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Conscience Exemption in the Supreme Court, Past and Present

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PUBLICATIONS

"Historical and Structural Limitations on Congressional Abilities to Make Foreign Policy," 50 Boston University Law Review, 51 (1970)

"Rebutting Presumptions: Order Out of Chaos," 58 Boston University Law Review 527 (1978)

The conscience exemption in the Supreme court

- Many religious individuals feel profoundly trapped between the demands of their faith and the laws of the State.
- Claims for religion based exemptions do not fit comfortably into American constitutional jurisprudence.
- The free exercise clause has allowed some exemptions under a balancing test derived from other First Amendment cases.

- Claims for religious based exemptions have been lodged against a variety of laws ranging from drivers license photograph requirement to tax laws, to narcotics statutes, to snake-handling prohibitions and bigamy proscriptions.

- The first cases declared that only religious beliefs, not religiously motivated actions were constitutionally protected *Reynolds v. US* 98 US 145, 164 (1878).
- In 1944, the Court in *US v. Ballard 322 US 78 (1944)* held that courts are not permitted to examine religious beliefs, regardless of how incredible they might be, if sincerely held.

- In 1963 in *Sherbert v Verner,* 374 US 398 (1963) the Court held that only a compelling state interest could justify imposing a burden on the exercise of religion and the state bore the burden of proof on this issue.
- In 1972, in Wisconsin v. Yoder, 406 US 205 (1972), the court concluded that Old Order Amish students could be excused from compulsory education above the eighth grade

- This balancing test has never been consistently applied.
- However, a rough test has emerged.
- A court first examines the sincerity of the religious claim being advanced and the degree to which the regulation being challenged interferes with the religious practice or belief.
- It will then weigh the importance of the secular value underlying the rule, the impact of an exemption on the regulatory scheme and the availability of a less restrictive alternative.

- Questions of sincerity have been brought before the courts most recently in three areas, conscientious objectors during the Vietnam War era,; vaccine exemptions which has taken on a new resilience in the age of COVID 19 and the religious issues of today, gay marriage, contraception and abortion.

- In 1993, the Religious Freedom Restoration Act (“RFRA”)was adopted.
- Generally speaking it protects the right to believe and the right to worship and also recognized the right to be protected from performing or abstaining from performing certain acts in accordance with one’s beliefs.
- RFRA does not change the fundamental concept that it is up to the courts to balance the claims of the petitioner and the state in determining whether an exemption is appropriate.

- Over the last ten years, these cases have bene driven by those with a particular agenda, one which I have characterized as consistent with the political agenda of the conservative right in the US.
- The first case was *Burwell v. Hobby Lobby,* 134 S.Ct. 2751 (2014) which extended the protections of RFRA to three closely held corporations which believed that the contraception mandate substantially burdened their religious exercise.

- Religious sincerity has been questioned before.
- In conscientious objector cases the courts have question the objector's sincerity.
- In examining religious objections to drug laws, the courts have been generally skeptical of churches who rely on drugs for the "religious" experience.

- Claims of sincere religious beliefs are matters of fact, but trial judges have been reluctant to evaluate the sincerity of belief especially when the objector is not a member of a church or other religious institution or who doesn't meet more objective standards of their religious sincerity.
- The Court did not address these issues in *Hobby* Lobby.

- In *Masterpiece Cakeshop Ltd and Jack Philips v. Colorado Civil Rights Commission and Craig and Mullins,* 138 S.Ct. 1719 (2018), the Court had the opportunity to revisit this issue, but it ducked the chance.
- In October 2017, attorney general Sessions issued a memorandum of Federal law protections for Religious Liberty. It is the strongest statement of its kind.

- It reads “Because the government cannot second-guess the reasonableness of a religious belief or the adherent’’ assessment of the religious connection between the government mandate and the underlying religious belief, the substantial burden test focuses on the extent of governmental compulsion involved.
- In general, a government action that bans an aspect of an adherent’s religious observance or practice . . . Will qualify as a substantial burden on religion.”
- This burden shifting has been tested in a case decided this term.

- On July 8, The Supreme Court decided Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania. The Court majrity avoided deciding the question of sincere religious belief.
- The Court's majority opinion written by Justice Thomas focused solely on the issue of whether the regulation was properly issued under the Administrative Procedure Act. Justice Alito filed a concurring opinion as did Justice Kagan. Justice Ginsberg dissented.
- Justice Alito's concurring opinion focused directly on the sincere religious belief point as did Justice Ginsberg.

- Justice Thomas wrote that it is clear from the face of the statute that the contraceptive mandate is capable of violating RFRA.
- The ACA does not explicitly exempt RFRA, and the regulations implementing the contraceptive mandate qualify as “Federal law” or “the implementation of [Federal] law” under RFRA.
- Additionally, this Court stated in *Hobby Lobby* that the mandate violated RFRA as applied to entities with complicity-based objections.
- Thus, he held that the Departments were free to consider RFRA going forward and the Departments’ failure to discuss RFRA at all when formulating their solution would make them susceptible to claims that the rules were arbitrary and capricious for failing to consider an important aspect of the problem.

- REFRA compels an exemption for the Little Sisters Justice Alito wrote. The Little Sisters objected to engaging in any conduct that had the effect of making contraceptives available to their employees.
- Justice Alito went on, if an employer has a religious objection to the use of a covered contraceptive, and if the employer has a sincere religious belief (which he neither explains or defines) that compliance with the mandate makes it complicit in that conduct, then RFRA requires that the belief be honored.
- He noted that the objection raised by the employers in Hobby Lobby "implicate[d] a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Hobby Lobby*, at 724.

- The Court noted that different individuals have different beliefs on this question, but we were clear, he wrote, that “federal courts have no business addressing . . . whether the religious belief asserted in a RFRA case is reasonable.” Ibid.
- Instead, the “function” of a court is “‘narrow’”: “‘to determine’ whether the line drawn reflects ‘an honest conviction.’” Id., at 725 (quoting Thomas v. Review Bd. of Ind. Employment Security Div., 450 U. S. 707, 716 (1981)).

- Applying this holding to the Little Sisters yields an obvious answer, he concluded. It is undisputed that the Little Sisters have a sincere religious objection to the use of contraceptives and that they also have a sincere religious belief that utilizing the accommodation would make them complicit in this conduct.
- As in *Hobby Lobby*, "it is not for us to say that their religious beliefs are mistaken or insubstantial." 573 U. S., at 725.
- My comment is if not the courts, then who if anyone can make this determination.

- Justice Kagan joined by Justice Breyer acknowledged that the Departments had the power to make the regulation, but they would have remanded the case as there was serious questions as to the overbreadth of the regulation as well as the power delegated to the agencies by Congress to draft such a sweeping exception to the contraceptive mandate.

- Justice Ginsberg dissented.
- On the sincere religious belief point, she argued that by adopting the Little Sisters absolutist positon regarding providing contraceptive coverage, the Court has tilted the balance in a way not contemplated by previous decisions or the terms of the Affordable Care Act.
- She writes that rather foster a compromise between the religious position of the employer and the needs of the employee for contraceptive care, the employee must accept the position of her employer. This she finds unacceptable and unconstitutional.

MEMORANDUM FOR ALL EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: THE ATTORNEY GENERAL

SUBJECT: Federal Law Protections for Religious Liberty

The President has instructed me to issue guidance interpreting religious liberty protections in federal law, as appropriate. Exec. Order No. 13798 § 4, 82 Fed. Reg. 21675 (May 4, 2017). Consistent with that instruction, I am issuing this memorandum and appendix to guide all administrative agencies and executive departments in the execution of federal law.

Principles of Religious Liberty

Religious liberty is a foundational principle of enduring importance in America, enshrined in our Constitution and other sources of federal law. As James Madison explained in his Memorial and Remonstrance Against Religious Assessments, the free exercise of religion "is in its nature an unalienable right" because the duty owed to one's Creator "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[1] Religious liberty is not merely a right to personal religious beliefs or even to worship in a sacred place. It also encompasses religious observance and practice. Except in the narrowest circumstances, no one should be forced to choose between living out his or her faith and complying with the law. Therefore, to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity, including employment, contracting, and programming. The following twenty principles should guide administrative agencies and executive departments in carrying out this task. These principles should be understood and interpreted in light of the legal analysis set forth in the appendix to this memorandum.

1. The freedom of religion is a fundamental right of paramount importance, expressly protected by federal law.

Religious liberty is enshrined in the text of our Constitution and in numerous federal statutes. It encompasses the right of all Americans to exercise their religion freely, without being coerced to join an established church or to satisfy a religious test as a qualification for public office. It also encompasses the right of all Americans to express their religious beliefs, subject to the same narrow limits that apply to all forms of speech. In the United States, the free exercise of religion is not a mere policy preference to be traded against other policy preferences. It is a fundamental right.

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[1] James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), *in* 5 THE FOUNDERS' CONSTITUTION 82 (Philip B. Kurland & Ralph Lerner eds., 1987).

2. The free exercise of religion includes the right to *act* or *abstain from action* in accordance with one's religious beliefs.

The Free Exercise Clause protects not just the right to believe or the right to worship; it protects the right to perform or abstain from performing certain physical acts in accordance with one's beliefs. Federal statutes, including the Religious Freedom Restoration Act of 1993 ("RFRA"), support that protection, broadly defining the exercise of religion to encompass all aspects of observance and practice, whether or not central to, or required by, a particular religious faith.

3. The freedom of religion extends to persons *and* organizations.

The Free Exercise Clause protects not just persons, but persons collectively exercising their religion through churches or other religious denominations, religious organizations, schools, private associations, and even businesses.

4. Americans do not give up their freedom of religion by participating in the marketplace, partaking of the public square, or interacting with government.

Constitutional protections for religious liberty are not conditioned upon the willingness of a religious person or organization to remain separate from civil society. Although the application of the relevant protections may differ in different contexts, individuals and organizations do not give up their religious-liberty protections by providing or receiving social services, education, or healthcare; by seeking to earn or earning a living; by employing others to do the same; by receiving government grants or contracts; or by otherwise interacting with federal, state, or local governments.

5. Government may not restrict acts or abstentions because of the beliefs they display.

To avoid the very sort of religious persecution and intolerance that led to the founding of the United States, the Free Exercise Clause of the Constitution protects against government actions that target religious conduct. Except in rare circumstances, government may not treat the same conduct as lawful when undertaken for secular reasons but unlawful when undertaken for religious reasons. For example, government may not attempt to target religious persons or conduct by allowing the distribution of political leaflets in a park but forbidding the distribution of religious leaflets in the same park.

6. Government may not target religious individuals or entities for special disabilities based on their religion.

Much as government may not restrict actions only because of religious belief, government may not target persons or individuals because of their religion. Government may not exclude religious organizations as such from secular aid programs, at least when the aid is not being used for explicitly religious activities such as worship or proselytization. For example, the Supreme Court has held that if government provides reimbursement for scrap tires to replace child playground surfaces, it may not deny participation in that program to religious schools. Nor may

government deny religious schools—including schools whose curricula and activities include religious elements—the right to participate in a voucher program, so long as the aid reaches the schools through independent decisions of parents.

7. Government may not target religious individuals or entities through discriminatory enforcement of neutral, generally applicable laws.

Although government generally may subject religious persons and organizations to neutral, generally applicable laws—e.g., across-the-board criminal prohibitions or certain time, place, and manner restrictions on speech—government may not apply such laws in a discriminatory way. For instance, the Internal Revenue Service may not enforce the Johnson Amendment—which prohibits 501(c)(3) non-profit organizations from intervening in a political campaign on behalf of a candidate—against a religious non-profit organization under circumstances in which it would not enforce the amendment against a secular non-profit organization. Likewise, the National Park Service may not require religious groups to obtain permits to hand out fliers in a park if it does not require similarly situated secular groups to do so, and no federal agency tasked with issuing permits for land use may deny a permit to an Islamic Center seeking to build a mosque when the agency has granted, or would grant, a permit to similarly situated secular organizations or religious groups.

8. Government may not officially favor or disfavor particular religious groups.

Together, the Free Exercise Clause and the Establishment Clause prohibit government from officially preferring one religious group to another. This principle of denominational neutrality means, for example, that government cannot selectively impose regulatory burdens on some denominations but not others. It likewise cannot favor some religious groups for participation in the Combined Federal Campaign over others based on the groups' religious beliefs.

9. Government may not interfere with the autonomy of a religious organization.

Together, the Free Exercise Clause and the Establishment Clause also restrict governmental interference in intra-denominational disputes about doctrine, discipline, or qualifications for ministry or membership. For example, government may not impose its nondiscrimination rules to require Catholic seminaries or Orthodox Jewish yeshivas to accept female priests or rabbis.

10. The Religious Freedom Restoration Act of 1993 prohibits the federal government from substantially burdening any aspect of religious observance or practice, unless imposition of that burden on a particular religious adherent satisfies strict scrutiny.

RFRA prohibits the federal government from substantially burdening a person's exercise of religion, unless the federal government demonstrates that application of such burden to the religious adherent is the least restrictive means of achieving a compelling governmental interest. RFRA applies to all actions by federal administrative agencies, including rulemaking, adjudication or other enforcement actions, and grant or contract distribution and administration.

11. RFRA's protection extends not just to individuals, but also to organizations, associations, and at least some for-profit corporations.

RFRA protects the exercise of religion by individuals and by corporations, companies, associations, firms, partnerships, societies, and joint stock companies. For example, the Supreme Court has held that Hobby Lobby, a closely held, for-profit corporation with more than 500 stores and 13,000 employees, is protected by RFRA.

12. RFRA does not permit the federal government to second-guess the reasonableness of a religious belief.

RFRA applies to all sincerely held religious beliefs, whether or not central to, or mandated by, a particular religious organization or tradition. Religious adherents will often be required to draw lines in the application of their religious beliefs, and government is not competent to assess the reasonableness of such lines drawn, nor would it be appropriate for government to do so. Thus, for example, a government agency may not second-guess the determination of a factory worker that, consistent with his religious precepts, he can work on a line producing steel that might someday make its way into armaments but cannot work on a line producing the armaments themselves. Nor may the Department of Health and Human Services second-guess the determination of a religious employer that providing contraceptive coverage to its employees would make the employer complicit in wrongdoing in violation of the organization's religious precepts.

13. A governmental action substantially burdens an exercise of religion under RFRA if it bans an aspect of an adherent's religious observance or practice, compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice.

Because the government cannot second-guess the reasonableness of a religious belief or the adherent's assessment of the religious connection between the government mandate and the underlying religious belief, the substantial burden test focuses on the extent of governmental compulsion involved. In general, a government action that bans an aspect of an adherent's religious observance or practice, compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice, will qualify as a substantial burden on the exercise of religion. For example, a Bureau of Prisons regulation that bans a devout Muslim from growing even a half-inch beard in accordance with his religious beliefs substantially burdens his religious practice. Likewise, a Department of Health and Human Services regulation requiring employers to provide insurance coverage for contraceptive drugs in violation of their religious beliefs or face significant fines substantially burdens their religious practice, and a law that conditions receipt of significant government benefits on willingness to work on Saturday substantially burdens the religious practice of those who, as a matter of religious observance or practice, do not work on that day. But a law that infringes, even severely, an aspect of an adherent's religious observance or practice that the adherent himself regards as unimportant or inconsequential imposes no substantial burden on that adherent. And a law that regulates only the government's internal affairs and does not involve any governmental compulsion on the religious adherent likewise imposes no substantial burden.

14. The strict scrutiny standard applicable to RFRA is exceptionally demanding.

Once a religious adherent has identified a substantial burden on his or her religious belief, the federal government can impose that burden on the adherent only if it is the least restrictive means of achieving a compelling governmental interest. Only those interests of the highest order can outweigh legitimate claims to the free exercise of religion, and such interests must be evaluated not in broad generalities but as applied to the particular adherent. Even if the federal government could show the necessary interest, it would also have to show that its chosen restriction on free exercise is the least restrictive means of achieving that interest. That analysis requires the government to show that it cannot accommodate the religious adherent while achieving its interest through a viable alternative, which may include, in certain circumstances, expenditure of additional funds, modification of existing exemptions, or creation of a new program.

15. RFRA applies even where a religious adherent seeks an exemption from a legal obligation requiring the adherent to confer benefits on third parties.

Although burdens imposed on third parties are relevant to RFRA analysis, the fact that an exemption would deprive a third party of a benefit does not categorically render an exemption unavailable. Once an adherent identifies a substantial burden on his or her religious exercise, RFRA requires the federal government to establish that denial of an accommodation or exemption to that adherent is the least restrictive means of achieving a compelling governmental interest.

16. Title VII of the Civil Rights Act of 1964, as amended, prohibits covered employers from discriminating against individuals on the basis of their religion.

Employers covered by Title VII may not fail or refuse to hire, discharge, or discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of that individual's religion. Such employers also may not classify their employees or applicants in a way that would deprive or tend to deprive any individual of employment opportunities because of the individual's religion. This protection applies regardless of whether the individual is a member of a religious majority or minority. But the protection does not apply in the same way to religious employers, who have certain constitutional and statutory protections for religious hiring decisions.

17. Title VII's protection extends to discrimination on the basis of religious observance or practice as well as belief, unless the employer cannot reasonably accommodate such observance or practice without undue hardship on the business.

Title VII defines "religion" broadly to include all aspects of religious observance or practice, except when an employer can establish that a particular aspect of such observance or practice cannot reasonably be accommodated without undue hardship to the business. For example, covered employers are required to adjust employee work schedules for Sabbath observance, religious holidays, and other religious observances, unless doing so would create an undue hardship, such as materially compromising operations or violating a collective bargaining agreement. Title VII might also require an employer to modify a no-head-coverings policy to allow a Jewish employee to wear a yarmulke or a Muslim employee to wear a headscarf. An

employer who contends that it cannot reasonably accommodate a religious observance or practice must establish undue hardship on its business with specificity; it cannot rely on assumptions about hardships that might result from an accommodation.

18. The Clinton Guidelines on Religious Exercise and Religious Expression in the Federal Workplace provide useful examples for private employers of reasonable accommodations for religious observance and practice in the workplace.

President Clinton issued Guidelines on Religious Exercise and Religious Expression in the Federal Workplace ("Clinton Guidelines") explaining that federal employees may keep religious materials on their private desks and read them during breaks; discuss their religious views with other employees, subject to the same limitations as other forms of employee expression; display religious messages on clothing or wear religious medallions; and invite others to attend worship services at their churches, except to the extent that such speech becomes excessive or harassing. The Clinton Guidelines have the force of an Executive Order, and they also provide useful guidance to private employers about ways in which religious observance and practice can reasonably be accommodated in the workplace.

19. Religious employers are entitled to employ only persons whose beliefs and conduct are consistent with the employers' religious precepts.

Constitutional and statutory protections apply to certain religious hiring decisions. Religious corporations, associations, educational institutions, and societies—that is, entities that are organized for religious purposes and engage in activity consistent with, and in furtherance of, such purposes—have an express statutory exemption from Title VII's prohibition on religious discrimination in employment. Under that exemption, religious organizations may choose to employ only persons whose beliefs and conduct are consistent with the organizations' religious precepts. For example, a Lutheran secondary school may choose to employ only practicing Lutherans, only practicing Christians, or only those willing to adhere to a code of conduct consistent with the precepts of the Lutheran community sponsoring the school. Indeed, even in the absence of the Title VII exemption, religious employers might be able to claim a similar right under RFRA or the Religion Clauses of the Constitution.

20. As a general matter, the federal government may not condition receipt of a federal grant or contract on the effective relinquishment of a religious organization's hiring exemptions or attributes of its religious character.

Religious organizations are entitled to compete on equal footing for federal financial assistance used to support government programs. Such organizations generally may not be required to alter their religious character to participate in a government program, nor to cease engaging in explicitly religious activities outside the program, nor effectively to relinquish their federal statutory protections for religious hiring decisions.

Guidance for Implementing Religious Liberty Principles

Agencies must pay keen attention, in everything they do, to the foregoing principles of religious liberty.

Agencies As Employers

Administrative agencies should review their current policies and practices to ensure that they comply with all applicable federal laws and policies regarding accommodation for religious observance and practice in the federal workplace, and all agencies must observe such laws going forward. In particular, all agencies should review the Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, which President Clinton issued on August 14, 1997, to ensure that they are following those Guidelines. All agencies should also consider practical steps to improve safeguards for religious liberty in the federal workplace, including through subject-matter experts who can answer questions about religious nondiscrimination rules, information websites that employees may access to learn more about their religious accommodation rights, and training for all employees about federal protections for religious observance and practice in the workplace.

Agencies Engaged in Rulemaking

In formulating rules, regulations, and policies, administrative agencies should also proactively consider potential burdens on the exercise of religion and possible accommodations of those burdens. Agencies should consider designating an officer to review proposed rules with religious accommodation in mind or developing some other process to do so. In developing that process, agencies should consider drawing upon the expertise of the White House Office of Faith-Based and Neighborhood Partnerships to identify concerns about the effect of potential agency action on religious exercise. Regardless of the process chosen, agencies should ensure that they review all proposed rules, regulations, and policies that have the potential to have an effect on religious liberty for compliance with the principles of religious liberty outlined in this memorandum and appendix before finalizing those rules, regulations, or policies. The Office of Legal Policy will also review any proposed agency or executive action upon which the Department's comments, opinion, or concurrence are sought, *see, e.g.*, Exec. Order 12250 § 1-2, 45 Fed. Reg. 72995 (Nov. 2, 1980), to ensure that such action complies with the principles of religious liberty outlined in this memorandum and appendix. The Department will not concur in any proposed action that does not comply with federal law protections for religious liberty as interpreted in this memorandum and appendix, and it will transmit any concerns it has about the proposed action to the agency or the Office of Management and Budget as appropriate. If, despite these internal reviews, a member of the public identifies a significant concern about a prospective rule's compliance with federal protections governing religious liberty during a period for public comment on the rule, the agency should carefully consider and respond to that request in its decision. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). In appropriate circumstances, an agency might explain that it will consider requests for accommodations on a case-by-case basis rather than in the rule itself, but the agency should provide a reasoned basis for that approach.

Agencies Engaged in Enforcement Actions

Much like administrative agencies engaged in rulemaking, agencies considering potential enforcement actions should consider whether such actions are consistent with federal protections for religious liberty. In particular, agencies should remember that RFRA applies to agency enforcement just as it applies to every other governmental action. An agency should consider RFRA when setting agency-wide enforcement rules and priorities, as well as when making decisions to pursue or continue any particular enforcement action, and when formulating any generally applicable rules announced in an agency adjudication.

Agencies should remember that discriminatory enforcement of an otherwise nondiscriminatory law can also violate the Constitution. Thus, agencies may not target or single out religious organizations or religious conduct for disadvantageous treatment in enforcement priorities or actions. The President identified one area where this could be a problem in Executive Order 13798, when he directed the Secretary of the Treasury, to the extent permitted by law, not to take any "adverse action against any individual, house of worship, or other religious organization on the basis that such individual or organization speaks or has spoken about moral or political issues from a religious perspective, where speech of *similar character*" from a non-religious perspective has not been treated as participation or intervention in a political campaign. Exec. Order No. 13798, § 2, 82 Fed. Reg. at 21675. But the requirement of nondiscrimination toward religious organizations and conduct applies across the enforcement activities of the Executive Branch, including within the enforcement components of the Department of Justice.

Agencies Engaged in Contracting and Distribution of Grants

Agencies also must not discriminate against religious organizations in their contracting or grant-making activities. Religious organizations should be given the opportunity to compete for government grants or contracts and participate in government programs on an equal basis with nonreligious organizations. Absent unusual circumstances, agencies should not condition receipt of a government contract or grant on the effective relinquishment of a religious organization's Section 702 exemption for religious hiring practices, or any other constitutional or statutory protection for religious organizations. In particular, agencies should not attempt through conditions on grants or contracts to meddle in the internal governance affairs of religious organizations or to limit those organizations' otherwise protected activities.

* * *

Any questions about this memorandum or the appendix should be addressed to the Office of Legal Policy, U.S. Department of Justice, 950 Pennsylvania Avenue N.W., Washington, D.C. 20530, phone (202) 514-4601.

APPENDIX

Although not an exhaustive treatment of all federal protections for religious liberty, this appendix summarizes the key constitutional and federal statutory protections for religious liberty and sets forth the legal basis for the religious liberty principles described in the foregoing memorandum.

Constitutional Protections

The people, acting through their Constitution, have singled out religious liberty as deserving of unique protection. In the original version of the Constitution, the people agreed that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. Const., art. VI, cl. 3. The people then amended the Constitution during the First Congress to clarify that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I, cl. 1. Those protections have been incorporated against the States. *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15 (1947) (Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (Free Exercise Clause).

A. Free Exercise Clause

The Free Exercise Clause recognizes and guarantees Americans the "right to believe and profess whatever religious doctrine [they] desire[]." *Empl't Div. v. Smith*, 494 U.S. 872, 877 (1990). Government may not attempt to *regulate* religious beliefs, *compel* religious beliefs, or *punish* religious beliefs. *See id.*; *see also Sherbert v. Verner*, 374 U.S. 398, 402 (1963); *Torcaso v. Watkins*, 367 U.S. 488, 492–93, 495 (1961); *United States v. Ballard*, 322 U.S. 78, 86 (1944). It may not lend its power to one side in intra-denominational disputes about dogma, authority, discipline, or qualifications for ministry or membership. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 185 (2012); *Smith*, 494 U.S. at 877; *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724–25 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 116, 120–21 (1952). It may not discriminate against or impose special burdens upon individuals because of their religious beliefs or status. *Smith*, 494 U.S. at 877; *McDaniel v. Paty*, 435 U.S. 618, 627 (1978). And with the exception of certain historical limits on the freedom of speech, government may not punish or otherwise harass churches, church officials, or religious adherents for speaking on religious topics or sharing their religious beliefs. *See Widmar v. Vincent*, 454 U.S. 263, 269 (1981); *see also* U.S. Const., amend. I, cl. 3. The Constitution's protection against government regulation of religious belief is absolute; it is not subject to limitation or balancing against the interests of the government. *Smith*, 494 U.S. at 877; *Sherbert*, 374 U.S. at 402; *see also West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

The Free Exercise Clause protects beliefs rooted in religion, even if such beliefs are not mandated by a particular religious organization or shared among adherents of a particular religious

tradition. *Frazee v. Illinois Dept. of Emp't Sec.*, 489 U.S. 829, 833–34 (1989). As the Supreme Court has repeatedly counseled, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531 (1993) (internal quotation marks omitted). They must merely be "sincerely held." *Frazee*, 489 U.S. at 834.

Importantly, the protection of the Free Exercise Clause also extends to acts undertaken in accordance with such sincerely-held beliefs. That conclusion flows from the plain text of the First Amendment, which guarantees the freedom to "*exercise*" religion, not just the freedom to "believe" in religion. *See Smith*, 494 U.S. at 877; *see also Thomas*, 450 U.S. at 716; *Paty*, 435 U.S. at 627; *Sherbert*, 374 U.S. at 403–04; *Wisconsin v. Yoder*, 406 U.S. 205, 219–20 (1972). Moreover, no other interpretation would actually guarantee the freedom of belief that Americans have so long regarded as central to individual liberty. Many, if not most, religious beliefs require external observance and practice through physical acts or abstention from acts. The tie between physical acts and religious beliefs may be readily apparent (e.g., attendance at a worship service) or not (e.g., service to one's community at a soup kitchen or a decision to close one's business on a particular day of the week). The "exercise of religion" encompasses all aspects of religious observance and practice. And because individuals may act collectively through associations and organizations, it encompasses the exercise of religion by such entities as well. *See, e.g., Hosanna-Tabor*, 565 U.S. at 199; *Church of the Lukumi Babalu Aye*, 508 U.S. at 525–26, 547; *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770, 2772–73 (2014) (even a closely held for-profit corporation may exercise religion if operated in accordance with asserted religious principles).

As with most constitutional protections, however, the protection afforded to Americans by the Free Exercise Clause for physical acts is not absolute, *Smith*, 491 U.S. at 878–79, and the Supreme Court has identified certain principles to guide the analysis of the scope of that protection. First, government may not restrict "acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display," *id.* at 877, nor "target the religious for special disabilities based on their religious status," *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___, ___ (2017) (slip op. at 6) (internal quotation marks omitted), for it was precisely such "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Church of the Lukumi Babalu Aye*, 508 U.S. at 532 (internal quotation marks omitted). The Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion" just as surely as it protects against "outright prohibitions" on religious exercise. *Trinity Lutheran*, 582 U.S. at ___ (slip op. at 11) (internal quotation marks omitted). "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* (quoting *Sherbert*, 374 U.S. at 404).

Because a law cannot have as its official "object or purpose . . . the suppression of religion or religious conduct," courts must "survey meticulously" the text and operation of a law to ensure that it is actually neutral and of general applicability. *Church of the Lukumi Babalu Aye*, 508 U.S. at 533–34 (internal quotation marks omitted). A law is not neutral if it singles out particular religious conduct for adverse treatment; treats the same conduct as lawful when undertaken for secular reasons but unlawful when undertaken for religious reasons; visits "gratuitous restrictions

on religious conduct"; or "accomplishes . . . a 'religious gerrymander,' an impermissible attempt to target [certain individuals] and their religious practices." *Id.* at 533–35, 538 (internal quotation marks omitted). A law is not generally applicable if "in a selective manner [it] impose[s] burdens only on conduct motivated by religious belief," *id.* at 543, including by "fail[ing] to prohibit nonreligious conduct that endangers [its] interests in a similar or greater degree than . . . does" the prohibited conduct, *id.*, or enables, expressly or de facto, "a system of individualized exemptions," as discussed in *Smith*, 494 U.S. at 884; *see also Church of the Lukumi Babalu Aye*, 508 U.S. at 537.

"Neutrality and general applicability are interrelated, . . . [and] failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531. For example, a law that disqualifies a religious person or organization from a right to compete for a public benefit—including a grant or contract—because of the person's religious character is neither neutral nor generally applicable. *See Trinity Lutheran*, 582 U.S. at ___–___ (slip op. at 9–11). Likewise, a law that selectively prohibits the killing of animals for religious reasons and fails to prohibit the killing of animals for many nonreligious reasons, or that selectively prohibits a business from refusing to stock a product for religious reasons but fails to prohibit such refusal for myriad commercial reasons, is neither neutral, nor generally applicable. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 533–36, 542–45. Nonetheless, the requirements of neutral and general applicability are separate, and any law burdening religious practice that fails one or both must be subjected to strict scrutiny, *id.* at 546.

Second, even a neutral, generally applicable law is subject to strict scrutiny under this Clause if it restricts the free exercise of religion and another constitutionally protected liberty, such as the freedom of speech or association, or the right to control the upbringing of one's children. *See Smith*, 494 U.S. at 881–82; *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295–97 (10th Cir. 2004). Many Free Exercise cases fall in this category. For example, a law that seeks to compel a private person's speech or expression contrary to his or her religious beliefs implicates both the freedoms of speech and free exercise. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 707–08 (1977) (challenge by Jehovah's Witnesses to requirement that state license plates display the motto "Live Free or Die"); *Axson-Flynn*, 356 F.3d at 1280 (challenge by Mormon student to University requirement that student actors use profanity and take God's name in vain during classroom acting exercises). A law taxing or prohibiting door-to-door solicitation, at least as applied to individuals distributing religious literature and seeking contributions, likewise implicates the freedoms of speech and free exercise. *Murdock v. Pennsylvania*, 319 U.S. 105, 108–09 (1943) (challenge by Jehovah's Witnesses to tax on canvassing or soliciting); *Cantwell*, 310 U.S. at 307 (same). A law requiring children to receive certain education, contrary to the religious beliefs of their parents, implicates both the parents' right to the care, custody, and control of their children and to free exercise. *Yoder*, 406 U.S. at 227–29 (challenge by Amish parents to law requiring high school attendance).

Strict scrutiny is the "most rigorous" form of scrutiny identified by the Supreme Court. *Church of the Lukumi Babalu Aye*, 508 U.S. at 546; *see also City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) ("Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law."). It is the same standard applied to governmental classifications based on race, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007), and

restrictions on the freedom of speech, *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015). *See Church of the Lukumi Babalu Aye*, 508 U.S. at 546–47. Under this level of scrutiny, government must establish that a challenged law "advance[s] interests of the highest order" and is "narrowly tailored in pursuit of those interests." *Id.* at 546 (internal quotation marks omitted). "[O]nly in rare cases" will a law survive this level of scrutiny. *Id.*

Of course, even when a law is neutral and generally applicable, government may run afoul of the Free Exercise Clause if it interprets or applies the law in a manner that discriminates against religious observance and practice. *See, e.g.*, *Church of the Lukumi Babalu Aye*, 508 U.S. at 537 (government discriminatorily interpreted an ordinance prohibiting the unnecessary killing of animals as prohibiting only killing of animals for religious reasons); *Fowler v. Rhode Island*, 345 U.S. 67, 69–70 (1953) (government discriminatorily enforced ordinance prohibiting meetings in public parks against only certain religious groups). The Free Exercise Clause, much like the Free Speech Clause, requires equal treatment of religious adherents. *See Trinity Lutheran*, 582 U.S. at __ (slip op. at 6); *cf. Good News Club v. Milford Central Sch.*, 533 U.S. 98, 114 (2001) (recognizing that Establishment Clause does not justify discrimination against religious clubs seeking use of public meeting spaces); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 837, 841 (1995) (recognizing that Establishment Clause does not justify discrimination against religious student newspaper's participation in neutral reimbursement program). That is true regardless of whether the discriminatory application is initiated by the government itself or by private requests or complaints. *See, e.g.*, *Fowler*, 345 U.S. at 69; *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951).

B. Establishment Clause

The Establishment Clause, too, protects religious liberty. It prohibits government from establishing a religion and coercing Americans to follow it. *See Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1819–20 (2014); *Good News Club*, 533 U.S. at 115. It restricts government from interfering in the internal governance or ecclesiastical decisions of a religious organization. *Hosanna-Tabor*, 565 U.S. at 188–89. And it prohibits government from officially favoring or disfavoring particular religious groups as such or officially advocating particular religious points of view. *See Galloway*, 134 S. Ct. at 1824; *Larson v. Valente*, 456 U.S. 228, 244–46 (1982). Indeed, "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion." *Rosenberger*, 515 U.S. at 839 (emphasis added). That "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.* Thus, religious adherents and organizations may, like nonreligious adherents and organizations, receive indirect financial aid through independent choice, or, in certain circumstances, direct financial aid through a secular-aid program. *See, e.g.*, *Trinity Lutheran*, 582 U.S. at ___ (slip. op. at 6) (scrap tire program); *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (voucher program).

C. Religious Test Clause

Finally, the Religious Test Clause, though rarely invoked, provides a critical guarantee to religious adherents that they may serve in American public life. The Clause reflects the judgment

of the Framers that a diversity of religious viewpoints in government would enhance the liberty of all Americans. And after the Religion Clauses were incorporated against the States, the Supreme Court shared this view, rejecting a Tennessee law that "establishe[d] as a condition of office the willingness to eschew certain protected religious practices." *Paty*, 435 U.S. at 632 (Brennan, J., and Marshall, J., concurring in judgment); *see also id.* at 629 (plurality op.) ("[T]he American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts.").

Statutory Protections

Recognizing the centrality of religious liberty to our nation, Congress has buttressed these constitutional rights with statutory protections for religious observance and practice. These protections can be found in, among other statutes, the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.*; the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.*; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*; and the American Indian Religious Freedom Act, 42 U.S.C. § 1996. Such protections ensure not only that government tolerates religious observance and practice, but that it embraces religious adherents as full members of society, able to contribute through employment, use of public accommodations, and participation in government programs. The considered judgment of the United States is that we are stronger through accommodation of religion than segregation or isolation of it.

A. Religious Freedom Restoration Act of 1993 (RFRA)

The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.*, prohibits the federal government from "substantially burden[ing] a person's exercise of religion" unless "it 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." *Id.* § 2000bb-1(a), (b). The Act applies even where the burden arises out of a "rule of general applicability" passed without animus or discriminatory intent. *See id.* § 2000bb-1(a). It applies to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," *see* §§ 2000bb-2(4), 2000cc-5(7), and covers "individuals" as well as "corporations, companies, associations, firms, partnerships, societies, and joint stock companies," 1 U.S.C. § 1, including for-profit, closely-held corporations like those involved in *Hobby Lobby*, 134 S. Ct. at 2768.

