Nos. 19-431 and 19-454

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, ET AL.,

Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA, ET AL.,

Respondents.

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

Brief of Constitutional Law Scholars as *amici curiae* in support of Petitioners

NELSON MULLINS RILEY & SCARBOROUGH, LLP
Miles E. Coleman, *Counsel of Record*
miles.coleman@nelsonmullins.com
2 W. Washington St., 4th Floor
Greenville, SC 29601
(864) 373-2352

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are constitutional law scholars who possess an acute interest in a reasoned development of constitutional doctrine. They write to aid the Court in interpreting and applying the Religious Freedom Restoration Act. *Amici* are listed below:[2]

Ronald J. Colombo
Professor of Law
Associate Dean for Distance Education
Maurice A. Deane School of Law
Hofstra University

Richard Epstein
Laurence A. Tisch Professor of Law
NYU School of Law
Peter and Kirstin Bedford Senior Fellow, Hoover Institution
Senior Lecturer, University of Chicago

Carl H. Esbeck
R.B. Price Professor of Law Emeritus
Isabelle Wade & Paul C. Lyda Professor Emeritus
University of Missouri

David F. Forte
Professor of Law
Cleveland State University
Cleveland Marshall College of Law

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[1] The parties filed blanket consents to the filing of *amicus* brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity, other than *amici curiae* or their counsel made a monetary contribution to the preparation and submission of this brief.

[2] All institutional names given for identification purposes only.

Robert P. George
McCormick Professor of Jurisprudence
Princeton University

Mary Ann Glendon
Learned Hand Professor of Law
Harvard University

Bryan McCall
Orpha and Maurice Merrill Professor in Law
University of Oklahoma College of Law

Stacy Scaldo
Associate Professor of Law
Florida Coastal School of Law

Steven Smith
Warren Distinguished Professor of Law
Co-Executive Director, Institute for Law & Religion
Co-Executive Director, Institute for Law & Philosophy
University of San Diego School of Law

SUMMARY OF THE ARGUMENT

Lurking behind the regulatory issues presented by this appeal is a concerted effort to displace the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ("RFRA"), with a novel approach that would trivialize a law's burden on religion. The Court should not indulge it.

In "an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 737 (2014) (Kennedy, J., concurring). To aid in this determination, Congress enacted RFRA—a sensible framework for balancing religious freedom and third-party interests implicated by religious exemptions to neutral, generally applicable laws. In so doing, Congress restored the compelling interest test to claims that a facially-neutral law of general applicability "substantially burdens" the free exercise of religion[3]—a test that had been abandoned by the Court in *Employment Division* v. *Smith,* 494 U.S. 872 (1990). Thus, RFRA creates a statutory exemption from neutral and generally applicable laws that substantially burden sincere religious beliefs unless the government can establish its requirement meets the exacting "strict scrutiny" standard. *O'Bryan* v. *Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003).

Time and again, this Court has held that Congress's weighted balance in favor of religious freedom is constitutional. See, e.g., *Hobby Lobby*, 573 U.S. at 736;

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[3] See 42 U.S.C. § 2000bb(b)(1) ("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.").

Cutter v. Wilkinson, 544 U.S. 709, 719–21 (2005). Some of RFRA's critics in academia, however, contend the Establishment Clause bans any religious exemption that "requires people to bear the burden of religions to which they do not belong and whose teachings they do not practice."[4] Indeed, it is not an exaggeration to characterize these critics' position—like that of the States challenging the Final Rules at issue here—as a backdoor attempt to neutralize RFRA in all cases involving abortion, contraception, and certain applications of anti-discrimination law.[5] Yet nothing in *Smith* prevents Congress from reinstating the accom-

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[4] See Frederick Mark Gedicks, *Exemptions from the 'Contraception Mandate' Threaten Religious Liberty*, WASH. POST (Jan. 15, 2014). See also Micah Schwartzman, Nelson Tebbe, & Richard Schragger, *The Costs of Conscience*, Public Law & Legal Theory Research Paper Series 2018-14, University of Virginia Law School (Mar. 2018) (hereinafter "*Costs of Conscience*"); Micah Schwartzmann, Richard Schragger & Nelson Tebbe, Holt v. Hobbs *and Third Party Harms*, BALKINIZATION BLOG (Jan. 22, 2015) https://balkin.blogspot.com/2015/01/holt-v-hobbs-and-third-party-harms.html; Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.–C.L. L. REV. 343 (2014); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for* Hobby Lobby *Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC, 51 (2014).

