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.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

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

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

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

BRIEF FOR AMICI CURIAE CHRISTIAN LEGAL SOCIETY AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S RFRA PRECEDENT 5

A. Civil Courts Are Not Religious Tribunals Capable Of Interpreting Religious Doctrine 5

1. The "Accommodation" requires Petitioner to take affirmative action contrary to its religious beliefs 6

2. The Third Circuit impermissibly questioned the reasonableness of Petitioner's religious beliefs 9

3. The Third Circuit's analysis improperly focused on the administrative burdens of complying with the Accommodation, instead of the significant penalties for refusing to participate in the Accommodation scheme in accordance with objectors' religious beliefs 13

TABLE OF CONTENTS—Continued

Page

B. Contrary To The Third Circuit's Flawed Understanding, RFRA Sets A Floor, Not A Ceiling, For Protecting Religious Exercise 15

II. THE THIRD CIRCUIT'S FLAWED INTERPRETATION OF RFRA WILL HAVE SWEEPING, DETRIMENTAL CONSEQUENCES FOR RELIGIOUS LIBERTY IF UPHELD 17

A. The Third Circuit's Substantial Burden Analysis Would Allow Courts To Override Any Sincerely Held Religious Belief 17

B. If The Third Circuit's Decision Is Upheld, It Will Incentivize Regulators To Utilize Similar False "Accommodations" Which Stifle Religious Freedom 21

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Page(s)

Burwell v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) ..... *passim*

City of Boerne v. *Flores*, 521 U.S. 507 (1997) 16

Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520 (1993) 20

Employment Division, Department of Human Resources of Oregon v. *Smith*, 494 U.S. 872 (1990) 9, 17

Geneva College v. *Secretary, Department of Health & Human Services*, 778 F.3d 442 (3d Cir. 2015) 11, 19

Gonzales v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) 19

Hernandez v. *Commissioner*, 490 U.S. 680 (1989) 9

Holt v. *Hobbs*, 574 U.S. 352 (2015) 143, 18, 20

Little Sisters of the Poor Home for the Aged v. *Sebelius*, 6 F. Supp. 3d 1225 (D. Colo. 2013) 7

Lyng v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) 18, 19, 20

New Doe Child #1 v. *Congress of Unied States*, 891 F.3d 578 (6th Cir. 2018) 10

Sherbert v. *Verner*, 374 U.S. 398 (1963) 17

Thomas v. *Review Board of Indiana Employment Security Divison*, 450 U.S. 707 (1981) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 14

Zubik v. *Burwell*, 194 L. Ed. 2d 599 (Mar. 29, 2016) 7

Zubik v. *Burwell*, 136 S. Ct. 1557 (2016) 5, 7, 8, 11, 15

STATUTORY PROVISIONS

26 U.S.C.
- § 4980D 6
- § 4980H 6

42 U.S.C.
- § 300a-7 22
- § 2000bb 13, 22
- § 2000bb-1 16
- § 2000bb-3 16
- § 2000bb-4 15
- § 2000cc-3 16
- § 2000cc-5 17

REGULATIONS

29 C.F.R. § 2590.715-2713A 6, 7

77 Fed. Reg. 8725 (Feb. 15, 2012) 6

78 Fed. Reg. 39,870 (July 2, 2013) 7

79 Fed. Reg. 51,092 (Aug. 27, 2014) 7

80 Fed. Reg. 41,318 (July 14, 2015) 7

83 Fed. Reg. 57,536 (Nov. 15, 2018) 8

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

McConnell, Michael W., *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).....21

INTEREST OF AMICI CURIAE[1]

The Christian Legal Society (CLS) is a nonprofit, nondenominational association of Christian attorneys, law students, and law professors with members in every state and chapters on 90 law school campuses. CLS's legal advocacy division, the Center for Law and Religious Freedom, works to protect all citizens' right to be free to exercise their religious beliefs. CLS was instrumental in the passage of the Religious Freedom Restoration Act (RFRA) and the subsequent defense of RFRA's constitutionality and proper application in the courts.

The National Association of Evangelicals (NAE) is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions, and individuals that includes more than 50,000 local churches from 74 different denominations and serves a constituency of over 20 million people.

