Nos. 13-354; 13-356

IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, *et al.*,
Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners,

v.

KATHLEEN SEBELIUS, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND TENTH CIRCUITS

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, *ET AL.*

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INTERESTS OF *AMICI CURIAE*

Amici are Constitutional Law scholars who have an interest in the development of coherent constitutional doctrine.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief argues that the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* (RFRA), properly applied, complies with the Establishment Clause. The brief responds to the recent proposal by several scholars that the Establishment Clause prohibits the government from accommodating "substantial burdens" on religious exercise, as RFRA does, when the accommodation imposes "significant burdens on third parties who do not believe or participate in the accommodated practice."[2] This brief does not address

1. All parties except Hobby Lobby have filed blanket consents to the filing of amicus briefs. Hobby Lobby has consented to the filing of this brief, and such consent is being filed herewith. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amici curiae* or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

2. Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. L. Rev. (forthcoming Spring 2014) (manuscript at 9), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328516; *see also* Nelson Tebbe, Richard Schragger, & Micah Schwartzman,

the issues directly before the Court, *i.e.*, whether RFRA protects for-profit corporations like Hobby Lobby and Conestoga Woods, and whether either of those parties has a valid RFRA claim.[3]

The scholars' proposed doctrine is contradicted by precedent, would needlessly require courts to analyze three speculative Religion Clause questions in most religious accommodation cases, and would threaten thousands of statutes that protect religious minorities.

First, precedent strongly supports the constitutionality of statutory religious accommodations, like RFRA, that allow courts to weigh the government's "compelling" interests against claimant's interests in religious exercise. In *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (Ginsburg, J.), the Court unanimously upheld the Religious Land Use and Institutionalized Persons Act against a facial Establishment Clause challenge. Guaranteeing "room for play in the joints between the Free Exercise and Establishment Clauses," *Cutter*, 544 U.S. at 713 (internal quotations omitted), the Court held that a statutory religious accommodation, like RLUIPA or RFRA, that (1) prohibits "substantial burden[s]" on religious exercise, (2) is denominationally neutral, and (3) allows courts to take into account the government's "compelling interest[s]" is

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The Establishment Clause and the Contraception Mandate, Balkinization (Dec. 4, 2013, 6:04 PM), http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause.html ("At root the constitutional conviction is that it is unfair and unconstitutional for the government to impose any substantial costs of a religious exemption on a focused and identifiable class of third parties.").

3. *Amici* do not share a view on the answers to these legal questions.

constitutional. *See id.* at 720. An application of RFRA's balancing test that does not take sufficient account of the government's interests, including its interests in protecting third parties, would therefore fail under RFRA, not the Establishment Clause.

While the Court has *never* invalidated a statutory religious accommodation that, like RFRA, enlists courts to evaluate the government's interest in "substantial[ly] burden[ing]" religious liberty, *Cutter* nevertheless resolved a tension between prior cases about Congress's authority to promote Free Exercise principles without running afoul of the Establishment Clause. *See id.* at 713-714. The Court should decline the scholars' invitation to return to that doctrinal uncertainty.

Second, the scholars' proposed doctrine requires courts to decide three vague Establishment *and* Free Exercise Clause questions. Under the proposed doctrine, a court facing a statutory religious accommodation will often face a difficult baseline question: does the statute provide a right to a third party that would be burdened by a religious accommodation, or is the statute preempted by a religious exercise interest, rendering null the third party's purported statutory right? In cases like this one, the answer is clear. Under RFRA's "rule of construction," by remaining silent about RFRA's applicability, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (ACA),[4] effectively incorporates RFRA's balancing test into its own provisions. *See* 42 U.S.C. § 2000bb-3(b). If ACA, therefore, by incorporating RFRA, accommodates the plaintiffs' religious exercise, plaintiffs'

4. Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

employees simply have no right to plaintiff-provided coverage under the ACA regulations, and employees would not be burdened by plaintiffs' religious exercise. Not every case will be so clear.

Furthermore, in every statutory religious accommodation case, a court would have to determine whether the accommodation would create a "burden" on third parties that is "significant" enough to raise an Establishment Clause question. The court would have to engage in speculative fact-finding about the effect of laws on third parties who, like in this case, may not be before the court. The court would then have to engage in common law rule-making to decide whether the accommodation created a burden "significant" enough to violate the Establishment Clause.

Because the Free Exercise Clause *requires* some religious accommodations, the court would also have to determine whether the Free Exercise Clause requires the accommodation at issue before it could conclude that the Establishment Clause prohibits it. *See Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-145 (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."). Under RFRA, this awkward Religion Clause three-step is unnecessary and entirely avoidable. RFRA already ensures that courts take account of the government's interest in protecting third parties.

Third, with over 2,000 statutory religious accommodations, the federal and state governments have a long and admirable tradition of protecting minority

religious belief and practice, particularly on moral questions about the beginning and end of life. The scholars' proposed doctrine would cast doubt on a well-established legislative patchwork of religious liberty.

