Nos. 19-431 & 19-454

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,
Petitioner,
v.
COMMONWEALTH OF PENNSYLVANIA AND STATE OF NEW JERSEY,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioner,
v.
COMMONWEALTH OF PENNSYLVANIA AND STATE OF NEW JERSEY,
Respondents.

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

BRIEF *AMICI CURIAE* OF THE CENTER FOR INQUIRY, INC., AMERICAN ATHEISTS, INC., AND THE AMERICAN HUMANIST ASSOCIATION, IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

This amici curiae brief in support of the respondents is being filed on behalf of the Center for Inquiry (CFI), American Atheists, Inc. (American Atheists), and the American Humanist Association (AHA).

CFI is a non-profit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. American Atheists strives to promote understanding of atheists through education, advocacy, and community-building; works to end the stigma associated with atheism; and fosters an environment where bigotry against our community is rejected.

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[1] All parties have granted blanket consents to the filing of amicus briefs. Their consents are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

The AHA is a national nonprofit membership organization based in Washington, D.C. Founded in 1941, the AHA is the nation's oldest and largest humanist organization. The AHA has tens of thousands of members and hundreds of chapters and affiliates across the country. Humanism is a progressive lifestance that affirms—without theism or other supernatural beliefs—our responsibility to lead meaningful and ethical lives that add to the greater good of humanity. The mission of the AHA's legal center is to protect one of the most fundamental principles of our democracy: the separation of church and state. To that end, the AHA has litigated dozens of First Amendment cases nationwide, including in the U.S. Supreme Court.

SUMMARY OF ARGUMENT

This case concerns a religious-based exemption, currently subject to a national injunction, to the requirement under the Affordable Care Act (ACA) to provide health insurance which covers contraceptive care at no cost to employees. 42 U.S.C. § 300gg-13(a). Petitioner, Little Sisters of the Poor, maintains that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, either requires or permits the exemption currently enjoined by the Third Circuit. However, any requirement under the Constitution or legislation was more than satisfied by the prior accommodation. Indeed, the enjoined exemption is unconstitutional as a violation of the Establishment Clause.[2]

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[2] Amici maintain that as regards the new, enjoined, exemption, "the Agencies did not follow the [Administrative Procedures Act] and that the regulations are not authorized under the ACA." *Penn. v. President United States*, 930 F.3d 543, 556 (3rd Cir. 2019), *cert. granted Trump v. Penn.*, 140 S. Ct. 918 (2020).

First, there exists no Free Exercise Clause right to the enjoined exemption. Congress does not impinge on the right to free exercise by enacting a law of general applicability, even if that law impacts an individual's or a group's ability to practice religion. *Empl. Div. v. Smith*, 494 U.S. 872, 879 (1990). Any exemption granted under RFRA is legislative, not constitutional, and so must withstand constitutional scrutiny. As this Court has held on multiple occasions, exemptions to laws granted in order to protect individual religious expression are unconstitutional as violative of the Establishment Clause if they shift the burden from the religious complainant to a third party. Here, petitioner seeks to eliminate its alleged religious burden by creating a burden on its employees who will be denied the seamless and copayment-free contraceptive benefits guaranteed by the ACA.

Second, petitioner cannot demonstrate that it has suffered the requisite "substantial burden" on religion to warrant relief under RFRA. The pre-existing accommodation fully removed any real burden on its religious beliefs.[3] What petitioner objects to is the requirement that it must inform the government of its intention to exercise the accommodation. Such a requirement has never been held to be a burden by this Court. Recognizing it as a substantial burden, as petitioner claims, would render the word "substantial" in RFRA meaningless, and thus rewrite democratically enacted legislation. RFRA has always been held to require that when a substantial burden on religion is found that the government cannot justify by a compelling interest, an accommodation be offered to parties making a claim of a religious burden. This is

[3] Amici do not accept that the prior accommodation was either necessary or permissible.

precisely what the government did. This Court has never held that a requirement to notify the government of a desire to avail oneself of such an accommodation can itself be considered a substantial burden on religion.

Third, petitioner's theory of causation, claiming a religious burden caused by requiring it to notify the government of a desire to take advantage of an accommodation, knows no limits. If accepted, it would not only allow religious groups to refuse to directly participate in legitimate governmental activities, such as the regulation of health care, the provision of social security, or the military draft, but also to demand that no person replace them to fulfil the government's intentions. RFRA was never intended to grant religious groups such an absolute veto over government policy.

Fourth, even if this Court determines that a substantial burden on religion exists, the interest of the government in the widespread provision of contraceptive services to women at zero copayment cost is a compelling one, sufficient to overcome any burden on petitioner.

The enjoined exemption is therefore not required by the Free Exercise Clause or by RFRA, and, in fact, would violate the Establishment Clause, by creating a burden for third parties. Accordingly, it must be rejected by this Court.

