Nos. 19-431 & 19-454

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,	DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, et al.,
Petitioner,	*Petitioners*,
v.	v.
PENNSYLVANIA, et al.,	PENNSYLVANIA, et al.,
Respondents.	*Respondents*.

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

BRIEF OF LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE* AND SUMMARY OF ARGUMENT *

Amici curiae, who are listed in an appendix to this brief, are leading scholars and teachers of administrative law, constitutional law, and health law. They submit this brief in their individual capacities, not on behalf of their institutions.

Amici study and write on agency authority, constitutional design, and health law. *Amici* have an interest in promoting clear standards for determining when statutes may be read to confer authority on agencies to promulgate legislative rules, which are binding regulations that alter regulated parties' legal rights and responsibilities.

In *amici*'s view, the Religious Freedom Restoration Act (RFRA) does not authorize the Departments of Health and Human Services, Treasury, or Labor to adopt religious exemptions to the contraceptive coverage requirement under the Patient Protection and Affordable Care Act (ACA) that are broader than what RFRA itself requires.

The Third Circuit held that the ACA does not authorize, and in fact "forecloses," the expanded religious exemption here. Pet. App. 40a. That holding was correct: The Women's Health Amendment to the ACA does not delegate to the Departments or to the Health Resources and Services Administration (HRSA) the authority to exempt group health plans and health insurance issuers from the mandate to provide "preventive care" coverage. 42 U.S.C. 300gg-13(a). Rather, the

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* No counsel for a party authored this brief in whole or part, and no party other than *amici* or their counsel made a monetary contribution to the preparation or submission of the brief. All parties have filed blanket consents to the filing of *amicus* briefs.

statute clearly mandates that any "group health plan" or "health insurance issuer offering group or individual health insurance coverage *shall*" provide coverage for "preventive care and screenings" as defined by HRSA's guidelines. *Ibid.* (emphasis added). Thus, the ACA does not permit HRSA or the Departments to promulgate the religious exemption.

No matter, the government argues, because RFRA separately delegates to it the requisite authority to promulgate legislative rules, at least with respect to the religious exemption—even if those rules go beyond what RFRA's text requires and are inconsistent with express limits on the Departments' authority under the ACA. As the government puts it, this Court should afford executive agencies "some leeway" to issue rules broader than RFRA actually dictates. U.S. Br. 29. One of petitioners' *amici*, Professor Douglas Laycock, likewise argues that RFRA authorizes agencies "to grant exemptions broader than the minimum that RFRA requires." Laycock Br. 5. "The absence of any provision [in RFRA] explicitly delegating rulemaking power is," in his view, "irrelevant." *Ibid.* In essence, the government and its *amici* argue, agencies may promulgate exemptions that exceed RFRA's mandate so long as the agency believes the exemptions might prevent a RFRA violation. And, moreover, RFRA delegates this sweeping rulemaking authority *implicitly*.

This startling position cannot be reconciled with basic administrative law or separation-of-powers principles. Federal agencies are "creature[s] of statute" possessing "only those authorities conferred upon [them] by Congress." *Michigan* v. *EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Thus, an agency's legislative rules "must be promulgated pursuant to authority Congress has delegated to [it]." *Gonzales* v. *Oregon*, 546 U.S. 243, 258 (2006); accord *Bowen* v. *Georgetown*

Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

In other words, a regulation that "*modifies* or *adds* to a legal norm based on the agency's *own authority*" must be based upon "a congressional delegation to promulgate substantive rules, to engage in supplementary lawmaking." *Syncor Int'l Corp.* v. *Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997). "[I]n the absence of statutory authorization for [an agency's] act[ion]," the action is necessarily "contrary to law and cannot stand.'" *Atlantic City Elec. Co.* v. *FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (quoting *Michigan*, 268 F.3d at 1081). Put another way, just as the Executive Branch may not unilaterally cancel any of a statute's requirements (*Clinton* v. *City of New York*, 524 U.S. 417, 439 (1998)), so too it may not unilaterally supplement them.

These principles operate at the core of the American constitutional design, and they are dispositive here. The Departments' religious exemption is a legislative rule: It reorders the rights of female employees and the duties of their employers under the ACA. Accordingly, it is lawful only if Congress delegated the Departments the authority to issue legislative rules under RFRA. It did not.