ARGUMENT

I. Precedent Strongly Supports RFRA's Constitutionality

A. Under Cutter v. Wilkinson, Religious Accommodations That Take Account of "Compelling" Governmental Interests Comply With the Establishment Clause

The Establishment and Free Exercise Clauses cooperate to promote religious liberty by keeping religion from interfering with government, and the government from interfering with religion. Moreover, there is "play in the joints" between the Clauses so that legislatures may further protect minority religious liberty without effectively creating an establishment of religion. *Cutter*, 544 U.S. at 713 (quotations omitted); *see also Hobbie*, 480 U.S. at 144-145 (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."). Americans have inherited a "'happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.'" *Gillette v. United States*, 401 U.S. 437, 453 (1971) (quoting *United States v. MacIntosh*, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting)). Unsurprisingly, this Court has maintained that "it is hardly impermissible for Congress to attempt to accommodate free exercise values." *Gillette*, 401 U.S. at 453.

A nearly unanimous Congress passed RFRA to promote robust free exercise values without running afoul of the Establishment Clause. *See* 42 U.S.C. § 2000bb (purpose), 2000bb-4 ("Establishment clause unaffected"). The Act prohibits the federal government from substantially burdening religious exercise, unless the government has used the least restrictive means to accomplish a compelling governmental interest. 42 U.S.C. § 2000bb-1. RFRA is, by its own terms, effectively incorporated into every act of Congress that does not expressly reject it. 42 U.S.C. § 2000bb-3(b).

Several scholars have recently proposed an Establishment Clause limit to RFRA's application in this case: accommodating plaintiffs' religious exercise would violate the Establishment Clause because it would, they allege, significantly burden third parties—plaintiffs' employees—who do not share plaintiffs' religious commitment.[5] The scholars misread this Court's Establishment Clause decisions.

Less than a decade ago, the Court considered an Establishment Clause argument much like the scholars' in a challenge to the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (RLUIPA). RLUIPA prohibits qualifying state and local institutions from imposing a "substantial burden on the religious exercise" of inmates without "a compelling governmental interest" and without using "the least restrictive means." 42 U.S.C. § 2000cc-1(a)(1)-(2).

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5. *See* Gedicks & Van Tassel, *RFRA Exemptions*, *supra* note 2 (manuscript at 9).

Ohio, however, asserted the scholars' rationale, arguing that RLUIPA violates the Establishment Clause because "providing benefits for some inmates necessarily imposes costs on others." *See* Resp. Br. 2.

The Court disagreed, *see Cutter*, 544 U.S. at 717, despite its ordinary deference to the institutional expertise of prison administrators regarding the government's interests in prison safety, *see Overton v. Bazetta*, 539 U.S. 126, 132 (2003).

The Court held, rather, that RLUIPA is a "permissible government accommodation of religious practices." *Id.* at 714. In doing so, the Court reaffirmed that there is constitutional "space for legislative action that is neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause." *Id.* at 719 (citing *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) ("[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation …"); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 329-330 (1987); *Sherbert v. Verner*, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting) ("The constitutional obligation of 'neutrality' is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation.")).

Without adopting a standard that all statutory religious accommodations must meet to be constitutional, the Court reasoned that RLUIPA has three attributes that ensured its constitutionality. *Cutter*, properly understood, applies to facial *and* as-applied challenges of statutes, like RFRA, that share those three attributes.

First, like RLUIPA, RFRA "alleviates exceptional government-created burdens on private religious exercise." *Cutter* at 720. Courts assess the "substantial[ity]" of those burdens and the sincerity of the religious exercise on a case-by-case basis. *See United States v. Ballard*, 322 U.S. 78, 86-88 (1944) (articulating the sincerity test). This potential constitutional concern, *see Texas Monthly v. Bullock*, 489 U.S. 1, 8 n.1, 15, (1989) (Brennan, J., writing for a plurality), is thus covered by the statutory test.

Second, RFRA is denominationally neutral. *See Cutter* at 720. RFRA applies to laws substantially burdening *any* religion. *Cf. Bd. of Ed. of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994) (invalidating a New York school district created for a religious denomination); *Larson v. Valente*, 456 U.S. 228 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").[6]

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6. Any suggestion that RFRA would be constitutional only if it applied equally to religious and non-religious objectors is a *non sequitur* in this case for two reasons. First, the Free Exercise Clause, which requires some religious accommodations, protects "the exercise" of "religion." U.S. Const. amend. I; *see Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) ("[Henry David] Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses."). Furthermore, the Court has consistently upheld statutes that accommodate religious but not analogous non-religious objections. *See Amos*, 482 U.S. at 338 ("We see no reason to require that the [religious organization] exemption [to Title VII] come packaged with benefits to secular entities."). Second, in this case there are no nonreligious objectors before the Court, but if there were, and if the Court were concerned about RFRA's protection of *religious* exercise, its best resort would be to extend RFRA's protection to nonreligious objectors whose conscientious objections are

Third, "properly applying RLUIPA [and RFRA], courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter* at 720. Unlike an "absolute and unqualified [statutory] right" to religious exercise, regardless of the cost to third parties, *see Cutter* at 722 (quoting and contrasting the statute in *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985)), RLUIPA and RFRA allow courts to decide religious accommodation claims on a case-by-case basis, with due consideration of the government's "compelling" interests in the factual and regulatory "context" of each case. *Cutter* at 722-23 ("We have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns."). Put simply, when a court "properly" applies the statutory balancing test, that application does not violate the Establishment Clause. An application of the test that does not take sufficient account of the government's interests, including its interests in protecting third parties, would fail under the statute—in this case, RFRA—not the Establishment Clause.