Subject to the exceptions identified below, a law "substantially burden[s] a person's exercise of religion," 42 U.S.C. § 2000bb-1, if it bans an aspect of the adherent's religious observance or practice, compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice, *see Sherbert*, 374 U.S. at 405–06. The "threat of criminal sanction" will satisfy these principles, even when, as in *Yoder*, the prospective punishment is a mere $5 fine. 406 U.S. at 208, 218. And the denial of, or condition on the receipt of, government benefits may substantially burden the exercise of religion under these principles. *Sherbert*, 374 U.S. at 405–06; *see also Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987); *Thomas*, 450 U.S. at 717–18. But a law that infringes, even severely, an aspect of an adherent's religious observance or practice that the adherent himself

regards as unimportant or inconsequential imposes no substantial burden on that adherent. And a law that regulates only the government's internal affairs and does not involve any governmental compulsion on the religious adherent likewise imposes no substantial burden. *See, e.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448–49 (1988); *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986).

As with claims under the Free Exercise Clause, RFRA does not permit a court to inquire into the reasonableness of a religious belief, including into the adherent's assessment of the religious connection between a belief asserted and what the government forbids, requires, or prevents. *Hobby Lobby*, 134 S. Ct. at 2778. If the proffered belief is sincere, it is not the place of the government or a court to second-guess it. *Id.* A good illustration of the point is *Thomas v. Review Board of Indiana Employment Security Division*—one of the *Sherbert* line of cases, whose analytical test Congress sought, through RFRA, to restore, 42 U.S.C. § 2000bb. There, the Supreme Court concluded that the denial of unemployment benefits was a substantial burden on the sincerely held religious beliefs of a Jehovah's Witness who had quit his job after he was transferred from a department producing sheet steel that could be used for military armaments to a department producing turrets for military tanks. *Thomas*, 450 U.S. at 716–18. In doing so, the Court rejected the lower court's inquiry into "what [the claimant's] belief was and what the religious basis of his belief was," noting that no one had challenged the sincerity of the claimant's religious beliefs and that "[c]ourts should not undertake to dissect religious beliefs because the believer admits that he is struggling with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Id.* at 714–15 (internal quotation marks omitted). The Court likewise rejected the lower court's comparison of the claimant's views to those of other Jehovah's Witnesses, noting that "[i]ntrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences." *Id.* at 715. The Supreme Court reinforced this reasoning in *Hobby Lobby*, rejecting the argument that "the connection between what the objecting parties [were required to] do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they [found] to be morally wrong (destruction of an embryo) [wa]s simply too attenuated." 134 S. Ct. at 2777. The Court explained that the plaintiff corporations had a sincerely-held religious belief that provision of the coverage was morally wrong, and it was "not for us to say that their religious beliefs are mistaken or insubstantial." *Id.* at 2779.

Government bears a heavy burden to justify a substantial burden on the exercise of religion. "[O]nly those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Thomas*, 450 U.S. at 718 (quoting *Yoder*, 406 U.S. at 215). Such interests include, for example, the "fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's history," *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983), and the interest in ensuring the "mandatory and continuous participation" that is "indispensable to the fiscal vitality of the social security system," *United States v. Lee*, 455 U.S. 252, 258–59 (1982). But "broadly formulated interests justifying the general applicability of government mandates" are insufficient. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). The government must establish a compelling interest to deny an accommodation to the particular claimant. *Id.* at 430, 435–38. For example, the military may have a compelling interest in its

uniform and grooming policy to ensure military readiness and protect our national security, but it does not necessarily follow that those interests would justify denying a particular soldier's request for an accommodation from the uniform and grooming policy. *See, e.g.*, Secretary of the Army, Army Directive 2017-03, Policy for Brigade-Level Approval of Certain Requests for Religious Accommodation (2017) (recognizing the "successful examples of Soldiers currently serving with" an accommodation for "the wear of a hijab; the wear of a beard; and the wear of a turban or under-turban/patka, with uncut beard and uncut hair" and providing for a reasonable accommodation of these practices in the Army). The military would have to show that it has a compelling interest in denying that particular accommodation. An asserted compelling interest in denying an accommodation to a particular claimant is undermined by evidence that exemptions or accommodations have been granted for other interests. *See O Centro*, 546 U.S. at 433, 436–37; *see also Hobby Lobby*, 134 S. Ct. at 2780.

The compelling-interest requirement applies even where the accommodation sought is "an exemption from a legal obligation requiring [the claimant] to confer benefits on third parties." *Hobby Lobby*, 134 S. Ct. at 2781 n.37. Although "in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries,'" the Supreme Court has explained that almost any governmental regulation could be reframed as a legal obligation requiring a claimant to confer benefits on third parties. *Id.* (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)). As nothing in the text of RFRA admits of an exception for laws requiring a claimant to confer benefits on third parties, 42 U.S.C. § 2000bb-1, and such an exception would have the potential to swallow the rule, the Supreme Court has rejected the proposition that RFRA accommodations are categorically unavailable for laws requiring claimants to confer benefits on third parties. *Hobby Lobby*, 134 S. Ct. at 2781 n.37.

Even if the government can identify a compelling interest, the government must also show that denial of an accommodation is the least restrictive means of serving that compelling governmental interest. This standard is "exceptionally demanding." *Hobby Lobby*, 134 S. Ct. at 2780. It requires the government to show that it cannot accommodate the religious adherent while achieving its interest through a viable alternative, which may include, in certain circumstances, expenditure of additional funds, modification of existing exemptions, or creation of a new program. *Id.* at 2781. Indeed, the existence of exemptions for other individuals or entities that could be expanded to accommodate the claimant, while still serving the government's stated interests, will generally defeat a RFRA defense, as the government bears the burden to establish that no accommodation is viable. *See id.* at 2781–82.

B. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)

Although Congress's leadership in adopting RFRA led many States to pass analogous statutes, Congress recognized the unique threat to religious liberty posed by certain categories of state action and passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to address them. RLUIPA extends a standard analogous to RFRA to state and local government actions regulating land use and institutionalized persons where "the substantial burden is imposed in a program or activity that receives Federal financial assistance" or "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. §§ 2000cc(a)(2), 2000cc-1(b).

RLUIPA's protections must "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by [RLUIPA] and the Constitution." *Id.* § 2000cc-3(g). RLUIPA applies to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," *id.* § 2000cc-5(7)(A), and treats "[t]he use, building, or conversion of real property for the purpose of religious exercise" as the "religious exercise of the person or entity that uses or intends to use the property for that purpose," *id.* § 2000cc-5(7)(B). Like RFRA, RLUIPA prohibits government from substantially burdening an exercise of religion unless imposition of the burden on the religious adherent is the least restrictive means of furthering a compelling governmental interest. *See id.* § 2000cc-1(a). That standard "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." *Id.* § 2000cc-3(c); *cf. Holt v. Hobbs*, 135 S. Ct. 853, 860, 864–65 (2015).

With respect to land use in particular, RLUIPA also requires that government not "treat[] a religious assembly or institution on less than equal terms with a nonreligious assembly or institution," 42 U.S.C. § 2000cc(b)(1), "impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination," *id.* § 2000cc(b)(2), or "impose or implement a land use regulation that (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction," *id.* § 2000cc(b)(3). A claimant need not show a substantial burden on the exercise of religion to enforce these antidiscrimination and equal terms provisions listed in § 2000cc(b). *See id.* § 2000cc(b); *see also Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 262–64 (3d Cir. 2007), *cert. denied*, 553 U.S. 1065 (2008). Although most RLUIPA cases involve places of worship like churches, mosques, synagogues, and temples, the law applies more broadly to religious schools, religious camps, religious retreat centers, and religious social service facilities. Letter from U.S. Dep't of Justice Civil Rights Division to State, County, and Municipal Officials re: The Religious Land Use and Institutionalized Persons Act (Dec. 15, 2016).

C. Other Civil Rights Laws

To incorporate religious adherents fully into society, Congress has recognized that it is not enough to limit governmental action that substantially burdens the exercise of religion. It must also root out public and private discrimination based on religion. Religious discrimination stood alongside discrimination based on race, color, and national origin, as an evil to be addressed in the Civil Rights Act of 1964, and Congress has continued to legislate against such discrimination over time. Today, the United States Code includes specific prohibitions on religious discrimination in places of public accommodation, 42 U.S.C. § 2000a; in public facilities, *id.* § 2000b; in public education, *id.* § 2000c-6; in employment, *id.* §§ 2000e, 2000e-2, 2000e-16; in the sale or rental of housing, *id.* § 3604; in the provision of certain real-estate transaction or brokerage services, *id.* §§ 3605, 3606; in federal jury service, 28 U.S.C. § 1862; in access to limited open forums for speech, 20 U.S.C. § 4071; and in participation in or receipt of benefits from various federally-funded programs, 15 U.S.C. § 3151; 20 U.S.C. §§ 1066c(d), 1071(a)(2), 1087-4, 7231d(b)(2), 7914; 31 U.S.C. § 6711(b)(3); 42 U.S.C. §§ 290cc-33(a)(2), 300w-7(a)(2), 300x-57(a)(2), 300x-65(f), 604a(g), 708(a)(2), 5057(c), 5151(a), 5309(a), 6727(a), 9858l(a)(2), 10406(2)(B), 10504(a), 10604(e), 12635(c)(1), 12832, 13791(g)(3), 13925(b)(13)(A).

Invidious religious discrimination may be directed at religion in general, at a particular religious belief, or at particular aspects of religious observance and practice. *See, e.g.*, *Church of the Lukumi Babalu Aye*, 508 U.S. at 532–33. A law drawn to prohibit a specific religious practice may discriminate just as severely against a religious group as a law drawn to prohibit the religion itself. *See id.* No one would doubt that a law prohibiting the sale and consumption of Kosher meat would discriminate against Jewish people. True equality may also require, depending on the applicable statutes, an awareness of, and willingness reasonably to accommodate, religious observance and practice. Indeed, the denial of reasonable accommodations may be little more than cover for discrimination against a particular religious belief or religion in general and is counter to the general determination of Congress that the United States is best served by the participation of religious adherents in society, not their withdrawal from it.

1. Employment

i. Protections for Religious Employees

Protections for religious individuals in employment are the most obvious example of Congress's instruction that religious observance and practice be reasonably accommodated, not marginalized. In Title VII of the Civil Rights Act, Congress declared it an unlawful employment practice for a covered employer to (1) "fail or refuse to hire or to discharge any individual, or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion," as well as (2) to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a); *see also* 42 U.S.C. § 2000e-16(a) (applying Title VII to certain federal-sector employers); 3 U.S.C. § 411(a) (applying Title VII employment in the Executive Office of the President). The protection applies "regardless of whether the discrimination is directed against [members of religious] majorities or minorities." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71–72 (1977).

After several courts had held that employers did not violate Title VII when they discharged employees for refusing to work on their Sabbath, Congress amended Title VII to define "[r]eligion" broadly to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j); *Hardison*, 432 U.S. at 74 n.9. Congress thus made clear that discrimination on the basis of religion includes discrimination on the basis of any aspect of an employee's religious observance or practice, at least where such observance or practice can be reasonably accommodated without undue hardship.

Title VII's reasonable accommodation requirement is meaningful. As an initial matter, it requires an employer to consider what adjustment or modification to its policies would effectively address the employee's concern, for "[a]n *ineffective* modification or adjustment will not *accommodate*" a person's religious observance or practice, within the ordinary meaning of that word. *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002) (considering the ordinary

meaning in the context of an ADA claim). Although there is no obligation to provide an employee with his or her preferred reasonable accommodation, *see Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986), an employer may justify a refusal to accommodate only by showing that "an undue hardship [on its business] would *in fact* result from *each available* alternative method of accommodation." 29 C.F.R. § 1605.2(c)(1) (emphasis added). "A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship." *Id.* Likewise, the fact that an accommodation may grant the religious employee a preference is not evidence of undue hardship as, "[b]y definition, any special 'accommodation' requires the employer to treat an employee . . . differently, *i.e.*, preferentially." *U.S. Airways*, 535 U.S. at 397; *see also E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015) ("Title VII does not demand mere neutrality with regard to religious practices—that they may be treated no worse than other practices. Rather, it gives them favored treatment.").

Title VII does not, however, require accommodation at all costs. As noted above, an employer is not required to accommodate a religious observance or practice if it would pose an undue hardship on its business. An accommodation might pose an "undue hardship," for example, if it would require the employer to breach an otherwise valid collective bargaining agreement, *see, e.g.*, *Hardison*, 432 U.S. at 79, or carve out a special exception to a seniority system, *id.* at 83; *see also U.S. Airways*, 535 U.S. at 403. Likewise, an accommodation might pose an "undue hardship" if it would impose "more than a de minimis cost" on the business, such as in the case of a company where weekend work is "essential to [the] business" and many employees have religious observances that would prohibit them from working on the weekends, so that accommodations for all such employees would result in significant overtime costs for the employer. *Hardison*, 432 U.S. at 80, 84 & n.15. In general, though, Title VII expects positive results for society from a cooperative process between an employer and its employee "in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." *Philbrook*, 479 U.S. at 69 (internal quotations omitted).

The area of religious speech and expression is a useful example of reasonable accommodation. Where speech or expression is part of a person's religious observance and practice, it falls within the scope of Title VII. *See* 42 U.S.C. §§ 2000e, 2000e-2. Speech or expression outside of the scope of an individual's employment can almost always be accommodated without undue hardship to a business. Speech or expression within the scope of an individual's employment, during work hours, or in the workplace may, depending upon the facts and circumstances, be reasonably accommodated. *Cf. Abercrombie*, 135 S. Ct. at 2032.

The federal government's approach to free exercise in the federal workplace provides useful guidance on such reasonable accommodations. For example, under the Guidelines issued by President Clinton, the federal government permits a federal employee to "keep a Bible or Koran on her private desk and read it during breaks"; to discuss his religious views with other employees, subject "to the same rules of order as apply to other employee expression"; to display religious messages on clothing or wear religious medallions visible to others; and to hand out religious tracts to other employees or invite them to attend worship services at the employee's church, except to the extent that such speech becomes excessive or harassing. Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, § 1(A), Aug. 14, 1997 (hereinafter "Clinton

Guidelines"). The Clinton Guidelines have the force of an Executive Order. *See Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order*, 24 Op. O.L.C. 29, 29 (2000) ("[T]here is no substantive difference in the legal effectiveness of an executive order and a presidential directive that is styled other than as an executive order."); *see also* Memorandum from President William J. Clinton to the Heads of Executive Departments and Agencies (Aug. 14, 1997) ("All civilian executive branch agencies, officials, and employees must follow these Guidelines carefully."). The successful experience of the federal government in applying the Clinton Guidelines over the last twenty years is evidence that religious speech and expression can be reasonably accommodated in the workplace without exposing an employer to liability under workplace harassment laws.

Time off for religious holidays is also often an area of concern. The observance of religious holidays is an "aspect[] of religious observance and practice" and is therefore protected by Title VII. 42 U.S.C. §§ 2000e, 2000e-2. Examples of reasonable accommodations for that practice could include a change of job assignments or lateral transfer to a position whose schedule does not conflict with the employee's religious holidays, 29 C.F.R. § 1605.2(d)(1)(iii); a voluntary work schedule swap with another employee, *id.* § 1065.2(d)(1)(i); or a flexible scheduling scheme that allows employees to arrive or leave early, use floating or optional holidays for religious holidays, or make up time lost on another day, *id.* § 1065.2(d)(1)(ii). Again, the federal government has demonstrated reasonable accommodation through its own practice: Congress has created a flexible scheduling scheme for federal employees, which allows employees to take compensatory time off for religious observances, 5 U.S.C. § 5550a, and the Clinton Guidelines make clear that "[a]n agency must adjust work schedules to accommodate an employee's religious observance—for example, Sabbath or religious holiday observance—if an adequate substitute is available, or if the employee's absence would not otherwise impose an undue burden on the agency," Clinton Guidelines § 1(C). If an employer regularly permits accommodation in work scheduling for secular conflicts and denies such accommodation for religious conflicts, "such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness." *Philbrook*, 479 U.S. at 71.

Except for certain exceptions discussed in the next section, Title VII's protection against disparate treatment, 42 U.S.C. § 2000e-2(a)(1), is implicated *any time* religious observance or practice is a motivating factor in an employer's covered decision. *Abercrombie*, 135 S. Ct. at 2033. That is true even when an employer acts without actual knowledge of the need for an accommodation from a neutral policy but with "an unsubstantiated suspicion" of the same. *Id.* at 2034.

ii. Protections for Religious Employers

Congress has acknowledged, however, that religion sometimes *is* an appropriate factor in employment decisions, and it has limited Title VII's scope accordingly. Thus, for example, where religion "is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise," employers may hire and employ individuals based on their religion. 42 U.S.C. § 2000e-2(e)(1). Likewise, where educational institutions are "owned, supported, controlled or managed, [in whole or in substantial part] by a particular religion or by a particular religious corporation, association, or society" or direct their curriculum "toward the

propagation of a particular religion," such institutions may hire and employ individuals of a particular religion. *Id.* And "a religious corporation, association, educational institution, or society" may employ "individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." *Id.* § 2000e-1(a); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335–36 (1987).

Because Title VII defines "religion" broadly to include "all aspects of religious observance and practice, as well as belief," 42 U.S.C. § 2000e(j), these exemptions include decisions "to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts." *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991); *see also Killinger v. Samford Univ.*, 113 F.3d 196, 198–200 (11th Cir. 1997). For example, in *Little*, the Third Circuit held that the exemption applied to a Catholic school's decision to fire a divorced Protestant teacher who, though having agreed to abide by a code of conduct shaped by the doctrines of the Catholic Church, married a baptized Catholic without first pursuing the official annulment process of the Church. 929 F.2d at 946, 951.

Section 702 broadly exempts from its reach religious corporations, associations, educational institutions, and societies. The statute's terms do not limit this exemption to non-profit organizations, to organizations that carry on only religious activities, or to organizations established by a church or formally affiliated therewith. *See* Civil Rights Act of 1964, § 702(a), *codified at* 42 U.S.C. § 2000e-1(a); *see also Hobby Lobby*, 134 S. Ct. at 2773–74; *Corp. of Presiding Bishop*, 483 U.S. at 335–36. The exemption applies whenever the organization is "religious," which means that it is organized for religious purposes and engages in activity consistent with, and in furtherance of, such purposes. Br. of Amicus Curiae the U.S. Supp. Appellee, *Spencer v. World Vision, Inc.*, No. 08-35532 (9th Cir. 2008). Thus, the exemption applies not just to religious denominations and houses of worship, but to religious colleges, charitable organizations like the Salvation Army and World Vision International, and many more. In that way, it is consistent with other broad protections for religious entities in federal law, including, for example, the exemption of religious entities from many of the requirements under the Americans with Disabilities Act. *See* 28 C.F.R. app. C; 56 Fed. Reg. 35544, 35554 (July 26, 1991) (explaining that "[t]he ADA's exemption of religious organizations and religious entities controlled by religious organizations is very broad, encompassing a wide variety of situations").

In addition to these explicit exemptions, religious organizations may be entitled to additional exemptions from discrimination laws. *See, e.g.*, *Hosanna-Tabor*, 565 U.S. at 180, 188–90. For example, a religious organization might conclude that it cannot employ an individual who fails faithfully to adhere to the organization's religious tenets, either because doing so might itself inhibit the organization's exercise of religion or because it might dilute an expressive message. *Cf. Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649–55 (2000). Both constitutional and statutory issues arise when governments seek to regulate such decisions.

As a constitutional matter, religious organizations' decisions are protected from governmental interference to the extent they relate to ecclesiastical or internal governance matters. *Hosanna-Tabor*, 565 U.S. at 180, 188–90. It is beyond dispute that "it would violate the First Amendment for courts to apply [employment discrimination] laws to compel the ordination of

women by the Catholic Church or by an Orthodox Jewish seminary." *Id.* at 188. The same is true for other employees who "minister to the faithful," including those who are not themselves the head of the religious congregation and who are not engaged solely in religious functions. *Id.* at 188, 190, 194–95; *see also* Br. of Amicus Curiae the U.S. Supp. Appellee, *Spencer v. World Vision, Inc.*, No. 08-35532 (9th Cir. 2008) (noting that the First Amendment protects "the right to employ staff who share the religious organization's religious beliefs").

Even if a particular associational decision could be construed to fall outside this protection, the government would likely still have to show that any interference with the religious organization's associational rights is justified under strict scrutiny. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (infringements on expressive association are subject to strict scrutiny); *Smith*, 494 U.S. at 882 ("[I]t is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns."). The government may be able to meet that standard with respect to race discrimination, *see Bob Jones Univ.*, 461 U.S. at 604, but may not be able to with respect to other forms of discrimination. For example, at least one court has held that forced inclusion of women into a mosque's religious men's meeting would violate the freedom of expressive association. *Donaldson v. Farrakhan*, 762 N.E.2d 835, 840–41 (Mass. 2002). The Supreme Court has also held that the government's interest in addressing sexual-orientation discrimination is not sufficiently compelling to justify an infringement on the expressive association rights of a private organization. *Boy Scouts*, 530 U.S. at 659.

As a statutory matter, RFRA too might require an exemption or accommodation for religious organizations from antidiscrimination laws. For example, "prohibiting religious organizations from hiring only coreligionists can 'impose a significant burden on their exercise of religion, even as applied to employees in programs that must, by law, refrain from specifically religious activities.'" *Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act*, 31 Op. O.L.C. 162, 172 (2007) (quoting *Direct Aid to Faith-Based Organizations Under the Charitable Choice Provisions of the Community Solutions Act of 2001*, 25 Op. O.L.C. 129, 132 (2001)); *see also Corp. of Presiding Bishop*, 483 U.S. at 336 (noting that it would be "a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court w[ould] consider religious" in applying a nondiscrimination provision that applied only to secular, but not religious, activities). If an organization establishes the existence of such a burden, the government must establish that imposing such burden on the organization is the least restrictive means of achieving a compelling governmental interest. That is a demanding standard and thus, even where Congress has not expressly exempted religious organizations from its antidiscrimination laws—as it has in other contexts, *see, e.g.*, 42 U.S.C. §§ 3607 (Fair Housing Act), 12187 (Americans with Disabilities Act)—RFRA might require such an exemption.

2. Government Programs

Protections for religious organizations likewise exist in government contracts, grants, and other programs. Recognizing that religious organizations can make important contributions to government programs, *see, e.g.*, 22 U.S.C. § 7601(19), Congress has expressly permitted religious organizations to participate in numerous such programs on an equal basis with secular

organizations, *see, e.g.*, 42 U.S.C. §§ 290kk-1, 300x-65 604a, 629i. Where Congress has not expressly so provided, the President has made clear that "[t]he Nation's social service capacity will benefit if all eligible organizations, including faith-based and other neighborhood organizations, are able to compete on an equal footing for Federal financial assistance used to support social service programs." Exec. Order No. 13559, § 1, 75 Fed. Reg. 71319, 71319 (Nov. 17, 2010) (amending Exec. Order No. 13279, 67 Fed. Reg. 77141 (2002)). To that end, no organization may be "discriminated against on the basis of religion or religious belief in the administration or distribution of Federal financial assistance under social service programs." *Id.* "Organizations that engage in explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization)" are eligible to participate in such programs, so long as they conduct such activities outside of the programs directly funded by the federal government and at a separate time and location. *Id.*

The President has assured religious organizations that they are "eligible to compete for Federal financial assistance used to support social service programs and to participate fully in the social services programs supported with Federal financial assistance without impairing their independence, autonomy, expression outside the programs in question, or religious character." *See id.*; *see also* 42 U.S.C. § 290kk-1(e) (similar statutory assurance). Religious organizations that apply for or participate in such programs may continue to carry out their mission, "including the definition, development, practice, and expression of . . . religious beliefs," so long as they do not use any "direct Federal financial assistance" received "to support or engage in any explicitly religious activities" such as worship, religious instruction, or proselytization. Exec. Order No. 13559, § 1. They may also "use their facilities to provide social services supported with Federal financial assistance, without removing or altering religious art, icons, scriptures, or other symbols from these facilities," and they may continue to "retain religious terms" in their names, select "board members on a religious basis, and include religious references in . . . mission statements and other chartering or governing documents." *Id.*

With respect to government contracts in particular, Executive Order 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002), confirms that the independence and autonomy promised to religious organizations include independence and autonomy in religious hiring. Specifically, it provides that the employment nondiscrimination requirements in Section 202 of Executive Order 11246, which normally apply to government contracts, do "not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." Exec. Order No. 13279, § 4, *amending* Exec. Order No. 11246, § 204(c), 30 Fed. Reg. 12319, 12935 (Sept. 24, 1965).

Because the religious hiring protection in Executive Order 13279 parallels the Section 702 exemption in Title VII, it should be interpreted to protect the decision "to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts." *Little*, 929 F.2d at 951. That parallel interpretation is consistent with the Supreme Court's repeated counsel that the decision to borrow statutory text in a new statute is "strong indication that the two statutes should be interpreted pari passu." *Northcross v. Bd. of Educ. of Memphis City Sch.*, 412 U.S. 427 (1973) (per curiam); *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 559

U.S. 573, 590 (2010). It is also consistent with the Executive Order's own usage of discrimination on the basis of "religion" as something distinct and more expansive than discrimination on the basis of "religious belief." *See, e.g.*, Exec. Order No. 13279, § 2(c) ("No organization should be discriminated against on the basis of religion *or* religious belief . . . " (emphasis added)); *id.* § 2(d) ("All organizations that receive Federal financial assistance under social services programs should be prohibited from discriminating against beneficiaries or potential beneficiaries of the social services programs on the basis of religion or religious belief. Accordingly, organizations, in providing services supported in whole or in part with Federal financial assistance, and in their outreach activities related to such services, should not be allowed to discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice."). Indeed, because the Executive Order uses "on the basis of religion or religious belief" in both the provision prohibiting discrimination against religious organizations and the provision prohibiting discrimination "against beneficiaries or potential beneficiaries," a narrow interpretation of the protection for religious organizations' hiring decisions would lead to a narrow protection for beneficiaries of programs served by such organizations. *See id.* §§ 2(c), (d). It would also lead to inconsistencies in the treatment of religious hiring across government programs, as some program-specific statutes and regulations expressly confirm that "[a] religious organization's exemption provided under section 2000e-1 of this title regarding employment practices shall not be affected by its participation, or receipt of funds from, a designated program." 42 U.S.C. § 290kk-1(e); *see also* 6 C.F.R. § 19.9 (same).

Even absent the Executive Order, however, RFRA would limit the extent to which the government could condition participation in a federal grant or contract program on a religious organization's effective relinquishment of its Section 702 exemption. RFRA applies to all government conduct, not just to legislation or regulation, *see* 42 U.S.C. § 2000bb-1, and the Office of Legal Counsel has determined that application of a religious nondiscrimination law to the hiring decisions of a religious organization can impose a substantial burden on the exercise of religion. *Application of the Religious Freedom Restoration Act to the Award of a Grant*, 31 Op. O.L.C. at 172; *Direct Aid to Faith-Based Organizations*, 25 Op. O.L.C. at 132. Given Congress's "recognition that religious discrimination in employment is permissible in some circumstances," the government will not ordinarily be able to assert a compelling interest in prohibiting that conduct as a general condition of a religious organization's receipt of any particular government grant or contract. *Application of the Religious Freedom Restoration Act to the Award of a Grant*, 31 Op. of O.L.C. at 186. The government will also bear a heavy burden to establish that requiring a particular contractor or grantee effectively to relinquish its Section 702 exemption is the least restrictive means of achieving a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1.

The First Amendment also "supplies a limit on Congress' ability to place conditions on the receipt of funds." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013) (internal quotation marks omitted)). Although Congress may specify the activities that it wants to subsidize, it may not "seek to leverage funding" to regulate constitutionally protected conduct "outside the contours of the program itself." *See id.* Thus, if a condition on participation in a government program—including eligibility for receipt of federally backed student loans—would interfere with a religious organization's constitutionally protected rights, *see, e.g.*,

Hosanna-Tabor, 565 U.S. at 188–89, that condition could raise concerns under the "unconstitutional conditions" doctrine, *see All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. at 2328.

Finally, Congress has provided an additional statutory protection for educational institutions controlled by religious organizations who provide education programs or activities receiving federal financial assistance. Such institutions are exempt from Title IX's prohibition on sex discrimination in those programs and activities where that prohibition "would not be consistent with the religious tenets of such organization[s]." 20 U.S.C. § 1681(a)(3). Although eligible institutions may "claim the exemption" in advance by "submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions . . . [that] conflict with a specific tenet of the religious organization," 34 C.F.R. § 106.12(b), they are not required to do so to have the benefit of it, *see* 20 U.S.C. § 1681.

3. Government Mandates

Congress has undertaken many similar efforts to accommodate religious adherents in diverse areas of federal law. For example, it has exempted individuals who, "by reason of religious training and belief," are conscientiously opposed to war from training and service in the armed forces of the United States. 50 U.S.C. § 3806(j). It has exempted "ritual slaughter and the handling or other preparation of livestock for ritual slaughter" from federal regulations governing methods of animal slaughter. 7 U.S.C. § 1906. It has exempted "private secondary school[s] that maintain[] a religious objection to service in the Armed Forces" from being required to provide military recruiters with access to student recruiting information. 20 U.S.C. § 7908. It has exempted federal employees and contractors with religious objections to the death penalty from being required to "be in attendance at or to participate in any prosecution or execution." 18 U.S.C. § 3597(b). It has allowed individuals with religious objections to certain forms of medical treatment to opt out of such treatment. *See, e.g.*, 33 U.S.C. § 907(k); 42 U.S.C. § 290bb-36(f). It has created tax accommodations for members of religious faiths conscientiously opposed to acceptance of the benefits of any private or public insurance, *see, e.g.*, 26 U.S.C. §§ 1402(g), 3127, and for members of religious orders required to take a vow of poverty, *see, e.g.*, 26 U.S.C. § 3121(r).

Congress has taken special care with respect to programs touching on abortion, sterilization, and other procedures that may raise religious conscience objections. For example, it has prohibited entities receiving certain federal funds for health service programs or research activities from requiring individuals to participate in such program or activity contrary to their religious beliefs. 42 U.S.C. § 300a-7(d); (e). It has prohibited discrimination against health care professionals and entities that refuse to undergo, require, or provide training in the performance of induced abortions; to provide such abortions; or to refer for such abortions, and it will deem accredited any health care professional or entity denied accreditation based on such actions. *Id.* § 238n(a), (b). It has also made clear that receipt of certain federal funds does not require an individual "to perform or assist in the performance of any sterilization procedure or abortion if [doing so] would be contrary to his religious beliefs or moral convictions" nor an entity to "make its facilities available for the performance of" those procedures if such performance "is prohibited by the entity on the basis of religious beliefs or moral convictions," nor an entity to "provide any personnel for the performance or assistance in the performance of" such procedures if such performance or assistance "would be contrary to the religious beliefs or moral convictions of such

personnel." *Id.* § 300a-7(b). Finally, no "qualified health plan[s] offered through an Exchange" may discriminate against any health care professional or entity that refuses to "provide, pay for, provide coverage of, or refer for abortions," § 18023(b)(4); *see also* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. H, § 507(d), 129 Stat. 2242, 2649 (Dec. 18, 2015).

Congress has also been particularly solicitous of the religious freedom of American Indians. In 1978, Congress declared it the "policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." 42 U.S.C. § 1996. Consistent with that policy, it has passed numerous statutes to protect American Indians' right of access for religious purposes to national park lands, Scenic Area lands, and lands held in trust by the United States. *See, e.g.*, 16 U.S.C. §§ 228i(b), 410aaa-75(a), 460uu-47, 543f, 698v-11(b)(11). It has specifically sought to preserve lands of religious significance and has required notification to American Indians of any possible harm to or destruction of such lands. *Id.* § 470cc. Finally, it has provided statutory exemptions for American Indians' use of otherwise regulated articles such as bald eagle feathers and peyote as part of traditional religious practice. *Id.* §§ 668a, 4305(d); 42 U.S.C. § 1996a.

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The depth and breadth of constitutional and statutory protections for religious observance and practice in America confirm the enduring importance of religious freedom to the United States. They also provide clear guidance for all those charged with enforcing federal law: The free exercise of religion is not limited to a right to hold personal religious beliefs or even to worship in a sacred place. It encompasses all aspects of religious observance and practice. To the greatest extent practicable and permitted by law, such religious observance and practice should be reasonably accommodated in all government activity, including employment, contracting, and programming. *See Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("[Government] follows the best of our traditions . . . [when it] respects the religious nature of our people and accommodates the public service to their spiritual needs.").

67 STAN. L. REV. ONLINE 59
November 7, 2014

QUESTIONING SINCERITY: THE ROLE OF THE COURTS AFTER *HOBBY LOBBY*

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INTRODUCTION

In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court extended the protections of the Religious Freedom Restoration Act (RFRA) to Hobby Lobby, Mardel, and Conestoga Wood Specialties, three closely held corporations, and held that the contraception mandate of the Affordable Care Act substantially burdened their religious exercise.[1] The sincerity of their religious beliefs was never disputed.[2] As such, they had no difficulty meeting RFRA's requirement that their asserted beliefs be both sincere and religious in nature.[3] In the wake of the decision, however, critics have expressed concern that future courts will be powerless to block insincere RFRA claims brought by wholly secular corporations seeking to evade generally applicable laws.[4]

In her powerful dissent, Justice Ginsburg proclaimed an "overriding interest" in "keeping the courts 'out of the business of evaluating' . . . the sincerity with which an asserted religious belief is held."[5] Under that view, a court "must accept as true" any assertion that one's "beliefs are sincere and of a religious nature" when evaluating a RFRA claim.[6] Justice Ginsburg's approach treats the merits of a religious belief much the same as the sincerity with which a belief is held; evaluating either, in her view, would make the courts arbiters of scriptural interpretation. If unable to evaluate sincerity, courts would indeed be powerless to identify fraudulent claims.

Fortunately, courts historically have demonstrated that they are able to ferret out insincere religious claims. There is a long tradition of courts competent-

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1. 134 S. Ct. 2751 (2014).

2. *Id.* at 2774 ("[N]o one has disputed the sincerity of their religious beliefs.").

3. *See id.* at 2774 & n.28.

4. *See, e.g.*, Michael Hiltzik, *Danger Sign: The Supreme Court Has Already Expanded Hobby Lobby Decision*, L.A. TIMES (July 2, 2014, 12:37 PM), http://www.latimes.com/business/hiltzik/la-fi-mh-expanded-hobby-lobby-20140702-column.html#page=1.

5. *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting) (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1981) (Stevens, J., concurring in the judgment)).

6. *Id.* at 2798 (quoting Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008)) (internal quotation mark omitted).

ly scrutinizing asserted religious beliefs for sincerity without delving into their validity or verity. The difference is this: Suppose someone claims a religious objection to eating broccoli, but that same person knowingly eats broccoli each week. A court, without asking whether there is any moral truth behind a religious objection to broccoli consumption, may nonetheless ask whether the claimant actually holds that religious belief. The former, spiritual question is one no court should ever ask. The latter, factual inquiry into fraud is something courts are well equipped to do by examining objective criteria. As courts face future RFRA claims from for-profit corporate litigants, they can continue to use objective criteria to give teeth to RFRA's "sincere belief" requirement.[7]

I. JUDICIAL EXPERIENCE FERRETING OUT RELIGIOUS INSINCERITY

Looking back on how courts have historically evaluated the sincerity of religious objections sheds light on how they can do so in the future. When Justice Alito, writing for the *Hobby Lobby* majority, concluded that a for-profit corporation's "pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail,"[8] he was drawing on deep judicial experience identifying fraudulent claims—religious and otherwise.