To be sure, Congress often "gives an agency broad power to enforce all provisions of the statute." *Gonzales*, 546 U.S. at 258. When, for example, Congress has authorized an agency to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of a federal statute, there is no doubt that the agency has rulemaking authority. *National Cable & Telecomm. Assn.* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (quoting 47 U.S.C.

201(b)). But no such authorization appears in—nor could one be implied by—RFRA's text. Instead, RFRA creates a private right of action enforceable in federal court. See 42 U.S.C. 2000bb-1. The Act authorizes "[a] person whose religious exercise has been burdened * * * [to] assert that violation as a claim or defense in a judicial proceeding." *Id.* 2000bb-1(c). Federal courts, then, have the primary role in implementing RFRA. As this Court has put it, Congress "plainly contemplate[d] that *courts* would recognize exceptions—that is how the law works." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006).

RFRA does address itself to agencies, but in a more limited way than needed to promulgate the rules at issue here. In particular, it is appropriate for agencies to consider RFRA's constraints when exercising delegated policymaking authority under *other* federal laws. Thus, for example, the Departments might consider RFRA's requirements when making a discretionary policy determination in the course of a rulemaking proceeding authorized by the ACA. See, *e.g.*, 78 Fed. Reg. 39,874 (July 2, 2013) (considering RFRA when adopting limited exemptions under ACA); cf. *O Centro Espirita*, 546 U.S. at 433 (noting that agency could consider RFRA when deciding whether to grant waiver under Controlled Substances Act). But the Departments may not rely upon RFRA as a standalone source of authority for promulgating legislative rules that create exemptions not required by RFRA and not permitted by the ACA. To hold otherwise would be to bestow unprecedented power on the administrative state in a manner that neither Congress nor the Framers ever intended.

ARGUMENT

I. AGENCIES MAY NOT ISSUE BINDING RULES WITHOUT CLEAR STATUTORY AUTHORITY

Administrative agencies like HHS have a subordinate place in the framework of the federal government. Unlike Congress, the President, or this Court, agencies are not created by the Constitution and do not derive any of their powers from it. Rather, agencies are creatures of Congress: They are created by statute and "literally ha[ve] no power to act[] * * * unless and until Congress confers power upon" them. *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986).[1]

Because agencies' "power to act and how they are to act is authoritatively prescribed by Congress," agencies necessarily act "ultra vires" when they attempt to exercise power beyond the scope of the authority that Congress gives them. *City of Arlington, Tex.* v. *FCC*, 569 U.S. 290, 297 (2013); see *id.* at 297-98 ("The question * * * is always whether the agency has gone beyond what Congress has permitted it to do."). Congress codified that exact principle in the Administrative Procedure Act, which instructs courts to "hold unlawful and set aside agency action * * * in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. 706(2).

This Court accordingly has held in a variety of contexts that when agencies take actions that Congress did not authorize them to take, those actions are unlawful or without legal effect. The Court has held, for example, that an agency's interpretation of a statute is binding on courts only if Congress authorized the

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[1] The Constitution contemplates the existence of "executive Departments" (U.S. Const. art. II, § 2, cl. 1), but it does not provide for any such departments or confer any power upon them.

agency to interpret the statute by leaving "a gap for the agency to fill." *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Moreover, the delegation must be clear and express before an agency can exercise interpretive authority respecting a "question of deep economic and political significance that is central to [a] statutory scheme." *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015) (internal quotation marks omitted). Agencies cannot exercise jurisdiction over persons or matters as to which Congress intended to deny them jurisdiction. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). And most pertinently here, the Court has held it "axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

To be sure, agencies routinely issue a variety of nonbinding rules for which no explicit statutory authority is required. Agencies may issue such "interpretative" rules at their discretion, but only because they constitute nonbinding guidance, lacking the force and effect of law. See, *e.g.*, *Joseph* v. *U.S. Civil Serv. Comm'n*, 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977) ("An agency without legislative rulemaking authority may issue interpretative rules."). Agencies also generally have latitude to issue "rules of agency organization, procedure, or practice" (5 U.S.C. 553(b)(3)(A))—*i.e.*, rules that set forth the procedures governing agency matters without adopting any "substantive value judgments." *Public Citizen* v. *Dep't of State*, 276 F.3d 634, 640 (D.C. Cir. 2002).

