Nos. 19-431, 19-454

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR
SAINTS PETER AND PAUL HOME, *Petitioner*
v.
PENNSYLVANIA, ET AL., *Respondents.*

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

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

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have often appeared before this Court as counsel for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or *amicus curiae*, *e.g.*, *American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067 (2019); *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

The ACLJ has vigorously opposed the federal contraception mandate ("mandate") since it was first imposed on the country by regulatory fiat over eight years ago. Through litigation and public advocacy, and in formal comments filed with federal agencies, the ACLJ has argued that the mandate, including the numerous faulty regulatory attempts to accommodate religious objections to it, violates both the First Amendment and federal law, most notably, the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*.

The ACLJ represented a total of thirty-two individuals and for-profit corporations in seven legal

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[1] The parties in this case have consented to the filing of this *amicus* brief. No counsel for any party authored this brief in whole or in part. No person or entity aside from *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

actions against the mandate,[2] and submitted *amicus* briefs with this Court in support of the religious claimants in both *Hobby Lobby v. Burwell*, 573 U.S. 682 (2014), and *Zubik v. Burwell,* 136 S. Ct. 1557 (2016).

Now that the government has, at long last, provided an authentic accommodation of religious exercise with respect to the mandate, the ACLJ urges the Court to uphold the religious exemption at issue in this case and reverse the lower court's decision.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1804, the Ursuline Sisters of New Orleans wrote a letter to the Secretary of State, James Madison, expressing their concerns that the Jefferson administration would not respect the rights that they had enjoyed prior to the Louisiana Purchase. After Madison replied, sharing the President's "grateful sentiments due to those of all religious persuasions who so laudably devote themselves in its diffusion," Jefferson himself wrote in response:

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[2] *Gilardi v. United States HHS*, 733 F.3d 1208 (D.C. Cir. 2013); *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *O'Brien v. U.S. HHS*, 766 F.3d 862 (8th Cir. 2014); *Am. Pulverizer Co. v. U.S. HHS*, No. 6:12-cv-03459-MDH (W.D. Mo.); *Lindsay v. U.S. HHS*, No. 1:13-cv-01210 (N.D. Ill.); *Bick Holdings, Inc. v. U.S. HHS*, No. 4:13-cv-00462-AGF (E.D. Mo.); *Hartenbower v. U.S. HHS*, No. 1:13-cv-2253 (N.D. Ill.).

[3] This brief is also submitted on behalf of more than 463,000 supporters of the ACLJ as an expression of their support for the principles of religious freedom at stake in this case.

> I have received, Holy Sisters, the letters you have written to me, wherein you express anxiety for the property vested in your institution by the former Government of Louisiana. The principles of the Government and Constitution of the United States are a sure guaranty to you that it will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to its own voluntary rules, without interference from civil authority.[4]

Jefferson pledged that the Sisters' charitable work would be afforded "all the protection my office can give it."[5]

If the previous administration, when it first created the mandate, offered to the Little Sisters of the Poor the same solicitude that Jefferson offered the Ursuline Sisters, it would not have been necessary for the Sisters to engage in years of litigation, at every level of the federal judiciary, to secure their legal rights. Not only that, but had the previous administration granted to the Little Sisters the same religious exemption that the current administration has granted, it is highly doubtful that Respondents would have sued that administration in order to force the Sisters to violate their conscience.

This case is therefore not about access to cost-free contraceptive services, which the government could

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[4] As quoted in Edward McGlynn Gaffney, Jr., Pierce *and Parental Liberty as a Core Value in Educational Policy*, 78 U. Det. Mercy L. Rev. 491, 506 (2001).

[5] *Id.*

provide to citizens in any number of ways without dragooning religious objectors into participating. It concerns whether the government can alleviate religious burdens *that it itself has imposed*. Entities like the Little Sisters desire only to conduct themselves according to their religious convictions, free from governmental coercion, on a subject matter of great moral significance.

The rulemaking at issue in this case, providing an exemption to entities that object to the mandate on religious or moral grounds, is in keeping with Jefferson's assurances to the Ursuline Sisters and our nation's longstanding tradition of respecting and protecting religious freedom. The right of an individual or institution to conduct itself according to the dictates of religious conscience is a principle of autonomy that should be held "sacred and inviolate."

While the lower court did not address whether the religious exemption violates the Establishment Clause, it is more than likely that *amici* for Respondents (if not Respondents themselves) will argue that it does. Not only did Respondents' complaint allege an Establishment Clause violation, *amici* in the court below filed briefs asserting that contention in support of Respondents.