The sincere belief requirement has its roots in a long tradition of exempting conscientious objectors from conscripted military service.[9] That policy created a strong incentive to feign religious sincerity—and forced draft boards and courts to conduct rigorous factual inquiries into religious claims.[10] In *Witmer v. United States*, the Court observed that "the ultimate question" in such cases is "the sincerity of the registrant" objecting to military service.[11] During that inquiry, "any fact which casts doubt on the veracity of the registrant is relevant."[12]

Since then, courts have questioned religious sincerity in a variety of contexts, notably in criminal cases. Religious objections to drug laws have some-

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7. We limit our analysis to claims under statutes like RFRA, recognizing First Amendment claims involve different considerations that may weigh against asking courts to question the religious sincerity of claimants. *See infra* Part II and note 45.

8. *Hobby Lobby*, 134 S. Ct. at 2774 n.28.

9. *See* 50 U.S.C. app. § 456(j) (2012) (exempting from service anyone who "by reason of religious training and belief, is conscientiously opposed to participation in war in any form"). For a discussion of the early history of conscription in America, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1468-69 (1990).

10. *See* United States v. Seeger, 380 U.S. 163, 185 (1965) ("[W]hile the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact . . . .").

11. 348 U.S. 375, 381 (1955).

12. *Id.* at 381-82.

times succeeded,[13] but criminal courts are generally skeptical,[14] wary that claimed "churches" exist for "the desire to use drugs and to enjoy drugs for their own sake, regardless of religious experience."[15] For example, in his *Hobby Lobby* opinion, Justice Alito cited to *United States v. Quaintance*,[16] in which the defendants claimed RFRA barred their drug prosecutions because "they [we]re the founding members of the Church of Cognizance, which teaches that marijuana is a deity and sacrament."[17] The Tenth Circuit rejected that claim as insincere, observing that the evidence "strongly suggest[ed]" that the defendants' marijuana dealings stemmed from "commercial or secular motives rather than sincere religious conviction."[18] Outside the drug context, courts have also rejected insincere RFRA claims in a variety of animal-related prosecutions, such as for possessing and trading in eagle feathers[19] and for importing parts of endangered African primate species.[20] Ultimately, these cases show that where there is a financial or otherwise self-interested motive to lie about a religious belief, courts are willing and able to evaluate sincerity.

In *Hobby Lobby*, Justice Alito also noted Congress's belief that federal courts are "up to the job of dealing with insincere prisoner claims," referencing the vast judicial experience exposing insincere religious claims by prisoners.[21] In the prison environment, both sincere and insincere religious accommodation claims are common, as intense regulation of mundane details of daily life gives rise to frequent conflict between government and religious interests. Prisoners have challenged prison dietary restrictions,[22] grooming restrictions,[23] housing

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13. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006) (holding that the government did not have a compelling interest in enforcing the Controlled Substances Act against a sect with a sincere religious belief that required the use of a controlled substance).

14. *See* John Rhodes, *Up in Smoke: The Religious Freedom Restoration Act and Federal Marijuana Prosecutions*, 38 OKLA. CITY U. L. REV. 319, 356 (2013) ("[F]ederal marijuana defendants have invoked [RFRA] as a defense with limited success, which appears reasonable at first glance because many defendants have raised seemingly fanciful explanations for their religious marijuana use.").

15. United States v. Kuch, 288 F. Supp. 439, 444 (D.D.C. 1968).

16. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774 n.28 (2014) (citing United States v. Quaintance, 608 F.3d 717, 718-19 (10th Cir. 2010)).

17. *Quaintance*, 608 F.3d at 718.

18. *Id.* at 722.

19. United States v. Winddancer, 435 F. Supp. 2d 687, 695 (M.D. Tenn. 2006).

20. United States v. Manneh, 645 F. Supp. 2d 98, 100, 112-14 (E.D.N.Y. 2008).

21. *Hobby Lobby*, 134 S. Ct. at 2774.

22. Abate v. Walton, 77 F.3d 488, 1996 U.S. App. LEXIS 624, at *14 (9th Cir. Jan. 5, 1996) (unpublished table decision) (finding "doubts about the consistency and sincerity of Abate's dietary demands").

23. Gartrell v. Ashcroft, 191 F. Supp. 2d 23, 25 (D.D.C. 2002) (finding that the plaintiffs "hold sincere beliefs that shaving off their beards violates a fundamental tenet of Islam").

policies,[24] and a host of other prison rules.[25] Both prison officials and courts have proven able to reject insincere religious claims, whether by evaluating the consistency of the prisoner's actions or the context in which the objection was raised.

Bankruptcy proceedings provide yet another window into the sincerity inquiry.[26] For instance, large pre-petition donations to religious organizations can be invalidated or "avoided" as fraudulent transfers.[27] While the Religious Liberty and Charitable Donation Protection Act of 1998 protected smaller donations from creditors,[28] Congress left § 548(a)(1) of the Bankruptcy Code intact, allowing the avoidance of *any* transfer, regardless of size, when made with "actual intent to hinder, delay, or defraud."[29] This forces bankruptcy courts to determine whether religious contributions are motivated by sincere religious belief.

These examples show that courts have meaningful experience questioning religious sincerity. This experience has also demonstrated that courts are best able to examine sincerity "where extrinsic evidence is evaluated" and objective factors dominate the analysis.[30] First, courts look for any secular self-interest that might motivate an insincere claim.[31] In *Quaintance*, for instance, the defendant's desire to avoid prison and continue selling drugs offered an obvious

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24. Ochs v. Thalacker, 90 F.3d 293, 296 (8th Cir. 1996) ("[W]e are skeptical that Ochs's request to be racially segregated, first made in the midst of prison racial disturbances, reflected a sincerely held religious belief.").

25. *See, e.g.*, Green v. White, 525 F. Supp. 81, 83-84 (E.D. Mo. 1981) ("[I]t does not necessarily follow that . . . defendant denied the plaintiff the ability to exercise his religion in violation of the Constitution by denying him conjugal visits, banquets, or the ability to distribute his newspaper. In light of plaintiff's reputation and his actions a responsible person would very well conclude his religion was no more than a sham."), *aff'd*, 693 F.2d 45 (8th Cir. 1982).

26. For a discussion of the role of religious donations in bankruptcy proceedings, see Kenneth N. Klee, *Tithing and Bankruptcy*, 75 AM. BANKR. L.J. 157, 181 (2001) ("[C]haritable donations or tithes are involved in twenty-two percent of Chapter 13 cases and eleven percent of Chapter 7 cases.").

27. *See* Stein v. Zarling (*In re* Zarling), 70 B.R. 402, 404-05 (Bankr. E.D. Wis. 1987) ("The debtor's attempts to portray himself as an unsophisticated individual acting out of sincere religious convictions are unconvincing.").

28. Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, sec. 3(b)(2), § 544(b), 112 Stat. 517, 518 (codified at 11 U.S.C. § 544(b)(2) (2013)).

29. 11 U.S.C. § 548(a)(1)(A) (2013); *see also* 144 CONG. REC. 8941 (1998) (statement of Sen. Grassley) ("Only genuine charitable contributions and tithes are protected by S. 1244.").

30. Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981).

31. *Id.* (looking for "evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine").

motive to fabricate religious belief.[32] This factor is particularly probative where the purported religious belief arose only after the benefit of claiming such a belief became apparent.[33] On the flip side, not "all accommodations [will] be perceived as 'benefits.'"[34] For example, in *Jolly v. Coughlin*, there was little reason to question the sincerity of a prisoner who had endured "the conditions of medical keeplock for over three and a half years based on what he claims are the tenets of his religion."[35]

Second, courts look to the claimant's behavior. Witnesses might testify about regular attendance at services or religious study.[36] More controversially, courts might also look for inconsistencies between a litigant's purported beliefs and his behavior.[37] For example, evidence that a prisoner regularly violates the requirements of his religiously mandated diet can reveal insincerity.[38] The obvious challenge here is that no one is perfect; simply because someone fails to live up to his religious ideals does not mean those beliefs are insincere.[39] Particularly for religions with stringent requirements, imperfect compliance may be the norm. Nevertheless, actions can be strongly probative of sincerity.[40] Courts should weigh this evidence carefully to avoid improperly concluding that new or erratically followed beliefs are insincere.

Claims of religious sincerity are ultimately questions of fact,[41] and courts have a wealth of experience weighing witness credibility. They are "seasoned

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32. United States v. Quaintance, 608 F.3d 717, 722 (10th Cir. 2010) ("[T]he Quaintances considered themselves in the marijuana 'business.'").

33. *See, e.g.*, United States v. Messinger, 413 F.2d 927, 928-30 (2d Cir. 1969) (citing a Justice Department recommendation that a draftee's "long delay in asserting his conscientious objector claim" was evidence of insincerity where his religious claim came two years after his initial registration for Selective Service).

34. Cutter v. Wilkinson, 544 U.S. 709, 721 n.10 (2005) ("[C]ongressional hearings on RLUIPA revealed that one state corrections system served as its kosher diet 'a fruit, a vegetable, a granola bar, and a liquid nutritional supplement—each and every meal.'").

35. 894 F. Supp. 734, 742-43 (S.D.N.Y. 1995), *aff'd*, 76 F.3d 468 (2d Cir. 1996).

36. *See, e.g.*, Howard v. United States, 864 F. Supp. 1019, 1021, 1024 (D. Colo. 1994) (noting that an inmate "educated himself in the area of Satanism through reading literature and attending lectures," and concluding as a factual matter that his beliefs were sincere).

37. *See, e.g.*, Dobkin v. District of Columbia, 194 A.2d 657, 659 (D.C. 1963) (finding that a member of the Jewish faith who worked on Saturdays was insincere when he challenged being compelled to appear in court on the Sabbath).

38. Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988) ("Evidence of nonobservance is relevant on the question of sincerity, and is especially important in the prison setting . . . .").

39. Kevin L. Brady, Comment, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA?*, 78 U. CHI. L. REV. 1431, 1458 (2011) ("Prior violations of accommodations would be weak evidence of inconsistency, since even sincere believers are imperfectly religious.").

40. *See, e.g.*, United States v. Zimmerman, 514 F.3d 851, 854 (9th Cir. 2007) (observing that a history of drug use and tattoos casts possible doubt on a prisoner's religious objection to drawing blood for DNA testing purposes).

41. *See* United States v. Seeger, 380 U.S. 163, 185 (1965).

appraisers of the 'motivations' of parties" and can observe the claimant's "demeanor during direct and cross-examination."[42] A religious claimant must convincingly explain in court the basis for his objection, and he can be pressed on inconsistencies. "Neither the government nor the court has to accept the defendants' mere say-so."[43]

II. HARNESSING OBJECTIVITY AFTER *HOBBY LOBBY*

Going forward, for-profit corporations raising RFRA claims must prove sincerity, and courts can put them to that proof, as they do in other contexts. It is important to recognize, however, that courts will be asked to perform an inquiry that can be "exceedingly amorphous, requiring the factfinder to delve into the claimant's most veiled motivations."[44] At the core of courts' apprehension to weigh religious beliefs is the dangerous temptation to confuse sincerity with the underlying truth of a claim. Particularly for unorthodox beliefs, the challenge is that "[p]eople find it hard to conclude that a particularly fanciful or incredible belief can be sincerely held."[45]

That challenge, however, should not dissuade courts from questioning the sincerity of RFRA claims. Congress could not have intended RFRA to be a blank check to opt out of government programs. A long history of courts competently questioning sincerity was part of the backdrop against which Congress legislated, and questioning sincerity is the least dangerous way to place reasonable limits on RFRA claims. While there is a risk that sincerity may be used as a proxy for verity, openly questioning the underlying truth of a religious claim surely would be worse. And were courts to examine the importance of an asserted belief, not only would they move closer to scriptural interpretation, but that test would run counter to Congress's intent to protect religious beliefs regardless of their centrality to a religious system.[46] Provided that courts take care that their test for sincerity is truly one for fraud, not verity or centrality, placing this limit on RFRA claims will best effectuate Congress's intent.

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42. United States v. Manneh, 645 F. Supp. 2d 98, 112 (E.D.N.Y. 2008) (quoting Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984)) (internal quotation mark omitted).

43. United States v. Bauer, 84 F.3d 1549, 1559 (9th Cir. 1996).

44. *Patrick*, 745 F.2d at 157.

45. Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981). These practical difficulties, combined with the different limits that constrain First Amendment claims, *see* Emp't Div. v. Smith, 494 U.S. 872 (1990), may well mean that courts should avoid questioning the religious sincerity of First Amendment claimants. This issue is beyond the scope of this Essay.

46. In 2000, Congress amended RFRA to incorporate the following definition: "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 8, 114 Stat. 803, 807 (codified at 42 U.S.C. § 2000cc-5(7)(A) (2013)); *see also id.* sec. 7(a)(3), § 5, 114 Stat. at 806 (codified at 42 U.S.C. § 2000bb-2(4)).

In doing so, courts should keep objective indicia of sincerity at the center of their analysis. The most important of those factors will be motivation to lie. If a religious exemption would save the corporation money, the court will need to carefully weigh the corporation's motives and decide in context whether its claim is merely a secular interest couched in religious language. For instance, there was little reason to question Hobby Lobby's sincerity, because the contraception mandate was unlikely to impose a monetary cost on the plaintiffs.[47] On the other hand, if publicly traded corporations are allowed to bring RFRA claims, the corporation's duty to maximize shareholder profit will also be relevant.

Corporate behavior, just like individual behavior, provides the second basket of objective factors. A for-profit corporation's public activities will often provide extensive evidence of sincerity. Hobby Lobby's and Mardel's behavior, for example, reveals their religious convictions: they close their doors on Sundays (losing millions in annual sales), refuse to sell alcohol, donate to Christian groups, and buy hundreds of religious newspaper ads.[48] Conestoga's corporate mission statement publicly proclaims its commitment to Christian values.[49] If the government disputes sincerity in other cases, internal records of corporate decisionmaking and witness testimony can help resolve doubts.

To be sure, *Hobby Lobby* leaves plenty of questions unanswered. Even when weighing the sincerity of individual religious beliefs, "[c]ourts are often unclear about which party bears the burden of proof and what evidence is permissible."[50] *Hobby Lobby* is silent as to who will adjudicate religious exemptions claimed by for-profit corporations; in both the draft and prison contexts, courts are generally involved only after government administrators conduct an initial sincerity inquiry.[51] *Hobby Lobby* also addresses only closely held corporations,[52] the owners of which are unanimous in their beliefs, where the number of owners is small enough that a court could hear testimony and other evidence regarding their beliefs. If publicly traded or nonuniform corporations raise

47. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2763 (2014) ("HHS has determined that this obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from the services.").

48. *Id.* at 2766. Hobby Lobby received a great deal of criticism for its admission that prior to litigation, it funded some (but not all) of the contraceptives to which it now objects. This inconsistency may be probative of insincerity but not dispositive, as the owners of Hobby Lobby alleged they were unaware of the presence of objectionable drugs in their insurance coverage. Complaint at 14-15, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (Civil Action No. CIV-12-1000-HE), 2012 WL 4009450.

49. *Hobby Lobby*, 134 S. Ct. at 2764.

50. Brady, *supra* note 39, at 1452.

51. *See, e.g.*, Beerheide v. Suthers, 82 F. Supp. 2d 1190, 1198-1200 (D. Colo. 2000) (finding the plaintiffs' religious claims sincere, but noting favorably a prison policy that established criteria for the review and cancellation of special dietary requests), *aff'd*, 286 F.3d 1179 (10th Cir. 2002).

52. *Hobby Lobby*, 134 S. Ct. at 2774.

RFRA claims, courts will face unique questions about how to weigh their religious sincerity.

Congress could assist courts in answering these questions by clarifying RFRA's requirements. In the bankruptcy context, the Religious Liberty and Charitable Donation Protection Act essentially creates a presumption of sincerity where a religious contribution is either less than fifteen percent of a debtor's income or where it is "consistent with the practices of the debtor in making charitable contributions."[53] Similarly, Congress could identify objective factors that demonstrate a presumption of religious sincerity in the for-profit context, such as a history of expressing similar positions prior to the instant litigation or lack of economic benefit from adhering to the asserted belief. Congress could also limit RFRA claims to certain types of for-profit corporations, such as those whose owners are uniform in their beliefs or that have previously expressed a religious commitment. Ultimately, RFRA is Congress's creation, and it is up to Congress to "pass upon its wisdom [and] fairness" and guide courts in how to draw these difficult lines.[54]

CONCLUSION

It is broadly accepted that the judiciary has no business evaluating the moral truth underlying religious claims.[55] The challenge for courts is how to apply that principle without extending RFRA's protections to any and all claimants. The answer lies in objectivity. As courts face RFRA claims from for-profit corporations, they can and should evaluate the factual sincerity of asserted religious beliefs as they historically have done in other contexts. Doing so certainly involves risks that courts will improperly slip into questions of verity or centrality, but this path offers the best chance at shielding the religious principles Congress intended to protect while blocking fraudulent claims by for-profit corporations seeking to evade generally applicable laws.

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53. 11 U.S.C. § 548(a)(2) (2013).

54. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012).

55. *See Hobby Lobby*, 134 S. Ct. at 2798 (Ginsburg, J., dissenting) ("[C]ourts are not to question where an individual 'dr[aws] the line' in defining which practices run afoul of her religious beliefs." (alteration in original) (quoting Thomas v. Review Bd., 450 U.S. 707, 715 (1981))).

Notes

Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities

Many religious individuals feel profoundly trapped between the demands of their faith and the laws of the state. The relief that such persons often seek is exemption from laws that, although constitutionally sound, nevertheless infringe upon their religious beliefs. The basis for such relief can be found in the free exercise clause of the First Amendment.[1]

Claims for religion-based exemptions under the free exercise clause do not fit easily into American constitutional jurisprudence. Most constitutional rights involve norms internal to society's value system. Grants of religion-based exemptions, in contrast, require that the state accommodate itself to external norms of conduct or just treatment.[2]

Present free exercise doctrine, which has allowed some exemptions under a balancing test derived from other aspects of First Amendment law, is ad hoc and conceptually flawed. Courts ap-

1. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion].") The Supreme Court declared the free exercise clause applicable to the states in Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

The question of religion-based exemptions from otherwise constitutional laws is a distinct issue within free exercise doctrine. *Cf.* Galanter, *Religious Freedoms in the United States: A Turning Point?* 1966 WIS. L. REV. 217, 217-18, 231 (singling out freedom from "admittedly 'secular' regulations"). Courts also apply the free exercise clause to hold unconstitutional laws that discriminate on the basis of religion, *see, e.g.*, Cruz v. Beto, 405 U.S. 319 (1972) (prison must provide Buddhist reasonable opportunity to pursue his faith comparable to that afforded other prisoners); Fowler v. Rhode Island, 345 U.S. 67 (1953) (Jehovah's Witnesses meeting may not be barred in public park open to other religious services), or that exceed the permissible scope of government regulation, *see, e.g.*, West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (state may not compel students to recite pledge of allegiance); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (state may not impose license requirement on door-to-door distribution of religious literature). This Note refers to such findings of unconstitutionality, in contrast to the granting of religion-based exemptions, as the "general application" of the free exercise clause.

2. The fundamental decision to consider religion-based exemptions is itself founded upon society's internal norms, but any particular claim for an exemption is derived from the specific tenet of the claimant's religion. The uniqueness of religion-based exemptions as a constitutional issue is highlighted by contrasting it with free speech doctrine. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (refusing to accept "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea").

plying it have been insufficiently generous in granting exemptions, and even when they have allowed them, have been prone to make inappropriate substantive judgments.

A central premise of this Note is that religious liberty, as enshrined in the free exercise clause, is a pure value that should be promoted to the greatest extent possible in a pluralistic society.[3] The Note argues that religion-based exemptions are necessary to a system of religious liberty, yet can be understood only by looking beyond standard constitutional principles. The Note first examines the defects of current exemption doctrine. It then argues that the courts should adopt instead a doctrine of "competing legal authorities." That doctrine employs an analogy to the legal discipline of conflict of laws, which has long grappled with claims based upon externally derived norms. Finally, the Note suggests procedures by which courts could apply the doctrine of competing authorities.

I. The Inadequacy of Religious Exemption Doctrine

Claims for religion-based exemptions have been lodged against a variety of laws, including driver's license photograph requirements,[4] compulsory education requirements,[5] tax laws,[6] unemployment insurance rules,[7] narcotics statutes,[8] civil rights statutes,[9]

3. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963) (purpose of free exercise clause is to "secure religious liberty in the individual by prohibiting any invasions thereof by civil authority"). The guarantee of religious liberty is nurtured in part by a substantive commitment to the protection of religious life. *See id.* at 222 (free exercise clause recognizes value of religious training, teaching, and observance); Zorach v. Clauson, 343 U.S. 306, 313 (1952) ("[w]e are a religious people"); M. HOWE, THE GARDEN AND THE WILDERNESS 15-19 (1965) (religion clauses inspired in large part by evangelical principle meant to protect religions from worldly corruption). Concurrent with this commitment, however, the free exercise clause also protects the right of persons to be irreligious. *See* Torcaso v. Watkins, 367 U.S. 488 (1961) (state may not make belief in God condition of holding public office). Moreover, the establishment clause, U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion"), requires that statutes have a secular legislative purpose, have a principal or primary effect that neither advances nor inhibits religion, and not foster excessive entanglement with religion. Wolman v. Walter, 433 U.S. 229, 235-36 (1977).

4. *E.g.*, Johnson v. Motor Vehicle Div., 197 Colo. 455, 593 P.2d 1363, *cert. denied*, 444 U.S. 885 (1979); Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc., 380 N.E.2d 1225 (Ind. 1978).

5. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); State v. Kasuboski, 87 Wis. 2d 407, 275 N.W.2d 101 (Ct. App. 1978).

6. *E.g.*, United States v. American Friends Serv. Comm., 419 U.S. 7 (1974) (withholding tax); Jaggard v. Commissioner, 582 F.2d 1189 (8th Cir. 1978), *cert. denied*, 440 U.S. 913 (1979) (self-employment tax).

7. *E.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Bd., 391 N.E.2d 1127 (Ind. 1979), *cert. granted*, 444 U.S. 1070 (1980).

8. *E.g.*, People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (peyote); Town v. State *ex rel.* Reno, 377 So. 2d 648 (Fla. 1979), *appeal dismissed and cert. denied*, 101 S. Ct. 48 (1980) (marijuana).

9. *E.g.*, Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977), *cert. denied*,

labor laws,[10] snake-handling prohibitions,[11] and bigamy proscriptions.[12] Serious judicial consideration of such claims is a relatively recent,[13] and still controversial,[14] element of First Amendment doctrine. The approach adopted by the courts has been ill-conceived and unconvincing.[15]

A. *Evolution of Exemption Doctrine*

Debate over the framers' intent as to the scope of the free exercise clause has been vigorous but inconclusive.[16] The most accurate statement may be that the framers did not contemplate the problems that would arise from the combination of increasing government activity and growing religious diversity.[17]

In its earliest opinion on the exemption issue, the Supreme

434 U.S. 1063 (1978) (claim that private school's racial discrimination on religious grounds was protected from civil rights action); Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975) (similar claim against federal funding cutoff).

10. *E.g.*, Catholic Bishop v. NLRB, 559 F.2d 1112 (7th Cir. 1977), *aff'd on other grounds*, 440 U.S. 490 (1979) (free exercise challenge to NLRB jurisdiction over lay teachers in parochial schools).

11. *E.g.*, State v. Massey, 229 N.C. 734, 51 S.E.2d 179, *appeal dismissed sub nom.* Bunn v. North Carolina, 336 U.S. 942 (1949) (denying religious defense to municipal ordinance prohibiting handling of venomous and poisonous reptiles as to endanger public health, safety, and welfare); State *ex rel.* Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976) (upholding, and justifying as abatement of public nuisance, injunction against snake handling by members of religious group).

12. *E.g.*, Cleveland v. United States, 329 U.S. 14 (1946) (transportation of plural wives as violation of Mann Act); Reynolds v. United States, 98 U.S. 145 (1878) (denying religious defense to federal law forbidding bigamy in United States territories).

13. *See* Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115, 1139 (1973) (identifying Sherbert v. Verner, 374 U.S. 398 (1963), as turning point in doctrinal development).

14. *See, e.g.*, M. MALBIN, RELIGION AND POLITICS 39-40 (1978) (criticizing religion-based exemptions); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 16-17 (1978) (same).

15. *Cf.* Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 329-30 (1969) (present doctrine not predictable or coherent); Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 244 (1973) (Supreme Court has not established a "doctrinal base").

16. *See* Summers, *The Sources and Limits of Religious Freedom*, 41 ILL. L. REV. 53, 55-58 (1946) (historical argument inconclusive and misleading). *Compare* R. MORGAN, THE SUPREME COURT AND RELIGION 23 (1972) ("freedom of conscience" did not mean that government could not force persons to do things that offended them) *with* Freeman, *A Remonstration for Conscience*, 106 U. PA. L. REV. 806, 808-13 (1958) (protection of actions based upon conscience included in motivation for religion clauses). The framers themselves may not have had a common understanding. *See* M. MALBIN, *supra* note 14, at 19-37 (Madison likely believed in religion-based exemptions, but others did not share his views).

17. *See* Gianella, *Religious Liberty, Non-Establishment, and Doctrinal Development* (pt. 1), 80 HARV. L. REV. 1381, 1387-90 (1967) (unlikely that authors of First Amendment appreciated inner tension between the two religion clauses); Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1232-33 (specific problems that now arise could not have been imagined by founding fathers).

Court declared that only religious beliefs, not religiously-motivated actions, were constitutionally protected.[18] This belief-action distinction implicitly precluded the possibility of religion-based exemptions.[19] The Court eroded the belief-action distinction in the 1940s in a series of decisions that upheld rights of religious expression.[20] Those cases, however, rested heavily upon free speech considerations[21] and did not authorize religion-based exemptions.[22]

18. Reynolds v. United States, 98 U.S. 145, 164 (1878) (upholding polygamy conviction of Utah Mormon). Commentators have found little intelligible content in the belief-action distinction itself. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-8, at 838 (1978) (distinction more apparent than real); Marcus, *supra* note 17, at 1233-35 (carried to logical conclusion, distinction is ludicrous). Some commentators, however, have identified it with a doctrine that would deny free exercise protection against laws that have valid secular objectives. *See* R. MORGAN, *supra* note 16, at 41 (equating belief-action distinction with secular regulation rule); L. TRIBE, *supra*, § 14-8, at 837 (belief-action distinction can be understood most clearly in terms of secular purpose requirement); *cf.* Gianella, *supra* note 17, at 1387 (*Reynolds* court itself would probably not have permitted interference with certain actions).

19. *See* Reynolds v. United States, 98 U.S. 145, 166-67 (1878) (exemptions would "in effect . . . permit every citizen to become a law unto himself"); *cf.* Hamilton v. Regents, 293 U.S. 245, 265-68 (1934) (Cardozo, J., concurring) (religious judgment cannot be "exalted above the powers and the compulsion of the agencies of government"). The logic of either the belief-action distinction or the secular-purpose formula precludes constitutional protection from otherwise constitutional laws, and thereby forecloses the possibility of religion-based exemptions. *See* Minersville School Dist. v. Gobitis, 310 U.S. 586, 594 (1940) ("[c]onscientious scruples . . . [do not relieve] the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs").

20. *E.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 109 (1943) (distribution of religious tracts is protected activity); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (First Amendment embraces both freedom to believe and freedom to act, though latter cannot be absolute). Those decisions also eroded the closely related secular-purpose rule. *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943) (permissible goals may not be accomplished by impermissible means); Cantwell v. Connecticut, 310 U.S. 296, 306-07 (1940) (same).

The belief-action distinction, though no longer an absolute guide in free exercise cases, remains an important benchmark. *See, e.g.*, McDaniel v. Paty, 435 U.S. 618, 626-27 (1978) (because provision barring clergymen from serving as delegates to state constitutional convention was aimed at act, absolute prohibition against infringement on "freedom to believe" not engaged); State *ex rel.* Swann v. Pack, 527 S.W.2d 99, 108-11 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976) (compelling state interest may justify regulation of action or conduct).

21. *E.g.*, West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (invalidating compulsory flag salute); Martin v. Struthers, 319 U.S. 141 (1943) (invalidating ban on door-to-door distribution of circulars); *see* M. HOWE, *supra* note 3, at 109 ("[i]n nearly every opinion . . . Court . . . [insisted] that whatever protection it was giving to religious speech or conscience it would also give to non-religious speech or conviction"); Pfeffer, *supra* note 13, at 1130 (whenever free exercise claim stood alone, it was unsuccessful).

22. *See, e.g.*, West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 635-36 (1943) (validity of compulsory flag salute must be framed in terms of overall constitutionality rather than religion-based exemption); Murdock v. Pennsylvania, 319 U.S. 105, 108-09 (1943) (tax on distribution of religious literature on its face violation of First Amendment). Though some of the cases spoke of granting exemptions, they actually held that the challenged statutes were facially overbroad insofar as the statutes reached religious activities. *See, e.g.*, Follett v. Town of McCormick, 321 U.S. 573, 575-78 (1944) (distributors of religious literature cannot be required to obtain bookseller's license). Such cases therefore represent a general application of the free exercise clause. *See* note 1 *supra*.

The Court took a decisive turn in 1963 in *Sherbert v. Verner*.[23] Drawing heavily from other types of First Amendment cases,[24] the Court held that only a compelling state interest could justify imposing a burden upon the exercise of religion[25] and that the state bore the burden of demonstrating that no less restrictive regulation could achieve its aims.[26] Nine years later, in *Wisconsin v. Yoder*,[27] the Court reiterated that the Constitution sometimes requires religion-based exemptions,[28] and it undertook a thorough analysis, weighing both the religious and state interests involved to determine which should prevail.[29]

The present state of exemption doctrine is unclear. Neither *Sherbert* nor *Yoder* involved a pure case of exemption from an otherwise constitutional law.[30] Moreover, the courts have not been consistent in outlining the structure of their balancing test.[31]

23. 374 U.S. 398 (1963) (Seventh-Day Adventist awarded unemployment insurance benefits denied her because she refused to work on Saturdays).

24. For its compelling state interest requirement, the *Sherbert* court cited NAACP v. Button, 371 U.S. 415 (1963), and Thomas v. Collins, 323 U.S. 516 (1945), both free speech cases. *See* Sherbert v. Verner, 374 U.S. 398, 403, 406 (1963). For the less restrictive alternative test, the Court cited Shelton v. Tucker, 364 U.S. 479 (1960) (freedom of association); Talley v. California, 362 U.S. 60 (1960) (freedom of speech); Martin v. Struthers, 319 U.S. 141 (1943) (freedom of speech and press); and Schneider v. New Jersey, 308 U.S. 147 (1939) (same). *See* Sherbert v. Verner, 374 U.S. 398, 407-08 (1963). *Martin* and *Schneider* involved the distribution of religious literature and therefore had free exercise overtones.

25. 374 U.S. at 403.

26. *Id.* at 407.

27. 406 U.S. 205 (1972) (excusing Old Order Amish from compulsory education above the eighth grade).

28. *Id.* at 220-21. The Court had never adequately reconciled the earlier *Sherbert* decision with Braunfeld v. Brown, 366 U.S. 599 (1961) (denying Orthodox Jew exemption from Sunday-closing laws), and it seemed something of an aberration. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1322 (1970) (arguing that *Sherbert* should not be followed); Pfeffer, *supra* note 13, at 1140 (until *Yoder*, it appeared that *Sherbert* might have been isolated opinion).

29. 406 U.S. at 215-34.

30. *Sherbert* was complicated by South Carolina's decision that leaving a job for religious reasons was not "good cause," 374 U.S. at 401, and by the state's express solicitude for Sunday worshippers, *id.* at 406, both of which may have been contrary to the general application of the free exercise clause. *See* P. KAUPER, RELIGION AND THE CONSTITUTION 42 (1964) (*Sherbert* could have been decided on discrimination grounds.) *Yoder*, in turn, relied in part upon the right of parents to play an important role in determining the education of their children. *See* 406 U.S. at 213, 232-34. *But cf.* McDaniel v. Paty, 435 U.S. 618, 628 n.8 (1978) (approving balancing process employed by lower courts in exemption cases).

The Supreme Court may clarify its religion-based exemptions doctrine when it decides Thomas v. Review Bd., 391 N.E.2d 1127 (Ind. 1979), *cert. granted*, 444 U.S. 1070 (1980) (denying unemployment insurance benefits to worker who quit job because of ostensible religious scruples).

31. Some cases apply a two-tiered, modified balancing test, in which a sufficient degree of religious interest triggers a burden on the state to demonstrate a compelling state interest and the lack of a less restrictive alternative; if the burden is met, the statute is valid. *See,*

Nevertheless, a rough composite test has emerged.[32] A court faced with a claim for a religion-based exemption from a government regulation will first consider the sincerity of the religious claim being advanced[33] and the degree to which the challenged regulation interferes with vital religious practice or belief.[34] It will then weigh, on the other side of the balance, the importance of the secular value underlying the rule,[35] the impact of an exemption upon the regulatory scheme,[36] and the availability of a less restrictive alternative.[37] The result of this balancing process determines whether or not the court will grant an exemption.

B. *Failures in Theory and Practice*

The current exemption test is fundamentally flawed. As with any ad hoc balancing test,[38] it leads to inconsistent and unprincipled

e.g., Sherbert v. Verner, 374 U.S. 398, 406 (1963); Johnson v. Motor Vehicle Div., 593 P.2d 1363, 1365 (Colo.), *cert. denied*, 444 U.S. 885 (1979). Other cases apply a "true" balancing test that, although it also requires a threshold religious interest as a trigger, undertakes a detailed consideration of the relative weights of the religious and state interests. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); People v. Woody, 61 Cal. 2d 716, 725, 394 P.2d 813, 820, 40 Cal. Rptr. 69, 76 (1964).

32. For a careful discussion of a "thoroughgoing balancing test," see Gianella, *supra* note 17.

33. *See, e.g.*, United States v. Kuch, 288 F. Supp. 439, 445 (D.D.C. 1968); *In re* Grady, 61 Cal. 2d 887, 888, 394 P.2d 728, 729, 39 Cal. Rptr. 912, 913 (1964); Dobkin v. District of Columbia, 194 A.2d 657, 659 (D.C. Ct. App. 1963). The parties often stipulate the sincerity of the religious proponent. *See, e.g.*, Varga v. United States, 467 F. Supp. 1113, 1115 (D. Md. 1979), *aff'd*, 618 F.2d 106 (4th Cir. 1980); Johnson v. Motor Vehicle Div., 593 P.2d 1363, 1364 (Colo.), *cert. denied*, 444 U.S. 885 (1979).

34. This involves an examination of whether the relevant belief is "religious," *see* note 45 *infra* (discussing judicial definitions of religion), and how the state is impinging upon it, *see, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 218 (1972); Bureau of Motor Vehicles v. Pentecostal House of Prayer, 380 N.E.2d 1225, 1228 (Ind. 1978). It may also involve inquiries into such matters as whether the relevant belief is "central" to the religious faith, whether the state infringes it directly or indirectly, and whether the religion would excuse noncompliance. *See* pp. 360-61 *infra* (discussing such inquiries).

35. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 221-29 (1972); State *ex rel.* Swann v. Pack, 527 S.W.2d 99, 113 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976).

36. *See, e.g.*, Johnson v. Motor Vehicle Div., 593 P.2d 1363, 1365 (Colo.), *cert. denied*, 444 U.S. 885 (1979); *In re* Jenison, 267 Minn. 136, 137, 125 N.W.2d 588, 589 (1963).

37. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 407 (1963); Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc., 380 N.E.2d 1225, 1229 (Ind. 1978). Although commentators have shown particular favor to the less restrictive alternative test, *see, e.g.*, L. TRIBE, *supra* note 18, § 14-10; Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 817-21 (1978), courts have often been quick to dismiss proposed alternative burdens, *see, e.g.*, Johnson v. Motor Vehicle Div., 593 P.2d 1363, 1365 (Colo.), *cert. denied*, 444 U.S. 885 (1979) (other forms of identification as substitute for picture on driver's license); State *ex rel.* Swann v. Pack, 527 S.W.2d 99, 114 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976) (restrictions on snake handling as alternative to prohibition).