[5] RFRA's detractors have suggested the Final Rules (and the Interim Final Rule before them) only accentuate the third-party harms present within this exemption because the Rules accommodate "moral as well as religious convictions." See Micah Schwartzman, Nelson Tebbe, and Richard Schragger, *The Costs of Conscience and the Trump Contra-ception Rules*, TAKE CARE BLOG (Mar. 8, 2018) https://takecareblog.com/blog/the-costs-of-conscience-and-the-trump-contraception-rules. But the proper Establishment Clause remedy is to extend exemptions to religious-like objections. See *Welsh* v. *United States*, 398 U.S. 333, 351–61 (1970) (Harlan, J., concurring in result).

modation scheme that was widely respected in such cases as *Sherbert* v. *Verner*, 374 U.S. 398 (1968) and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

The critics' argument suffers from several analytical defects that can be remedied by (1) a proper constitutional understanding of RFRA's relationship to the Establishment Clause; (2) an accurate understanding of how the Religion Clauses safeguard third-party interests; and (3) the correct application of these understandings to the Final Rules.

First, RFRA incorporates Establishment Clause limits on religious accommodations. It applies equally to all religions and takes into account the government's interest in protecting third parties when that interest is compelling. The critics object to RFRA on supposed Establishment Clause grounds on the odd view that government entitlements (rather than constitutional protections) are the "baseline" of rights, even though the Constitution gives that priority of place to the rights of individuals to practice their religious faiths. They also object to the ostensible "strictness" of RFRA's compelling state interest even though that too only marks a return to the prior learning in both *Sherbert* and *Verner*, which was well defended by Justice Blackmun in his prescient dissent in *Smith*. See 494 U.S. 872, 909–10 (1990); see also Richard A. Epstein, *The Defeat of the Contraceptive Mandate in Hobby Lobby: Right Result, Wrong Reason*, CATO SUPREME COURT REV. 35, 41–42 (2013 Term). Nor is there any reason to dilute the protection afforded under RFRA because a private party, and not the government, is making the protest. A uniform standard is the only way to protect the statute from being gutted with a succession of third party claims.

More fundamentally, arguing that RFRA should not apply when abortion, contraception, or anti-discrimination laws are at issue is a *political* argument for the *political* branches. It is not an argument for distorting Establishment Clause jurisprudence, which, as this Court has confirmed, "must be interpreted by reference to historical practices and understandings." *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1819 (2014) (internal quotations omitted).

Second, allowing selective, "significant" (but not compelling) third-party interests to trump RFRA under the false flag of the Establishment Clause misstates Religion Clause jurisprudence. This Court's cases distinguish between religious *exemptions*, which do not violate the Constitution, and religious *preferences*, which may (though not always) violate the Establishment Clause. Preferences entail State action; exemptions do not.[6] RFRA's critics gloss over this distinction by re-characterizing landmark Supreme Court decisions like *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327 (1987) and *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664 (1970), which defended exemptions from Social Security contributions and the tax laws, respectively. Ignoring the distinction between exceptions and preferences "could turn all regulations into entitlements to which nobody could object on religious grounds." *Hobby Lobby*, 573 U.S. at 729 n.37. Indeed, this conflation could even threaten the longstanding, widely embraced statutory practice of exempting

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[6] Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?*, 106 KTY. L. J. 603, 616 and n.81 (2018) (hereinafter "*Discretionary Religious Exemptions*").

individuals and entities from being forced to provide or pay for abortions.

Third, the argument for contriving an Establishment Clause bypass around RFRA is an unprincipled exercise in special pleading, which disregards the clear import of the Supreme Court's decisions in *Hobby Lobby* and *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (*per curiam*). Both cases indicated the "seamless" coverage of abortifacients and contraceptives is not a compelling interest that justifies denying a religious exemption to the Little Sisters of the Poor similar to that already given to some for-profit corporations, small businesses, entities with "grandfathered" health-insurance plans, and those religious organizations the federal government has already deemed exempt. "RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally." *Id.* at 2786 (Kennedy, J., concurring). The Final Rules resolved this under-inclusiveness. An exemption that satisfies RFRA does not become constitutionally suspect simply because the determined opponents of RFRA do "not *lik*e the compelling interest test."[7]

Congress did not exempt the Affordable Care Act ("ACA") from RFRA, as it could have. At long last, HHS has recognized and applied RFRA to the substantial burden faced by the Little Sisters and other nonprofits. The efforts of the Plaintiff States and RFRA's critics in academia to circumvent that framework in the name of third-party interests is unmoored from the Constitution

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[7] See Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 251 (1995) (emphasis in original).

and would upend our nation's venerable tradition of religious accommodation that Congress, through RFRA, consciously sought to restore.

