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Brief of Amici Curiae Constitutional Law Scholars In Support Of Petitioners

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IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, ET AL.

Petitioners,

v.

SYLVIA MATTHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD, FIFTH, TENTH, AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF OF AMICI CURIAE CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are constitutional law scholars who possess an acute interest in a reasoned development of constitutional doctrine.

A full list of *amici* is provided as an Appendix to this brief.

[1] Counsel for all parties have submitted blanket consent to the filing of amicus briefs in this case. No counsel for a party authored this brief in whole or in part. No person or entity other than *amici curiae* or their counsel made a monetary contribution that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

"[I]n a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781, 2785 (2014) (Kennedy, J., concurring). The Religious Freedom Restoration Act ("RFRA")[2] addresses that difficulty by harmonizing religious freedom and the interests of third parties. RFRA will not exempt free exercise from a law's command simply because the law substantially burdens religion—nor will it deny a religious exemption simply because the exemption would affect a third party.

However, some seek to supplant RFRA's framework with a novel, one-sided constitutional doctrine that downplays a law's burden on religion. Several scholars contend that the Establishment Clause bans religious exemptions that "require[] people to bear the burden of religions to which they do not belong and whose teachings they do not practice."[3] In this case, these scholars argue, a

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[2] Pub. L. No. 103-141, 107 Stat. 1488-89; 42 U.S.C. § 2000bb (Supp. V. 1993).

[3] *See* Frederick Mark Gedicks, *Exemptions from the 'Contraception Mandate' Threaten Religious Liberty*, WASH. POST (Jan. 15, 2014), http://www.washingtonpost.com/opinions/exemptions-from-the-contraception-mandate-threaten-religious-liberty/2014/01/15/f5cb9bd0-7d79-11e3-93c1-0e888170b723_story.html; *see also* Micah Schwartzman, Richard Schragger & Nelson Tebbe, *Holt v. Hobbs and Third Party Harms,* BALKINIZATION BLOG (Jan. 22, 2015), http://balkin.blogspot.com/2015/01/holt-v-hobbs-and-third-party-harms.html; Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-

RFRA exemption would substantially burden the right of women to "seamless" coverage of abortifacients and contraceptives and therefore is constitutionally invalid. These contentions are misplaced.

RFRA incorporates Establishment Clause limits on religious accommodations: it applies equally to all religions and takes into account the government's interest in protecting third parties when that interest is compelling.[4] There is no support in constitutional doctrine or theory for an Establishment Clause limit on religious exemptions that do not conflict with a government interest that is less than compelling. Rather, the Court has consistently held that there is "play in the joints" between the Free Exercise Clause and the Establishment Clause allowing for legislative action. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 713, 719-20 (2005) (per Ginsburg, J.) (citation and internal quotation marks omitted); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."). The suggestion that the Establishment Clause prevents RFRA from

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C.L. L. REV. 343 (2014); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014).

[4] This case does not present an Establishment Clause concern over RFRA's protection of *religious* exercise. Even if it did, the proper remedy under that Clause is to extend exemptions to religious-like objections. *See Welsh v. United States*, 398 U.S. 333, 351-61 (1970) (Harlan, J., concurring in result).

operating according to its own terms lacks any support in the Court's cases addressing the Religion Clauses.

Indeed, the Court has left no doubt that RFRA falls within the constitutional "space for legislative action [that is] neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause," *see Cutter*, 544 U.S. at 719. *See Hobby Lobby*, 134 S. Ct. at 2781 n.37 ("It is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.' That consideration will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest.") (quoting *Cutter*, 544 U.S. at 720). The scholars' argument thus conflicts with the Court's repeated application of RFRA,[5] with the government's own argument in *Hobby Lobby*,[6] and even with Justice Ginsburg's dissent in *Hobby Lobby*.[7] RFRA's

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[5] *See Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) ("We reaffirm[] . . . the feasibility of case-by-case consideration of religious exemptions to generally applicable rules.").

[6] *See* Oral Arg. Tr. at 43:3-7, *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354 (Mar. 25, 2014) (Justice Alito: "Well, is it your argument that providing the accommodation that's requested here would violate the Establishment Clause?" General Verrilli: "It's not our argument that it would violate the Establishment Clause.").

[7] *See, e.g.*, 134 S. Ct. at 2802 n.25 (Ginsburg, J., dissenting) (quoting *United States v. Lee*, which is not an Establishment Clause case, to say that "one person's right to free exercise must be kept in harmony with the rights of her fellow citizens, and 'some religious practices [must] yield to the common good.'") (quoting *United States v. Lee*, 455 U.S. 252, 259 (1982)).

compelling interest test has been shown to be fully constitutional.

Imposing the Establishment Clause as an extraneous limit on exemptions under RFRA would upend thousands of religious-exemption statutes. *See Hobby Lobby*, 134 S. Ct. at 2781 n.37 ("By framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds . . . ."). Not even statutes that allow individuals and entities absolute protection from being forced to provide or pay for abortions would be exempt from its sweep.