But Congress must plainly grant an agency authority before an agency may adopt "legislative rules" that have the force of law and "grant rights, impose obligations, or produce other significant effects on private in-

terests." *American Tort Reform Ass'n* v. *Occupational Safety & Health Admin.*, 738 F.3d 387, 395 (D.C. Cir. 2013) (internal quotation marks omitted). "[T]he exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979).

Congress can delegate legislative rulemaking authority to an agency in a variety of ways. It can confer this authority with respect to an entire statute, by "giv[ing] an agency broad power to enforce all provisions of the statute." *Gonzales* v. *Oregon*, 546 U.S. 243, 258 (2006); see, *e.g.*, *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (deferring to FCC regulation in light of Congress's grant of authority to "'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act") (quoting 47 U.S.C. 201(b)); *Household Credit Servs., Inc.* v. *Pfennig*, 541 U.S. 232, 238 (2004) (same, because "Congress ha[d] expressly delegated to the [Federal Reserve] Board the authority to prescribe regulations * * * [that] 'are necessary or proper to effectuate the purposes of'" the statute) (quoting 15 U.S.C. 1604(a)). Or Congress can confine an agency's rulemaking authority to certain subjects. *Gonzales*, 546 U.S. at 259 (concluding that "Congress did not delegate to the Attorney General authority to carry out or effect all provisions of the CSA," but rather authority relating to particular matters).

Whether Congress's delegation is broad or narrow, however, it must be clear. There can be no delegation without a discernible indication that "Congress would expect the agency to be able to speak with the force of law." *United States* v. *Mead Corp.*, 533 U.S. 218, 229

(2001). To hold otherwise would be to loosen Congress's control over administrative agencies and to open the door to administrative lawmaking on a scale that the Framers never could have envisioned.

II. THE ACA DOES NOT PERMIT THE RELIGIOUS EXEMPTION

The Women's Health Amendment to the ACA does not permit the Departments to promulgate the religious exemption. See 42 U.S.C. 300gg-13(a)(4). Rather, as the court of appeals held, "the mandate articulated in § 300gg-13(a) forecloses such exemptions." Pet. App. 40a. The Departments have no discretion to avoid this clear mandate. See *Chevron*, 467 U.S. at 843 ("[An] agency[] must give effect to the unambiguously expressed intent of Congress.").

Congress mandated certain coverage through the Women's Health Amendment. In particular, the Amendment provides that group plans and insurance issuers "offering group or individual health insurance coverage *shall*, at a minimum *provide* coverage for and shall not impose any cost sharing requirements for * * * preventive care and screenings * * * as provided for in comprehensive guidelines support by the Health Resources and Services Administration [HRSA]." 42 U.S.C. 300gg-13(a) (emphases added). HRSA's comprehensive guidelines were based upon recommendations from a panel of experts from the Institute of Medicine. Pet. App. 9a. Based upon this expert opinion, the HRSA concluded that "preventive care" includes all "Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," where prescribed by a health care provider. HRSA, *Women's Preventive Service Guidelines*, perma.cc/77JF-F3DQ. The most current version of the Guidelines similarly "recommends that the full range

of female-controlled U.S. Food and Drug Administration-approved contraceptive methods, effective family planning practices, and sterilization procedures be available as part of contraceptive care." HRSA, Women's Preventive Services Guidelines (Dec. 17, 2019), perma.cc/7NSM-T2QB.

Once HRSA determined that preventive care includes contraceptive care, the ACA mandated coverage for such care. The Women's Health Amendment does not delegate the question of who must provide coverage for preventive care services to the Departments or HRSA. The statute clearly answers that question: Any "group health plan and a health insurance issuer offering group or individual health insurance coverage shall" provide preventive care coverage. 42 U.S.C. 300gg-13(a). The ordinary meaning of the term "shall" is mandatory. See *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1977 (2016) ("[T]he word 'shall' usually connotes a requirement."). Unless Congress has indicated otherwise, that ordinary meaning controls. See *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994) ("[W]e construe a statutory term in accordance with its ordinary or natural meaning.").[2] Thus, while the ACA authorizes HRSA to define "preventive care," it does not authorize HRSA or the Departments to determine

[2] Of course, the term "shall" sometimes permits some agency discretion as to procedural requirements such as statutory deadlines. *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986) (expressing "reluctan[ce] to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action"); see *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158 (2003) (recognizing that "shall" is a "mandatory" term but rejecting argument that agency cannot act after missing statutory deadline). But this Court has not permitted agencies to avoid substantive mandates in the same way.

whether group health plans and health insurance issuers must provide preventive care coverage.