The questions presented in this case are of substantial importance to CLS and NAE, which have a commitment to religious liberty, not just for themselves and their constituents, but for Americans of all faith traditions. While members of CLS and NAE may differ in their views regarding whether the general use of contraceptives is acceptable or whether certain contraceptives act as abortion-inducing drugs, they agree that the nation's historic, bipartisan commitment to religious liberty requires that the government respect the

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[1] No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made any monetary contribution to the preparation or submission of this brief. Letters granting blanket consent from all parties are on file with the Clerk.

religious beliefs of those faith traditions whose religious beliefs prohibit participating in the use or provision of contraceptives, including abortion-inducing contraceptives. CLS and NAE write in support of Petitioner's position because the lower court's decision fails to respect basic principles of religious liberty.

SUMMARY OF ARGUMENT

The Court has repeatedly admonished that the First Amendment prohibits courts from acting as ecclesiastical tribunals judging the reasonableness or orthodoxy of an organization's or person's religious beliefs. *See Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine … the plausibility of a religious claim."); *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether" someone who has religious qualms with a law has "correctly perceived the commands of [his] faith."). Despite this constitutional mandate, the Third Circuit, through an improper application of the substantial burden test, held that Petitioner Little Sisters of the Poor Saints Peter and Paul Home was simply mistaken that the accommodation makes it complicit in evil and that the accommodation "provides a means for an observer to adhere to religious precepts." Pet. App. 45a.

The Third Circuit's decision wrongly places courts in a position to determine as a matter of law whether the religious beliefs of the parties before them are not only sincerely held but also "reasonable." Because the Third Circuit's substantial burden test makes civil courts the ultimate authority on religious orthodoxy, the Court should reverse the Third Circuit's decision.

No party here disputes that Petitioner, a congregation of Roman Catholic women, sincerely holds religious objections both to providing health insurance that offers certain contraceptives *and* to taking actions required to avail themselves of an "accommodation" that obligates others to provide contraception on its behalf. In Petitioner's view, both options make it morally complicit in the provision of contraceptives contrary to its religious beliefs.

The court below erred by focusing on the activity of third parties rather than the Petitioner's role in enabling such activity. Although the court acknowledged that its role was to determine whether the HHS "accommodation" creates a substantial burden on an objector's religious beliefs, the panel in fact analyzed objectors' religious reasoning and the correctness of their belief that acting pursuant to the HHS regulatory "accommodation" scheme would make them morally complicit in the provision of contraceptives. Pet. App. 45a-47a.

The First Amendment precludes civil courts from making such an evaluation under RFRA's substantial burden analysis. Rather, the Court's decisions confine judicial review of whether an adherent's religious beliefs prohibit compliance with government regulation to the "'narrow function'" of inquiring whether those beliefs "reflect[] 'an honest conviction.'" *Hobby Lobby*, 573 U.S. at 725 (quoting *Thomas*, 450 U.S. at 716). In other words, the adherent alone defines the tenets of his or her religious observance. Courts may determine only the sincerity of religious beliefs, not their validity. Even religious beliefs that some reasonable observers would view as implausible are entitled to protection if sincerely held. *See id.* at 724.

Once a court determines that an objector sincerely believes that some government-mandated action or prohibition is contrary to his or her religious beliefs, the only burden question for the court is whether a substantial governmental sanction attaches to disobedience of the law. If so, the substantial burden inquiry ends there.

Here, however, the Third Circuit improperly inquired into the validity of Petitioner's beliefs under the guise of a substantial burden analysis. The panel examined whether objectors' beliefs are reasonable rather than whether the burden placed on those beliefs is substantial. In so doing, the court cast off the role of a legal arbiter and assumed that of a theologian or moral philosopher, improperly wading into an area where it has no competence. It is not for courts "to say that the [religious] line" objectors drew "was an unreasonable one." *Thomas*, 450 U.S. at 715.

Rather than evaluate the substantial financial penalties the government placed on an objector's adherence to their religious belief, the Third Circuit measured the ease with which an objector could violate that belief by participating in the "accommodation" scheme. This is not the inquiry RFRA requires. To the contrary, "the question that RFRA presents" is whether the challenged government action "imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs." *Hobby Lobby*, 573 U.S. at 724 (emphasis omitted). RFRA provides a floor, not a ceiling, for protecting religious exercise.

