Nos. 19-431 & 19-454

In the
Supreme Court of the United States

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

v.

PENNSYLVANIA, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, *et al.*,
Petitioners,

v.

PENNSYLVANIA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE INDEPENDENT WOMEN'S LAW CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Independent Women's Law Center (IWLC) is a project of Independent Women's Forum (IWF), a non-profit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues. Independent Women's Law Center promotes access to free markets and the marketplace of ideas and defends the individual and religious liberties of American women.

IWLC has a strong interest in the outcome of these cases. In fact, IWF has twice previously filed an amicus brief in this Court in support of the religious liberty rights of the Little Sisters of the Poor.

IWLC is particularly concerned that the contraceptive mandate impinges on the liberty of women. More is at stake here than contraception. These cases are about empowering charitable employers, many of them women like the Little Sisters, to follow their deeply held religious convictions. IWLC believes the Court meant what it said in *Hobby Lobby*: Americans—whether they operate for-profit or non-profit ventures—do not check their religious liberty rights at the office or charitable door.

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[1] Pursuant to Sup. Ct. R. 37.3(a), amicus certifies that all parties have given blanket consent to the filing of amicus briefs in these cases. Pursuant to SUP. CT. R. 37.6, amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus or its counsel made such a monetary contribution.

INTRODUCTION

The government's implementation of the contraceptive mandate has resulted in expansive litigation for the better part of the last decade. The Court has granted petitions for certiorari in three different sets of cases—involving a total of eleven petitions for certiorari—in the past seven years. And the Court has repeatedly been forced to step in before the merits stage, issuing injunctions in three cases—two of which it entered while an appeal was pending in the court of appeals. This continued litigation has serious real-world consequences for women of faith. For nearly ten years, the Little Sisters have diverted scarce attention away from their core charitable mission of helping the elderly poor and dying in order to fight a never ending cycle of unlawful regulatory overreach that puts not only their conscience rights but also their entire organization in jeopardy.

Enough is enough. The Little Sisters and the government urge this Court to find that the government was required to exempt religious objectors, such as the Little Sisters of the Poor, from the contraceptive mandate when rulemaking under the Affordable Care Act (ACA). IWLC urges this Court to decide these cases on this basis, because a holding that RFRA requires the exemption is no further than the Court must go in these cases, and in fact is the simplest way to resolve the errors made by the courts below. Only by so doing can this Court put a permanent end to litigation over the relationship between RFRA and the contraceptive

mandate, ensuring that religious observers like the Little Sisters are firmly and permanently protected.

SUMMARY OF ARGUMENT

I. RFRA modifies all federal statutes. Accordingly, the government was required to comply with RFRA when implementing the contraceptive mandate. The fact that RFRA provides a cause of action for individuals whose religious exercise has been impermissibly burdened does not change the fact that its text also plainly binds the government in all lawmaking and rulemaking. Both this administration and the prior administration have conceded that the government was required to obey RFRA when implementing the contraceptive mandate.

II. The "accommodation" adopted by regulations that predate the recent rulemakings and the final rule clearly violated RFRA. The "accommodation" required religious employers' health insurance plans to provide coverage for contraceptives, abortifacients, and sterilization procedures and required religious employers to certify their religious objections—ultimately forcing employers to comply with the contraceptive mandate. Because the "accommodation" substantially burdened religious objectors' exercise of religion and because it was not the least restrictive means of furthering a compelling governmental interest, it violated RFRA.

III. This Court should hold that RFRA not only permitted, but required the government to adopt the exemption laid out in the final rule for three reasons.

First, RFRA empowers this Court to decide whether RFRA required the agencies to grant the exemption. Second, holding that RFRA mandated the final rule's exemption would allow this Court to avoid a number of the more complicated issues these cases raise. And third, by deciding these cases on this basis, the Court will once and for all end the incessant litigation over the interaction between RFRA and the government's implementation of the contraceptive mandate.

ARGUMENT

I. THE GOVERNMENT WAS REQUIRED TO COMPLY WITH RFRA WHEN ISSUING THE FINAL RULE.

A. RFRA Modifies All Federal Statutes and the Government Must Comply with RFRA when Engaging in Rulemaking.

RFRA modifies all federal statutes, and, under time-honored principles of statutory interpretation and agency rulemaking, the government was required to comply with RFRA when developing and issuing the final rule.