The government argues that Section 300gg-13(a)(4) delegates authority to create religious exemptions by broadly authorizing HRSA to "support[]" guidelines that "provide[] for" coverage subject to exemptions. U.S. Br. 15. That simply is not what the statute says. Section 300gg-13(a) imposes an obligation upon a covered plan or issuer, which "shall, at a minimum provide coverage for and shall not impose any cost sharing requirements" for preventive care. 42 U.S.C. 300gg-13(a). And Section 300gg-13(a)(4) provides that this obligation includes, "with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by [HRSA] for purposes of this paragraph." 42 U.S.C. 300gg-13(a)(4). Thus, while Section 300gg-13(a) gives HRSA the power to define what preventive care the ACA requires, the statute directly imposes an obligation upon plans and issuers to cover the care that HRSA has identified. HRSA's authority to "provide[] for" guidelines regarding preventive care accordingly does not extend to creating exemptions from the statutory mandate. Nor would such authority be consistent with the purpose of the Women's Health Amendment to increase access to preventive care services. See, *e.g.*, Glen Cheng, *The National Residency Exchange: A Proposal to Restore Primary Care in an Age of Microspecialization*, 38 Am. J.L. & Med. 158, 176 (2012) (discussing ACA's purposes).

As the Third Circuit held, the ACA's command is clear. See Pet. App. 40a. Unless RFRA overrides that command, "that is the end of the matter." See *Chevron*, 467 U.S. at 842-43.

III. RFRA DOES NOT DELEGATE AUTHORITY TO THE DEPARTMENTS TO PROMULGATE EXTRA-TEXTUAL EXEMPTIONS

The United States and its *amici* argue that RFRA independently "permits" the Departments to promulgate the expanded religious exemption even though RFRA does not require the exemption and the ACA does not permit it. U.S. Br. 20. Accord, *e.g.*, Laycock Br. 5. But if the ACA does not authorize the Departments to promulgate the exemption, then the question is not whether RFRA "permits" them to do so. The question, instead, is whether RFRA provides the missing congressional delegation of rulemaking authority. If it does not, the exemption is invalid.

RFRA does not delegate the necessary authority here. Indeed, RFRA does not expressly delegate *any* rulemaking authority to agencies, and this "extraordinary" authority may not be implied from a federal agency's duty to comply with RFRA's requirements. See *Gonzales*, 546 U.S. at 262.

Agencies must, of course, comply with RFRA when they implement federal law. But they may not rely on RFRA to reorder rights and duties under other statutes where RFRA does not require them to do so and the governing statute prohibits it. According to respondents, that is precisely what the Departments have done here.

A. RFRA does not expressly delegate authority to promulgate prophylactic rules

The government argues that RFRA requires the broader religious exemption as a matter of law. But as a backstop to that argument, the government also contends that even if RFRA does not require the exemption, it authorizes the Departments to promulgate the religious exemption as a prophylactic measure. Indeed,

that is how the Departments justified the broader exemption in their final rulemaking: "[E]ven if RFRA does not compel" the exemption, in the government's view, it is the "most appropriate administrative response to the religious objections that have been raised." 83 Fed. Reg. 57,536, 57,544 (Nov. 15, 2018). Nothing in RFRA, however, authorizes this kind of prophylactic legislative rulemaking.

There can be no doubt that the expanded religious exemption is a legislative rule because it substantially reorders both the rights of female employees and the duties of their employers under the ACA. The ACA directs employers to provide coverage without cost-sharing for "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by [HRSA]." 42 U.S.C. 300gg-13(a)(4). The Departments' final rule carves out a broad exemption from this coverage requirement. Under that rule, private employers with a religious objection are exempted entirely from the contraceptive coverage requirement. See 83 Fed. Reg. at 57,558-65. And once an employer raises such an objection, its female employees' right to contraceptive coverage is effectively negated. The religious exemption thus operates as a legislative rule that "substantially affect[s] the rights and interests of private parties." See, *e.g.*, *Thomas* v. *State of N.Y.*, 802 F.2d 1443, 1447 (D.C. Cir. 1986) (internal citation omitted).

