

Nos. 19-431, 19-454

---

---

IN THE  
**Supreme Court of the United States**

---

LITTLE SISTERS OF THE POOR  
SAINTS PETER AND PAUL HOME,

*Petitioner,*

v.

PENNSYLVANIA, ET AL.,

*Respondents.*

---

DONALD J. TRUMP,  
PRESIDENT OF THE UNITED STATES, ET AL.,

*Petitioners,*

v.

PENNSYLVANIA, ET AL.,

*Respondents.*

---

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

---

**BRIEF OF *AMICI CURIAE* 161 MEMBERS OF  
CONGRESS IN SUPPORT OF PETITIONERS**

---

TRAVIS ANDREWS

JOHN S. EHRETT

ANDREW FERGUSON\*

GIBSON, DUNN & CRUTCHER LLP

1050 Connecticut Ave., N.W.

Washington, D.C. 20036

(202) 955-8500

BLAINE H. EVANSON

*Counsel of Record*

DANIEL NOWICKI

GIBSON, DUNN & CRUTCHER LLP

3161 Michelson Drive

Irvine, CA 92612

(949) 451-3800

bevanson@gibsondunn.com

*Counsel for Amici Curiae*

---

---

\*Admitted only in Tennessee; practicing under the supervision  
of principals of the firm.

**TABLE OF CONTENTS**

	<u>Page</u>
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	6
STATEMENT .....	8
ARGUMENT .....	13
I. RFRA REQUIRES FEDERAL AGENCIES TO EXEMPT RELIGIOUS NONPROFITS FROM THE CONTRACEPTIVE MANDATE. ....	13
A. The Previous HHS “Accommodation” Violated RFRA. ....	13
B. RFRA Plays a Vital Background Role in Legislation and Regulation. ....	16
II. RFRA WAS DESIGNED TO EMPOWER LITIGANTS TO DEFEND THEIR RIGHT TO FREE EXERCISE. ....	18
CONCLUSION .....	21

## TABLE OF AUTHORITIES

	<u>Page(s)</u>
<b>Cases</b>	
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 (2014).....	6, 12, 13, 16, 19, 20
<i>Emp’t Div., Dep’t of Human Res. of Or.</i> <i>v. Smith</i> , 494 U.S. 872 (1990).....	9, 15
<i>Gonzales v. O Centro Espirita</i> <i>Beneficente Uniao do Vegetal</i> , 546 U.S. 418 (2006).....	7, 8
<i>Hernandez v. Comm’r</i> , 490 U.S. 680 (1989).....	15
<i>Little Sisters of the Poor Home for the</i> <i>Aged v. Burwell</i> , 799 F.3d 1315 (10th Cir. 2015).....	14, 15
<i>NAACP v. Button</i> , 371 U.S. 415 (1963).....	9
<i>Presbyterian Church in U.S. v. Mary</i> <i>Elizabeth Blue Hull Mem’l</i> <i>Presbyterian Church</i> , 393 U.S. 440 (1969).....	15
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963).....	7, 9, 18, 19

<i>Spokeo, Inc. v. Robins</i> , 136 S. Ct. 1540 (2016).....	20
<i>Thomas v. Review Bd. of Ind. Emp't Sec.</i> <i>Div.</i> , 450 U.S. 707 (1981).....	15
<i>Trinity Lutheran Church of Columbia,</i> <i>Inc. v. Comer</i> , 137 S. Ct. 2012 (2017).....	19
<i>Walz v. Tax Comm'n of City of New</i> <i>York</i> , 397 U.S. 664 (1970).....	18
<i>Zubik v. Burwell</i> , 136 S. Ct. at 1559.....	13, 14

### **Statutes**

42 U.S.C. § 2000bb(a)(2) .....	8
42 U.S.C. § 2000bb(a)(3) .....	6
42 U.S.C. § 2000bb(a)(5) .....	8
42 U.S.C. § 2000bb(b).....	18, 19
42 U.S.C. § 2000bb(b)(1) .....	7
42 U.S.C. § 2000bb-1(a).....	11, 17
42 U.S.C. § 2000bb-1(b).....	6, 11
42 U.S.C. § 2000bb-2(1).....	11
42 U.S.C. § 2000bb-2(4).....	12