Likewise, RFRA incorporates a balancing test that allows courts to evaluate and protect the federal government's "compelling" interests, including its interest in requiring for-profit corporations to provide their employees with certain health benefits. *See* Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 Fordham L. Rev. 883, 886 (1994) ("The compelling interest test allows government to regulate

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like those of religious objectors, not to decline to apply RFRA to religious objectors. *See Welsh v. United States*, 398 U.S. 333, 351-61 (1970) (Harlan, J., concurring in result).

for sufficiently strong reasons, principally to prevent *tangible* harm to third persons . . ..") (emphasis added). Because RFRA effectively incorporates an Establishment Clause test, "properly applying [it]" would obviate any Establishment Clause concerns. *See Gonzales v. O Centro Espirito*, 546 U.S. 418 (2006) (noting, in the course of invalidating a federal drug law for its inconsistency with RFRA, that the Court "affirmed just last Term the feasibility of case-by-case consideration of religious exemptions to generally applicable rules"); Michael W. McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 698 (1992).

This argument answers the "constitutional conviction" of the scholars who believe it is "unfair" to accommodate religious exercise at the expense of third parties.[7] As the reasoning in *Cutter* makes clear, the balancing tests incorporated into statutes like RFRA already provide courts ample opportunity to ensure that any given religious accommodation will not overly burden a third party. *Id.* at 726.[8] Adding a constitutional analysis to every

7. Tebbe, *et al.*, *supra* note 2.

8. The Court noted that RLUIPA's standard ensures that where "requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. In that event, adjudication in as-applied challenges would be in order." Id. at 726. The only plausible reading of the Court's reference to "adjudication in as-applied challenges," given the whole opinion and the logic of RLUIPA's balancing test, is to adjudications that "properly apply[]" RLUIPA, not some extraneous Establishment Clause doctrine.

RFRA case would be useless, and the Court should avoid it. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Cutter represents a clear consensus on how to resolve a doctrinal tension that bedeviled the Court for decades. *See id.* at 719 ("While the two Clauses express complementary values, they often exert conflicting pressures."). The Free Exercise Clause requires some religious accommodations.[9] Under the Establishment Clause doctrine articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), however, virtually any religious accommodation could be characterized as having a "religious" "purpose," thereby putting it in tension with the Establishment Clause. *See, e.g.*, *Thomas v. Review Board*, 450 U.S. 707, 720-727 (1981) (Rehnquist, C.J., dissenting) (highlighting this tension and expressing his view that the Establishment Clause permits legislative religious exemptions); *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring) ("[T]he Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause"); *see* Michael W. McConnell et al., *Religion and the Constitution* 257-313 (3d ed. 2010) (exploring the doctrinal tension).

Cutter resolved this tension. For purposes of evaluating legislative religious accommodations like RLUIPA and RFRA, *see Cutter* at 717 n.6, the Court replaced *Lemon* with a clear principle: statutory religious accommodations steer well clear of the Establishment

9. *See, e.g., Hosanna-Tabor v. E.E.O.C.*, 132 S.Ct. 694 (2012); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Clause when they alleviate a substantial burden on religious exercise, are denominationally neutral, and protect the government's compelling interests. *Id.* at 720. The *Cutter* principle harmonized prior case law and reiterated the government's authority to promote religious liberty without endorsing religion, allowing for "play in the joints" between the Religion Clauses. *Walz v. Tax Comm'n*, 394 U.S. 664, 669 (1970); *see also id.*, at 673 ("The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself."); *Locke v. Davey*, 540 U.S. 712, 719 (2004) ("[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."). The Court should not resurrect a needless tension between the Religion Clauses.

B. The Court With Few Exceptions Has Consistently Upheld Religious Accommodations, Even When They Burden Third Parties

"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." *Hobbie*, 480 U.S. at 144-145; *see also Amos*, 483 U.S. at 334 ("There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'") (quoting *Walz*, 397 U.S. at 669). Indeed, the Court has never invalidated an application of a statute like RFRA that prohibits "substantial burden[s]" on religious exercise subject to the least restrictive means of advancing a compelling governmental interest.

In fact, the Court has already unanimously enforced RFRA, presuming its constitutionality. *O Centro Espirito*, 546 U.S. at 418 (invalidating a drug law that substantially burdened a group's religious exercise).

The Court has also upheld statutory religious accommodations for employers, even when the accommodation limits employees' statutory rights. In *Amos*, the Court rejected an as-applied Establishment Clause challenge to Section 702 of Title VII, 42 U.S.C. § 2000e-1(a) (2006), which exempts "the secular nonprofit activities of religious organizations" from Title VII's antidiscrimination rules. 483 U.S. at 329-30. Applying the *Lemon* test, which no longer controls in this context,[10] *Cutter*, 544 U.S. at 717 n.6, the Court held that the exemption's purpose and effect were not to advance religion. Instead, Section 702 merely "lift[ed] a regulation [Title VII] that burdens the exercise of religion." *Amos,* 483 U.S. at 338. Likewise, RFRA operates here to "lift" whatever burden the ACA may place on religious exercise.