ARGUMENT

I. RFRA is a constitutionally acceptable, legislative judgment about how to treat third-party objections to religious exemptions.

When Congress enacted RFRA, it manifested the "solicitousness" *Smith* anticipated regarding the social value of religious exercise and, at the same time, it respected the primacy of the democratic process in harmonizing religious exemptions with other social values.[8] RFRA is consistent with this nation's long tradition of safeguarding religious exercise through democratically-enacted exemptions.

Even as some framers debated whether the Constitution compelled certain religious exemptions, "there is virtually *no evidence* that anyone thought [regulatory exemptions] were constitutionally prohibited or that they were part of an establishment of religion."[9] Indeed, RFRA and the baseline of religious freedom it ensures follow from the founders' political philosophy, best articulated by James Madison: "It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to

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[8] See, e.g., Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 44–45 (2014); William K. Kelly, *The Primacy of Political Actors in Accommodation of Religion*, 22 U. HAW. L. REV. 403 (2000).

[9] Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1796 (2006) (emphasis added).

him. *This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society*."[10]

RFRA's structure harmonizes the right of free exercise and other compelling interests. It supersedes all prior, inconsistent federal law; it presumptively applies to all future federal law; and it applies to the implementation of federal law (like the HHS mandate and the Final Rules).[11] If Congress does not want RFRA to apply to a given statute (whether out of a concern for a third-party's interest or for other reasons), it can exempt that statute from RFRA's grasp.[12] Even as it stands, RFRA only protects religious exercise when the exercise is "substantially" burdened by government action. Even then, the government may substantially burden religious exercise only when its action, applied 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."[13]

Rather than resolve every conceivable conflict between religious claims and other values, Congress tasked the judiciary with applying—not distorting—RFRA's framework to particular cases. This Court has consistently "reaffirmed . . . the feasibility of case-by-

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[10] James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *reprinted in* 8 The Papers of James Madison 1784–86, at 295 (Robert A. Rutland et al. eds., 1973) (emphasis added); see also Kevin Seamus Hasson, *Framing a Nation Under God: The Political Philosophy of the Founders* in BELIEVERS, THINKERS, AND FOUNDERS: HOW WE CAME TO BE ONE NATION UNDER GOD 115–29 (2016).

[11] 42 U.S.C. § 2000bb-3(a)-(b).

[12] *Id.* at § 2000bb-3(b).

[13] *Id.* at §§ 2000bb(b), 2000bb-1(a) & (b).

case consideration of religious exemptions to generally applicable rules." *Gonzalez* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436–37 (2006). Despite the claims of some critics that the Establishment Clause, *ex ante*, takes this harmonizing off the table here in light of *Cutter*,[14] "[n]othing in [*Cutter*] suggested that courts were not up to the task" of the balancing. *Id.* Because RFRA does not embody an unyielding preference for religious exercise over any other public or private interest and because it both avoids denominational favoritism and gives adequate protection for third-party interests, RFRA's framework does not violate the Establishment Clause. See, e.g., *Cutter*, 544 U.S. at 719–20 (holding so in the context of the RLUIPA, which possesses the same framework as RFRA).

Even RFRA's critics, who urge a ban on religious exemptions that allegedly cause "substantial" third-party harms, concede that "RFRA seems *facially* to comply with the Establishment Clause."[15] Notably, in their recent article, *Costs of Conscience*, Professors Schwartzman, Tebbe, and Schragger avoid casting any explicit constitutional doubt on RFRA. Instead, they seek to undermine the wisdom of Congress's decision to address third-party harms through RFRA's analysis of a compelling interest pursued through the least-restrictive means.[16] Putting aside the fact that "the *wisdom* of Congress's judgment" in establishing RFRA "is not [a judicial] concern," *Hobby Lobby*, 573 U.S. 736 (emphasis added), the critics' objections to considering

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[14] See *Costs of Conscience* at 12.

[15] Gedicks & Van Tassell, *RFRA Exemptions from the Contraception Mandate*, 49 HARV. C.R. – C.L. L. REV. at 348.