Contrary to any such assertions, however, the religious exemption does not violate the Establishment Clause. Even before the founding of this country, the government alleviated burdens on religious exercise by granting exemptions, a practice wholly consistent with the religion clauses of the First Amendment. The challenged religious exemption here falls comfortably

within that long-established historical tradition. Indeed, far from violating the religion clauses, the religious exemption faithfully pursues the freedoms the First Amendment guarantees.

Additionally, exemptions for religious objectors are not rendered unconstitutional by the possibility that some third parties may be inconvenienced or burdened. This is especially true where, as here, the government can address those third parties' concerns through alternative means that do not involve infringing upon the freedom of conscience.

Finally, the states do not have Article III standing to press their claims here. Allowing state attorneys general to challenge federal regulations that address abortion access or conscience rights based merely on the consequential budgetary impact from such rulemaking would create an unprecedented and unwarranted expansion of state attorney general standing. This flawed view of the law would give state attorneys general standing to attack, in federal court, the Hyde Amendment's bar on federal tax funding of abortions, the federal conscience protection statutes, and any regulations that protect conscience in these contexts, and would open the floodgates for a host of federal lawsuits by states contesting federal actions that at most have incidental economic impacts on states (a category that likely sweeps in most, if not all, federal action).

ARGUMENT

I. Governmental accommodations of religious exercise, like that afforded by the religious exemption here, are a well-established historical practice of this country.

The challenged rulemaking in this case provides entities and individuals with an exemption from complying with the mandate based on religious principles or moral convictions.[6] The granting of such exemptions is fully consistent with the long and well-established history in this country of governmental accommodation of religious beliefs and practices.

"The pursuit of religious liberty was one of the most powerful forces driving early settlers to the American continent and remained a powerful force at the time of the founding of the American republic." Brett G. Scharffs, *The Autonomy of Church and State*, 2004 B.Y.U.L. Rev. 1217, 1230 (2004). Even before the ratification of the Constitution, "tension between religious conscience and generally applicable laws, though rare, was not unknown." *City of Boerne v. Flores*, 521 U.S. 507, 557 (1997) (O'Connor, dissenting).

The resolution of conflicts over matters such as "oath requirements, military conscription, and religious assessments," demonstrates that "Americans in the Colonies and early States thought that, if an

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[6] At issue in this case are both a moral and religious exemption to complying with the mandate. As there can be no real question that the (non-religious-based) moral exemption does not violate the Establishment Clause, this brief focuses on the constitutionality of the religious exemption.

individual's religious scruples prevented him from complying with a generally applicable law, the government should, if possible, excuse the person from the law's coverage." *Id*. Exemptions were understood as "a natural and legitimate response to the tension between law and religious convictions." Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466 (1990).

In 1775, for example, the Continental Congress passed a resolution exempting individuals with pacifist religious convictions from military conscription:

> As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.

Id. at 1469 (citation omitted).

Thus, even when the country was in dire need of men to take up arms to fight for independence, our forefathers knew that conscience is inviolable and must be honored. They understood that to conscript men into military service against their religious conscience would have undermined the very cause of liberty to which they pledged their lives, fortunes, and sacred honor.

The care and concern for religious freedom prior to the ratification of the Constitution was the underlying and animating principle of the religion clauses of the First Amendment:

> The core value of the religion clauses is liberty of conscience in religious matters, an ideal which recurs throughout American history from the colonial period of Roger Williams to the early national period of the Founders. All three traditions of church and state—Enlightenment, pietistic, and political centrist—regarded religious liberty as an inalienable right encompassing both belief and action and as an essential cornerstone of a free society.

A. Adams & C. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1664 (1989).[7]

Examples of this truth are seen most clearly in the writings of the Founding Fathers themselves. James Madison, the Father of the Constitution, opined that "[c]onscience is the most sacred of all property," and that man "has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them." *Property* (March 29, 1792), in *The Founders' Constitution*, Vol. 1, Doc. 23 (P. Kurland & R. Lerner eds. 1987). Madison understood that one's duty to the "Creator . . . . is precedent, both in order of

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[7] The states at the time of the founding were similarly concerned with the preservation of religious liberty and conscience. "Between 1776 and 1792, every state that adopted a constitution sought to prevent the infringement of 'liberty of conscience,' 'the dictates of conscience,' 'the rights of conscience,' or the 'free exercise of religion.'" *A Heritage of Religious Liberty*, *supra*, at 1600-01.

time and in degree of obligation, to the claims of Civil Society." *A Memorial and Remonstrance Against Religious Assessments* (1785), in *The Sacred Rights of Conscience*, 309 (D. Dreisbach & M.D. Hall eds. 2009). "The Religion . . . of every man must be left to the conviction and conscience of every man," and efforts to "degrade[] from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority" must be prevented. *Id*.