42 U.S.C. § 2000bb-3(a).....	7, 12, 17
42 U.S.C. § 2000bb-3(b).....	12
42 U.S.C. § 2000cc-3(g).....	12, 17
42 U.S.C. § 2000cc-5(7)(A).....	12
<b>Other Authorities</b>	
139 Cong. Rec. 4992 (1993).....	11
139 Cong. Rec. H2356 (1993).....	9
H.R. Rep. No. 103-88 (1993).....	10
S. Rep. No. 103-111 (1993).....	9, 10
<i>Religious Freedom Restoration Act of 1990: Hearing Before the Subcomm. on Civil &amp; Constitutional Rights of the H. Comm. on the Judiciary, 101st Cong., 2d Sess. (1990).....</i>	10
<i>Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil &amp; Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 2d Sess. (1992).....</i>	19
<i>The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary, 102d Cong., 2d Sess. (1992).....</i>	8, 9

Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 Pub. Papers 2000 (Nov. 16, 1993) .....	11
Douglas Laycock & Oliver S. Thomas, <i>Interpreting the Religious Freedom Restoration Act</i> , 73 Tex. L. Rev. 209 (1994).....	11, 12
Michael S. Paulsen, <i>A RFRA Runs Through It: Religious Freedom and the U.S. Code</i> , 56 Mont. L. Rev. 249 (1995).....	12, 16, 17
Daniel Webster, Oration Before the Pilgrim Society at Plymouth, Massachusetts (Dec. 22, 1820), <i>The Speeches of Daniel Webster</i> (B.F. Tefft ed., 1907) .....	8
<b>Regulations</b>	
80 Fed. Reg. 41,318 (July 14, 2015).....	14
83 Fed. Reg. 57,536 (Nov. 15, 2018) .....	13
<b>Constitutional Provisions</b>	
U.S. Const. amend. I .....	8

**INTEREST OF *AMICI CURIAE***<sup>1</sup>

*Amici* are 161 Members of Congress devoted to maintaining Congress’s centuries-old bipartisan tradition of protecting religious liberty. To this end, *amici* coalesce to defend the Religious Freedom Restoration Act (“RFRA”) and its application to the Affordable Care Act (“ACA”). Congress enacted RFRA, and *amici* rely on RFRA’s protections when they legislate against its backdrop. *Amici* are thus uniquely obligated and positioned to explain RFRA’s purpose of protecting religious liberty, its role as a shield for those who seek to practice their sincerely held religious beliefs, and the breadth of the protections it provides.

*Amici* are:

***United States Senators***

James Lankford (R-OK)	Bill Cassidy, M.D. (R-LA)
John Barrasso (R-WY)	John Cornyn (R-TX)
Marsha Blackburn (R-TN)	Tom Cotton (R-AR)
Roy Blunt (R-MO)	Kevin Cramer (R-ND)
John Boozman (R-AR)	Mike Crapo (R-ID)
Mike Braun (R-IN)	Ted Cruz (R-TX)
Richard Burr (R-NC)	Steve Daines (R-MT)

---

<sup>1</sup> Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief’s preparation. All parties received timely notice and consented to the filing of this brief.

Michael B. Enzi (R-WY)	Kelly Loeffler (R-GA)
Joni K. Ernst (R-IA)	Jerry Moran (R-KS)
Deb Fischer (R-NE)	James E. Risch (R-ID)
Lindsey Graham (R-SC)	Pat Roberts (R-KS)
Charles E. Grassley (R-IA)	M. Michael Rounds (R-SD)
Josh Hawley (R-MO)	Marco Rubio (R-FL)
John Hoeven (R-ND)	Ben Sasse (R-NE)
Cindy Hyde-Smith (R-MS)	Tim Scott (R-SC)
James M. Inhofe (R-OK)	Thom Tillis (R-NC)
Ron Johnson (R-WI)	Pat Toomey (R-PA)
John Kennedy (R-LA)	Roger F. Wicker (R-MS)
Michael S. Lee (R-UT)	

***Members of the House of Representatives***

Vicky Hartzler (R-MO)	James R. Baird (R-IN)
Ralph Abraham, M.D. (R-LA)	Andy Barr (R-KY)
Robert B. Aderholt (R-AL)	Andy Biggs (R-AZ)
Rick W. Allen (R-GA)	Dan Bishop (R-NC)
Kelly Armstrong (R-ND)	Rob Bishop (R-UT)
Jodey C. Arrington (R-TX)	Mike Bost (R-IL)
Brian Babin, D.D.S. (R-TX)	Kevin Brady (R-TX)