In *Amos*, the Court carefully distinguished Section 702 from the Connecticut statute invalidated in *Calder*. *Amos*, 483 U.S. at 337 n.15. The Connecticut law forced employers, without exception, to allow their religious employees to observe their respective Sabbaths. *Id.* That law interfered with the status quo by lifting a burden imposed on religious exercise by private ordering—employment agreements—and placing it on employers,

10. Even under *Lemon*, promoting religious liberty, as RFRA does (and as the Religion Clauses do), is a secular purpose and effect. *See Wallace*, 472 U.S. at 83 (O'Connor, J., concurring) ("[T]he Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause").

without a case-by-case evaluation of religious burdens and costs to employers.

By contrast, the statute in *Amos* interfered with the status quo by forcing religious employers to provide benefits to which they have a religious objection. Section 702 merely "lift[ed] a regulation [Title VII] that burdens the exercise of religion." *Amos*, 483 U.S. at 338. While a minority of the Justices questioned whether Section 702 may apply to for-profit corporations consistent with the Establishment Clause without a case-by-case analysis,[11] none of them questioned the Court's fundamental baseline distinction between the government creating a statutory burden on nonreligious employers on the basis of their employees' religious exercise (which the Establishment Clause might prohibit) and the government relieving a burden on employers' religious exercise created by a statute (which the Establishment Clause permits).

In this case, like in *Amos*, the regulation at issue interferes with the status quo by requiring employers to provide certain health benefits to employees. Like in *Amos*, the employers here argue that a religious accommodation under RFRA merely "lift[s] [the ACA] regulation that burdens the exercise of religion." *Amos*, 483 U.S. at 338. Thus, as in *Amos*, *Caldor* is inapposite here. RFRA changes the baseline of legal entitlements.

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11. *See, e.g., Amos*, 483 U.S. at 344-346 (Brennan, concurring) (suggesting that Section 702 may apply to for-profit corporations only on a case-by-case basis); *id.* at 348-349 (O'Connor, J., concurring) (noting that the Court was not addressing the application of Section 702 to for-profit corporations).

The Court has likewise upheld statutory religious accommodations that imposed significant burdens on third parties. During the Vietnam era, the Court repeatedly upheld the selective service exemption for conscientious objectors, even though the exemption was facially limited to those whose objections were based on a belief in a "Supreme Being," and when an exemption for one otherwise eligible draftee necessarily sent another one to war. *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 (1969); *cf.* James W. Tollefson, *The Strength Not to Fight* 7 (1993) (noting that 170,000 Vietnam draftees received conscientious objector deferments).

Further, courts routinely exclude from evidence at trial the substance of communications between a member of the clergy and a parishioner, though the exclusion of that evidence burdens the opposing party's right to the admission of all potentially favorable evidence, and burdens the court's quest for truth. *See Mockaitis v. Harcleroad*, 104 F.3d 1522, 1532 (9th Cir. 1997) ("All 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.") (quotation omitted); *see also Trammel v. United States*, 445 U.S. 40, 51 (1980) (noting that the priest-penitent privilege, like the privilege between attorney and client, is "rooted in the imperative need for confidence and trust"); *Totten v. United States*, 92 U.S. 105, 107 (1875) (stating that "[s]uits cannot be maintained which would require a disclosure of the confidences of the confessional"); *see generally People v. Philips*, (N.Y. Ct. Gen. Sess. June 14,

1813), *reprinted in* McConnell, et al., *Religion and the Constitution*, *supra*, at 139 (presenting the classic case); Walter J. Walsh, *The Priest-Penitent Privilege*, 80 Ind. L.J. 1037 (2005) (recounting doctrinal development).[12]

Additionally, in *Walz*, 397 U.S. at 664, the Court upheld a New York City real property tax exemption for religious houses of worship, notwithstanding the cost imposed to taxpayers. In sum, as the Court has noted in other contexts, protecting individual rights is often costly, but worth it to safeguard a free society. *See New York Times v. Sullivan*, 367 U.S. 258, 281 (1964) ("[O]ccasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great.") (internal quotation omitted).

On the few occasions when the Court *has* invalidated statutes designed to alleviate burdens on religious exercise, it has done so because the statute (1) directly coerced nonreligious people (2) without regard to whether a contrary law would have been a "substantial burden" on the accommodated beliefs, and (3) without regard to the government's interest in individual cases.[13]

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12. *See, e.g.*, Eugene Volokh, *Would Granting an Exemption from the Employer Mandate Violate the Establishment Clause?*, The Volokh Conspiracy (Dec. 4, 2013, 5:11 PM), http://www.volokh.com/2013/12/04/3b-granting-exemption-employer-mandate-violate-establishment-clause/.

13. The Court has also held that a government violates the Establishment Clause when it effectively delegates civic authority to a religious institution. *See Grendel's Den, Inc.*, 459 U.S. at 116; *see also Kiryas Joel*, 512 U.S. at 698 (1994) (Souter, J., concurring).

As already explained, in *Caldor*, the Court invalidated a law that directly coerced employers on the basis of their employees' religious beliefs, without exception. 472 U.S. at 708-711; *see also Amos*, at 337 n.15. In *Texas Monthly*, the Court invalidated a state law that exempted religious literature from sales tax. 489 U.S. at 1. The majority divided on the proper constitutional analysis. One Justice based his decision on the Press Clause, *id.* at 26 (White, J.), and two others seemed especially concerned that the law lent the government's support to "the communication of religious messages," *id.* at 28 (Blackmun, J.). A plurality of justices objected principally to the law's failure to relieve a substantial burden on religious exercise, or to incorporate an exception for compelling governmental interests. *Id.* at 18 n.8 (Brennan, J.). RFRA has neither defect. Unlike the laws at issue in *Caldor* and *Texas Monthly*, RFRA applies only where the government substantially burdens religious exercise without using the least restrictive means to advance a compelling governmental interest.