George Washington, the Father of the Country, noted that "the establishment of Civil and Religious Liberty was the Motive that induced me to the field of battle." Michael Novak & Jana Novak, *Washington's God*, 111 (2006). In his famous 1789 letter to the Quakers, he wrote:

> The conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit.

Letter to the Annual Meeting of Quakers (1789), in *The Papers of George Washington*, 266 (Dorothy Twohig ed. 1993).

Thomas Jefferson observed that "[n]o provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority." *To the Society of the Methodist Episcopal Church at New London, Connecticut* (Feb. 4, 1809). Like Madison, Jefferson understood the right of conscience to be a *pre-political*

one, *i.e.*, one that could not be surrendered to the government as a term of the social contract: "[O]ur rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God." *Notes on the State of Virginia*, in *The Basic Writings of Thomas Jefferson*, 157-58 (Philip S. Foner ed., 1944).

In sum, "[t]he victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State." *Girouard v. United States*, 328 U.S. 61, 68 (1946). And it is the longstanding commitment to that principle that has animated the "happy tradition" in our country "of avoiding unnecessary clashes with the dictates of conscience." *Gillette v. United States*, 401 U.S. 437, 453 (1970).

Recognition and legal protection of religious freedom is not just a project of the American experiment:

> Freedom of thought, conscience, and belief, including foundationally freedom of religion, is historically the taproot of the tree of human rights that was planted with the Magna Carta (drafted by a religious leader, the Archbishop of Canterbury, Stephen Langton), nourished by the Declaration of Independence (with its inalienable rights with which human beings are endowed "by their Creator") and the French Declaration of the Rights of Man (which describes the foundational rights it identifies as "sacred"), given global recognition in the

> Universal Declaration of Human Rights (UDHR), and turned into globally recognized and protected rights protected by international treaties such the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), among others, and scores of post-World War II constitutions.

Brett G. Scharffs, *Why Religious Freedom? Why the Religiously Committed, the Religiously Indifferent, and Those Hostile to Religion Should Care*, 2017 B.Y.U.L. Rev. 957, 962-63 (2017).

II. Governmental accommodations of religious exercise, like those provided by the religious exemption here, are consistent with the Constitution's religion clauses.

In light of the foregoing, it is clear that the accommodation of religious beliefs and practices, such as those afforded by the religious exemption, is wholly consistent with the text, nature, and purpose of the First Amendment's religion clauses.

The requirement of *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), that a law have a secular purpose (assuming *arguendo Lemon* remains good law)[8] "does

[8] This Court's recent decision in *American Legion* put another nail in *Lemon*'s coffin. The plurality opinion refused to apply *Lemon*, 139 S. Ct. at 2087, and instead summarized its many "shortcomings." *Id.* at 2080. None of the dissenting Justices argued that the *Lemon* test should be used as the controlling analytical framework in Establishment Clause cases. Justice Kavanaugh catalogued all the Establishment Clause cases in which *Lemon* was either ignored or which were otherwise irreconcilable with

not mean that the law's purpose must be unrelated to religion." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987). In fact, "[g]overnment policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part). Such solicitude "respects the religious nature of our people and accommodates the public service to their spiritual needs." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

Indeed, "[s]ince the framing of the Constitution," this Court "has approved legislative accommodations for a variety of religious practices." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 723 (1994) (Kennedy, J., concurring in judgment) (citing *Selective Draft Law Cases*, 245 U.S. 366, 389-90 (1918), and *Gillette* (military draft exemption for religious objectors); *Zorach* (program permitting public school children to leave school for one hour a week for religious observance and instruction); and *Amos* (exemption of religious organizations from Title VII's prohibition of religious discrimination)); *see also Cutter v. Wilkinson*, 544 U.S. 709 (2005) (holding that the Religious Land Use and Institutionalized Persons Act does not violate Establishment Clause).

Importantly, "[t]he limits of permissible state accommodation to religion are by no means coextensive

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Lemon. *Id*. at 2092-93 (Kavanaugh, J., concurring). Included among those were the Court's "accommodations and exemptions" cases. *Id*. at 2092 (citations omitted).

with the non-interference mandated by the Free Exercise Clause." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 673 (1970). In other words, a governmental accommodation of religious practice is not limited only to what the Free Exercise Clause requires; to the contrary, the government may afford *additional* religious protection by offering such accommodations. *See Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987) (". . . the government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause"); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (not "all benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause"); *cf. Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) ("[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required.").[9]

[9] In fact, there are numerous instances of Congress providing greater protection for religious practice than the Free Exercise Clause does. For example, after the Court in *United States v. Lee*, 455 U.S. 252 (1982), denied a free exercise claim by an adherent of the Amish faith over the payment of social security taxes, Congress adopted 26 U.S.C. § 3127, granting the Amish (and others) such an exemption. Also, following this Court's rejection of a free exercise claim of an Air Force serviceman to wear a yarmulke while in uniform, *Goldman v. Weinberger*, 475 U.S. 503 (1986), Congress enacted 10 U.S.C. § 774, allowing members of the armed services to wear "religious apparel."