Larry Bucshon, M.D. (R-IN)	A. Drew Ferguson, IV (R-GA)
Ted Budd (R-NC)	Chuck Fleischmann (R-TN)
Michael C. Burgess, M.D. (R-TX)	Bill Flores (R-TX)
Bradley Byrne (R-AL)	Jeff Fortenberry (R-NE)
Earl L. "Buddy" Carter (R-GA)	Virginia Foxx (R-NC)
Steve Chabot (R-OH)	Russ Fulcher (R-ID)
Liz Cheney (R-WY)	Matt Gaetz (R-FL)
Michael Cloud (R-TX)	Bob Gibbs (R-OH)
Tom Cole (R-OK)	Louie Gohmert (R-TX)
Doug Collins (R-GA)	Paul A. Gosar, D.D.S. (R-AZ)
K. Michael Conaway (R-TX)	Garret Graves (R-LA)
Warren Davidson (R-OH)	Sam Graves (R-MO)
Rodney Davis (R-IL)	Mark E. Green, M.D. (R-TN)
Scott DesJarlais, M.D. (R-TN)	Glenn Grothman (R-WI)
Jeff Duncan (R-SC)	Michael Guest (R-MS)
Neal P. Dunn, M.D. (R-FL)	Brett Guthrie (R-KY)
Tom Emmer (R-MN)	Andy Harris, M.D. (R-MD)
Ron Estes (R-KS)	Kevin Hern (R-OK)

Jody Hice (R-GA)	Blaine Luetkemeyer (R-MO)
French Hill (R-AR)	Roger Marshall, M.D. (R-KS)
George Holding (R-NC)	Thomas Massie (R-KY)
Richard Hudson (R-NC)	Kevin McCarthy (R-CA)
Bill Huizenga (R-MI)	Tom McClintock (R-CA)
Bill Johnson (R-OH)	Patrick McHenry (R-NC)
Mike Johnson (R-LA)	Mark Meadows (R-NC)
Jim Jordan (R-OH)	Daniel P. Meuser (R-PA)
John Joyce, M.D. (R-PA)	Carol D. Miller (R-WV)
Fred Keller (R-PA)	John Moolenaar (R-MI)
Mike Kelly (R-PA)	Alex X. Mooney (R-WV)
Steve King (R-IA)	Gregory F. Murphy, M.D. (R-NC)
Adam Kinzinger (R-IL)	Ralph Norman (R-SC)
Darin LaHood (R-IL)	Pete Olson (R-TX)
Doug LaMalfa (R-CA)	Steven M. Palazzo (R-MS)
Doug Lamborn (R-CO)	Gary J. Palmer (R-AL)
Robert E. Latta (R-OH)	Scott Perry (R-PA)
Debbie Lesko (R-AZ)	Collin C. Peterson (D-MN)
Billy Long (R-MO)	Bill Posey (R-FL)
Barry Loudermilk (R-GA)	John Ratcliffe (R-TX)

Guy Reschenthaler (R-PA)	Ross Spano (R-FL)
Tom Rice (R-SC)	W. Gregory Steube (R-FL)
Cathy McMorris Rodgers (R-WA)	Chris Stewart (R-UT)
David P. Roe, M.D. (R-TN)	Glenn "GT" Thompson (R-PA)
Mike D. Rogers (R-AL)	William R. Timmons, IV (R-SC)
John Rose (R-TN)	Ann Wagner (R-MO)
David Rouzer (R-NC)	Tim Walberg (R-MI)
Chip Roy (R-TX)	Mark Walker (R-NC)
Steve Scalise (R-LA)	Jackie Walorski (R-IN)
David Schweikert (R-AZ)	Michael Waltz (R-FL)
Austin Scott (R-GA)	Randy K. Weber (R-TX)
John Shimkus (R-IL)	Brad R. Wenstrup, D.P.M. (R-OH)
Mike Simpson (R-ID)	Bruce Westerman (R-AR)
Adrian Smith (R-NE)	Roger Williams (R-TX)
Christopher H. Smith (R-NJ)	Joe Wilson (R-SC)
Jason Smith (R-MO)	Ron Wright (R-TX)
Lloyd Smucker (R-PA)	Ted S. Yoho, D.V.M. (R-FL)

## SUMMARY OF ARGUMENT

For most of the past decade, the Little Sisters have sought a religious exemption from the contraceptive mandate promulgated by the Health Resources and Services Administration (“HRSA”), an agency of the U.S. Department of Health and Human Services (“HHS”). After years of litigation, the government finally provided religious nonprofits like the Little Sisters with a religious exemption—which the agency was not only *permitted*, but *required*, to implement under RFRA.

