Nos. 19-431, 19-454

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR
SAINTS PETER AND PAUL HOME, *Petitioner*
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 FIRST LIBERTY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

First Liberty Institute is a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans. First Liberty provides pro bono legal representation to individuals and institutions of all faiths—Catholic, Islamic, Jewish, Native American, Protestant, the Falun Gong, and others.

Over the past seven years, First Liberty has represented multiple faith-based organizations that hold sincere religious objections to portions of the Contraceptive Mandate. Accordingly, First Liberty has a strong interest in the outcome of this litigation. Government compulsion to violate one's conscience or sincerely held religious beliefs threatens religious individuals' ability to participate in the marketplace on terms equal to others. Because First Liberty represents a broader range of religious perspectives than those of the particular plaintiffs in this case, its interest in free religious exercise reaches beyond this particular dispute. Precedent that tramples on the right of conscience for individuals of one faith impacts all others.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Religious Freedom Restoration Act (RFRA) in 1993 with broad bipartisan and public support in order to protect religious objectors from laws that substantially burden the free exercise of their religion. More specifically, RFRA protects religious objectors from such laws, unless the government can demonstrate that the law serves a compelling interest and is carried out by the least restrictive means. President Bill Clinton signed RFRA into law, proclaiming the nation's "shared desire . . . to protect perhaps the most precious of all American liberties, religious freedom." President Bill Clinton, Remarks on Signing the Religious Freedom Restoration Act of 1993 (Nov. 16, 1993), bit.ly/2TtrsrI.

With a view toward "very broad protection for religious liberty," *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014), RFRA sets out a balancing test to ensure that the interests of both the religious objector and the government are properly considered. When analyzing a claim under RFRA, the religious objector must establish that a government action "substantially burden[s]" the exercise of his or her religion. 42 U.S.C. § 2000bb–1(a) (2012). The burden then shifts to the government to show that its action furthers a compelling government interest and employs the least restrictive means to do so.

But the Third Circuit distorted that balancing framework in this case by importing the "undue

burden" test from abortion cases to evaluate the government's interest in avoiding alleged harm to third parties. In doing so, the court concluded that third-party harm supersedes RFRA's protections for religious objectors. RFRA and this Court's precedents foreclose that conclusion. To be sure, third-party burdens may inform certain stages of the RFRA analysis. But, as this Court has explained, externalities cannot, on their own, defeat a RFRA claim. 573 U.S. at 729 n.37. Otherwise, the government "could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless." *Id.* This Court should not allow such a distortion to stand.

ARGUMENT

I. Congress Enacted RFRA to Broadly Protect Religious Liberty.

As America's "first freedom," religious liberty holds a prized place in the "hierarchy of constitutional values." Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 Cardozo L. Rev. 1243, 1243 (2000). In 1993, in response to widespread concern about the future of that "first freedom," Congress enacted RFRA "in order to provide very broad protection for religious liberty." *Hobby Lobby Stores, Inc.*, 573 U.S. at 693. Accordingly, RFRA "prohibits the Government from substantially burdening 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." *Id.* at 705 (cleaned up).

RFRA's origin sheds light on how its balancing test operates to protect religious liberty broadly. Three years prior to RFRA's enactment, this Court narrowly interpreted the Constitution's Free Exercise Clause in *Employment Division v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court "largely repudiated the [balancing-test] method of analyzing free-exercise claims that had been used in cases like *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." *Hobby Lobby Stores, Inc.*, 573 U.S. at 693. Instead of balancing "whether the challenged action imposed a substantial burden on the practice of religion" with "whether it was needed to serve a compelling government interest," *id.*, *Smith* concluded that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997). In other words, *Smith* established that a law that does not target religion need only survive rational basis review, even if it substantially burdens religious exercise. 494 U.S. at 882–90.