At least as dangerously, the Third Circuit's opinion wrongly precludes government agencies from providing religious exemptions or accommodating religious

objections under RFRA. In *Zubik* v. *Burwell*, the Court remanded the issue of the accommodation to the lower courts in order to afford the parties an opportunity "to arrive at an approach going forward that accommodates petitioners' religious exercise." 136 S. Ct. 1557, 1560 (2016). Surprisingly, despite this Court affording HHS and the religious objectors an opportunity to reach an agreement on an accommodation, the Third Circuit held that HHS has no authority to offer Petitioner and other religious objectors any accommodation other than that at issue in *Zubik*. Instead, under the Third Circuit's reasoning, the only remedy afforded by RFRA is a suit against the government. Such an interpretation conflicts with the plain language of RFRA and puts religious objectors in the uniquely disadvantaged position of having to compel accommodation through federal courts.

The lower court's flawed interpretation of RFRA will have far-reaching adverse consequences for religious liberty. It is critical that this Court re-affirm the correct substantial burden test and authorize agencies to proactively accommodate religious objectors. Anything less would undermine the important interests in protecting religious liberty that have been recognized by Congress and this Court.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S RFRA PRECEDENT

A. Civil Courts Are Not Religious Tribunals Capable Of Interpreting Religious Doctrine

Substantial burden on an objector's religious exercise is evaluated on the basis of the objector's own sincerely held religious belief. *E.g.*, *Burwell* v. *Hobby*

Lobby Stores, Inc., 573 U.S. 682, 724 (2014). This Court has stated repeatedly that "'it is not for us to say'" whether a party's religious beliefs "are mistaken or insubstantial." *Id.* at 725. When a party determines that certain conduct violates its religious beliefs, a court's "'narrow function … is to determine' whether the line drawn 'reflects an honest conviction.'" *Id.* Here, it is undisputed that Petitioner believes that preparing documentation that obligates third parties to provide contraception to its employees involves it in behavior it views as morally evil.

1. The "Accommodation" requires Petitioner to take affirmative action contrary to its religious beliefs

Petitioner, like many Catholic organizations, has strong religious convictions against the use and provision of contraceptives and abortifacients.

Under the Affordable Care Act (ACA), HHS promulgated guidelines requiring employers to provide "coverage, without cost sharing, for '[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.'" 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012); *see* 29 C.F.R. § 2590.715-2713A (referred to herein as the "Contraceptive Mandate"). Any employer who fails to comply with this Contraceptive Mandate faces stiff financial penalties. 26 U.S.C. §§ 4980D(b), 4980H(a), (c).

Although the regulations exempt certain churches and closely-related organizations, religious nonprofit organizations like Petitioner are not exempted. *See Hobby Lobby*, 573 U.S. at 698. Instead, these religious nonprofits were granted an "accommodation" (referred

to herein as the "Accommodation"). 78 Fed. Reg. 39,870, 39,871-39,872 (July 2, 2013); 29 C.F.R. § 2590.715-2713A. Under the Accommodation, an organization that has moral objections to contraception or abortifacients must fill out one of two forms. The first is an EBSA Form 700 Certification. This form certifies to a third-party administrator (TPA) that the organization is a religious nonprofit entity that religiously objects to providing abortifacient or contraceptive care required by the Contraceptive Mandate. 29 C.F.R. § 2590.715-2713A(a)-(b). The second form is a notice to HHS that provides the organization's name, its religious objections to complying with the mandate, and, importantly, its insurance plan name and type and its TPA's name and contact information. 79 Fed. Reg. 51,092, 51,094-51,095 (Aug. 27, 2014); 80 Fed. Reg. 41,318, 41,323 (July 14, 2015); 29 C.F.R. § 2590.75-2713A(b)(1)(ii)(B). Upon receiving the form or notice, the TPA would then provide the contraceptives. 78 Fed. Reg. at 39,874, 39,879, 39,892-39,893.

Several religious employers who did not qualify for the exemption—including the Little Sisters of the Poor Homes from Denver and Baltimore—filed lawsuits seeking protection under RFRA. *See, e.g.*, *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, 6 F. Supp. 3d 1225 (D. Colo. 2013). This Court eventually consolidated several appeals, including the Little Sisters' case out of the Tenth Circuit. *See Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016). The Court heard argument in March 2016 and asked the parties to submit additional briefing on whether the regulatory mechanism could be further modified to resolve the dispute. *See Zubik* v. *Burwell*, 194 L. Ed. 2d 599 (Mar. 29, 2016). In light of this supplemental briefing, the Court issued a per curiam order vacating the decisions of the courts that had

rejected RFRA challenges to the regulatory mechanism. *Zubik*, 136 S. Ct. at 1560-1561. The Court remanded the cases to afford the parties "an opportunity to arrive at an approach going forward" that would resolve the dispute. *Id.* at 1560.

