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.
THE COMMONWEALTH OF PENNSYLVANIA AND THE
STATE OF NEW JERSEY, ET AL., *Respondents*.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL., *Petitioners*,
v.
COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Respondents.

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

BRIEF OF PROFESSOR DOUGLAS LAYCOCK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief addresses only the second Question Presented in *Little Sisters of the Poor* v. *Pennsylvania*, No. 19-431, and the first Question Presented in *Trump* v. *Pennsylvania*, No. 19-454. More specifically:

Whether agencies required to comply with the Religious Freedom Restoration Act may grant religious exemptions broader than what a court holds is the minimum exemption required to comply with RFRA.

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INTEREST OF *AMICUS CURIAE*

Douglas Laycock is the Robert E. Scott Distinguished Professor of Law and Professor of Religious Studies at the University of Virginia. He is one of the Nation's leading authorities on the law of religious liberty, having taught and written about the subject for four decades at the University of Chicago, the University of Texas, the University of Michigan, and the University of Virginia. His many writings on religious liberty have been republished in a five-volume collection.[1]

Amicus has previously argued that the Religious Freedom Restoration Act (RFRA) does not *require* an exemption like the one at issue in this case. See Brief of Baptist Joint Committee for Religious Liberty, *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016).[2] He adheres to that position here. But an agency subject to RFRA, and required to comply with it, may lawfully *choose* to grant a religious exemption like the one here.

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[1] *Amicus* states that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amicus* and its counsel—contributed money intended to fund preparing or submitting the brief. *Amicus* joins this brief as an individual; institutional affiliation is noted for informational purposes only and does not state endorsement by the institutional employer of positions advocated. All parties have filed blanket consents to the filing of amicus briefs.

[2] This brief is available online at https://www.scotusblog.com/wp-content/uploads/2016/02/Zubik-BJC-Amicus-Final.pdf. It is also reprinted in Douglas Laycock, *Religious Liberty Volume Three: Religious Freedom Restoration Acts, Same-Sex Marriage Legislation, and the Culture Wars* 444 (2018).

SUMMARY OF ARGUMENT

Federal agencies have authority to avoid religious conflicts when creating and enforcing rules. In fact, agencies should be commended when they do so, as this is a responsible use of administrative power. Governments in our Nation have long accommodated differing religious viewpoints in furtherance of "a tolerant citizenry" underpinning our "pluralistic society." *Lee* v. *Weisman*, 505 U.S. 577, 590 (1992); see Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1837 (2006) ("From the late seventeenth century to the present, there is an unbroken tradition of legislatively enacted regulatory exemptions.").

In furtherance of those principles, an agency within the Department of Health and Human Services (the Health Resources and Services Administration) expanded an existing religious exemption to resolve years of litigation. Various parties had sued in multiple courts, alleging that the agency's "contraceptive mandate"—its requirement that certain health insurance plans cover some forms of contraception—imposed unlawful burdens on their religious exercise. In response, the agency has taken various approaches attempting to address these alleged burdens, culminating in the religious exemption at issue here. See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018).

Now, however, a group of States asserts that the agency's religious exemption is unlawful. This Court should reject respondents' challenges for multiple reasons.

I. RFRA requires federal agencies to grant certain religious exemptions, and federal agencies do not violate

RFRA by granting religious exemptions—even if a court subsequently interprets RFRA differently than the agency did.

Whenever an agency creates or enforces rules, it must honor Congress's mandate in RFRA to avoid any "substantial[] burden" on the exercise of religion, unless the agency's regulation satisfies strict scrutiny. 42 U.S.C. §§ 2000bb-1(a)-(b). Congress further provided that an agency does not violate RFRA by "[g]ranting * * * exemptions." *Id.* § 2000bb-4. So in fulfilling its RFRA obligation to avoid religious conflicts, an agency can exempt entities with a religious objection from an otherwise generally applicable rule. Nothing in RFRA requires an agency to grant a potentially underinclusive exemption, imposing burdens on some religious exercise, and inviting litigation to alleviate those burdens.

II. Likewise, the agency here did not violate the Administrative Procedure Act (APA). The court below's APA holding was predicated on its erroneous finding of a RFRA violation. See Pet. App. 38a.

