius*, No. 11-cv-1989 (D.D.C. Nov. 10, 2011), ECF No. 1; Compl., *Eternal Word Television Network, Inc.* v. *Sebelius*, No. 2:12-cv-501 (N.D. Ala. Feb. 9, 2012), ECF No. 1.

The next month, the agencies initiated a new rulemaking that revisited the religious exemption. See 77 Fed. Reg. 16,501 (Mar. 21, 2012). Those proceedings culminated in a final rule in July 2013. See 78 Fed. Reg. 39,870 (July 2, 2013). In that final rule, the agencies created a three-tiered system for religious employers: (1) a full exemption from the contraceptive mandate for churches and some religious orders, (2) an "accommodation" for certain religious non-profit employers, and (3) no exemptions for religious for-profit employers. See *id.* at 39,873-39,875. With regard to the second tier—the so-called "accommodation"—the agencies created an alternative regulatory mechanism by which a religious non-profit could comply with the contraceptive mandate "if it provides to all third party administrators with which it or its plan has contracted a copy of its self-certification" form. *Id.* at 39,879. The

form would operate as an "instrument[] under which the employer's plan is operated" and designate the recipient an ERISA "plan administrator," to "ensure[] that there is a party with legal authority" to provide contraceptive coverage to plan participants. *Id.* at 39,879-39,8780.

3. *Hobby Lobby* and *Zubik*

Numerous non-profit and for-profit religious objectors who did not qualify for the religious exemption filed suit and sought protection under RFRA. The Little Sisters' homes in Denver and Baltimore filed a class action challenging the regulatory mechanism on behalf of themselves and all similarly situated employers who use the same church plan. See Compl., *Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Sebelius*, No. 13-cv-02611 (D. Colo. Sept. 24, 2013), ECF No. 1). Wheaton College, a Christian liberal arts college in Illinois, filed a similar suit. See Compl., *Wheaton Coll.* v. *Sebelius*, No. 1:13-cv-08910 (N.D. Ill. Dec. 13, 2013), ECF No. 1. In January 2014, this Court granted emergency relief to the Little Sisters without addressing the merits of their claims. See *Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Sebelius*, 571 U.S. 1171 (2014) (mem.). In June 2014, the Court provided comparable relief to Wheaton College. See *Wheaton Coll.* v. *Burwell*, 573 U.S. 958 (2014).

In between those orders, in June 2014, this Court addressed the contraceptive mandate on the merits for the first time in cases brought by two closely held for-profit businesses. See *Hobby Lobby*, 573 U.S. 682. In *Hobby Lobby*, the Court concluded that the "contraceptive mandate 'substantially burden[s]' the exercise of religion" and violates RFRA. *Id.* at 719-736 (citation omitted). The Court cited the regulatory mechanism

as among the less-restrictive alternatives available to the government, while noting that challenges to that mechanism remained pending and explicitly declining to "decide today whether an approach of this type complies with RFRA for purposes of all religious claims." *Id.* at 731. The Court thus took it as a given that the executive branch had "at its disposal" authority to promulgate the regulatory mechanism, and that RFRA "surely allows" "modification of an existing program" to comply with its dictates. *Id.* at 729-731. But the Court expressly reserved judgment on whether that mechanism sufficed under RFRA.

In August 2014, the agencies responded to these developments by issuing a third IFR that modified the regulatory mechanism. See 79 Fed. Reg. 51,092 (Aug. 27, 2014) (Third IFR). As with the First and Second IFRs, the agencies promulgated the Third IFR without full notice-and-comment procedures and made it immediately effective based on the APA's "good cause" exception. See *id.* at 51,092. The agencies finalized the Third IFR in July 2015 after receiving post-promulgation public comments. See 80 Fed. Reg. 41,318 (July 14, 2015). In the final rule, the agencies asserted that they had taken action that "goes beyond what is required by RFRA and *Hobby Lobby*." *Id.* at 41,324. They confirmed that seamless coverage requires the plan's "coverage administration infrastructure to verify the identity of women in accommodated health plans and provide formatted claims data for government reimbursement." *Id.* at 41,328-41,329. They continued, however, to refuse to extend the exemption available to certain non-profit religious employers to all non-profit religious employers and instead demanded that religious non-profits like petitioner comply via the regulatory

mechanism. The cases challenging the regulatory mechanism therefore persisted.

In June 2015, this Court granted emergency relief in one of those cases, see *Zubik* v. *Burwell*, 135 S. Ct. 2924 (2015) (mem.), and in November 2015, the Court granted certiorari in several. An eight-Justice Court heard argument in the consolidated cases in March 2016, and shortly thereafter took the unusual step of ordering additional briefing on whether the government could further modify the regulatory mechanism to resolve the parties' dispute. See *Zubik* v. *Burwell*, 194 L. Ed. 2d 599 (2016) (No. 14-1418) (mem.). Over the course of briefing and argument in *Zubik*, the government made several key concessions.

First, the government admitted that the contraceptive coverage provided via the regulatory mechanism must be "part of the same 'plan' as the coverage provided by the employer" and may not be provided under a "separate" plan. U.S. Br. at 38, *Zubik*, *supra*; see also Tr. of Oral Arg. at 60-61, *Zubik*, *supra*. Second, the government acknowledged that women who do not receive contraceptive coverage from their employer can "ordinarily" get it from "a family member's employer," "an Exchange," or "another government program." U.S. Br. at 65, *Zubik*, *supra*. Third, the government agreed that the contraceptive-mandate regulations "could be modified" to better protect religious liberty. U.S. Supp. Br. at 14-15, *Zubik*, *supra*.

In light of "the substantial clarification and refinement in the positions of the parties," the Court issued a per curiam order vacating all the decisions on review. *Zubik* v. *Burwell*, 136 S. Ct. 1557, 1560-61 (2016). The Court remanded the cases to afford the parties "an opportunity to arrive at an approach going

forward" that would resolve the dispute and ordered the government not to impose penalties on the religious objectors in the interim for failure to comply with the contraceptive mandate. *Id.* at 1560. The Court emphasized that it was "express[ing] no view on the merits" of the RFRA question. *Ibid.* But its order was openly premised on the view that the executive branch had ample authority to adopt an approach that would bring the dispute to an end.

4. Post-*Zubik* Developments

Following *Zubik*, the agencies issued a "Request for Information (RFI) to determine * * * whether modifications to the existing accommodation procedure could resolve the objections asserted by the plaintiffs in the pending RFRA cases while still ensuring that the affected women seamlessly receive full and equal health coverage, including contraceptive coverage." 81 Fed. Reg. 47,741, 47,742 (July 22, 2016). Various parties, including representatives of the Little Sisters, met with the government to pursue a path forward, but no rulemaking resulted from the RFI. Instead, on January 9, 2017—two months after the 2016 presidential election and 11 days before Inauguration Day—the agencies stated on a website that they had been unable to identify a "feasible approach" to modify the regulatory mechanism. U.S. Dep't of Labor, *FAQs About Affordable Care Act Implementation Part 36* 4 (Jan. 9, 2017), https://perma.cc/R3LN-CMSH.