This Court has thus recognized that there is "play in the joints" in the First Amendment's religion clauses: a "space for legislative action that is neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause." *Cutter*, 544 U.S. at 719, 720 (citing *Smith*, 494 U.S. at 890 ("[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation.")).

Congress has regularly operated within that zone to provide numerous religious and moral exemptions in the context of health care. For example, the "Church Amendment" provides that individuals or entities receiving federal health grants, contracts, loans, or loan guarantees are not required to participate in abortion or sterilization procedures contrary to their religious or moral beliefs. 42 U.S.C. § 300a-7. The federal government, or governments receiving federal funds, may not discriminate against health care entities that refuse to perform, train, or refer for abortions. 42 U.S.C. § 238n.[10] Medicaid managed care

[10] Congress is not alone in protecting the religious exercise of those who object to participating in abortions. States are virtually unanimous in affording various levels of statutory protection to those who are so opposed. Arizona, for example, provides that a physician or staff member who states in writing an objection to abortion "on moral or religious grounds is not required to facilitate or participate in the medical or surgical procedures that will result in the abortion." Ariz. Rev. Stat. § 36-2154(B). Georgia law protects "any person" who states in writing an objection to participating in "any abortion or all abortions on moral or religious grounds." Ga. Code Ann. § 16-12-142(a). Idaho provides that medical professionals should not be required to "participate in the performance or provision of any abortion" if they object on the

organizations are not required to provide coverage or reimbursements for counseling or referrals contrary to their moral or religious objections. 42 U.S.C. § 1396u-2(b)(3)(B).

Obviously, religious exemptions in federal law are not limited to the provision of health care services. Title VII of the Civil Rights Act of 1964 specifically exempts religious employers from antidiscrimination laws that apply to secular employers. 42 U.S.C. § 2000e-1. Under the Federal Death Penalty Act, "[n]o employee . . . shall be required . . . to be in attendance at or to participate in any prosecution or execution under this section if such participation is contrary to the moral or religious convictions of the employee." 18 U.S.C. § 3597(b). Federal law provides an exemption from unemployment insurance obligations for employers that are "operated primarily for religious purposes." 26 U.S.C. § 3309(b). ERISA exempts "church plan[s]" from its otherwise-comprehensive regulation of employee benefit plans. 29 U.S.C. § 1003(b)(2). Indeed, "[r]eligious exemptions to ordinary laws and policies are so common we often do not notice them at all." *Oxford Handbook of Church and State in the United States*, at 167 (D. Davis, ed. 2010).[11]

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basis of "personal, moral or religious reasons." Idaho Code § 18-612. Montana protects individual medical personnel from having to "advise concerning, perform, assist, or participate in abortion because of religious beliefs or moral convictions." Mont. Code Ann. § 50-20-111(2).

[11] *See also* L. Fisher, *Religious Liberty in America: Political Safeguards*, 231 (2002) ("The United States Code is filled with religious exemptions. On hundreds of occasions, Congress has decided to protect religious interests by exempting them from

The most sweeping federal law that provides for religious exemptions is RFRA. That law—described as "the most important congressional action with respect to religion since the First Congress proposed the First Amendment," Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 243 (1994)—authorizes religious exemptions from complying with *any* federal law that is not specifically excluded from RFRA's reach. 42 U.S.C. § 2000bb–3(a) (the statute "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993"). The sweeping breadth of RFRA is why it has been described as a "super-statute." Michael Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995). While RFRA is not *necessitated* by the Free Exercise Clause as this Court has interpreted it—in fact, it was adopted in the wake of a Supreme Court decision limiting the Clause's reach and scope, *see Hobby Lobby*, 573 U.S. at 693-96 (discussing RFRA's history)—the law furthers, and expands upon, the same underlying interests, *i.e.*, the preservation and protection of religious exercise. This, as explained previously, is well within the government's authority and purview. "By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required." *Id.* at 706.

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general laws on taxation, social security, military service, peyote use, labor laws, discrimination in housing and employment, census questions, rehabilitative services, medical examinations, and public health measures.").

In sum, there is more than ample room within the religion clauses for the government to accommodate the religious exercise of persons and entities, even where the Free Exercise Clause does not require that it do so. The government does not establish a religion, or take a step toward doing so, by simply declining to burden the freedom of conscience of individuals and entities.