ARGUMENT

I. THERE IS NO CONSTITUTIONAL RIGHT TO AN EXEMPTION.

A. Permissive religious exemptions to laws of general applicability are subject to Establishment Clause Review.

For many years, the availability of exemptions for religious groups or individuals from laws which did not specifically target those religions was governed by the Sherbert Test, expounded by this Court in *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). This test granted exemptions to laws that placed substantial burdens on the ability to practice religion based on the First Amendment right to free exercise of religion. In *Sherbert*, a factory worker was terminated for refusing to work on Saturday, the Sabbath for her religion of Seventh Day Adventism. *Id.* at 399. South Carolina denied her unemployment benefits, claiming she was voluntarily unavailable for work. *Id.* at 401. This Court ruled that the state could not, absent a compelling government interest, condition access to a governmental program such as unemployment benefits by placing a substantial burden on a person's religious freedom–here the right to observe the Sabbath as that person saw fit. *Id.* at 403-04.

Twenty-seven years later, however, in *Smith*, the Court ruled that a law which did not specifically target religion, but which had the incidental effect of burdening religious adherents, did not require an exemption. 494 U.S. at 878-79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is otherwise free to regulate.").

Consequently, the state had no obligation to show that the law served a compelling government interest.

In response, Congress enacted RFRA with the express purpose of restoring the Sherbert Test and applying the compelling interest test once again to government-imposed burdens on religion. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 746 (2014) (Ginsburg, J. dissenting, internal citations omitted) ("RFRA's purpose is specific and written into the statute itself. The Act was crafted to 'restore the compelling interest test as set forth in *Sherbert v. Verner*.'"). Importantly, this grants a legislative, not a constitutional right. This Court in *Smith*, 494 U.S. at 880-81, determined the extent to which the Free Exercise Clause protects individuals from burdens on religious practice imposed by laws of general applicability. RFRA, as a legislative enactment, granted protections beyond those constitutional rights. Such permissive rights granted by an Act of Congress are subject to constitutional scrutiny by this Court. An exemption sought under RFRA which violates the Establishment Clause is not permitted. Congress does not have the authority to violate the Constitution. Nor can Congress overrule a Supreme Court determination of the extent of constitutional protections, short of the passage of an actual constitutional amendment. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (The Constitution is "superior, paramount law, unchangeable by ordinary means . . . [It is not] alterable when the legislature shall please to alter it.") Any exemption claimed under RFRA must therefore pass constitutional review under the Establishment Clause.

Despite being ruled unconstitutional as applied to the states by this Court, *City of Boerne v. Flores*, 521 U.S.507, 536 (1997), RFRA has been treated as

facially constitutional regarding the federal government.[4] Facial constitutionality does not end the scrutiny, as laws may still be applied in ways which violate the constitution. The Establishment Clause "mandates government neutrality between religion and religion, and between religion and non-religion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). To decide that merely giving notice in order to obtain an exemption from a law of general applicability, in itself, substantially burdens religion would make a mockery both of RFRA and of real burdens on religious practice and belief.

B. The enjoined exemption violates the Establishment Clause by burdening third parties.

As discussed, *supra*, the expressed purpose of RFRA is to defend the freedom of an individual or group to practice religion against restrictions imposed by government. For example, in *Gonzales v. O Centro Espirita Beneficente Unaio do Vegetal*, 546 U.S. 418, 423 (2006), members of a Brazilian church located in New Mexico were denied permission to use a tea brewed from plants unique to the Amazon Rainforest, because the tea contained a hallucinogen controlled under federal law. Church members drank the tea as part of a religious ritual. This Court ruled unanimously that because the government did not demonstrate a compelling interest in denying the church

[4] Amici do not concede the constitutionality of RFRA, noting that it grants special privileges to religion which violate the Establishment Clause. Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, I U. Pa. J. Const. L. 1, 19 (1998-99). Without conceding this, amici emphasize that RFRA should not be extended to legitimize further violations of the Constitution.

access to the plants, it must, under RFRA, accommodate the religious exercise of the church. *Id.* at 439.

The fundamental difference between the exemption requested by the religious group in *O Centro* and that enjoined here lies in the impact on third parties. When the New Mexico church members were permitted an exemption from the Controlled Substances Act to drink hallucinogenic tea as part of a religious ceremony, no other party was harmed, or indeed impacted at all.[5] The government imposed the burden on the church and could remove it without impacting the rights of other people. Petitioner, on the other hand, now seeks to remove from its employees a right guaranteed to them by the ACA – the right to receive contraceptive coverage with zero copayments. 42 U.S.C. § 300gg-13(a).[6] RFRA permits the government to remove a burden on religious practices created by government action. Shifting a burden from petitioner to third parties, in order to accommodate petitioner's religious beliefs, however, represents a preference that is being granted to those religious beliefs over and above the beliefs, or lack thereof, of the employees. Such a preference strikes at the very heart of the Establishment Clause. *Epperson*, 393 U.S. at 104.