[16] See, e.g., *Costs of Conscience* at 17–19.

third-party interests within the RFRA framework do not give rise to an Establishment Clause violation.[17]

A. The proper "baseline" of rights is religious liberty, not government benefits.

The first objection RFRA's academic critics make to RFRA's alleged effect on third-party interests is that "regulatory baselines" that identify the "entitlements" owed to particular third-parties (*e.g.*, the alleged "entitle[ment] to insurance coverage for all forms of contraception approved by the FDA") need to be established *before* religious exemptions can be considered, not after.[18]

This objection has no place under the Establishment Clause. "[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz*, 397 U.S. at 668; see *also Town of Greece*, 134 S. Ct. at 1819 (confirming the Establishment Clause "must be interpreted by reference to historical practices and understandings")

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[17] RFRA's consideration of third-party harms as a facet of the compelling-interest analysis is commonplace in constitutional law. See, e.g., *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 250 (1964) (explaining the "fundamental object" of banning race discrimi-nation in public accommodations "was to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments") (internal quotation marks and citation omitted); *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623, 625 (1984) (the compelling interest in "eradicating discrimination against its female citizens" exists because sex discrimination "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.").

[18] See, e.g., *Costs of Conscience* at 14–19.

(internal quotation marks and citation omitted). Accordingly, "establishing" religion requires some form of government action:

> [T]he government does not establish religion by leaving it alone. . . . In the case of a religious exemption, the government has never altered the status quo ante. . . . With an exemption, the Court does not deny that third parties may have suffered a harm. Rather, the Court is saying that if there was such incidental harm, it was not caused by the government.[19]

Because the Establishment Clause is not implicated in the absence of State action,[20] it is incoherent to suggest the Clause protects "regulatory baselines"[21] when a religious claimant seeks to restore the *pre-regulation* status quo. Indeed, the chronology of the exemption protected by the Final Rules here proves the point: the ACA promised, via HHS regulation, a new government entitlement to contraception and abortifacients that overrode previously-protected religious liberty. RFRA only evaluates the propriety of returning the religious claimant to the prior baseline. This approach is consistent with Madison's understanding of religious rights and duties as "precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[22]

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[19] *Discretionary Religious Exemptions* at 623–24.

[20] *Id.* at 616 and n.81.

[21] *Cf. Costs of Conscience* at 17.

[22] See *supra* n.10; see *also* Ronald J. Colombo, *An Antitrust Approach to Corporate Free Exercise Claims*, 91 ST. JOHN'S L. REV. 1, 49 n.260 (2018) ("It is only because of government's interference . . . that the conflict between rights even arises."). Cf. *Hobby*

This Court illustrated in *Amos* how religious liberty serves as the proper baseline for evaluating government entitlements. There, the Court rejected an as-applied Establishment Clause challenge to Title VII's exemption of religious employers from the statute's general prohibition of religious discrimination. See 483 U.S. at 329–30. This exemption allowed the religious employer in *Amos* to terminate a building custodian based on his religion—a clear third-party harm, but one this Court nevertheless found insufficient to override the statute's religious exemption. Like RFRA, the purpose of Title VII's religious exemption is to "lift[] a regulation that burdens the exercise of religion." *Id.* at 338.

Amos further explained that this purpose is distinct from an advancement of religion that might violate the Establishment Clause. Unlike statutes that "delegate[] governmental power to religious employers and convey[] a message of governmental endorsement of religious discrimination," *id.* at 337 n.15 (internal quotation marks and citation omitted), Title VII's statutory religious exemption restores the "baseline" of rights the religious claimant and the third-party respectively possessed before the government imposed

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Lobby, 573 U.S. at 729 n.37 ("HHS appears to maintain that a plaintiff cannot prevail on a RFRA claim that seeks an exemption from a legal obligation requiring the plaintiff to confer benefits on third parties. Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals. . . . [I]t could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties.").

its regulation. No government action occurs when a private party takes action involving a third-party. See *id.* ("Undoubtedly, the [third-party's] freedom of choice in religious matters was impinged upon, but it was the Church . . . and not the Government, who put him to the choice of changing his religious practices or losing his job.").

Just as Title VII's prohibitions cannot be considered without its provision for religious exemptions, the ACA cannot be evaluated without looking at RFRA. By its own terms, RFRA applies to any subsequent federal statute—and administrative implementation of that statute—unless Congress expressly says otherwise. Congress did not do that here, and RFRA's incorporation into the ACA ensures the "baseline" protection of religious liberty is not disturbed by the ACA. Like the Title VII exemption in *Amos*, RFRA merely lifts, in certain circumstances, a government-imposed burden on religion. Restoring that pre-burden baseline does not "require that the [religious] exemption come packaged with benefits to secular entities." *Id.* at 338; see also *Harris* v. *McRae*, 448 U.S. 297, 316 (1980) (upholding the Hyde Amendment and concluding the government was under no obligation to "remove those [obstacles to a right, there, the right to abortion] not of its own creation"). Just so here: removing the burden of the HHS mandate does not violate the Establishment Clause. See *id.* at 317 (the statutory religious exemption at issue, as here, left third parties with "the same range of [insurance] choice[s] . . . as [they] would have had if Congress had chosen to subsidize no health care costs at all.").