III. The religious exemption here falls within the constitutionally permissible "play in the joints" that allows for protecting religious freedom without establishing religion.

A. *The religious exemption is religiously neutral and consistent with the historical practices and understandings of the religion clauses.*

The religious exemption, promulgated by the government in light of RFRA's purposes and protections, fits within a permissible regulatory play in the joints. It is fully "compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise." *Cutter*, 544 U.S. at 720. Regardless of whether it is *required* by the Free Exercise Clause, the religious exemption is a justifiable and *permissible* regulatory measure under the Establishment Clause.

The hallmark principle of the Establishment Clause is *neutrality* among religions and denominations, *see*, *e.g.*, *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947), and it is beyond dispute that the exemptions that the

challenged regulations provide are religiously neutral.[12] The religious exemption does not give preference to one religion over another, as any covered person of any faith or religious belief may claim the exemption. Nor does the rulemaking favor religion over non-religion, as any person with a non-religious objection to the drugs required by the mandate may claim a *moral* exemption.[13] No matter what judicial rubric one uses, the religious exemption does not breach the Establishment Clause. "There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" *Amos*, 483 U.S. at 334 (quoting *Walz*, 397 U.S. at 673).

This Court's recent approach in considering historical practice in adjudging Establishment Clause claims further supports the constitutionality of the religious exemption. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019) (noting that this Court's recent Establishment Clause cases use an analysis "that focuses on the particular issue at hand and looks to history for guidance").

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[12] *See also Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) ("Our cases recognize that '[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.'") (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)).

[13] Nonetheless, where the "government acts with the proper purpose of lifting a regulation that burdens the exercise of religion," there is "no reason to require that the exemption come packaged with benefits to secular entities." *Amos*, 483 U.S. at 338.

In *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), this Court held that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Id.* at 1819 (quoting *Allegheny*, 492 U.S. at 670 (Kennedy, J.)). It observed that the line "between the permissible and the impermissible" under the Establishment Clause has nothing to do with the reasonable observer and his perceptions of endorsement, but rather is "one which accords with history and faithfully reflects the understanding of the Founding Fathers." *Id.* (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294, (1963) (Brennan, J., concurring)). While the respondents in both *American Legion* and *Town of Greece* were burdened with the feelings of offense at witnessing a large cross displayed on public property and government-sanctioned prayer, respectively, those burdens did not overcome the indisputable weight of history that supported the challenged governmental practices.

According to the history and tradition of government-created religious exemptions, discussed previously at Section I, there can be no doubt that when the government lifts a government-imposed burden on religious exercise, as the religious exemption does with the mandate, it is an action that comports fully with the Establishment Clause. The practice of accommodating religious exercise has been a tradition of this country even before the adoption of the First Amendment's religion clauses.

B. *Any alleged imposition on third parties does not render the religious exemption unconstitutional.*

Any argument that because the religious exemption allegedly burdens third parties, it must therefore violate the Establishment Clause, is unpersuasive.

First, the notion that a religious exemption that burdens any non-beneficiary must necessarily violate the Establishment Clause was rejected by this Court in *Hobby Lobby*, a decision providing, in part, the impetus for the rulemaking challenged here. In that case, the government suggested that "a plaintiff cannot prevail on a RFRA claim that seeks an exemption from a legal obligation requiring the plaintiff to confer benefits on third parties." 573 U.S. at 729 n.37. The Court responded that while burdens on non-beneficiaries can be taken into account in evaluating governmental interests and the means to further those interests, it "could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties." *Id*. Indeed, "[b]y framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless." *Id*.

Second, any impact on third parties will not be a *government*-imposed impact, but rather the result of the discretionary choices of private actors made

pursuant to their religious or moral beliefs. That distinction is crucial. *See Amos*, 483 U.S. at 337 n.15 ("it was *the Church* . . . and *not the Government*," that "impinged" upon the employee's choice). Indeed, the Free Exercise Clause, RFRA, RLUIPA, and the church autonomy doctrine, *like the religious exemption here*, all protect religious practice from *governmental* burdens. These situations are therefore quite unlike the case of *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), in which the burden on religious exercise (facing work obligations on the Sabbath) was the doing of *private employers*, not the *government*. *Id*. at 710. Here, the religious exemption lifts a regulatory burden imposed by the *government itself*.[14]

Third, even to the extent the effects an exemption will have on third parties is minimally relevant, the standard for what burdens upon third parties are "too much" is high. For example, the third party suffering religious discrimination in *Amos* did not negate the religious exemption of the employer. Being required to serve in place of a conscientious objector in the military in wartime, at risk of life and limb, as in *Gillette*, did