The court of appeals’ decision prohibiting the agency from exempting religious objectors is a direct assault on RFRA and imposes a drastic and unprecedented restriction on federal agencies’ mandate to protect religious liberty. This Court should reverse the court of appeals’ decision, and reaffirm the scope and role of RFRA, which Congress enacted “to provide very broad protection for religious liberty.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014).

RFRA expressly directs federal agencies to avoid substantially burdening religious exercise without a compelling justification, and if regulation is warranted, to do so with the least restrictive means. 42 U.S.C. § 2000bb(a)(3); *id.* § 2000bb-1(b). But the Third Circuit’s decision allows an agency to implement regulations that burden religious exercise, while also restricting an agency from providing sufficient religious accommodations to temper that burden. That pair of rulings runs roughshod over RFRA’s requirement that all laws—including all regulations promulgated to “implement[]” statutory law—be interpreted and construed to provide the

greatest possible protection for freedom of conscience and religious exercise. *Id.* § 2000bb-3(a).

*Amici* write to emphasize RFRA’s unique status in modern congressional history: a bipartisan group of 97 Senators voted for its passage, the House adopted it on a voice vote, and President Clinton signed it into law. By its terms, RFRA applies broadly to every official act of a federal agency. Its importance for protecting the religious liberty of Americans in a whole host of contexts is profound. The Third Circuit’s ruling significantly reduces RFRA’s reach, and must be reversed.

This Court should also rule that the Little Sisters have appellate standing. Pet. i–ii.<sup>2</sup> RFRA provides a robust private cause of action for those Americans whose religious liberty is threatened by government action. But that right of action is meaningless if religious objectors are denied standing to invoke it. The Third Circuit’s ruling that petitioners suffer no harm from being forced to choose between their insurance plan and exercising their religious beliefs directly contradicts this Court’s repeated holding that “to condition the availability of benefits upon [an objector’s] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.” *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); see 42 U.S.C. § 2000bb(b)(1) (codifying *Sherbert*).

“Congress had a reason for enacting RFRA.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006). It “legislated ‘the compelling interest test’ as the means for the courts to

---

<sup>2</sup>

All “Pet.” and “App.” citations refer to the petition and appendix in Case No. 19-431.

‘stri[k]e sensible balances between religious liberty and competing prior government interests.’” *Ibid.* (alteration in original) (quoting 42 U.S.C. § 2000bb(a)(2), (5)). Although this task is not “an easy one,” Congress mandated that courts undertake it. *Ibid.* This Court should reverse the Third Circuit’s failure to do so.

### STATEMENT

Religious liberty has been one of our country’s bedrock principles since the Founding. Indeed, “[o]f the motives which influenced the first settlers to a voluntary exile, ... and to seek asylum in this then unexplored wilderness, the first and principal, no doubt, were connected with religion.” Daniel Webster, *Oration Before the Pilgrim Society at Plymouth, Massachusetts* (Dec. 22, 1820), *The Speeches of Daniel Webster* (B.F. Tefft ed., 1907). As Senator Edward Kennedy—one of RFRA’s sponsors—explained during the Act’s legislative hearings, “[t]he brave pioneers who founded America came here in large part to escape religious tyranny and to practice their faiths free from government interference.” *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary (Senate Hearing)*, 102d Cong., 2d Sess., at 1 (1992) (statement of Sen. Kennedy). “The persecution they had suffered in the old world convinced them of the need to assure for all Americans for all time the right to practice their religion unencumbered by the yoke of religious tyranny.” *Ibid.* Thus, when forming their own system of government, the American people gave religious liberty special prominence as the first right protected in the Bill of Rights. *See* U.S. Const. amend. I (“Congress shall make no law respecting an

establishment of religion, or prohibiting the free exercise thereof ....”).