1. RFRA Applies to and Modifies All Federal Statutes.

RFRA unambiguously applies to and modifies all federal statutes. RFRA "applies to *all* Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. 2000bb-3(a) (emphasis added). And RFRA unequivocally provides that "Gov-

ernment *shall not substantially burden a person's exercise of religion* even if the burden results from a rule of general applicability" unless the government "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." 42 U.S.C. 2000bb-1 (emphasis added). *See also* 42 U.S.C. 2000bb-2 ("As used in this chapter * * * the term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States."). The Court's analysis of whether RFRA applies to the ACA should rely solely on RFRA's clear text because where "the plain language" of a statute "is 'unambiguous,' " the Court's " 'inquiry begins with the statutory text, and ends there as well.' " *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (quoting *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004) (plurality op.)).

The fact that RFRA provides a cause of action for individuals whose religious exercise has been impermissibly burdened, *see* 42 U.S.C. 2000bb-1(c), does not change the fact that, on a plain reading of its text, it *also* binds the government in all lawmaking and rulemaking. *Contra* Pet. App. 37a–38a. Federal law often both restricts or mandates government action *and* creates a cause of action for violations of such restrictions and mandates. For example, the Administrative Procedure Act both requires the government to follow its

mandates when engaging in rulemaking and adjudications, *see, e.g.*, 5 U.S.C. 553, 554, and creates a cause of action for injured parties to obtain judicial review if the government fails to follow these mandates, *see, e.g.*, 5 U.S.C. 702. The Freedom of Information Act likewise requires "[e]ach agency [to] make available to the public information," 5 U.S.C. 552(a), and creates a cause of action if the government fails to do so, *see* 5 U.S.C. 552(a)(4)(B). RFRA is the same: it both bars the government from impermissibly burdening religious exercise when engaging in lawmaking, rulemaking, and enforcement and creates a cause of action when the government fails to do so.

This Court has never suggested that RFRA solely provides a cause of action for aggrieved parties. *Contra* Pet. App. 37a–38a. Instead, it has recognized RFRA's "universal coverage," *City of Boerne* v. *Flores*, 521 U.S. 507, 516 (1997), and emphasized that "RFRA was designed to provide very broad protection for religious liberty," *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014). *Cf.* 42 U.S.C. 2000bb-4 ("Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter."). And the Court has confirmed that "RFRA prohibits" certain government actions and that "[i]f the Government substantially burdens a person's exercise of religion" under RFRA the person is generally "*entitled to* an exemption from the rule." *Burwell*, 573 U.S. at 705, 694 (emphasis added).

And the courts of appeals have repeatedly agreed: absent clear indications to the contrary, RFRA applies to all federal statutes—including the Affordable Care Act. As the Tenth Circuit put it, "RFRA applies to all subsequent federal statutes absent a specific exemption by Congress" and "[t]he ACA, enacted in 2010, did not contain a specific exemption and is subject to RFRA." *Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Burwell*, 794 F.3d 1151, 1159 n.4 (10th Cir. 2015), *vacated and remanded sub nom. Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016); *see Geneva Coll.* v. *Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 430 (3d Cir. 2015), *vacated and remanded sub nom. Zubik*, 136 S. Ct. 1557 ("RFRA places requirements on all federal statutes that impact a person's exercise of religion, even when that federal statute is a rule of general applicability."); *O Centro Espirita Beneficiente Uniao Do Vegetal* v. *Ashcroft*, 389 F.3d 973, 1029 (10th Cir. 2004), *aff'd and remanded sub nom. Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) ("[T]he government has no less interest in obeying RFRA than it has in enforcing the [Controlled Substances Act].").

2. The Government Must Comply with RFRA when Engaging in Rulemaking Pursuant to Its Authority Under the ACA.

A federal agency must comply with *all* federal statutes—not solely the statutes that it is charged with administering—when engaging in rulemaking.