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[14] The court below stated that Petitioners "downplayed this burden on women, contradicting Congress's mandate that women be provided contraceptive coverage." *Trump* Pet. App. 41a. But Congress did *not* mandate contraceptive coverage in the Affordable Care Act. It was the Health Resources and Service Administration, a division of the Department of Health and Human Services, which promulgated the "Women's Preventive Services Guidelines"—guidelines which require "nonexempt employers . . . to provide 'coverage, without cost sharing' for '[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling.'" *Hobby Lobby*, 573 U.S. at 697.

not negate the religious exemption. *See Grumet*, 512 U.S. at 724-25 (Kennedy, J., concurring in judgment) (citing *Amos* and *Gillette* as upholding laws under the Establishment Clause despite these "substantial" burdens on third parties). Declining to provide cost-free contraceptive services through an employer's health insurance plan falls well below the third-party burdens at issue—and tolerated—in those, and other, cases.

Fourth, any alleged burdens placed on employees of employers who claim an exemption under the Rules must be considered in their proper context, namely, that inconveniences and burdens to employees are part and parcel of the employment context. A dress code denies the freedom to dress as one chooses. *E.g., Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282 (1977) (employee criticizing workplace dress code). Finite salaries deny employees money beyond their agreed upon pay. *E.g., Comm'r of Internal Revenue v. Kowalski*, 434 U.S. 77, 81 (1977) (amount of salary subject to labor negotiation). Fixed work shifts deny employees the freedom to work the hours they choose. *E.g., Bhd. of Locomotive Engineers v. Atchison, Topeka & Santa Fe R.R.*, 516 U.S. 152, 158 (1996) (noting fatigue likely to result from 12-hour shifts). The physical layout of an office will deny employees the space, window views, or furniture arrangements they might prefer. *E.g., Kilby v. CVS Pharm., Inc.*, 739 F.3d 1192, 1194 (9th Cir. 2013) (noting role of "business judgment" in determining the "physical layout of the workplace"). That employees do not always get what

they deem to be optimum benefits and conditions is not remarkable, but rather a fact of life.[15]

Fifth, the mischaracterization (*see Amos*, 483 U.S. at 337 n.15) of religious exemptions as imposing burdens upon third parties is a charge that knows no limits. The employee who refuses a Sabbath shift "imposes" upon his employer or, perhaps, co-workers who need to fill in. *But see Sherbert v. Verner*, 374 U.S. 398 (1963). The parents who remove their Amish child from formal high school education deny that child the instruction that would otherwise be given. *But see Wisconsin v. Yoder*, 406 U.S. 205 (1972). The owners of a kosher deli who refuse to sell pork deny their patrons the option of a ham sandwich. *But see* Jonathan D. Sarna, "Constitutional Dilemma on Birth Control," Forward.com (Mar. 16, 2012) ("We all might agree that kosher delis should not be coerced into selling ham."). And the physician who refuses to perform a "female circumcision," *see* Female Genital Mutilation, WHO media centre fact sheet (Feb. 2014), or an unnecessary amputation, *see* David Brang *et al.*, "Apotemnophilia: a neurological disorder," 19 NeuroReport 1305 (2008) (disorder characterized by intense desire for amputation of healthy limb), "imposes" upon the would-be recipients of those procedures (or their parents). Nevertheless, both law and common sense recognize that compelling someone to personally take action that violates his or her religious beliefs and conscience is *a much more egregious thing* than the mere

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[15] It should be noted, however, that the government has alleviated any purported burden by broadening Title X to cover any women whose employers cannot provide the contraceptive coverage at issue in this case. 84 Fed. Reg. 7714, 7734 (Mar. 4, 2019).

inconvenience that a third party may experience by the government declining to compel such conscience-violating action.

Finally, it is important that the religious exemption does not coerce any person into participating in the religious practices of her employer. Nothing in the rulemaking compels employees to agree with the religious choice made by an employer who objects to the mandate. Nothing in the challenged regulations authorizes an employer to forbid their employees from using their salaries to obtain contraceptive services. Just as the employers are free to follow their conscience with respect to choosing and paying for a health insurance plan, employees remain free to make their own private choices with respect to birth control using their own money and resources.

In sum, any attenuated, minor burden imposed on third parties on account of choices made by private actors pursuant to the religious exemption does not render it unconstitutional under the Establishment Clause. If purported harm to third parties is to be the measure of whether one can exercise a liberty granted by the Constitution, laws, or regulations, then those liberties are not truly liberties, but mere fleeting perks that can be easily rescinded by somebody else crying foul.

IV. The States Lack Article III Standing to Challenge the Exemptions.

In any event, this Court should reverse the judgment below and remand with instructions to dismiss the case for lack of standing.