For many years, this Court interpreted the First Amendment as requiring courts to carve out exemptions from laws burdening the free exercise of religion unless they were “justified by a ‘compelling state interest.’” *Sherbert*, 374 U.S. at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). The Court, however, changed course in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), abandoning the compelling interest test for free exercise claims in favor of one akin to rational basis review. *See id.* at 882–89. The Court held that “the political process,” rather than the judiciary, must protect the freedom of conscience and religion. *Id.* at 890.

RFRA was a swift and direct response to *Smith*. Congress expressly and specifically sought to protect through legislation the religious expression that the Court had determined was not protected by the First Amendment.

Congress recognized that, as a result of *Smith*, “governments throughout the U.S. [could] run roughshod over religious conviction.” S. Rep. No. 103-111, at 8 (1993) (quoting *Senate Hearing* at 44 (testimony of Oliver S. Thomas)); *see also* 139 Cong. Rec. H2356, H2361 (1993) (statement of Rep. Hoyer) (“Orthodox Jews have been subjected to unnecessary autopsies in violation of their family’s religious faith and one Catholic teaching hospital lost its accreditation for refusing to provide abortion services. Evangelical churches have been zoned out of commercial districts in some cities prompting a Minnesota trial judge to remark that churches have

no more constitutional rights than adult movies theaters.”).

Congress understood that the political process could not protect religious liberty in piecemeal fashion: “It is not feasible to combat the burdens of generally applicable laws on religion by relying upon the political process for the enactment of separate religious exemptions in every Federal, State, and local statute.” H.R. Rep. No. 103-88, at 6 (1993). RFRA addressed these concerns by requiring that “[a]ll governmental actions” provide “proof of a compelling justification in order to burden religious exercise.” *Ibid.* And by passing RFRA, Congress imposed on federal officials the responsibility to “show that the relevant regulations are the least restrictive means of protecting a compelling governmental interest.” *Id.* at 8.

Congressional support for RFRA was nearly unanimous and overwhelmingly bipartisan. Then-Representative and now-Senate Minority Leader Charles Schumer introduced RFRA in the House of Representatives, where the bill passed unanimously after amassing 170 co-sponsors representing both political parties. H.R. Rep. No. 103-88. In turn, Republican Senator Orrin Hatch and Democratic Senator Edward Kennedy jointly introduced RFRA to the Senate, where the bill garnered 58 co-sponsors and passed with a vote of 97 to 3. S. Rep. No. 103-111, at 2.

The congressional coalition supporting RFRA’s passage cut across traditional political and ideological boundaries and included “liberals and conservatives, Republicans and Democrats, Northerners and Southerners.” *Religious Freedom Restoration Act of 1990: Hearing Before the Subcomm. on Civil &*



*Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong., 2d Sess., at 13 (1990) (statement of Rep. Solarz). As President Clinton observed when he signed RFRA into law, this alliance was (and is) extraordinary—but “[t]he power of God is such that even in the legislative process miracles can happen.” Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 Pub. Papers 2000 (Nov. 16, 1993).

Congress’s nearly unanimous approval of RFRA reflected the shared sentiment of the public at large. Secular and religious groups alike supported RFRA, including the American Civil Liberties Union, the American Humanist Association, the American Muslim Council, the United States Catholic Conference, and the National Council of Churches. 139 Cong. Rec. 4992 (1993) (statement of Sen. Kennedy). These organizations composed “one of the broadest coalitions in recent political history.” Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 210 (1994).

RFRA includes a private right of action, but it is far more than a backward-facing statute enacted to address prior wrongs. RFRA sets forth an *affirmative mandate* that, when carrying out official duties, each member of the federal government (including federal administrative agencies) “*shall not* substantially burden a person’s exercise of religion,” absent a compelling interest and use of the least restrictive means. 42 U.S.C. § 2000bb-1(a)–(b) (emphasis added); *see also id.* § 2000bb-2(1) (defining the “government” under the Act as every “branch, department, agency, instrumentality, and official” of the United States). And the text of RFRA makes clear

that its commands apply to “all Federal law, *and the implementation of that law*,” unless a particular statute “explicitly excludes ... application” of RFRA. *Id.* § 2000bb-3(a)–(b) (emphasis added).