With a change in administration, however, the effort to fashion a broader accommodation of religious objections to the mandate continued. In May 2017, President Trump issued an executive order directing the agencies to consider alternatives to the regulatory mechanism. See Exec. Order No. 13,798, *Promoting*

Free Speech and Religious Liberty, 82 Fed. Reg. 21,675 (May 4, 2017). In October 2017, the agencies modified the contraceptive-mandate regulations by issuing two additional IFRs—the Fourth and Fifth IFRs, which, like their predecessors, became effective immediately. See 82 Fed. Reg. 47,792 (Oct. 13, 2017) (Fourth IFR); 82 Fed. Reg. 47,838 (Oct. 13, 2017) (Fifth IFR). The agencies used the same procedures as with the previous three IFRs: They explained that they had statutory authority to promulgate IFRs without full notice-and-comment procedures and that the APA's "good cause" exception applied in any event. See 82 Fed. Reg. at 47,813-47,815; 82 Fed. Reg. at 47,854-47,856. The agencies also provided a post-promulgation period for public comments. See 82 Fed. Reg. at 47,792; 82 Fed. Reg. at 47,838.

As relevant here, the Fourth IFR expanded the religious exemption to a broader group of religious employers, including the Little Sisters.[2] See 45 C.F.R. 147.132. In providing this relief, the agencies stated, *inter alia*, that they had acted in response to this Court's order in *Zubik* and the need to resolve the ongoing litigation. See 82 Fed. Reg. at 47,796-47,799. The agencies engaged in a lengthy analysis of their RFRA obligations and concluded, based in part upon the concessions before this Court in *Zubik* and the information gathered afterward, that RFRA compelled a broadened religious exemption or, at a minimum, permitted it. See *id.* at 47,799-47,806. The Fourth IFR otherwise left the contraceptive-mandate regulations in place as to all employers previously covered.

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[2] The Fifth IFR provided a similar exemption to employers with moral objections. The Little Sisters address only the Fourth IFR.

B. Proceedings Below

1. Before the agencies could even publish the IFRs in the Federal Register, Pennsylvania filed this lawsuit against the President, the agencies, and their Secretaries. See CA3.JA.165-97. Despite the existence of countless pending suits involving the mandate and RFRA and Pennsylvania's distinctly state-constrained interests, Pennsylvania sought a nationwide injunction, contending that, *inter alia*, RFRA does not "require[]" a religious exemption; the Fourth IFR violated the ACA; and the agencies' "failure to engage in notice and comment rulemaking" violated the APA. CA3.JA.194-195.

Because Pennsylvania sought to invalidate an exemption that the Little Sisters had long pursued and would directly benefit from, they moved to intervene. See Fed. R. Civ. P. 24. The district court denied the Little Sisters' motion, *Pennsylvania* v. *Trump*, No. 17-cv-4540, 2017 WL 6206133 (E.D. Pa. Dec. 8, 2017), but the Third Circuit reversed, concluding that the Little Sisters "have a significantly protectable interest in the religious exemption" that the Fourth IFR provided. *Pennsylvania* v. *Trump*, 888 F.3d 52, 58 (3d Cir. 2018). The Third Circuit further explained that, "[b]ecause the Little Sisters moved to intervene as defendants and seek the same relief as the federal government, they need not demonstrate Article III standing." *Id.* at 57 n.2.

2. The district court granted Pennsylvania's motion for a nationwide preliminary injunction. The court first rejected an objection to Pennsylvania's standing, see Pet.App.147a-158a, then proceeded to conclude, *inter alia*, that Pennsylvania was likely to succeed on

its argument that neither RFRA nor the ACA authorized the Fourth IFR, see Pet.App.173a-183a. The court additionally determined that the agencies lacked statutory authority to "bypass notice and comment" and could not rely upon the APA's "good cause" exception either. Pet.App.160a-173a. The court therefore enjoined implementation of the Fourth IFR—and did so on a nationwide basis, notwithstanding that only one state had filed the suit. Pet.App.193a-195a.

The Little Sisters and the government appealed. During the pendency of those appeals, the agencies memorialized the expanded religious exemption in a final rule after considering more than 56,000 comments on the Fourth IFR. See 83 Fed. Reg. 57,536, 57,540 (Nov. 15, 2018) (Final Rule). In the Final Rule, the agencies explained, *inter alia*, that "an expanded exemption rather than the existing accommodation is the most appropriate administrative response to the substantial burden identified by the Supreme Court in *Hobby Lobby*." *Id.* at 57,545. They further observed that, "with respect to at least some objecting entities, an expanded exemption, as opposed to the existing accommodation, is required by RFRA." *Id.* In addition, the agencies concluded that they possessed independent authority to promulgate the Final Rule under the ACA. See *id.* at 57,540-57,541.

Pennsylvania—now joined by New Jersey—filed an amended complaint. See CA3.JA.198a-233a. They sought a nationwide preliminary injunction against the Final Rule, which the district court granted on the same day that the Final Rule would have taken effect. Pet.App.126a-137a. In its decision, the district court again rejected objections to respondents' standing. See Pet.App.73a-81a. It concluded that the Final Rule

"cannot be justified under RFRA" and "exceed[s] the scope of the Agencies' authority under the ACA." Pet.App.99a-100a. And it held that, "regardless of whether the procedure followed by the Agencies in the Final Rule[] may otherwise meet the requirements of notice-and-comment rulemaking," the absence of such procedures during the promulgation of the Fourth IFR "fatally tainted" the Final Rule. Pet.App.97a.

3. The Little Sisters and the government appealed again, and the Third Circuit consolidated those appeals with their earlier appeals. The Third Circuit affirmed the district court's nationwide injunction against the implementation of the Final Rule. Pet.App.8a.

Before addressing the merits, the Third Circuit held that respondents had standing to sue because, if the Final Rule took effect, they would likely experience "increased use of state-funded services." Pet.App.22a. The court acknowledged that respondents had not identified a "specific woman who will be affected by the Final Rule[]," but it concluded that Article III does not require "such a demanding level of particularity." Pet.App.25a. Given that conclusion, the court determined that it need "not decide whether [respondents] also have standing under the special solicitude or parens patriae doctrines." Pet.App.27a n.17.

Although neither the Third Circuit nor respondents questioned the government's standing to appeal, the court concluded in a footnote that the Little Sisters "lack appellate standing" to join the government in defending the Final Rule. Pet.App.15a n.6. While a differently constituted Third Circuit panel had previously determined that the Little Sisters could inter-

vene, the new panel noted that a district court in Colorado had "permanently enjoined enforcement of the Contraceptive Mandate for benefit plans in which Little Sisters participates." Pet.App.15a n.6 (citing *Little Sisters of the Poor* v. *Azar*, No. 1:13-cv-02611, Dkt. No. 82 at 2-3 (D. Colo. May 29, 2018)). Accordingly, in the panel's view, the Little Sisters are "no longer aggrieved by the District Court's ruling," and their "need for relief is moot." Pet.App.15a n.6.

On the merits, the Third Circuit concluded that respondents are likely to succeed on their argument that the agencies lacked statutory authority to promulgate the Final Rule. As to RFRA, the court expressed doubt "that RFRA provides statutory authority for the Agencies to issue regulations to address religious burdens the Contraceptive Mandate may impose on certain individuals." Pet.App.43a. But "[e]ven assuming" it did, the court concluded that "RFRA does not require the enactment of the Religious Exemption" because, in its view, the regulatory mechanism "did not infringe on the religious exercise of covered employers." Pet.App.43a, 48a.

The Third Circuit also rejected the argument that the ACA provides statutory authority for the Final Rule, reasoning that the statute provides no "discretion" to "wholly exempt" any employers from the contraceptive mandate. Pet.App.40a. The court recognized that its interpretation of the ACA "may seem facially at odds" with the agencies' explanation for promulgating the religious exemption in 2011, as well as with their explanation for promulgating the regulatory mechanism in 2013. Pet.App.40a n.26. The court dismissed those concerns, however, because "the Agencies' authority to issue the Church Exemption

and Accommodation is not before us." Pet.App.40a n.26.