Petitioners Little Sisters of the Poor have already thoroughly debunked the states' asserted claim of standing in this case in their briefing before the Third Circuit. *See* Br. of Defendant-Intervenor-Appellant, Little Sisters of the Poor, Saints Peter and Paul Home, Nos. 17-3752, 18-1253, 19-1129, 19-1189 (3d Cir. Feb. 15, 2019) (Argument § I), *available at* https://tinyurl.com/rxt5ph7. That argument need not be repeated here.

Moreover, whether the Little Sisters or the federal government press the argument before this Court is beside the point. "As a jurisdictional requirement, standing to litigate cannot be waived or forfeited." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019); *accord Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996) ("[S]tanding . . . is jurisdictional and not subject to waiver."). Hence, as this Court has often noted, "we bear an independent obligation to assure ourselves that jurisdiction is proper before proceeding to the merits." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008). Indeed, "every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

Addressing—and rejecting—the states' claim of standing here is especially important, as the theory adopted by the Third Circuit would give states standing to challenge any federal government action arguably limiting not just access to birth control, but access to abortion—or for that matter any federal action that arguably would lead to an increase in the number of people who are born or who continue living rather than dying. *Amicus* therefore turns to the heart of the standing argument as embraced by the court below.

This is decidedly *not* a case like *Massachusetts v. EPA*, 549 U.S. 497 (2007), where the injury the state alleged was the swallowing up of its own sovereign property under rising sea levels. *See, e.g., id.* at 521-23 & n.19. This Court divided sharply over whether the harm alleged was actual or imminent and not conjectural, and whether the elements of causation and redressability were satisfied. *See id.* at 541-46 (Roberts, C.J., dissenting). But no Justice questioned the notion that the destruction of state-owned land was a cognizable Article III injury to a state.

In the present case, by contrast, the states claim no destruction of their sovereign territory. Rather, the states assert a *consequential budgetary impact* from the challenged federal regulation. The reasoning, as explained by the Third Circuit, Pet. App. 21a-27a (No. 19-431), is as follows:

> 1. The federal action allows employers to decline to provide certain insurance coverage for contraception.

> 2. Some employers will take advantage of this opportunity and drop certain insurance coverage for at least some contraception.
>
> 3. Some employees who would otherwise use the employer insurance coverage will instead turn to state-funded benefits *or* will forego using the contraception in question.
>
> 4. Those women who turn to state funded programs will raise state expenses.
>
> 5. Some of those women who forego using contraception will more likely get pregnant, and some of those women in turn will seek state-funded services in connection with their pregnancies and associated costs.
>
> 6. States will therefore incur greater expenses.

Particularly notable is the following passage relating to women who forego birth control: "The costs of such unintended pregnancies are often shouldered by states, costing hundreds of millions of dollars." Pet. App. 25a (No. 19-431). The implications of this line of (speculative) reasoning are staggering.

First, *anything* the federal government does to protect the *conscience rights* of individuals or entities who object to abortion, sterilization, abortifacients, or any form of contraception will be subject to challenge by hostile state attorneys general. State AGs will simply allege that failing to force objectors to violate their consciences will lead either to women turning to the state for alternative providers or to more women getting pregnant and incurring expenses the state may

cover. This means that state attorneys general can attack, in federal court, the Hyde Amendment's bar on federal tax funding of abortions, the federal conscience protection statutes, and any regulations that protect conscience in these contexts.

Second, *anything* the federal government does to *regulate or limit abortion* will be subject to challenge by hostile state attorneys general. Those attorneys general will simply allege that the restrictions will lead to more women getting pregnant and incurring expenses the state may cover. This means states can attack, in federal court, the federal partial birth abortion ban, the Title X regulations requiring separation of family planning and abortion, and any other existing or future federal regulation or prohibition of abortion.

But that is not all. The same rationale would apply to any federal limit on assisted suicide or euthanasia, as states could plead the greater expense of caring for elderly or disabled people who are not dead yet. Indeed, under the theory embraced by the Third Circuit, state attorneys general can challenge any federal action that arguably would increase the number of births or decrease the number of deaths, as states can claim an anticipated increased expense in providing services to the additional people. The same rationale would confer standing on states to challenge a vast array of federal government actions on the theory that such actions affect state expenditures. But as the Department of Justice explained in a prior case before this Court:

> It is to be expected that actions of the federal government affecting individuals within a State may in turn generate incidental effects on that

> State with respect to its own governmental actions affecting those same individuals. But the necessary autonomy inherent in the Constitution's framework of separate sovereigns, each acting directly upon individuals, is inconsistent with the notion that a State has a legally-protected interest in avoiding the incidental effects that are derivative of the federal government's actions affecting residents of the State. Those every-day emanations of federal government action therefore cannot be the basis for a State to invoke the jurisdiction of an Article III court to challenge such action . . .