This Court's precedents could not be more clear: "The Administrative Procedure Act requires federal courts to set aside federal agency action that is 'not in accordance with law,' 5 U.S.C. 706(2)(A)—which means, of course, *any* law, and not merely those laws that the agency itself is charged with administering." *F.C.C.* v. *NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003); *see also Hoffman Plastic Compounds, Inc.* v. *N.L.R.B.*, 535 U.S. 137, 147 (2002) ("[W]here the [National Labor Relations] Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield."). As then-Judge Breyer put it, this requirement is rooted in both the clear text of the APA and its legislative history, which

> indicates that [the statute's words] mean what they say. The House Judiciary Committee Report explains, in respect to the general right of judicial review stated in 5 U.S.C. 702 ("A person suffering legal wrong because of agency action * * * is entitled to judicial review"), that: "The phrase 'legal wrong' means * * * a complainant, in order to prevail, must show that the action is contrary to law in either substance or procedure. The law so made relevant is not only constitutional law but *any and all applicable law*."

Cousins v. *Sec'y of the U.S. Dep't of Transp.*, 880 F.2d 603, 607–608 (1st Cir. 1989) (en banc) (quoting H.R. Rep. No. 1980, 79th Cong., 2d Sess. 276 (1946)).

This Court has repeatedly invalidated agency actions for failing to comply with laws outside those that the agency is entrusted with administering. For example, in *F.C.C.* v. *NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 300–302, 307–308 (2003), the Court overturned an action taken by the Federal Communications Commission because that action violated a provision in the Bankruptcy Act—a statute that the Commission had no authority to administer but that the Court found the Commission was still required to abide by. *See also id.* at 304 ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.") (internal quotation marks omitted; alteration in original). And in *Hoffman Plastic Compounds, Inc.* v. *N.L.R.B.*, 535 U.S. 137, 151–152 (2002), the National Labor Relations Board had ordered an employer to provide backpay to an undocumented alien after the employer fired the alien for engaging in union activities; the Court found this order invalid because it "would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in [the Immigration Reform and Control Act of 1986]"—although the Board was *not* entrusted with administering that Act.

B. The Government Has Conceded that It Must Comply with RFRA Here.

In light of all this, it is unsurprising that the government has conceded that it must comply with RFRA when rulemaking pursuant to its ACA authority.

When issuing the final rule, the government explained that "Congress * * * left the ACA subject to RFRA." 83 Fed. Reg. 57,536, 57,543 (Nov. 15, 2018); *see also id.* at 57,542 ("Congress has * * * established a background rule against substantially burdening sincere religious beliefs except where consistent with the stringent requirements of the Religious Freedom Restoration Act. * * * Therefore, the Departments consider it appropriate, to the extent we impose a contraceptive coverage Mandate by the exercise of agency discretion, that we also include exemptions for the protection of religious beliefs in certain cases."). *See also* U.S. Br. at 20–25.

And the recognition that the agencies that administer the ACA—the Departments of Health and Human Services, Labor, and the Treasury (the agencies)—must abide by RFRA when administering the ACA has been consistent across administrations. The prior administration did not contest that it was required to abide by RFRA when engaging in rulemaking under the ACA—and in fact discussed why it thought its rules abided by RFRA. *See* 78 Fed. Reg. 39,870, 39,886–39,887 (July 2, 2013) (asserting that "the accommodations for eligible organizations * * * do not violate RFRA because they do not substantially burden religious exercise, and they serve compelling government interests and moreover are the least restrictive means to achieve those interests"). And the prior administration did not contest that RFRA applied to its ACA rulemaking in its briefing in *Zubik* v. *Burwell*. Instead, the prior administration argued

that its regulations complied with RFRA. *See* U.S. Br. at 25, 27, *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (arguing that "[t]he accommodation does not substantially burden the exercise of religion under RFRA" and that "[e]ven if petitioners could establish a substantial burden on their exercise of religion, the accommodation would be consistent with RFRA because it furthers a compelling governmental interest by the least restrictive means available").

II. THE PRIOR REGULATIONS VIOLATED RFRA.

As this Court explained in *Hobby Lobby*,

> [i]f the Government substantially burdens a person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government "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."

573 U.S. at 694–95 (quoting 42 U.S.C. 2000bb-1(b)). Under this framework, the prior regulations—that is, the regulations that predated the recent rulemakings that culminated in the final rule—clearly violated RFRA because they substantially burdened the exercise of religion and were not the least restrictive means of furthering a compelling governmental interest.