When this Court has considered religious exemption requests which impose a burden on a third party, it has rejected those requests. A Connecticut law requir-

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[5] As noted, amici maintain all such religious exemptions are a violation of the Establishment Clause. *Supra*, n.4. Where exemptions are granted, however, a plain reading of the Constitution mandates that they do not impose harmful burdens on third parties.

[6] Petitioner here seeks not only to refuse to pay for insurance coverage for contraceptives, but also to prevent insurance companies from providing it free of charge.

ing businesses to honor requests from their employees not to work on their Sabbath day was struck down as violative of the Establishment Clause because it "took no account of the convenience or interests of the employer *or those of other employees who do not observe a Sabbath*." *Est. of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985) (emphasis added). Similarly a Sabbatarian airline employee was not entitled to a change in the shift structure at his place of employment to accommodate his religious preference for not working on Saturdays, as granting that request would "deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath." *T.W.A. v. Hardison*, 432 U.S. 63, 81 (1977). And Amish employers were required to continue to pay social security contributions for their employees despite their sincere religious objections because granting such an exemption would harm the interests of the employees who should be free to make their own choices as to the moral implications of involvement in a government run retirement savings program. *United States v. Lee*, 455 U.S. 252, 261 (1982) (An exemption would "operate[] to impose the employer's religious faith on the employees."). Most recently, an exemption allowing a beard for religious purposes was granted to a prisoner where "accommodating petitioner's religious beliefs . . . would not detrimentally affect others." *Holt v. Hobbs*, 574 U.S. 352, 370 (2015) (Ginsburg, J., concurring).

This Court's decision in *Hobby Lobby*, 573 U.S. at 682, that the contraceptive mandate could not be imposed on for-profit, closely held corporations that expressed a religious view that conflicted with providing certain types of contraception, does not change this analysis. *Hobby Lobby* does not imply any retreat from this Court's longstanding refusal to grant religious

exemptions where there will be a burden shifted onto a third party. Key to the willingness of this Court to grant Hobby Lobby its requested exemption was the existence of the very accommodation for non-profits that this petitioner now deems unacceptable. *Id.* at 692 (Kennedy, J. concurring) ("[T]he Government has not met its burden of showing that it cannot accommodate the plaintiffs' similar religious objections under this established framework."). By allowing for-profit religiously owned corporations to access the same exemption that non-profit religious corporations could access, the burden would not be placed on the third party employees, who would still receive their coverage. Petitioner, here, however, demands a complete and total exemption that will create obstacles to its employees' ACA rights, without any consideration of whether those employees will continue to receive the promised benefit and the degree of increased burden they will suffer seeking to obtain it.[7]

The enjoined exemption therefore replaces any alleged burden on petitioner with a significant burden on a third party: petitioner's employees. Imposing such a burden violates the Establishment Clause, and

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[7] The baseline from which we must consider whether a burden has been imposed on a third party is the situation that would exist absent the exemption. *Locke v. Davey*, 540 U.S. 712, 726 (2004) (Scalia, J., dissenting) ("[W]hen the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured.") Therefore the benefit, the availability of contraception without copayment, is considered the baseline for employees. Granting this exemption, and thus removing the benefit from those employees, cannot be seen in any way other than imposing a burden on those third parties in order to accommodate the religion of petitioner. *Infra* § II.

cannot therefore be required by or permitted under RFRA.

II. PETITIONER CANNOT DEMONSTRATE A SUBSTANTIAL BURDEN ON ITS RELIGIOUS BELIEFS.

A. Any cognizable burden was relieved by the prior accommodation.

For the purposes of this brief, amici assume that the contraceptive mandate does impose a substantial burden on petitioner's religious beliefs. What petitioner fails to acknowledge, however, is that the government had already met any requirement it might have under RFRA to ease that burden, by providing religious objectors with an accommodation which permitted them to opt out from covering contraception. Religious organizations cannot demonstrate that a requirement that they merely give notice of their religious objection to the contraception coverage requirement represents a *substantial* burden on their religious exercise. Absent a demonstration of a substantial burden, no exemption under RFRA is allowed. In the final analysis, petitioner is not claiming there remains a burden on its religious beliefs. It claims that it dislikes the method the government provided for avoiding that burden. RFRA guarantees a religious plaintiff the right to an exemption in certain limited situations. It does not, however, guarantee to a religious plaintiff the right to dictate to the government the method for accepting that exemption.

As part of regulations established by the Department of Health and Human Services ("HHS") under the ACA, employer group health plans are required to provide "preventive care and screenings" for women per the Women's Health Amendment and "shall not

impose any cost sharing requirements." 42 U.S.C. § 300gg-13(a)(4). This preventive care requires employers to provide coverage for all forms of contraceptive methods approved by the Food and Drug Administration. 26 C.F.R. § 54.9815-2713; 45 C.F.R. § 147.130(a)(iv).