There is at least one reason why some scholars may prefer a new constitutional test that considers "substantial" third-party harms outside of the RFRA analysis: "Seamless" coverage of abortifacients and contraceptives is not a compelling government interest that can justify denying an exemption to the Little Sisters of the Poor and other religious nonprofits. This new test would change the "baseline" of rights and make RFRA the problem. But, this Court's jurisprudence requires understanding RFRA as preserving the rights of religious claimants and third parties as they were *before* the Affordable Care Act burdened religion. Congress' and the Department of Health and Human Services' ("HHS") own practice reveals the wisdom of the Court's jurisprudence over the new "baseline" offered by some scholars.

"RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both

equally . . . ." *Id.* at 2786 (Kennedy, J., concurring). The Affordable Care Act exempted tens-of-millions of Americans from "seamless" coverage of abortifacients and contraceptives when it excluded "grandfathered" plans and small businesses from its reach. HHS then exempted many more Americans when it excluded churches and their integrated auxiliaries from the coverage mandate. By the Affordable Care Act's own terms and HHS' own determination, "seamless" coverage of abortifacients and contraceptives is to be unavailable to many Americans. The government's underinclusiveness belies the claim that "seamless" coverage is now a compelling interest because the Little Sisters of the Poor seek the same exemption already given to churches and their integrated auxiliaries.

Moreover, the abortion context reveals that an interest in "seamless" access—even "seamless" access to a right deemed by this Court to be protected by the Constitution—is not sufficient to justify a substantial religious burden. More broadly, if there is a compelling interest in ensuring "seamless" health-insurance coverage of important services, it is hardly unique to women seeking coverage of abortifacients and contraceptives. But the government is not pursuing that interest elsewhere. There can thus be no entitlement to "seamless" access.

Congress could have exempted the Affordable Care Act from the application of RFRA. It did not. Instead, RFRA is incorporated within it, meaning that no benefit the Affordable Care Act provides can be contemplated as standing without RFRA and its "stringent test." *See Hobby Lobby*, 134 S. Ct. at

2785 (Kennedy, J., concurring) (internal quotation marks and citation omitted). "One may not *like* the compelling interest test, but there it is in black and white." Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 251 (1995) (emphasis in original). "Seamless" coverage cannot satisfy that test, and there is no Establishment Clause bypass around it. RFRA's framework structures the difficult harmony of interests that is critical to the dignity of the people involved and our national identity. It cannot and should not be circumvented.

ARGUMENT

I. RFRA HARMONIZES RELIGIOUS FREEDOM AND THIRD-PARTY INTERESTS.

"[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation . . . ." *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990). When Congress enacted RFRA in light of the Court's decision in *Smith*, it manifested "solicitousness" towards the social value of religious exercise and respected the role of the political process in harmonizing religious exemptions with other social values. *See, e.g.*, Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 44-45 (2014); William K. Kelley, *The Primacy of Political Actors in Accommodation of Religion*, 22 U. HAW. L. REV. 403 (2000). RFRA followed from this nation's long tradition of preserving free exercise through politically-enacted exemptions. Indeed, while some

framers debated whether they were constitutionally compelled, "there is virtually no evidence that anyone thought [regulatory exemptions] were constitutionally *prohibited* or that they were part of an establishment of religion." Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1796 (2006) (emphasis in original). The harmony RFRA achieved between the right of free exercise and other compelling interests is apparent throughout its structure.

RFRA is at once both sweeping and reserved. It supersedes all prior, inconsistent federal law,[8] presumptively applies to all future federal law,[9] and applies to federal law's implementation.[10] But, if Congress does not want RFRA to apply to a given statute (perhaps out of a concern for third parties), it can simply exempt the statute from RFRA.[11] RFRA generally prohibits the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," but the government may still do so when its law, "appli[ed] . . . 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."[12] RFRA

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[8] Pub. L. No. 103-141, § 6(a), 107 Stat. at 1489; 42 U.S.C. § 2000bb-3(a) (Supp. V. 1993).

[9] Pub. L. No. 103-141, § 6(b), 107 Stat. at 1489; 42 U.S.C. § 2000bb-3(b) (Supp. V. 1993).

[10] Pub. L. No. 103-141, § 6(a), 107 Stat. at 1489; 42 U.S.C. § 2000bb-3(a) (Supp. V. 1993).

[11] *See supra note* 9.

[12] Pub. L. No. 103-141, § 3(a) & (b), 107 Stat. at 1488-89; 42 U.S.C. § 2000bb(b), § 2000bb-1(a) & (b) (Supp. V. 1993). Even as RFRA employs "strict scrutiny"—the most demanding

calls for a harmonizing of other interests with religious exercise, and the exemptions it requires do not violate the Establishment Clause. *See O Centro*, 546 U.S. at 436; Michael W. McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 GEO. WASH. L. REV. 685, 698 (1992).

Indeed, even the scholars urging a ban on religious exemptions that accompany "substantial" third-party harms concede that "RFRA seems *facially* to comply with the Establishment Clause . . . ."[13] These scholars contend that RFRA's "permissive accommodations" which "impose significant burdens on third parties who do not believe or participate in the accommodated practice" violate the Establishment Clause.[14] But this view presumes that RFRA's consideration of third-party harms is inadequate and that resort to the Establishment Clause is required. The Court has rejected these premises.