Congress further expanded the RFRA mandate in the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). RLUIPA amended the definition of “religious exercise” protected under RFRA to include “*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7)(A) (emphasis added); *see id.* § 2000bb-2(4) (incorporating RLUIPA’s definition of “religious exercise” into RFRA). And Congress mandated that the law’s already significant protections be construed “in favor of a broad protection of religious exercise” to the “maximum extent” possible. *Id.* § 2000cc-3(g); *see also Hobby Lobby*, 573 U.S. at 696 & n.5 (acknowledging that RLUIPA’s “broad” construction rule applies to RFRA).

Simply put, RFRA “is both a rule of interpretation for future federal legislation and an exercise of general legislative supervision over federal agencies.” Laycock & Thomas, 73 *Tex. L. Rev.* at 211. It “operates as a sweeping ‘super-statute,’ cutting across all other federal statutes ... and modifying their reach.” Michael S. Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 *Mont. L. Rev.* 249, 253 (1995). Since RFRA’s adoption, Congress has maintained RFRA’s protections in every law it has passed—no statute, including the ACA, has “explicitly exclude[d]” RFRA’s application.

## ARGUMENT

### I. RFRA REQUIRES FEDERAL AGENCIES TO EXEMPT RELIGIOUS NONPROFITS FROM THE CONTRACEPTIVE MANDATE.

The Third Circuit’s decision inappropriately restricts agencies from taking into account the burdens their regulations impose on religious exercise, as required by RFRA.

As HHS recognized following this Court’s remand in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), the previous “accommodation” mandating self-certification did not satisfy RFRA’s demanding requirements. Namely, the “accommodation” imposed a substantial burden on many individuals’ exercise of their religion, failed to serve a compelling governmental interest, and employed mechanisms that were not the least restrictive means available. 83 Fed. Reg. 57,536, 57,547–48 (Nov. 15, 2018). The Third Circuit’s decision striking down the religious exemption rule and reinstating the prior (insufficient) “accommodation” fundamentally misapplies this Court’s precedent and misunderstands RFRA.

#### A. The Previous HHS “Accommodation” Violated RFRA.

The “contraceptive mandate” at the center of this case was not enacted by Congress, but was created by the HRSA when it promulgated the “Women’s Preventive Service Guidelines” as part of its implementation of the ACA. *See Hobby Lobby*, 573 U.S. at 697 (recounting the history of the mandate). To circumscribe the impact of this requirement on those holding sincere religious beliefs that artificial contraception violates human dignity, HHS fully exempted certain religious organizations, such as

churches and some religious orders, from complying with the mandate. *See* Pet. 7. But for certain religious nonprofit employers, such as the Little Sisters, HHS created an “accommodation” (*not* an exemption) under which an objecting organization could self-certify to its insurance provider or the federal government that it opposed providing contraceptives for religious reasons. *See ibid.*; *see also Zubik*, 136 S. Ct. at 1559. After receiving the nonprofit’s self-certification, the insurance provider then could offer the contraceptives directly to the nonprofit’s employees. *See* 80 Fed. Reg. 41,318, 41,323 (July 14, 2015).

Yet as the Little Sisters explain, for many religious believers, participating in the “accommodation” process requires actively facilitating a life-degrading and immoral act. *See* Pet’r’s Br. 32; *see also Little Sisters of the Poor Home for the Aged v. Burwell*, 799 F.3d 1315, 1317 (10th Cir. 2015) (Hartz, J., dissenting from denial of rehearing en banc) (“All the plaintiffs in this case sincerely believe that they will be violating God’s law if they execute the documents required by the government.”). In fact, the so-called accommodation “still requires petitioners to do the very thing that they find religiously objectionable: They must affirmatively assist HHS in its efforts to get contraceptive coverage to their own employees.” Pet’rs’ Br. at 42–43, *Zubik v. Burwell*, Nos. 15-35, 15-105, 15-119, & 15-191 (Jan. 4, 2016). “It is thus no mystery why those with sincere religious objections to facilitating such coverage object to this regulatory mechanism for compliance and are not satisfied with the government’s misleading labels.” *Id.* at 45.

The Third Circuit dismissed this burden on religious exercise as “not substantial.” Pet. App. 46a. But as five judges of the Tenth Circuit recognized before *Zubik*, there is “no precedent holding that a person’s free exercise was not substantially burdened when a significant penalty was imposed for refusing to do something prohibited by the person’s sincere religious beliefs (however strange, or even silly, the court may consider those beliefs).” *Little Sisters*, 799 F.3d at 1318.