As a legislative rule, the expanded religious exemption must be promulgated pursuant to a congressional delegation of rulemaking authority. Although the government argues that RFRA provides an "independent[]" delegation of authority to grant the exemption (U.S. Br. 15), it does not point to any provision in RFRA expressly delegating to federal agencies the authority to promulgate rules concerning the free exercise

of religion. That is because RFRA contains no such provision. Congress did not, for example, provide that agencies may "prescribe such rules and regulations as may be necessary" to implement RFRA, as it typically does when it intends to authorize an agency to implement a statute through legislative rulemaking. See *Brand X*, 545 U.S. at 980; see also *City of Arlington*, 569 U.S. at 306 (explaining that "a general conferral of rulemaking authority * * * validate[s] rules for *all* the matters *the agency is charged with administering*") (second emphasis added); *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 20 (D.C. Cir. 2019) ("[W]e know Congress intended a delegation of legislative authority to the agency because Congress made the relevant delegations express."). Nor did Congress give the Departments (or any other federal agency) authority to "enforce" the statute. *Gonzales*, 546 U.S. at 258.

Instead, RFRA simply imposes baseline requirements that agencies must follow when they implement *other* federal laws. The Act commands the federal government not to "substantially burden a person's exercise of religion" unless doing so is the least restrictive means of furthering a compelling governmental interest (42 U.S.C. 2000bb-1). This negative prohibition cannot plausibly be read as an authorization to issue affirmative, prophylactic rules.

It is also telling that RFRA addresses itself to all federal departments and agencies generally (42 U.S.C. 2000bb-2(1)), rather than one agency in particular. In general, statutes that speak to multiple agencies do not confer broad rulemaking authority on any of them. Cf., *e.g.*, *Kaufman* v. *Nielsen*, 896 F.3d 475, 485 (D.C. Cir. 2018) (noting that *Chevron* deference is generally unwarranted when a statute is "administered by multiple agencies"); *United States Dep't of the Interior* v. *Federal*

Energy Regulatory Comm'n, 876 F.3d 360, 364 (1st Cir. 2015) (same).

For example, this Court has never suggested that agencies are due deference when interpreting the APA—which, like RFRA, is a transsubstantive statute addressed to all agencies. And in *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999), this Court held that the Americans with Disabilities Act of 1990 did not delegate to any agency the authority to elaborate the meaning of "disability" under the Act. *Id*. at 478-479. In that case, Congress had expressly authorized three agencies—including the EEOC—to promulgate regulations regarding parts and subchapters of the Act. See *ibid.* But no agency had "been given authority to issue regulations implementing the generally applicable provisions of the ADA," which included the statutory definition of "disability." *Id.* at 479. The majority thus held that the statute did not authorize the regulations that the EEOC had promulgated further defining the term "disability." *Ibid.* So too here: RFRA, which applies to all agencies at once, does not give any agency the authority to issue prophylactic rules.

Not only doesn't RFRA confer express rulemaking authority on agencies, but it also specifies that its primary method of enforcement is judicial action. The statute allows a "person whose religious exercise has been burdened" to assert a RFRA claim by suing in federal court or invoking the statute as a "defense in a judicial proceeding." 42 U.S.C. 2000bb-1(c). In adopting this judicial-relief provision, Congress "plainly contemplate[d] that *courts* would recognize [religious] exceptions" to federal laws—"that is how the law works." *O Centro Espirita*, 546 U.S. at 434.

Congress's choice to entrust enforcement of RFRA primarily to courts makes sense, given that the impe-

tus for RFRA's enactment was judicial decisionmaking. RFRA was a response to this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), which held that the First Amendment is not violated when a burden on the exercise of religion is "merely the incidental effect of a generally applicable and otherwise valid provision" of law. *Id*. at 878. Congress enacted RFRA to supersede *Smith* and "restore the compelling interest test as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972)." See 42 U.S.C. 2000bb(b)(1).

Congress thus anticipated that the statute would be enforced through federal courts' case-by-case assessments of religious burdens imposed by generally applicable laws—not by prophylactic agency action. In short, RFRA is devoid of any indication that Congress gave agencies independent authority to promulgate prophylactic exemptions that go beyond what the statute requires.

B. The Court cannot read a delegation of authority into RFRA by implication

The government and its *amici* do not contend that RFRA expressly gives agencies prophylactic rulemaking authority. Rather, they argue that RFRA should be read to confer this authority impliedly. U.S. Br. 20; see also Laycock Br. 5. On this view, an agency's duty to comply with RFRA's requirements implies the power to promulgate rules that go beyond the statute's requirements to prevent possible RFRA violations. U.S. Br. 27; Laycock Br. 5. This previously untested position would give all federal agencies (not just the Departments) authority to write broad, prophylactic rules based upon virtually all generally applicable statutes (not just RFRA).