Hobby Lobby confirmed that RFRA calls for considering third-party harms within its analysis of

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standard in constitutional law—when evaluating the government's interest in burdening free exercise, the government prevails more often than not in religious-exemption cases. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 861-62 (2006) (concluding that, with 74% of religious exemption claims being rejected in the sample, "there is a major difference between strict scrutiny's deadliness as applied in exemption cases compared to discrimination cases.").

[13] Gedicks & Van Tassell, *supra* note 3, at 348 (emphasis in original).

[14] Gedicks & Van Tassell, *supra* note 3, at 349.

a compelling government interest being pursued through the least-restrictive means. *See* 134 S. Ct. at 2781 n.37; *see also Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015) (explaining that the Court will "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants" when assessing a compelling interest) (internal quotation marks and citation omitted). This makes sense: "Indeed, one might simply say that compelling state interests *just exactly are* third party interests of adequate gravity. Whose interests is the government protecting in resisting a religious accommodation if not those of third parties?"[15] RFRA's own framework thus starts with—and depends upon—considering third-party interests. For that reason, the Court has not found it necessary to resort to the Establishment Clause when considering RFRA claims.

In *Cutter*, the Court confirmed that RFRA's framework responds appropriately to Establishment

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[15] Marc O. DeGirolami, *Free Exercise By Moonlight* 24 (St. John's Univ. Sch. of Law, Legal Studies Research Paper Series, 15-2587216, 2015), http://ssrn.com/abstract=2587216 (emphasis in original). Considering third-party harms as a facet of a compelling-government-interest analysis is commonplace in constitutional law. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (explaining that the "fundamental object" of banning race discrimination in public accommodations "was to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.") (internal quotation marks and citation omitted); *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 625 (1984) (explaining that the compelling government interest in "eradicating discrimination against its female citizens" exists because sex discrimination "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.").

Clause concerns over religious exemptions. The Court explained that the Religious Land Use Institutionalized Persons Act ("RLUIPA," which possesses the same statutory framework of RFRA) raises no Establishment Clause issue. The Court identified three Establishment Clause problems that religious exemptions could cause: (1) an unyielding preference for religion; (2) denominational favoritism; and (3) inadequate consideration of third-party harms. *See* 544 U.S. at 719-20. These concerns do not mean, as the Court reaffirmed, that there is no "space for legislative action [that is] neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause." *Id.* at 719. Rather, the statute's application must account for the Establishment Clause's requirements. RFRA does just that.

First, RFRA avoids creating an unyielding religious preference by relieving "exceptional government-created burdens on private religious exercise." *Id.* at 720. RFRA assesses the "substantial[ity]" of those burdens and the sincerity of religious belief case-by-case. *See United States v. Ballard*, 322 U.S. 78, 86-88 (1944). Second, RFRA avoids denominational favoritism by applying to all laws that substantially burden *any* religion's exercise. *See Cutter*, 544 U.S. at 720; *cf. Bd. of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (invalidating a New York school district created for a religious denomination). Third, RFRA "take[s] adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *See* 544 U.S. at 720. Rather than provide an "absolute and unqualified [statutory] right" to free exercise, *see id.* at 722, RFRA's framework requires

courts to decide exemption claims case-by-case, considering whether substantial burdens on religious exercise may persist in light of a compelling government interest pursued in the least-restrictive way. *See Hobby Lobby*, 134 S. Ct. at 2781 n.37; *cf. Cutter*, 544 U.S. at 722-23 ("We have no cause to believe that RLUIPA would not be applied in an appropriately balanced way . . . .").

RFRA's framework stands in stark contrast to the religious preferences that the Court has found to violate the Establishment Clause. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985) (holding that a statute allowing Sabbath observers to not work on any day they designate as their Sabbath provides "*unyielding weighting in favor of Sabbath observers over all other interests*") (emphasis added); *cf. Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 337 n.15 (1987) ("This is a very different case than [*Caldor*] . . . . In effect, Connecticut [in *Caldor*] had given the force of law to the employee's designation of a Sabbath day and required accommodation by the employer regardless of the burden which that constituted for the employer or other employees."). Similarly, in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989) (plurality opinion), the Court invalidated a law exempting religious literature from the state's sales tax. Though the justices could not agree on the basis for the law's unconstitutionality, RFRA has none of the problems identified by members of the Court: a violation of the freedom of the press, *see id.* at 26 (White, J.); lending the government's support to "the communication of religious messages," *see id.* at 28 (Blackmun, J.); or failing to lift a substantial burden on religion or incorporate compelling government

interests into the analysis, *see id.* at 18 n.8 (Brennan, J.).