Following this Court's instruction to "arrive at an approach that accommodates [objectors'] religious exercise," *Zubik*, 136 S. Ct. at 1560, the government modified the Contraceptive Mandate regulations described above by issuing a new rule. *See* 83 Fed. Reg. 57,536, 57,540 (Nov. 15, 2018). This new rule (referred to herein as the "Religious Exemption") expanded the religious exemption previously available to churches to a broader group of religious objectors, including Petitioner. The district court below, however, issued a nationwide preliminary injunction prohibiting enforcement of the new rule and effectively compelling the resurrection of the previously existing regulatory scheme (including the Accommodation). *See* Pet. App. 126a-137a. The Third Circuit upheld this nationwide preliminary injunction, holding that there was no "basis to conclude the Accommodation process infringes on the religious exercise of any employer." *See* Pet. App. 48a-53a. If allowed to stand, the Third Circuit's decision means that Petitioner will be forced to comply with the Contraceptive Mandate, whether by the Accommodation or otherwise.

Petitioner objects, on religious grounds, to using even the Accommodation. Petitioner genuinely believes that using either form of the Accommodation would make it complicit in sin, give the appearance of involvement in sin (itself a sin), and grievously impair its ability to bear witness to the sanctity of human life. The court below minimized the burden of participation in the Accommodation scheme, focusing excessively on

the role of third parties rather than the burden placed on objectors required to submit the accommodation form. *See* Pet. App. 46a ("Here, through the Accommodation process, 'the actual provision of contraceptive coverage is by a third party,' so any possible burden from the notification procedure is not substantial."). But in this case it is undisputed that Petitioner sincerely objects to filling out the accommodation forms. This is not an objection to the actions of third parties.

2. The Third Circuit impermissibly questioned the reasonableness of Petitioner's religious beliefs

More fundamentally, this Court's precedents do not allow the courts to conduct an analysis of the legitimacy of objectors' conscience. *See Hobby Lobby*, 573 U.S. at 724-725; *Employment Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 887 (1990); *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989); *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981). Rather, the objector alone defines the tenets of its religious observance; the reasonableness or truth of religious belief is beyond the competence and purview of the courts. *Smith*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); *Hernandez*, 490 U.S. at 699 ("It is not within the judicial ken to question … the validity of particular litigants' interpretations of [their] creeds.").

Similarly, it is not for the courts to engage in "difficult and important question[s] of … moral philosophy," including "the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the

commission of an immoral act by another." *Hobby Lobby*, 573 U.S. at 724. Where a religious objector believes that performing an act will violate his or her religious beliefs, and that belief is sincerely held, courts must accept the objector's belief. *Id.*; *see also New Doe Child #1* v. *Congress of U.S.*, 891 F.3d 578, 586-587 (6th Cir. 2018) ("Sincerity is distinct from reasonableness. *Hobby Lobby* teaches that once plaintiffs allege that certain conduct violates their sincerely held religious beliefs as they understand them, it is not within the court's purview to question the reasonableness of those allegations." (citations omitted)). The sincerity of Petitioner's belief, and the beliefs of many other individuals and organizations, that participating in the Accommodation would violate their religion is not in dispute. *See* Pet. App. 33a.

The Court's most recent reasoned RFRA decision, *Hobby Lobby*, is illustrative. Faced with the government's position "that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception …) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated," the Court explained that courts "have no business addressing whether the religious belief asserted in a RFRA case is reasonable." 573 U.S. at 723-724 (alterations omitted). The petitioners, the Court explained, believed that complying with the Contraceptive Mandate was "connected to the destruction of an embryo in a way that is sufficient to make it immoral for them" to comply. *Id.* at 724. The Court did not analyze whether the Contraceptive Mandate was *in fact* immoral or connected to the destruction of an embryo; rather, it noted that the determination of whether these beliefs were "flawed" was not for courts to make. *Id.*