Smith drew widespread criticism from both legislators and the public. *See* Michael W. McConnell et al., *Religion and the Constitution* 143–45 (4th ed. 2016). And a groundswell of public support for stronger religious liberty protections followed. *Id.* Acknowledging that public concern, Congress

introduced RFRA as a direct response to *Smith*. *Hobby Lobby Stores, Inc.*, 573 U.S. at 694. The statute garnered broad bipartisan support, passing unanimously in the House and facing a mere three opponents in the Senate. Religious Freedom Restoration Act of 1993: Roll Vote No. 331. Congressional Record 103:88 (Oct. 27, 1993), bit.ly/2vq6u5c. President Bill Clinton then signed RFRA into law, explaining that the new law would "honor[] the principle that our laws and institutions should not impede or hinder but rather should protect and preserve fundamental religious liberties." Clinton Remarks, *supra*.

Modeled after the high-water mark of religious exemptions in *Sherbert* and *Yoder*, Congress designed RFRA to provide "sweeping protection" for religious liberty. *Hobby Lobby Stores, Inc.*, 573 U.S. at 706; *see also Holt v. Hobbs*, 574 U.S. 352 (2015) (cleaned up) ("Congress enacted . . . RFRA, in order to provide very broad protection for religious liberty."). Specifically, RFRA restored the compelling-interest test, noting that it serves as a "workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb. Yet "RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions." *Hobby Lobby Stores, Inc.*, 573 U.S. at 695 n.3. Indeed, RFRA added another layer of protection for religious liberty. Namely, it required the government to use "the least restrictive means" when burdening religious exercise. 42 U.S.C.

§ 2000bb–1. This Court has recognized that "by imposing a least-restrictive-means test, [RFRA] went beyond what was required by [the Court's] pre-*Smith* decisions." *Hobby Lobby Stores, Inc.*, 573 U.S. at 706 n.18.

Moreover, by its text, RFRA "applies to all Federal law, and the implementation of that law." 42 U.S.C. § 2000bb–3. And to sharpen its protection of religious liberty even further, Congress subsequently amended RFRA (via RLUIPA), directing that the law "shall be construed in favor of a *broad protection* of religious exercise, to the *maximum extent* permitted by the terms of [the Act] and the Constitution." 42 U.S.C. § 2000cc–3(g) (emphasis added); *see also Hobby Lobby Stores, Inc.*, 573 U.S. at 696.

RFRA's burden-shifting test is straightforward. When analyzing a claim under RFRA, the religious objector must establish that a government action "substantially burden[s]" the exercise of their religion. 42 U.S.C. § 2000bb–1(a); *see Hobby Lobby*, 573 U.S. at 719. Then, the burden flips to the government to show that its action "(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(b); *see Hobby Lobby Stores, Inc.*, 573 U.S. at 726.

Government substantially burdens religious exercise when it exerts substantial pressure on a religious adherent to modify her behavior and, thus, to violate her sincere religious beliefs. *See Thomas v. Review Bd.*, 450 U.S. 707, 717–18 (1981); *see also*

Hobby Lobby, 573 U.S. at 691 (finding substantial burden where the government imposes heavy monetary penalties on believers for not complying with regulations that violate their religious convictions). Importantly, RFRA's substantial burden analysis does not require a search for theological truth. In fact, it prohibits a court from dissecting the merits of an objector's sincere religious beliefs at all. *See Hobby Lobby Stores, Inc.*, 573 U.S. at 691; *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 938 (8th Cir. 2015) ("[I]t is not within the judicial function to determine whether a religious belief or practice comports with the tenets of a particular religion.") (internal quotation marks omitted), *vacated and remanded sub nom. U.S. Dep't of Health & Human Servs. v. CNS Int'l Ministries*, 136 S. Ct. 2006 (2016).