Put simply, a proper application of RFRA cannot violate the Establishment Clause. Failing to consider the government's compelling interests—including avoiding certain third-party harms—would violate RFRA, regardless of the Establishment Clause. The harmony RFRA crafted between "the exercise of religion" and "other important values in life" deserves affirmation by the Court. *See* McConnell, *Accommodation of Religion*, 60 GEO. WASH. L. REV. at 704. An alternative view—one that places "substantial" third-party harms above and beyond RFRA's framework—"could turn all regulations into entitlements to which nobody could object on religious grounds . . . ." *Hobby Lobby*, 134 S. Ct. at 2781 n.37. This view "could not reasonably be maintained" in the face of the Court's jurisprudence or this country's legislative practice. *See id.*

II. THERE IS NO BASIS TO CONCLUDE THAT THE POSSIBILITY OF "SUBSTANTIAL" THIRD-PARTY HARMS PRECLUDES RELIGIOUS EXEMPTIONS.

The Court has not allowed the possibility of substantial third-party harms to trump religious exemptions. Indeed, the Court has so held with unanimity.

Hosanna-Tabor held that the First Amendment's "ministerial exception" to federal anti-discrimination statutes barred a retaliation claim from an ordained teacher at a Lutheran school.

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694, 710 (2012). The case rested on both the Establishment Clause and the Free Exercise Clause, *see, e.g.*, *id.* at 699, but neither Clause was understood to thwart the right to church autonomy because of a possible harm to third parties.[16]

There is no doubt that a third-party harm was at stake in *Hosanna-Tabor*: The only reason why the employee in the case could not sue her employer for violating the Americans With Disabilities Act's retaliation prohibition was that the employer was a religious organization. The means of protecting the third-party interest in that case without recognizing the ministerial exception—evaluating the application of employment-discrimination laws against religious organizations case-by-case—would result in illegal government interference with a church's governance. *See id.* at 706.

"The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious

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[16] It is logical for the two religion clauses to work in tandem here. As the Court has recognized, there are contexts in which the Free Exercise Clause *compels* religious exemptions—even when doing so harms third parties. *See Hobbie*, 480 U.S. at 144-45 ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."). Arguing that the Establishment Clause bars religious exemptions simply because they harm third parties would, as Professor Michael McConnell has explained, "[p]aradoxically" eviscerate the Free Exercise Clause. *See* McConnell, *Accommodation of Religion*, 60 GEO. WASH. L. REV. at 691.

groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."[17] *Id.* at 710. Giving heed to both religious freedom and third-party harms in constitutional cases like *Hosanna-Tabor* is consistent with both RFRA's statutory framework and the Court's practice under other statutes.[18]

The Court has upheld statutory religious exemptions even when the third-party interest emanates from a statute, as is the case here. In *Amos*, the Court rejected an as-applied Establishment Clause challenge to Title VII's exemption of religious employers from its prohibition on religious discrimination. *See* 483 U.S. at 329-30. This exemption allowed a religious employer to terminate a building custodian based on his religion—a clear third-party harm that the Court found insufficient to block the statutory exemption.[19] The Court upheld the exemption because its purpose was to "lift[] a regulation [Title VII] that burdens the

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[17] Even *Hosanna-Tabor*'s caveat—"express[ing] no view on whether the [ministerial] exception bars other types of suits"—undermines the view that religious exemptions must fail when they raise substantial third-party harms. *See id.* By reserving judgment on "the applicability of the exception to other circumstances," *id.*, the Court embraced the same kind of case-by-case analysis of religious burdens and third-party harms that RFRA embodies.

[18] Additionally, the principle that substantial third-party harms will not thwart the exercise of constitutionally-guaranteed rights is no stranger to other First Amendment guarantees. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

[19] Title VII was amended in 1972 so as to extend this religious "exemption to all activities of religious organizations," allowing it to reach even a religious organization's building custodians. *See id.* at 332 n.9.

exercise of religion." *Id.* at 338. As *Amos* explained, this purpose is distinct from an impermissible advancement of religion. Unlike statutes that "delegate[] governmental power to religious employers and convey[] a message of governmental endorsement of religious discrimination," *id.* at 337 n.15, this exemption simply "lifted" a governmental burden on religion—returning the rights of the religious employer and the employee to the pre-burden "baseline." RFRA provides the same "baseline" here.

Just as in *Amos*, RFRA does not call for religious exemptions that impermissibly advance religion. As explained above, RFRA's construction and framework eschew outcomes prohibited by the Establishment Clause. Instead, as *Amos* teaches, the HHS mandate cannot be considered without the Affordable Care Act's incorporation of RFRA—just as Title VII's religious discrimination ban could not be considered without its exemption for religious employers. By its own terms, RFRA applies to any subsequent federal statute unless the statute expressly says otherwise,[20] and RFRA applies to that statute's implementation as well.[21] Because Congress did not specifically exempt the Affordable Care Act from RFRA, RFRA is part of that Act and its implementation. This construction is meant to ensure that the "baseline" contemplates religious exemptions.

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[20] Pub. L. No. 103-141, § 6(b), 107 Stat. at 1489; 42 U.S.C. § 2000bb-3(b) (Supp. V. 1993).

[21] Pub. L. No. 103-141, § 6(a), 107 Stat. at 1489; 42 U.S.C. § 2000bb-3(a) (Supp. V. 1993).