Likewise, the Court's Free Exercise Clause analysis in *United States v. Lee* is inapposite.[14] 455 U.S. 252 (1982). In *Lee*, the Court held that the Free Exercise Clause does not require an accommodation for Amish employers who object to participating in the social security system. *Id.* at 260-61. The Court did not suggest that the Establishment Clause prohibits Congress from providing such a statutory religious accommodation, or prohibits courts from applying a statute like RFRA to plaintiffs like Lee. *See id.* at 260 n.11 ("[W]e [need not] decide whether, if Congress had … intended … to reach this case, conflicts with the Establishment Clause would arise"). The Court finally settled those questions in *Cutter*.

14. *See, e.g.*, Tebbe, *et al.*, *supra* note 2.

The Court's decisions strongly support the constitutionality of RFRA, both facially and as-applied.

II. An Establishment Clause Limit on RFRA Would Require Courts To Perform Three Separate and Needless Religion Clause Analyses

In many, if not all, religious accommodations cases, the scholars' proposed doctrine would require courts to needlessly analyze the entitlement baseline, the weight of hypothetical burdens imposed on third parties, and whether the Free Exercise Clause requires an accommodation.

First, the proposed doctrine begs an entitlement baseline question in many religious accommodation cases. Where a religious accommodation would allegedly burden third party rights *that were created by the statute that burdens religious exercise*, we might ask which came first – the burden on religion, or the rights that the accommodation allegedly burdens? Plaintiffs allege that the ACA regulations burden their religious exercise, and the scholars allege that an accommodation would significantly burden employees because they would not be entitled to have their employer pay for certain health care services. But the employees were not entitled to have their employer pay for that health care *before* the administration adopted the regulations that allegedly burden the plaintiffs' religious exercise.

In this case, the answer to the baseline question is fairly straightforward: under RFRA's "[r]ule of construction," by remaining silent about RFRA's applicability, the ACA effectively incorporates RFRA's balancing test

into its own provisions. *See* 42 U.S.C. § 2000bb-3(b). The regulations implementing the ACA therefore may not create a third party entitlement contrary to RFRA. *See Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

But the baseline issue will not be so easy in every case. Suppose a statute provides a right to physician-assisted suicide, but also provides that health care providers with religious objections do not have to assist a suicide. *See, e.g.*, Or. Rev. Stat. § 127.885 (2012). What if a certain hospital or pharmacist's objection imposes a significant burden on patients who want to exercise their right to physician-assisted suicide? In that case, which came first, the right to physician-assisted suicide, or the right to conscientious objection?

This difficult analysis is entirely unnecessary, especially when the religious accommodation, like RFRA, already takes into account the government's interest in protecting third parties.

Second, the proposed doctrine would limit only statutory accommodations that put a "significant burden" on third parties. To determine whether an accommodation violates the Establishment Clause, therefore, a court would be obligated to speculate about all of the possible burdens the accommodation could put on parties who are not before the court, and then to determine whether they are "significant." The proposed doctrine would generate a cottage industry of speculative judicial line drawing about what constitutes a "significant burden" on third parties sufficient to trigger an Establishment Clause analysis, often in cases, like this one, where those parties are not before the court to develop a factual record.

This contention finds no support in this Court's decisions. In *Amos*, the Court upheld a religious accommodation that cost a third party his job. 483 U.S. at 330-331. In *Gillette*, the Court upheld a religious accommodation that sent others to war. 401 U.S. at 449-453. Courts routinely enforce the clergy-penitent privilege against a party's right to present evidence at trial. And in *Cutter*, the Court explained that, for statutes like RLUIPA and RFRA, the way to protect third parties that might be burdened by a religious accommodation is to *apply the statute*, precisely because the statute requires courts to consider the government's interest in protecting nonbeneficiaries. 544 U.S. at 720.

Third, courts applying the proposed doctrine would also have to determine whether the Free Exercise Clause *requires* the accommodation.

The Court has not only upheld statutory religious accommodations, it has held that the Free Exercise Clause itself sometimes *requires* religious accommodations, even when those accommodations may impose burdens on third parties. At a minimum, the Free Exercise Clause limits the applicability of a statute: where a law appears on its face to target religious exercise, *Church of the Lukumi Babalu Aye, Inc. v. Hialea*, 508 US. 520, 532 (1993); where a law would interfere with a religious institution's ministerial decisions, *Hosanna-Tabor v. EEOC*, 132 S.Ct. 664, 706 (2012); and where a law would require teenage children to go to school, even if the limited schooling would impose a burden on those children, *Wisconsin v. Yoder*, 406 U.S. 205, 230-231 (1972). The reach of these doctrines is unclear. It *is* clear, though, as a matter of constitutional logic, that the Free Exercise Clause's mandatory religious

accommodations and the Establishment Clause are in sync. *See* McConnell, *Accommodation of Religion*, *supra*, at 691 (arguing that reading the Establishment Clause to forbid all solicitude for religious accommodation would "[p]aradoxically" forbid the Free Exercise Clause).