The Third Circuit's substantial burden analysis below impermissibly evaluates whether participating in a government program through the completion of certain forms *in fact* will violate an objector's religious beliefs and concludes that Petitioner's objections are misplaced because "[t]he Accommodation … provides a means for an observer to adhere to religious precepts." Pet. App. 45a. Despite paying lip service in a footnote to these long-settled principles (*see* Pet. App. 44a n.28), the Third Circuit based its RFRA analysis on *Geneva College* v. *Secretary, Department of Health & Human Services*, a fatally flawed decision that this Court vacated in *Zubik*.[2] Relying on *Geneva College*, the Third Circuit here framed its substantial burden inquiry as whether participation without the Religious Exemption would make Petitioner and other objectors "trigger," "facilitate," or be "complicit" in the grave moral wrong—*i.e.*, the provision of contraceptive and abortifacient coverage. *See* Pet. App. 45a-46a (quoting *Geneva Coll.* v. *Secretary, Dep't of Health & Human Servs.*, 778 F.3d 442, 437-438 (3d Cir. 2015), *vacated by Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (per curiam)). Applying this approach, the Third Circuit concluded that because the Accommodation did not require religious objectors to directly provide contraceptives and abortifacients, "any possible burden … is not substantial." Pet. App. 46a.

But this approach is incorrect and contrary to this Court's directive. By requiring objectors to show that

[2] *See* 778 F.3d 442 (3d Cir. 2015), *vacated by Zubik* v. *Burwell*, 136 S. Ct. 1557, 1561 (2016) (per curiam). Although this Court vacated *Geneva College* in *Zubik* without expressing a "view on the merits," 136 S. Ct. at 1560, *Geneva College*'s reasoning is inconsistent with this Court's prohibition on questioning the reasonableness of religious beliefs.

compliance would cause them to "trigger" or "facilitate" a moral wrong in order to satisfy the substantial burden inquiry, the Third Circuit implicitly held that objectors cannot reasonably believe that they would violate their religion merely by signing the self-certification. But it is not for courts to evaluate the basis of an objector's religious beliefs about what would make them complicit in an immoral act. *See Thomas*, 450 U.S. at 714 ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit … protection."). Nor is it for courts to attempt to discern why, from the perspective of moral theology, signing a document that the objector believes makes it morally complicit in the provision of contraceptives and abortifacients is any different from a simple declaration that the objector objects to providing contraceptives and abortifacients on religious grounds. *Compare* Pet. App. 46a (dismissing religious objectors' claimed burden under the Accommodation mechanism as insubstantial in part because "the actual provision of contraceptive coverage is by a third party"), *with Thomas*, 450 U.S. at 714 (rejecting lower court's analysis of whether religious objector's beliefs were "consistent").

The government implemented the Religious Exemption because Petitioner and other objectors asserted that participating in the Accommodation would make them complicit in a grave wrong that violates their religious beliefs. Once the sincerity of these beliefs was established, the Third Circuit was required to accept the assertion. Its refusal to do so, and its decision to instead second-guess an objector's religious beliefs under the guise of determining whether an objector's religious beliefs will be substantially burdened, is contrary to this Court's precedent.

3. The Third Circuit's analysis improperly focused on the administrative burdens of complying with the Accommodation, instead of the significant penalties for refusing to participate in the Accommodation scheme in accordance with objectors' religious beliefs

Where a law or policy affects religious exercise, the Court has made clear that the RFRA substantial burden analysis focuses on the degree of burden imposed on *adhering* to, and acting in accordance with, religious belief. *See Hobby Lobby*, 573 U.S. at 724 ("[T]he question that RFRA presents" is whether the challenged government action "imposes a substantial burden on the ability of the objecting parties to conduct business *in accordance* with *their religious beliefs*." (first emphasis added)); *Thomas*, 450 U.S. at 718 (explaining that a burden is substantial to the extent it "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs"). That is, a religious believer's exercise of religion is substantially burdened if the law presents the believer with the choice of either violating his or her religious beliefs or incurring a substantial penalty. *Hobby Lobby*, 573 U.S. at 726; *see also Holt* v. *Hobbs*, 574 U.S. 352, 361 (2015).