But HHS also provided a religious accommodation to the contraception coverage requirement that is available to religious entities and to for-profit closely held corporations with a religious objection to the mandate. 45 C.F.R. § 147.131*ff*; *Hobby Lobby*, 573 U.S. at 682. Under that accommodation, all that was required was to affirm that such organizations were eligible, via a form to their insurer or third-party administrator (TPA) or a letter to the HHS Secretary, including a list of which forms of contraception the employer objected to providing. The notice was required to specify the name and type of the plan, and the contact information of the plan issuer or TPA. There were no further requirements of the employer.

RFRA prohibits the federal government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a), (b). As this Court has determined that the contraceptive mandate imposes a substantial burden on religious exercise, within the meaning of RFRA, and ruled against the government, *Hobby Lobby*, 573 U.S. at 682, it is necessary to see what solution has been held to satisfy the requirements of RFRA.

Courts have been satisfied when the government has provided a successful plaintiff with an accommodation to the objected to aspects of the law. *E.g.* 21 CFR 1307.03 (after *O Centro*, 546 U.S. 418, government created accommodation allowing a person to file for an exception to the Controlled Substances Act); Wis. Stat. § 118.15 (after *Wisconsin v. Yoder*, 406 U.S. 205 (1972), accommodation allowing parents to remove students from school before age 18 for religious reasons upon notice to school officials.).

In the present case, the government had *already* provided an accommodation for those non-profit employers who object on religious grounds to the contraceptive coverage requirement. *Administration issues final rules on coverage of certain recommended preventive services without cost sharing*, HHS (July 10, 2015) *available at* https://wayback.archive-it.org/3926/20170127190158/https://www.hhs.gov/about/news/2015/07/10/administration-issues-final-rules-on-coverage-of-certain-recommended-preventive-services-without-cost-sharing.html (last visited Apr. 1, 2020). These employers may opt out of the requirement, and, by self-certifying their religious objection, they are guaranteed to be granted their accommodation. This is a much less rigorous process than applying for a religious exemption for hoasca tea under the statutorily imposed process of the Controlled Substances Act where there is no guarantee that the accommodation would be granted to all applicants. 21 C.F.R. § 1307.03.

HHS provided a regulatory accommodation allowing a religious employer, who objected to paying or participating in the ACA's contraceptive coverage requirement, to avoid doing so. Petitioner, though, demands an exemption *from the exemption*, claiming

that filing the paperwork to indicate it does not wish to participate in the contraceptive mandate for religious reasons, itself constitutes an unacceptable religious burden. Such an exemption is not only not required under RFRA, it is constitutionally impermissible.

B. A requirement to inform the government that one has a religious objection to a regulation is not a "substantial" burden.

RFRA does not outlaw any and all burdens on religious freedom which cannot be justified by a compelling government interest implemented in the least restrictive manner possible. It outlaws *substantial* burdens on religious freedom which cannot be sufficiently justified. Congress included the word "substantial," and we must assume that when Congress writes a statute, it does so giving deliberate meaning to the words it uses. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("[W]e have considered ourselves bound to 'assume that the legislative purpose is expressed by the ordinary meaning of the words used.'") (citations omitted). "In other words, if the law's requirements do not amount to a substantial burden under RFRA, that is the end of the matter." *Priests for Life v. U.S. HHS*, 772 F.3rd 229, 244 (D.C. Cir. 2014), *vacated by, remanded by Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

In *Hobby Lobby*, 573 U.S. at 707, this Court was faced with determining the meaning of the word "person" in RFRA. It noted that the first step to be taken was to look to the Dictionary Act, "which we must consult '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise." *Id*. (citing 1 U.S.C. § 1). Nothing in that Act, however,

provides a definition of the word "substantial." Courts have, however, interpreted the word frequently and its meaning is apparent. Turning to dictionary definitions, we see a common thread. Substantial means "[r]eal and not imaginary; having actual, not fictitious existence. . . . Important, essential, and material; of real worth and importance." *Substantial*, *Black's Law Dictionary* (11th Ed. 2019). It is that which is "[o]f considerable importance, size, or worth." *New Oxford Am. Dictionary* (3d Ed., Oxford U. Press 2010).

A substantial burden, then, stands in stark comparison to a *de minimis* one. It is a burden which carries a certain degree of weight or impact, one that is considered real and significant, as opposed to minor and trivial. Where this Court has been required to determine the meaning of *substantial* in similar situations, it is this element of importance which is emphasized. For example, when determining the meaning of "substantial evidence," this Court found that it is evidence which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). To be substantial, evidence must be enough so as to convince a reasonable person of the conclusion it is put forward to support. *Edison Co. v. Labor Bd.*, 305 U.S. 197, 229 (1938).

Petitioner relies on a fundamental misunderstanding of RFRA. It claims that the court system has no place in determining whether a burden on religious practice is substantial. While it is true that courts cannot determine religious doctrine, and must therefore accept a sincere claim of a burden on religious belief, the word "substantial" has a meaning, and it is

the role of the court system to determine if a particular burden reaches that level.