As long as an objector establishes a substantial burden, the government must demonstrate that it uses the least restrictive means to further a compelling interest, "even if the burden results from a rule of general applicability" 42 U.S.C. § 2000bb–1(a). Under the compelling-interest standard, the government must prove with specificity its interests in upholding the law despite the burdensome effect. *See e.g.*, *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006). This prong is satisfied "through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430-31 (quoting 42 U.S.C. § 2000bb–1(b)). Even if the government has an interest in the broader policy, it must explain

with particularity what adverse effect would result if the objector was granted an exemption. *E.g. Yoder*, 406 U.S. at 236; *see also Hobby Lobby Stores, Inc.*, 573 U.S. at 726-27 (explaining that the Court must "look to the marginal interest in enforcing the contraceptive mandate" in that case).

Finally, even if the government can show a compelling interest, it also must show that it has implemented the law using the least restrictive means. *Hobby Lobby Stores, Inc.*, 573 U.S. at 728. This is a difficult task, however, because "[t]he least-restrictive-means standard is exceptionally demanding." *Id.* In fact, "[r]equiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 534. If the government fails to make that showing, the religious objector must prevail.

II. The Third Circuit Flipped RFRA on Its Head by Erroneously Using the "Undue Burden" Standard to Find that the Presence of Third-Party Harm Overcomes Free-Exercise Rights.

By manipulating RFRA's substantial-burden analysis to conclude that the Accommodation does not substantially burden Petitioners' religious exercise, the Third Circuit allowed the government to escape its burden to show that it had a compelling interest and that it used the least restrictive means in furthering that interest. However, rather than ending its RFRA analysis there, the Third Circuit

also determined that the religious exemption and optional Accommodation "would impose an undue burden on nonbeneficiaries" because of "the female employees who will lose coverage for contraceptive care." *Pennsylvania v. Trump*, 930 F.3d 543, 574 (2019). This "undue burden" standard derives from cases challenging abortion regulations and is entirely foreign to RFRA analysis. By substituting this extraneous standard for RFRA's compelling-interest test, the court turned RFRA's "very broad protection for religious liberty" upside down. *Hobby Lobby Stores, Inc.*, 573 U.S. at 693.

Immediately after holding that the Accommodation imposes no substantial burden on Petitioners' religious rights, the court abruptly, and without supporting precedent,[2] explained that exempting the Little Sisters from the contraceptive mandate would impose an "undue burden on nonbeneficiaries." *Pennsylvania*, 930 F.3d at 574. In doing so, the court focused on "female employees who will lose coverage for contraceptive care" *id.*, and effectively carved out a RFRA exemption where third-party harm exists. That is not the law.

First, the Third Circuit's conclusion that third parties will be unduly burdened is inapposite, because the "undue burden" standard has no application to this case. Courts employ the "undue burden" standard to determine whether "a state regulation has the purpose or effect of placing a

[2] To be sure, the court cited the *Hobby Lobby* dissent. But a dissent cannot do the work of precedent; after all, the defining feature of dissents is that they say what the law is not.

substantial obstacle in the path of a woman seeking an abortion." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992). Indeed, the "undue burden" test is unique to the abortion context. Courts have therefore avoided using that standard outside of its proper context. No court, including this one, has employed an "undue burden" analysis under RFRA. In short, the "undue burden" test is the wrong application of the wrong law.

Moreover, the Third Circuit distorted the RFRA analysis by addressing the burdens on the States and third-party beneficiaries. In *Hobby Lobby*, this Court explained that externalities to third parties cannot, on their own, defeat a RFRA claim. 573 U.S. at 729 n.37. Here, the Third Circuit framed the Contraceptive Mandate as an entitlement owed to third parties. *See Pennsylvania*, 930 F.3d at 574. This Court recently warned against such framing, because "[b]y framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless." *Hobby Lobby Stores, Inc.*, 573 U.S. at 729 n.37.

To be sure, considering third-party burdens is appropriate at certain stages of the RFRA analysis. For example, when courts consider the burdens a requested accommodation may impose on nonbeneficiaries, "[t]hat consideration will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest." *Id.* But this Court has rejected the idea that third-party harm can be

used to circumvent RFRA altogether. That is, whether accommodating religious beliefs creates externalities to third parties may be relevant in assessing RFRA's compelling interest and least restrictive means elements, but it cannot overcome the free-exercise rights of the religious objector. As this Court further explained, "[I]t could not reasonably be maintained that any burden on religious exercise . . . is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties." *Id.* Concluding otherwise would eviscerate RFRA's test for balancing competing interests. *See* Section I, *supra*.