B. *Complaining that the compelling interest test is "too stringent" to account for third-party interests has no basis in this Court's jurisprudence.*

The second objection raised by RFRA's detractors is that Congress's choice to account for third-party harms within the compelling-interest test imposes an analysis that "is too stringent and also inconsistent with precedent."[23] The Supreme Court's cases support no such contention.

The critics' argument relies on a misreading of *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985),[24] which invalidated a religious preference on Establishment Clause grounds; specifically, a Connecticut statute that "permitted employees who observe a Sabbath to demand that their employer accommodate the employee's religious practice."[25] All that the critics of the compelling-interest test claim is that "[i]t seems improbable that the state had a compelling interest" in *Caldor*.[26] That misses the point. *Caldor* involved a religious preference, not a religious exemption. Moreover, an Establishment Clause violation was found because the government entered a wholly private dispute and took the side of the religious claimant by imposing an "*unyielding* weighting in favor of Sabbath observers over all other interests." 472 U.S. at 709–10 (emphasis added). The balancing inherent to RFRA makes it improper to characterize

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[23] *Costs of Conscience* at 18.

[24] *Id.*

[25] *Discretionary Religious Exemptions* at 606; see also *id*. at 613–16 (analyzing *Caldor*).

[26] *Costs of Conscience* at 18.

the Final Rules as exhibiting an "unyielding" religious preferences.

More importantly, this Court has never held that significant third-party harms that fall short of a compelling state interest are strong enough to overcome a substantial religious burden. Rather, this Court will uphold religious exemptions even when the government has a compelling interest if the government has not pursued that interest through the means least-restrictive to religious liberty. See, e.g., *Holt*, 135 S. Ct. at 864–65. *Hobby Lobby* explained the consequences of bypassing the compelling-interest test simply because a third-party claim finds it too hard to satisfy. See 573 U.S. at 729 n.37 ("By framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless."). To be sure, "there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA." *O Centro*, 546 U.S. at 436. But no such "instance" exists here.

When, as here, the religious exemption at issue is of a "longstanding" type, the sort of exemption that led Congress to enact RFRA, *and* when "the Government has not offered evidence demonstrating that granting . . . an exemption would cause *the kind of . . . harm recognized as a compelling interest*," *id.* at 437 (emphasis added), an "instance in which a need for uniformity precludes the recognition of [RFRA] exemptions" does not exist, see *id.* at 436. RFRA's critics do not contradict these provisos from *O Centro*, and tellingly so. As this language confirms, whenever the Supreme Court faces a claim that some lesser interest might require "uniform" application of a

general law, RFRA notwithstanding, the Court *still* insists that any challengers demonstrate a compelling state interest. Constitutional law simply provides no basis to skirt that test.[27]

Here, the exemption provided by the Final Rules simply gives to the objecting nonprofits the *same*, pre-existing exemption afforded to churches and their integrated auxiliaries.[28] This exemption is the *raison d'etre* of RFRA. See *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102 CONG. REC. 192 (1992) (statement of Nadine Strossen) ("In the after-math of the *Smith* decision, it was easy to imagine how religious practices and institutions would have to abandon their beliefs in order to comply with generally applicable, neutral laws. At risk were such familiar practices as . . . permitting religiously sponsored hospitals to decline to provide abortion or contraception services."); 139 CONG. REC. 9685 (1993) (statement of Rep. Hoyer) (explaining that RFRA is "an opportunity to correct . . . injustice[s]" like a "Catholic teaching hospital [that] lost its accreditation for refusing to provide abortion services"). And finally, as the critics all but concede in complaining that the compelling-interest test is too "stringent" to satisfy, there has been no showing that "seamless" insurance coverage of abortifacients and

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[27] Indeed, even *United States* v. *Lee*, which RFRA's critics rely on in support of the argument that regulatory entitlements should be understood to precede religious liberty, applied—as the critics concede—the compelling interest analysis. *Costs of Conscience* at 16 (citing *Lee*, 455 U.S. at 258). Moreover, *Hobby Lobby* distinguished *Lee* from the situation here. *Discretionary Religious Exemptions* at 621 n.123.

[28] See Gedicks & Van Tassell, *RFRA Exemptions from the Contracep-tion Mandate*, 49 HARV. C.R.-C.L. L. REV. at 380–81.

contraceptives is a compelling interest pursued through the means least-restrictive on religious exercise. Skipping over the compelling-interest step guts RFRA's carefully calibrated three-stage framework.