In the present case, petitioner has stated that providing the government notice of its religious objection is in and of itself a substantial burden on its religious exercise. Pet.'s Br. *Little Sisters*, 36-38. But providing written notice of an objection is merely "the written equivalent of raising a hand in response to the government's query as to which religious organizations want to opt out." *Priests for Life*, 772 F.3d at 235. This Court can accept that the religious employer believes that providing this notice is against its religious beliefs without finding that doing so is in fact a substantial burden on its religious exercise.

While the courts may allow religious organizations to determine for themselves if an activity or prohibition of an activity constitutes a burden for the purposes of that religion, the courts maintain a responsibility to determine if the burden proclaimed by the religious groups rises to the level of "substantial," triggering protection under RFRA.[8] With regard to the burden imposed by signing a piece of paper to indicate that a religious non-profit is seeking an exemption

[8] Indeed, petitioner's argument, by rendering the word "substantial" superfluous, would reduce any initial decision to be made under RFRA to a determination as to whether a belief is sincere. This is a highly subjective exercise and one which, outside of the rights of prisoners to religious exercise, both the courts and the government are wary of wading into. All that would be left is a determination of whether the government had a compelling interest which had been implemented in the least restrictive manner possible. Congress determined that plaintiffs should have to show a substantial burden before their claim was cognizable under RFRA. Petitioner should not be permitted to rewrite an Act of Congress–that is the responsibility of the elected branch of government.

from the requirements of the contraceptive mandate of the ACA, circuit courts found, rightly, that any such complicity with a future alleged sin undertaken by a third party after numerous intervening steps was too attenuated to rise to the level of being a substantial burden under RFRA. *Geneva College v. Sec. U.S. HHS*, 778 F.3rd 422, 442 (3d Cir. 2015), *vacated by, remanded by Zubik*, 136 S. Ct. 1557 ("[W]here the actual provision of contraceptive coverage is by a third party, the burden is not merely attenuated at the outset but totally disconnected from the appellees."); *University of Notre Dame v. Sebelius*, 743 F.3d 547, 557 (7th Cir. 2015), *vacated by, remanded by University of Notre Dame v. Burwell*, 575 U.S. 909 (2015) ("The accommodation in this case consists in the organization's (that is, Notre Dame's) washing its hands of any involvement in contraceptive coverage, and the insurer and third-party administrator taking up the slack under compulsion of federal law."). Indeed, were such an extended and tortured view of causation by distant complicity to be accepted by this Court, it would lead to illogical and unacceptable consequences. *Infra* § IV.

C. Compliance penalties are not a "substantial burden."

Petitioner claims that refusing to provide the required notice of its religious objection would lead to the imposition of fines which constitute a substantial burden. But the presence of a government sanction of some sort cannot in and of itself make compliance with the law a substantial burden. If all it takes for a burden on religion to be substantial is the claim of the religious group allegedly impacted, and a penalty for non-compliance, then the word "substantial" in RFRA loses all meaning.

All government requirements to act, or to refrain from acting, carry some sort of penalty for noncompliance. Any refusal to obey the requirements of government is punishable. If a government requirement is not accompanied by such threat of penalty, that is, if a person is simply told to take an action, or refrain from an action, but is not penalized for ignoring the government mandate, then there is *no* burden on the individual, as refusal to participate would have no cost. Without a cost for refusal, there simply is no burden, substantial or otherwise, on religion.

Moreover, petitioner's argument fails because of one simple, yet unavoidable, fact – the government provided an accommodation, and the accommodation provided a way for the petitioner to avoid the involvement and the penalties it finds objectionable. All petitioner needed to do was let the government know it wished to avail itself of the accommodation.

It has never been held that a religious group is permitted to simply ignore a statute. A conscientious objector cannot simply refuse to turn up when drafted, but must instead file a claim of religious or philosophical objection to combat and may still be required to serve in a noncombatant role. 50 U.S.C. § 3806(j). The religious adherents in *O Centro*, 546 U.S. 418, who continue to drink hoasca tea ceremonially, as this Court ruled was their constitutional right, must still file for an exemption under the federal Controlled Substances Act or face substantial criminal penalties of up to 20 years in prison or $5 million for a first trafficking offense. 21 C.F.R. § 1308.11. Likewise, looking back to *Yoder*, 406 U.S. 205, parents who wish to remove their children from school on religious grounds are still required by law to inform school officials of

this fact or may be charged with a misdemeanor. Wis. Stat. § 118.15.

The government is not barred by RFRA from creating a rational, efficient mechanism for implementing a religious exemption, and requiring those seeking the exemption to notify the government of their desire is indisputably rational and efficient. Petitioner was granted a method of exempting itself from a requirement it claims burdens its religious beliefs. RFRA does not under any reasonable interpretation require that petitioner be additionally given the right to refuse to inform the government of its desire to be exempted.