Br. for the Petitioners at 23, *United States v. Texas*, No. 15-674 (U.S. Mar. 1, 2016) ("DOJ Deferred Action Br.").[16] Disallowing standing in such cases is especially apt given the that alleged injury—increased state expenditures—is subject to the states' own control over what to subsidize, and how much, and thus in a sense is a "self-inflicted" injury. As the DOJ explained:

> [T]here can be no "real need" for a State to invoke the judicial power to challenge federal policies on the basis of their incidental effects on the State when the plaintiff State itself created the causal link that produces the unwanted effects. Any such injury is properly treated as self-inflicted, and not a legally cognizable injury or one that is fairly traceable to the challenged federal policy. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1152-1153 (2013); *Petro-Chem*

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[16] This Court equally divided in that case and so did not issue a decision on the merits.

> *Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir.) (Ginsburg, J.), *cert. denied*, 490 U.S. 1106 (1989). This Court has rejected a State's effort to claim standing on such a self-generated basis. In *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (*per curiam*), this Court held that a State that chooses to extend a tax credit on the basis of another sovereign's actions does not thereby gain standing to challenge the other sovereign's policies by claiming that they have the incidental consequence of costing the complaining State money. Specifically, this Court concluded that Pennsylvania lacked standing to challenge a New Jersey tax that triggered a tax credit under Pennsylvania law and thereby reduced Pennsylvania's tax revenue. *Id.* at 662-664. The Court explained that "[n]o State can be heard to complain about damage inflicted by its own hand," and noted that "nothing prevents Pennsylvania from withdrawing [the] credit." *Id.* at 664.

DOJ Deferred Action Br. at 24-25. Here, the "causal link" is far more attenuated, as any increase in state expenditures depends on a host of intermediate contingencies. But the point remains that a state itself chooses whether to make the outlays that allegedly will increase as an indirect consequence of the challenged federal action. As the DOJ explained further:

> Respondents cannot establish a cognizable Article III injury based on their more generalized allegations that the Guidance will have the incidental effect of increasing Texas's

> costs . . . for education, health care, and social services. This Court has never found such claims to be cognizable under Article III, and doing so here would utterly transform the judicial power. Federal courts would displace the political process as the preferred forum for policy disputes between individual States and the federal government because a potentially limitless class of federal actions could be said to have incidental effects on a State's fisc. *See* U.S. Br. 30-33; pp. 9-11, *infra*. For example, the decision to regulate—or even not regulate—a particular drug or medical device might impose increased health care costs on a State.

Reply Br. for the Petitioners at 6-7, *United States v. Texas*, No. 15-674 (U.S. Mar. 1, 2016). Treating a state's increased incidental expenses as a basis for challenging federal action would immensely expand state standing.

The states' "increased population as Article III injury" argument is further refuted by the fact that states receive many *benefits* from having increased populations, such as a greater tax, consumer, employee, and employer base. In fact, many of these same states recently established Article III standing before this Court by relying on the *benefits* that population brings, such as greater federal funding and higher representation in Congress. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565-66 (2019). How can population gain and population loss both give rise to Article III standing? Even in the highly unlikely event that a cause-and-effect relationship can be established

between the enactment of the religious exemptions here and an increase in a state's population, the benefits that a would-be a plaintiff state receives by having more citizens outweighs any negatives such that no Article III injury would exist.

Rejecting such an unprecedented expansion of state attorney general standing would not, of course, preclude any *private party* from challenging federal action that causes that party to suffer Article III injury. But repudiating the claim of state standing here would represent an important doorstop on what otherwise would be an enormous and unprecedented expansion of state attorney general standing.

This Court should reverse the judgment of the Third Circuit as to state standing and remand with instructions to dismiss for lack of jurisdiction.

CONCLUSION

This Court should reverse the judgment below.

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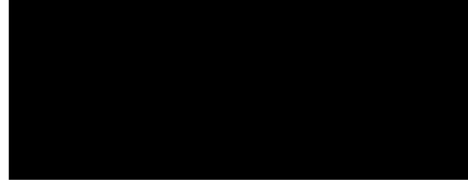

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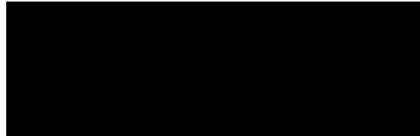

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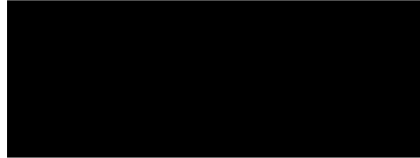

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