This Court has previously declined to read such "extraordinary authority" into a statute by "implication." See *Gonzales*, 546 U.S. at 262. It should likewise decline to do so here. Neither the legal nor the practical considerations identified by the government justify departing from the general rule that Congress must delegate rulemaking authority to agencies clearly and specifically.

1. The Take Care Clause does not provide a basis for implying the authority to promulgate the religious exemption

The government suggests that the Executive Branch's Article II duty to take care that RFRA is faithfully executed implies the authority to promulgate legislative rules. U.S. Br. 27. But this contention cannot be reconciled with fundamental principles of administrative law. The Take Care Clause does not provide a basis for implying agency authority to promulgate prophylactic exemptions from the coverage requirements of the ACA.

As an initial matter, the Executive Branch's duty to take care extends not just to RFRA but also to the ACA; thus, in taking care to faithfully execute RFRA, the Departments must also abide by the requirements of the ACA. If the Third Circuit was correct that the two statutes do not conflict here (because the ACA "forecloses" the expanded religious exemption and RFRA does not require it (Pet. App. 40a)), then promulgating the expanded exemption violates the Executive Branch's duty faithfully to execute the ACA.

In any event, this Court's precedents do not support the proposition that the Take Care Clause can substitute for a congressional delegation of legislative rulemaking authority to an agency. The Court has not treated the Take Care Clause as a source of law-

making authority; on the contrary, it has explained that under the separation of powers, "Congress makes laws" and *then* "the President, acting at times through agencies * * *, 'faithfully execute[s]' them." *Utility Air Reg. Grp.* v. *EPA*, 573 U.S. 302, 327 (2014).

To be sure, the Court has recognized that faithful execution of the laws "necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration." *Utility Air. Reg. Grp.*, 573 U.S. at 327. But the Court has never held that agencies' authority to resolve "questions left open by Congress" also allows them to announce new legal norms in the first instance. Thus, in *Gonzales*, when the Attorney General asserted "broad authority to promulgate rules" under the Controlled Substances Act, this Court did not inquire whether the regulations were authorized by the Take Care Clause. 546 U.S. at 259. Rather, it asked whether the Act itself authorized the Attorney General to "issue * * * a statement with the force of law." See *id.* at 268.

The government does not rest the prophylactic rule on independent executive authority to take care to comply with the Constitution itself. See generally Gillian E. Metzger, *Administrative Constitutionalism*, 91 Tex. L. Rev. 1897 (2013). And for good reason: This Court has held that the Free Exercise Clause is not violated by a generally applicable law that incidentally burdens the exercise of religion. See *Smith*, 494 U.S. at 890. Moreover, Congress lacks the constitutional authority to amend or alter by statute this Court's interpretation of "the meaning of the Free Exercise Clause." *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997). Because RFRA goes far beyond the Constitution's requirements for protecting religious freedom (*id.* at 532), this Court has held that it is valid only insofar as

it operates as a statutory limitation on the executive's power to execute federal law. *Ibid*.

Thus, the Departments are purporting to implement a federal statutory command. But the Executive Branch's duty to take care that RFRA is enforced does not afford the Departments authority to ignore the clear commands of the ACA where RFRA does not require doing so. To be sure, RFRA provides that it "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. 2000bb-3(a). But nothing in the statute suggests that an agency may go beyond its express requirements at the expense of express requirements in another statute. Yet that is precisely what the government argues the Departments may do.

2. Agencies' duty to comply with RFRA does not imply authority to create exemptions that RFRA does not itself require

As the Court's interpretation of the Take Care Clause illustrates, a negative duty to *comply* with limits established by statute does not imply an affirmative power to *make* binding law by regulation. Thus, just as the Take Care Clause does not authorize agencies to carve out exemptions that RFRA does not require, agencies' statutory duty to comply with RFRA does not authorize such prophylactic exemptions either.

As we have noted, RFRA nowhere mentions rules or regulations. Its key provision is that the government "shall not substantially burden a person's exercise of religion" unless the burden is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(a)-(b). As the government points out (U.S. Br. 27), this prohibition applies to "the implementation" of "all Federal law." *Id.* 2000bb-3(a).