Nor is the agency's religious exemption arbitrary, capricious, or an abuse of discretion on any other ground beyond the one relied on by the court below. The agency explained that (1) it believed that RFRA required the exemption, and (2) even if RFRA did not, the agency wanted to resolve years of litigation. The former was a reasonable conclusion, even though disputed, as multiple courts had split on whether RFRA required this exemption. The latter was also wholly rational, as an agency responsibly uses its administrative authority and resources to end litigation and avoid religious conflict. The APA does not require agencies to expend their own resources or force sincere religious claimants to spend years litigating every plausible but uncertain exemption to this Court.

III. Nothing in the Affordable Care Act (ACA) even arguably limits the agency's obligation to grant religious exemptions under RFRA. No provision of the ACA "explicitly excludes" RFRA's duty to avoid religious conflicts. 42 U.S.C. § 2000bb-3(b).

But the ACA does not merely refrain from limiting RFRA. The ACA's broad delegation of authority to the agency to define what "additional preventive care" must be covered necessarily includes the authority to grant exceptions, including reasonable exemptions for religious conscience. *Id.* § 300gg-13(a)(4). Religious liberty is a fundamental value in this country, and there is a long and deep legislative tradition of protecting it. If Congress had meant to require the agency to exercise its sweeping authority without regard to that tradition, it would have said so.

ARGUMENT

I. RFRA Requires Federal Agencies to Grant Certain Religious Exemptions, And It Authorizes Them to Grant Exemptions Broader Than the Minimum That RFRA Requires.

A federal agency does not violate RFRA by granting religious exemptions. An agency's religious exemption is valid even if a court's RFRA analysis differs from the agency's.

RFRA is not a statute that creates a federal agency to implement and administer it and authorizes that agency to issue implementing regulations. The absence of any provision explicitly delegating rulemaking power is irrelevant, because that is not how the statute works.

Instead, RFRA is a statute that *regulates* all federal agencies and requires them to comply. RFRA imposes on each agency an affirmative duty to avoid burdening the religious exercise of the persons and entities it regulates: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," and the government "may" impose such a burden "only" if it satisfies strict scrutiny. 42 U.S.C. § 2000bb-1. This duty to minimize religious conflicts applies to all agencies and all agency actions: The "government" that is subject to RFRA "includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." *Id.* § 2000bb-2(1). The agency's obligations under RFRA extend to everything the agency does: RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." *Id.* § 2000bb-3(a). And Congress authorized awards of attorneys' fees incurred in proceedings before any agency that neglected its obligations under RFRA. See Religious Freedom

Restoration Act of 1993, Pub. L. 103-141, § 4(b), 107 Stat. 1488, 1489 (inserting RFRA into 5 U.S.C. § 504, which authorizes fee awards in proceedings before agencies).

If Congress wants to create any exception to these duties, it must do so explicitly and by specifically cross-referencing RFRA: "Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb-3(b). "This chapter" is RFRA.

RFRA thus operates as "both a rule of interpretation for future federal legislation and *an exercise of general legislative supervision over federal agencies*, enacted pursuant to each of the federal powers that gives rise to legislation or agencies in the first place." Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 211 (1994) (emphasis added).

RFRA expressly allows any "person whose religious exercise has been burdened in violation of [RFRA]" to "assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against" the agency or its officials and employees. 42 U.S.C. § 2000bb-1(c). Agencies are not required to ignore these obligations, wait to be sued, and be held liable for attorneys' fees under 42 U.S.C. § 1988(b)—or wait for their enforcement efforts to be stymied by a RFRA defense. To do so would not just be foolish in policy and fiscal terms. It would be a form of defiance rather than compliance. An agency taking this course would be refusing to make any effort to comply with RFRA until held liable in litigation, and it would then comply only to the minimum extent required by a court's judgment.

Faithful compliance with RFRA requires agencies—whenever they act—to consider whether their regulations

might "substantially burden a person's exercise of religion." *Id.* § 2000bb-1(a). If an agency concludes that its regulation may substantially burden religious exercise, then it must consider how to respond. If an agency believes that it may not be able to satisfy strict scrutiny, then RFRA dictates that the agency should grant a religious exemption. And even if the agency thinks that it *might* be able to satisfy strict scrutiny, the agency is not required to nevertheless impose a burden on religious exercise. See *id.* § 2000bb-1(b) (providing the "Government *may* substantially burden a person's exercise of religion only if" it satisfies strict scrutiny) (emphasis added).