The Third Circuit further held that the agencies did not have "good cause" under the APA to depart from full notice-and-comment procedures. See Pet.App.32a. Although these purported deficiencies did not apply to the Final Rule, the court concluded that "[t]he notice and comment exercise surrounding the Final Rule[] does not reflect any real open-mindedness toward the position set forth in the IFR[]." Pet.App.36a. The court "express[ed] no opinion on whether the Agencies appropriately responded to comments collected," and instead emphasized that the agencies made only "minor changes" to the Final Rule. Pet.App.36a & n.24. Finding that this proved the absence of a "flexible and open-minded attitude," the court concluded that the purported APA violation infected the Final Rule as well. Pet.App.36a.

After finding the remainder of the injunction factors satisfied, the court affirmed the nationwide injunction, which had the effect of reinstating the status quo pre-Fourth IFR—*i.e.*, the same regulatory mechanism that itself was the product of a series of IFRs issued without notice and comment. Pet.App.36a, 48a-52a. In providing that nationwide relief, the court relied substantially on an amicus brief filed by Massachusetts and various other states. Pet.App.51a-52a. Citing that brief, the court emphasized "the impact of * * * interstate activities," such as "[o]ut-of-state college attendance" and the fact that "[m]any individuals work in a state that is different from the one in which they reside." Pet.App.51a-52a.

SUMMARY OF ARGUMENT

The decision below concludes, quite remarkably, that the federal government is not obligated, or even empowered, to exempt the Little Sisters and other religious employers from the contraceptive mandate. The court of appeals reached that decision even though the federal government has always recognized that the mandate implicates religious exercise and admits of some exemptions (for religious and non-religious reasons). More remarkable still, the Third Circuit reached that conclusion even though this Court has already concluded that the contraceptive mandate violates RFRA. And to add insult to injury, the Third Circuit held that the Little Sisters do not even have appellate standing to vindicate their exemption. That decision defies law, logic, and the last decade of developments related to the contraceptive mandate.

First, the Little Sisters plainly have appellate standing. They have a direct stake in the legality of the religious exemption that they helped secure, which gives them broad protection to provide health insurance to their employees in accordance with their sincerely held religious beliefs. The Third Circuit concluded otherwise on the theory that a Colorado injunction mooted the Little Sisters' interest in this case. Setting aside that the court had no need to test the Little Sisters' appellate standing since the federal government undoubtedly had standing to appeal, the Colorado injunction hardly deprives the Little Sisters of standing to defend the broader exemption the Final Rule provides. Indeed, their standing is particularly obvious now that the case is in *this* Court, and the states are asking this Court to reject the very RFRA holding that supports the Colorado injunction. This

Court should not follow the Third Circuit's lead and decide this dispute about the religious liberty of the Little Sisters and religious employers like them as if it were an intramural dispute between governments. The religious employers seeking to vindicate their entitlement to an exemption from a government burden are an indispensable party to this case.

On the merits, the answer to the RFRA question is straightforward: RFRA not only permits, but affirmatively requires, the Final Rule. The federal government itself recognized nearly a decade ago that the contraceptive mandate implicates sincerely held religious beliefs, which is why, from the outset, it exempted some religious employers entirely and "accommodated" others via the regulatory mechanism. The federal government likewise has admitted from the outset that the mandate is not the kind of command that requires universal compliance to function, as it exempted some religious employers and many non-religious employers, for a variety of reasons. This Court has since concluded in *Hobby Lobby* that the contraceptive mandate substantially burdens religious exercise and violates RFRA. The contraceptive mandate at the center of this dispute is one and the same. Under RFRA, the onus thus shifts to the government to alleviate that burden in some fashion, and an exemption is the straightforward way to do so.

The Third Circuit's contrary conclusion is flawed at every turn. The court began by focusing on whether *the regulatory mechanism* violates RFRA. It undoubtedly does, but the obligation to accommodate religious exercise initially springs *from the contraceptive mandate itself*, and the government can meet its duty to

alleviate that burden most directly by simply exempting religious employers entirely, as it did with a subset of religious employers and a subset of non-religious employers from the start. Indeed, the regulatory mechanism only underscores the futility of addressing the Little Sisters' objection with anything short of an exemption. The regulatory mechanism was not a meaningful alternative to the contraceptive mandate, but was rather just the latest and most convoluted means of offering the Little Sisters an alternative mechanism *to comply* with the contraceptive mandate—*i.e.*, just one more way for the government to accomplish its objective of forcing the Little Sisters to provide "seamless" coverage as "part of the same 'plan.'" U.S. Br. at 38, 75 *Zubik*, *supra*. But the gravamen of the Little Sisters' religious objection is to the substance of the contraceptive mandate. The government can offer them a dozen different ways to comply with that mandate, but as long as they really are just different means of achieving compliance with the actual obligation that the Little Sisters and their plan "shall provide" coverage to which they object, the government can hardly express surprise that the Little Sisters continue to object. That is not obstinacy, but constancy of belief. The executive branch finally learned this lesson, but the courts below continue to resist it. The only way to bring this long-simmering dispute to a close is to make clear once and for all that the way to stop burdening the Little Sisters' religious exercise is to stop insisting on compliance with the mandate.

Even apart from being both compelled and authorized by RFRA, the Final Rule is independently authorized by the ACA, which grants the executive branch substantial discretion with respect to the preventive-

services mandate from which the contraceptive mandate springs. And the Third Circuit's APA and remedial holdings are equally flawed. While the government can explain those flaws in detail, two problems leap out from the perspective of the governed. First, virtually every aspect of the government's regulatory efforts concerning the contraceptive mandate—including the contraceptive mandate itself—began with an IFR. To single out for condemnation the one liberty-enhancing regulation produced by that process (and to effectively reimpose more burdensome regulations imposed through the exact same process) is bewildering. So too is the notion that in the wake of literally hundreds of actions filed across the nation seeking to vindicate the rights of religious adherents, the courts would impose a nationwide injunction cutting back those rights based on the highly attenuated interests of two states.

In short, from beginning to end, the decision below reflects a begrudging approach to eliminating substantial burdens on religious exercise and a suspicion of governmental efforts to eliminate such burdens that runs directly counter to RFRA and "the best of our traditions." *Zorach*, 343 U.S. at 314.

ARGUMENT

I. The Little Sisters Have Appellate Standing.

The Little Sisters plainly have Article III standing to seek review of the nationwide injunction barring implementation of the Final Rule. As this Court recently reiterated, the standard for appellate standing is no different, and no more demanding, than the test for standing to "invok[e] the power of a federal court" in

the first instance. *Virginia House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019) (citation omitted); see also *Wittman* v. *Personhuballah*, 136 S. Ct. 1732, 1736 (2016); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997). Specifically, on appeal, "a litigant must seek relief for an injury that affects him in a 'personal and individual way'" and "must possess a 'direct stake in the outcome' of the case." *Hollingsworth* v. *Perry*, 570 U.S. 693, 705 (2013).