Consistent with the doctrine of constitutional avoidance, courts ordinarily resolve religious exercise issues on statutory rather than Free Exercise grounds. As a result, courts rarely opine on whether statutory religious accommodations overlap with the Constitution's mandatory accommodations.

Were the Court to adopt the scholars' proposed Establishment Clause doctrine, however, a court considering whether a given accommodation creates a "significant burden" on third parties would *also* have to decide whether the Free Exercise Clause *requires* the accommodation. Vague and contradictory Religion Clause analyses would proliferate across state and federal courts, in cases arising from myriad regulatory and factual settings.

This Religion Clause three-step is entirely avoidable. The Court has already decided that statutes like RFRA that protect "compelling governmental interest[s]," "[p]roperly applied," comply with the Establishment Clause. *Cutter*, 544 U.S. at 720. Furthermore, in this case, the "compelling governmental interest" test adequately protects any interest the Government may have in requiring employers to provide health benefits to their employees. The Court should decline the scholars' invitation to needlessly venture into uncharted Religion Clause waters. *Cf. Ashwander*, 297 U.S. at 347 (Brandeis,

J., concurring) (discussing the merits of constitutional avoidance); *Pearson v. Callahan*, 555 U.S. 223 (2009) (opting for a qualified immunity analysis that minimizes unnecessary constitutional adjudication).

III. An Establishment Clause Limit on RFRA Would Threaten Thousands of Legislative Religious Accommodations

From the earliest days of the Republic, American legislatures have responded to religious pluralism with accommodations from laws that would otherwise substantially burden the religious exercise of political minorities. While some of the framers debated whether and when the Free Exercise Clause *requires* religious accommodations, "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); *see also* McConnell, *Accommodation of Religion*, *supra*, at 693 ("At a minimum, the message of [the drafting and ratifying] history is that religious accommodations are permissible and desirable, even if not constitutionally compelled."); *see generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 104 Harv. L. Rev. 1409, 1466-73 (1990).

Indeed, the first two Congresses debated whether to exempt Quakers from militia service. The First Congress debated a constitutional accommodation, and settled on the Free Exercise Clause without clearly deciding whether it

required an accommodation for conscientious objectors. The Second Congress debated a statutory accommodation for Quakers under the Uniform Militia Act. *See* 2 *Annals Cong.* 1858-59, 1868-75 (Dec.17 to Dec. 24, 1790). The members disputed *whether* the Free Exercise Clause required an accommodation, and *how* to accommodate objectors without exempting them from their share of service to the republic. James Madison supported a federal statutory accommodation. *Id.* at 1871 (Dec. 22, 1790). Only one member suggested that a federal accommodation would "establish the [Quaker] religion" by inducing "the whole community" to "turn Quakers," but he went on to suggest that requiring those exempted to "pay a full equivalent" of the cost would satisfy his concern. *Id.* at 1869-70 (Jackson). In the end, "[m]ost speakers treated the question as one of federalism or policy," not a matter for concern under the Religion Clauses, "and it was left to the states" to resolve for themselves. David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801*, at 159 (1997).

Since the earliest days, Congress and the states have regularly accommodated religious minorities. Douglas Laycock, in a paper tracing the history of American regulatory exemptions from colonial to modern days, notes that "regulatory exemptions emerged" in early American history "when the majority became willing to provide for the religious liberty of minority faiths;" indeed, "exemptions were never part of the establishment; they grew out of a *political commitment to free exercise*." Laycock, *Regulatory Exemptions*, 81 Notre Dame L. Rev. at 1803 (emphasis added). Some exemptions, such as legislative exemptions from Prohibition for sacramental wine, National Prohibition Act of 1919 (The Volstead Act),

Pub. L. No. 66-66, 41 Stat. 305, and from the military draft, *Gillette*, 401 U.S. at 437, have a storied place in American political life.

Out of growing sensitivity to religious, cultural, and moral pluralism, in the last few decades the federal government and states have adopted thousands of religious accommodations. Some of them apply in specific regulatory circumstances, such as the provision of health care. Others, like RFRA, establish heightened scrutiny for any government action that "substantial[ly] burden[s]" the exercise of religion. Many states have adopted a statutory or constitutional analog to RFRA.[15] Indeed, these statutes are in keeping with the Court's intuition that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation." *Smith*, 494 U.S. at 890.

Legislatures have been particularly sensitive to plural views on questions about the beginning and end of human life. Accordingly, federal and state legislatures have exempted religious objectors from laws that would otherwise require objectors to engage in what they believe to be a form of unjustified killing. Abortion,[16] capital

15. *See* Appendix A: *State Religious Exercise Provisions That Would Be Limited By An Establishment Clause Doctrine That Limits RFRA*.