Nor is the agency required to precisely predict the ultimate judicial interpretation of what RFRA requires. Under the court below's view, the agency is nearly guaranteed to be wrong, no matter what it does. If it grants no exemption, or too narrow an exemption, it is liable to the persons whose religious exercise it has burdened. And if it grants too broad an exemption, it is liable to whatever entities can successfully claim standing to object. In its efforts to implement a statute that enacts broad standards rather than narrow rules—"substantially burden," "compelling governmental interest," "least restrictive means"—an agency would have zero discretion and zero interpretive authority. It would always be wrong unless it exactly anticipated the judicial reaction to the facts as well as to the law.

In the frequent event of a circuit split, an agency could not comply in one circuit without becoming liable in another. Compare Pet. App. 43a-48a (holding that an exemption in this context is unauthorized and somehow illegal), and *Geneva College* v. *Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 427 (3d Cir. 2015) (reversing two district courts and holding that agency's earlier and narrower exemption was adequate so that no

further exemption was required on these facts), with *Sharpe Holdings, Inc.* v. *U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 942 (8th Cir. 2015) (holding that an earlier exemption burdened plaintiff's religious exercise and that some further exemption, such as that at issue here, was required).

"RFRA was designed to provide very broad protection for religious liberty." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014). So of course Congress did not put agencies subject to RFRA in any such impossible bind as just described. To the contrary, Congress expressly provided that an agency does not violate RFRA when it *grants* a religious exemption: "Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter [RFRA]." 42 U.S.C. § 2000bb-4.

Consequently, an agency does not violate RFRA by granting a religious exemption that may turn out to be broader than what a court subsequently interprets RFRA to require. When an agency and court disagree about what constitutes a "substantial burden" on religious exercise—or whether that burden satisfies strict scrutiny—the agency does not violate RFRA if it errs on the side of exempting individuals with potential religious objections. In other words, agencies may promulgate potentially overinclusive exemptions. Nothing in RFRA requires the agency to grant potentially underinclusive exemptions, impose burdens on some religious exercise, and invite litigation to alleviate those burdens.

II. Because the Exemption at Issue Is a Rational Attempt to Comply with RFRA, It Also Substantively Complies with the Administrative Procedure Act.

A. The court below's substantive holding under the Administrative Procedure Act explicitly depended on its

mistaken RFRA holding. The court said that neither RFRA nor the Affordable Care Act "authorize or require the Final Rules" at issue. Pet. App. 38a. "*Thus*, they were enacted 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,' making them 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Ibid.* (emphasis added) (quoting 5 U.S.C. § 706(2)). That "thus" is the court's entire holding on the point.

By its own terms, therefore, if the court below's RFRA holding falls, its APA holding falls as well. Because RFRA requires the agency to grant certain religious exemptions and necessarily authorizes reasonable latitude in doing so, the exemption at issue here is authorized by RFRA. The exemption is therefore "in accordance with law" and is not "in excess of statutory jurisdiction." 5 U.S.C. § 706(2). And because lack of statutory authorization was the court's only reason for holding the exemption "arbitrary, capricious, [or] an abuse of discretion," the exemption suffers from none of those defects either. *Ibid.* It follows that respondents have no substantive claim under the APA.

B. Nor is the exemption arbitrary, capricious, or an abuse of discretion on any other ground beyond the one relied on by the court below. A court cannot "set aside," *ibid.*, an agency's religious exemption under the APA simply because the court interprets the agency's RFRA duty to avoid religious conflicts more narrowly than the agency does.

Review under the APA to determine whether agency action is "arbitrary, capricious, or an abuse of discretion" is "narrow." *Dep't of Commerce* v. *New York*, 139 S. Ct. 2551, 2569 (2019). The Court determines "only whether the Secretary examined 'the relevant data' and articulated 'a satisfactory explanation' for his decision, 'including a

rational connection between the facts found and the choice made.'" *Ibid.* (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). This standard requires simply "that an agency provide reasoned explanation for its action," and—as relevant to the agency's latest religious exemption here—"it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Under this standard, an agency is not required to grant a "perfect" religious exemption comporting with what any one court believes RFRA requires. Instead, an agency provides a satisfactory "reasoned explanation," *ibid.*, for granting a religious exemption by explaining its rational belief that RFRA required the exemption—even if a reviewing court thinks that the agency was (reasonably) incorrect. Alternatively, an agency can provide a satisfactory reasoned explanation by stating its rational belief that a religious exemption would avoid the risk and expense of litigation.