The Little Sisters cleared that hurdle with ease in the Third Circuit, and their standing in this Court is, if anything, more obvious. As Judge Hardiman observed for a unanimous panel when reversing the district court's intervention decision, "[t]he Little Sisters * * * litigated for the protection conferred by the religious exemption * * * for five years, and the [Fourth] IFR describes the Little Sisters as one impetus for change." *Pennsylvania*, 888 F.3d at 58 (citing 82 Fed. Reg. at 47,798). The Final Rule formalized the Fourth IFR, thereby providing broad and permanent protection for the Little Sisters to offer healthcare to their employees in a manner consistent with their sincere religious beliefs without regard to their benefit provider. According to the district court and the Third Circuit, however, the Final Rule—indeed, *any* religious accommodation that is more protective than the regulatory mechanism (and perhaps even that)—is unlawful. The Little Sisters quite obviously had a "direct stake" in reversing that outcome below, *Hollingsworth*, 570 U.S. at 705, and that interest is even more obvious in this Court. After all, if affirmed by this Court, the lower courts' miserly view of RFRA would subject the Little Sisters to the very religious injury they have sought to avoid ever since the government

introduced the contraceptive mandate nearly a decade ago.

The Third Circuit's conclusion that the Little Sisters lacked appellate standing not only was profoundly wrong; it was wholly unnecessary. While the Little Sisters readily satisfy appellate-standing requirements, the court had no need to examine the issue. The Little Sisters intervened as a defendant in support of the federal government in the district court, and they sought "the same relief as the federal government"—namely, preservation of the religious exemption in the Final Rule. *Pennsylvania*, 888 F.3d at 57 n.2. The federal government appealed the district court's adverse ruling, and it had "undoubted standing" to do so. *Diamond* v. *Charles*, 476 U.S. 54, 64 (1986); see also 25 U.S.C. 515-519; *Buckley* v. *Valeo*, 424 U.S. 1, 138-141 (1976) (per curiam).

Although an appellate court must inquire into an intervenor's standing when "the primary party does not challenge" a lower-court decision, *Bethune-Hill*, 139 S. Ct. at 1951—or if the intervenor seeks "additional relief" beyond what the primary party seeks, *Town of Chester* v. *Laroe Estates,Est., Inc.*, 137 S. Ct. 1645, 1651 (2017)—there is no need to do so when, as here, the intervenor merely supports the primary party, see, *e.g.*, *Horne* v. *Flores*, 557 U.S. 433, 446 (2009); *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008) (plurality op.); *McConnell* v. *FEC*, 540 U.S. 93, 233 (2003). Indeed, principles of constitutional avoidance counsel against undertaking an unnecessary inquiry into Article III standing. *Cf. Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006). Those principles thus should have foreclosed the Third Circuit's gratuitous

questioning of the Little Sisters' appellate standing, just as they foreclosed what the court saw as a gratuitous probe into whether respondents had standing to sue under the "special solicitude and parens patriae doctrines." Pet.App.27a n.17.

Instead of adhering to these principles, the Third Circuit forged ahead and concluded that the Little Sisters lack appellate standing as a result of an injunction issued by a district court in Colorado, which purportedly made the Little Sisters "no longer aggrieved by the District Court's ruling." Pet.App.15a n.6. That contention is deeply flawed. Although the Colorado district court recognized that enforcing the contraceptive mandate against the Little Sisters homes in that case "violated and would violate" RFRA, it enjoined its enforcement against the petitioner Little Sisters *only* to the extent they remain in their current plan; if they leave that plan, the government is "free to enforce" the contraceptive mandate. *Little Sisters*, No. 1:13-cv-02611, ECF No. 82 at 2-3; accord Pet.App.15a n.6. The Colorado injunction thus is not coextensive with the Final Rule, which categorically exempts the Little Sisters from the contraceptive mandate regardless of their plan provider. That more limited injunction in no way "moot[s]" the Little Sisters' direct and concrete stake in this case. Pet.App.15a n.6.

The Little Sisters' appellate standing is particularly clear now that the proceedings have shifted to this Court. Respondents are here to advance a view of RFRA that is at odds with the Colorado injunction (and all other similar or competing injunctions). The Little Sisters have a particularly strong interest in making sure that nothing in this Court's decision could threaten their existing injunction or deny them

the broader exemption. Thus, while the Colorado injunction was never a sufficient basis to deny the Little Sisters' standing to vindicate the categorical exemption provided by the Fourth IFR and Final Rule, that lower-court injunction is plainly not a sufficient basis to deny the Little Sisters' right to vindicate their religious liberty in this Court. That is particularly so given that the Little Sisters have a distinct interest in seeing a resolution of this case that not only will vindicate the federal government's power to issue Final Rule, but will vindicate their right under RFRA to the exemption it provides.

In sum, the Third Circuit's questioning of the Little Sisters' standing was gratuitous and mistaken. Now that the issue has reached this Court, their standing is clear beyond cavil. And the alternative of deciding critical issues of religious liberty as if they were an intramural squabble between governments has nothing to recommend it. After years of the Little Sisters' pressing the argument that RFRA required the government to exempt them from the contraceptive mandate, the government finally relented and granted that exemption. In this case alone, two states and now two federal courts have asserted that the federal government lacks authority to provide that exemption. The notions that the Little Sisters do not have standing to fight for their exemption, or that this Court should decide this dispute without religious employers front and center, have no grounding in common sense or in Article III.

II. The Government Has Both The Power And The Obligation To Expand The Religious Exemption To The Contraceptive Mandate.

This case is equally straightforward on the merits. RFRA not only permits, but affirmatively requires the government to exempt objecting religious employers from the contraceptive mandate. The Third Circuit's contrary conclusion is fatally flawed, and even apart from RFRA, the ACA itself gives the government sufficient statutory authority to expand the religious exemption.

A. The Religious Exemption To The Contraceptive Mandate Is The Most Straightforward Means Of Satisfying RFRA.

To ensure that persons of faith enjoy "very broad protection" under federal law, *Hobby Lobby*, 573 U.S. at 693, RFRA provides that the "Government shall not substantially burden a person's exercise of religion" unless "application of the burden to the person" is the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(a)-(b). The starting point in the RFRA analysis therefore is to identify the government action that imposes the burdens on the claimant's religious exercise and to determine whether that burden is substantial. See, *e.g.*, *Hobby Lobby*, 573 U.S. at 719; *cf. Holt* v. *Hobbs*, 135 S. Ct. 853, 862-863 (2015). The relevant government action here is the contraceptive mandate, and that mandate plainly imposes a substantial burden on religious exercise.

That conclusion is hardly groundbreaking. Not only has this Court already squarely so held, see *Hobby Lobby*, 573 U.S. at 719; the government itself

recognized from the outset that the mandate was intruding on matters of great religious sensitivity, such that certain religious employers should be exempted entirely. In particular, the government exempted "churches, their integrated auxiliaries, conventions or associations of churches," and "the exclusively religious activities of any religious order." 76 Fed. Reg. at 46,623. Although that exemption was underinclusive and its contours independently problematic (why discriminate among religious orders based on whether their religious mission includes providing services to the needy in addition to what the government deems "exclusively religious activities"?), the exemption recognized the mandate's burdens on religious exercise.

The government further recognized those burdens by attempting to fashion an "accommodation" for other religious non-profit employers. That "accommodation" was both inadequate and independently problematic, see *infra* Part II.C, but it was established in recognition of the fact that non-profit religious employers like the Little Sisters have sincere religious objections to the mandate. See 78 Fed. Reg. at 39,874. Moreover, apart from these religious exemptions and accommodations, the federal government recognized from the beginning that the mandate was not the kind of universal requirement that admits of no exceptions. To the contrary, millions of employees of employers with grandfathered plans were exempted for reasons of administrative convenience. See 83 Fed. Reg. at 57,541; *Hobby Lobby*, 573 U.S. at 727.