Importantly, this Court has consistently held that it is not for courts to determine whether the moral lines drawn by religious believers are “unreasonable.” *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 715 (1981). “[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.” *Smith*, 494 U.S. at 887; *see also Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 450 (1969) (“[T]he First Amendment forbids civil courts from” “determin[ing] matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion.”).

In the decision below, the Third Circuit opined, quoting its pre-*Zubik* decision on the accommodation, that “the submission of the self-certification form does not make the [employers] ‘complicit’ in the provision of contraceptive coverage” (Pet. App. 46a (alteration in original))—thereby purporting to “decide” the moral question at the core of this case.

But “[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.” *Hernandez v.*

*Comm'r*, 490 U.S. 680, 699 (1989). Petitioners have repeatedly explained that the accommodation forces them to participate in a process—the dissemination of contraceptives—that they believe to be immoral and in conflict with their sincerely held religious beliefs. *Cf. Hobby Lobby*, 573 U.S. at 724 (“the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another” amount to “a difficult and important question of religion and moral philosophy”).

The Third Circuit’s parsing and adjudication of religious doctrine is flatly prohibited. “[W]hether the religious belief asserted in a RFRA case is reasonable” is a “question that *the federal courts have no business addressing.*” *Hobby Lobby*, 573 U.S. at 724. (emphasis added).

### **B. RFRA Plays a Vital Background Role in Legislation and Regulation.**

Not only was the Third Circuit derelict in its duty to protect the religious liberty of the Little Sisters, the court of appeals also affirmatively (and erroneously) *prevented* the Executive from tailoring its regulation in a way that avoided burdening petitioners’ religious expression. This feature of the Third Circuit’s decision is especially troubling to *amici*, who urge the Court to reiterate that “RFRA is a congressional mandate that federal agencies make the effort, and bear the cost, of accommodating sincere religious exercise, with all the difficulties that that may entail for government.” Paulsen, *A RFRA Runs Through It*, 56 Mont. L. Rev. at 274.

The Women’s Health Amendment—like every statute since RFRA’s passage—incorporated RFRA’s

protections, and the “implementation” of the Amendment by federal agencies thus requires adherence to RFRA’s commands. But the Third Circuit implied that agencies lack authority to issue preemptive rules designed to ensure religious beliefs are accommodated—suggesting instead that the Act authorizes *only* “a cause of action” and “a judicial remedy via individualized adjudication.” Pet. App. 43a. In effect, the Third Circuit held that because “the Supreme Court has not held that the Accommodation” violates RFRA, HHS could do nothing to further accommodate religious belief. *Id.* at 46a–47a.

The Third Circuit’s extraordinarily cramped view of RFRA’s mandate should be reversed—and courts and agencies alike should be reminded that RFRA demands “broad protection of religious exercise” to the “maximum extent” possible. 42 U.S.C. § 2000cc-3(g). *Amici* expect that regulators will implement the statutes Congress passes in a way that will afford ample respect for their constituents’ freedom of conscience.

Indeed, the genius of RFRA is that it provides an ongoing directive to agencies to affirmatively avoid substantial burdens on religion when implementing statutes. There is no need for an explicit exemption in an enabling statute, or for agencies to wait for a private litigant to prove that a law violates her beliefs. *See, e.g.,* Paulsen, *A RFRA Runs Through It*, 56 Mont. L. Rev. at 253 (RFRA “operates as a sweeping ‘super-statute,’ cutting across all other federal statutes.”). The Third Circuit’s treatment of RFRA as meaningless unless endorsed by a court decision is directly contrary to the text of the statute. *See* 42 U.S.C. §§ 2000bb-1(a), 2000bb-3(a) (“Government *shall not* substantially burden a person’s exercise of

religion” during the implementation of “all Federal law” (emphasis added)).

To be sure, RFRA’s broad mandate and “super-statute” status is unique and extraordinary. But that is by design. “Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms—economic, political, and sometimes harshly oppressive.” *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 673 (1970). Congress, in an extraordinary act of bipartisanship and political agreement, passed RFRA to provide a critical bulwark against this hostility; and its important protections for freedom of religion and conscience—and the power of agencies to effect those protections—should be re-affirmed.