Either one of these possible explanations would sufficiently justify a religious exemption. But here, the agency provided both, and its explanations are plainly "reasoned" and rational.

First, the agency concluded that requiring "compliance through the [contraceptive] Mandate or accommodation constituted a substantial burden on the religious exercise of many entities or individuals" and does not satisfy strict scrutiny under RFRA. 83 Fed. Reg. at 57,546.

This was a reasonable conclusion, even though disputed. Lower courts had divided on whether the agency's earlier, narrower exemption to the contraceptive mandate (which it had called an "accommodation")

violated RFRA as applied to certain challengers. It was a reasonable inference that this Court may have been closely divided on the question. See *Zubik*, 136 S. Ct. at 1561 (vacating and remanding seven judgments without deciding the merits of any of them, and urging the parties to settle their differences). And whether or not this Court ultimately concluded that the agency's earlier policy substantially burdened anyone's exercise of religion, a number of serious and sincere religious organizations passionately believed that it did.

Since the agency proposed the exemption at issue here, courts have continued to disagree about whether the earlier exemption substantially burdened anyone's religious exercise. Compare Pet. App. 53a (affirming nationwide preliminary injunction against the exemption here, in part, on the basis that it was not required under RFRA), with Order, *DeOtte* v. *Azar*, No. 4:18-cv-00825, Dkt. No. 76 (N.D. Tex. June 5, 2019) (enjoining application of the earlier, narrower exemption to a religious objector); Order, *Little Sisters of the Poor* v. *Azar*, No. 1:13-cv-02611, Dkt. No. 82 (D. Colo. May 29, 2018) (same); Order, *Wheaton Coll.* v. *Azar*, No. 1:13-cv-08910, Dkt. No. 119 (N.D. Ill. Feb. 22, 2018) (same).

Second, the agency concluded that "even if RFRA does not compel" the exemption, this exemption was "the most appropriate administrative response to the religious objections that have been raised." 83 Fed. Reg. at 57,544. This judgment was informed not only by the agency's reassessment of the competing interests, but also by its "desire to bring to a close the more than five years of litigation over RFRA challenges to the [contraceptive] Mandate." *Id.* at 57,545. It is wholly rational—and a responsible use of administrative authority and resources—for an agency to grant religious exemptions to end litigation and avoid religious conflict. An agency need not spend its own resources litigating every exemption

issue to this Court. Moreover, it need not, and should not, force sincere religious claimants to spend years litigating plausible but uncertain claims to this Court.

III. THE AFFORDABLE CARE ACT GIVES THE AGENCY SEPARATE AUTHORITY TO GRANT THIS RELIGIOUS EXEMPTION.

A. Nothing in the Affordable Care Act even arguably limits the agency's obligation to grant religious exemptions under RFRA. RFRA applies to all post-RFRA legislation, including the ACA, unless the later legislation "explicitly excludes such application by reference to this chapter [RFRA]." 42 U.S.C. § 2000bb-3(b). Congress properly called this provision a "[r]ule of construction." *Ibid.* It prevents courts from eroding RFRA with implied exceptions, and to achieve that end, it requires Congress to be clear.

There is no reference to RFRA in the ACA. So the agency's obligation and authority to grant reasonable religious exemptions pursuant to RFRA is in no way affected by the ACA. That is enough to decide this case; whether the ACA also provides implicit authority for the agency to grant religious exemptions is effectively redundant.

B. In all events, the ACA, reasonably read, does independently give the agency authority to grant this religious exemption. The ACA grants the agency authority to identify what "additional preventive care" must be covered under the statute's health-insurance mandate. 42 U.S.C. § 300gg-13(a)(4). "Congress itself * * * did not specify what types of preventive care must be covered. Instead, Congress authorized the [agency] to make that important and sensitive decision." *Hobby Lobby*, 573 U.S. at 697.