A. Brief Background on the Prior Regulatory Scheme.

As laid out in the Little Sisters' and the United States' briefing, the ACA's "contraceptive mandate" as implemented via agency guidelines and rulemaking generally requires employers to provide contraceptive coverage in health plans for their employees. *See* U.S. Br. at 3; Pet. Br. at 8–9. If an employer fails to abide by the contraceptive mandate, the employer incurs steep penalties. *See* U.S. Br. at 23–24. The ACA "exempts a great many employers from most of its coverage requirements," including the contraceptive mandate; the statutory exemptions include grandfathered health plans and employers with fewer than fifty employees. *See Hobby Lobby*, 573 U.S. at 699–700; *see also* Pet. Br. at 5–6. Through rulemaking, the agencies created a third exemption that applies to a subset of religious employers (the church exemption). *See* 78 Fed. Reg. at 39,873–39,874. But this exemption is significantly limited because it applied only to "churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order." *Id.* at 39,874. The Little Sisters do not qualify as an "integrated auxiliary" merely because they own and fund their own operations rather than having the church do so.

If an employer falls within any of the three categories, the employer is automatically entitled to an exemption—and need not take any further action related to contraceptive coverage for its employees. The infrastructure of the employer's health insurance plan

is not used to provide any contraceptive coverage that the employer has chosen not to provide.

In the regulations that predated the recent rulemakings that culminated in the final rule (the prior regulations), the agencies required all covered religious employers who did not qualify for one of the exemptions laid out above—which included orders of nuns, faith-based charities, religious colleges and universities, and theological seminaries—to comply with the contraceptive mandate via a so-called "accommodation." *See* 78 Fed. Reg. at 39,874–39,878. To make use of the "accommodation," a covered religious employer is required to "provide[]" to their health insurance provider "a copy of its self-certification" form. *Id.* at 39,879. The insurer is required to provide or arrange for the contraceptive coverage—*using the infrastructure of the objecting religious employer's plan*. *See id.* at 39,875–39,880. If an employer obeys this regulatory regime, its health plan is "considered to comply with the contraceptive coverage requirement." *Id.* at 39,879. In other words, the "accommodation" still requires religious employers' health insurance plans to provide contraceptive coverage and requires employers to trigger this coverage by certifying their objections—ultimately forcing objecting employers to comply with the contraceptive mandate.

As originally adopted, this "accommodation" was limited to religious nonprofits, *see* 78 Fed. Reg. at 39,875, but after this Court's decision in *Hobby Lobby,* the agencies extended the "accommodation" to closely held for-profit entities that have religious objections

to providing contraceptive coverage, *see* 80 Fed. Reg. 41,318, 41,323 (July 14, 2015). But the regulatory mechanism and general rules governing the "accommodation" remained essentially the same. Although the post-*Hobby Lobby* rules permitted an objecting employer to notify either their health insurance provider or the Department of Health and Human Services of their objection, either route still triggered contraceptive coverage by the employer's health insurance plan. *Ibid.*

B. The Prior Regulations Substantially Burdened the Exercise of Religion.

Under *Hobby Lobby*, it is clear that the "accommodation" the prior regulations offered substantially burdens the sincere religious beliefs of the Little Sisters and similar religious employers.

The "accommodation" in question clearly requires the Little Sisters to do the exact thing that they find objectionable based on their faith: assist in providing contraceptive coverage to their own employees. Many religious employers believe that this would violate their sincerely held religious beliefs. *See* 83 Fed. Reg. at 57,546 ("Various entities sincerely contended, in litigation or in public comments, that complying with either the Mandate or the accommodation was inconsistent with their religious observance or practice."); *id.* at 57,554 (noting that the government "recogniz[es] that some people have sincere religious objections to providing contraception coverage").

Because it is clear that this conviction is an honest one, this Court cannot question it; the "truth of a belief is not open to question; rather, the question is whether the objector's beliefs are truly held." *Gillette* v. *United States*, 401 U.S. 437, 457 (1971) (internal quotation marks omitted). When a religious objector "dr[aws] a line * * * it is not for [the Court] to say that the line * * * was an unreasonable one," *Thomas* v. *Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 715 (1981), and "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim," *Employment Div., Dep't of Human Res. of Oregon* v. *Smith*, 494 U.S. 872, 887 (1990). *See also Hobby Lobby*, 573 U.S. at 724–725.