The government's refusal to exempt more than a subset of religious employers with sincere religious objections to the mandate prompted widespread litigation under RFRA. When this Court first addressed

that litigation on the merits in *Hobby Lobby*, it had "little trouble" concluding that the contraceptive mandate substantially burdens religious exercise. 573 U.S. at 719. As it explained, "[b]ecause the contraceptive mandate forces [religious objectors] to pay an enormous sum of money * * * if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs." *Id.* at 726. The Court proceeded to "assume" that the government's interest in providing cost-free access to contraceptives is "compelling within the meaning of RFRA," *id.* at 728, but it concluded that the government could further that interest in less restrictive ways. See *id.* at 730-731.

Hobby Lobby thus makes crystal clear that the contraceptive mandate not only substantially burdens religious exercise, but fails strict scrutiny. Thus, as long as the contraceptive mandate (itself a product of regulation, rather than statute) exists, the government is duty-bound to remedy that RFRA violation and eliminate the substantial burden by *some* means. See 42 U.S.C. 2000bb-1(a); *cf.* 42 U.S.C. 2000cc-3(e) (identifying "exempting the substantially burdened religious exercise" as one "means" for "eliminat[ing a] substantial burden" under RLUIPA).

Here, the single most obvious and straightforward means for eliminating a substantial burden on religious exercise imposed by a law already subject to other non-religious exemptions is an exemption for those whose sincerely held religious beliefs are substantially burdened. That is presumably why the federal government exempted a subset of religious employers in the first place, and why many of this Court's

cases involving religious accommodations have involved exemptions. While it might be possible to fashion some alternative, the most straightforward way to eliminate a religious burden imposed by a compelled pledge of allegiance or compulsory school attendance is to exempt religious adherents from the requirement.

The government thus plainly did not run afoul of RFRA or exceed its authority when it concluded that "an expanded exemption * * * is the most appropriate administrative response to the substantial burden identified by the Supreme Court in *Hobby Lobby*." 83 Fed. Reg. at 57,545. Indeed, the history of the government's efforts to "accommodate" rather than exempt religious employers demonstrates the wisdom of the exemption. Accommodations often create a temptation for government officials to second-guess religious beliefs or to draw arbitrary distinctions among religious adherents, deliberately imposing greater burdens on some. The so-called "regulatory accommodation" is a case in point. See *infra* Part II.C.

The Third Circuit missed that obvious conclusion only by making two fundamental errors—first, by focusing on the so-called regulatory accommodation to the exclusion of the contraceptive mandate itself, and second, by concluding that the accommodation satisfied RFRA. In reality, that regulatory mechanism for compliance with the mandate only demonstrates the belated wisdom of the exemption, as that "accommodation" itself violates RFRA and disregards the sincerely held religious beliefs of the Little Sisters. The government was thus duty-bound to change its rules and stop forcing religious objectors to comply via the accommodation. Indeed, expanding the religious exemption not only was the most obvious route to RFRA

compliance, but is the only truly viable means of putting an end to the mandate's RFRA problems once and for all.

B. The Third Circuit's Analysis Misunderstands RFRA.

The Third Circuit's analysis was doomed from the outset because it focused on the so-called regulatory accommodation in isolation from the mandate and mistakenly presumed that if the accommodation satisfied RFRA, then the government could do no more. This analysis fundamentally misunderstands RFRA.

First, what the Little Sisters have always objected to is *the contraceptive mandate*, and what they have always sought is the same thing the government extended to other religious employers (and substantial numbers of non-religious employers): an exemption from the mandate. To be sure, during the many years in which the federal government refused the Little Sisters that exemption and instead offered only ham-handed efforts to "accommodate" their religious beliefs, the Little Sisters were forced to explain why those accommodations were just alternative means of complying with the mandate that still required them to take actions that violated their faith, and thus failed to eliminate the substantial burden on their religious beliefs or satisfy RFRA. See *supra* pp. 10, 11. But the focus of the Little Sisters' objection never wavered. They always objected to the mandate, and they steadfastly rejected alternative means of complying with that mandate, no matter the label. When the federal government finally got the message and exempted the Little Sisters, the focus should have been principally on the mandate, not on the accommodation in isola-

tion. And since this Court has already found the mandate to impose a substantial burden, and an exemption is an unproblematic and time-tested means of eliminating such burdens, the challenge to the exemption should have been readily rejected.

The Third Circuit erred not only by thinking that the "accommodation" satisfied RFRA, but also by thinking that the federal government was bound to retain that mechanism if it did. Contrary to the Third Circuit's view, nothing in RFRA constrains the government to alleviate a substantial burden in the most miserly and begrudging way possible. Nor did Congress enact RFRA nearly unanimously and with "one of the broadest coalitions in recent political history," Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 210 (1994), only to tie the government's hands once it has offered religious objectors the stingiest of accommodations. "RFRA was designed to provide *very broad* protection for religious liberty." *Hobby Lobby*, 573 U.S. at 706 (emphasis added). Simply put, RFRA demands that government intrusions on religious exercise be kept to an absolute minimum. See 42 U.S.C. 2000bb-1(b)(2). To read that statute as imposing that kind of "least accommodating alternative" test gets matters exactly backward.

Nor does the fact that the government has already made a previous effort to accommodate religious exercise preclude it from embracing a policy that it deems more appropriate or effective, especially when the first effort did not eliminate the objections of religious adherents. If it did, this Court's remand in *Zubik* would be inexplicable. The Court "express[ed] no view" in *Zubik* on whether the regulatory mechanism violates

RFRA, yet it nonetheless remanded to afford the government and the religious-objector petitioners "an opportunity to arrive at an approach" that better accommodated the petitioners' religious objections. *Zubik*, 136 S. Ct. at 1560. That remand would have been an incoherent exercise in futility if the government were powerless to embrace an alternative unless and until this Court resolved the very question that its remand put off. Instead, this Court's remand plainly rested on the seemingly obvious understanding that when the government's first effort to accommodate religious exercise fails to quell religious-based objections, the government follows the best of our traditions when it looks for an alternative that actually eliminates the religious burden, rather than merely satisfying a government official's conception of what should be "good enough."

C. The "Accommodation" Violates RFRA.

In all events, the Third Circuit plainly erred in failing to recognize that the "accommodation" violates RFRA. When the government intrudes into an area as religiously sensitive as contraception, and then proceeds to impose a mandate subject to all manner of exemptions, the only way to satisfy RFRA is with an exemption. That is particularly true when the government itself admits that its various "accommodations" share the common denominator that contraceptives will be furnished "seamlessly" via the religious employers' own health plans. See *supra* pp. 10, 11. In light of that reality, the government was obligated by RFRA to stop forcing religious objectors to use the accommodation. The Third Circuit's failure to understand this basic point confirms that the time has come

to make clear that this accommodation does not respond to the core of the Little Sisters' religious objection. The way to stop burdening the Little Sisters' religious exercise is to stop insisting that they be complicit in providing the coverage to which they sincerely object, and to give them the same exemption others have long enjoyed. And the way to end litigation over religious objections to the contraceptive mandate once and for all is to confirm that RFRA requires the government to do so.