Congress specified that qualifying health insurance plans "shall" cover "additional preventive care * * * *as*

provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(4) (emphasis added). The complete sentence reads:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for— * * * (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

Ibid.

Consequently, Congress delegated power to the agency to create "comprehensive guidelines" defining what "additional preventive care" would have to be covered "as provided for" by the agency. *Ibid.* This broad delegation independently authorizes the agency's religious exemption.

Contrary to the court below's reasoning, see Pet. App. 39a-41a, Congress placed no other relevant restrictions on the agency's exercise of that authority. Congress neither defined "preventive care" nor limited the agency's discretion to place conditions on when coverage of that care is mandatory. And the ACA's requirement that plans "shall" cover what the agency has "provided for" does not circumscribe the agency's authority to define what its guidelines provide for. Cf. Pet. App. 39a-40a. In short, Congress delegated to the agency broad authority not only to identify what "additional preventive care" plans shall cover, but also *under what circumstances* plans must

cover that care.

The religious exemption at issue here is not the only condition the agency has placed on preventive-care coverage. As reflected in its guidelines, the agency retains discretion to "determine the frequency, method, treatment, or setting for coverage of" preventive care. 26 C.F.R. § 54.9815-2713(a)(4) (granting plans and issuers discretion over the same only to "the extent not specified in a recommendation or guideline").

And the agency has used that discretion to condition the circumstances under which its identified care must be covered. For example, the agency has limited coverage for HPV screenings to women over 30 and for mammograms to women over 40. See U.S. Department of Health and Human Services, *Women's Preventive Services Guidelines*, https://www.hrsa.gov/womens-guidelines-2016/index.html (last updated Oct. 2019). The agency has further delegated authority to health-plan providers to use "reasonable medical management techniques to determine" any coverage limitations when the agency has not done so. 26 C.F.R. § 54.9815-2713(a)(4). These "techniques" inevitably mean that some patients will not get the preventive medical services that they request and for which coverage is otherwise required. If, as the court below claimed, the statutory word "shall" means that the agency must require coverage of all defined preventive services without exception, then the exceptions for age and medical management are both invalid.

Likewise, the agency has placed conditions on coverage based on the employer's circumstances. Specifically, the agency exempted churches and their associated entities from the contraceptive mandate (the "Church Exemption"). See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and

Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011); *Hobby Lobby*, 573 U.S. at 698 ("[Health and Human Services (HHS)] has effectively exempted certain religious nonprofit organizations, described under HHS regulations as 'eligible organizations,' from the contraceptive mandate.").

Tellingly, the court below offered no persuasive distinction between the agency's authority to grant the Church Exemption—which it noted was "facially at odds" with its interpretation, Pet. App. 40a-41a n.26—and the religious exemption here. The court suggested that the Church Exemption *might* be permissible because of the longstanding history of similar church exemptions or the First Amendment's "ministerial exception." See *ibid.*; cf. *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 188 (2012) ("Requiring a church to *accept or retain an unwanted minister*, or punishing a church for failing to do so, intrudes upon more than a mere employment decision.") (emphasis added). To be sure, both of these considerations underscore the deep political significance of religious exemptions, as discussed below. But they have nothing to do with the scope of authority delegated to the agency by the ACA's *statutory text*, which authorizes the agency to "provide[] for" "additional preventive care" in "comprehensive guidelines." 42 U.S.C. § 300gg-13(a)(4). The court below's position is textually untenable.

C. More fundamentally, the court below's attempt to distinguish the Church Exemption based on the Nation's "longstanding tradition" of protecting religious liberty points to another reason for interpreting the ACA as authorizing religious exemptions. Neither that "longstanding tradition" in general, nor the ministerial exception more specifically, stops at the door of the church itself. See *Hosanna-Tabor*, 565 U.S. at 190 (stating that "the ministerial exception is not limited to the head of a

religious congregation," and applying the exception to a teacher in a religious school).

If Congress wanted to delegate broad rulemaking authority to a federal agency, but limit that delegation with a rule prohibiting consideration of the needs of religious conscience, it would need to make that surprising limitation explicit. Such a limitation would be inconsistent with long national tradition, commitments to religious liberty in state and federal constitutions, and vast numbers of statutes. No such limitation appears in the ACA.