Moreover, RFRA would have no meaning at all if it only applied where no other interest competed with the religious objector's interest. Although the idea that third-party harm vetoes any interest in religious toleration is a prevalent deception RFRA opponents advance,[3] RFRA is at its core a burden-shifting standard. *See* 42 U.S.C. § 2000bb(a)(5). Therefore, in structuring and passing RFRA, Congress accepted the consequence that religious tolerance may sometimes affect third parties. RFRA's balancing test operates to ensure that relevant interests on both sides receive consideration—once a

[3] *See generally* the Equality Act, H.R. 5, 116th Cong. (2019) which says, "The Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.) shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title." *Id.* at § 1107.

religious objector establishes a substantial burden to his sincerely held religious belief, the burden shifts to the government to demonstrate that it pursues a compelling interest by the least restrictive means (a showing that incorporates the government's interest in protecting third parties). *See* 42 U.S.C. § 2000bb–1; *Hobby Lobby*, 573 U.S. at 729 n.37. But the Third Circuit distorted RFRA's balancing framework by importing the "undue burden" test to evaluate harm to third parties and elevated that third-party harm over the rights of religious objectors.

More broadly, this case's procedural posture bears mention here. On appeal to this Court, the federal government conceded that refusing to exempt Petitioners is not narrowly tailored to serve a compelling interest. Cert. Pet. at 23, *Trump v. Pennsylvania* (No. 19-454) ("But, as the agencies found, application of the mandate to objecting entities neither serves a compelling governmental interest nor is narrowly tailored to any such interest."). That concession should be the end of this arduous battle to force nuns to insure contraception. Instead, the Third Circuit thwarted a hard-fought armistice by empowering individual states, who are wholly extraneous to the RFRA analysis, to force the federal government to continue action that it concedes illegally burdens religious exercise in order to save the states a few hypothetical pennies. *See Pennsylvania*, 930 F.3d at 560–61 ("[T]he States expect to spend more money due to the [broad exemptions].").

But any added cost to the states does not overcome a RFRA violation. In concluding otherwise,

the Third Circuit ignored this Court's decision in *Hobby Lobby*. There, this Court rejected the "view that RFRA can never require the Government to spend even a small amount" because such a view "reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law." *Hobby Lobby*, 573 U.S. at 730.

Additionally, any costs will be shifted to the state and not to the women themselves. This is a reasonable alternative that would not impede the Little Sisters' free exercise of their religion. As this Court noted in *Hobby Lobby*, "RFRA . . . may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs." *Id.* For example, this Court has stated that "[t]he most straightforward way [to ensure contraceptive coverage] would be for the Government to assume the cost of providing the . . . contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Id.* at 728. This same reasoning holds true in this case.

Yet, even without the federal government's concession, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (cleaned up). That is the case here, as it was in *Hobby Lobby*. *See* 573 U.S. at 700. The federal government has exempted numerous entities from providing contraception without any Accommodation process.

And employers with fewer than 50 employees do not have to provide insurance at all. Having exempted these parties, the government has no justification for forcing religious employers to comply with either the Contraceptive Mandate or the Accommodation against their sincere religious beliefs. At this point, under RFRA, the federal government must offer an exemption, not merely the Accommodation, to all religious objectors who demonstrate a substantial burden.

* * *

In sum, the Third Circuit distorted RFRA's balancing framework. The lower court below flipped RFRA on its head by mandating that the government find a means of applying RFRA that is least restrictive of third parties, not least restrictive of religious objectors. Doing so not only violates RFRA's text but also undermines the "very broad protection for religious liberty" RFRA was enacted to protect. *Hobby Lobby Stores, Inc.*, 573 U.S. at 693.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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