In this sense, RFRA "operates as a sweeping 'super-statute,' cutting across all other federal statutes * * * and modifying their reach." Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995). Accord *City of Boerne*, 521 U.S. at 517. But all that RFRA's prohibition indicates is that agencies are limited by RFRA when they implement other federal laws. It does not allow agencies to go *beyond* RFRA by making rules that further modify other generally applicable laws.

Put differently, there is no doubt that "whenever they act," agencies must "consider" whether their actions would violate RFRA. See Laycock Br. 6-7. Agencies regularly do so when pointing to statutes they administer as authority for promulgating exemptions from their generally applicable rules. See, *e.g.*, *Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests*, 81 Fed. Reg. 91,494, 91,537 (Dec. 16, 2016) ("It is * * * important to recognize that the Hopi take of golden eagles * * * is a protected activity under the Religious Freedom Restoration Act."); *id.* at 91,494 (explaining that Bald and Golden Eagle Protection Act provided requisite authority for exemption); see also Paulsen & Walsh Br. 9 (citing 81 Fed. Reg. at 91,494). The question here, however, is whether RFRA impliedly authorizes agencies to promulgate religious exemptions that RFRA does not require and the ACA does not permit. The answer to that question is "no."

On the government's view, RFRA provides "independent" authority to every federal agency and department to promulgate prophylactic rules. This is an extraordinary claim of authority to base upon the mere implications of statutory text. This Court has disfavored such claims before. See *Gonzales*, 546 U.S. at 262. Similarly here, even though the Departments

have authority to promulgate regulations under other statutes, and even if there were a plausible argument that promulgating prophylactic rules is necessary to implement RFRA, that is not enough to imply authority to promulgate the religious exemption.

The government purports to find an implication of rulemaking authority in RFRA's silence on how agencies are to comply with its requirements. U.S. Br. 28. So long as a prophylactic rule would remedy "what [an agency] reasonably perceive[s] to be a RFRA violation," the government argues, RFRA should be read to allow an agency to promulgate that rule. *Id.* at 30. But RFRA is *not* silent on how statutory violations are to be remedied. It expressly provides for judicial relief based upon application of the compelling interest test. 42 U.S.C. 2000bb-1(c). There is no need to read an additional remedial tool into the statute.

The government's *amici* note that the purpose of RFRA was "'to provide * * * broad protection for religious liberty.'" Laycock Br. 8 (quoting *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014)). But although Congress's goal was clearly to protect religious liberty, it did not intend to pursue that goal at all costs. Rather, Congress's intent was to restore pre-*Smith* law, in order to strike "sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. 2000bb(a)(5).

Moreover, Congress specified judicial action as the means by which its policy in favor of religious liberty should be enforced. Congress stated that the "purposes of [RFRA] are" (1) "to restore the compelling interest test * * * and to guarantee *its application in all cases* where free exercise of religion is substantially burdened" (42 U.S.C. 2000bb(b)(1) (emphasis added)) and (2) "to provide a *claim or defense* to persons whose reli-

gious exercise is substantially burdened by government" (*id.* 2000bb(b)(2)). Both objectives relate to the manner in which federal courts adjudicate religious freedom claims in litigation—neither suggests prophylactic rulemaking authority for agencies.

In short, Congress crafted a scheme designed to balance the important values of religious freedom with the federal government's interest in adopting generally applicable regulations. And as this Court has explained, Congress "legislated the compelling interest test as the means *for the courts* to strik[e]" that balance. *O Centro Espirita*, 546 U.S. at 439 (emphasis added) (internal quotation marks omitted). Implying administrative authority to promulgate prophylactic rules would upend the scheme Congress created.

3. RFRA is administrable without prophylactic rulemaking power

The government and its *amici* lastly argue that practical consequences justify implying agency authority to implement RFRA through prophylactic rules. As the government puts it, federal agencies should be permitted to "choose to be more protective of religious rights than might be strictly required" in the face of uncertainty about how courts will apply the statute. U.S. Br. 13. Accord *id*. at 29.

Pause a moment to let that sink in: According to the government, agencies should have the inherent authority to establish binding requirements in *excess* of what Congress provides by statute, when it suits their need for clarity. That fantastical position finds no support in either administrative law or constitutional doctrine. On the contrary, if the Executive Branch lacks the authority to *cancel* any of a statute's requirements by unilateral decree (*Clinton* v. *City of New York*, 524 U.S. 417, 439 (1998)), it should go without saying that

it also lacks the authority to *supplement* a statute's requirements unilaterally by regulation.