16. Church Amendment, 42 U.S.C. § 300a-7(b) (enacted as part of the Health Programs Extension Act of 1973, Pub. L. No. 93-45) (mandating that public officials may not require individuals or entities receiving certain public fund to perform abortion or sterilizations procedures if it "would be contrary to [the individual or entity's] religious beliefs or moral convictions"); Danforth Amendment of 1988, 20 U.S.C. § 1688 (part of the Civil Rights

punishment,[17] physician-assisted suicide[18]—these are all matters about which Americans maintain a plurality of moral views. Despite the burden that accommodating minority religious views might place on third parties, including patients, physicians, prison administrators, etc., Americans have concluded that the appropriate

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Restoration Act of 1988, Pub. L. No. 100-259) (clarifying that Title IX of the Education Amendments of 1972 may not be construed to prohibit or require any individual or entity to provide or pay for abortion-related services); Coats/Snowe Amendment of 1996, 42 U.S.C. § 238n(a)(1) (part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134) (specifying that federal, state, and local governments may not discriminate against health care entities that decline to participate in abortion training or abortions); Medicare and Medicaid Conscience Clause Provisions, 42 U.S.C. §§ 1395w-22(j)(3)(B), 1396u-2(b)(3)(B) (part of the Balanced Budget Act of 1997, Pub. L. No. 105-33) (exempting managed care providers from requirement to cover counseling or referral for procedures that violate their moral or religious views, the first to exempt for counseling or referrals); Weldon Amendment, Consolidated Appropriations Act, 2009, Pub. L. No. 111-117, 123 Stat. 3034; *see generally* Appendix B: *Health Care Conscience Rights That Would Be Limited By An Establishment Clause Doctrine That Limits RFRA*.

17. 18 U.S.C. § 3597(b) (prohibiting state governments and federal agencies from requiring an employee "to be in attendance at or participate in any prosecution or execution under this section if such participation is contrary to the moral or religious convictions of the employee" including "personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities").

18. Oregon Death with Dignity Act sec. 4.01, Or. Rev. Stat. sec. 127.885 (2012); Washington Death with Dignity Act sec. 19, Wash. Rev. Code sec. 70.245.190 (2008).

resolution of these dilemmas is to forgo forcing dissenters to violate their consciences on matters of life and death. The scholars' proposed Establishment Clause limit on RFRA would threaten a wide array of statutory religious accommodations that have become integral to a robust culture of religious liberty and mutual respect in an increasingly religiously diverse society.

CONCLUSION

When Congress provides religious accommodations consistent with the government's compelling interests, including its interests in protecting third parties, it supplements, rather than contradicts, the Religion Clauses' protection of religious liberty. The scholars' proposed Establishment Clause doctrine has scant support in this Court's decisions, and would work a massive revision to the American religious liberty regime, one based on a tradition of respecting and protecting religious minorities. Respectfully, the Court should stay the course.

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APPENDIX B — STATE RELIGIOUS EXERCISE PROVISIONS THAT WOULD BE LIMITED BY AN ESTABLISHMENT CLAUSE DOCTRINE THAT LIMITS RFRA

Alabama

Ala. Const. Amend. 622, § V(b) (1999)

Alaska

Larson v. Cooper, 90 P.3d 125 (Alaska 2004)

Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska), *cert. denied*, 513 U.S. 979 (1994)

Arizona

Ariz. Rev. Stat. Ann. §§ 41-1493–41-1493.04 (2011)

Connecticut

Conn. Gen. Stat. Ann. § 52-571b(b) (West 1999)

Florida

Fla. Stat. Ann. § 761.03(1) (West 1997)

Idaho

Idaho Code Ann. §§ 73.401–73.404 (2013)

Illinois

775 Ill. Comp. Stat. 35/15 (West 1999)

Indiana

City Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443 (Ind. 2001)

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Kansas

Kan. Stat. Ann. §§ 60-5301–60-5305 (Westlaw 2013)

State v. Evans,
796 P.2d 178 (Kan. Ct. App. 1990)

Lower v. Bd. of Dirs. of Haskell Cnty. Cemetery Dist.,
56 P.3d 235 (Kan. 2002)

Kentucky

Ky. Rev. Stat. § 446.350 (Westlaw 2013)

Louisiana

La. Rev. Stat. Ann. §§13:5231–13:5242 (2012)

Maine

Rupert v. City of Portland,
605 A.2d 63 (Me. 1992)

Massachusetts

Attorney General v. Desilets,
636 N.E.2d 233 (Mass. 1994)

Rasheed v. Comm'r of Corr.,
845 N.E.2d 296 (Mass. 2006)

Michigan

Porth v. Roman Catholic Diocese, 532 N.W.2d 195
(Mich. Ct. App. 1995)

McCready v. Hoffius,
586 N.W.2d 723 (Mich. 1998), *vacated on other grounds*,
593 N.W.2d 545 (Mich. 1999)

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Minnesota

State v. Hershberger,
462 N.W.2d 393 (Minn. 1990)

Mississippi

In re Brown,
478 So.2d 1033 (Miss. 1985)

Missouri

Mo. Rev. Stat. §§ 1.302–1.307 (West 2013)

Montana

St. John's Lutheran Church v. State Comp. Ins. Fund,
830 P.2d 1271 (Mont. 1992)

New Mexico

N.M. Stat. Ann. §§ 28-22-1–28-22-5 (West 2013)

New York

Rourke v. New York State Dep't of Corr. Servs.,
603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), *aff'd*, 615
N.Y.S.2d 470 (N.Y. App. Div. 1994)

Catholic Charities v. Serio,
859 N.E.2d 459 (N.Y. 2006)

North Carolina

In re Browning,
476 S.E.2d 465 (N.C. 1996)

Appendix B

Ohio

Humphrey v. Lane,
728 N.E.2d 1039 (Ohio), *cert. denied*, 531 U.S. 912 (2000)

Oklahoma

Okla. Stat. tit. 51, §§ 251–258 (2013)