Like in *Amos*, the HHS mandate disrupts the status quo by forcing religious nonprofits to provide a benefit which imposes a religious burden—one recognized by HHS when raised by churches and their integrated auxiliaries and by the Court in the context of for-profit corporations. To determine whether the exemption added to Title VII to "lift" this religious burden violated the Establishment Clause as an impermissible advancement of religion, *Amos* assessed whether "the Church's ability to propagate its religious doctrine . . . is any greater now than it was prior to the passage of the Civil Rights Act of 1964." *See* 483 U.S. at 337. It was not—the statutory exemption simply returned the religious organization's (and the individual's rights) to a proverbial neutral: no new burden on religion or new benefit to employee. RFRA has the same effect: A religious exemption in its name simply "lifts" the burden imposed on religious employers by the Affordable Care Act, returning both the religious employer and its employees to neutral. That "baseline" does not generate a "substantial" third-party harm that the government has a compelling interest in preventing.

Amos teaches that the distinction between a religious *exemption* that lifts a government-imposed burden on religion and a statutory religious *preference* is critical to understanding the proper "baseline." The statute at issue in *Amos*, like RFRA here, are "shield[s] from . . . general regulatory burden[s] imposed by the state, [not] . . . sword[s] forcing others in the private sector to facilitate [the claimant's] religious practices . . . ." *See* Carl H. Esbeck, *Third-Party Harms, Congressional Statutes Accommodating Religion, and the Establishment*

Clause 8 (Univ. of Mo. Sch. of Law, Legal Studies Research Paper Series, No. 2015-10, 2015), http://ssrn.com/abstract=2607277. This distinction puts the case here (like *Amos*) in contrast with instances where the Court has found statutes benefiting religious claimants unconstitutional. *See, e.g.*, *Amos*, 483 U.S. at 337 n.15 (distinguishing *Caldor* on the grounds that "[u]ndoubtedly, [the third party's] freedom of choice in religious matters was impinged upon, but it was the Church . . . and not the Government who put him to the choice of changing his religious practices or losing his job. . . ."); *see also* Esbeck, *Third-Party Harms*, at 8 ("Unlike *Caldor*'s naked preference [for religion] where the statute had government intervening in a private-sector dispute on the side of religion, in *Amos* Congress did not vest religious employers with new powers but left them with the same net powers as it had before the passage of Title VII.").

The distinction between a religious exemption and a statutory religious preference also corrects the scholars' understanding of the Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) ("*TWA*"). The scholars suggest that this case allows religious exemptions to fail in the face of a *de minimis* third-party harm. But, this conclusion ignores that *TWA* was a religious-preference case.

The statutory provision at issue in *TWA* was Title VII's requirement that employers accommodate their employees' (and prospective employees') religious needs. *See* 42 U.S.C. § 2000e(j). Unlike the statute in *Caldor*, which afforded an "unyielding" religious preference, this statute allowed the employer to refuse religious accommodations that

imposed an "undue hardship" on it. In defining "undue hardship" to be only a "*de minimis* cost," *see* 432 U.S. at 84, the Court does not mean that such costs defeat religious exemptions. Unlike *Amos* or this case, *TWA* did not present a general governmental burden on religious exercise that a religious claimant could seek statutory relief from. By defining "undue hardship" to be nothing more than a *de minimis* cost, the Court avoided an Establishment Clause problem akin to the "unyielding" preference in *Caldor*. *Cf.* 432 U.S. at 89 (Marshall, J. dissenting) ("The Court's interpretation of the statute, by effectively nullifying it, has the singular advantage of making consideration of [TWA's] constitutional challenge unnecessary."). But Establishment Clause concerns about "unyielding" statutory *preferences* for religion are irrelevant to the "baseline" provided by religious *exemptions* from governmental burdens.

The scholars advocating for a ban on RFRA exemptions from the Affordable Care Act fail to appreciate RFRA's rule of construction and *Amos*. These scholars assert that "[a]ny argument about impermissible cost shifting [between the religious claimant's interest and the third-party's alleged harm] must identify the proper status quo ante as the baseline measure of whether and to what extent costs have been shifted."[22] To them, this entails that the "baseline" between the religious objector and the third party should be set before RFRA was passed in 1993[23] or that it should assume the universal availability of health-insurance coverage for

[22] Gedicks & Van Tassell, *supra* note 3, at 371.
[23] Gedicks & Van Tassell, *supra* note 3, at 371.

contraceptives and abortifacients.[24] The net effect is to make RFRA exemptions a disruption to the status quo, resulting in an impermissible cost-shifting to third parties that implicates the Establishment Clause. This argument—in addition to being contrary to *Amos*—proves too much: It would undermine this nation's long and rich history of statutory exemptions for religion.

Indeed, in the context of "lifting a regulation" that burdens free exercise, *see Amos*, 483 U.S. at 337-38, the Court has upheld statutory religious exemptions that *facially* involve third-party harm. These exemptions simply restore the "baseline" of rights to their pre-religious-burden state—they do not advance religion. The fact that this has the net effect of removing a burden on religion while denying a potential benefit to a third party is immaterial. As the Court said in *Amos*, "[w]here . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities." 483 U.S. at 337-38; *see also Hobby Lobby*, 134 S. Ct. at 2781 n.37 ("Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals.").

170,000 Vietnam War draftees received conscientious-objector deferments, *see* James W.