"Religious liberty is one of America's great contributions to the world." Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 840 (2014). The "principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in [this Court's] opinions." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 523 (1993) (collecting cases).

Religious exemptions ensure that laws enacted by the majority of citizens do not infringe on heterodox beliefs and practices of a minority. Exemptions "emerged when the majority became willing to provide for the religious liberty of minority faiths." Douglas Laycock, *Regulatory Exemptions*, 81 Notre Dame L. Rev. at 1803. And once majorities recognized the rights of minorities to worship according to their faith, "the logic of toleration suggested that they should also be exempted from other laws that made their lives unnecessarily difficult." *Id.* at 1804. Religious exemptions therefore perform a vital function in a pluralistic society: They "reduce[] human suffering," because "people do not have to choose between incurring legal penalties and surrendering core parts of their identity." Laycock, *Religious Liberty*, 2014 U. Ill. L. Rev.

at 842.

The Nation's commitment to religious liberty has been manifested in an "unbroken tradition" of religious exemptions extending from "the late seventeenth century to the present." Laycock, *Regulatory Exemptions*, 81 Notre Dame L. Rev. at 1837. A survey in 1992 found some 2,000 specific religious exemptions in state and federal statutes. James E. Ryan, Comment, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445-1450 (1992). Many more have been enacted since. For many years, religious exemptions from generally applicable laws were understood to be required by the First Amendment's Free Exercise Clause. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972); *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963).

After *Employment Division* v. *Smith*, 494 U.S. 872, 884-885 (1990), held otherwise, both the federal government and many States responded to ensure that religious exemptions would be available generally—and not just for specific cases that the legislature could anticipate and resolve. Congress enacted RFRA, which "is a statute designed to perform a constitutional function. It is designed to restore the rights that previously existed under the Free Exercise Clause." Laycock & Thomas, 73 Tex. L. Rev. at 219. When passed, RFRA "was supported by one of the broadest coalitions in [then] recent political history, including Christians, Jews, Muslims, Sikhs, Humanists, and secular civil liberties organizations." *Id.* at 210. Likewise, many States have enshrined requirements for religious exemptions into their laws. See Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 3 (2016) ("Congress and thirty-three states have rejected the *Smith* standard, either by enacting [RFRAs] or by interpreting state constitutions to subject neutral and generally applicable laws that burden religious exercise to

heightened judicial scrutiny[.]").

Our history and legal tradition establish the profound importance of accommodating religious belief and exercise through religious exemptions. In the ACA, Congress delegated very broad regulatory authority to the agency over many aspects of health care, including the preventive care at issue here. It would have been deeply at odds with our legal tradition for Congress to delegate such broad regulatory authority with an implicit prohibition on considering the need for religious exemptions to the exercise of that authority. No such surprising withholding of authority is explicitly stated, and the court below erred in inferring one.

* * *

The court below chided the agency for failing to be "flexible and open-minded." Pet. App. 36a. But "it follows the best of our traditions" for government to "respect[] the religious nature of our people and accommodate[]" religious objections. *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952).

Nothing in our Nation's tradition of religious exemptions, in RFRA, in the APA, or in the ACA suggests that the agency lacked authority to grant the religious exemption here. To the contrary, any reasonable effort to comply with RFRA requires the agency to grant religious exemptions, and those exemptions need not precisely match ultimate judicial interpretation of RFRA's minimum requirements. And the broad delegation of regulatory authority to the agency in the ACA necessarily, and independently, includes authority to consider the need for religious exemptions. In issuing the exemption at issue here, the agency acted responsibly to end litigation and

avoid religious conflict.[3]

CONCLUSION

The judgment of the Third Circuit should be reversed.

Respectfully submitted.

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[3] The exemption for moral objections, 83 Fed. Reg. 57,592 (Nov. 15, 2018), is not at issue in this case, because the private petitioners are religious in the most traditional sense. The Court should not casually opine on the moral exemption without briefing, as the court below arguably did. Compare Pet. App. 43a n.27 (noting that no party defended the moral exemption under RFRA), with Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313, 326-337 (1996) (reviewing the evolution of religious beliefs to include nontheistic conscience and why nontheistic conscience must be protected by religious liberty).