The nature of the exemption to the draft offered to conscientious objectors is instructive. In order to qualify for status as a conscientious objector, whether available for non-combatant service only (Class 1-A-O) or not available for any form of military service, and therefore only available for civilian alternative service (Class 1-O), a registrant must submit a claim to the government. This claim "must be made by the registrant in writing" and is only cognizable "after the registrant has received an order to report for induction." 32 C.F.R. § 1636.2. The individual then appears before a board which considers the request, looking at the documentation submitted, the oral statements of the claimant, any oral statements from witnesses presented, and the demeanor of the claimant. 32 C.F.R. § 1636.8. The board then determines which draft classification to give to the claimant. In order to be exempted, claimants are required to demonstrate their beliefs and show sincerity. 32 C.F.R. § 1636.6. Were petitioner to be successful in achieving its requested exemption, this entire structure of seeking conscientious objector status would need to be altered. Petitioner's requested relief would not only permit

draftees to prevent the military's replacing them if exempted, but also allow them to claim that even filing a written claim or explaining their grounds for objection to the draft board itself would trigger a future sin and thus was a burden on their religious practices. *Infra* § III.

III. PETITIONER'S CASE DOES NOT CONCERN A BURDEN ON RELIGIOUS LIBERTY, BUT RATHER AN ATTEMPT TO LEGISLATE THROUGH THE COURTS.

As shown, *supra*, petitioner has failed to demonstrate a substantial burden on its religious beliefs. Indeed, this case represents a concerted effort, including petitioner, to rewrite RFRA itself. If successful, Congressional intent in passing the law will be overridden. Rather than having to show a substantial burden, any plaintiff claiming religious harm will simply be able to state that a burden is substantial, and this view will be unchallengeable in the courts, however attenuated and unconnected the government required action and the alleged sin may be. Petitioner has made clear in its briefing that it believes that courts have no place in determining whether a burden is substantial. Pet.'s Br. *Little Sisters*, 38-39. By so doing, petitioner seeks to eliminate the word *substantial* from the text of RFRA, acting as if Congress never included it in the first place.

This case does not involve any real, substantial burden on religious beliefs. Instead, this case represents no more than a complaint about government policy. Simply put, petitioner does not want its employees to participate in a scheme established by the government for the provision of certain types of health care services. Opposing the use of contraception is petitioner's fundamental right under the First

Amendment. However, seeking to prevent insurance companies from providing such services to its employees on asserted religious grounds interferes with the rights of those employees. This Court and lower courts have repeatedly concluded that such claims founded on dislike for a policy have no merit. Religious disapproval of government policy is entitled to no more deference than political disapproval.

Frequently, individuals and employers have been expected to put their own personal disapproval of a policy aside, even when based on sincerely held religious convictions, and participate in a scheme of which they disapprove, when their participation is sufficiently remote from the outcome. While a conscientious objector may not be compelled to serve in the military, for example, a similarly sought exemption from paying taxes to support the military has been definitively denied, even to Quakers whose sincere religious belief in pacifism is unquestioned. *Adams v. Commr.*, 170 F. 3d 173, 180-82 (3d Cir. 1999), *cert denied* 528 U.S. 1117 (2000) (despite feasibility of exempting individuals from tax payments, sincere beliefs do not exempt an individual from participation in societal responsibilities such as the payment of tax)

Participation in a government scheme to which a plaintiff had sincerely held religious opposition was also required by this Court in *Bowen v. Roy*, 476 U.S. 693, 712 (1986). Native American parents claimed that obtaining a social security number for their daughter violated their religion, and therefore they should be exempted from the requirement to produce such a number to qualify for welfare benefits. *Id.* at 695. Chief Justice Burger was dismissive of the idea that actions undertaken by the government, even when attached to the plaintiff's name in this fashion,

could create a religious burden. *Id.* at 700. ("Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets.") The use of the number by the government "d[id] not itself in any degree impair Roy's freedom to believe, express, and exercise his religion." *Id.*

This Court has been clear that simply because a religious group claims substantial harm, "not all burdens on religion are unconstitutional." *Lee*, 455 U.S. at 257. In *Lee*, this Court unqualifiedly enforced the rule that religious accommodations sought by an employer, where granting the exemption to the employer would impose burdens on third parties, would not be permitted. This Court refused to grant an Amish employer an exemption permitting him to avoid paying social security contributions for his employees, which would "operate[] to impose the employer's religious faith on the employees." *Id.* at 261. Importantly, this Court acknowledged that Congress had exempted self-employed Amish from paying social security contributions for themselves, but refused to extend that exemption to contributions for employees, who might not share the same religious convictions. *Id.*

These cases reveal the weakness of petitioner's argument. In *Lee*, this Court made clear that the existence of one or more exemptions does not require further exemptions, even when the religious belief involved is similar. That self-employed Amish were exempted from social security payments did not allow Amish employers to refuse to pay contributions for their employees. This Court recognized that the government was entitled to draw a line and limit such

exemptions. *Id.* at 260 ("Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it is a violation of their faith to participate in the social security system."). In this case, as in *Lee*, the government had already provided generous exemptions for churches and an accommodation for religious nonprofits. It was not required to tailor the exemption process to suit every individual or group claiming an exemption. Nor is the government permitted to broaden the scope of the exemption such that the accommodation has an adverse effect on the rights of third parties.