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[24] *See* Micah Schwartzman, Richard Schragger & Nelson Tebbe, *Hobby Lobby and the Establishment Clause, Part II: What Counts As A Burden on Employees?*, BALKINIZATION, (Dec. 4, 2013), http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause.html.

Tollefson, THE STRENGTH NOT TO FIGHT: AN ORAL HISTORY OF CONSCIENTIOUS OBJECTORS OF THE VIETNAM WAR 7 (1993), even as the selective service exemption for these objectors was facially limited to those with a belief in a "Supreme Being" and the granting of an objection sent a third party to war in the objector's place. *See Gillette v. United States*, 401 U.S. 437 (1971) (upholding the Military Selective Service Act); *see also Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965). Generous wartime religious exemptions date back to the Revolutionary War and the Quakers and occurred even in the course of world wars. *See, e.g.*, *The Selective Draft Law Cases*, 245 U.S. 366 (1918) (finding no Establishment Clause violation in military draft exemptions for clergy members, seminarians, and pacifists).

Further, "[a]ll fifty states have enacted statutes granting some form of testimonial privilege to clergy-communicant communications. Neither scholars nor courts question the legitimacy of the privilege, and attorneys rarely litigate the issue," even as the privilege—rooted in religious exercise—imposes an obstacle to a third-party's search for truth. *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1532 (9th Cir. 1997) (internal quotation marks and citation omitted).

Moreover, "the abortion context offers the most systematic and all-encompassing example of government efforts to ensure that unwilling individuals"—often individuals with religious objections to abortion—"are not forced to engage in what they believe to be killings." Mark L. Rienzi, *The Constitutional Right Not To Kill*, 62 EMORY L.J.

121, 147 (2012). This particular context is quite analogous to the RFRA exemption sought by the Little Sisters of the Poor and other religious nonprofits here, as these exemptions can result in the lack of "seamless" access to government-funded abortion. Nevertheless, "[c]oncern about discrimination against individuals who, for religious or other moral reasons, objected to participating in providing abortion services led to the widespread adoption of conscience clause statutes." Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 180-81 (1993); *see also* Rienzi, *The Constitutional Right Not To Kill*, 62 EMORY L.J. at 148-49 (citing illustrative "conscience clause" provisions and concluding that "virtually every state in the country has some sort of statute protecting individuals and, in many cases, entities who refuse to provide abortions").

The story is the same at the federal level. The "Church Amendment," which ensured that recipients of particular federal funds were not obliged to provide abortions and could not discriminate against employees who would not participate in abortions, *see* 42 U.S.C. § 300a-7(c)(1) (2006), passed overwhelmingly and became law in 1973. In advocating for the Amendment, Senator Ted Kennedy explained that "Congress has the authority under the Constitution to exempt individuals *from any requirement* that they perform medical procedures that are objectionable to their religious convictions." 119 CONG. REC. 9602 (1973) (emphasis

added). The same sentiment followed for future federal conscience protections.[25]

The lack of "seamless" access to abortion generated by these exemptions does not constitute a third-party harm under the Court's cases, even as a compelling interest in protecting the right to abortion exists in the Court's cases. Indeed, in the passage of RFRA, some of its advocates made clear that RFRA would draw this exact distinction. *See, e.g.*, The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary, 102d Cong. 192 (1992) (statement of Nadine Strossen) (explaining that "[i]n the aftermath of the *Smith* decision, it was easy to imagine how religious practices and institutions would have to abandon their beliefs in order to comply with generally applicable, neutral laws. . . . At risk were such familiar practices as . . . permitting religiously sponsored hospitals to decline to provide abortion or contraception services . . . ."); 139 CONG. REC. 9685 (1993) (statement of Rep. Hoyer) (explaining that RFRA is "an opportunity to correct . . . injustice[s]" like a "Catholic teaching hospital [that] lost its accreditation for refusing to provide abortion services"). To argue otherwise is to invite the Court to question all of these statutory exemptions with a

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[25] These protections include the Danforth Amendment, extending the refusal to participate in abortion or abortion-related services beyond religious objections, *see* 42 U.S.C. § 238n, and the Hyde-Weldon Amendment, removing federal funding from institutions that discriminate against healthcare providers for not participating in abortions, *see* Consolidated Appropriations Act of 2005, Pub. L. No. 108–447, § 508, 118 Stat. 2809, 3163 (2004); *see also* Consolidated Appropriations Act of 2008, Pub. L. No. 110–161, § 508(d)(1), 121 Stat. 1844, 2209.

new constitutional doctrine grounded in speculation about what constitutes a "substantial" burden on third parties. But such judicial speculation is exactly what the Court has sought to avoid. *See Smith*, 494 U.S. at 890 (rejecting an approach "in which judges weigh the social importance of all laws against the centrality of all religious beliefs").