38. Commentators distinguish between ad hoc balancing—the case-by-case weighing of conflicting interests—and definitional balancing—the formulation of general rules from a

decisions.[39] That problem is particularly acute in this area because the contexts in which claims for exemptions arise are so varied.[40] But the present test's reliance upon ad hoc balancing is only one element of a more general failure in theory and practice.[41]

1. *Conceptual Defects*

Religious-exemption doctrine, borrowed as it is from other sources of constitutional law, does not address the distinctive features of the exemption context. The doctrine suffers from three conceptual defects.

First, courts have failed to develop an independent justification for religion-based exemptions. Exemption doctrine has therefore been unable to provide a principled answer to objections that religion-based exemptions contradict the rule of law,[42] violate general notions of equal treatment,[43] and violate the establishment clause.[44] This failure has also prevented courts from defining, in a

weighing of competing principles. *See* Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 939-45 (1968); *cf.* Marcus, *supra* note 17, at 1242 (concluding that present free exercise doctrine is essentially ad hoc, though Court has defined certain state interests as not compelling in any case).

39. *See* Clark, *supra* note 15, at 330 (free exercise and other balancing tests are formless and unprincipled, give little guidance to potential litigants, and can be overly deferential to legislative judgment); Marcus, *supra* note 17, at 1240-41 (same).

40. *See* pp. 351-52 *supra* (examples of exemption claims); *cf.* Clark, *supra* note 15, at 330 (because particular interests involved in free exercise cases vary, uncertainties of ad hoc test are especially great).

41. Courts could add some certainty to exemption doctrine by making greater use of definitional balancing—distilling the balancing test into specific guidelines. *Cf.* Clark, *supra* note 15 (suggesting guidelines for free exercise adjudication). But such definitional balancing, unaccompanied by a basic reconceptualization, would still suffer from many of the same failures as does ad hoc balancing. *Cf.* DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV., 161, 180 (1972) (neither ad hoc nor definitional balancing in free speech context adequately focuses upon guarantee's purpose).

42. *See* Minersville School Dist. v. Gobitis, 310 U.S. 586, 594-95 (1940) (conscientious beliefs should not relieve individuals of duty to obey valid laws); Kurland, *supra* note 14, at 16 (religion-based exemptions give protected persons "license to violate the laws with impunity").

43. *See* F. HAYEK, THE CONSTITUTION OF LIBERTY 153-56 (1960) (only abstract rules laid down irrespective of their particular application allow persons to be free and not subject to will of others); *cf.* Clark, *supra* note 15, at 345, 348 (important factor in adjudicating exemption claims should be whether state can impose alternative burdens that retain objective equality).

44. *See* Ely, *supra* note 28, at 1313-14 (combination of religion clauses requires that government not go out of its way in any context to favor or disfavor particular religion or religion generally); Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 26, 96 (1961) (Constitution requires that government may not utilize religion as standard for action or inaction); Kurland, *supra* note 14, at 15-18 (Supreme Court has not reconciled religion-based exemptions with establishment clause); *cf.* Epperson v. Arkansas, 393 U.S.

consistent fashion, what constitutes a cognizable religious claim.[45]

The courts' failure to develop a justification is compounded by the focus in present doctrine upon preventing injuries to conscience rather than enforcing claims of right; that is, the doctrine is more concerned with the possibility that the government will cause persons to suffer moral anguish than that it will violate their religious autonomy.[46] Personal conscience is one of the least distinctive elements of religious life[47] and opponents of religion-based exemptions can argue justifiably that such exemptions unfairly favor one type of conscience over others.[48]

97, 103-04 (1968) (First Amendment mandates neutrality among religions and between religion and nonreligion); R. DWORKIN, *Taking Rights Seriously*, in TAKING RIGHTS SERIOUSLY 184, 201 (1977) (secular society cannot prefer religious to nonreligious morality). *But see* Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972) (establishment clause does not stand in way of exemptions vital to protection of values promoted by free exercise clause); Sherbert v. Verner, 374 U.S. 398, 409 (1963) (exemption may promote neutrality in face of religious differences).

A related objection is that allowing religion-based exemptions forces courts to become impermissibly enmeshed in the task of defining what is religious. *See* Weiss, *Privilege, Posture, and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 622 (1964).

45. Courts have abandoned their traditional, purely theistic view of religion. *Compare* Davis v. Beason, 133 U.S. 333, 342 (1890) (defining religion as "relations to [one's] Creator, and . . . obligations [those relations] impose of reverence for his being and character, and of obedience to his will") *with* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (recognizing many of world's religions are not theistic). Courts have also shown increased reluctance to limit the scope of what could be a religious belief. *Compare* Davis v. Beason, 133 U.S. 333, 341-42 (1890) (to call advocacy of polygamy "a tenet of religion is to offend the common sense of mankind") *with* United States v. Ballard, 322 U.S. 78, 86-87 (1944) (unusual religious beliefs are not less worthy of protection). Having rejected the old certainties, however, courts have been unable to find a stable medium ground between narrow-minded limitations and no limitations at all, and they have sometimes resorted to a dubious search for doctrinal pedigree. *See* note 56 *infra* (describing and criticizing that inquiry).

46. *See* Johnson v. Robison, 415 U.S. 361, 385 (1974) (denial of veteran's benefits to conscientious objector who performed alternative service does not force oppressive choice upon him); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (denial of unemployment benefits to Sabbatarian does force oppressive choice upon her); Clark, *supra* note 15, at 337 (framing one justification for free exercise clause in terms of avoiding pain to religious individuals); Gianella, *supra* note 17, at 1422-23 (courts regard "[g]overnment regulations that compel action contrary to conscience . . . as more serious interferences with religious liberty than those which merely subject more or less passive religious dissenters to government action").

47. *See* M. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE 99 (1968) ("persons who avow religious beliefs . . . do not hold a monopoly on conscience"); M. WALZER, *Conscientious Objection*, in OBLIGATIONS 120, 133 (1970) (conscience of religious persons no more real than that of other persons).

48. *See, e.g.*, Kurland, *supra* note 15, at 237-41; Weiss, *supra* note 44, at 622-23.

The First Amendment could be read to include a general "right of conscience." Gillette v. United States, 401 U.S. 437, 465-66 (1971) (Douglas, J., dissenting); M. KONVITZ, *supra* note 47, at 104-06. In some contexts, such a right has already been recognized. *See* Wooley v. Maynard, 430 U.S. 705 (1977) (state may not compel drivers to display official motto on their license plates). Nevertheless, a broadly defined general "right of conscience" would require a basic rethinking of democratic theory, *cf.* p. 362 *infra* (law takes precedence over individual desire), and a commitment to a significantly more liberatarian form of govern-

The second conceptual flaw of existing doctrine is that it erroneously treats consideration of an exemption claim as an assessment of the constitutionality of a statute. Ordinarily, courts should review laws to correct legislative mistake or abuse,[49] applying strict scrutiny only if there is particular reason to suspect the legislative product.[50] In such cases, a court may appropriately undertake a substantive evaluation of the law in order to determine whether the legislative judgment was improper.[51]

The nature of the adjudication is fundamentally different in the exemption context.[52] Because claims for exemption arise out of a law's incidental conflict with externally derived norms, not out of any legislative mistake or abuse,[53] a legislature cannot insure that

ment, *cf.* R. NOZICK, ANARCHY, STATE, AND UTOPIA ix (1974) (any state with more than very narrow functions violates persons' rights not to be forced to do certain things), while a more narrowly defined right would leave many religious claims unprotected.

49. *See* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 206-07 (1976) (constitutional rules must be framed so that conscientious government could in theory comply with them).

This account of judicial review makes no claim regarding precisely to what level of diligence or good faith courts do or should hold legislatures; it merely claims that the process implies some such standards. For example, though legislatures can perhaps all too easily adhere to the rule of conduct inherent in the Supreme Court's racial discrimination doctrine, *see* Washington v. Davis, 426 U.S. 229, 240 (1976) (equal protection claim requires proof of racially discriminatory purpose), they could also adhere to the rules of conduct implicit in tests proposed by dissenting commentators, *see, e.g.*, Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 559 (1977) (proposing that disproportionate racial impact test be applied in contexts in which there is causal connection with historical pattern of discrimination).

50. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (strict scrutiny should be applied when legislation appears on its face to violate constitutional prohibition, and might apply when legislation restricts political process, or when it is directed at particular minorities); *cf.* J. ELY, DEMOCRACY AND DISTRUST 102-03 (1980) (judicial review necessary when process of substantive decisionmaking cannot be trusted); L. TRIBE, *supra* note 18, § 11-4, at 575 (strict scrutiny applied when protected values seem politically fragile).

51. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978) ("[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (usual judicial deference inappropriate when legislature intrudes upon rights of family; court must then carefully examine importance of competing interests); Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 30-32 (1973) (judicial "second-guessing" of legislative judgment in abortion decisions necessary because of factors prejudicing legislative process).

52. Commentators attempting to develop general standards of judicial review have noted the anomalous treatment of claims for religion-based exemptions. *See* Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 165-66 (1977) (contrasting impact analysis in free exercise cases with motive requirement in equal protection cases); Ely, *supra* note 28, at 1315-17 (free exercise cases should not be determined on basis of impact per se).

53. This is true by hypothesis. *See* p. 350 *supra* (discussing nature of exemption claims). Not all claims for exemptions are in fact against laws that are otherwise clearly constitutional. *See* p. 354 *supra* (discussing *Sherbert* and *Yoder*).

its laws will not be susceptible to claims of interference in the exercise of religion.[54] Therefore, courts are placed in the position of scrutinizing possibly every enactment to determine whether it is justified by a compelling state interest.[55]

The third conceptual defect of exemption doctrine is its excessive intrusion into religious autonomy.[56] The intrusion occurs in

54. Even when a legislature includes specific religious exemptions in a statute, claims outside the scope of the legislative provision are likely to be made. *See, e.g.*, Gillette v. United States, 401 U.S. 437 (1971) (claiming exemption from draft based upon religious objection to particular war rather than all war); Kennedy v. Bureau of Narcotics & Dangerous Drugs, 459 F.2d 415 (9th Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973) (claiming exemption from narcotics statute despite failure to be member of religious group qualifying for exemption under regulations).

55. *See* Ely, *supra* note 28, at 1316 (most government actions affect some religions, and it is impossible that all such actions are unconstitutional); Weiss & Wizner, *Pot, Prayer, Politics, and Privacy: The Right to Cut Your Own Throat in Your Own Way*, 54 IOWA L. REV. 709, 716-17 (1969) (assessing amount of damage that may result from unlawful act is not proper judicial function).

Some commentators urge that in evaluating whether a state interest is compelling, courts should only measure the incremental benefit of applying the law to those who may be eligible for an exemption. *See* L. TRIBE, *supra* note 18, § 14-10, at 855; Clark, *supra* note 15, at 331. This method makes some sense when society's only interest in enforcing a legal rule in individual cases is that the aggregate result furthers some given goal. One example may be the rule that persons acquire a social security number. *See* Stevens v. Berger, 428 F. Supp. 896 (E.D.N.Y. 1977) (allowing exemption and arguing that impact upon aggregate benefit of rule would be minimal). In the case of a great many, if not most, laws, however, society is concerned with individual enforcement as well as aggregate effect, so that measuring incremental benefit is inextricably tied to measuring general compellingness. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 239-40 (1972) (White, J., concurring) (discussing benefits to children of compulsory education); J.F.K. Memorial Hosp. v. Heston, 58 N.J. 576, 580-84, 279 A.2d 670, 672-74 (1971) (asserting state interest in preserving individual lives); *cf.* R. DWORKIN, *Hard Cases*, in TAKING RIGHTS SERIOUSLY 81, 82, 91 (1977) (distinguishing individuated and nonindividuated political aims). Even when the incremental benefit of a law seems easily quantifiable in some respects, other factors may be at work. The goal of a progressive tax system, for example, is not only to raise revenue, but also to equalize incomes. *See* Blum & Kalven, *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 519-20 (1952).

56. *See* Weiss, *supra* note 44, at 622 (assessing religious beliefs in itself intrudes into religious freedom).

The use of intrusive and improper tests has extended into the process of determining whether particular beliefs of religious groups are themselves religious. Courts have been unable to define adequately what constitutes a religious belief. *See* note 45 *supra; cf.* Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) (distinguishing religious from personal and philosophical beliefs, without attempting to define either). Courts have therefore resorted to dubious tests of doctrinal pedigree. *See, e.g., id.* at 216-18 (concluding Amish objection to compulsory education was religious because shared by organized group, derived from scripture, and long held); State v. Kasuboski, 87 Wis. 2d 407, 414-18, 275 N.W.2d 101, 104-06 (Ct. App. 1978) (applying *Yoder* test to conclude that auxiliary church's objection to education in local public school was personal and philosophical rather than religious). Such tests fail to recognize that the right of a religion to change or interpret its doctrine is itself protected by the First Amendment, *cf.* Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 451 (1969) (courts may not use "departure-from-doctrine" rule in resolving church property disputes), and that many religions ascribe to individuals the right to interpret religious doctrine, *see* note

two respects: in weighing the religious interests at stake and in focusing upon injuries to conscience. Though any exemptions scheme must determine when religious interests are at stake,[57] current doctrine goes beyond such threshold tests, differentiating among religious claims so that a court can weigh them against government interests.[58] Courts have relied upon a distinction between activities central to a religion's way of life and those that are incidental parts of religious belief.[59] This inquiry into centrality is beyond the practical[60] and institutional[61] competence of courts. Moreover, the very notion of centrality is so vague that it can obscure the use of even less defensible distinctions.[62]

In addition, the doctrine's focus upon preventing injuries to conscience rather than enforcing claims of right engenders a number of pernicious distinctions. Courts have held, for example, that government may impose indirect burdens upon the exercise of reli-

115 *infra* (citing examples). Inquiries into doctrinal pedigree favor well-documented and familiar religious faiths without justifying how that preference is anything more than gratuitous.

57. *But cf.* note 48 *supra* (discussing possibility of recognizing general "right of conscience").

58. *See* pp. 354-55 *supra* (describing balancing test). The need to differentiate among religious claims is most evident in cases applying a "true," rather than a modified, balancing test, since, in such cases, courts must weigh the importance of both the religious and state interests at stake. *See* note 31 *supra* (discussing two forms of test).

59. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 218-19 (1972) (compulsory education law caused "grave interference with important Amish religious tenets"); People v. Woody, 61 Cal. 2d 716, 725, 394 P.2d 813, 820, 40 Cal. Rptr. 69, 76 (1964) (peyote was "*sine qua non* of defendants' faith"); *cf.* Leary v. United States, 383 F.2d 851, 861 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969) (distinguishing *Woody* on centrality issue).

60. *See* M. KONVITZ, *supra* note 47, at 77-79 (discovering essence of particular religion difficult even for theologians; religions have survived loss of even apparently fundamental features). Among the dangers inherent in the "centrality" inquiry is the natural tendency to use familiar criteria taken from general experience. *See, e.g.*, Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 321 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978) (Goldberg, J., concurring) (importance of belief in racial segregation minimized because disobedience would not endanger salvation); People v. Woody, 61 Cal. 2d 716, 720-21, 394 P.2d 813, 817-18, 40 Cal. Rptr. 69, 73-74 (1964) (comparing peyote cult's beliefs and practices to those of more familiar groups).

61. *See* M. KONVITZ, *supra* note 47, at 79 (judicial efforts to find essence of particular religion equivalent to defining what one may label orthodox or heretical); *cf.* Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 450 (1969) (civil courts may not judge relative importance of doctrines of religious group); Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871) ("[t]he law knows no heresy").

62. For example, the centrality of an activity may be defined in terms of its sacramental significance, *see* People v. Woody, 61 Cal. 2d 716, 721-22, 725, 394 P.2d 813, 817-18, 820, 40 Cal. Rptr. 69, 73-74, 76 (1964), thus excluding religions that believe in communion with God through deeds rather than sacraments, *see, e.g.*, A. HESCHEL, GOD IN SEARCH OF MAN 281-92 (1955) (discussing role of "mitzvot" in Judaism); THE LAWS OF MANU 30-31 (G. Bühler trans. 1886) (discussing "dharma" in Hinduism).

gion even when it cannot directly regulate religion-related activity,[63] that it may compel violation of religious doctrine if the religion does not blame the believer for such compelled violations,[64] and that it may coerce compliance with a law even if it could not punish noncompliance.[65]

2. *Practical Defects*

The structure of present doctrine allows courts to be inconsistent and illiberal. Though courts have granted a number of exemptions,[66] they have also made dubious findings that a state has a compelling interest in requiring, for example, driver's license applicants to be photographed,[67] persons willing to pay annual taxes to participate in the withholding tax system,[68] and adult hospital patients to receive blood transfusions.[69] The adjudicative process, moreover, has often involved impermissible judgments as to the

63. *See, e.g.*, Johnson v. Robison, 415 U.S. 361, 385 (1974) (denial of veteran's benefits to conscientious objector who performed alternative service only imposes at most indirect burden on him); Braunfeld v. Brown, 366 U.S. 599, 605-06 (1961) (Sunday-closing laws only an indirect burden on Orthodox Jew who closes his store on Saturday). *But see* Sherbert v. Verner, 374 U.S. 398, 417-18 (1963) (Stewart, J., concurring) (*Sherbert* eliminates distinction between direct and indirect burdens). "Indirect" burdens can be more punishing than "direct" ones. *Compare* Wisconsin v. Yoder, 406 U.S. 205, 208 (1972) (direct $5 fine) *with* Braunfeld v. Brown, 366 U.S. 599, 601 (1961) (indirectly caused loss of business).

64. *See, e.g.*, *In re* President of Georgetown College, Inc., 331 F.2d 1000, 1009 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964) (compulsory blood transfusion); United States v. George, 239 F. Supp. 752, 753 (D. Conn. 1965) (same). Such a principle penalizes religions that have devised mechanisms for coping under repressive regimes, *see* note 116 *infra* (distinguishing different types of religious deference to state authority), and thereby allows the state to become one of those regimes.

65. *See, e.g.*, J.F.K. Memorial Hospital v. Heston, 58 N.J. 576, 582, 279 A.2d 670, 673 (1971) (compulsory life-saving treatment); *cf.* Clark, *supra* note 15, at 347, 353 (arguing criminal penalties may be inappropriate if compliance can be coerced).

66. *See* Shetreet, *Exemptions and Privileges on Grounds of Religion and Conscience*, 62 KY. L.J. 377, 377-91 (1974) (discussing both legislatively and judicially created exemptions).

67. Johnson v. Motor Vehicle Div., 197 Colo. 455, 593 P.2d 1363, *cert. denied*, 444 U.S. 885 (1979). The *Johnson* court was too uncritical in accepting the state's claim of compelling interest, and failed to take sufficient account of less restrictive alternatives. *Cf.* Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc., 380 N.E.2d 1225 (Ind. 1978) (granting exemption).

68. United States v. American Friends Serv. Comm., 419 U.S. 7 (1974) (relying upon Anti-Injunction Act, I.R.C. § 7421 (a)). An incremental-benefits analysis, *see* note 55 *supra*, should have been dispositive in this case: whatever may be the total administrative advantage of the withholding tax system, the government would lose little if a small group of persons waited to pay taxes until the end of the year.

69. *In re* President of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); J.F.K. Memorial Hospital v. Heston, 58 N.J. 576, 279 A.2d 670 (1971). *But see* Estate of Brooks, 32 Ill. 2d 361, 373, 205 N.E.2d 435, 442 (1965) (forbidding compulsion in absence of clear and present danger to society).

substantive worth of the beliefs being asserted;[70] rather than balancing religious freedoms against state interests, many courts have in effect evaluated the desirability of the religious behaviour as an alternative to the state's general norm.[71]

II. The Doctrine of Competing Authorities

The free exercise clause reflects a commitment to the protection of religious liberty.[72] But simply asserting this commitment does not explain how religion-based exemptions relate to either religious liberty or other basic values. That explanation can be found in approaching religion-based exemptions from a new direction: not as civil liberties in the ordinary sense, but rather as accommodations to competing sources of authority, an approach analogous to conflict of laws determinations.[73] This doctrine of competing authorities could instill in courts a more self-confidently generous attitude toward religious claims.

A. *The Distinctive Nature of Religious Authority*

A basic premise of democratic theory is that when the government acts within the limits of its authority, it has the right to expect that its laws will take precedence over individual belief.[74] Religion

70. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 222-27 (1972) (implied approval of Amish alternative life style); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (implied sympathy with Native American Church use of peyote as sacrament and object of worship).

71. *See* Burkholder, *"The Law Knows No Heresy": Marginal Religious Movements and the Courts*, in RELIGIOUS MOVEMENTS IN CONTEMPORARY AMERICA 27, 45 (I. Zaretsky & M. Leone, eds. 1974). Such judgments themselves violate the First Amendment. *See* United States v. Ballard, 322 U.S. 78, 86-87 (1944) (courts may not inquire into truth or worth of religious beliefs).

72. *See* p. 351 *supra* (pure value of religious liberty nurtured in part by commitment to protection of religious life).

73. Commentators have often employed models and analogies to give meaning to the bare texts of First Amendment guarantees. *See, e.g.*, A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22-27 (1948) (rationale and parameters of free speech clause can best be understood by analogy to rules governing "town meeting"); Stewart, *"Or of the Press"*, 26 HASTINGS L.J. 631, 633-35 (1975) (free press guarantee can be understood as granting to press institutional rights analogous to that of branch of government).

Although some commentators on the religion clauses have used rhetoric that might support an analogy between religion-based exemptions and conflict of laws determinations, none has proposed explicit reference to the distinct legal doctrine of conflict of laws. *See, e.g.*, Berger & Neuhaus, *Foreword* to CHURCH, STATE, AND PUBLIC POLICY (J. Mechling ed. 1978) (unpaginated) (jurisdictional claims of state and religion inevitably run into conflict); Wright, Book Review, 38 MINN. L. REV. 87, 88 (1953) (courts assert that "state is free to punish violations of its law, while God punishes violations of His Law. It is left to the individual to decide which code he will obey.")

74. Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) ("concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which so-

poses a special challenge to this theory. Although religion can be defined in many ways,[75] that challenge is best understood by reference to three fundamental attributes generally associated with religion: it influences human behaviour;[76] its adherents believe that its principles are authoritative;[77] and the source of that authority is perceived to transcend both individual conscience[78] and the state.[79]

These three attributes describe commonly recognized, God-believing, organized religions, but can extend as well to creeds that are nontheistic or noninstitutional. The attributes do not, however, apply to beliefs that are not purported to be compelled by a source beyond human judgment. Thus, Buddhism, a nontheistic religion,[80] has the attributes of religion upon which this discussion focuses, as does a person's sense that God, or the cosmos, forces him

ciety as a whole has important interests"). The supremacy of law over individual desire plays an important role in the basic sources of liberal democratic theory. *See, e.g.*, THE FEDERALIST No. 2 (J. Jay); J. LOCKE, *The Second Treatise of Civil Government*, in TWO TREATISES OF CIVIL GOVERNMENT ¶¶ 129-31 (Hafner ed. 1947). Modern writers have expanded on this principle. *See, e.g.*, J. RAWLS, A THEORY OF JUSTICE 212, 368-71 (1971) (liberty of conscience limited by common interest in public order and security; conscientious refusal distinguished from politically aimed civil disobedience); P. SINGER, DEMOCRACY AND DISOBEDIENCE 59 (1973) (special reasons exist for obeying law in democracy); *cf.* G. POGGI, THE DEVELOPMENT OF THE MODERN STATE 101 (1978) (modern state legitimizes its rule by positive law enacted in accordance with constitutional rules).

75. *See* Clark, *supra* note 15, at 339-40 (distinguishing subject matter, sociological, and psychological definitions of religion).

76. *See* P. BERGER, THE SACRED CANOPY 40-41 (1967) (religious ideation grounded in religious activity); 2 G. VAN DER LEEUW, RELIGION IN ESSENCE AND MANIFESTATION 340 (J. Turner trans. 1963) (religious revelation leads persons into fixed course of activity); J. WACH, THE COMPARATIVE STUDY OF RELIGIONS 36-37 (1958) (religion issues in imperatives to action).

77. *See* notes 82-83 *infra* (religion much like civil government); W. CLARK, THE PSYCHOLOGY OF RELIGION 22-23 (1958) (religious person attempts to harmonize his life with divine will); Geertz, *Religion: Anthropological Study*, in 13 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 398, 406 (1968) (religion "relates a view of the ultimate nature of reality to a set of ideas of how man is well advised, even obligated, to live").

78. *See* P. BERGER, *supra* note 76, at 33-34 (religion legitimates social institutions by locating them within sacred and cosmic frame of reference that transcends both history and man); M. BUBER, I AND THOU 123-68 (W. Kaufman trans. 1970) (religion is encounter with unconditional You); W. SMITH, THE MEANING AND END OF RELIGION 173 (1964) ("The traditions evolve. Men's faith varies. God endures.")

79. *See* Berger & Neuhaus, *supra* note 73 ("[a]uthentic religion . . . must refer to a sovereignty that transcends the authority of the state"); Lekachman, *The Perils of Power*, in THE CHURCHES AND THE PUBLIC 5, 7 (Center for the Study of Democratic Institutions 1960) (because they justify their actions at least in part by appeals to divine inspiration, churches cannot accept temporal judgments on their spiritual mission).

Recognizing the distinct nature of religious belief does not, however, require abandoning more skeptical explanations for that belief. *Cf.* W. JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 19-26 (1902) (psychological and physiological explanations of religious emotion do not exclude its study as distinct spiritual phenomenon).

80. *See* H. VON GLASSENAPP, BUDDHISM—A NON-THEISTIC RELIGION 48-53 (I. Schloegl trans. 1970) (Buddhism refers to an impersonal but fixed cosmic order).

into a pattern of behaviour. On the other hand, a personal belief or organized creed that does not refer to a transcendent and authoritative source for that belief, but instead relies upon human reason or intuition, lacks these attributes.

Religious concerns can extend at least as wide as proper governmental concerns,[81] and the two may therefore come into conflict. To the extent that a religious doctrine refers to a behavioral, authoritative, and transcendent system of commands, it is itself much like a civil government.[82] Many religions have highly articulated legal codes,[83] and many postulate punishment for disobedience.[84]

The conceded preference of state authority over individual belief therefore cannot apply unproblematically. For government to reduce the role of religion to that of a system of belief, or even that of belief combined with a narrow range of actions,[85] would be to ignore the behavioral, authoritative, and transcendent elements of religion. Such a course would not merely disadvantage a few sects or individuals, but would be a profoundly secularizing act.[86] The alternative, for a society that values religion, is to read the free ex-

81. *See, e.g.*, D. MANWARING, RENDER UNTO CAESAR 17 (1962) (Jehovah's Witnesses base all actions upon religious beliefs); P. WEISS, THE GOD WE SEEK 159 (1964) ("[e]verything can be looked at from a religious viewpoint"); Dorff, *Judaism as a Religious Legal System*, 29 HASTINGS L.J. 1331, 1333 (1978) (large segments of Jewish law cover subjects ordinarily considered secular).

82. *See* K. BARTH, *The Christian Community and the Civil Community*, in AGAINST THE STREAM 15, 18-19 (R. Smith ed. 1954) (Christian community, as well as civil community, lives and works within framework of law binding upon all members); H. KELSEN, GENERAL THEORY OF LAW AND STATE 20 (A. Wedberg trans. 1961) (religion closer to law than is morality). The analogy can be reversed. *See, e.g.*, Bellah, *Civil Religion in America*, 96 DAEDALUS 1 (1967) (American political ideology includes religious component).

83. *See, e.g.*, J. HOSTETLER, AMISH SOCIETY 58-62 (1963) (describing Amish "*ordnung*," or rules of church community); J. MCKENZIE, THE ROMAN CATHOLIC CHURCH 25-26 (1969) (describing canon law); Dorff, *supra* note 81 (describing biblical and Talmudic system of law).

84. *See, e.g.*, J. MCKENZIE, *supra* note 83, at 156 (mortal sin separates man permanently from union with God); D. MANWARING, *supra* note 81, at 20 (Jehovah's Witnesses believe that a "Witness who backslides in any substantial matter of doctrine or conduct is doomed beyond hope of redemption").

85. *See* Dodge, *The Free Exercise of Religion: A Sociological Approach*, 67 MICH. L. REV. 679, 697-99 (1969) (distinguishing between "belief," "therapy," "worship," and "ethical action" subsystems of religion; arguing that first two should be protected absolutely, third protected conditionally, and last unprotected); Weiss, *supra* note 44, at 608 (arguing that only religious belief and religious action that has no worldly consequences should be protected).

86. *Cf.* A. GREELEY, RELIGION IN THE YEAR 2000, at 21 (1969) (meanings of secularization include relegation of religion to private sphere of human activity and lack of influence by religion on human behaviour); R. MEHL, THE SOCIOLOGY OF PROTESTANTISM 61 (J. Farley trans. 1970) (at extreme of secularization, "religion no longer is considered as anything but a private affair, and the exercise of worship tends to be enclosed in very narrow limits").

ercise clause as, in part, granting limited recognition to the religious source of authority.[87]

B. *The Conflict of Laws Analogy*

A doctrine based upon recognition of competing authorities is best considered in the context of an authority-recognizing doctrine such as conflict of laws. Conflict of laws doctrine is consulted by the courts of an adjudicatory forum when a dispute involves the laws of other jurisdictions.[88] Among the techniques used in conflict of laws are mechanical rules based upon the situs of crucial events,[89] flexible inquiries into which territory has the most significant relationship to a set of events,[90] and considerations of the functions of the divergent laws and the interests of the respective jurisdictions in having their laws govern the dispute.[91]

87. The notion of granting legal recognition to religious authority is not novel. Ecclesiastical courts had broad jurisdiction in medieval England. *See* S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 13-15 (1969); Jones, *The Two Laws in England: The Later Middle Ages*, 11 J. CHURCH & STATE 111 (1969). Today, various nations grant religious institutions particular powers. *See, e.g.*, Rubinstein, *Law and Religion in Israel*, in JEWISH LAW IN ANCIENT AND MODERN ISRAEL 190, 190-210 (H. Cohn ed. 1971) (describing Israeli religious courts); Taylor, *Church and State in Scotland*, 2 JUR. REV. 121 (1957) (describing established status of Church of Scotland). Even in the United States, religous institutions have virtually absolute autonomy over their internal governance. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724-25 (1976); Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1871). One recent work suggests that, in order to reduce the impersonality and bureaucratic oppressiveness of the modern "welfare state," public policy and constitutional doctrine should protect and foster the role of religious institutions, as well as the neighborhood, family, and voluntary associations, as "mediating structures." P. BERGER & R. NEUHAUS, TO EMPOWER PEOPLE 1-3, 26-33 (1977).

The grant of recognition proposed in this Note differs from all of the above in two respects. First, the grant is not limited to a particular range of subject matter. Second, it does not extend to giving any adjudicative or administrative role to religious institutions beyond their claim to be transmitting or interpreting the dictates of the religious source of authority.

88. *See* G. CHESHIRE & P. NORTH, CHESHIRE'S PRIVATE INTERNATIONAL LAW 3 (10th ed. 1979) [hereinafter cited as CHESHIRE]; R. LEFLAR, AMERICAN CONFLICTS LAW § 2, at 3 (3d ed. 1977); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (1971) [hereinafter cited as RESTATEMENT OF CONFLICTS].

89. For example, the law applicable to a tort is often determined by the place where the injury occurred. *See* CHESHIRE, *supra* note 88, at 259; RESTATEMENT OF CONFLICTS, *supra* note 88, § 146.

90. *See, e.g.*, CHESHIRE, *supra* note 88, at 260-63 (arguable that foreign tort should be adjudged according to social environment in which it was committed); RESTATEMENT OF CONFLICTS, *supra* note 88, § 145 (contacts relevant to determing which state has most significant relationship to alleged tort include place where injury occurred, place where conduct causing injury occurred, domicile of parties, and place where relationship between parties, if any, is centered).

91. *See* Seidelson, *Interest Analysis: For Those Who Like It and Those Who Don't*, 11 DUQ. L. REV. 283, 304-09 (1973) (courts should look to whether potentially interested states have substantial interest in issue presented). *But cf.* R. LEFLAR, *supra* note 88, § 92, at 185-86 (discussing drawbacks of approach).

1. *Establishing the Analogy*

A useful analogy can be drawn between religion-based exemptions and conflict of laws.[92] Both are responses to claims that certain behaviour can be appropriately judged only by reference to an alien legal norm. The justification for religion-based exemptions arises from a gap in democratic theory: the state implicitly assumes that it is the only external legal authority that governs persons. Religious doctrine, however, has many of the characteristics of a legal system and can contradict secular law. The case for conflict of laws[93] arises from a similar gap in conventional jurisprudential theory: systems of substantive law implicitly assume universal application.[94] Each nation, however, has its own system of substantive law, and those systems can collide.[95] When individuals have conformed their behaviour to or acquired rights under a foreign legal

92. The ambiguity of much of modern conflicts doctrine may make it appear to be a poor source of guidance for other fields of law. *Cf.* von Mehren, *Choice of Law and the Problem of Justice*, LAW & CONTEMP. PROB., Spring 1977, at 27, 27 (choice of law problems often seem intractable). But the analogy here is framed in such a way as to avoid most of these complexities. *See* note 100 *infra* (discussing territorial principle); note 102 *infra* (discussing third-party rule).

93. Conflict of laws principles are not logically inevitable; adjudicatory forums could always apply their own law to disputes before them or simply refuse to hear disputes involving a foreign element. *See* A. DICEY & J. MORRIS, THE CONFLICT OF LAWS 6 (9th ed. 1973) [hereinafter cited as DICEY]; RESTATEMENT OF CONFLICTS, *supra* note 88, § 1, Comment c. There are in fact commentators who advocate that forums regularly apply their own law. *See, e.g.*, B. CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 177, 183-84 (1963) (even in cases involving foreign elements, courts should normally apply law of forum); Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637, 637, 643-45 (1960) (application of forum law should be presumptive rule in conflict of laws). The existence of a forum preference school of conflict of laws actually strengthens the analogy between religion-based exemptions and conflict of laws by demonstrating that in both contexts there is a reasonable, if not ultimately compelling, argument for refusing to defer to the foreign source of authority. In this connection, it is significant that even the strongest advocates of forum preference never proposed that the forum's law always apply, *see* B. CURRIE, *supra*, at 183-84 (forum law should apply unless forum has no interest in application of its policy); Ehrenzweig, *supra*, at 637, 643-45 (factors such as intentions of parties may justify exceptions to *lex fori* presumption), that most commentators have remained unconvinced by the forum preference school, *see, e.g.*, CHESHIRE, *supra* note 88, at 3-4, 258-59 (strict *lex fori* rule would often lead to unjust results); R. LEFLAR, *supra* note 88, § 90, at 181-82 (mere forum preference is not valid reason for choice-of-law result), and that the leading members of the school have modified their own views in response to criticism, *see* A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW 62-65 (1967) (discussing both Currie and Ehrenzweig).

94. *See* B. CURRIE, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 77, 82 (1963) (legislatures implicitly assume fully domestic context in enacting laws).

95. *See* B. CURRIE, *supra* note 93, at 178-79 (world with single system of law would not require conflict of laws rules); RESTATEMENT OF CONFLICTS, *supra* note 88, § 1, Comment a (ordinary court cases require reference only to law of forum); Von Mehren, *supra* note 92, at 28-30 ("justice" can be achieved fully only when legal unit coincides with social or economic unit within which problem arises).

norm, blind application of domestic law is inadequate, and substantial deference to the foreign system of authority may be appropriate.

Both conflicts and exemption doctrine therefore require the state to undertake the unaccustomed task of fixing boundaries upon the application of its legal system. Conflict of laws rules are devised to prevent parochialism from frustrating the needs of the international system[96] and to promote justice for individuals whose activities cross national borders.[97] Similarly, a coherent and generous scheme of religion-based exemptions would prevent parochialism from unduly constricting the role of religion in society and would promote justice for individuals caught between competing authorities. Although the entire body of conflicts rules cannot be transplanted into the free exercise clause,[98] the analogy, if pursued carefully and selectively, could provide the basic structure for a new exemption doctrine.