C. An Establishment Clause claim requires State action.

The final objection RFRA's critics make to considering third-party harms within the RFRA framework is that "the government will not always be the party objecting to a religious exemption."[29] The critics cite this very litigation as proof positive, claiming that "[t]he interest of those burdened by a religious accommodation need not coincide with the government's interests, whether or not compelling, to warrant protection under the Establishment Clause. After all, the Establishment Clause protects the religious freedom of private individuals, not only state actors."[30] Establishment Clause jurisprudence rejects this argument.[31]

RFRA's detractors seek to buttress their argument by pointing to *Caldor*, which "was brought by private employers," and in which, the critics claim, the private employers "did not need to allege that their interests were compelling for government purposes, only that they were significantly burdened as a result of the

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[29] *Costs of Conscience* at 18.

[30] *Id.*

[31] Moreover, the division between third-party harms and societal interests is artificial. "[O]ne might simply say that compelling state interests just exactly are third party interests of adequate gravity. Whose interests is the government protecting in resisting a religious accommodation if not those of third parties?" Marc O. DeGirolami, *Free Exercise By Moonlight*, 53 SAN DIEGO L. REV. 105, 133 (2016).

government's religious accommodation."[32] These contentions are *non sequiturs*. Although "the commercial burden on Caldor Stores gave it standing to raise the Establishment Clause defense[,] *it was the statute* requiring private parties to assist Thornton in his religious duties that crossed the boundary between church and state, thus violating the Establishment Clause."[33] Unlike here, where the Final Rules *lift* a burden imposed on religious exercise by the HHS mandate pursuant to the ACA, Thornton was "actively empowered" by the Connecticut statute "to demand the assistance of private parties to secure the observance of his Sabbath. That is 'state action.'"[34]

The *Amos* Court distinguished *Caldor* in the same way, noting that, in *Caldor*, "Connecticut had *given the force of law* to the employee's designation of a Sabbath day and required accommodation by the employer regardless of the burden which that constituted for the employer or other employees." *Amos*, 483 U.S. at 337 n.15 (emphasis added). In *Amos,* there was no State action; the harm to the janitor was caused by his own church. *Id.* In *Caldor,* there was State action; the harm to the department store was caused by the Connecticut statute. The Establishment Clause (indeed, the entire Bill of Rights) is not there to protect private parties from other private parties. It is there to protect private parties from the Government.

This Court's decision in *Walz* reinforces *Amos*'s distinction between a religious exemption and a religious preference. By a vote of 8 to 1, the Court held

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[32] *Costs of Conscience at 18.*

[33] *Discretionary Religious Exemptions* at 614 (emphasis added).

[34] *Id.* at 615.

that a municipality's property tax exemption for houses of worship did not violate the Establishment Clause because granting an exemption "is simply sparing the exercise of religion from the burden of property taxation levied on [others]." *Walz*, 397 U.S. at 673. Had the municipality in *Walz* enacted a preference, it would have "transfer[red] part of its revenue to churches." *Id.* at 675. Instead, it "simply abstain[ed] from demanding that the church support the state." *Id.* There is no basis to claim that an Establishment Clause violation exists when the government is not taking some action to affirmatively advance religion.

"As we have said before, our cases will not tolerate the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as authorization or encouragement." *Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 54 (1999) (internal quotation marks and citation omitted). The same is true when federal action is at issue, and the RFRA critics who oppose the Final Rules' religious exemption offer no basis to revolutionize constitutional law by applying its restraints to private conduct.

Ultimately, the critics' objections to the application of RFRA boil down to this: They—and the States that echo their third-party harm arguments—disagree with the way Congress chose to account for religious interests relative to other competing social values. Overturning religious exemptions would result in "a much larger role for government in the lives of religious people and organizations, thereby shrinking that part of civil society for church-state separation and the desired religious self-governance. Whether such an expansion is good or bad is not the issue here.

Rather, the question is who has the authority to make that decision and how it is made."[35] As Professor Alexander Bickel put it, "by right, the idea of progress is common property;" it is not the judiciary's to define.[36] No argument consistent with the historical practices and traditions protected by the Establishment Clause has been made to authorize this Court to undermine the congressional judgment RFRA embodies.

II. There is no constitutional basis to argue that discretionary religious exemptions violate the Constitution simply because of "significant" third-party interests.

Conscious of the insurmountable challenges to upending RFRA via the Establishment Clause, the critics opposing the Little Sisters' hard-won exemption seek to reinterpret the Religion Clauses more generally. According to their novel, revisionist view, this Court has supposedly "explicitly and repeatedly recognized" that substantial—not compelling—third-party harms give rise to Establishment Clause limits on religious exemptions.[37] Not so. The "Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 144–45 (1987).