Pennsylvania

71 Pa. Stat. Ann. §§ 2401–2407 (West 2013)

Rhode Island

R.I. Gen. Laws §§ 42-80.1-1–42.80.1-4 (2006)

South Carolina

S.C. Code Ann. §§ 1-32-10–1-32-60 (2013)

Tennessee

Tenn. Code Ann. §4-1-407 (West 2013) *cf.*

State ex rel. Swann v. Pack,
527 S.W.2d 99 (Tenn. 1975) *cert. denied*, 424 U.S. 954 (1976)

Texas

Tex. Civ. Prac. & Rem. Code Ann. §§ 110.001–110.012 (West 2013)

Vermont

Hunt v. Hunt,
648 A.2d 843 (Vt. 1994)

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Virginia

Va. Code Ann. § 57-2.02 (West 2013)

Washington

First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992)

City of Woodlinville v. Northshore United Church of Christ, 211 P.3d 406 (Wash. 2009)

Wisconsin

State v. Miller, 549 N.W.2d 235 (Wis. 1996)

Coulee Catholic Schs. v. Labor & Indus. Review Comm'n, 768 N.W.2d 868 (Wis. 2009)

APPENDIX C — HEALTH CARE CONSCIENCE RIGHTS THAT WOULD BE LIMITED BY AN ESTABLISHMENT CLAUSE DOCTRINE THAT LIMITS RFRA

Federal

Danforth Amendment of 1988, 20 U.S.C. § 1688 (part of the Civil Rights Restoration Act of 1988, Pub. L. No. 100-259)

Coats/Snowe Amendment of 1996, 42 U.S.C. § 238n(a)(1) (part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134)

Church Amendment, 42 U.S.C. § 300a-7(b) (2006) (enacted as part of the Health Programs Extension Act of 1973, Pub. L. No. 93-45)

Medicare and Medicaid Conscience Clause Provisions, 42 U.S.C. §§ 1395w-22(j)(3)(B), 1396u-2(b)(3)(B) (part of the Balanced Budget Act of 1997, Pub. L. No. 105-33)

Weldon Amendment, Consolidated Appropriations Act, 2009, Pub. L. No. 111-117, 123 Stat. 3034

State

Ariz. Rev. Stat. Ann § 36-2154 (2009)

Ark. Code Ann. § 20-16-601(a) (2005)

Cal. Health & Safety Code § 123420(a), (c) (West 2006)

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Conn. Agencies Regs. § 19-13-D54(f) (2005)

Del. Code Ann. tit. 24, § 1791 (2005)

Fla. Stat. Ann. § 390.0111(8) (West 2007)

Ga. Code Ann. § 16-12-142 (2006)

Haw. Rev. Stat. Ann. § 453-16(d) (LexisNexis 2005)

Idaho Code Ann. § 18-612 (2004)

720 Ill. Comp. Stat. Ann. 510/13 (West 2003)

745 Ill. Comp. Stat. Ann. 70/7 (West 2002)

Ind. Code Ann. § 16-34-1-4 (LexisNexis 1993)

Iowa Code Ann. §§ 146.1, 146.2 (West 2005)

Kan. Stat. Ann. § 65-443 (2002)

Ky. Rev. Stat. Ann. § 311.800, (LexisNexis 2007)

La. Rev. Stat. Ann. § 40:1299.33 (2001)

Me. Rev. Stat. Ann. tit. 22, §§ 1591, 1592 (2004)

Md. Code. Ann., Health-Gen. § 20-214 (LexisNexis 2005)

Mass. Gen. Laws Ann. ch. 112, § 12I (West 2003)

Mich. Comp. Laws Ann. § 333.20181 (West 2001)

Minn. Stat. Ann. § 145.414 (West 2005)

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Mo. Ann. Stat. §§ 197.032, 376.1199(1) (West 2004)

Mont. Code. Ann. § 50-20-111 (2007)

Neb. Rev. Stat. § 28-337 (1995)

N.J. Stat. Ann. § 2A: 65A-2 (West 2000)

N.M. Stat. Ann. § 30-5-2 (LexisNexis 2003)

N.Y. Civ. Rights Law § 79-i (McKinney 1992)

Nev. Rev. Stat. Ann. § 449.191 (LexisNexis 2004)

N.C. Gen. Stat. § 14-45.1(e), (f) (LexisNexis 2007)

N.D. Cent. Code § 23-16-14 (2002)

Ohio Rev. Code Ann. § 4731.91 (LexisNexis 2004)

Or. Rev. Stat. §§ 435.475, 435.485 (2007)

43 Pa. Cons. Stat. Ann. § 955.2 (West 1991); 18 Pa. Cons. Stat. Ann. § 3213(d) (West 2000)

R.I. Gen Laws § 23-17-11 (2001)

S.C. Code Ann. § 44-41-40, 50 (2002)

S.D. Codified Laws §§ 34-23A-11, 34-23A-12 (2004)

Ten. Code Ann. § 39-15-204 (2006)

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Tex. Occ. Code Ann. § 103.004 (Vernon 2004)

Utah Code Ann. § 76-7-306(2) (2003)

Va. Code. Ann. § 18.2-75 (2004)

Wash. Rev. Code Ann. § 9.02.150 (West 2003)

Wis. Stat. Ann. § 253.09(4) (West 2004)

Wyo. Stat. Ann. §§ 35-6-105, 106 (LexisNexis 2007)