2. *Territoriality in the Religious Context*

An important distinction between conflict of laws and religion-based exemptions is that the former can rely upon the fact of physical territoriality. The analogy can be pursued, however, by devising standards for cognizable religious claims that in effect carve out a "territory" for religious concerns and articulate conditions

96. *See* RESTATEMENT OF CONFLICTS, *supra* note 88, § 6(2)(a) & Comment d (regard for needs and policies of other states and for community of states furthers important goal of conflicts); Cheatham & Maier, *Private International Law and its Sources*, 22 VAND. L. REV. 27, 95-97 (1968) (domestic law must be modified to meet needs of situations that confront it).

97. CHESHIRE, *supra* note 88, at 258 (unjust to hold person responsible for what would be innocent act in place where it was committed); DICEY, *supra* note 93, at 6-7 (just determination of rights must sometimes involve reference to foreign law).

Conflicts rules have two other goals. The first, achieving uniformity of result in order to avoid forum shopping, *see* R. LEFLAR, *supra* note 88, § 103, at 205, is not relevant for purposes of the analogy. The second goal, furthering the policies of the states involved, is circular: those policies may include limits on the application of domestic law. *See* RESTATEMENT OF CONFLICTS, *supra* note 88, § 6(2)(b)-(c) & Comments e & f; Von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 931 (1975) ("local-law theory" of conflicts in itself provides no guidance as to when foreign law should be consulted).

98. Unreflective reference to the conflicts analogy may be particularly inappropriate when extended beyond the context of religion-based exemptions. For example, courts often must interpret and apply foreign law in resolving a dispute between two private parties, but the First Amendment forbids the courts from attempting to interpret religious doctrine in the course of deciding disputes over church property. *See* Jones v. Wolf, 443 U.S. 595, 602 (1979). Yet even here there is an imperfect analogue in conflicts doctrine, in that courts will sometimes refuse to hear a case in which applying the law that would otherwise be applicable would pose special institutional problems. *See* Ramirez v. Autobuses Blancos Flecha Roja, S.A. De C.V., 486 F.2d 493, 497 (5th Cir. 1973) (refusing to attempt to apply unfamiliar remedial provisions of foreign law, and dismissing suit without prejudice to bringing of action in different forum).

that determine when persons are operating within that territory.[99] Establishment of such a territory would set boundaries upon the application of the conflicting legal norms. A claim for a religion-based exemption should therefore be thought of as an assertion that certain behaviour should be governed by the law of the religious territory in which it occurred.[100]

The parallel to territoriality suggests that one interest of the forum state may lead it to reject the religious exemption claim and apply its own law: protection of third parties not subject to the religious authority who would be directly affected by the granting of an exemption. Protection of third parties is distinctive, not because it is the most compelling state interest,[101] but rather because in the context of relations with third parties, the religious adherent's claim that his conduct should be deemed to be within the jurisdiction of the religious source of authority becomes untenable. Even if a territory for religious concerns has been carved out and the religious proponent is subject to the source of authority for that territory, his action has recrossed the hypothetical boundary, and the place of injury should determine the law to be applied.[102]

99. *Cf.* Kelley, *Confronting the Danger of the Moment*, in CHURCH, STATE, AND PUBLIC POLICY 9, 16-17 (J. Mechling ed. 1978) (discussing concept of "extraterritoriality" to guarantee autonomy for religious institutions).

100. *Cf.* RESTATEMENT OF CONFLICT OF LAWS §§ 377-83 (1934) (tort governed by law of place where it occurred). Modern conflicts doctrine no longer suscribes to as strict a territorial principle. *See* R. LEFLAR, *supra* note 88, § 86, at 173-74 (describing traditional theory of "vested rights" and attacks upon it). Deviations from territorial considerations most often arise, however, when it is arguable that the site of a given event was fortuitous and does not reflect the jurisdiction with which the event has the most significant relationship. *See* CHESHIRE, *supra* note 88, at 260-63 (discussing principle of "proper law of the tort"); RESTATEMENT OF CONFLICTS, *supra* note 88, § 145, Comment e (discussing special problems that arise when location of event is fortuitous). Given that the religious territory assumed for purposes of the analogy is an abstraction, events never occur in it "fortuitously." In any case, conflicts doctrine remains highly territorial in determining the basic wrongfulness of conduct, *see* Babcock v. Jackson, 12 N.Y.2d 473, 483, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 751 (1963) (jurisdictions have strong interest in regulating conduct within their borders); Reese, *American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases*, 33 VAND. L. REV. 717, 736 & n.46 (1980) (no case is known in which law of state where conduct and injury occurred was not applied to determine whether conduct was tortious), and in its consideration of criminal law and governmental claims, *see* R. LEFLAR, *supra* note 88, §§ 49, 115-16 (rules and qualifications), all of which are subjects that most often generate claims for religion-based exemptions.

101. Under present free exercise doctrine, protection of third parties is recognized by courts as a compelling interest. *See, e.g.*, West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943) (dictum) (state intervention required when freedoms asserted by individuals collide with rights asserted by other individuals); Robert Stigwood Group Ltd. v. O'Reilly, 346 F. Supp. 376, 382-83 (D. Conn. 1972), *aff'd*, No. 72-1826 (2d Cir. May 30, 1973) (unpublished order) (denying religious defense in suit for copyright infringement); Clark, *supra* note 15, at 361 (discussing state interest in protecting third parties).

102. *Cf.* R. LEFLAR, *supra* note 88, §§ 111-114 (criminal liability for act generally determined by place of injury); RESTATMENT OF CONFLICTS, *supra* note 88, § 145 (rights and lia-

Any religion-based exemption arguably has effects outside the religious territory. For example, if a religious proponent is exempted from a military draft, another person must arguably be drafted in his place; if he is exempted from paying taxes, the tax burden of other people arguably increases. Such arguments depend, however, upon an assumption that domestic law actually governs the activity in question. The territorial analogy is instructive. In a technical sense, not drafting residents of foreign countries has the effect of requiring more Americans to be drafted in their place. This is not, however, perceived as an injury to any American resident, for it is not assumed that foreigners are being exempted from a law that should apply to them.[103] The conflicts analogy suggests that persons with claims for religion-based exemptions are much like these foreigners: their claims represent, not dispensations from regulatory schemes, but rather recognition of limits upon the application of those schemes.[104]

Similar analysis justifies ignoring a number of state interests that are ordinarily very important. The conflicts analogy suggests that state interests such as the goals of uniformity and fairness in the application of law, as well as the state interest in preventing persons from compromising their own moral or physical well-being, are relevant to individuals only to the extent that those individuals are perceived to be within the jurisdiction of the state. By carving out a territory for religious concerns, and thereby recognizing circumstances in which religious persons are not within the jurisdiction of the state, the doctrine of competing authorities would make those state interests, not less important, but merely less relevant.

None of the state's interests need be diminished, however, when such territorial carving-out is inappropriate. For all purposes except their specific religious claims, religious persons do remain within the jurisdiction of the state.[105]

bilities in relation to tort usually governed by place of injury, particularly if injured party has significant relationship to that place). In the exemptions context, third parties have a First Amendment right of their own not to be subject to the religious source of authority. *Cf.* State v. Celmer, 80 N.J. 405, 404 A.2d 1, *cert. denied*, 444 U.S. 951 (1979) (invalidating conviction by municipal court controlled, under state grant, by religious association).

103. The distinction is similar to that often made between philosophical cause, which is determined merely by the existence of a chain of events, and legally cognizable cause, which is determined by the context of a set of normative expectations. *See* W. PROSSER, LAW OF TORTS § 41, at 236-37 (4th ed. 1971).

104. *Cf.* Bittker, *Churches, Taxes, and the Constitution*, 78 YALE L.J. 1285, 1287-91 (1969) (no more accurate to say that religious institutions are "exempted" from taxation than to say that tax system, by purpose and structure, does not encompass taxation of religious institutions).

105. Thus, when the legislature creates nonpunitive alternative burdens, the courts

III. Judicial Application of the Conflicts Approach

The conflict of laws analogy does not by itself create the specific legal rules necessary for adjudication of exemption claims. The analogy leaves undefined such pivotal concepts as "carving out a religious territory" and "prejudice to third parties." The procedure described below develops the insights of the analogy in order to provide courts with a practical alternative to the current balancing test. The procedure narrows both the scope of cognizable religious claims and the range of state interests that may overcome those cognizable claims, while avoiding the pitfalls of the current test.

A. *Cognizable Religious Claims*

The first step of the proposed procedure would be to examine whether a claim to a religion-based exemption was cognizable. The test has three components that, respectively, define the territories of religious concern, determine whether the claimant has significant connections with one of those territories, and decide whether the source of authority perceived to be sovereign in that territory has an interest in the matter.

1. *Religious Systems of Authority*

The argument for religion-based exemptions has here been grounded upon the particular challenge to democratic authority posed by the behavioral, authoritative, and transcendent attributes of religious systems of belief. The test of cognizable religious claims would therefore initially determine whether these attributes, rather than merely individual conscience, were being invoked. In the context of adjudicating exemption claims, religion would be defined as a system of belief, not necessarily theistic or institutional, that contained a source of authority perceived to transcend both the believer and the state. This source of authority must be external to personal belief or philosophy, no matter how strong or sincere, and must have a reality and normative force analogous to that of a foreign government.

This definition would be functional, not theological.[106] It would limit the scope of cognizable exemption claims by adopting stan-

should enforce them except against those individuals who have legitimate religious objections to the particular alternative burden.

106. *Cf.* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1066-67, 1075 (1978) (proposing functional definition of religion drawn from concern for "inviolability of conscience").

dards derived directly from the justification for the exemptions.[107] Systems of belief that did not meet the definition would fail to support claims, not because they were less worthy of respect, but simply because they did not pose the same challenge to democratic authority.

2. *Life Context*

If a religious system of authority were involved, the test would next consider whether the claimant's life context justified his attempt to invoke that authority. One element of this inquiry would involve the screening of fraudulent claims,[108] especially in situations in which an exemption would be in the person's secular self-interest. For example, if an ostensible religious group were to appear that objected to payment of any taxes, evidence that it recruited members by promising that they would be able to avoid taxes, and that it had little impact upon their lives other than that promise, would justify denial of an exemption.[109] In order to prevent the inquiry from acting as a vehicle for inappropriate prejudices, the government would bear the burden of proving fraudulent intent.

Beliefs can be sincerely held, however, without being part of a larger religious commitment. An inquiry into the claimant's life context would therefore include an examination of whether a nexus existed between his particular belief and a general intent to be governed by the religious source of authority. For some religious systems of authority, such an examination could involve an attempt to identify enough overt behaviour to substantiate the proponent's claim, without engaging in an impermissible inquiry into the nature of religious orthodoxy.[110] Thus, a person who based his

107. The limited purpose of the definition implies that a different meaning could be ascribed to religion for purposes of the general application of the free exercise clause. The establishment clause might require yet a third definition. *Cf.* L. TRIBE, *supra* note 18, § 14-6, at 827-28 (arguing that free exercise and establishment clauses require different definitions of religion); Note, *supra* note 106, at 1083-86 (same).

108. The standard proposed here is similar in some respects to the sincerity component of present doctrine, United States v. Ballard, 322 U.S. 78 (1944) (court may inquire into good faith, but not truth or falsity of religious belief), but it focuses more narrowly upon an affirmative proof of fraud rather than upon an attempt to measure the intensity of beliefs. *Cf. id.* at 92-95 (Jackson, J., dissenting) (sincerity test dangerous to religious liberty).

109. Similar fraudulent religious claims for the purpose of evading taxes are possible under present tax statutes and have not proved their unworking. *Cf.* Kurtz, *Difficult Definitional Problems in Tax Administration: Religion and Race*, 23 CATH. LAW. 301, 305 (1978) (describing scheme to exploit religious exemptions).

110. *See* p. 360 *supra* (courts should not try to find essence of particular religion). Courts should not demand that religious behaviour satisfy their perception of consistency.

claim for exemption upon adherence to a particular tenet of an organized religion that encompassed a collection of distinctive ritual or moral directives, would also have to demonstrate adherence to at least some set of those directives. For other religious systems of belief, which did not lend themselves to such a behaviour-oriented test, the averment of the claimant would often have to suffice.[111] A final prong of the life-context inquiry would be consideration of factors such as childhood[112] or mental disability[113] that cast doubt upon the proponent's intent to be subject to the religious system of authority.

3. *Ambit of Religious Authority*

Finally, the test would ask whether the specific religious claim fell within the ambit of the religious source of authority. The test of the religious character of a belief would be whether it was perceived to receive its imperative power from the transcendent religious source of authority: only such a status would pose the particular challenge to democratic authority recognized by the competing authorities justification.

This portion of the test would not involve difficult inquiries into centrality[114] or into the doctrinal pedigree of particular religious beliefs.[115] Similarly, a religion's pardon of violation of its laws coerced by conflicting civil law would not justify denial of an exemp-

Cf. Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration under Title VII*, 69 MICH. L. REV. 599, 615-16 (1971) (citing example of Jews who keep kosher homes but eat nonkosher food away from home).

111. The life-context test is akin to a determination of domicile in conflicts doctrine. *Cf.* R. LEFLAR, *supra* note 88, § 10 (discussing requirement of physical presence coinciding with state of mind).

112. *Cf.* R. LEFLAR, *supra* note 88, § 12 (children generally cannot choose their own domicile). Depending upon maturity and intelligence, some minors may be capable of forming an intent to be bound by the religious source of authority. Nevertheless, the state should have the right to use age as a trigger for an inquiry into such capacity. *Cf.* Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion) (state may require parental consent for minor to obtain abortion, but must provide alternative procedure in which minor can demonstrate to court either that she is mature and well-informed enough to make decision or that abortion would be in her best interests).

113. *Cf.* R. LEFLAR, *supra* note 88, § 13 (mental incompetent may not have capacity to choose own domicile). As in the case of children, particularized inquiry would be necessary. *Cf.* Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644, 1657 (1979) (courts refuse to single out mentally disabled person for distinct treatment unless disability is shown to affect capacity in question).

114. *See* p. 360 *supra* (criticizing inquiry into centrality).

115. *See* note 56 *supra* (criticizing pedigree tests). A religious community will often perceive part of its ordained duty to be the interpretation of doctrine. *See, e.g.*, J. HOSTETLER, *supra* note 83, at 58-59 (describing establishment of "*ordnung*" in Amish church); Dorff, *supra* note 81, at 1334-41 (describing process of interpreting Jewish law).

tion to adherents of that religion.[116] The inquiry would, however, exclude claims that were based upon the institutional interests of religious groups rather than upon religious doctrine.[117]

B. *Relevant State Interests*

The three-pronged test of religious interests would establish religion-based exemptions as limited and specialized exceptions within the fabric of democratic authority. Nevertheless, one interest of the larger community would overcome even cognizable religious claims: protection of third parties.

The principle of third-party injury would arise in cases of direct prejudice to the legal rights of identifiable third parties who were not subject to the religious source of authority.[118] A general test of

116. *See* p. 361 *supra* (criticizing this distinction). Exemptions would be denied if the religion, out of a theological judgment regarding the legitimate role of the state, incorporated all or part of civil law into its religious doctrine. *See, e.g.*, M. LUTHER, *Temporal Authority: To What Extent It Should Be Obeyed*, in 45 LUTHER'S WORKS 75, 92 (Am. ed. 1962) (civil government necessary to bring about external peace and prevent evil deeds); *Romans* 13:1 ("Let everyone be subject to the higher authorities, for . . . [they] have been appointed by God.") But if the religion excuses violation of religious doctrine because of a conviction that subjection to the civil penalty is a greater evil, or out of a desire to keep peace with the civil authority, that decision should not destroy the religious claim of right. *See, e.g.*, L. ARRINGTON & D. BITTON, THE MORMON EXPERIENCE 179-84 (1979) (after persecution of Mormons for belief in polygamy, Mormon leaders urged submission to anti-polygamy laws for "temporal salvation of the church"); CHRISTIAN SCIENCE COMMITTEE ON PUBLICATIONS, FACTS ABOUT CHRISTIAN SCIENCE 10 (1959), *quoted in* Note, *Compulsory Medical Treatment and the Free Exercise of Religion*, 42 IND. L.J. 386, 386 n.2 (1967) (though Christian Scientists obey laws requiring medical treatment of children, they seek legal recognition of right to rely upon Christian Science healing); S. FREEHOF, A TREASURY OF RESPONSA 184 (1962) (some practices otherwise prohibited by Jewish law allowed in order to keep peace with civil authorities).

The problem dealt with here is similar to the question of "renvoi" in conflicts doctrine: whether, in referring to the laws of another state, a court should also look to the choice-of-law rules of that state. *Cf.* RESTATEMENT OF CONFLICTS, *supra* note 88, § 8 (reference to other state's choice-of-law rules usually not appropriate).

117. Such claims are not justified by the competing-authorities approach, since the religious source of authority, not the religious institution, transcends the state. For example, in Pillar of Fire v. Denver Urban Renewal Auth., 181 Colo. 411, 509 P.2d 1250 (1973), the court attempted to establish standards by which a religious group could prevent condemnation of its church building under the free exercise clause. Those standards, however, relied more upon the historical and sentimental significance of the church building than the specific doctrinal beliefs of the church members. *See* Note, *The Lord Buildeth and the State Taketh Away—Church Condemnation and the Religion Clauses of the First Amendment*, 46 U. COLO. L. REV. 43, 50 (1974). The non-entanglement element of establishment clause doctrine should suffice to protect those institutional interests that are necessary to religious liberty. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (upholding right of religious group to autonomy in internal government); Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970) (tax exemption of religious institutions prevents greater evil of excessive entanglement).

118. *See* p. 368 *supra* (justifying concern for direct injury to third parties).

such legal prejudice would be the existence of a hypothetical right of action by that third party against the exempt individual.[119]

The third-party principle would place outside the range of religion-based exemptions crimes and civil wrongs such as murder, trespass, and breach of contract. It would also permit enforcement of social regulations such as fair labor standards and civil rights laws, but only if the religious defendant conducted himself in a market outside the particular religious faith to which he belonged.[120] Thus, intervention in the consensual relationships of the religious group would unnecessarily invade the territory of religious concern.[121]

The third-party rule would require some qualifications to cope with situations in which the operational test might be misleading. First, absence of an injured third party would not bar prosecutions of attempted crimes.[122] Second, when the institution of government itself is an injured third party, and not merely a competing source of authority, it should have rights analogous to those of

119. Rights of action are generally created in favor of persons who have been damaged by another's violation of a legal duty. *See* B. SHIPMAN, COMMON-LAW PLEADINGS § 77, at 196-97 (3d ed. 1923); *cf.* Hodge v. Service Machine Co., 438 F.2d 347, 349 (6th Cir. 1971) (cause of action does not exist until plaintiff suffers legally cognizable damages); Kane v. Nomad Mobile Homes, Inc., 84 Ill. App. 2d 17, 228 N.E.2d 207 (1967) (finding of legal wrong without damage must lead to verdict for defendant).

The private right of action standard would be applied functionally rather than mechanically. The state should not be able to evade it by creating private rights of action when no injury has been sustained. Conversely, if a private right of action were barred for some procedural reason, it would not cease to be a "hypothetical right of action." The existence of a private right of action would trigger the state's right to pursue whatever remedies are available to it. Allowing the state to intervene would be necessary to afford the potentially injured party his full measure of protection.

120. In Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978), a racially segregated private religious school attempted to block a private civil rights action under 42 U.S.C. § 1981 (1976). The Court held that the discriminatory practices of the school were matters of policy rather than religion. *Id.* at 313. A concurring opinion argued that the belief was religious, but was overcome by a compelling state interest. *Id.* at 320, 322. The procedure proposed in this Note would have allowed the court to focus more directly on evidence that the school's students were not limited to those in families of church members and that the school advertised in the "yellow pages." *Id.* at 311.

121. The territoriality metaphor is especially appropriate in considering such relationships: a group of persons has voluntarily entered a sphere in which their rights and obligations are determined by a distinct set of legal norms. *Cf.* Note, *Title VII and the Appointment of Women Clergy: A Statutory and Constitutional Quagmire*, 13 COLUM. J.L. & SOC. PROB. 257, 286-88 (1977) (women seeking to become priests have impliedly consented to their religion's discriminatory practices).

122. This exception is justified by the same rationale that underlies the crime of attempt itself: if a person has substantially completed an effort to commit a punishable act, the state should not have to wait for him to cause actual injury before it can stop him and take punitive measures. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 59, at 426-27 (1972).

other persons.[123] Finally, the existence of a legally prejudiced third party should in some cases be insufficient to deny an exemption. This is most obvious when the injury to the third party is minimal or nominal.[124] This third caveat would also apply when the primary purpose of the legal rule was to influence the behaviour of the religious proponent rather than to do justice to the third party,[125] or when a religion-based exemption could, without undue distortion, be justified by the logic of the relevant legal standard.[126]

C. *Comparative Advantages of the Proposed Test*

The new procedure would not be a mere variant of the balancing test; rather, a claim of exemption would be recognized only if it passed the test of religious interest and did not fall into the concrete and limited category of government interest. The proposed test addresses the distinctive features of the exemption context and overcomes the specific failures that dominate current doctrine. First, the theoretical underpinnings of the test suggest responses to basic objections that religion-based exemptions are inconsistent with the rule of law, notions of equal treatment, and the establishment clause. To the extent that the analysis uncovers limits upon the application of domestic law, and argues for deference to other legal systems, the rule of law is left uncompromised. To the extent that religious persons are potentially subject to two systems of authority, the goal of equal treatment within one of those systems can

123. *Cf.* Note, *Protecting the Public Interest: Nonstatutory Suits by the United States*, 89 YALE L.J. 118, 120-21 (1979) (distinguishing government rights of action analogous to those afforded private parties from other government interests to which parallel cannot be applied). Thus, theft from the government is as much a direct injury to an identifiable third party as theft from a private individual. Furthermore, the fact that a crime against the institution of government is separately enumerated, and perhaps defined or punished in a way not completely parallel to crimes against private individuals, should not affect the state's right to protect itself against direct injury. Thus, prosecution for conversion of government property, forgery of government documents, and similar acts should not be blocked by religion-based exemptions.

124. *Cf.* TWA v. Hardison, 432 U.S. 63 (1977) (statute requiring employers to make "reasonable accommodations" to employee's religious beliefs does not require more than minimal expenditures or disruption of procedures).

Such a *de minimis* standard would isolate those circumstances in which private rights of action do not reflect true direct injury. *See* note 119 *supra* (discussing usual meaning of "right of action"). The exemption would be a narrow one so as to avoid reintroducing a balancing test to the procedure.

125. In such cases, the relevant norm is that imposed by religious law. *Cf.* RESTATEMENT OF CONFLICTS, *supra* note 88, § 145, Comment c (distinguishing deterrence and compensation purposes of tort rules).

126. *Cf.* Note, *Medical Care, Freedom of Religion, and Mitigation of Damages*, 87 YALE L.J. 1466, 1479-81 (1978) (allowing religion-based exemption to mitigation of damages requirement in tort suits would conform to principles of underlying requirement).

reasonably give way to a just accommodation between them. Finally, to the extent that exemptions are characterized as responses to one of the dilemmas of a legally heterogeneous world, rather than as gratuitous preferences for the consciences of religious persons, the establishment clause is not seriously threatened.[127]

Second, unlike current doctrine, the proposed test does not resort to weighing of the relative importance of every law from which an exemption is claimed. Rather, it categorizes laws by use of functional arguments tied to an underlying analysis unrelated to particular legislative judgments.

Third, the test does not intrude excessively upon religious autonomy. The test establishes standards for cognizable religious claims, but once a claim meets those standards, its religious character is not subject to further weighing and probing. The standards themselves are straightforward and functional, and they avoid intrusive inquiries into centrality or doctrinal pedigree. Moreover, the test is concerned with vindicating religious claims of right, rather than monitoring how much suffering particular laws cause individuals.

Finally, the clear parameters established by the proposed test would reduce the probability of ill-conceived or biased decisions. Factual uncertainties and borderline cases would still arise, but their difficulty would be minimized by the combination of a clear underlying theory and a specific set of legal standards.

127. No doctrine of religion-based exemptions could satisfy adherents of the view that the establishment clause forbids government from ever taking religion into account. *Cf.* Kurland, *supra* note 44, at 95-96 (advocating "strict neutrality"). But the Supreme Court has never adopted this absolutist position. *See* L. TRIBE, *supra* note 18, § 14-4, at 820-21. The competing authorities approach does, however, demonstrate the particular challenge posed by religious claims for exemptions, *cf.* Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970) (statutory tax exemptions of religious institutions permissible because they prevent greater harm of excessive entanglement), while placing those exemptions in a context that renders them less anomalous and gratuitous, *cf.* Bittker, *supra* note 104, at 1295 (nonprofit institutions other than religious institutions also receive statutory tax exemptions).

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

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

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

No. 19–431. Argued May 6, 2020—Decided July 8, 2020*

The Patient Protection and Affordable Care Act of 2010 (ACA) requires covered employers to provide women with "preventive care and screenings" without "any cost sharing requirements," and relies on Preventive Care Guidelines (Guidelines) "supported by the Health Resources and Services Administration" (HRSA) to determine what "preventive care and screenings" includes. 42 U. S. C. §300gg–13(a)(4). Those Guidelines mandate that health plans provide coverage for all Food and Drug Administration approved contraceptive methods. When the Departments of Health and Human Services, Labor, and the Treasury (Departments) incorporated the Guidelines, they also gave HRSA the discretion to exempt religious employers, such as churches, from providing contraceptive coverage. Later, the Departments also promulgated a rule accommodating qualifying religious organizations that allowed them to opt out of coverage by self-certifying that they met certain criteria to their health insurance issuer, which would then exclude contraceptive coverage from the employer's plan and provide participants with separate payments for contraceptive services without imposing any cost-sharing requirements.

Religious entities challenged the rules under the Religious Freedom Restoration Act of 1993 (RFRA). In *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682, this Court held that the contraceptive mandate substantially burdened the free exercise of closely held corporations with sincerely held religious objections to providing their employees with certain methods of contraception. And in *Zubik* v. *Burwell*, 578

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* Together with 19–454, *Trump, President of the United States, et al.* v. *Pennsylvania et al.*, on certiorari to the same Court.

U. S. ___, the Court opted to remand without deciding the RFRA question in cases challenging the self-certification accommodation so that the parties could develop an approach that would accommodate employers' concerns while providing women full and equal coverage.

Under *Zubik*'s direction and in light of *Hobby Lobby*'s holding, the Departments promulgated two interim final rules (IFRs). The first significantly expanded the church exemption to include an employer that "objects . . . based on its sincerely held religious beliefs," "to its establishing, maintaining, providing, offering, or arranging [for] coverage or payments for some or all contraceptive services." 82 Fed. Reg. 47812. The second created a similar "moral exemption" for employers with sincerely held moral objections to providing some or all forms of contraceptive coverage. The Departments requested post-promulgation comments on both IFRs.

Pennsylvania sued, alleging that the IFRs were procedurally and substantively invalid under the Administrative Procedure Act (APA). After the Departments issued final rules, responding to post-promulgation comments but leaving the IFRs largely intact, New Jersey joined Pennsylvania's suit. Together they filed an amended complaint, alleging that the rules were substantively unlawful because the Departments lacked statutory authority under either the ACA or RFRA to promulgate the exemptions. They also argued that the rules were procedurally defective because the Departments failed to comply with the APA's notice and comment procedures. The District Court issued a preliminary nationwide injunction against the implementation of the final rules, and the Third Circuit affirmed.

Held:

1. The Departments had the authority under the ACA to promulgate the religious and moral exemptions. Pp. 14–22.

(a) As legal authority for both exemptions, the Departments invoke §300gg–13(a)(4), which states that group health plans must provide women with "preventive care and screenings . . . as provided for in comprehensive guidelines supported by [HRSA]." The pivotal phrase, "as provided for," grants sweeping authority to HRSA to define the preventive care that applicable health plans must cover. That same grant of authority empowers it to identify and create exemptions from its own Guidelines. The "fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts,'" *Rotkiske* v. *Klemm*, 589 U. S. ___, ___ applies not only to adding terms not found in the statute, but also to imposing limits on an agency's discretion that are not supported by the text, see *Watt* v. *Energy Action Ed. Foundation*, 454 U. S. 151, 168. Concerns that the exemptions thwart Congress' intent by making it significantly harder

for interested women to obtain seamless access to contraception without cost-sharing cannot justify supplanting the text's plain meaning. Even if such concerns are legitimate, they are more properly directed at the regulatory mechanism that Congress put in place. Pp. 14–18.

(b) Because the ACA provided a basis for both exemptions, the Court need not decide whether RFRA independently compelled the Departments' solution. However, the argument that the Departments could not consider RFRA at all is without merit. It is clear from the face of the statute that the contraceptive mandate is capable of violating RFRA. The ACA does not explicitly exempt RFRA, and the regulations implementing the contraceptive mandate qualify as "Federal law" or "the implementation of [Federal] law" under RFRA. §2000bb–3(a). Additionally, this Court stated in *Hobby Lobby* that the mandate violated RFRA as applied to entities with complicity-based objections. And both *Hobby Lobby* and *Zubik* instructed the Departments to consider RFRA going forward. Moreover, in light of the basic requirements of the rulemaking process, the Departments' failure to discuss RFRA at all when formulating their solution would make them susceptible to claims that the rules were arbitrary and capricious for failing to consider an important aspect of the problem. Pp. 19–22.

2. The rules promulgating the exemptions are free from procedural defects. Pp. 22–26.

(a) Respondents claim that because the final rules were preceded by a document entitled "Interim Final Rules with Request for Comments" instead of "General Notice of Proposed Rulemaking," they are procedurally invalid under the APA. The IFRs' request for comments readily satisfied the APA notice requirements. And even assuming that the APA requires an agency to publish a document entitled "notice of proposed rulemaking," there was no "prejudicial error" here, 5 U. S. C. §706. Pp. 22–24.

(b) Pointing to the fact that the final rules made only minor alterations to the IFRs, respondents also contend that the final rules are procedurally invalid because nothing in the record suggests that the Departments maintained an open mind during the post-promulgation process. The "open-mindedness" test has no basis in the APA. Each of the APA's procedural requirements was satisfied: The IFRs provided sufficient notice, §553(b); the Departments "g[a]ve interested persons an opportunity to participate in the rule making through submission of written data, views or arguments," §553(c); the final rules contained "a concise general statement of their basis and purpose," *ibid.*; and they were published more than 30 days before they became effective, §553(d). Pp. 24–26.

930 F. 3d 543, reversed and remanded.

Syllabus

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, GORSUCH, and KAVANAUGH, JJ., joined. ALITO, J., filed a concurring opinion, in which GORSUCH, J., joined. KAGAN, J., filed an opinion concurring in the judgment, in which BREYER, J., joined. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 19–431 and 19–454

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME, PETITIONER

19–431 *v.*

PENNSYLVANIA, ET AL.

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

19–454 *v.*

PENNSYLVANIA, ET AL.

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

[July 8, 2020]

JUSTICE THOMAS delivered the opinion of the Court.

In these consolidated cases, we decide whether the Government created lawful exemptions from a regulatory requirement implementing the Patient Protection and Affordable Care Act of 2010 (ACA), 124 Stat. 119. The requirement at issue obligates certain employers to provide contraceptive coverage to their employees through their group health plans. Though contraceptive coverage is not required by (or even mentioned in) the ACA provision at issue, the Government mandated such coverage by promulgating interim final rules (IFRs) shortly after the ACA's passage. This requirement is known as the contraceptive mandate.

After six years of protracted litigation, the Departments

of Health and Human Services, Labor, and the Treasury (Departments)—which jointly administer the relevant ACA provision[1]—exempted certain employers who have religious and conscientious objections from this agency-created mandate. The Third Circuit concluded that the Departments lacked statutory authority to promulgate these exemptions and affirmed the District Court's nationwide preliminary injunction. This decision was erroneous. We hold that the Departments had the authority to provide exemptions from the regulatory contraceptive requirements for employers with religious and conscientious objections. We accordingly reverse the Third Circuit's judgment and remand with instructions to dissolve the nationwide preliminary injunction.

I

The ACA's contraceptive mandate—a product of agency regulation—has existed for approximately nine years. Litigation surrounding that requirement has lasted nearly as long. In light of this extensive history, we begin by summarizing the relevant background.

A

The ACA requires covered employers to offer "a group health plan or group health insurance coverage" that provides certain "minimum essential coverage." 26 U. S. C. §5000A(f)(2); §§4980H(a), (c)(2). Employers who do not comply face hefty penalties, including potential fines of $100 per day for each affected employee. §§4980D(a)–(b); see also *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682, 696–697 (2014). These cases concern regulations promulgated under a provision of the ACA that requires covered employers to provide women with "preventive care and screenings" without "any cost sharing requirements." 42

[1] See 42 U. S. C. §300gg–92; 29 U. S. C. §1191c; 26 U. S. C. §9833.

U. S. C. §300gg–13(a)(4).[2]

The statute does not define "preventive care and screenings," nor does it include an exhaustive or illustrative list of such services. Thus, the statute itself does not explicitly require coverage for any specific form of "preventive care." *Hobby Lobby*, 573 U. S., at 697. Instead, Congress stated that coverage must include "such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" (HRSA), an agency of the Department of Health and Human Services (HHS). §300gg–13(a)(4). At the time of the ACA's enactment, these guidelines were not yet written. As a result, no specific forms of preventive care or screenings were (or could be) referred to or incorporated by reference.

Soon after the ACA's passage, the Departments began promulgating rules related to §300gg–13(a)(4). But in doing so, the Departments did not proceed through the notice and comment rulemaking process, which the Administrative Procedure Act (APA) often requires before an agency's regulation can "have the force and effect of law." *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 96 (2015) (internal quotation marks omitted); see also 5 U. S. C. §553. Instead, the Departments invoked the APA's good cause exception, which permits an agency to dispense with notice and comment and promulgate an IFR that carries immediate legal force. §553(b)(3)(B).

The first relevant IFR, promulgated in July 2010, primarily focused on implementing other aspects of §300gg–13. 75

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[2]The ACA exempts "grandfathered" plans from 42 U. S. C. §300gg–13(a)(4)—*i.e.*, "those [plans] that existed prior to March 23, 2010, and that have not made specified changes after that date." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682, 699 (2014). See §§18011(a), (e); 29 CFR §2590.715–1251 (2019). As of 2018, an estimated 16 percent of employees "with employer-sponsored coverage were enrolled in a grandfathered group health plan." 84 Fed. Reg. 5971 (2019).

Fed. Reg. 41728. The IFR indicated that HRSA planned to develop its Preventive Care Guidelines (Guidelines) by August 2011. *Ibid.* However, it did not mention religious exemptions or accommodations of any kind.

As anticipated, HRSA released its first set of Guidelines in August 2011. The Guidelines were based on recommendations compiled by the Institute of Medicine (now called the National Academy of Medicine), "a nonprofit group of volunteer advisers." *Hobby Lobby*, 573 U. S., at 697. The Guidelines included the contraceptive mandate, which required health plans to provide coverage for all contraceptive methods and sterilization procedures approved by the Food and Drug Administration as well as related education and counseling. 77 Fed. Reg. 8725 (2012).

The same day the Guidelines were issued, the Departments amended the 2010 IFR. 76 Fed. Reg. 46621 (2011). When the 2010 IFR was originally published, the Departments began receiving comments from numerous religious employers expressing concern that the Guidelines would "impinge upon their religious freedom" if they included contraception. *Id.*, at 46623. As just stated, the Guidelines ultimately did contain contraceptive coverage, thus making the potential impact on religious freedom a reality. In the amended IFR, the Departments determined that "it [was] appropriate that HRSA . . . tak[e] into account the [mandate's] effect on certain religious employers" and concluded that HRSA had the discretion to do so through the creation of an exemption. *Ibid.* The Departments then determined that the exemption should cover religious employers, and they set out a four-part test to identify which employers qualified. The last criterion required the entity to be a church, an integrated auxiliary, a convention or association of churches, or "the exclusively religious activities of any religious order." *Ibid.* HRSA created an exemption for these employers the same day. 78 Fed. Reg. 39871 (2013).

Because of the narrow focus on churches, this first exemption is known as the church exemption.