1. The Third Circuit concluded that the "accommodation" suffices under RFRA by resurrecting its pre-*Zubik* precedent holding that the regulatory mechanism for complying with the mandate does not substantially burden religion. That reasoning was wrong the day it issued, but it became entirely untenable in light of the government's subsequent admissions about how the regulatory mechanism actually works. The Third Circuit's effort to revive its pre-*Zubik* precedent *nunc pro tunc* without accounting for subsequent developments cannot withstand scrutiny.

Under RFRA, a substantial burden on religious exercise exists when, *inter alia*, the government imposes sanctions or penalties on a person for exercising sincerely held religious beliefs. See, *e.g.*, *Hobby Lobby*, 573 U.S. at 717 n.28, 719-726; *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-718 (1981). This Court thus unsurprisingly had "little trouble" concluding that the contraceptive mandate itself imposes a substantial burden: If religious objectors fail to "yield to th[e] demand" that they comply with the mandate, "the economic consequences will be severe." *Hobby Lobby*, 573 U.S. at 720; see 26 U.S.C. 4980D(a)-(b); 26 U.S.C. 4980H(a), (c)(1).

The substantial burden that the regulatory mechanism imposes is no different. After all, as the Third Circuit itself observed, see Pet.App.40a n.26, the euphemistically labeled "accommodation" is merely another means of *complying with the contraceptive mandate* to which religious employers have always objected. Indeed, the government's own regulations long stated *in haec verba* that the regulatory mechanism ensures "compliance" with the contraceptive mandate. See, *e.g.*, 45 C.F.R. 147.131(c)(1) (2016); 26 C.F.R. 54.9815-2713A(b)(1) (2016); 29 C.F.R. 2590.715-2713A(b)(1) (2014). That is presumably why the government eventually admitted to this Court that the "seamless" coverage was "part of the same 'plan'" after all. U.S. Br. at 38, 75 *Zubik*, *supra*. From the start, forced compliance via the accommodation was forced assistance with the government's efforts to provide contraception. 78 Fed. Reg. at 39,879-39,880; see also *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 19-20 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of rehearing en banc) ("[T]here is no dispute that the form is part of the process by which the Government ensures that the religious organizations' insurers provide contraceptive coverage to the organizations' employees.").

That reality has always been at the core of the problem with all variants of the so-called accommodation, all of which were designed to ensure that the religious employer facilitated the provision of "seamless" coverage. When what a religious adherent objects to is providing the coverage that the mandate requires, then no matter how many ways the government offers the religious adherent to accomplish that end, the basic objection remains. If the government itself considers certain actions by religious adherents sufficient

to bring them into compliance with its mandate to ensure "seamless" access to the objected-to coverage, then it should not come as a surprise that religious adherents view those same actions as sufficient to trigger their scruples. Indeed, it is hard to see how religious adherents could come to any other conclusion when the government has admitted that the compliance in question requires use of the employer's "same 'plan.'" U.S. Br. at 38, *Zubik*, *supra*. And the consequences of not complying in the government's eyes remain the same draconian penalties as if religious adherents refused to comply with the mandate outright. See 83 Fed. Reg. at 57,546 ("The Mandate and accommodation * * * forced certain non-exempt religious entities to choose between complying with the Mandate, complying with the accommodation, or facing significant penalties."). That is a textbook substantial burden.

The Third Circuit nevertheless concluded that the regulatory mechanism eliminates the substantial burden that the contraceptive mandate imposes, reasoning that, contrary to religious employers' understanding, it "does not make the employers 'complicit' in the provision of contraceptive coverage." Pet.App.46a (brackets omitted). That analysis is doubly flawed. To the extent it turns on the notion that, under the regulatory mechanism, contraceptives are provided "separate" from the health plans of religious employers, see Pet.App.11a, it is foreclosed both by the facts (coverage under the "accommodation" was "seamless," not separate) and by the government's own concessions before this Court in *Zubik*, see, *e.g.*, Oral Arg. Tr. at 60, *supra* (Solicitor General agreeing that regulatory mechanism requires contraceptive coverage to be "in * * * one insurance package"); U.S. Br. at 38, *supra* (in self-insured plans, coverage is "part of the same 'plan' as

the coverage provided by the employer"). And to the extent it turns on the notion that religious employers are simply mistaken in their belief that the regulatory mechanism makes them complicit in moral wrongdoing, it is foreclosed by RFRA and this Court's precedent interpreting it. Indeed, if there is "any fixed star" in interpreting RFRA, "it is that no official, high or petty," judicial or executive, should second-guess religious adherents about the degree of complicity that makes them morally culpable under their religion. *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943).

To be sure, a court may inquire into the *sincerity* of religious objectors' beliefs (something the Third Circuit never doubted here), but it may not tell them that "their beliefs are flawed." *Hobby Lobby*, 573 U.S. at 724. Indeed, "[r]epeatedly 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; see also, *e.g.*, *Hernandez* v. *Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *United States* v. *Lee*, 455 U.S. 252, 261 n.12 (1982) (courts cannot "speculate whether" the peculiarities of a legal scheme "ease or mitigate the perceived sin of participation"); *Gillette* v. *United States*, 401 U.S. 437, 457 (1971) ("the truth of a belief is not open to question; rather, the question is whether the objector's beliefs are 'truly held'") (citation and internal quotation marks omitted). Accordingly, whether "the connection between what the objecting parties must do" (comply with the regulatory mechanism) and

"the end that they find to be morally wrong (destruction of an embryo)" is "too attenuated" to be of religious consequence is a question for the Little Sisters, not the Third Circuit. *Hobby Lobby*, 573 U.S. at 723.

2. Once it is clear that forced compliance with the regulatory mechanism imposes a substantial burden on religious exercise, the balance of the RFRA analysis is straightforward. Even "assum[ing]" the government has a compelling interest in guaranteeing cost-free access to contraceptives, it cannot satisfy RFRA's "exceptionally demanding" least-restrictive-means test. *Hobby Lobby*, 573 U.S. at 728. That test requires the government to prove "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." *Id.* In other words, "if a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Holt*, 135 S. Ct. at 864. Once again, the government's own concessions doom any effort to satisfy that demanding test.

At the outset, the government acknowledged during the *Zubik* proceedings that the contraceptive-mandate regulations "could be modified" to avoid forcing religious objectors to provide the coverage through their own health plans, which alone sufficed to defeat any least-restrictive-means defense. U.S. Supp. Br. at 14-15, *supra*. And since then, the government has expressly concluded that the regulatory mechanism is "not the least restrictive means of" furthering its interests, noting that, "among other[]" programs, Medicaid, Title X, community health center grants, and TANF promote cost-free contraceptive access. 82 Fed. Reg. at 47,806, 47,803. The government has also taken

this Court up on its suggestion to simply assume any additional costs itself, clarifying that women whose employers do not provide contraceptive coverage due to a "sincerely held religious or moral objection" can be eligible for subsidized contraception. 84 Fed. Reg. 7714, 7734 (Mar. 4, 2019). Those ample alternatives make it impossible to satisfy the "most demanding test known to * * * law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997).

The Third Circuit's concern that expanding the religious exemption "would impose an undue burden on * * * female employees," Pet.App.47a, thus is not only legally misplaced, but factually unfounded. As the government itself has recognized, female employees have numerous avenues beyond their employers to obtain cost-free contraceptives and contraceptive coverage. See also U.S. Br. at 65, *Zubik*, *supra* (acknowledging that women who do not receive contraceptive coverage from their employer can "ordinarily" get it from "a family member's employer," "an Exchange," or "another government program"). In all events, given the vast number of employers the government exempts from the mandate, including for reasons as non-compelling as administrative convenience, any burden that may result from broadening the scope of the religious exemption cannot suffice to overcome RFRA's clear command.