And there is no doubt that the forced choice between complying with the contraceptive mandate via the "accommodation" or facing the ACA's significant penalties constitutes a substantial burden. Here, *Hobby Lobby* clearly controls: "Because the contraceptive mandate forces them 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." 573 U.S. at 726. Given the Court's clear RFRA precedents, it is no surprise that the government has recognized that "the accommodation can be seen as imposing a substantial burden on religious exercise in many instances." 83 Fed. Reg. at 57,546; *see id.* at 57,561 (recognizing the "substantial burdens on

sincere religious beliefs imposed by the contraceptive Mandate").

C. The Prior Regulations Were Not the Least Restrictive Means of Furthering a Compelling Governmental Interest.

Assuming, as the Court did in *Hobby Lobby*, "that the interest in guaranteeing cost-free access to * * * contraceptive[s] * * * is compelling within the meaning of RFRA," 573 U.S. at 728, to survive RFRA the "accommodation" must be "the least restrictive means of furthering that compelling governmental interest," 42 U.S.C. 2000bb-1(b)(2).

"The least-restrictive-means standard is exceptionally demanding," *Hobby Lobby*, 573 U.S. at 728, and is part of "the most demanding test known to constitutional law," *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997). What is more, the fact that Congress or an agency has already provided exemptions from a rule weighs heavily against the claim that a RFRA-based exemption would impermissibly undercut a compelling governmental interest. *See Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432–35 (2006).

Here, because of the existence of numerous other exemptions to the contraceptive mandate, the government could never "show[] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion." *See Hobby Lobby*, 573 U.S. at 728. As discussed previously, *see*

pp. 12 *supra*, there are three major groups who are already exempted from the contraceptive mandate: (1) employers with grandfathered health insurance plans, (2) employers with fewer than fifty employees, and (3) certain religious employers who fall under the church exemption. These provisions "exempt[] a great many employers from most of [the ACA's] coverage requirements" and mean that "the contraceptive mandate presently does not apply to tens of millions of people." *Hobby Lobby*, 573 U.S. at 699–700 (internal quotation marks omitted); *cf.* 83 Fed. Reg. at 57,541 ("[O]f the 150 million nonelderly people in America with employer-sponsored health coverage, approximately 25.5 million are estimated to be enrolled in grandfathered plans."). If an employer fits into one of these categories, that employer is completely excused from complying with the contraceptive mandate; it need not submit paperwork to any federal agency or insurer and it is not forced to be involved in obtaining contraceptive coverage for its employees.

The third exception for church employers is both over- and under-inclusive. It is under-inclusive because it does not include clearly religious entities like the Little Sisters. But it is also over-inclusive, as it does not require an employer to actually have a religious objection to providing contraceptive coverage in order for the employer to take advantage of it. Where the government has excused church employers from compliance even though some of them have no religious objection, it cannot—without a rationale that survives RFRA's strict scrutiny—decline to extend the

exemption to similarly situated religious employers who *do* have a sincere religious belief preventing them from providing contraceptive coverage.

Moreover, there is no compelling reason to exempt these three groups of employers while declining to exempt religious employers who do not fit within one of the groups. The rationale for the grandfathered plan exemption was "simply the interest of employers in avoiding the inconvenience of amending an existing plan." *Hobby Lobby*, 573 U.S. at 727. If the government has found it appropriate to exempt contraceptive coverage for the purpose of mere convenience, exempting objecting religious employers from contraceptive coverage for the purpose of complying with RFRA cannot fatally undermine any compelling governmental interest.

The expansive exemptions to the contraceptive mandate clearly demonstrate that the governmental interests in enforcing that mandate are not the sort that require categorical or comprehensive coverage—and the forced choice between the "accommodation" and incurring steep fines runs afoul of RFRA. And—contrary to what the Third Circuit found below, *see* Pet. App. 41a—there is no possible problem for third parties that cuts against finding that the prior regulations violated RFRA. Again, *Hobby Lobby* is clear on this point: where, as here "the Government can readily arrange for other methods of providing contraceptives, without cost sharing, to employees who are unable to obtain them under their health-insurance plans due to their employers' religious objections," the

holding that RFRA requires an exemption "need not result in any detrimental effect on any third party." *Hobby Lobby*, 573 U.S. at 729 n.37.