III. THE THIRD-PARTY HARM OF INSURANCE COVERAGE THAT IS NOT "SEAMLESS" FAILS AS A COMPELLING INTEREST.

The scholars calling for a ban on religious exemptions that accompany "substantial" third-party harms reason that "seamless coverage [of abortifacients and contraceptives in insurance] is essential to the validity of an accommodation under RFRA in this context." *See, e.g.*, Law Professor submission, Comment on the coverage of certain preventative services under the Affordable Care Act, (Oct. 21, 2014), at 4 (on file with author).[26] In other words, no religious exemption may issue under RFRA if it results in "delays or excess costs for beneficiaries entitled to contraceptive coverage without cost sharing." *Id.* at 5. But under RFRA, "seamless" coverage fails as a compelling interest.

By incorporating the assessment of third-party harms into RFRA's compelling-interest prong, *see*

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[26] *See* also Gedicks & Van Tassel, *supra* note 3 at 374-79; Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Establishment Clause and the Contraception Mandate*, BALKINIZATION (Nov. 27, 2013), http://balkin.blogspot.com/2013/11/the-establishment-clause-and.html.

Hobby Lobby, 134 S. Ct. at 2781 n. 37, the statute puts on the government the burden of showing that these harms meet the compelling-interest test. That test "is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being burdened." *Holt*, 135 S. Ct. at 863. As such, the Court will "'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants,' and 'look to the marginal interest in enforcing' the challenged government action in that particular context." *Id.* (quoting *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *O Centro*, 546 U.S. at 431)).

RFRA's demanding standard follows from the fact that it "did more than merely restore the balancing test used in the *Sherbert* [*v. Verner*, 374 U.S. 398 (1963)] line of cases; it provided even broader protection for religious liberty than was available under those decisions." *Hobby Lobby*, 134 S. Ct. at 2761 n.3. As Professor Michael Stokes Paulsen observed, "the test is an extremely rigorous one, referring to an extremely narrow range of permissible justifications for infringements on religious liberty. Not every legitimate, or even very important, interest of government qualifies." Paulsen, *A RFRA Runs Through It*, 56 MONT. L. REV. at 263; *cf. id.* ("Only interests 'of the highest order' and 'not otherwise served' qualify, in the words of *Yoder*. *Sherbert*'s words are even more strict: Only 'the gravest abuses, endangering *paramount* interests, give occasion for permissible limitation' of religious exercise.'") (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972), *Sherbert*, 374 U.S. at 42 (emphasis added) (original quotation marks and citations omitted)).

Even if the government possesses a compelling interest in providing contraceptive and abortifacient insurance coverage without cost-sharing, it has failed to meet its burden to show such an interest in "seamless" coverage. Satisfying its burden requires the government to "specifically identify an actual problem in need of solving" and to show that burdening religious exercise "must be actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (internal citations and quotations omitted). But the government cannot meet this burden.

There is a clear distinction between a right to engage in certain activity and a compelling interest in making cost-free access to that activity "seamless." Just as there are limitations that the Constitution places on the harm to third parties in religious exemptions, there are limits that the Constitution places on abortion restrictions. *See Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992) (holding that a statute is unconstitutional when it places an "undue burden" on a woman, occurring when it has the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"). Lacking "seamless" access to abortion, however, is not such a burden.

By granting the RFRA exemption sought in this case, women working for the Little Sisters of the Poor would be left with "the same range of [insurance] choice[s] . . . as [they] would have had if Congress had chosen to subsidize no health care costs at all," which the Court found acceptable in upholding the Hyde Amendment. *See Harris v.*

McRae, 448 U.S. 297, 315-17 (1980). This holding is consistent with the effect of RFRA's statutory incorporation into the Affordable Care Act. As discussed above, RFRA ensures that the "baseline" of rights for the religious claimant and the third party remains the same as it was before the new governmental burden. As explained in *McRae*, a woman's constitutional right to abortion does not result in "a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Id.* at 316. The government is under no obligation to "remove those [obstacles to a right] not of its own creation." *Id.* This distinction compliments the "baseline" distinction between religious preferences and religious exemptions drawn in *Amos* and supported by RFRA. *See Amos*, 483 U.S. at 337 n. 15 ("Undoubtedly, [the third party's] freedom of choice in religious matters was impinged upon, *but it was the Church . . . and not the Government* who put him to the choice of changing his religious practices or losing his job. . . .") (emphasis added).

To deny a religious exemption under RFRA, the third-party interest at stake must be an interest that "the law deems compelling." *Hobby Lobby*, 134 S. Ct. at 2786-87 (Kennedy, J., concurring). But, "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *See Brown*, 131 S. Ct. at 2741 n. 9. There is thus no compelling interest in "seamless" insurance coverage. As the analogy to *McRae* illustrates, the line between a third-party's right and a compelling government interest in "seamless" access to that right, which is not compelling, is critical.

Justice Kennedy pressed the government on this issue during oral argument in *Hobby Lobby*. When asked if for-profit corporations faced the risk of being "forced in principle to pay for abortions" because they could not receive a religious exemption, the government stated that that outcome would "depend on the entity" seeking an exemption. *See* Oral Arg. Tr. at 75:1-24, *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354 (Mar. 25, 2014). The government argued that while a for-profit corporation could be forced to pay for abortions, *see id.* at 75:19-24—a position the Court's decision in *Hobby Lobby* puts in serious doubt—churches and religious nonprofits would never be exposed to that risk, *see id.* at 75:12-14 ("It certainly wouldn't be true, I think, for religious nonprofits. It certainly wouldn't be true for a church."). But, in embracing a "third-party harms" trump to a RFRA exemption for religious nonprofits—while granting an exemption to churches and their integrated auxiliaries—the government has changed course. It is now forcing religious nonprofits to provide "seamless" access of abortifacients and contraceptive coverage while exempting churches from the same obligation.