For example, in *Hobby Lobby*, the Court held that the respondents' religious exercise was substantially burdened by a law requiring that they pay "an enormous sum of money" in penalties for adhering to religious beliefs prohibiting the provision of contraceptives and abortifacients. *See* 573 U.S. at 726. Similarly, in *Wisconsin* v. *Yoder*, which Congress enacted RFRA to restore, 42 U.S.C. § 2000bb(b)(1), the Court held that the respondent's religious exercise was substantially burdened by the imposition of criminal sanctions for

adhering to religious beliefs prohibiting the enrollment of children in secondary school. 406 U.S. 205, 218 (1972).

Here, Petitioner faces a similar choice if the Third Circuit's opinion is allowed to stand: participate in the Accommodation scheme in violation of its religious beliefs or encounter severe penalties. Rather than apply this Court's directly applicable substantial burden precedent by evaluating the significant financial penalties the government placed on Petitioner's *adherence* to its religious belief, the Third Circuit instead assessed the practical effort required of Petitioner and other objectors to *violate* their beliefs by participating in the Accommodation scheme. For example, the Third Circuit asserted that completing the paperwork necessary for participating in the Accommodation scheme would not burden the exercise of religion by an objector like Petitioner. *See* Pet. App. 46a ("Here, through the Accommodation process, the actual provision of contraceptive coverage is by a third party, so any possible burden from the notification procedure is not substantial." (internal quotation marks omitted)).

This is not the inquiry RFRA requires. Nowhere did the Third Circuit analyze the degree to which objectors' *adherence* to their religious beliefs by *not* participating in the Accommodation scheme (or otherwise providing coverage for contraceptive and abortifacient coverage) would expose objectors to draconian penalties. It was that analysis which the Court's precedent compels and which the circuit court failed to undertake.

B. Contrary To The Third Circuit's Flawed Understanding, RFRA Sets A Floor, Not A Ceiling, For Protecting Religious Exercise

In *Zubik*, the Court remanded to the lower courts to afford the parties, including HHS, "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise." *Zubik*, 136 S. Ct. at 1560. Despite the Court's express and unanimous indication that HHS could create an accommodation for religious nonprofits' objections to the Accommodation, the Third Circuit determined that such an accommodation is beyond the power of the government.

Rather, the Third Circuit held that federal agencies cannot proactively take steps under RFRA to remedy substantial burdens on religious exercise—such as by issuing the Religious Exemption. Pet. App. 43a, 46a-47a. Instead, the Third Circuit held that the only remedy RFRA affords to persons whose exercise of religion is substantially burdened by the government is a federal lawsuit. Under the Third Circuit's formulation, agencies therefore must wait for a court to find that a government action violates RFRA before they may provide for a religious accommodation. *Id.* This nonsensical interpretation is based on a view implicit throughout the Third Circuit's opinion: that RFRA is not a mandate to accommodate religious exercise, but rather sets a limit on the protections to which religious entities are entitled. This understanding of RFRA is not only flawed, but conflicts with RFRA's express language. *See* 42 U.S.C. § 2000bb-4 ("Granting … exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter.").

RFRA's protections are a floor, not a ceiling. Rather than creating a limited cause of action, Congress intentionally drafted RFRA "to provide very broad protection for religious liberty." *Hobby Lobby*, 573 U.S. at 693; *see also* 42 U.S.C. § 2000cc-3(g) (demanding "broad protection of religious exercise" to the "maximum extent" possible). RFRA expressly "applies to all Federal law and the implementation of that law, whether statutory or otherwise," unless a later statute "explicitly excludes … [the] application" of RFRA. 42 U.S.C. § 2000bb-3(a)-(b). The statute thus "intru[des] at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter," while imposing on all federal agencies a mandatory duty to avoid substantially burdening religious exercise. *City of Boerne* v. *Flores*, 521 U.S. 507, 532 (1992); *see also Hobby Lobby*, 573 U.S. at 695 ("As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work ….").

The Third Circuit's flawed understanding that RFRA's protections are meaningless until endorsed by a federal court is contrary to the plain text of the statute and this Court's interpretations. *See* 42 U.S.C. §§ 2000bb-1(a), 2000bb-3(a) ("Government shall not substantially burden a person's exercise of religion" in the implementation of "all Federal law"). Since RFRA's protections are the baseline from which government actions must proceed, agencies are permitted to provide proactive accommodations under RFRA. The Third Circuit's reading to the contrary is incorrect.