In sum, the decision below is wrong about how RFRA works, it is wrong about how the regulatory mechanism works, and it is wrong about the extent to which the contraceptive mandate and the various government efforts to impose it burden religious exercise. This Court should correct all those mistakes and bring

this long-running controversy to an end. The government cannot burden religious adherents with a mandate that admits of exceptions yet not exempt those with sincere religious beliefs. No matter how many times the government adjusts the goalposts, it cannot simultaneously declare religious adherents in compliance with the substance of its mandate and dismiss their objections to compliance as unfounded. The executive branch finally got that message, but the courts below still resisted it. The way to stop burdening religious exercise is to exempt religious objectors. The way to bring this long-running dispute to an end is to make clear once and for all that the regulatory mechanism and other half-measures will not suffice.

D. The Religious Exemption Is Independently Authorized By The ACA.

While RFRA provides ample authority for the expanded religious exemption, the ACA itself, even apart from RFRA, provides independent statutory authority as well. The plain text of the ACA supports that conclusion, and both administrations have taken that position since its enactment.

The ACA identifies items that "group health plan[s]" and certain "health insurance issuer[s]" "shall * * * provide" as part of "minimum" coverage. 42 U.S.C. 300gg-13(a). Among other things, it states that covered plans must include coverage for, "with respect to women, such additional preventive care and screenings * * * as provided for in comprehensive guidelines supported by [HRSA]." 42 U.S.C. 300gg-13(a)(4). Notably, that provision conspicuously omits any mention of contraceptives and grants considerable discretion to the executive.

Given that the ACA itself does not compel the contraceptive mandate and instead grants substantial discretion to the executive branch, the executive branch has never viewed the ACA or its preventive care provisions as a straightjacket that prohibits the exemption of certain health plans—including, for example, to avoid unnecessary interference with religious liberty. See 76 Fed. Reg. at 46,623 ("In the Departments' view, it is appropriate that HRSA, in issuing these Guidelines, takes into account the effect on the religious beliefs of certain religious employers if coverage of contraceptive services were required in the group health plans in which employees in certain religious positions participate."); 83 Fed. Reg. at 57,540 ("nothing in the statute mandated that the Guidelines had to include contraception, let alone for all types of employers with covered plans"). HRSA and the agencies that implement the preventive-care mandate have endorsed that view ever since the contraceptive mandate first emerged. During the previous administration, HRSA and the Departments of HHS, Labor, and the Treasury concluded that—precisely because of the mandate's "effect on the religious beliefs of certain religious employers"—the ACA itself allowed them to exempt "churches," "their integrated auxiliaries," "conventions or associations of churches," and "the exclusively religious activities of any religious order" from the mandate entirely. 76 Fed. Reg. at 46,623; see also HRSA Guidelines, *supra*.

The Third Circuit nonetheless concluded that the ACA gives HRSA no "discretion to wholly exempt actors of its choosing from providing the guidelines services," emphasizing that the statute states that covered plans "*shall* provide" the services in HRSA's guidelines. Pet.App.39a-40a (emphasis added). But

that badly misreads the text, which simply does not provide that HRSA or its guidelines may not differentiate among employers with respect to the contraceptive mandate. If it did, then not even the original church exemption promulgated during the previous administration would be lawful under the ACA.

The district court recognized this problem as "the elephant in the room," CA3.JA.736, and the Third Circuit conceded that, under its theory, "the Church Exemption may seem facially at odds with" the ACA, Pet.App.40a n.26. The Third Circuit hypothesized, however, that the church exemption may be justified under the First Amendment's "ministerial exception." *Ibid.* (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012)). In reality, the original church exemption and the expanded exemption are independently justified by RFRA. But having rejected that view, the Third Circuit's belated attempt to save the church exemption via the ministerial exception is a poor substitute. The church exemption exempts certain religious employers despite the fact that they have employees who plainly are not ministerial employees. *Cf. Hosanna-Tabor*, 565 U.S. at 204 (Alito, J., concurring) ("a purely secular teacher [at a religious school] would not qualify for the 'ministerial' exception"). The ministerial exception thus is neither a justification nor a substitute for the church exemption.

As for the regulatory mechanism that the district court's injunction effectively reinstated, the Third Circuit suggested that it "does not plainly run afoul of the ACA" because it "provides a process through which a statutorily identified actor 'shall provide' the mandated coverage." Pet.App.40a n.26. Exactly—but that

is the precise concession that is fatal to the Third Circuit's RFRA analysis. The regulatory mechanism satisfies the Third Circuit's narrow view of the ACA because it is just a complicated mechanism to ensure that religious employers like the Little Sisters "shall provide" the precise coverage they object to providing. The Third Circuit is wrong about the ACA, but its ACA analysis only underscores the RFRA problem at the absolute heart of the regulatory mechanism and every other so-called accommodation. As long as the government insists that the Little Sisters do something that complies with the "shall provide" contraceptive mandate, the RFRA problem subsists. The way forward is to recognize what the Little Sisters have been saying since day one: RFRA entitles them to an exemption.

III. The Third Circuit's APA And Remedial Holdings Are Equally Flawed.

In the alternative, the Third Circuit held that the religious exemption is procedurally invalid under the APA. The court then imposed a nationwide injunction adjudicating the rights of religious adherents across the nation. The federal government is well-positioned to address those errors, but two points are particularly compelling from the perspective of the governed. First, the very last of the many government actions implemented via interim rulemaking that should have been invalidated is the one that enhanced liberty by expanding an exemption for religious exercise. The net effect of the Third Circuit's decision was to reimpose a regulatory regime that is the product of the same procedures, and is distinguishable only in being less protective of religious liberty. That itself is a sure sign that something is deeply amiss. Second, the imposition

of a nationwide injunction that disregarded the interests of thousands of religious adherents throughout the country is a particularly problematic use of the nationwide injunction.

A. The Religious Exemption Is Fully Consistent With The APA.

The APA "prescribes a three-step procedure for so-called 'notice-and-comment rulemaking.'" *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015). As a default rule, an agency must (1) offer "[g]eneral notice of proposed rule making"; (2) "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," and then consider and respond to significant comments, and (3) when promulgating the final rule, provide "a concise general statement of [its] basis and purpose." 5 U.S.C. 553(b)-(c). An agency need not follow this three-step procedure, however, if it has "good cause," see 5 U.S.C. 553(b)(B), or when authorized by statute, see 5 U.S.C. 559. In this case, the agencies invoked both exceptions to promulgate the First, Second, Third and Fourth IFRs, and they subsequently proceeded through notice-and-comment before promulgating the Final Rule at issue here. The government's latest, liberty-enhancing actions were fully consistent with the APA.

As an initial matter, it bears emphasis that virtually every aspect of the government's regulatory efforts with respect to the contraceptive mandate over the past decade began with an IFR that did not adhere to the APA's standard three-step process. In July 2010, the agencies issued their First IFR concerning cost-sharing requirements and made it effective before considering and responding to public comments. See

75 Fed. Reg. at 41,726, 41,728. In August 2011, the agencies issued the Second IFR effective immediately that demanded compliance with the contraceptive mandate (which itself was posted only on a website and was never subject to notice and comment). See 76 Fed. Reg. at 46,621, 46,623. And in August 2014, the agencies issued a Third IFR effective immediately that modified the regulatory mechanism that facilitates compliance with the contraceptive mandate. 79 Fed. Reg. at 51,092, 51,094. In each instance, the agencies invoked both the APA's "good cause" exception and their statutory authorization to issue IFRs as justification for departing from the APA's standard process. 75 Fed. Reg. at 41,729; 76 Fed. Reg. at 46,624; 79 Fed. Reg. at 51,092.