The Affordable Care Act and implementing regulations offer exemptions that add additional steps to securing insurance coverage—and thus deny "seamless" coverage—of abortifacients and contraceptives to tens of millions of Americans. The law exempts any plan that was in existence before March 23, 2010 and did not make certain changes afterwards from complying with the abortifacient and contraceptive mandate. *See* 42 U.S.C. § 18011. Indeed, this particular exemption is meant "simply [to serve] the interest of employers in avoiding the

inconvenience of amending an existing plan." *Hobby Lobby*, 134 S. Ct. at 2780. The statute itself also exempts all employers with less than fifty employees (employing approximately 34 million Americans)—they are not required to provide insurance coverage at all. *See* 26 U.S.C. § 4980H(c)(2)(A); *Hobby Lobby*, 134 S. Ct. at 2764. Most relevant to the Little Sisters of the Poor and other religious nonprofits here, HHS exempted churches and their integrated auxiliaries from complying with the mandate altogether as well. *See* 78 Fed. Reg. at 39,870, 39,874 (July 2, 2013); 45 C.F.R. 147.131(a). In the case of these "religious employers," their exemption hinges on how much control a church exerts over the organization. *See* 26 C.F.R. 1.6033-2(h).

The government's failure to give the Little Sisters of the Poor and other religious nonprofits the same exemption given to churches and their integrated auxiliaries undermines a compelling government interest in "seamless" coverage. For a third-party harm in lacking "seamless" coverage to constitute a compelling interest, the government's own underinclusiveness must not do "appreciable damage to [the] supposedly vital interest prohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (quotation omitted). Here, the government's interest in "seamless" coverage is belied by the Affordable Care Act itself, which authorizes the same exemption sought here to tens of millions of Americans, including churches and their integrated auxiliaries. *See Hobby Lobby*, 134 S. Ct. at 2783 (explaining that women who work for exempted organizations may seek insurance coverage on the government's exchanges or buy it on their own, "requir[ing]

[women] to take steps to learn about, and to sign up for, a new government funded and administered health benefit."). The government takes the position that the Little Sisters of the Poor and other religious nonprofits already have a "choice" not to provide insurance coverage of abortifacients and contraceptives, and that should settle the matter. "But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." *Union P.R. Co. v. Public Service Comm'n.*, 248 U.S. 67, 70 (1918) (per Holmes, J.). The government's singling out of religious nonprofits for disparate treatment puts religious exercise at stake.

"RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally . . . ." *Id.* at 2786 (Kennedy, J., concurring). Nevertheless, HHS continues to discriminate among religious organizations based on its own definition of what organization is "religious enough" to receive an exemption. HHS provided an exemption from its contraceptive and abortifacient mandate to "houses of worship and their integrated auxiliaries"—but not to the Little Sisters of the Poor or other religious nonprofits—because employees of these organizations, according to HHS, "are more likely than other employers to employ people of the same faith," and, in its view, "less likely" to employ people who desire contraceptives and abortifacients. *See* 78 Fed. Reg. at 39,874. Tellingly, the scholars arguing against exempting religious nonprofits from the HHS abortifacient and contraceptive insurance mandate make an exception for churches and integrated

auxiliaries too. *See* Gedicks & Van Tassell, *RFRA Exemptions from the Contraception Mandate*, 49 HARV. C.R.-C.L. L. REV. at 380-81. "But a woman working for a church suffers the same unrealized-benefit 'loss' as does a woman working for" the Little Sisters of the Poor. *See* Esbeck, *Third-Party Harms*, at 13. Allowing the government to determine what entities are "religious enough" to garner religious exemptions undermines one of "the reasons the United States is so open, so tolerant, and so free[:] no person may be restricted or demeaned by government in exercising his or her religion." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). Denying religious nonprofits the same treatment as churches—on the grounds that the Little Sisters of the Poor and other religious nonprofits are not "religious enough" to be worthy of the same exemption as churches—demeans the Little Sisters of the Poor and religious nonprofits. *See id.* at 2785 ("[F]ree exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts."). There cannot be a compelling interest in demeaning free exercise.

CONCLUSION

Because the government's asserted interest in "seamless" coverage cannot satisfy the compelling-interest standard under RFRA, some scholars seek to circumvent this standard with a new constitutional doctrine focused on third-party harms. But RFRA does exactly what is required in this "difficult" area—"reconcile [the] two priorities" of protecting third-party interests and protecting religious exercise, *see id.* at 2787 (Kennedy, J., concurring). Letting one of these priorities automatically trump

the other when it is "substantial" has no basis and invites judicial mishandling of this delicate harmony. This mishandling could force believers to violate deeply-held beliefs on matters that the Court understands to be of grave significance. *Amici* respectfully ask the Court to reject this end-run around RFRA.

Respectfully submitted,

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