Professor Laycock worries that, without inherent rulemaking authority, agencies will face an "impossible bind" (Laycock Br. 8): On the one hand, if they grant only a narrow religious exemption, they will face liability in potential RFRA claims. On the other hand, if they grant a broad exemption, they run the risk that the exemption is not authorized by RFRA.

These problems (if they are problems at all) are not unique to RFRA. The possibility that courts will invalidate agency actions is a familiar and ever-present feature of administrative law. So too is the possibility of circuit splits that impose conflicting obligations on agencies until this Court resolves them. Laycock Br. 7-8. Thus, even supposing RFRA creates the challenges that Professor Laycock supposes, they would not warrant implying agency authority to prescribe exemptions that RFRA itself does not require.

Moreover, a holding that agencies have implied authority under RFRA to issue prophylactic rules would have significant practical consequences of its own. RFRA applies to all federal departments and agencies. On the government's view, the statute grants all of these entities authority to promulgate prophylactic exemptions from the regulatory schemes they administer. But it is unclear how far beyond RFRA's requirements agencies may go. The government hazards no view on the issue. And RFRA itself does not furnish an answer. RFRA instructs agencies not to burden the free exercise of religion where doing so would violate strict scrutiny under the compelling-interest test (42 U.S.C. 2000bb-1(a)-(b)), but it says nothing about how much more free-exercise protection agencies may choose to provide. Agencies would therefore be on their own in

deciding where to draw the line between permissible and impermissible religious exemptions.

There is no warrant in this Court's precedents for granting agencies such sweeping authority to make law. On the contrary, this Court has warned in its decisions discussing the nondelegation doctrine of the practical consequences of standardless delegations of lawmaking authority: Such delegations may threaten private rights, frustrate political accountability, hamstring judicial review, and undermine the rule of law.[3] In light of these concerns, this Court has required that Congress lay down an intelligible principle to guide an agency even when *explicitly* delegating rulemaking authority. See *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001). There is *more* danger of standardless decisionmaking, not less, when the rulemaking authority is implicit. That is why this Court in *Gonzales* was so loath to find that the Controlled Substances Act had impliedly granted the Attorney General "unrestrained" and "extraordinary" administrative authority. 546 U.S. at 262.

The government suggests that a guiding principle may be found in Title VII jurisprudence. It argues that just as a private employer may engage in disparate treatment under Title VII if it has a strong basis to be-

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[3] Although this Court has rarely held that Congress has violated the nondelegation doctrine, it has addressed nondelegation concerns through subconstitutional doctrine, including doctrines of statutory interpretation. See *Gundy* v. *United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 330 (2000). In *Gundy*, for example, a plurality of the Court interpreted a federal statute not to grant "'unguided' and 'unchecked' authority" to determine its applicability to a class of persons, lest it "face a nondelegation question." *Gundy*, 139 S. Ct. at 2123-24.

lieve doing so is necessary to remedy a disparate-impact violation, so too a federal agency may promulgate a prophylactic regulation if it has a strong basis for believing that RFRA requires it. U.S. Br. 29 (citing *Ricci* v. *DeStefano*, 557 U.S. 557, 585 (2009)).

This analogy is strained at best. Unlike employers facing potential liability under Title VII, federal agencies promulgating legislative rules are not private parties whose liberty and property interests may be at stake and accordingly do not need the same kind of leeway. Title VII's standard for when remedial disparate treatment is permitted accordingly cannot supply a useful limiting principle for prophylactic rulemaking under RFRA.

There is no need (let alone warrant) to grant agencies unfettered authority to make prophylactic rules in order to make RFRA administrable. Congress has already provided a scheme for implementing RFRA, under which agencies have a duty to ensure that they do not substantially and unjustifiably burden the free exercise of religion and courts enforce that duty case by case. That case-by-case process is readily administrable—as this Court has repeatedly affirmed. See *O Centro Espirita*, 546 U.S. at 436 ("We reaffirmed just last Term the feasibility of case-by-case consideration of religious exemptions to generally applicable rules." (citing *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005))). By contrast, the government's proposed approach—under which all federal departments and agencies would possess implied authority to promulgate potentially conflicting prophylactic exemptions subject to no congressional guidance—would create substantial confusion and likely do more harm than good.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted.

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APRIL 2020

APPENDIX

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