II. THE THIRD CIRCUIT'S FLAWED INTERPRETATION OF RFRA WILL HAVE SWEEPING, DETRIMENTAL CONSEQUENCES FOR RELIGIOUS LIBERTY IF UPHELD

A. The Third Circuit's Substantial Burden Analysis Would Allow Courts To Override Any Sincerely Held Religious Belief

As demonstrated above, federal courts have refrained from sitting as ecclesiastical tribunals who evaluate the validity of religious beliefs, finding in a variety of contexts that the federal judiciary has "no business" addressing this question. *Hobby Lobby*, 573 U.S. at 724. This judicial restraint is particularly important with regard to review of regulatory schemes and their effects on religious beliefs since "many people hold beliefs alien to the majority of our society—beliefs that are protected by the First Amendment but which could easily be trod upon under the guise of 'police' or 'health' regulations reflecting the majority's view." *Sherbert* v. *Verner*, 374 U.S. 398, 411 (1963) (Douglas, J., concurring).

RFRA does not require that the belief be deeply held, central to a particular religion, or a core religious principle to "qualify" for the substantial burden analysis. *See Hobby Lobby*, 573 U.S. at 696 ("Congress … defined the 'exercise of religion' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" (quoting 42 U.S.C. § 2000cc-5(7)(A))). Instead, Congress and this Court interpret religious exercise broadly. *E.g.*, *id.* at 710 ("Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within [the] definition" of "exercise of religion."); *Smith*, 494 U.S. at 877 ("[T]he 'exercise of religion' often involves not only belief and profession but the performance of (or absten-

tion from) physical acts [that] are engaged in for religious reasons."); *Holt*, 574 U.S. at 358 ("Congress defined 'religious exercise' capaciously" and "mandated that this concept 'shall be construed in favor of a broad protection of religious exercise.'").

A court cannot create a hierarchy of beliefs and then apply the substantial burden test only to some levels of belief. This broad definition of religious exercise is necessary because civil courts cannot judicially evaluate an individual's religious doctrine by how closely it follows any particular creed or religious practice. *E.g.*, *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457 (1988) ("We would accordingly be required to weigh the value of every religious belief and practice that is said to be threatened by any government program."); *Holt*, 574 U.S. at 361-362 (the "'substantial burden' inquiry asks whether the government has substantially burdened religious exercise … not whether the [individual] is able to engage in other forms of religious exercise"). Moreover, a valid belief may not comport precisely with the tenets of the adherent's particular faith, as understood by others. For example, in *Thomas*, this Court concluded that a Jehovah's Witness who refused to work on tank turrets was entitled to unemployment compensation despite another member of his faith having "no scruples" about the work. The Court correctly understood that it neither could nor should say "whether the petitioner or his fellow worker more correctly perceived the commands of their common faith." 450 U.S. at 715-716.

A judicial standard based on a court's understanding of religious centrality and substantiality creates a legal test under which courts could decide which beliefs are "'central' or 'indispensable' to which religions, and by implication which are 'dispensable' or 'peripheral,'

and would then [empower courts to] decide which government programs are 'compelling' enough to justify 'infringement of those practices.'" *Lyng*, 485 U.S. at 457 (rejecting the "prospect of this Court holding that some sincerely held religious beliefs and practices are not 'central' to certain religions, despite protestations to the contrary from the religious objectors").

The approach that the Third Circuit adopted in evaluating the burden on objectors in this case invites just such a forbidden inquiry into religious beliefs. *See* Pet. App. 45a-46a ("[T]he self-certification form does not trigger or facilitate the provision of contraceptive coverage … And the submission of the self-certification form does not make the employers 'complicit' in the provision of contraceptive coverage." (quoting *Geneva Coll.*, 778 F.3d at 437-438) (brackets omitted)). *Geneva College*, on which the Third Circuit relied, avowed that a court need not consider the "coercive effect" of "fines for noncompliance," because the court could itself "dispel[] the notion that the self-certification procedure is burdensome." 778 F.3d at 442. In other words, by concluding that the certification was not "burdensome," the court ruled that the certification was not contrary to Petitioner's religious beliefs. This method of analysis involves courts in reviewing reasonableness of religious beliefs, rather than the depth of the burden that the regulation would impose—an approach that intrudes into inviolable matters of faith. Applied to recent cases involving free exercise—where the burdened religious belief was unquestioned—the resulting modified assessment could lead to a different outcome. *E.g.*, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 425 (2006) ("receiving communion through *hoasca*," a sacramental tea and a Schedule I controlled substance, was "[c]entral to the [religion's]

faith"); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 524 (1993) (finding, without inquiry, that "one of the principal forms of devotion [in the Santeria religion] is an animal sacrifice").