In sum, given RFRA's demanding standard it is no surprise that the government has admitted that solely offering religious objectors the "accommodation" violated RFRA. *See* 83 Fed. Reg. at 57,544 (explaining that by "requiring certain religiously objecting entities to choose between the Mandate, the accommodation, or penalties for noncompliance * * * the Departments would violate their rights under RFRA"). The agencies thus adopted the final rule. The final rule did what the Little Sisters and other religious objectors requested: it extended the church exemption to include them in its coverage. *See id.* at 57,537. The final rule ensures that religious objectors are no longer required to participate in an "accommodation" process and facilitate the provision of contraceptive coverage to which they object.

III. RFRA Requires the Government To Follow the Approach Taken by the Final Rule and the Court Should Decide These Cases on this Basis.

A. RFRA Requires the Government To Exempt Religious Objectors Such as the Little Sisters from the Contraceptive Mandate.

The arguments laid out above unavoidably lead to the conclusion that RFRA requires the agencies to adopt the final rule. Religious employers who object to

the contraceptive mandate have a sincerely held religious belief that the mandate substantially burdens. And the "accommodation" introduced in the prior regulations did them no good; it violated their religious beliefs—and was not the least restrictive means of furthering a compelling governmental interest.

Most important, when promulgating the final rule the agencies that administer it were required to abide by RFRA. There is no doubt that RFRA applies to the ACA as part of the corpus of federal law. *See* 42 U.S.C. 2000bb-3(a); *see also* pp. 4–7 *supra*. Nor is there any doubt that, because an agency must abide by all applicable laws, *see NextWave Pers. Commc'ns Inc.*, 537 U.S. at 300, the agencies here were required to obey RFRA's prohibition against impermissibly burdening religion when promulgating their final rule. It does not matter that the agencies are not expressly charged with implementing RFRA; rather, RFRA expressly "applies to *all* Federal law, and the implementation of that law, whether statutory or otherwise," 42 U.S.C. 2000bb-3(a) (emphasis added). Indeed, the reality that the agencies must abide by RFRA when promulgating regulations pursuant to their authority under the ACA is the cornerstone of the Court's decision in *Hobby Lobby*—which invalidated regulations that the agencies had promulgated under the ACA *for failing to comply with RFRA*. *See* 573 U.S. at 736.

RFRA thus required the agencies to fully exempt religious objectors such as the Little Sisters from the contraceptive mandate's coverage. This Court should

decide these cases by holding that RFRA not only permitted, but required the government to adopt the final rule. The federal courts are empowered to decide whether RFRA exemptions are required, and doing so in these cases will put to rest the incessant litigation the contraceptive mandate has spawned, relieve women like the Little Sisters of an unlawful burden on their conscience rights, and avoid a number of thorny legal issues.

B. The Court Should Hold that RFRA Required the Agencies To Adopt the Final Rule Because Courts Must Decide the Propriety of RFRA Exemptions.

As the Court explained in *O Centro*, "RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress." 546 U.S. at 434. Similarly, when analyzing the Religious Land Use and Institutionalized Persons Act (RLUIPA, which is similar to RFRA) in *Holt* v. *Hobbs*, 574 U.S. 352, 135 S. Ct. 853, 863–64 (2015), the Court noted that while the lower courts "thought that they were bound to defer to the [government's] assertion that [granting the exemption] would undermine its interest * * * RLUIPA * * * does not permit such unquestioning deference." The government "[may] not merely * * * explain why it denied the exemption but [must] prove that denying the exemption is the least restrictive means of furthering a compelling governmental interest," *id.* at 864—and whether the government has carried its burden of proof is for the courts to decide.

This Court is thus not limited to deciding whether the agencies properly *could* grant the final rule's exemption. Instead, RFRA empowers the Court to decide whether RFRA *required* the agencies to grant the exemption—and the Court should actually reach that decision when resolving these cases. *See O Centro*, 546 U.S. at 434.

C. The Court Should Hold that RFRA Required the Agencies To Adopt the Final Rule Because that Is the Most Straightforward Way To Decide These Cases.

Holding that RFRA mandated the final rule's exemption would allow this Court to decide these cases in the most straightforward manner possible. And it would help this Court (and, by extension, lower federal courts in future cases) avoid rendering unnecessary opinions on a host of related but more complicated issues that ultimately have little bearing on the merits questions related to RFRA's application. If the Court simply holds that RFRA requires the exemption, it will not have to wade into (1) whether the agencies followed the APA's procedural mechanisms when issuing the interim rules that predated the final rule; (2) what precisely the preventative care mandate required and related APA questions regarding the contours of the ACA; (3) the extent to which RFRA provides agencies authority to interpret it to override other rules; (4) whether any supposed flaws in the interim rules infected the final rule; and (5) the propriety of the nationwide injunction that was entered and

affirmed by the lower courts. Instead, the Court can answer the straightforward question of whether RFRA requires the final rule's exemption (which it does) and steer clear of these interrelated and thorny questions. And by doing so the Court will issue a clear rule that can easily be applied in future cases—precluding the need for courts to reach questions like these in many cases.