Hosanna-Tabor, for example, held that the First Amendment's "ministerial exception" to federal anti-discrimination statutes barred a retaliation claim from

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[35] *Discretionary Religious Exemptions* at 624.

[36] Alexander M. Bickel, THE SUPREME COURT AND THE IDEA OF PROGRESS 181 (1978).

[37] See *Costs of Conscience* at 7.

a fourth-grade teacher at a Lutheran school. *Hosanna-Tabor Evangelical Lutheran Church and Sch.* v. *E.E.O.C.*, 565 U.S. 171, 195–96 (2012). There is no doubt that a discrete and significant third-party harm was present in *Hosanna-Tabor*: the *only* reason the employee there could not sue her employer for violating the Americans With Disabilities Act's retaliation prohibition was because her employer was a religious organization and she qualified as a "minister." But while "[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important[, . . .] so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196. Like in RFRA, the Court confirmed that the ministerial exception can be applied "to other circumstances." See *id.* No part of *Hosanna-Tabor* suggests that the mere presence of substantial third-party harm acts to defeat religious exemptions, and RFRA's detractors set forth no framework for balancing substantial third-party harms against religious burdens in particular cases.[38]

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[38] The critics opposing the RFRA framework purport to distinguish *Hosanna-Tabor* (and *Amos*) from the handling of third-party harms in other cases because they rest on "powerful free exercise and associational interests that generate a range of statutory and constitutional protections against liability" that, apparently, only "religious organizations" enjoy. See *Costs of Conscience* at 13. This distinction is contrived. *Hosanna-Tabor* never even mentions *Amos*—a strong indication that the Court has not adopted the critics' narrow reading of these two cases. Indeed, while the ministerial exception certainly guards against "government interference with an internal church decision that affects the faith and mission of the church itself," *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021 n.2 (2017) (internal quotation marks and citation omitted) (explaining *Hosanna-Tabor*), that only speaks to the substantial burden such government action imposes upon religion. This distinction does not

Further, *Amos*, *Walz*, and other cases[39] demonstrate a distinction between a religious *exemption* that lifts a government-imposed burden on religious exercise, and a statutory religious *preference*.[40] This distinction not only explains how, as discussed above, *Amos* harmonized its holding with *Caldor*, see 483 U.S. at 337 n.15—it explains the myriad, long-accepted ways in which Congress and the judiciary have "lift[ed] [] regulation[s]" that burden free exercise without any constitutional infirmities, see *id.* at 338. Indeed, there is *not a single case* in which this Court has ever overturned a religious exemption on Establishment Clause grounds.[41]

Other longstanding examples of accepted religious exemptions where third-parties experience harm abound. For example, 170,000 Vietnam War draftees received conscientious objector deferments, even as the selective service exemption for these objectors was facially limited to those with a belief in a "Supreme

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at all suggest that religious liberty rights turn upon whether the claimant at issue is a "religious organization" (however that phrase is defined). See, e.g., *Hobby Lobby*, 573 U.S. at 706–17 (survey-ing the U.S. Code and pre-*Smith* free-exercise jurisprudence and finding no principled basis to conclude that for-profit corporations cannot have their religious exercise substantially burdened within the meaning of RFRA).

[39] *Discretionary Religious Exemptions* at 609–10 ("In addition to *Amos*, the Court has on six other plenary reviews turned back an Establish-ment Clause challenge to a discretionary religious exemption) (citing *Cutter*, 544 U.S. at 720; *Gillette* v. *United States*, 401 U.S. 437, 448-60 (1971); *Walz*, 397 U.S. at 673–75; *Zorach* v. *Clauson*, 343 U.S. 306, 308–15 (1952); *Aver* v. *United States*, 245 U.S. 366, 374 (1918); *Goldman* v. *United States*, 245 U.S. 474, 476 (1918)).

[40] See *Discretionary Religious Exemptions* at 613–18.

[41] *Id*. at 613.

Being" and even though the granting of an exemption sent a third-party to war in the objector's place.[42] Indeed, the structure of conscientious objections in Vietnam made it possible to determine affected third-parties.[43] Such objections date back to the American Revolution. At no point have such objections been thought to violate the Establishment Clause.

Another example is the priest-penitent privilege. This privilege is recognized throughout the United States and "[n]either scholars nor courts question the legitimacy of the privilege, and attorneys rarely litigate the issue," even as the privilege imposes an obstacle on a third-party's search for truth. *Mockaitis* v. *Harcleroad*, 104 F.3d 1522, 1532 (9th Cir. 1997) (internal quotation marks and citation omitted).