The relevant inquiry for a substantial burden analysis is the substantiality of the *penalty* for refusing to abide by the regulation, not the substantiality of the specific act that a regulation mandates or proscribes. *See Hobby Lobby*, 573 U.S. at 720. If judicial deliberation addresses the act, which may seem objectively minimal, courts will increasingly be placed in a position of estimating the moral burden imposed solely by compliance with the regulation itself, rather than the consequence of adherence to religious beliefs in contravention of the regulation. Such analysis ignores the impossible choice that burdensome regulations present—one must violate his or her religious beliefs or be subject to potentially severe penalties. *See Holt*, 574 U.S. at 361-362. By determining whether a substantial burden exists, courts could use the reasoning of the Third Circuit below to question any and all sincerely held beliefs, potentially "rul[ing] that some religious adherents misunderstand their own religious beliefs." *Lyng*, 485 U.S. at 458.

Sincere religious belief and practice must be free from judicial definition, as it should be free from definition by other branches of government. Otherwise, the government would assume a role in determining permissible religious exercise that has long been expressly forbidden.

B. If The Third Circuit's Decision Is Upheld, It Will Incentivize Regulators To Utilize Similar False "Accommodations" Which Stifle Religious Freedom

Under the Third Circuit's novel and erroneous interpretation of the ACA, the government was not empowered to promulgate the Religious Exemption and RFRA does not compel the government to promulgate the Religious Exemption in order to address the substantial burdens that compliance with the mandate places on religious nonprofits. Pet. App. 38a, 43a. Instead, the Third Circuit returned to the pre-*Zubik* status quo, by finding that the Accommodation satisfies any religious concerns such employers could possibly have. Pet. App. 46a; Pet. App. 48a ("the status quo prior to the new Rule, with the Accommodation, did not infringe on the religious exercise of covered employers, nor is there a basis to conclude the Accommodation process infringes on the religious exercise of any employer"). This decision will incentivize regulators and agencies to use similar "accommodations" to circumvent RFRA and improperly burden the free exercise of religion.

A religious believer's ability to act in accordance with his or her religious beliefs is of utmost importance. This country has had a tradition of providing religious exemptions dating back to early America when religious objectors were exempted from taking oaths, serving in the military, and removing their hats in court. *See* McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466-1473 (1990). Since *Roe* v. *Wade* was decided in 1973, Congress has passed numerous laws granting exemptions to those who object to abortion on the basis of a religious or moral belief, such as the

Church Amendment, which protects hospitals receiving federal funds from forced participation in abortion or sterilization. 42 U.S.C. § 300a-7. Responding to the Supreme Court's decision in *Smith*, Congress enacted RFRA, recognizing "free exercise of religion as an unalienable right" and affirming its conviction that "governments should not substantially burden religious exercise without compelling justification." *Id.* § 2000bb(a)(1), (3). Thus, exemptions for religious reasons are an indelible part of this country's tradition of protecting religious liberty.

Ignoring this tradition of exemptions for religious liberty, the Third Circuit rejected the Religious Exemption and reverted to a so-called "accommodation" that is not in fact an accommodation, but an alternative way to "comply" with the mandate. But by paying more heed to the regulatory mechanism's title than to Petitioner's conviction that compliance with the Accommodation makes it morally complicit in the provision of types of contraceptive coverage that violate its religious beliefs, the Third Circuit somehow concluded that the Accommodation adequately safeguards religious liberty. Because it did not provide a full and appropriate consideration of the Accommodation's substantial burden, the Third Circuit now leaves religious nonprofits with a false choice: they must either fully comply with the mandate through the Accommodation, betraying their beliefs, or pay a significant penalty. Thus, the mandate's so-called Accommodation actually curbs religious liberty instead of "accommodating" it.

The Accommodation violates RFRA's recognition of the "free exercise of religion as an unalienable right." 42 U.S.C. § 2000bb(a)(1). The Third Circuit's holding, if left undisturbed, will establish a precedent detrimental to religious liberty by altering the demanding substan-

tial burden test and undermining the purpose of RFRA.

CONCLUSION

This Court should reverse the judgment of the circuit court.

Respectfully submitted.

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