D. The Court Should Hold that RFRA Requires the Agencies To Adopt the Final Rule To Enforce RFRA's Religious Liberty Protections and End Incessant Litigation over the Contraceptive Mandate Once and for All.

As this Court is well aware, the government's implementation of the contraceptive mandate has resulted in voluminous litigation—beginning with the government's very first rulemaking on that subject. Litigation over the extent to which exemptions and accommodations from the mandate comply with RFRA began as early as 2011—nearly a decade ago. These cases mark the third time in roughly seven years that this Court has granted groups of petitions for certiorari that involve questions related RFRA and the government's implementation of the contraceptive mandate. *See Hobby Lobby*, 573 U.S. 682 (decision on two consolidated cases); *Zubik*, 136 S. Ct. 1557 (decision on seven consolidated cases).

The Court has also repeatedly been forced to step in before the merits stage, issuing injunctions in three

cases, two of which it entered while an appeal was pending in the court of appeals. *See Little Sisters of the Poor Home for the Aged, Denver, Colorado* v. *Sebelius*, 571 U.S. 1171 (2014) (enjoining enforcement of the challenged provisions of the ACA and related regulations as to those having "religious objections to providing coverage for contraceptive services" pending the Tenth Circuit's resolution of the appeal); *Wheaton Coll.* v. *Burwell*, 573 U.S. 958 (2014) (enjoining enforcement of the "accommodation" by providing that a religious objector was not required to use the government-prescribed form or send copies to insurers pending the Seventh Circuit's resolution of the appeal); *Zubik* v. *Burwell*, 135 S. Ct. 2924 (2015) (enjoining application of the provisions challenged in *Zubik*, 136 S. Ct. 1557, pending the Court's final disposition of *Zubik*).

Given the number of times this issue has made its way to this Court, it is no surprise that there have been dozens of federal court decisions weighing the interaction between RFRA and the contraceptive mandate. *See* Pet. at 4–16; *see also* Pet. at i, 27, *Little Sisters of the Poor Jeanne Jugan Residence* v. *California* (2019) (No. 18-1192) (explaining that issues related to RFRA and the contraceptive mandate have been "adjudicated by ten courts of appeals and dozens of district courts" and that the "controversy has been addressed by more than 150 judges").

If the Court limits its decision to whether RFRA *permits* the final rule's exemption, the Court will all but ensure continued and protracted litigation over

the contraceptive mandate. Such a limited decision would not bind a future administration, which could easily and at any moment rescind the final rule. This would inevitably lead, once again, to widespread litigation throughout the lower federal courts—and, ultimately, to another set of petitions for certiorari to this Court.

And such a limited decision would inevitably cause unnecessary instability and worry for religious objectors like the Little Sisters—who deserve the enduring protection of their religious beliefs that RFRA promises. As this Court found in *Hobby Lobby*, the contraceptive mandate puts religious groups in an untenable position: comply with the mandate and violate sincerely held religious beliefs or "pay a very heavy price" in the form of a door-shuttering governmental fine. 573 U.S. at 691. This Court should make clear that this Hobson's choice violates RFRA and that the conscience rights of women like the Little Sisters are protected under that statute.

This Court can finally put to rest litigation over the interaction between RFRA and the contraceptive mandate by holding that RFRA requires the government to exempt religious objectors from the contraceptive mandate—as is currently, but by no means permanently, reflected in the final rule. This approach will, of course, serve the important end of preserving this Court's (and all other federal courts') limited resources by preventing needless litigation. But more important, it will fulfill RFRA's promise to religious observers that "governments should not substantially

burden religious exercise without compelling justification." 42 U.S.C. 2000bb(a)(3).

CONCLUSION

For these reasons, this Court should reverse the judgment of the Third Circuit and hold that RFRA requires the government to exempt religious objectors from the contraceptive mandate.

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Respectfully submitted,

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