Perhaps the most pervasive example—and most relevant here—of religious exemptions are the "systematic and all-encompassing" exemptions for individuals that decline to participate in abortions.[44] These widespread exemptions have never been held outside the realm of legislative authority simply because access to a constitutional right is at issue. Indeed, as Senator Ted Kennedy explained when advocating for the Church Amendment, which ensured that certain federal-fund recipients were not obliged to

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[42] See James W. Tollefson, THE STRENGTH NOT TO FIGHT: AN ORAL HISTORY OF CONSCIENTIOUS OBJECTORS OF THE VIETNAM WAR 7 (1993).

[43] See William P. Marshall, *Third-Party Burdens and Conscientious Objection to War*, 106 KTY. L. J. 661 (2018).

[44] See Mark L. Rienzi, *The Constitutional Right Not To Kill*, 62 EMORY L.J. 121, 147–49 (2012) ("[V]irtually every state in the country has some sort of statute protecting individuals and, in many cases, entities who refuse to provide abortions.").

provide abortions and could not discriminate against employees who would not participate in abortions: "*Congress has the authority under the Constitution to exempt individuals from any requirement that they perform medical procedures that are objectionable to their religious convictions.*" 119 CONG. REC. 9602 (1973) (emphasis added). Lacking "seamless" access to abortion because of religious exemptions does not constitute constitutionally-cognizable, third-party harm.

In short, devising a new constitutional doctrine grounded in "substantial" third-party harms would require taking an eraser to well-established religious exemptions. Without any principled framework to sort out why cases involving abortion, contraception, and antidiscrimination laws involve "substantial" third-party harms but, for example, military draft exemptions and the priest-penitent privilege do not. Any such a test invites unneeded judicial speculation about "the social importance of all laws" that the Supreme Court sought to avoid in *Smith*. See 494 U.S. at 890.

III. The asserted third-party harm cannot constitute a compelling government interest.

This Court must not consider third-party harms abstractly, wholly divorced from the burden they impose on the religious claimant. Rather, this Court must "'scrutinz[e] the asserted harm of granting specific exemptions to particular religious claimants,' and 'look to the marginal interest in enforcing' the challenged government action in that particular context." *Holt*, 135 S. Ct. at 863 (quoting *Hobby Lobby*, 573 U.S. at 726–27). As Professor Michael Stokes Paulsen has observed, "the test is an extremely rigorous one, referring to an extremely narrow range

of permissible justifications for infringements on religious liberty. Not every legitimate, or even very important, interest of government qualifies."[45]

By granting the Little Sisters and the other non-profits an exemption similar to that already received by churches, for-profit corporations, "grandfathered" health insurance plans, and small businesses, women working for the Little Sisters are simply restored to the pre-ACA baseline of rights (as were those women who worked for exempted for-profit corporations after *Hobby Lobby*, see 573 U.S. at 732–33). What the Court found acceptable in the face of Establishment Clause challenges in the Hyde Amendment context, see *Harris*, 448 U.S. at 315–17, and in the Title VII context, see *Amos*, 483 U.S. at 337 n.15, holds true here.

Without the Final Rules, objecting nonprofits remain singled out for disparate treatment compared to those many other entities that receive an exemption from the coverage mandate. By virtue of the exemptions offered to churches and other entities and businesses, Congress and HHS have already determined that "seamless" access to abortifacients and contraceptives should be unavailable to tens of millions of Americans. Denying the same exemption to the Little Sisters and the other objecting nonprofits, while citing the same regulatory interest Congress and HHS has already decided not to apply to many others, dooms a strict scrutiny defense. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 547 (1993) (explaining the government must avoid free-exercise invalidity in regulating by not letting

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[45] Paulsen, *A RFRA Runs Through It*, 56 MONT. L. REV. at 263 (discussing and citing *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972) and *Sherbert* v. *Verner*, 374 U.S. 398 (1963)).

under-inclusiveness do "appreciable damage to [the] supposedly vital interest prohibited"). The Final Rules correct this untenable discrimination.

"RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally." *Hobby Lobby*, 573 U.S. at 738 (Kennedy, J., concurring). The third-party harms doctrine proposed by RFRA's critics would tolerate this inconsistency. The Court should reject this end-run around RFRA.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court reverse the lower courts' rulings.

Miles E. Coleman
Counsel of Record
NELSON MULLINS RILEY & SCARBOROUGH, LLP
2 West Washington Street, Fourth Floor
Greenville, SC 29601
miles.coleman@nelsonmullins.com
(864) 373-2352

Counsel for *Amici Curiae*
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