Bowen, 476 U.S. 693, demonstrates that petitioner here simply does not have a sufficient interest at stake in how the government chooses to administer its program. The plaintiff sincerely believed that giving his daughter a social security number harmed her spirit, much as petitioner believes that providing the government with a form indicating its unwillingness to participate in a program that provides contraception involves it in sin. But, as the Seventh Circuit has noted, this belief did not entitle Roy to an accommodation that removed the burden of his providing that social security number on an application for welfare. *University of Notre Dame v. Burwell*, 786 F. 3d 606, 618 (7th Cir. 2015), *vacated by, remanded by University of Notre Dame v. Burwell*, 136 S. Ct. 2007 (2016). Like Roy's claim, petitioner's objection is, in the final analysis, a complaint about how the government administers a program. Just like Roy's desire to stop the government from issuing a social security number for his daughter, petitioner's objection to complying with the notice requirement, in order to exempt itself from providing contraceptive coverage, is no more the basis for an exemption than "a sincere religious objection to

the color of the Government's filing cabinets" in which such a form would be stored. *Bowen*, 476 U.S. at 700.

Petitioner's claims that the court system is powerless to even consider the nature of the chain-of-events objection, claimed by a religious group seeking an exemption, lead inevitably to illogical and unacceptable results. The United States has a long history of granting exemptions to conscientious objectors who oppose taking part in military action.[9] However, were petitioner's theory of causation to become accepted, pacifists would have the right not only to insist that they themselves not be sent into combat, but also that the military not be permitted to draft someone in their place. *University of Notre Dame*, 743 F. 3d at 556. It is inconceivable that such a theory of causation is what the drafters of RFRA had in mind. *Id.* at 557. ("What makes this case and others like it paradoxical and virtually unprecedented is that the beneficiaries of the religious exemption are claiming that the exemption process itself imposes a substantial burden on their religious faiths."). It would allow individual conscientious objectors to not only remove themselves from selection for the military, but also to permanently deprive the military of a replacement out of a belief that their refusal triggered someone else to be inducted, and that would be equally as sinful. This would grant religious individuals and groups not only the power to seek exemptions for themselves, but also the power to

[9] For many years, these exemptions were available only to those whose objections to war were based on religious beliefs, as opposed to other, philosophical objections to armed conflict. This Court in *Welsh v. United States*, 398 U.S. 333, 343 (1970) recognized this was a violation of the constitutional rights of non-believers.

legislate unconstitutional government actions from the pulpit.

The breadth of perverse results of such causation is unbounded. In *Thomas v. Review Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 709 (1981), a Jehovah's Witness was found to have been wrongly denied unemployment benefits after quitting his job in a roll foundry when he was transferred to a department where he would be producing turrets for tanks for the military, a use he found incompatible with his religious beliefs. Petitioner here would have us extend Thomas' exemption further. Not content with a right for Thomas to seek a transfer to another position that did not challenge his religious beliefs, petitioner's arguments would grant him the right to ensure that no other employee could take over the position he had left, and the spot on the production line for tank turrets would be permanently empty, in order to spare Thomas the religious burden of having triggered someone else's now making tank turrets, *however willing that next person might be*.

While a Muslim employee may have a religious right to be transferred from a job that involves the sale of alcohol, it is implausible to suggest that the employee possesses an equal right to seek to have that position remain unfilled on the ground that some other cashier scanning a bottle of Cabernet Sauvignon is only in that position because the Muslim employee refused to fill it. Jewish employers may choose not to purchase pork products, and it would violate their religious rights to require them to do so. Yet no court could hold that such employers have the right to insist that their employees refrain from using what these employers pay them to purchase bacon. And, as noted *supra*, the Amish who were self-employed were permitted to refrain from

paying their own social security contributions, as such contributions would potentially undermine the Amish religious principle of self-reliance. This did not, however, allow them to avoid such payments for their employees. *Lee*, 455 U.S. at 261. That employees, who did not share their employers' beliefs, might possibly be triggered to move away from self-reliance was not held to be a burden sufficient to require an exemption.

This then is the logical end of petitioner's theory of causation. If signing a piece of paper indicating a religious-based opposition to providing contraceptive health services, and thereby taking advantage of an exemption to a requirement to provide such services, is in and of itself a substantial burden on religion through an attenuated "trigger" theory, then so would countless other actions become substantial burdens. Employers would find themselves unable to replace a worker they reassigned to accommodate that individual's religious belief system. The military would find itself unable to fill its ranks in times of conscription as religious objectors could not be replaced, even by individuals without a religious objection to being drafted. A juror excused from duty on a capital case because of a religious opposition to capital punishment could not be replaced with a substitute, as the presence of a substitute juror's voting in favor of the death penalty was in some way triggered by the initial person's refusal to serve on the panel. Such an outcome was never the goal of RFRA, and would be unconstitutional, even if it were the intention.