The Guidelines were scheduled to go into effect for plan years beginning on August 1, 2012. 77 Fed. Reg. 8725–8726. But in February 2012, before the Guidelines took effect, the Departments promulgated a final rule that temporarily prevented the Guidelines from applying to certain religious nonprofits. Specifically, the Departments stated their intent to promulgate additional rules to "accommodat[e] non-exempted, non-profit organizations' religious objections to covering contraceptive services." *Id.*, at 8727. Until that rulemaking occurred, the 2012 rule also provided a temporary safe harbor to protect such employers. *Ibid.* The safe harbor covered nonprofits "whose plans have consistently not covered all or the same subset of contraceptive services for religious reasons."[3] Thus, the nonprofits who availed themselves of this safe harbor were not subject to the contraceptive mandate when it first became effective.

The Departments promulgated another final rule in 2013 that is relevant to these cases in two ways. First, after reiterating that §300gg–13(a)(4) authorizes HRSA "to issue guidelines in a manner that exempts group health plans established or maintained by religious employers," the Departments "simplif[ied]" and "clarif[ied]" the definition of a religious employer. 78 Fed. Reg. 39873.[4] Second, pursuant

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[3] Dept. of Health and Human Servs., Center for Consumer Information and Insurance Oversight, Centers for Medicare & Medicaid Services, Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers With Respect to the Requirement To Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code, p. 2 (2013).

[4] The Departments took this action to prevent an unduly narrow interpretation of the church exemption, in which "an otherwise exempt plan [was] disqualified because the employer's purposes extend[ed] beyond the inculcation of religious values or because the employer . . . serve[d]

to that same authority, the Departments provided the anticipated accommodation for eligible religious organizations, which the regulation defined as organizations that "(1) [o]ppos[e] providing coverage for some or all of the contraceptive services . . . on account of religious objections; (2) [are] organized and operat[e] as . . . nonprofit entit[ies]; (3) hol[d] [themselves] out as . . . religious organization[s]; and (4) self-certif[y] that [they] satisf[y] the first three criteria." *Id.*, at 39874. The accommodation required an eligible organization to provide a copy of the self-certification form to its health insurance issuer, which in turn would exclude contraceptive coverage from the group health plan and provide payments to beneficiaries for contraceptive services separate from the health plan. *Id.*, at 39878. The Departments stated that the accommodation aimed to "protec[t]" religious organizations "from having to contract, arrange, pay, or refer for [contraceptive] coverage" in a way that was consistent with and did not violate the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. §2000bb *et seq.* 78 Fed. Reg. 39871, 39886–39887. This accommodation is referred to as the self-certification accommodation.

B

Shortly after the Departments promulgated the 2013 final rule, two religious nonprofits run by the Little Sisters of the Poor (Little Sisters) challenged the self-certification accommodation. The Little Sisters "are an international congregation of Roman Catholic women religious" who have operated homes for the elderly poor in the United States since 1868. See Mission Statement: Little Sisters of the Poor, http://www.littlesistersofthepoor.org/mission-statement.

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people of different religious faiths." 78 Fed. Reg. 39874. But see *post*, at 12–13 (GINSBURG, J., dissenting) (arguing that the church exemption only covered houses of worship).

They feel called by their faith to care for their elderly residents regardless of "faith, finances, or frailty." Brief for Residents and Families of Residents at Homes of the Little Sisters of the Poor as *Amici Curiae* 14. The Little Sisters endeavor to treat all residents "as if they were Jesus [Christ] himself, cared for as family, and treated with dignity until God calls them to his home." Complaint ¶14 in *Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Sebelius*, No. 1:13–cv–02611 (D Colo.), p. 5 (Complaint).

Consistent with their Catholic faith, the Little Sisters hold the religious conviction "that deliberately avoiding reproduction through medical means is immoral." *Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Burwell*, 794 F. 3d 1151, 1167 (CA10 2015). They challenged the self-certification accommodation, claiming that completing the certification form would force them to violate their religious beliefs by "tak[ing] actions that directly cause others to provide contraception or appear to participate in the Departments' delivery scheme." *Id.*, at 1168. As a result, they alleged that the self-certification accommodation violated RFRA. Under RFRA, a law that substantially burdens the exercise of religion must serve "a compelling governmental interest" and be "the least restrictive means of furthering that compelling governmental interest." §§2000bb–1(a)–(b). The Court of Appeals disagreed that the self-certification accommodation substantially burdened the Little Sisters' free exercise rights and thus rejected their RFRA claim. *Little Sisters*, 794 F. 3d, at 1160.

The Little Sisters were far from alone in raising RFRA challenges to the self-certification accommodation. Religious nonprofit organizations and educational institutions across the country filed a spate of similar lawsuits, most resulting in rulings that the accommodation did not violate RFRA. See, *e.g.*, *East Texas Baptist Univ.* v. *Burwell*, 793 F. 3d 449 (CA5 2015); *Geneva College* v. *Secretary, U. S. Dept. of Health and Human Servs.*, 778 F. 3d 422 (CA3

2015); *Priests for Life* v. *United States Dept. of Health and Human Servs.*, 772 F. 3d 229 (CADC 2014); *Michigan Catholic Conference* v. *Burwell*, 755 F. 3d 372 (CA6 2014); *University of Notre Dame* v. *Sebelius*, 743 F. 3d 547 (CA7 2014); but see *Sharpe Holdings, Inc.* v. *United States Dept. of Health and Human Servs.*, 801 F. 3d 927 (CA8 2015); *Dordt College* v. *Burwell*, 801 F. 3d 946 (CA8 2015). We granted certiorari in cases from four Courts of Appeals to decide the RFRA question. *Zubik* v. *Burwell*, 578 U. S. ___, ___ (2016) (*per curiam*). Ultimately, however, we opted to remand the cases without deciding that question. In supplemental briefing, the Government had "confirm[ed]" that "'contraceptive coverage could be provided to petitioners' employees, through petitioners' insurance companies, without any . . . notice from petitioners.'" *Id.*, at ___ (slip op., at 3). Petitioners, for their part, had agreed that such an approach would not violate their free exercise rights. *Ibid.* Accordingly, because all parties had accepted that an alternative approach was "feasible," *ibid.*, we directed the Government to "accommodat[e] petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage," *id.*, at ___ (slip op., at 4) (internal quotation marks omitted).

C

Zubik was not the only relevant ruling from this Court about the contraceptive mandate. As the Little Sisters and numerous others mounted their challenges to the self-certification accommodation, a host of other entities challenged the contraceptive mandate itself as a violation of RFRA. See, *e.g.*, *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F. 3d 1114 (CA10 2013) (en banc); *Korte* v. *Sebelius*, 735 F. 3d 654 (CA7 2013); *Gilardi* v. *United States Dept. of Health and Human Servs.*, 733 F. 3d 1208 (CADC 2013); *Conestoga Wood Specialties Corp.* v. *Secretary of U. S. Dept.*

of Health and Human Servs., 724 F. 3d 377 (CA3 2013); *Autocam Corp.* v. *Sebelius*, 730 F. 3d 618 (CA6 2013). This Court granted certiorari in two cases involving three closely held corporations to decide whether the mandate violated RFRA. *Hobby Lobby*, 573 U. S. 682.

The individual respondents in *Hobby Lobby* opposed four methods of contraception covered by the mandate. They sincerely believed that human life begins at conception and that, because the challenged methods of contraception risked causing the death of a human embryo, providing those methods of contraception to employees would make the employers complicit in abortion. *Id.*, at 691, 720. We held that the mandate substantially burdened respondents' free exercise, explaining that "[if] the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price." *Id.*, at 691. "If these consequences do not amount to a substantial burden," we stated, "it is hard to see what would." *Ibid.* We also held that the mandate did not utilize the least restrictive means, citing the self-certification accommodation as a less burdensome alternative. *Id.*, at 730–731.

Thus, as the Departments began the task of reformulating rules related to the contraceptive mandate, they did so not only under *Zubik*'s direction to accommodate religious exercise, but also against the backdrop of *Hobby Lobby*'s pronouncement that the mandate, standing alone, violated RFRA as applied to religious entities with complicity-based objections.

D

In 2016, the Departments attempted to strike the proper balance a third time, publishing a request for information on ways to comply with *Zubik*. 81 Fed. Reg. 47741. This attempt proved futile, as the Departments ultimately concluded that "no feasible approach" had been identified.

Dept. of Labor, FAQs About Affordable Care Act Implementation Part 36, p. 4 (2017). The Departments maintained their position that the self-certification accommodation was consistent with RFRA because it did not impose a substantial burden and, even if it did, it utilized the least restrictive means of achieving the Government's interests. *Id.*, at 4–5.

In 2017, the Departments tried yet again to comply with *Zubik*, this time by promulgating the two IFRs that served as the impetus for this litigation. The first IFR significantly broadened the definition of an exempt religious employer to encompass an employer that "objects . . . based on its sincerely held religious beliefs," "to its establishing, maintaining, providing, offering, or arranging [for] coverage or payments for some or all contraceptive services." 82 Fed. Reg. 47812 (2017). Among other things, this definition included for-profit and publicly traded entities. Because they were exempt, these employers did not need to participate in the accommodation process, which nevertheless remained available under the IFR. *Id.*, at 47806.

As with their previous regulations, the Departments once again invoked §300gg–13(a)(4) as authority to promulgate this "religious exemption," stating that it "include[d] the ability to exempt entities from coverage requirements announced in HRSA's Guidelines." *Id.*, at 47794. Additionally, the Departments announced for the first time that RFRA compelled the creation of, or at least provided the discretion to create, the religious exemption. *Id.*, at 47800–47806. As the Departments explained: "We know from *Hobby Lobby* that, in the absence of any accommodation, the contraceptive-coverage requirement imposes a substantial burden on certain objecting employers. We know from other lawsuits and public comments that many religious entities have objections to complying with the [self-certification] accommodation based on their sincerely held religious beliefs." *Id.*, at 47806. The Departments "believe[d] that the

Court's analysis in *Hobby Lobby* extends, for the purposes of analyzing a substantial burden, to the burdens that an entity faces when it religiously opposes participating in the [self-certification] accommodation process." *Id.*, at 47800. They thus "conclude[d] that it [was] appropriate to expand the exemption to other . . . organizations with sincerely held religious beliefs opposed to contraceptive coverage." *Id.*, at 47802; see also *id.*, at 47810–47811.

The second IFR created a similar "moral exemption" for employers—including nonprofits and for-profits with no publicly traded components—with "sincerely held moral" objections to providing some or all forms of contraceptive coverage. *Id.*, at 47850, 47861–47862. Citing congressional enactments, precedents from this Court, agency practice, and state laws that provided for conscience protections, *id.*, at 47844–47847, the Departments invoked their authority under the ACA to create this exemption, *id.*, at 47844. The Departments requested post-promulgation comments on both IFRs. *Id.*, at 47813, 47854.

E

Within a week of the 2017 IFRs' promulgation, the Commonwealth of Pennsylvania filed an action seeking declaratory and injunctive relief. Among other claims, it alleged that the IFRs were procedurally and substantively invalid under the APA. The District Court held that the Commonwealth was likely to succeed on both claims and granted a preliminary nationwide injunction against the IFRs. The Federal Government appealed.

While that appeal was pending, the Departments issued rules finalizing the 2017 IFRs. See 83 Fed. Reg. 57536 (2018); 83 Fed. Reg. 57592, codified at 45 CFR pt. 147 (2018). Though the final rules left the exemptions largely intact, they also responded to post-promulgation comments, explaining their reasons for neither narrowing nor expanding the exemptions beyond what was provided for in the

IFRs. See 83 Fed. Reg. 57542–57545, 57598–57603. The final rule creating the religious exemption also contained a lengthy analysis of the Departments' changed position regarding whether the self-certification process violated RFRA. *Id.*, at 57544–57549. And the Departments explained that, in the wake of the numerous lawsuits challenging the self-certification accommodation and the failed attempt to identify alternative accommodations after the 2016 request for information, "an expanded exemption rather than the existing accommodation is the most appropriate administrative response to the substantial burden identified by the Supreme Court in *Hobby Lobby*." *Id.*, at 57544–57545.

After the final rules were promulgated, the State of New Jersey joined Pennsylvania's suit and, together, they filed an amended complaint. As relevant, the States—respondents here—once again challenged the rules as substantively and procedurally invalid under the APA. They alleged that the rules were substantively unlawful because the Departments lacked statutory authority under either the ACA or RFRA to promulgate the exemptions. Respondents also asserted that the IFRs were not adequately justified by good cause, meaning that the Departments impermissibly used the IFR procedure to bypass the APA's notice and comment procedures. Finally, respondents argued that the purported procedural defects of the IFRs likewise infected the final rules.

The District Court issued a nationwide preliminary injunction against the implementation of the final rules the same day the rules were scheduled to take effect. The Federal Government appealed, as did one of the homes operated by the Little Sisters, which had in the meantime intervened in the suit to defend the religious exemption.[5] The

[5]The Little Sisters moved to intervene in the District Court to defend

appeals were consolidated with the previous appeal, which had been stayed.

The Third Circuit affirmed. In its view, the Departments lacked authority to craft the exemptions under either statute. The Third Circuit read 42 U. S. C. §300gg–13(a)(4) as empowering HRSA to determine which services should be included as preventive care and screenings, but not to carve out exemptions from those requirements. It also concluded that RFRA did not compel or permit the religious exemption because, under Third Circuit precedent that was vacated and remanded in *Zubik*, the Third Circuit had concluded that the self-certification accommodation did not impose a substantial burden on free exercise. As for respondents' procedural claim, the court held that the Departments lacked good cause to bypass notice and comment when promulgating the 2017 IFRs. In addition, the court determined that, because the IFRs and final rules were "virtually identical," "[t]he notice and comment exercise surrounding the Final Rules [did] not reflect any real open-mindedness." *Pennsylvania* v. *President of United States*, 930 F. 3d 543, 568–569 (2019). Though it rebuked the Departments for their purported attitudinal deficiencies, the Third Circuit did not identify any specific public comments to which the agency did not appropriately respond. *Id.*, at 569, n. 24.[6]

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the 2017 religious-exemption IFR, but the District Court denied that motion. The Third Circuit reversed. After that reversal, the Little Sisters appealed the District Court's preliminary injunction of the 2017 IFRs, and that appeal was consolidated with the Federal Government's appeal.

[6]The Third Circuit also determined *sua sponte* that the Little Sisters lacked appellate standing to intervene because a District Court in Colorado had permanently enjoined the contraceptive mandate as applied to plans in which the Little Sisters participate. This was error. Under our precedents, at least one party must demonstrate Article III standing for each claim for relief. An intervenor of right must independently demonstrate Article III standing if it pursues relief that is broader than or different from the party invoking a court's jurisdiction. See *Town of Chester* v. *Laroe Estates, Inc.*, 581 U. S. ___, ___ (2017) (slip op., at 6). Here, the

We granted certiorari. 589 U. S. ___ (2020).

II

Respondents contend that the 2018 final rules providing religious and moral exemptions to the contraceptive mandate are both substantively and procedurally invalid. We begin with their substantive argument that the Departments lacked statutory authority to promulgate the rules.

A

The Departments invoke 42 U. S. C. §300gg–13(a)(4) as legal authority for both exemptions. This provision of the ACA states that, "with respect to women," "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide . . . such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by [HRSA]." The Departments maintain, as they have since 2011, that the phrase "as provided for" allows HRSA both to identify what preventive care and screenings must be covered and to exempt or accommodate certain employers' religious objections. See 83 Fed. Reg. 57540–57541; see also *post*, at 3 (KAGAN, J., concurring in judgment). They also argue that, as with the church exemption, their role as the administering agencies permits them to guide HRSA in its discretion by "defining the scope of permissible exemptions and accommodations for such guidelines." 82 Fed. Reg. 47794. Respondents, on the other hand, contend that §300gg–13(a)(4) permits HRSA to only list the preventive care and screenings that health plans "shall . . . provide," not to exempt entities from covering

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Federal Government clearly had standing to invoke the Third Circuit's appellate jurisdiction, and both the Federal Government and the Little Sisters asked the court to dissolve the injunction against the religious exemption. The Third Circuit accordingly erred by inquiring into the Little Sisters' independent Article III standing.

those identified services. Because that asserted limitation is found nowhere in the statute, we agree with the Departments.

"Our analysis begins and ends with the text." *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 572 U. S. 545, 553 (2014). Here, the pivotal phrase is "as provided for." To "provide" means to supply, furnish, or make available. See Webster's Third New International Dictionary 1827 (2002) (Webster's Third); American Heritage Dictionary 1411 (4th ed. 2000); 12 Oxford English Dictionary 713 (2d ed. 1989). And, as the Departments explained, the word "as" functions as an adverb modifying "provided," indicating "the manner in which" something is done. 83 Fed. Reg. 57540. See also Webster's Third 125; 1 Oxford English Dictionary, at 673; American Heritage Dictionary 102 (5th ed. 2011).

On its face, then, the provision grants sweeping authority to HRSA to craft a set of standards defining the preventive care that applicable health plans must cover. But the statute is completely silent as to *what* those "comprehensive guidelines" must contain, or how HRSA must go about creating them. The statute does not, as Congress has done in other statutes, provide an exhaustive or illustrative list of the preventive care and screenings that must be included. See, *e.g.*, 18 U. S. C. §1961(1); 28 U. S. C. §1603(a). It does not, as Congress did elsewhere in the same section of the ACA, set forth any criteria or standards to guide HRSA's selections. See, *e.g.*, 42 U. S. C. §300gg–13(a)(3) (requiring "*evidence-informed* preventive care and screenings" (emphasis added)); §300gg–13(a)(1) ("evidence-based items or services"). It does not, as Congress has done in other contexts, require that HRSA consult with or refrain from consulting with any party in the formulation of the Guidelines. See, *e.g.*, 16 U. S. C. §1536(a)(1); 23 U. S. C. §138. This means that HRSA has virtually unbridled discretion to decide what counts as preventive care and screenings. But

the same capacious grant of authority that empowers HRSA to make these determinations leaves its discretion equally unchecked in other areas, including the ability to identify and create exemptions from its own Guidelines.

Congress could have limited HRSA's discretion in any number of ways, but it chose not to do so. See *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 227 (2008); see also *Rotkiske* v. *Klemm*, 589 U. S. ___, ___ (2019) (slip op., at 6); *Husted* v. *A. Philip Randolph Institute*, 584 U. S. ___, ___ (2018) (slip op., at 16). Instead, it enacted "'expansive language offer[ing] no indication whatever'" that the statute limits what HRSA can designate as preventive care and screenings or who must provide that coverage. *Ali*, 552 U. S., at 219–220 (quoting *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 589 (1980)). "It is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.'" *Rotkiske*, 589 U. S., at ___ (slip op., at 5) (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 94 (2012)); *Nichols* v. *United States*, 578 U. S. ___, ___ (2016) (slip op., at 6). This principle applies not only to adding terms not found in the statute, but also to imposing limits on an agency's discretion that are not supported by the text. See *Watt* v. *Energy Action Ed. Foundation*, 454 U. S. 151, 168 (1981). By introducing a limitation not found in the statute, respondents ask us to alter, rather than to interpret, the ACA. See *Nichols*, 578 U. S., at ___ (slip op., at 6).

By its terms, the ACA leaves the Guidelines' content to the exclusive discretion of HRSA. Under a plain reading of the statute, then, we conclude that the ACA gives HRSA broad discretion to define preventive care and screenings and to create the religious and moral exemptions.[7]

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[7] Though not necessary for this analysis, our decisions in *Zubik* v. *Burwell*, 578 U. S. ___ (2016) (*per curiam*), and *Hobby Lobby*, 573 U. S. 682, implicitly support the conclusion that §300gg–13(a)(4) empowered HRSA

The dissent resists this conclusion, asserting that the Departments' interpretation thwarts Congress' intent to provide contraceptive coverage to the women who are interested in receiving such coverage. See *post*, at 1, 21 (opinion of GINSBURG, J.). It also argues that the exemptions will make it significantly harder for interested women to obtain seamless access to contraception without cost sharing, *post*, at 15–17, which we have previously "assume[d]" is a compelling governmental interest, *Hobby Lobby*, 573 U. S., at 728; but see *post*, at 10–12 (ALITO, J., concurring). The Departments dispute that women will be adversely impacted by the 2018 exemptions. 82 Fed. Reg. 47805. Though we express no view on this disagreement, it bears noting that such a policy concern cannot justify supplanting the text's plain meaning. See *Gitlitz* v. *Commissioner*, 531 U. S. 206, 220 (2001). "It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Lewis* v. *Chicago*, 560 U. S. 205, 215 (2010).

Moreover, even assuming that the dissent is correct as an empirical matter, its concerns are more properly directed at

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to create the exemptions. As respondents acknowledged at oral argument, accepting their interpretation of the ACA would require us to conclude that the Departments had no authority under the ACA to promulgate the initial church exemption, see Tr. of Oral Arg. 69–71, 91, which by extension would mean that the Departments lacked authority for the 2013 self-certification accommodation. That reading of the ACA would create serious tension with *Hobby Lobby*, which pointed to the self-certification accommodation as an example of a less restrictive means available to the Government, 573 U. S., at 730–731, and *Zubik*, which expressly directed the Departments to "accommodat[e]" petitioners' religious exercise, 578 U. S., at ___ (slip op., at 4). It would be passing strange for this Court to direct the Departments to make such an accommodation if it thought the ACA did not authorize one. In addition, we are not aware of, and the dissent does not point to, a single case predating *Hobby Lobby* or *Zubik* in which the Departments took the position that they could not adopt a different approach because they lacked the statutory authority under the ACA to do so.

the regulatory mechanism that Congress put in place to protect this assumed governmental interest. As even the dissent recognizes, contraceptive coverage is mentioned nowhere in §300gg–13(a)(4), and no language in the statute itself even hints that Congress intended that contraception should or must be covered. See *post*, at 4–5 (citing legislative history and *amicus* briefs). Thus, contrary to the dissent's protestations, it was Congress, not the Departments, that declined to expressly require contraceptive coverage in the ACA itself. See 83 Fed. Reg. 57540. And, it was Congress' deliberate choice to issue an extraordinarily "broad general directiv[e]" to HRSA to craft the Guidelines, without any qualifications as to the substance of the Guidelines or whether exemptions were permissible. *Mistretta* v. *United States*, 488 U. S. 361, 372 (1989). Thus, it is Congress, not the Departments, that has failed to provide the protection for contraceptive coverage that the dissent seeks.[8]

No party has pressed a constitutional challenge to the breadth of the delegation involved here. Cf. *Gundy* v. *United States*, 588 U. S. ___ (2019). The only question we face today is what the plain language of the statute authorizes. And the plain language of the statute clearly allows the Departments to create the preventive care standards as well as the religious and moral exemptions.[9]

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[8]HRSA has altered its Guidelines multiple times since 2011, always proceeding without notice and comment. See 82 Fed. Reg. 47813–47814; 83 Fed. Reg. 8487; 85 Fed. Reg. 722–723 (2020). Accordingly, if HRSA chose to exercise that discretion to remove contraception coverage from the next iteration of its Guidelines, it would arguably nullify the contraceptive mandate altogether without proceeding through notice and comment. The combination of the agency practice of proceeding without notice and comment and HRSA's discretion to alter the Guidelines, though not necessary for our analysis, provides yet another indication of Congress' failure to provide strong protections for contraceptive coverage.

[9]The dissent does not attempt to argue that the self-certification accommodation can coexist with its interpretation of the ACA. As for the

B

The Departments also contend, consistent with the reasoning in the 2017 IFR and the 2018 final rule establishing the religious exemption, that RFRA independently compelled the Departments' solution or that it at least authorized it.[10] In light of our holding that the ACA provided a basis for both exemptions, we need not reach these arguments.[11] We do, however, address respondents' argument that the Departments could not even consider RFRA as they formulated the religious exemption from the contraceptive mandate. Particularly in the context of these cases, it was appropriate for the Departments to consider RFRA.

As we have explained, RFRA "provide[s] very broad protection for religious liberty." *Hobby Lobby*, 573 U. S., at 693. In RFRA's congressional findings, Congress stated that "governments should not substantially burden religious exercise," a right described by RFRA as "unalienable." 42 U. S. C. §§2000bb(a)(1), (3). To protect this right, Con-

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church exemption, the dissent claims that it is rooted in the First Amendment's respect for church autonomy. See *post*, at 12–13. But the dissent points to no case, brief, or rule in the nine years since the church exemption's implementation in which the Departments defended its validity on that ground. The most the dissent can point to is a stray comment in the rule that expanded the self-certification accommodation to closely held corporations in the wake of *Hobby Lobby*. See *post*, at 13 (quoting 80 Fed. Reg. 41325 (2015)).

[10] The dissent claims that "all agree" that the exemption is not supported by the Free Exercise Clause. *Post*, at 2. A constitutional claim is not presented in these cases, and we express no view on the merits of that question.

[11] The dissent appears to agree that the Departments had authority under RFRA to "cure" any RFRA violations caused by its regulations. See *post*, at 14, n. 16 (disclaiming the view that agencies must wait for courts to determine a RFRA violation); see also *supra*, at 5 (explaining that the safe harbor and commitment to developing an accommodation occurred prior to the Guidelines going into effect). The dissent also does not—as it cannot—dispute our directive in *Zubik*.

gress provided that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest." §§2000bb–1(a)–(b). Placing Congress' intent beyond dispute, RFRA specifies that it "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." §2000bb–3(a). RFRA also permits Congress to exclude statutes from RFRA's protections. §2000bb–3(b).

It is clear from the face of the statute that the contraceptive mandate is capable of violating RFRA. The ACA does not explicitly exempt RFRA, and the regulations implementing the contraceptive mandate qualify as "Federal law" or "the implementation of [Federal] law." §2000bb–3(a); cf. *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 297–298 (1979). Additionally, we expressly stated in *Hobby Lobby* that the contraceptive mandate violated RFRA as applied to entities with complicity-based objections. 573 U. S., at 736. Thus, the potential for conflict between the contraceptive mandate and RFRA is well settled. Against this backdrop, it is unsurprising that RFRA would feature prominently in the Departments' discussion of exemptions that would not pose similar legal problems.

Moreover, our decisions all but instructed the Departments to consider RFRA going forward. For instance, though we held that the mandate violated RFRA in *Hobby Lobby*, we left it to the Federal Government to develop and implement a solution. At the same time, we made it abundantly clear that, under RFRA, the Departments must accept the sincerely held complicity-based objections of religious entities. That is, they could not "tell the plaintiffs that their beliefs are flawed" because, in the Departments' view, "the connection between what the objecting parties

must do . . . and the end that they find to be morally wrong . . . is simply too attenuated." *Hobby Lobby*, 573 U. S., at 723–724. Likewise, though we did not decide whether the self-certification accommodation ran afoul of RFRA in *Zubik*, we directed the parties on remand to "accommodat[e]" the free exercise rights of those with complicity-based objections to the self-certification accommodation. 578 U. S., at ___ (slip op., at 4). It is hard to see how the Departments could promulgate rules consistent with these decisions if they did not overtly consider these entities' rights under RFRA.

This is especially true in light of the basic requirements of the rulemaking process. Our precedents require final rules to "articulate a satisfactory explanation for [the] action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983) (internal quotation marks omitted). This requirement allows courts to assess whether the agency has promulgated an arbitrary and capricious rule by "entirely fail[ing] to consider an important aspect of the problem [or] offer[ing] an explanation for its decision that runs counter to the evidence before [it]." *Ibid.*; see also *Department of Commerce* v. *New York*, 588 U. S. ___, ___–___ (2019) (BREYER, J., concurring in part and dissenting in part) (slip op., at 3–4); *Genuine Parts Co.* v. *EPA*, 890 F. 3d 304, 307 (CADC 2018); *Pacific Coast Federation of Fishermen's Assns.* v. *United States Bur. of Reclamation*, 426 F. 3d 1082, 1094 (CA9 2005). Here, the Departments were aware that *Hobby Lobby* held the mandate unlawful as applied to religious entities with complicity-based objections. 82 Fed. Reg. 47799; 83 Fed. Reg. 57544–57545. They were also aware of *Zubik*'s instructions. 82 Fed. Reg. 47799. And, aside from our own decisions, the Departments were mindful of the RFRA concerns raised in "public comments and

. . . court filings in dozens of cases—encompassing hundreds of organizations." *Id.*, at 47802; see also *id.*, at 47806. If the Departments did not look to RFRA's requirements or discuss RFRA at all when formulating their solution, they would certainly be susceptible to claims that the rules were arbitrary and capricious for failing to consider an important aspect of the problem.[12] Thus, respondents' argument that the Departments erred by looking to RFRA as a guide when framing the religious exemption is without merit.

III

Because we hold that the Departments had authority to promulgate the exemptions, we must next decide whether the 2018 final rules are procedurally invalid. Respondents present two arguments on this score. Neither is persuasive.

A

Unless a statutory exception applies, the APA requires agencies to publish a notice of proposed rulemaking in the Federal Register before promulgating a rule that has legal force. See 5 U. S. C. §553(b). Respondents point to the fact that the 2018 final rules were preceded by a document entitled "Interim Final Rules with Request for Comments," not a document entitled "General Notice of Proposed Rulemaking." They claim that since this was insufficient to satisfy §553(b)'s requirement, the final rules were procedurally invalid. Respondents are incorrect. Formal labels aside,

[12] Here, too, the Departments have consistently taken the position that their rules had to account for RFRA in response to comments that the rules would violate that statute. See Dept. of Labor, FAQs About Affordable Care Act Implementation Part 36, pp. 4–5 (2017) (2016 Request for Information); 78 Fed. Reg. 39886–39887 (2013 rule); 77 Fed. Reg. 8729 (2012 final rule). As the 2017 IFR explained, the Departments simply reached a different conclusion on whether the accommodation satisfied RFRA. See 82 Fed. Reg. 47800–40806 (summarizing the previous ways in which the Departments accounted for RFRA and providing a lengthy explanation for the changed position).

the rules contained all of the elements of a notice of proposed rulemaking as required by the APA.

The APA requires that the notice of proposed rulemaking contain "reference to the legal authority under which the rule is proposed" and "either the terms or substance of the proposed rule or a description of the subjects and issues involved." §§553(b)(2)–(3). The request for comments in the 2017 IFRs readily satisfies these requirements. That request detailed the Departments' view that they had legal authority under the ACA to promulgate both exemptions, 82 Fed. Reg. 47794, 47844, as well as authority under RFRA to promulgate the religious exemption, *id.*, at 47800–47806. And respondents do not—and cannot—argue that the IFRs failed to air the relevant issues with sufficient detail for respondents to understand the Departments' position. See *supra*, at 10–11. Thus, the APA notice requirements were satisfied.

Even assuming that the APA requires an agency to publish a document entitled "notice of proposed rulemaking" when the agency moves from an IFR to a final rule, there was no "prejudicial error" here. §706. We have previously noted that the rule of prejudicial error is treated as an "administrative law . . . harmless error rule," *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 659–660 (2007) (internal quotation marks omitted). Here, the Departments issued an IFR that explained its position in fulsome detail and "provide[d] the public with an opportunity to comment on whether [the] regulations . . . should be made permanent or subject to modification." 82 Fed. Reg. 47815; see also *id.*, at 47852, 47855. Respondents thus do not come close to demonstrating that they experienced any harm from the title of the document, let alone that they have satisfied this harmless error rule. "The object [of notice and comment], in short, is one of fair notice," *Long Island Care at Home, Ltd.* v. *Coke*, 551 U. S. 158, 174 (2007), and respondents certainly had such notice here. Because

the IFR complied with the APA's requirements, this claim fails.[13]

B

Next, respondents contend that the 2018 final rules are procedurally invalid because "nothing in the record signal[s]" that the Departments "maintained an open mind throughout the [post-promulgation] process." Brief for Respondents 27. As evidence for this claim, respondents point to the fact that the final rules made only minor alterations to the IFRs, leaving their substance unchanged. The Third Circuit applied this "open-mindedness" test, concluding that because the final rules were "virtually identical" to the IFRs, the Departments lacked the requisite "flexible and open-minded attitude" when they promulgated the final rules. 930 F. 3d, at 569 (internal quotation marks omitted).

We decline to evaluate the final rules under the open-mindedness test. We have repeatedly stated that the text of the APA provides the "'maximum procedural requirements'" that an agency must follow in order to promulgate a rule. *Perez*, 575 U. S., at 100 (quoting *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 524 (1978)). Because the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness," *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 513 (2009), we have repeatedly rejected courts' attempts to impose "judge-made procedur[es]" in addition to the APA's mandates, *Perez*, 575 U. S., at 102; see also *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 654–655 (1990); *Vermont Yankee*, 435 U. S., at 549. And like the procedures that we have held invalid, the open-mindedness test violates the

[13] We note as well that the Departments promulgated many other IFRs in addition to the three related to the contraceptive mandate. See, *e.g.*, 75 Fed. Reg. 27122 (dependent coverage); *id.*, at 34538 (grandfathered health plans); *id.*, at 37188 (pre-existing conditions).

"general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA." *LTV Corp.*, 496 U. S., at 654. Rather than adopting this test, we focus our inquiry on whether the Departments satisfied the APA's objective criteria, just as we have in previous cases. We conclude that they did.

Section 553(b) obligated the Departments to provide adequate notice before promulgating a rule that has legal force. As explained *supra*, at 22–23, the IFRs provided sufficient notice. Aside from these notice requirements, the APA mandates that agencies "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," §553(c); states that the final rules must include "a concise general statement of their basis and purpose," *ibid.*; and requires that final rules must be published 30 days before they become effective, §553(d).

The Departments complied with each of these statutory procedures. They "request[ed] and encourag[ed] public comments on all matters addressed" in the rules—*i.e.*, the basis for the Departments' legal authority, the rationales for the exemptions, and the detailed discussion of the exemptions' scope. 82 Fed. Reg. 47813, 47854. They also gave interested parties 60 days to submit comments. *Id.*, at 47792, 47838. The final rules included a concise statement of their basis and purpose, explaining that the rules were "necessary to protect sincerely held" moral and religious objections and summarizing the legal analysis supporting the exemptions. 83 Fed. Reg. 57592; see also *id.*, at 57537–57538. Lastly, the final rules were published on November 15, 2018, but did not become effective until January 14, 2019—more than 30 days after being published. *Id.*, at 57536, 57592. In sum, the rules fully complied with "'the maximum procedural requirements [that] Congress was willing to have the courts impose upon agencies in conduct-

ing rulemaking procedures.'" *Perez*, 575 U. S., at 102 (quoting *Vermont Yankee*, 435 U. S., at 524). Accordingly, respondents' second procedural challenge also fails.[14]

* * *

For over 150 years, the Little Sisters have engaged in faithful service and sacrifice, motivated by a religious calling to surrender all for the sake of their brother. "[T]hey commit to constantly living out a witness that proclaims the unique, inviolable dignity of every person, particularly those whom others regard as weak or worthless." Complaint ¶14. But for the past seven years, they—like many other religious objectors who have participated in the litigation and rulemakings leading up to today's decision—have had to fight for the ability to continue in their noble work without violating their sincerely held religious beliefs. After two decisions from this Court and multiple failed regulatory attempts, the Federal Government has arrived at a solution that exempts the Little Sisters from the source of their complicity-based concerns—the administratively imposed contraceptive mandate.

We hold today that the Departments had the statutory authority to craft that exemption, as well as the contemporaneously issued moral exemption. We further hold that the rules promulgating these exemptions are free from procedural defects. Therefore, we reverse the judgment of the Court of Appeals and remand the cases for further proceedings consistent with this opinion.

It is so ordered.

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[14] Because we conclude that the IFRs' request for comment satisfies the APA's rulemaking requirements, we need not reach respondents' additional argument that the Departments lacked good cause to promulgate the 2017 IFRs.

SUPREME COURT OF THE UNITED STATES

Nos. 19–431 and 19–454

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME, PETITIONER

19–431 *v.*

PENNSYLVANIA, ET AL.

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

19–454 *v.*

PENNSYLVANIA, ET AL.

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

[July 8, 2020]

JUSTICE ALITO, with whom JUSTICE GORSUCH joins, concurring.