## **II. RFRA WAS DESIGNED TO EMPOWER LITIGANTS TO DEFEND THEIR RIGHT TO FREE EXERCISE.**

The Third Circuit, in a footnote, held that the Little Sisters lacked standing because they had secured a district court injunction against the accommodation. Pet. App. 15a n.6. But that injunction allows the Little Sisters to avoid intrusion on their religious beliefs *only if* they remain on their current insurance plan. The Third Circuit thus did not recognize the injury from being forced to choose between the right to pick one’s insurer and one’s religious freedom.

The Third Circuit’s narrow view of standing is directly contrary to RFRA’s express protection against “condition[ing] the availability of benefits upon [an objector’s] willingness to violate a cardinal principle of her religious faith.” *Sherbert*, 374 U.S. at 406; see 42 U.S.C. § 2000bb(b) (adopting *Sherbert*). Forcing this choice “effectively penalizes the free exercise of [one’s]



constitutional liberties.” *Sherbert*, 374 U.S. at 406. The Little Sisters are clearly subject to the harm identified in *Sherbert*, and assuredly still have standing under Article III.

To help achieve its goal of “provid[ing] very broad protection for religious liberty,” *Hobby Lobby*, 573 U.S. at 693, and to promote development of a comprehensive jurisprudence of religious freedom, Congress in RFRA allowed courts to entertain a wide range of RFRA-based religious exercise claims. *See, e.g., Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess., at 138 (1992) (statement of Rep. Solarz) (“I don’t think it should be the job of the Congress to pick and choose among which religious rights are legitimately a subject of presentation to the courts.”); *id.* at 106 (statement of Rep. Washington) (“We contemplate what is likely to be the tugs and balances and pulls and pushes on judicial interpretation and we direct the Court’s attention, and rightfully so, to how we wish to have it interpreted.”). This includes the claim that the government has infringed on “the liberties of religion and expression ... by the denial of or placing of conditions upon a benefit or privilege.” *Sherbert*, 374 U.S. at 404; *see* 42 U.S.C. § 2000bb(b).

There can be no doubt that this claim is legally cognizable, given that *this Court* historically recognized it—and continues to recognize it—as a basis for legal redress. *Sherbert*, 374 U.S. at 404; *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017) (reaffirming that the government “imposes a penalty on the free exercise of religion” that is cognizable in the courts if

it forces an organization to “renounce its religious character in order to participate in an otherwise generally available public benefit program”); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (noting that both “history and the judgment of Congress play important roles” in determining whether a harm constitutes an injury in fact and a basis for standing).

This case presents the exact kind of injury that *Sherbert* sought to eliminate. Denying the Little Sisters standing shackles them to a district court’s tentative compromise, barring them from choosing a different insurer going forward. If, for any reason, the Little Sisters leave their current insurance plan—or if their insurer changes its own policies—the Little Sisters would then face exactly the same unacceptable choice that triggered this litigation in the first place: Comply with the mandate, regardless of their convictions, or face punishment. The existing injunction is a stopgap, not a genuine remedy.

This watered-down religious accommodation is not what Congress enacted in RFRA, and the Little Sisters’ resulting injury satisfies Article III. RFRA was passed to allow Americans to practice their faith *freely*, without needing to depend on the good graces of their present insurer. “[V]ery broad protection for religious liberty” was the goal. *Hobby Lobby*, 573 U.S. at 693.

In passing RFRA and acknowledging the weightiness of claims of conscience by parties like the Little Sisters, Congress recognized this type of harm for what it is: an impediment to the free exercise of religion, which can be justified only if it furthers a compelling government interest by using the least restrictive means. The nationwide injunction against

the religious exemption inflicts such a harm on the Little Sisters, and thereby confers standing.

**CONCLUSION**

The decision below should be reversed.

Respectfully submitted,

TRAVIS ANDREWS

JOHN S. EHRETT

ANDREW FERGUSON\*

GIBSON, DUNN & CRUTCHER LLP

1050 Connecticut Ave., N.W.

Washington, D.C. 20036

(202) 955-8500

BLAINE H. EVANSON

*Counsel of Record*

DANIEL NOWICKI

GIBSON, DUNN & CRUTCHER LLP

3161 Michelson Drive

Irvine, CA 92612

(949) 451-3800

bevanson@gibsondunn.com

*Counsel for Amici Curiae*

\* Admitted only in Tennessee; practicing under the supervision of principals of the firm.

March 9, 2020