IV. THE GOVERNMENT HAS A COMPELLING INTEREST IN ENSURING THE WIDESPREAD AVAILABILITY OF CONTRACEPTIVE SERVICES TO WOMEN.

There are enormous benefits that accrue to society from the widespread availability of no-cost contraception to women in society. There can be no doubt regarding either the central role that preventive and reproductive health care plays in enabling women to participate fully in society, or the cost of the provision of such care if the individual has to pay for it. Under the ACA, millions of women were, for the first time, given a legal guarantee that their health insurance would cover the cost of all FDA approved contraceptive services. Petitioner seeks to remove that legislative right not only from their own employees, but also, by extension, from millions of other women who are employed by corporations which may seek such a religious-based exemption.

The cost of contraceptive care is far from *de minimis*. Studies by Planned Parenthood have shown that the cost of an intrauterine device ("IUD"), one of the most reliable forms of contraception available, including the fees for the required medical examinations, insertion, and ongoing follow up visits, may reach as high as $1,300.[10] Oral contraceptives, the most commonly covered form of contraception used under the mandate, are less expensive up front, but require an ongoing payment. These drugs cost, on an annualized basis, between $180 and $960, with the cheaper, generic contraceptives often being reported as causing un-

[10] Planned Parenthood, *IUD*, https://www.plannedparenthood.org/learn/birth-control/iud (last visited Apr. 1, 2020)

pleasant side effects.[11] Emergency contraception, such as the "Morning After Pill," ranges in cost from $30 to $65 per dosage.[12]

The direct costs of purchasing contraception fall largely upon women. Women of child-bearing age pay 68% more than men of the same age in out-of-pocket medical costs. *Hobby Lobby*, 573 U.S. at 742 (Ginsburg, J., dissenting). A significant part of this cost can be attributed to the cost of contraception. Removal of this disparity between health care costs for men and women is, in and of itself, a compelling interest for the government. The government interest, however, goes beyond the desire to seek greater equality for women. The widespread availability of contraception without copayments benefits the government and society by reducing the numbers of unplanned and unwanted pregnancies. This, in turn, reduces the burden on medical facilities, reduces the burden on schools and social services, and even reduces the number of abortions performed.[13] Studies

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[11] Frederick M. Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. Rev. 343, 376 (2014) (noting also that the lower cost contraceptive pills were less effective in preventing conception).

[12] Planned Parenthood, *Emergency Contraception (Morning-After Pill)*, https://www.plannedparenthood.org/get-care/our-services/emergency-contraceptive (last visited Apr. 1, 2020); purchasing one brand of Emergency Contraception, Plan B, manufactured by Teva Pharmaceuticals, over the counter costs around $50 per use. *E.g.* CVS, *Plan D One-Step Emergency Contraception Tablet*, https://www.cvs.com/shop/plan-b-one-step-emergency-contraceptive-tablet-prodid-876669 (last visited Apr. 1, 2020)

[13] While amici fully defend a woman's right to a legal and safe abortion, they also believe that the availability of low and no cost contraception, combined with effective education as to its use,

have indicated that each dollar spent on helping women avoid unwanted pregnancy reduces Medicaid expenditure by $7.09.[14] These savings, combined with the increased ability of women to control their own bodies and make their own reproductive choices, enabling them to fully participate in society on an equal basis, represent a compelling interest for the government in ensuring the widespread availability of contraception without copayments.

Petitioner argues repeatedly that the existence of exemptions for some groups indicates that the government interest cannot be considered compelling. This, however, misrepresents the governmental and societal interest at stake in the contraceptive mandate. It is fallacious to suggest that unless the mandate can cover everyone, the government has no interest in enforcing it. The compelling interest here is not necessarily that *all* women in the United States should have access to contraception without copayments, but that *as many women as possible* should have such access. Government programs are not all or nothing efforts. The governmental interest in preventing malnutrition among poor children through the SNAP program is not diminished when the program does not reach every child in need. Furthermore, if petitioner's logic were followed through to its end, then no exemption, religious or otherwise, could be offered to any group, because offering it would immediately indicate that there was no compelling interest behind

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would prevent many unwanted or high risk pregnancies, thus reducing the need for abortions.

[14] J.J. Frost, *et al.*, *Return on Investment: A Fuller Assessment of the Benefits and Cost Saving of the US Publicly Funded Family Planning Program*, 92 Milibank Q. 667, 668 (2014).

the law in the first place.[15] The government, as is its right, has drawn the line for exemptions. This in no way diminishes the compelling nature of the interests at stake.

CONCLUSION

For the above reasons, this Court should affirm the judgment of the U.S Court of Appeals for the Third Circuit.

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[15] While amici maintain religious exemptions are unconstitutional, *supra* n.4, their existence does not diminish the compelling nature of the government interest.