In these cases, the Court of Appeals held, among other things, (1) that the Little Sisters of the Poor lacked standing to appeal, (2) that the Affordable Care Act (ACA) does not permit any exemptions from the so-called contraceptive mandate, (3) that the Departments responsible for issuing the challenged rule[1] violated the Administrative Procedure

[1] The Health Resources and Services Administration (HRSA), a division of the Department of Health and Human Services, creates the "comprehensive guidelines" on "coverage" for "additional preventive care and screenings" for women, 42 U. S. C. §300gg–13(a)(4), but the statute is jointly administered and enforced by the Departments of Health and Human Services, Labor, and Treasury (collectively Departments), see §300gg–92; 29 U. S. C. §1191c; 26 U. S. C. §9833. The Departments promulgated the exemptions at issue here, which were subsequently incorporated into the guidelines by HRSA. See 83 Fed. Reg. 57536 (2018); *id.*, at 57592.

Act (APA) by failing to provide notice of proposed rulemaking, and (4) that the final rule creating the current exemptions is invalid because the Departments did not have an open mind when they considered comments to the rule. Based on this analysis, the Court of Appeals affirmed the nationwide injunction issued by the District Court.

This Court now concludes that all the holdings listed above were erroneous, and I join the opinion of the Court in full. We now send these cases back to the lower courts, where the Commonwealth of Pennsylvania and the State of New Jersey are all but certain to pursue their argument that the current rule is flawed on yet another ground, namely, that it is arbitrary and capricious and thus violates the APA. This will prolong the legal battle in which the Little Sisters have now been engaged for seven years—even though during all this time no employee of the Little Sisters has come forward with an objection to the Little Sisters' conduct.

I understand the Court's desire to decide no more than is strictly necessary, but under the circumstances here, I would decide one additional question: whether the Court of Appeals erred in holding that the Religious Freedom Restoration Act (RFRA), 42 U. S. C. §§2000bb–2000bb–4, does not compel the religious exemption granted by the current rule. If RFRA requires this exemption, the Departments did not act in an arbitrary and capricious manner in granting it. And in my judgment, RFRA compels an exemption for the Little Sisters and any other employer with a similar objection to what has been called the accommodation to the contraceptive mandate.

I

Because the contraceptive mandate has been repeatedly modified, a brief recapitulation of this history may be helpful. The ACA itself did not require that insurance plans

include coverage for contraceptives. Instead, the Act provided that plans must cover those preventive services found to be appropriate by the Health Resources and Services Administration (HRSA), an agency of the Department of Health and Human Services. 42 U. S. C. §300gg–13(a)(4). In 2011, HRSA recommended that plans be required to cover "'[a]ll . . . contraceptive methods'" approved by the Food and Drug Administration. 77 Fed. Reg. 8725 (2012). (I will use the term "contraceptive mandate" or simply "mandate" to refer to the obligation to provide coverage for contraceptives under any of the various regimes that have existed since the promulgation of this original rule.) At the direction of the relevant Departments, HRSA simultaneously created an exemption from the mandate for "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order." 76 Fed. Reg. 46623 (2011); see 77 Fed. Reg. 8726. (I will call this the "church exemption.") This narrow exemption was met with strong objections on the ground that it furnished insufficient protection for religious groups opposed to the use of some or all of the listed contraceptives.

The Departments responded by issuing a new regulation that created an accommodation for certain religious nonprofit employers. See 78 Fed. Reg. 39892–39898 (2013). (I will call this the "accommodation.") Under this accommodation, a covered employer could certify its objection to its insurer (or, if its plan was self-funded, to its third-party plan administrator), and the insurer or third-party administrator would then proceed to provide contraceptive coverage to the objecting entity's employees. Unlike the earlier church exemption, the accommodation did not exempt these religious employers from the contraceptive mandate, but the Departments construed invocation of the accommodation as compliance with the mandate.

Meanwhile, the contraceptive mandate was challenged

by various employers who had religious objections to providing coverage for at least some of the listed contraceptives but were not covered by the church exemption or the accommodation. In *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682 (2014), we held that RFRA prohibited the application of the regulation to closely held, for-profit corporations that fell into this category. The Departments responded by issuing a new regulation that attempted to codify our holding by allowing closely-held corporations to utilize the accommodation. See 80 Fed. Reg. 41343–41347 (2015).[2]

Although this modification solved one RFRA problem, the contraceptive mandate was still objectionable to some religious employers, including the Little Sisters. We considered those objections in *Zubik* v. *Burwell*, 578 U. S. ___ (2016) (*per curiam*), but instead of resolving the legal dispute, we vacated the decisions below and remanded, instructing the parties to attempt to come to an agreement. Unfortunately, after strenuous efforts, the outgoing administration reported on January 9, 2017, that no reconciliation could be reached.[3] The Little Sisters and other employers objected to engaging in any conduct that had the effect of making contraceptives available to their employees under their insurance plans, and no way of providing such coverage to their employees without using their plans could be found.

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[2]In the regulation, the Departments also responded to our holding in *Wheaton College* v. *Burwell*, 573 U. S. 958 (2014), by allowing employers who invoked the accommodation to notify the Government of their objection, rather than filing the objection with their insurer or third-party administrator. See 80 Fed. Reg. 41337.

[3]Dept. of Labor, FAQs About Affordable Care Act Implementation Part 36 (Jan. 9, 2017), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf.

In 2017, the new administration took up the task of attempting to find a solution. After receiving more than 56,000 comments, it issued the rule now before us, which made the church exemption available to non-governmental employers who object to the provision of some or all contraceptive services based on sincerely held religious beliefs.[4] 45 CFR §147.132 (2019); see 83 Fed. Reg. 57540, 57590. (The "religious exemption.") The Court of Appeals, as noted, held that RFRA did not require this new rule.

II

A

RFRA broadly prohibits the Federal Government from violating religious liberty. See 42 U. S. C. §2000bb–1(a). It applies to every "branch, department, agency, [and] instrumentality" of the Federal Government, as well as any "person acting under the color of" federal law. §2000bb–2(1). And this prohibition applies to the "implementation" of federal law. §2000bb–3(a). Thus, unless the ACA or some other subsequently enacted statute made RFRA inapplicable to the contraceptive mandate, the Departments responsible for administering that mandate are obligated to do so in a manner that complies with RFRA.

No provision of the ACA abrogates RFRA, and our decision in *Hobby Lobby*, 573 U. S., at 736, established that application of the contraceptive mandate must conform to RFRA's demands. Thus, it was incumbent on the Departments to ensure that the rules implementing the mandate were consistent with RFRA, as interpreted in our decision.

B

Under RFRA, the Federal Government may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it

[4] A similar exemption was provided for employers with moral objections. See 45 CFR §147.33.

"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." §§2000bb–1(a)–(b). Applying RFRA to the contraceptive mandate thus presents three questions. First, would the mandate substantially burden an employer's exercise of religion? Second, if the mandate would impose such a burden, would it nevertheless serve a "compelling interest"? And third, if it serves such an interest, would it represent "the least restrictive means of furthering" that interest?

Substantial burden. Under our decision in *Hobby Lobby*, requiring the Little Sisters or any other employer with a similar religious objection to comply with the mandate would impose a substantial burden. Our analysis of this question in *Hobby Lobby* can be separated into two parts. First, would non-compliance have substantial adverse practical consequences? 573 U. S., at 720–723. Second, would compliance cause the objecting party to violate its religious beliefs, *as it sincerely understands them*? *Id.*, at 723–726.

The answer to the first question is indisputable. If a covered employer does not comply with the mandate (by providing contraceptive coverage or invoking the accommodation), it faces penalties of $100 per day for each of its employees. 26 U. S. C. §4980D(b)(1). "And if the employer decides to stop providing health insurance altogether and at least one full-time employee enrolls in a health plan and qualifies for a subsidy on one of the government-run ACA exchanges, the employer must pay $2,000 per year for each of its full-time employees. §§4980H(a), (c)(1)." 573 U. S., at 697. In *Hobby Lobby*, we found these "severe" financial consequences sufficient to show that the practical effect of noncompliance would be "substantial."[5] *Id.*, at 720.

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[5]This is one of the differences between these cases and *Bowen* v. *Roy*,

Our answer to the second question was also perfectly clear. If an employer has a religious objection to the use of a covered contraceptive, and if the employer has a sincere religious belief that compliance with the mandate makes it complicit in that conduct, then RFRA requires that the belief be honored. *Id.*, at 724–725. We noted that the objection raised by the employers in *Hobby Lobby* "implicate[d] a difficult and important question of religion and moral philosophy, namely, 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." *Id.*, at 724. We noted that different individuals have different beliefs on this question, but we were clear that "federal courts have no business addressing . . . whether the religious belief asserted in a RFRA case is reasonable." *Ibid.* Instead, the "function" of a court is "'narrow'": "'to determine' whether the line drawn reflects 'an honest conviction.'" *Id.*, at 725 (quoting *Thomas* v. *Review Bd. of Ind. Employment Security Div.*, 450 U. S. 707, 716 (1981)).

Applying this holding to the Little Sisters yields an obvious answer. It is undisputed that the Little Sisters have a sincere religious objection to the use of contraceptives and that they also have a sincere religious belief that utilizing the accommodation would make them complicit in this conduct. As in *Hobby Lobby*, "it is not for us to say that their religious beliefs are mistaken or insubstantial." 573 U. S., at 725.

In reaching a contrary conclusion, the Court of Appeals adopted the reasoning of a prior Third Circuit decision hold-

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476 U. S. 693 (1986). See *post*, at 18–19 (opinion of GINSBURG, J.) (relying on *Bowen* to conclude that accommodation was unnecessary). In *Bowen*, the objecting individuals were not faced with penalties or "coerced by the Governmen[t] into violating their religious beliefs." *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439, 449 (1988).

ing that "'the submission of the self-certification form'" required by the mandate would not "'trigger or facilitate the provision of contraceptive coverage'" and would not make the Little Sisters "'"complicit" in the provision'" of objected-to services. 930 F. 3d 543, 573 (2019) (quoting *Geneva College* v. *Secretary of U. S. Dept. of Health and Human Servs.*, 778 F. 3d 422, 437–438 (CA3 2015), vacated and remanded *sub nom. Zubik*, 578 U. S. ___).

The position taken by the Third Circuit was similar to that of the Government when *Zubik* was before us. Opposing the position taken by the Little Sisters and others, the Government argued that what the accommodation required was not materially different from simply asking that an objecting party opt out of providing contraceptive coverage with the knowledge that by doing so it would cause a third party to provide that coverage. According to the Government, everything that occurred following the opt-out was a result of governmental action.[6]

Petitioners disagreed. Their concern was not with notifying the Government that they wished to be exempted from complying with the mandate *per se*,[7] but they objected to two requirements that they sincerely believe would make them complicit in conduct they find immoral. First, they took strong exception to the requirement that they maintain and pay for a plan under which coverage for contraceptives would be provided. As they explained, if they "were willing to incur ruinous penalties by dropping their health plans, their insurance companies would have no authority

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[6] See Brief for Respondents in *Zubik* v. *Burwell*, O. T. 2015, Nos. 14–1418, 14–1453, 14–1505, 15–35, 15–105, 15–119, 15–191, pp. 35–41.

[7] See Brief for Petitioners in *Zubik* v. *Burwell*, O. T. 2015, Nos. 15–35, 15–105, 15–119, 15–191, p. 45.

or obligation to provide or procure the objectionable coverage for [their] plan beneficiaries."[8] Second, they also objected to submission of the self-certification form required by the accommodation because without that certification their plan could not be used to provide contraceptive coverage.[9] At bottom, then, the Government and the religious objectors disagreed about the relationship between what the accommodation demanded and the provision of contraceptive coverage.

Our remand in *Zubik* put these two conflicting interpretations to the test. In response to our request for supplemental briefing, petitioners explained their position in the following terms. "[T]heir religious exercise" would not be "infringed" if they did not have to do anything "'more than contract for a plan that does not include coverage for some or all forms of contraception,' even if their employees receive[d] cost-free contraceptive coverage from the same insurance company." 578 U. S., at ___ (slip op., at 3). At the time, the Government thought that it might be possible to achieve this result under the ACA, *ibid.*, but subsequent attempts to find a way to do this failed. After great effort, the Government was forced to conclude that it was "not aware of the authority, or of a practical mechanism," for providing contraceptive coverage "specifically to persons covered by an objecting employer, other than by using the employer's plan, issuer, or third party administrator." 83 Fed. Reg. 57545–57546.

The inescapable bottom line is that the accommodation demanded that parties like the Little Sisters engage in conduct that was a necessary cause of the ultimate conduct to which they had strong religious objections. Their situation was the same as that of the conscientious objector in

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[8]Brief for Petitioners in *Zubik* v. *Burwell*, O. T. 2015, Nos. 14–1418, 14–1453, 14–1505, p. 49.

[9]Brief for Petitioners in *Zubik*, O. T. 2015, Nos. 15–35, 15–105, 15–119, 15–191, at 44.

Thomas, 450 U. S., at 715, who refused to participate in the manufacture of tanks but did not object to assisting in the production of steel used to make the tanks. Where to draw the line in a chain of causation that leads to objectionable conduct is a difficult moral question, and our cases have made it clear that courts cannot override the sincere religious beliefs of an objecting party on that question. See *Hobby Lobby*, 573 U. S., at 723–726; *Thomas*, 450 U. S., at 715–716.

For these reasons, the contraceptive mandate imposes a substantial burden on any employer who, like the Little Sisters, has a sincere religious objection to the use of a listed contraceptive and a sincere religious belief that compliance with the mandate (through the accommodation or otherwise) makes it complicit in the provision to the employer's workers of a contraceptive to which the employer has a religious objection.

Compelling interest. In *Hobby Lobby*, the Government asserted and we assumed for the sake of argument that the Government had a compelling interest in "ensuring that all women have access to all FDA-approved contraceptives without cost sharing." 573 U. S., at 727. Now, the Government concedes that it lacks a compelling interest in providing such access, Reply Brief in No. 19–454, p. 10, and this time, the Government is correct.

In order to show that it has a "compelling interest" within the meaning of RFRA, the Government must clear a high bar. In *Sherbert* v. *Verner*, 374 U. S. 398 (1963), the decision that provides the foundation for the rule codified in RFRA, we said that "'[o]nly the gravest abuses, endangering paramount interest'" could "'give occasion for [a] permissible limitation'" on the free exercise of religion. *Id.*, at 406. Thus, in order to establish that it has a "compelling interest" in providing free contraceptives to all women, the Government would have to show that it would commit one of "the gravest abuses" of its responsibilities if it did not

furnish free contraceptives to all women.

If we were required to exercise our own judgment on the question whether the Government has an obligation to provide free contraceptives to all women, we would have to take sides in the great national debate about whether the Government should provide free and comprehensive medical care for all. Entering that policy debate would be inconsistent with our proper role, and RFRA does not call on us to express a view on that issue. We can answer the compelling interest question simply by asking whether *Congress* has treated the provision of free contraceptives to all women as a compelling interest.

"'[A] law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 547 (1993). Thus, in considering whether Congress has manifested the view that it has a compelling interest in providing free contraceptives to all women, we must take into account "exceptions" to this asserted "'rule of general applicability.'" *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418, 436 (2006) (quoting §2000bb–1(a)). And here, there are exceptions aplenty. The ACA—which fails to ensure that millions of women have access to free contraceptives—unmistakably shows that Congress, at least to date, has not regarded this interest as compelling.

First, the ACA does not provide contraceptive coverage for women who do not work outside the home. If Congress thought that there was a compelling need to make free contraceptives available for all women, why did it make no provision for women who do not receive a paycheck? Some of these women may have a greater need for free contraceptives than do women in the work force.

Second, if Congress thought that there was a compelling need to provide cost-free contraceptives for all working

women, why didn't Congress mandate that coverage in the ACA itself? Why did it leave it to HRSA to decide whether to require such coverage *at all*?

Third, the ACA's very incomplete coverage speaks volumes. The ACA "exempts a great many employers from most of its coverage requirements." *Hobby Lobby*, 573 U. S., at 699. "[E]mployers with fewer than 50 employees are not required to provide" any form of health insurance, and a number of large employers with "'grandfathered'" plans need not comply with the contraceptive mandate. *Ibid.*; see 26 U. S. C. §4980H(c)(2); 42 U. S. C. §18011. According to a recent survey, 13% of the 153 million Americans with employer-sponsored health insurance are enrolled in a grandfathered plan, while only 56% of small firms provide health insurance. Kaiser Family Foundation, Employer Health Benefits: 2019 Annual Survey 7, 44, 209 (2019). In *Hobby Lobby*, we wrote that "the contraceptive mandate 'presently does not apply to tens of millions of people,'" 573 U. S., at 700, and it appears that this is still true apart from the religious exemption.[10]

Fourth, the Court's recognition in today's decision that the ACA authorizes the creation of exemptions that go beyond anything required by the Constitution provides further evidence that Congress did not regard the provision of cost-free contraceptives to all women as a compelling interest.

Moreover, the regulatory exemptions created by the Departments and HRSA undermine any claim that the agencies themselves viewed the provision of contraceptive coverage as sufficiently compelling. From the outset, the church exemption has applied to churches, their integrated

[10] In contrast, the Departments estimated that plans covering 727,000 people would take advantage of the religious exemption, and thus that between 70,500 and 126,400 women of childbearing age would be affected by the religious exemption. 83 Fed. Reg. 57578, 57581.

auxiliaries, and associations. 76 Fed. Reg. 46623. And because of the way the accommodation operates under the Employee Retirement Income Security Act of 1974, the Departments treated a number of self-insured non-profit organizations established by churches or associations of churches, including religious universities and hospitals, as "effectively exempted" from the contraceptive mandate as well. Brief for Petitioners in No. 19–454, p. 4. The result was a complex and sometimes irrational pattern of exemptions.

The dissent frames the allegedly compelling interest served by the mandate in different terms—as an interest in providing "seamless" cost-free coverage, *post*, at 1, 14, 21 (opinion of GINSBURG, J.)—but this is an even weaker argument. What "seamless" coverage apparently means is coverage under the insurance plan furnished by a woman's employer. So as applied to the Little Sisters, the dissent thinks that it would be a grave abuse if an employee wishing to obtain contraceptives had to take any step that would not be necessary if she wanted to obtain any other medical service. See *post*, at 16–17. Apparently, it would not be enough if the Government sent her a special card that could be presented at a pharmacy to fill a prescription for contraceptives without any out-of-pocket expense. Nor would it be enough if she were informed that she could obtain free contraceptives by going to a conveniently located government clinic. Neither of those alternatives would provide "seamless coverage," and thus, according to the dissent, both would be insufficient. Nothing short of capitulation on the part of the Little Sisters would suffice.

This argument is inconsistent with any reasonable understanding of the concept of a "compelling interest." It is undoubtedly convenient for employees to obtain all types of medical care and all pharmaceuticals under their general health insurance plans, and perhaps there are women whose personal situation is such that taking any additional

steps to secure contraceptives would be a notable burden. But can it be said that all women or all working women have a compelling need for this convenience?

The ACA does not provide "seamless" coverage for all forms of medical care. Take the example of dental care. Although lack of dental care can cause great pain and may lead to serious health problems, the ACA does not require that a plan cover dental services. Millions of employees must secure separate dental insurance or pay dentist bills out of their own pockets.

In short, it is undoubtedly true that the contraceptive mandate provides a benefit that many women may find highly desirable, but Congress's enactments show that it has not regarded the provision of free contraceptives or the furnishing of "seamless" coverage as "compelling."

Least restrictive means. Even if the mandate served a compelling interest, the accommodation still would not satisfy the "exceptionally demanding" least-restrictive-means standard. *Hobby Lobby*, 573 U. S., at 728. To meet this standard, the Government must "sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion." *Ibid.*; see also *Holt* v. *Hobbs*, 574 U. S. 352, 365 (2015) ("'[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it'").

In *Hobby Lobby*, we observed that the Government has "other means" of providing cost-free contraceptives to women "without imposing a substantial burden on the exercise of religion by the objecting parties." 573 U. S., at 728. "The most straightforward way," we noted, "would be for the Government to assume the cost of providing the . . . contraceptives . . . to any women who are unable to obtain them under their health-insurance policies." *Ibid.* In the context of federal funding for health insurance, the cost of such a

program would be "minor." *Id.*, at 729.[11]

The Government argued that we should not take this option into account because it lacked statutory authority to create such a program, see *ibid.*, but we rejected that argument, *id.*, at 729–730. Certainly, Congress could create such a program if it thought that providing cost-free contraceptives to all women was a matter of "paramount" concern.

As the Government now points out, Congress has taken steps in this direction. "[E]xisting federal, state, and local programs," including Medicaid, Title X, and Temporary Assistance for Needy Families, already "provide free or subsidized contraceptives to low-income women." Brief for Petitioners in No. 19–454, at 27; see also 83 Fed. Reg. 57548, 57551 (discussing programs).[12] And many women who

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[11] In 2019, the Government is estimated to have spent $737 billion subsidizing health insurance for individuals under the age of 65; $287 billion of that went to employment-related coverage. CBO, Federal Subsidies for Health Insurance for People Under Age 65: 2019 to 2029, pp. 15–16 (2019). While the cost of contraceptive methods varies, even assuming the most expensive options, which range around $1,000 a year, the cost of providing this coverage to the 126,400 women who are estimated to be impacted by the religious exemption would be $126.4 million. See Kosova, National Women's Health Network, How Much Do Different Kinds of Birth Control Cost Without Insurance? (Nov. 17, 2017), http://nwhn.org/much-different-kinds-birth-control-cost-without-insurance/ (discussing contraceptive methods ranging from $240 to $1,000 per year); 83 Fed. Reg. 57581 (estimating that up to 126,400 women will be affected by the religious exemption).

[12] The Government recently amended the definitions for Title X's family planning program to help facilitate access to contraceptives for women who work for an employer invoking the religious and moral exemptions. See 84 Fed. Reg. 7734 (2019). These definitions now provide that "for the purpose of considering payment for contraceptive services only," a "low income family" "includes members of families whose annual income" would otherwise exceed the threshold "where a woman has health insurance coverage through an employer . . . [with] a sincerely held religious or moral objection to providing such [contraceptive] coverage." 42 CFR §59.2(2).

work for employers who have religious objections to the contraceptive mandate may be able to receive contraceptive coverage through a family member's health insurance plan.

In sum, the Departments were right to conclude that applying the accommodation to sincere religious objectors violates RFRA. See *id.*, at 57546. All three prongs of the RFRA analysis—substantial burden, compelling interest, and least restrictive means—necessitate this answer.

III

Once it was apparent that the accommodation ran afoul of RFRA, the Government was required to eliminate the violation. RFRA does not specify the precise manner in which a violation must be remedied; it simply instructs the Government to avoid "substantially burden[ing]" the "exercise of religion"—*i.e.*, to eliminate the violation. §2000bb–1(a); see also §2000bb–1(c) (providing for "appropriate relief" in judicial suit). Thus, in *Hobby Lobby*, once we held that application of the mandate to the objecting parties violated RFRA, we left it to the Departments to decide how best to rectify this problem. See 573 U. S., at 736; 79 Fed. Reg. 51118 (2014) (proposing to modify the accommodation to extend it to closely held corporations in light of *Hobby Lobby*); 80 Fed. Reg. 41324 (final rule explaining that "[t]he Departments believe that the definition adopted in these regulations complies with and goes beyond what is required by RFRA and *Hobby Lobby*").

The same principle applies here. Once it is recognized that the prior accommodation violated RFRA in some of its applications, it was incumbent on the Departments to eliminate those violations, and they had discretion in crafting what they regarded as the best solution.

The solution they devised cures the problem, and it is not clear that any narrower exemption would have been sufficient with respect to parties with religious objections to the

accommodation. As noted, after great effort, the Government concluded that it was not possible to solve the problem without using an "employer's plan, issuer, or third party administrator." 83 Fed. Reg. 57546. As a result, the Departments turned to the current rule, under which an objecting party must certify that it "objects, based on its sincerely held religious beliefs, to its establishing, maintaining, providing, offering, or arranging for (as applicable)" either "[c]overage or payments for some or all contraceptive services" or "[a] plan, issuer, or third party administrator that provides or arranges such coverage or payments." 45 CFR §§147.132(a)(2)(i)–(ii).

The States take exception to the new religious rule on several grounds. First, they complain that it grants an exemption to some employers who were satisfied with the prior accommodation, but there is little basis for this argument. An employer who is satisfied with the accommodation may continue to operate under that regime. See §§147.131(c)–(d); 83 Fed. Reg. 57569–57571. And unless an employer has a religious objection to the accommodation, it is unclear why an employer would give it up. The accommodation does not impose any cost on an employer, and it provides an added benefit for the employer's work force.

The States also object to the new rule because it makes exemptions available to publicly traded corporations, but the Government is "not aware" of any publicly traded corporations that object to compliance with the mandate. *Id.*, at 57562. For all practical purposes, therefore, it is not clear that the new rule's provisions concerning entities that object to the mandate on religious grounds go any further than necessary to bring the mandate into compliance with RFRA.

In any event, while RFRA requires the Government to employ the least restrictive means of furthering a compelling interest that burdens religious belief, it does not re-

quire the converse—that an accommodation of religious belief be narrowly tailored to further a compelling interest. The latter approach, which is advocated by the States, gets RFRA entirely backwards. See Brief for Respondents 45 ("RFRA could require the religious exemption only if it was the least restrictive means of furthering [the Government's compelling interest]"). Nothing in RFRA requires that a violation be remedied by the narrowest permissible corrective.

Needless to say, the remedy for a RFRA problem cannot violate the Constitution, but the new rule does not have that effect. The Court has held that there is a constitutional right to purchase and use contraceptives. *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Carey* v. *Population Services Int'l*, 431 U. S. 678 (1977). But the Court has never held that there is a constitutional right to free contraceptives.

The dissent and the court below suggest that the new rule is improper because it imposes burdens on the employees of entities that the rule exempts, see *post*, at 14–17; 930 F. 3d, at 573–574,[13] but the rule imposes no such burden. A woman who does not have the benefit of contraceptive coverage under her employer's plan is not the victim of a burden imposed by the rule or her employer. She is simply not the beneficiary of something that federal law does not provide. She is in the same position as a woman who does not work outside the home or a woman whose health insurance

[13] Both the dissent and the court below refer to the statement in *Cutter* v. *Wilkinson*, 544 U. S. 709, 720 (2005), that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries," but that statement was made in response to the argument that RFRA's twin, the Religious Land Use and Institutionalized Persons Act, 42 U. S. C. §2000cc *et seq.*, violated the Establishment Clause. The only case cited by *Cutter* in connection with this statement, *Estate of Thornton v. Caldor, Inc.*, 472 U. S. 703 (1985), involved a religious accommodation that the Court held violated the Establishment Clause. Before this Court, the States do not argue—and there is no basis for an argument—that the new rule violates that Clause.

is provided by a grandfathered plan that does not pay for contraceptives or a woman who works for a small business that may not provide any health insurance at all.

* * *

I would hold not only that it was appropriate for the Departments to consider RFRA, but also that the Departments were required by RFRA to create the religious exemption (or something very close to it). I would bring the Little Sisters' legal odyssey to an end.

SUPREME COURT OF THE UNITED STATES

Nos. 19–431 and 19–454

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME, PETITIONER

19–431 *v.*

PENNSYLVANIA, ET AL.

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

19–454 *v.*

PENNSYLVANIA, ET AL.

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

[July 8, 2020]

JUSTICE KAGAN, with whom JUSTICE BREYER joins, concurring in the judgment.

I would uphold HRSA's statutory authority to exempt certain employers from the contraceptive-coverage mandate, but for different reasons than the Court gives. I also write separately because I question whether the exemptions can survive administrative law's demand for reasoned decisionmaking. That issue remains open for the lower courts to address.

The majority and dissent dispute the breadth of the delegation in the Women's Health Amendment to the ACA. The Amendment states that a health plan or insurer must offer coverage for "preventive care and screenings . . . as provided for in comprehensive guidelines supported by [HRSA] for purposes of this paragraph." 42 U. S. C. §300gg–13(a)(4). The disputed question is just what HRSA can "provide for." Both the majority and the dissent agree that

HRSA's guidelines can differentiate among preventive services, mandating coverage of some but not others. The opinions disagree about whether those guidelines can also differentiate among health plans, exempting some but not others from the contraceptive-coverage requirement. On that question, all the two opinions have in common is equal certainty they are right. Compare *ante,* at 16 (majority opinion) (Congress "enacted expansive language offer[ing] no indication whatever that the statute limits what HRSA can designate as preventive care and screenings or who must provide that coverage" (internal quotation marks omitted)), with *post,* at 9 (GINSBURG, J., dissenting) ("Nothing in [the statute] accord[s] HRSA authority" to decide "*who* must provide coverage" (internal quotation marks omitted; emphasis in original)).

Try as I might, I do not find that kind of clarity in the statute. Sometimes when I squint, I read the law as giving HRSA discretion over all coverage issues: The agency gets to decide who needs to provide what services to women. At other times, I see the statute as putting the agency in charge of only the "what" question, and not the "who." If I had to, I would of course decide which is the marginally better reading. But *Chevron* deference was built for cases like these. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984); see also *Arlington* v. *FCC*, 569 U. S. 290, 301 (2013) (holding that *Chevron* applies to questions about the scope of an agency's statutory authority). *Chevron* instructs that a court facing statutory ambiguity should accede to a reasonable interpretation by the implementing agency. The court should do so because the agency is the more politically accountable actor. See 467 U. S., at 865–866. And it should do so because the agency's expertise often enables a sounder assessment of which reading best fits the statutory scheme. See *id.,* at 865.

Here, the Departments have adopted the majority's reading of the statutory delegation ever since its enactment. Over the course of two administrations, the Departments have shifted positions on many questions involving the Women's Health Amendment and the ACA more broadly. But not on whether the Amendment gives HRSA the ability to create exemptions to the contraceptive-coverage mandate. HRSA adopted the original church exemption on the same capacious understanding of its statutory authority as the Departments endorse today. See 76 Fed. Reg. 46623 (2011) ("In the Departments' view, it is appropriate that HRSA, in issuing these Guidelines, takes into account the effect on the religious beliefs of certain religious employers if coverage of contraceptive services were required").[1] While the exemption itself has expanded, the Departments' reading of the statutory delegation—that the law gives HRSA discretion over the "who" question—has remained the same. I would defer to that longstanding and reasonable interpretation.

But that does not mean the Departments should prevail when these cases return to the lower courts. The States challenged the exemptions not only as outside HRSA's statutory authority, but also as "arbitrary [and] capricious." 5

[1] The First Amendment cannot have separately justified the church exemption, as the dissent suggests. See *post*, at 12–13 (opinion of GINSBURG, J.). That exemption enables a religious institution to decline to provide contraceptive coverage to *all* its employees, from a minister to a building custodian. By contrast, the so-called ministerial exception of the First Amendment (which the dissent cites, see *post*, at 13) extends only to *select* employees, having ministerial status. See *Our Lady of Guadalupe School* v. *Morrissey-Berru*, 591 U. S. ____, ____ (2020) (slip op., at 14–16); *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 190 (2012). (Too, this Court has applied the ministerial exception only to protect religious institutions from employment discrimination suits, expressly reserving whether the exception excuses their non-compliance with other laws. See *id.*, at 196.) And there is no general constitutional immunity, over and above the ministerial exception, that can protect a religious institution from the law's operation.

U. S. C. §706(2)(A). Because the courts below found for the States on the first question, they declined to reach the second. That issue is now ready for resolution, unaffected by today's decision. An agency acting within its sphere of delegated authority can of course flunk the test of "reasoned decisionmaking." *Michigan* v. *EPA*, 576 U. S. 743, 750 (2015). The agency does so when it has not given "a satisfactory explanation for its action"—when it has failed to draw a "rational connection" between the problem it has identified and the solution it has chosen, or when its thought process reveals "a clear error of judgment." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983) (internal quotation marks omitted). Assessed against that standard of reasonableness, the exemptions HRSA and the Departments issued give every appearance of coming up short.[2]

Most striking is a mismatch between the scope of the religious exemption and the problem the agencies set out to address. In the Departments' view, the exemption was "necessary to expand the protections" for "certain entities and individuals" with "religious objections" to contraception. 83 Fed. Reg. 57537 (2018). Recall that under the old system, an employer objecting to the contraceptive mandate for religious reasons could avail itself of the "self-certification accommodation." *Ante,* at 6. Upon making the certification, the employer no longer had "to contract, arrange, [or] pay" for contraceptive coverage; instead, its insurer would bear the services' cost. 78 Fed. Reg. 39874 (2013). That device dispelled some employers' objections—but not all. The Little Sisters, among others, maintained that the accommodation itself made them complicit in providing contraception. The measure thus failed to "assuage[]" their

[2]I speak here only of the substantive validity of the exemptions. I agree with the Court that the final rules issuing the exemptions were procedurally valid.

"sincere religious objections." 82 Fed. Reg. 47799 (2017). Given that fact, the Departments might have chosen to exempt the Little Sisters and other still-objecting groups from the mandate. But the Departments went further still. Their rule exempted all employers with objections to the mandate, even if the accommodation met their religious needs. In other words, the Departments exempted employers who had no religious objection to the status quo (because they did not share the Little Sisters' views about complicity). The rule thus went beyond what the Departments' justification supported—raising doubts about whether the solution lacks a "rational connection" to the problem described. *State Farm*, 463 U. S., at 43.[3]

And the rule's overbreadth causes serious harm, by the Departments' own lights. In issuing the rule, the Departments chose to retain the contraceptive mandate itself. See 83 Fed. Reg. 57537. Rather than dispute HRSA's prior finding that the mandate is "necessary for women's health and well-being," the Departments left that determination in place. HRSA, Women's Preventive Services Guidelines (Dec. 2019), www.hrsa.gov/womens-guidelines-2019; see 83 Fed. Reg. 57537. The Departments thus committed themselves to minimizing the impact on contraceptive coverage,

[3]At oral argument, the Solicitor General argued that the rule's overinclusion is harmless because the accommodation remains available to all employers who qualify for the exemption. See Tr. of Oral Arg. 20–23. But in their final rule, the Departments themselves acknowledged the prospect that some employers without a religious objection to the accommodation would switch to the exemption. See 83 Fed. Reg. 57576–57577 ("Of course, some of the[] religious" institutions that "do not conscientiously oppose participating" in the accommodation "may opt for the expanded exemption[,] but others might not"); *id.*, at 57561 ("[I]t is not clear to the Departments" how many of the religious employers who had used the accommodation without objection "will choose to use the expanded exemption instead"). And the Solicitor General, when pressed at argument, could offer no evidence that, since the rule took effect, employers without the Little Sisters' complicity beliefs had declined to avail themselves of the new exemption. Tr. of Oral Arg. 22.

even as they sought to protect employers with continuing religious objections. But they failed to fulfill that commitment to women. Remember that the accommodation preserves employees' access to cost-free contraceptive coverage, while the exemption does not. See *ante,* at 5–6. So the Departments (again, according to their own priorities) should have exempted only employers who had religious objections to the accommodation—not those who viewed it as a religiously acceptable device for complying with the mandate. The Departments' contrary decision to extend the exemption to those without any religious need for it yielded all costs and no benefits. Once again, that outcome is hard to see as consistent with reasoned judgment. See *State Farm*, 463 U. S., at 43.[4]

Other aspects of the Departments' handiwork may also prove arbitrary and capricious. For example, the Departments allow even publicly traded corporations to claim a religious exemption. See 83 Fed. Reg. 57562–57563. That option is unusual enough to raise a serious question about whether the Departments adequately supported their choice. Cf. *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682, 717 (2014) (noting the oddity of "a publicly traded corporation asserting RFRA rights"). Similarly, the Departments offer an exemption to employers who have moral, rather than religious, objections to the contraceptive mandate. Perhaps there are sufficient reasons for that decision—for example, a desire to stay neutral between religion and non-religion. See 83 Fed. Reg. 57603–57604. But

[4] In a brief passage in the interim final rule, the Departments suggested that an exemption is "more workable" than the accommodation in addressing religious objections to the mandate. 82 Fed. Reg. 47806. But the Departments continue to provide the accommodation to any religious employers who request that option, thus maintaining a two-track system. See *ante,* at 10; n. 3, *supra.* So ease of administration cannot support, at least without more explanation, the Departments' decision to offer the exemption more broadly than needed.