To be sure, the mere fact that the agencies routinely resorted to IFRs does not necessarily mean that each decision to do so was permissible. But it cannot seriously be contended that the Fourth IFR was the one to cross the line. In fact, the agencies had far better cause to proceed via IFR this time than in the first three instances. When the agencies issued the Fourth IFR, this Court had instructed the government to pursue a resolution to the RFRA litigation over the contraceptive mandate, and had enjoined application of the mandate to all of the petitioners. See *Zubik*, 136 S. Ct. at 1560. And the government itself had concluded that, "in many instances, requiring certain objecting entities or individuals to choose between the Mandate, the accommodation, or penalties for noncompliance * * * violated RFRA." 82 Fed. Reg. at 47,814. If the government could lawfully forgo full notice-and-comment procedures to restrict liberty and subject employers to a novel mandate that Congress itself did not impose, then surely it could do the same to respond to an

extraordinary remand and injunction from this Court and to enhance liberty by halting potential or actual RFRA violations.

The Third Circuit nevertheless dismissed the "purported harm to religious objections" as insufficient to satisfy the "good cause" exception, breezily observing that "[a]ll regulations are directed toward harm in some manner." Pet.App.33a. But there is an obvious difference between acting promptly to reduce harm at the margin and acting promptly in response to an order from this Court to halt an ongoing federal civil rights violation. If the latter does not constitute sufficient "good cause" to employ an IFR, then it is hard to see what would.

In all events, whether the Fourth IFR complied with the APA is ultimately immaterial. The government subjected the Final Rule—the rule challenged in respondents' amended complaint, see CA3.JA.233—to notice-and-comment. The agencies therefore cured and rendered harmless any purported procedural errors that may have existed during the interim rulemaking process. See, *e.g.*, 5 U.S.C. 706; *Shinseki* v. *Sanders*, 556 U.S. 396, 406 (2009) (holding that §706 is an administrative law "harmless error rule") (citation omitted); see also *United States* v. *Johnson*, 632 F.3d 912, 930-932 (5th Cir. 2011); *Friends of Iwo Jima* v. *National Capital Planning Comm'n*, 176 F.3d 768, 774 (4th Cir. 1999); *Advocates for Highway & Auto Safety* v. *Federal Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994).

The Third Circuit discounted the Final Rule on the theory that although it followed notice-and-comment, the lack of material changes in the rule evinced an absence of "real open-mindedness." Pet.App.36a. It is

hard to see how federal courts could even police such a nebulous "open mind" standard. *Cf. Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2507 (2019) ("'[J]udicial action must be governed by *standard*, by *rule*,' and must be 'principled, rational, and based upon reasoned distinctions' found in the Constitution or laws.") (citation omitted). But if that is the standard, Pet.App.37a, then it would be time for the contraceptive mandate itself to go. After all, the agencies finalized the IFR that imposed the mandate "without change" despite the thousands of objecting comments it drew. 77 Fed. Reg. at 8725. So too with the "accommodation." See *supra* p. 9. The Third Circuit thus cast the Final Rule aside only to resurrect a regime that suffers from the exact same professed procedural flaws, with the only difference being that the resurrected regime was less protective of religious liberty and evinced even less "open-mindedness." Unless this Court is prepared either to embrace the same blatant double standard or to imperil every significant regulatory effort regarding the contraceptive mandate over the past ten years, the Third Circuit's procedural ruling cannot stand.

B. The Nationwide Injunction Is Both Improper And Harmful.

The deep flaws that pervade the Third Circuit's reasoning are reason enough to show the perils of imposing those views nationwide. But the imposition of a nationwide injunction here was particularly problematic given its implications for religious adherents throughout the country. If the last decade of litigation over the contraceptive mandate has proven anything, it is that lower court dispositions of RFRA claims have been neither uniform nor unerring. The circuits were split on the issues that gave rise to this Court's *Hobby*

Lobby decision, and the majority of circuits adopted a narrow view of corporate religious exercise that garnered only two votes in this Court. The circuits were likewise split on the questions that came before this Court in *Zubik*. Under these circumstances, the courts below should have had ample reasons to think twice before imposing their resolution of these issues on the entire nation.

That is particularly true in light of the immediate and adverse effect of this injunction on religious adherents nationwide. Indeed, the stark contrast between the elusive interests of respondents and the straightforward interests of the religious adherents poised to benefit from the Final Rule is striking. Remarkably, respondents have yet "to identify a specific woman"—any woman, whether inside or outside their borders—"who will be affected by the Final Rule[]." Pet.App.25a. Despite that shortcoming, respondents managed to procure from a single district court a nationwide injunction that undermines the religious liberty interests of thousands of absent parties from whom the court never heard. Whatever the scope of courts' power to issue nationwide injunctions, certainly such injunctions are impermissible when they run the risk of compelling non-parties to the suit to violate their sincerely held religious beliefs.

In concluding otherwise, the Third Circuit—relying primarily upon a submission from non-party states—offered only generic observations about the "[m]any individuals" who live within respondents' borders but work out-of-state, and the college students who live within respondents' borders but rely on out-of-state health-insurance coverage. Pet.App.51a-52a. If more out-of-state religious employers are exempted

from the contraceptive mandate, the court reasoned, more people will seek contraceptives funded by respondents. Pet.App.51a-52a. Thus, according to the Third Circuit, the answer is to prevent out-of-state employers from having access to the religious exemption. Pet.App.51a-52a. Such rank speculation falls woefully short of justifying a departure from the "deep-rooted historic tradition that everyone should have his own day in court." *Taylor* v. *Sturgell*, 553 U.S. 880, 892-893 (2008) (citation omitted). More fundamentally, it is just another example of how the decision below cannot be reconciled with this Court's view that the government "follows the best of our traditions" when it accommodates religious exercise. *Zorach*, 343 U.S. at 314.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Third Circuit.

Respectfully submitted,

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March 2, 2020

APPENDIX

APPENDIX A

RELEVANT STATUTORY PROVISIONS

5 U.S.C. 553(b)-(c) provides:

§ 553. Rule making

* * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of writ-

ten data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

* * *

5 U.S.C. 559 provides:

§ 559. Effect on other laws; effect of subsequent statute

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5372, and 7521 of this title, and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.

5 U.S.C. 706 provides:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

42 U.S.C. 2000bb provides:

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. 2000bb-1 provides:

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. 2000bb-2 provides:

§ 2000bb-2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. 2000bb-3 provides:

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

42 U.S.C. 2000cc-3 provides:

§ 2000cc-3. Rules of construction

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated

Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected

Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) Other authority to impose conditions on funding unaffected

Nothing in this chapter shall—

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this chapter.

(e) Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) Effect on other law

With respect to a claim brought under this chapter, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this chapter.

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

(h) No preemption or repeal

Nothing in this chapter shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this chapter.

(i) Severability

If any provision of this chapter or of an amendment made by this chapter, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, the amendments made by this chapter, and the application of the provision to any other person or circumstance shall not be affected.

42 U.S.C. 2000cc-5 provides:

§ 2000cc-5. Definitions

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause" means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.