RFRA cast a long shadow over the Departments' rulemaking, see *ante,* at 19–22, and that statute does not apply to those with only moral scruples. So a careful agency would have weighed anew, in this different context, the benefits of exempting more employers from the mandate against the harms of depriving more women of contraceptive coverage. In the absence of such a reassessment, it seems a close call whether the moral exemption can survive.

None of this is to say that the Departments could not issue a valid rule expanding exemptions from the contraceptive mandate. As noted earlier, I would defer to the Departments' view of the scope of Congress's delegation. See *supra,* at 3. That means the Departments (assuming they act hand-in-hand with HRSA) have wide latitude over exemptions, so long as they satisfy the requirements of reasoned decisionmaking. But that "so long as" is hardly nothing. Even in an area of broad statutory authority—maybe especially there—agencies must rationally account for their judgments.

SUPREME COURT OF THE UNITED STATES

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

[July 8, 2020]

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, dissenting.

In accommodating claims of religious freedom, this Court has taken a balanced approach, one that does not allow the religious beliefs of some to overwhelm the rights and interests of others who do not share those beliefs. See, *e.g.*, *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S. 703, 708–710 (1985); *United States* v. *Lee*, 455 U. S. 252, 258–260 (1982). Today, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the *n*th degree. Specifically, in the Women's Health Amendment to the Patient Protection and Affordable Care Act (ACA), 124 Stat. 119; 155 Cong. Rec. 28841 (2009), Congress undertook to afford gainfully employed women comprehensive, seamless, no-cost insurance coverage for preventive care protective of their health and well-being. Congress delegated to a particular agency, the

Health Resources and Services Administration (HRSA), authority to designate the preventive care insurance should cover. HRSA included in its designation all contraceptives approved by the Food and Drug Administration (FDA).

Destructive of the Women's Health Amendment, this Court leaves women workers to fend for themselves, to seek contraceptive coverage from sources other than their employer's insurer, and, absent another available source of funding, to pay for contraceptive services out of their own pockets. The Constitution's Free Exercise Clause, all agree, does not call for that imbalanced result.[1] Nor does the Religious Freedom Restoration Act of 1993 (RFRA), 42 U. S. C. §2000bb *et seq.*, condone harm to third parties occasioned by entire disregard of their needs. I therefore dissent from the Court's judgment, under which, as the Government estimates, between 70,500 and 126,400 women would immediately lose access to no-cost contraceptive services. On the merits, I would affirm the judgment of the U. S. Court of Appeals for the Third Circuit.

I

A

Under the ACA, an employer-sponsored "group health plan" must cover specified "preventive health services" without "cost sharing," 42 U. S. C. §300gg–13, *i.e.*, without

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[1] In *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), the Court explained that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.*, at 879 (internal quotation marks omitted). The requirement that insurers cover FDA-approved methods of contraception "applies generally, . . . trains on women's well-being, not on the exercise of religion, and any effect it has on such exercise is incidental." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682, 745 (2014) (GINSBURG, J., dissenting). *Smith* forecloses "[a]ny First Amendment Free Exercise Clause claim [one] might assert" in opposition to that requirement. 573 U. S., at 744.

such out-of-pocket costs as copays or deductibles.[2] Those enumerated services did not, in the original draft bill, include preventive care specific to women. "To correct this oversight, Senator Barbara Mikulski introduced the Women's Health Amendment," now codified at §300gg–13(a)(4). *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682, 741 (2014) (GINSBURG, J., dissenting); see also 155 Cong. Rec. 28841. This provision was designed "to promote equality in women's access to health care," countering gender-based discrimination and disparities in such access. Brief for 186 Members of the United States Congress as *Amici Curiae* 6 (hereinafter Brief for 186 Members of Congress). Its proponents noted, *inter alia*, that "[w]omen paid significantly more than men for preventive care," and that "cost barriers operated to block many women from obtaining needed care at all." *Hobby Lobby*, 573 U. S., at 742 (GINSBURG, J., dissenting); see, *e.g.*, 155 Cong. Rec. 28844 (statement of Sen. Hagan) ("When . . . women had to choose between feeding their children, paying the rent, and meeting other financial obligations, they skipped important preventive screenings and took a chance with their personal health.").

Due to the Women's Health Amendment, the preventive health services that group health plans must cover include, "with respect to women," "preventive care and screenings . . . provided for in comprehensive guidelines supported by

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[2]This requirement does not apply to employers with fewer than 50 employees, 26 U. S. C. §4980H(c)(2), or "grandfathered health plans"—plans in existence on March 23, 2010 that have not thereafter made specified changes in coverage, 42 U. S. C. §18011(a), (e); 45 CFR §147.140(g) (2018). "Federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes." *Hobby Lobby*, 573 U. S., at 763 (GINSBURG, J., dissenting). "[T]he grandfathering provision," "far from ranking as a categorical exemption, . . . is temporary, intended to be a means for gradually transitioning employers into mandatory coverage." *Id.*, at 764 (internal quotation marks omitted).

[HRSA]." §300gg–13(a)(4). Pursuant to this instruction, HRSA undertook, after consulting the Institute of Medicine,[3] to state "what preventive services are necessary for women's health and well-being and therefore should be considered in the development of comprehensive guidelines for preventive services for women."[4] The resulting "Women's Preventive Services Guidelines" issued in August 2011.[5] Under these guidelines, millions of women who previously had no, or poor quality, health insurance gained cost-free access, not only to contraceptive services but as well to, *inter alia,* annual checkups and screenings for breast cancer, cervical cancer, postpartum depression, and gestational diabetes.[6] As to contraceptive services, HRSA directed that, to implement §300gg–13(a)(4), women's preventive services encompass "all [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[7]

Ready access to contraceptives and other preventive measures for which Congress set the stage in §300gg–13(a)(4) both safeguards women's health and enables

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[3] "The [Institute of Medicine] is an arm of the National Academy of Sciences, an organization Congress established for the explicit purpose of furnishing advice to the Government." *Id.*, at 742, n. 3 (internal quotation marks omitted).

[4] HRSA, U. S. Dept. of Health and Human Services (HHS), Women's Preventive Services Guidelines, www.hrsa.gov/womens-guidelines/index.html.

[5] 77 Fed. Reg. 8725 (2012).

[6] HRSA, HHS, Women's Preventive Services Guidelines, *supra.*

[7] 77 Fed. Reg. 8725 (alterations and internal quotation marks omitted). Proponents of the Women's Health Amendment specifically anticipated that HRSA would require coverage of family planning services. See, *e.g.*, 155 Cong. Rec. 28841 (2009) (statement of Sen. Boxer); *id.*, at 28843 (statement of Sen. Gillibrand); *id.*, at 28844 (statement of Sen. Mikulski); *id.*, at 28869 (statement of Sen. Franken); *id.*, at 28876 (statement of Sen. Cardin); *ibid.* (statement of Sen. Feinstein); *id.*, at 29307 (statement of Sen. Murray).

women to chart their own life's course. Effective contraception, it bears particular emphasis, "improves health outcomes for women and [their] children," as "women with unintended pregnancies are more likely to receive delayed or no prenatal care" than women with planned pregnancies. Brief for 186 Members of Congress 5 (internal quotation marks omitted); Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 10 (hereinafter ACOG Brief) (similar). Contraception is also "critical for individuals with underlying medical conditions that would be further complicated by pregnancy," "has . . . health benefits unrelated to preventing pregnancy," (*e.g.*, it can reduce the risk of endometrial and ovarian cancer), Brief for National Women's Law Center et al. as *Amici Curiae* 23–24, 26 (hereinafter NWLC Brief), and "improves women's social and economic status," by "allow[ing] [them] to invest in higher education and a career with far less risk of an unplanned pregnancy," Brief for 186 Members of Congress 5–6 (internal quotation marks omitted).

B

For six years, the Government took care to protect women employees' access to critical preventive health services while accommodating the diversity of religious opinion on contraception. The Internal Revenue Service (IRS), the Employee Benefits Security Administration (EBSA), and the Center for Medicare and Medicaid Services (CMS) crafted a narrow exemption relieving houses of worship, "their integrated auxiliaries," "conventions or associations of churches," and "religious order[s]" from the contraceptive-coverage requirement. 76 Fed. Reg. 46623 (2011). For other nonprofit and closely held for-profit organizations opposed to contraception on religious grounds, the agencies made available an accommodation rather than an exemption. See 78 Fed. Reg. 39874 (2013); *Hobby Lobby*, 573 U. S., at 730–731.

> "Under th[e] accommodation, [an employer] can self-certify that it opposes providing coverage for particular contraceptive services. See 45 CFR §§147.131(b)(4), (c)(1) [(2013)]; 26 CFR §§54.9815–2713A(a)(4), (b). If [an employer] makes such a certification, the [employer's] insurance issuer or third-party administrator must '[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan' and '[p]rovide separate payments for any contraceptive services required to be covered' without imposing 'any cost-sharing requirements . . . on the [employer], the group health plan, or plan participants or beneficiaries.' 45 CFR §147.131(c)(2); 26 CFR §54.9815–2713A(c)(2)." *Id.*, at 731 (some alterations in original).[8]

The self-certification accommodation, the Court observed in *Hobby Lobby*, "does not impinge on [an employer's] belief that providing insurance coverage for . . . contraceptives . . . violates [its] religion." *Ibid.* It serves "a Government interest of the highest order," *i.e.*, providing women employees "with cost-free access to all FDA-approved methods of contraception." *Id.*, at 729. And "it serves [that] stated interes[t] . . . well." *Id.*, at 731; see *id.*, at 693 (Government properly accommodated employer's religion-based objection to covering contraceptives under employer's health insurance plan when the harm to women of doing so "would be precisely zero"). Since the ACA's passage, "[gainfully employed] [w]omen, particularly in lower-income groups, have reported greater affordability of coverage, access to health

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[8]This opinion refers to the contraceptive-coverage accommodation made in 2013 as the "self-certification accommodation." See *ante*, at 6 (opinion of the Court). Although this arrangement "requires the issuer to bear the cost of [contraceptive] services, HHS has determined that th[e] obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from th[ose] services." *Hobby Lobby*, 573 U. S., at 698–699.

care, and receipt of preventive services." Brief for 186 Members of Congress 21.

C

Religious employers, including petitioner Little Sisters of the Poor Saints Peter and Paul Home (Little Sisters), nonetheless urge that the self-certification accommodation renders them "complicit in providing [contraceptive] coverage to which they sincerely object." Brief for Little Sisters 35. In 2017, responsive to the pleas of such employers, the Government abandoned its effort to both end discrimination against employed women in access to preventive services and accommodate religious exercise. Under new rules drafted not by HRSA, but by the IRS, EBSA, and CMS, *any* "non-governmental employer"—even a publicly traded for-profit company—can avail itself of the religious exemption previously reserved for houses of worship. 82 Fed. Reg. 47792 (2017) (interim final rule); 45 CFR §147.132(a)(1)(i)(E) (2018).[9] More than 2.9 million Americans—including approximately 580,000 women of childbearing age—receive insurance through organizations newly eligible for this blanket exemption. 83 Fed. Reg. 57577–57578 (2018). Of cardinal significance, the exemption contains no alternative mechanism to ensure affected women's continued access to contraceptive coverage. See 45 CFR §147.132.

Pennsylvania and New Jersey, respondents here, sued to enjoin the exemption. Their lawsuit posed this core question: May the Government jettison an arrangement that promotes women workers' well-being while accommodating employers' religious tenets and, instead, defer entirely to

[9]Nonprofit and closely held for-profit organizations with "sincerely held moral convictions" against contraception also qualify for the exemption. 45 CFR §147.133(a)(1)(i), (a)(2). Unless otherwise noted, this opinion refers to the religious and moral exemptions together as "the exemption" or "the blanket exemption."

employers' religious beliefs, although that course harms women who do not share those beliefs? The District Court answered "no," and preliminarily enjoined the blanket exemption nationwide. 281 F. Supp. 3d 553, 585 (ED Pa. 2017). The Court of Appeals affirmed. 930 F. 3d 543, 576 (CA3 2019). The same question is now presented for ultimate decision by this Court.

II

Despite Congress' endeavor, in the Women's Health Amendment to the ACA, to redress discrimination against women in the provision of healthcare, the exemption the Court today approves would leave many employed women just where they were before insurance issuers were obliged to cover preventive services for them, cost free. The Government urges that the ACA itself authorizes this result, by delegating to HRSA authority to exempt employers from the contraceptive-coverage requirement. This argument gains the Court's approbation. It should not.

A

I begin with the statute's text. But see *ante*, at 17 (opinion of the Court) (overlooking my starting place). The ACA's preventive-care provision, 42 U. S. C. §300gg–13(a), reads in full:

> "A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—
>
> "(1) evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force;
>
> "(2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization

> Practices of the Centers for Disease Control and Prevention with respect to the individual involved; . . .
>
> "(3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by [HRSA; and]
>
> "(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by [HRSA] for purposes of this paragraph."

At the start of this provision, Congress instructed who is to "provide coverage for" the specified preventive health services: "group health plan[s]" and "health insurance issuer[s]." §300gg–13(a). As the Court of Appeals explained, paragraph (a)(4), added by the Women's Health Amendment, granted HRSA "authority to issue 'comprehensive guidelines' concern[ing] the *type* of services" group health plans and health insurance issuers must cover with respect to women. 930 F. 3d, at 570 (emphasis added). Nothing in paragraph (a)(4) accorded HRSA "authority to undermine Congress's [initial] directive," stated in subsection (a), "concerning *who* must provide coverage for these services." *Ibid.* (emphasis added).

The Government argues otherwise, asserting that "[t]he sweeping authorization for HRSA to 'provide[] for' and 'support[]' guidelines 'for purposes of' the women's preventive-services mandate clearly grants HRSA the power not just to specify what services should be covered, but also to provide appropriate exemptions." Brief for HHS et al. 15.[10] This terse statement—the entirety of the Government's textual case—slights the language Congress employed. Most visibly, the Government does not endeavor to explain how

[10] This opinion uses "Brief for HHS et al." to refer to the Brief for Petitioners in No. 19–454, filed on behalf of the Departments of HHS, Treasury, and Labor, the Secretaries of those Departments, and the President.

any language in paragraph (a)(4) counteracts Congress' opening instruction in §300gg–13(a) that group health plans "shall . . . provide" specified services. See *supra*, at 8–9.

The Court embraces, and the opinion concurring in the judgment adopts, the Government's argument. The Court correctly acknowledges that HRSA has broad discretion to determine *what* preventive services insurers should provide for women. *Ante*, at 15. But it restates that HRSA's "discretion [is] equally unchecked in other areas, including the ability to identify and create exemptions from its own Guidelines." *Ante*, at 16. See also *ante*, at 2–3 (KAGAN, J., concurring in judgment) (agreeing with this interpretation). Like the Government, the Court and the opinion concurring in the judgment shut from sight §300gg–13(a)'s overarching direction that group health plans and health insurance issuers "shall" cover the specified services. See *supra*, at 8–9. That "'absent provision[s] cannot be supplied by the courts,'" *ante*, at 16 (quoting *Rotkiske* v. *Klemm*, 589 U. S. ___, ___ (2019) (slip op., at 5), militates *against* the Court's conclusion, not in favor of it. Where Congress wanted to exempt certain employers from the ACA's requirements, it said so expressly. See, *e.g.*, *supra*, at 3, n. 2. Section 300gg–13(a)(4) includes no such exemption. See *supra*, at 8–9.[11]

B

The position advocated by the Government and endorsed by the Court and the opinion concurring in the judgment encounters further obstacles.

Most saliently, the language in §300gg–13(a)(4) mirrors

[11] The only language to which the Court points in support of its contrary conclusion is the phrase "as provided for." See *ante*, at 15. This phrase modifies "additional preventive care and screenings." §300gg–13(a)(4). It therefore speaks to *what* services shall be provided, not *who* must provide them.

that in §300gg–13(a)(3), the provision addressing *children's* preventive health services. Not contesting here that HRSA lacks authority to exempt group health plans from the children's preventive-care guidelines, the Government attempts to distinguish paragraph (a)(3) from paragraph (a)(4). Brief for HHS et al. 16–17. The attempt does not withstand inspection.

The Government first observes that (a)(4), unlike (a)(3), contemplates guidelines created *"for purposes of this paragraph."* (Emphasis added.) This language does not speak to the scope of the guidelines HRSA is charged to create. Moreover, the Government itself accounts for this textual difference: The children's preventive-care guidelines described in paragraph (a)(3) were "preexisting guidelines . . . developed for purposes unrelated to the ACA." Brief for HHS et al. 16. The guidelines on women's preventive care, by contrast, did not exist before the ACA; they had to be created "for purposes of" the preventive-care mandate. §300gg–13(a)(4). The Government next points to the modifier "evidence-informed" placed in (a)(3), but absent in (a)(4). This omission, however it may bear on the kind of preventive services for women HRSA can require group health insurance to cover, does not touch or concern *who* is required to cover those services.[12]

HRSA's role within HHS also tugs against the Government's, the Court's, and the opinion concurring in the judgment's construction of §300gg–13(a)(4). That agency was a logical choice to determine *what* women's preventive services should be covered, as its mission is to "improve health care access" and "eliminate health disparities."[13] First and foremost, §300gg–13(a)(4) is directed at eradicating gender-

[12] The Court does not say whether, in its view, the exemption authority it claims for women's preventive care exists as well for HRSA's children's preventive-care guidelines.

[13] HRSA, HHS, Organization, www.hrsa.gov/about/organization/index.html.

based disparities in access to preventive care. See *supra*, at 3. Overlooked by the Court, see *ante*, at 14–18, and the opinion concurring in the judgment, see *ante*, at 2–3 (opinion of KAGAN, J.), HRSA's expertise does not include any proficiency in delineating religious and moral exemptions. One would not, therefore, expect Congress to delegate to HRSA the task of crafting such exemptions. See *King* v. *Burwell*, 576 U. S. 473, 486 (2015) ("It is especially unlikely that Congress would have delegated this decision to [an agency] which has no expertise in . . . policy of this sort.").[14]

In fact, HRSA *did not* craft the blanket exemption. As earlier observed, see *supra*, at 7, that task was undertaken by the IRS, EBSA, and CMS. See also 45 CFR §147.132(a)(1), 147.133(a)(1) (direction by the IRS, EBSA, and CMS that HRSA's guidelines "*must not* provide for" contraceptive coverage in the circumstances described in the blanket exemption (emphasis added)). Nowhere in 42 U. S. C. §300gg–13(a)(4) are those agencies named, as earlier observed, see *supra*, at 8–9, an absence the Government, the Court, and the opinion concurring in the judgment do not deign to acknowledge. See Brief for HHS et al. 15–20; *ante*, at 14–18 (opinion of the Court); *ante*, at 2–3 (opinion of KAGAN, J.).

C

If the ACA does not authorize the blanket exemption, the Government urges, then the exemption granted to houses of worship in 2011 must also be invalid. Brief for HHS et al. 19–20. As the Court of Appeals explained, however, see 930

[14] A more logical choice would have been HHS's Office for Civil Rights (OCR), which "enforces . . . conscience and religious freedom laws" with respect to HHS programs. HHS, OCR, About Us, www.hhs.gov/ocr/about-us/index.html. Indeed, when the Senate introduced an amendment to the ACA similar in character to the blanket exemption, a measure that failed to pass, the Senate instructed that OCR administer the exemption. 158 Cong. Rec. 1415 (2012) (proposed amendment); *id.*, at 2634 (vote tabling amendment).

F. 3d, at 570, n. 26, the latter exemption is not attributable to the ACA's text; it was justified on First Amendment grounds. See *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 188 (2012) (the First Amendment's "ministerial exception" protects "the internal governance of [a] church"); 80 Fed. Reg. 41325 (2015) (the exemption "recogni[zes] [the] particular sphere of autonomy [afforded to] houses of worship . . . consistent with their special status under longstanding tradition in our society").[15] Even if the house-of-worship exemption extends beyond what the First Amendment would require, see *ante*, at 3, n. 1 (opinion of KAGAN, J.), that extension, as just explained, cannot be extracted from the ACA's text.[16]

III

Because I conclude that the blanket exemption gains no aid from the ACA, I turn to the Government's alternative argument. The *religious* exemption, if not the moral exemption, the Government urges, is necessary to protect religious freedom. The Government does not press a free exercise argument, see *supra*, at 2, and n. 1, instead invoking RFRA. Brief for HHS et al. 20–31. That statute instructs that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a

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[15] On the broad scope the Court today attributes to the "ministerial exception," see *Our Lady of Guadalupe School* v. *Morrissey-Berru*, 591 U. S. ____ (2020).

[16] The Government does not argue that my view of the limited compass of §300gg–13(a)(4) imperils the self-certification accommodation. Brief for HHS et al. 19–20. But see *ante*, at 18, n. 9 (opinion of the Court). That accommodation aligns with the Court's decisions under the Religious Freedom Restoration Act of 1993 (RFRA). See *infra*, at 14–15. It strikes a balance between women's health and religious opposition to contraception, preserving women's access to seamless, no-cost contraceptive coverage, but imposing the obligation to provide such coverage directly on insurers, rather than on the objecting employer. See *supra*, at 6; *infra*, at 18–20. The blanket exemption, in contrast, entirely disregards women employees' preventive care needs.

rule of general applicability," unless doing so "is the least restrictive means of furthering [a] compelling governmental interest." 42 U. S. C. §2000bb–1(a), (b).

A

1

The parties here agree that federal agencies may craft accommodations and exemptions to cure violations of RFRA. See, *e.g.*, Brief for Respondents 36.[17] But that authority is not unbounded. *Cutter* v. *Wilkinson*, 544 U. S. 709, 720 (2005) (construing Religious Land Use and Institutionalized Persons Act of 2000, the Court cautioned that "adequate account" must be taken of "the burdens a requested accommodation may impose on nonbeneficiaries" of the Act); *Caldor*, 472 U. S., at 708–710 (invalidating state statute requiring employers to accommodate an employee's religious observance for failure to take into account the burden such an accommodation would impose on the employer and other employees). "[O]ne person's right to free exercise must be kept in harmony with the rights of her fellow citizens." *Hobby Lobby,* 573 U. S., at 765, n. 25 (GINSBURG, J., dissenting). See also *id.*, at 746 ("[Y]our right to swing your arms ends just where the other man's nose begins." (quoting Chafee, Freedom of Speech in War Time, 32 Harv. L. Rev. 932, 957 (1919))).

In this light, the Court has repeatedly assumed that any religious accommodation to the contraceptive-coverage requirement would preserve women's continued access to seamless, no-cost contraceptive coverage. See *Zubik* v. *Burwell*, 578 U. S. ___, ___ (2016) (*per curiam*) (slip op., at 4)

[17] But see, *e.g.*, Brief for Professors of Criminal Law et al. as *Amici Curiae* 8–11 (RFRA does not grant agencies independent rulemaking authority; instead, laws allegedly violating RFRA must be challenged in court). No party argues that agencies can act to cure violations of RFRA only after a court has found a RFRA violation, and this opinion does not adopt any such view.

("[T]he parties on remand should be afforded an opportunity to arrive at an approach . . . that accommodates petitioners' religious exercise while . . . ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage." (internal quotation marks omitted)); *Wheaton College* v. *Burwell*, 573 U. S. 958, 959 (2014) ("Nothing in this interim order affects the ability of applicant's employees and students to obtain, without cost, the full range of [FDA] approved contraceptives."); *Hobby Lobby*, 573 U. S., at 692 ("There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to . . . all [FDA]-approved contraceptives. In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of [other] companies.").

The assumption made in the above-cited cases rests on the basic principle just stated, one on which this dissent relies: While the Government may "accommodate religion beyond free exercise requirements," *Cutter*, 544 U. S., at 713, when it does so, it may not benefit religious adherents at the expense of the rights of third parties. See, *e.g.*, *id.*, at 722 ("[A]n accommodation must be measured so that it does not override other significant interests."); *Caldor*, 472 U. S., at 710 (religious exemption was invalid for its "unyielding weighting in favor of" interests of religious adherents "over all other interests"). Holding otherwise would endorse "the regulatory equivalent of taxing non-adherents to support the faithful." Brief for Church-State Scholars as *Amici Curiae* 3.

2

The expansive religious exemption at issue here imposes significant burdens on women employees. Between 70,500

and 126,400 women of childbearing age, the Government estimates, will experience the disappearance of the contraceptive coverage formerly available to them, 83 Fed. Reg. 57578–57580; indeed, the numbers may be even higher.[18] Lacking any alternative insurance coverage mechanism, see *supra*, at 7, the exemption leaves women two options, neither satisfactory.

The first option—the one suggested by the Government in its most recent rulemaking, 82 Fed. Reg. 47803—is for women to seek contraceptive care from existing government-funded programs. Such programs, serving primarily low-income individuals, are not designed to handle an influx of tens of thousands of previously insured women.[19] Moreover, as the Government has acknowledged, requiring women "to take steps to learn about, and to sign up for, a new health benefit" imposes "additional barriers," "mak[ing] that coverage accessible to fewer women." 78 Fed. Reg. 39888. Finally, obtaining care from a government-

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[18]The Government notes that 2.9 million people were covered by the 209 plans that previously utilized the self-certification accommodation. 83 Fed. Reg. 57577. One hundred nine of those plans covering 727,000 people, the Government estimates, will use the religious exemption, while 100 plans covering more than 2.1 million people will continue to use the self-certification accommodation. *Id.*, at 57578. If more plans, or plans covering more people, use the new exemption, more women than the Government estimates will be affected.

[19]Title X "is the only federal grant program dedicated solely to providing individuals with comprehensive family planning and related preventive health services." HHS, About Title X Grants, www.hhs.gov/opa/title-x-family-planning/about-title-x-grants/index.html. A recent rule makes women who lose contraceptive coverage due to the religious exemption eligible for Title X services. See 84 Fed. Reg. 7734 (2019). Expanding *eligibility*, however, "does nothing to ensure Title X providers actually have capacity to meet the expanded client population." Brief for National Women's Law Center et al. as *Amici Curiae* 22. Moreover, that same rule forced 1,041 health providers, serving more than 41% of Title X patients, out of the Title X provider network due to their affiliation with abortion providers. 84 Fed. Reg. 7714; Brief for Planned Parenthood Federation of America et al. as *Amici Curiae* 18–19.

funded program instead of one's regular care provider creates a continuity-of-care problem, "forc[ing those] who lose coverage away from trusted providers who know their medical histories." NWLC Brief 18.

The second option for women losing insurance coverage for contraceptives is to pay for contraceptive counseling and devices out of their own pockets. Notably, however, "the most effective contraception is also the most expensive." ACOG Brief 14–15. "[T]he cost of an IUD [intrauterine device]," for example, "is nearly equivalent to a month's full-time pay for workers earning the minimum wage." *Hobby Lobby*, 573 U. S., at 762 (GINSBURG, J., dissenting). Faced with high out-of-pocket costs, many women will forgo contraception, Brief for 186 Members of Congress 11, or resort to less effective contraceptive methods, 930 F. 3d, at 563.

As the foregoing indicates, the religious exemption "reintroduce[s] the very health inequities and barriers to care that Congress intended to eliminate when it enacted the women's preventive services provision of the ACA." NWLC Brief 5. "No tradition, and no prior decision under RFRA, allows a religion-based exemption when [it] would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect." *Hobby Lobby*, 573 U. S., at 764 (GINSBURG, J., dissenting).[20] I would therefore hold the religious exemption neither required nor permitted by RFRA.[21]

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[20] Remarkably, JUSTICE ALITO maintains that stripping women of insurance coverage for contraceptive services imposes no burden. See *ante*, at 18 (concurring opinion). He reaches this conclusion because, in his view, federal law does not require the contraceptive coverage denied to women under the exemption. *Ibid.* Congress, however, called upon HRSA to specify contraceptive and other preventive services for women in order to ensure equality in women employees' access to healthcare, thus safeguarding their health and well-being. See *supra*, at 2–5.

[21] As above stated, the Government does not defend the moral exemption under RFRA. See *supra*, at 13.

B

Pennsylvania and New Jersey advance an additional argument: The exemption is not authorized by RFRA, they maintain, because the self-certification accommodation it replaced was sufficient to alleviate any substantial burden on religious exercise. Brief for Respondents 36–42. That accommodation, I agree, further indicates the religious exemption's flaws.

1

For years, religious organizations have challenged the self-certification accommodation as insufficiently protective of their religious rights. See, *e.g.*, *Zubik*, 578 U. S., at ___ (slip op., at 3). While I do not doubt the sincerity of these organizations' opposition to that accommodation, *Hobby Lobby*, 573 U. S., at 758–759 (GINSBURG. J., dissenting), I agree with Pennsylvania and New Jersey that the accommodation does not substantially burden objectors' religious exercise.

As Senator Hatch observed, "[RFRA] does not require the Government to justify every action that has some effect on religious exercise." 139 Cong. Rec. 26180 (1993). *Bowen* v. *Roy*, 476 U. S. 693 (1986), is instructive in this regard. There, a Native American father asserted a sincere religious belief that his daughter's spirit would be harmed by the Government's use of her social security number. *Id.*, at 697. The Court, while casting no doubt on the sincerity of this religious belief, explained:

> "Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious

beliefs of particular citizens." *Id.*, at 699.[22]

Roy signals a critical distinction in the Court's religious exercise jurisprudence: A religious adherent may be entitled to religious accommodation with regard to her own conduct, but she is not entitled to "insist that . . . *others* must conform *their* conduct to [her] own religious necessities.'" *Caldor*, 472 U. S., at 710 (quoting *Otten* v. *Baltimore & Ohio R. Co.*, 205 F. 2d 58, 61 (CA2 1953) (Hand, J.); (emphasis added).[23] Counsel for the Little Sisters acknowledged as much when he conceded that religious "employers could [not] object at all" to a "government obligation" to provide contraceptive coverage "imposed directly on the insurers." Tr. of Oral Arg. 41.[24]

But that is precisely what the self-certification accommodation does. As the Court recognized in *Hobby Lobby*: "When a group-health-insurance issuer receives notice that [an employer opposes coverage for some or all contraceptive services for religious reasons], the issuer must then exclude [that] coverage from the employer's plan and provide separate payments for contraceptive services for plan participants." 573 U. S., at 698–699; see also *id.*, at 738 (Kennedy,

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[22] JUSTICE ALITO disputes the relevance of *Roy*, asserting that the religious adherent in that case faced no penalty for noncompliance with the legal requirement under consideration. See *ante*, at 6, n. 5. As JUSTICE ALITO acknowledges, however, the critical inquiry has two parts. See *ante*, at 6–7. It is not enough to ask whether noncompliance entails "substantial adverse practical consequences." One must also ask whether compliance substantially burdens religious exercise. Like *Roy*, my dissent homes in on the latter question.

[23] Even if RFRA sweeps more broadly than the Court's pre-*Smith* jurisprudence in some respects, see *Hobby Lobby*, 573 U. S., at 695, n. 3; but see *id.*, at 749–750 (GINSBURG, J., dissenting), there is no cause to believe that Congress jettisoned this fundamental distinction.

[24] JUSTICE ALITO ignores the distinction between (1) a request for an accommodation with regard to one's own conduct, and (2) an attempt to require others to conform their conduct to one's own religious beliefs. This distinction is fatal to JUSTICE ALITO's argument that the self-certification accommodation violates RFRA. See *ante*, at 6–10.

J., concurring) ("The accommodation works by requiring *insurance companies* to cover . . . contraceptive coverage for female employees who wish it." (emphasis added)). Under the self-certification accommodation, then, the objecting employer is absolved of any obligation to provide the contraceptive coverage to which it objects; that obligation is transferred to the insurer. This arrangement "furthers the Government's interest [in women's health] but does not impinge on the [employer's] religious beliefs." *Ibid.*; see *supra*, at 18–19.

2

The Little Sisters, adopting the arguments made by religious organizations in *Zubik*, resist this conclusion in two ways. First, they urge that contraceptive coverage provided by an insurer under the self-certification accommodation forms "part of the same plan as the coverage provided by the employer." Brief for Little Sisters 12 (internal quotation marks omitted). See also Tr. of Oral Arg. 29 (Little Sisters object "to having their plan hijacked"); *ante*, at 8 (ALITO, J., concurring) (Little Sisters object to "maintain[ing] and pay[ing] for a plan under which coverage for contraceptives would be provided"). This contention is contradicted by the plain terms of the regulation establishing that accommodation: To repeat, an insurance issuer "must . . . *[e]xpressly exclude* contraceptive coverage from the group health insurance coverage provided in connection with the group health plan." 45 CFR §147.131(c)(2)(i)(A) (2013) (emphasis added); see *supra*, at 6.[25]

[25] Religious organizations have observed that, under the self-certification accommodation, insurers need not, and do not, provide contraceptive coverage under a separate policy number. Supp. Brief for Petitioners in *Zubik* v. *Burwell*, O. T. 2015, No. 14–1418, p. 1. This objection does not relate to a religious employer's own conduct; instead, it concerns the *insurer's* conduct. See *supra*, at 18–19.

Second, the Little Sisters assert that "tak[ing] affirmative steps to execute paperwork . . . necessary for the provision of 'seamless' contraceptive coverage to their employees" implicates them in providing contraceptive services to women in violation of their religious beliefs. Little Sisters Reply Brief 7. At the same time, however, they have been adamant that they do not oppose merely "register[ing] their objections" to the contraceptive-coverage requirement. *Ibid.* See also Tr. of Oral Arg. 29, 42–43 (Little Sisters have "no objection to objecting"); *ante*, at 8 (ALITO, J., concurring) (Little Sisters' "concern was not with notifying the Government that they wished to be exempted from complying with the mandate *per se*"). These statements, taken together, reveal that the Little Sisters do not object to what the self-certification accommodation asks of *them*, namely, attesting to their religious objection to contraception. See *supra*, at 6. They object, instead, to the particular use insurance issuers make of that attestation. See *supra*, at 18–19.[26] But that use originated from the ACA and its once-implementing regulation, not from religious employers' self-certification or alternative notice.

* * *

The blanket exemption for religious and moral objectors to contraception formulated by the IRS, EBSA, and CMS is inconsistent with the text of, and Congress' intent for, both the ACA and RFRA. Neither law authorizes it.[27] The orig-

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[26] JUSTICE ALITO asserts that the Little Sisters' "situation [is] the same as that of the conscientious objector in *Thomas* [v. *Review Bd. of Ind. Employment Security Div.*, 450 U. S. 707, 715 (1981)]." *Ante*, at 9–10. I disagree. In *Thomas*, a Jehovah's Witness objected to "work[ing] on weapons," 450 U. S., at 710, which is what his employer required of him. As above stated, however, the Little Sisters have no objection to objecting, the only other action the self-certification accommodation requires of them.

[27] Given this conclusion, I need not address whether the exemption is

inal administrative regulation accommodating religious objections to contraception appropriately implemented the ACA and RFRA consistent with Congress' staunch determination to afford women employees equal access to preventive services, thereby advancing public health and welfare and women's well-being. I would therefore affirm the judgment of the Court of Appeals.[28]

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procedurally invalid. See *ante*, at 22–26 (opinion of the Court).

[28]Although the Court does not reach the issue, the District Court did not abuse its discretion in issuing a nationwide injunction. The Administrative Procedure Act contemplates nationwide relief from invalid agency action. See 5 U. S. C. §706(2) (empowering courts to "hold unlawful and set aside agency action"). Moreover, the nationwide reach of the injunction "was 'necessary to provide complete relief to the plaintiffs.'" *Trump* v. *Hawaii*, 585 U. S. ___, ___, n. 15 (2018) (SOTOMAYOR, J., dissenting) (slip op., at 25, n. 13) (quoting *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 765 (1994)). Harm to Pennsylvania and New Jersey, the Court of Appeals explained, occurs because women who lose benefits under the exemption "will turn to state-funded services for their contraceptive needs and for the unintended pregnancies that may result from the loss of coverage." 930 F. 3d, at 562. This harm is not bounded by state lines. The Court of Appeals noted, for example, that some 800,000 residents of Pennsylvania and New Jersey work—and thus receive their health insurance—out of State. *Id.*, at 576. Similarly, many students who attend colleges and universities in Pennsylvania and New Jersey receive their health insurance from their parents' out-of-state health plans. *Ibid.*