Nos. 14-1418, 14-1453, 14-1505, 15-35,
15-105, 15-119, 15-191

IN THE

Supreme Court of the United States

DAVID A. ZUBIK, ET AL.

Petitioners,

v.

SYLVIA BURWELL, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Courts of Appeals
for the Third, Fifth, Tenth, and DC Circuits

BRIEF OF AMICI CURIAE SCHOLARS OF RELIGIOUS LIBERTY SARAH BARRINGER GORDON, R. KENT GREENAWALT, MARTIN S. LEDERMAN, IRA C. LUPU, AND ROBERT W. TUTTLE IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICI CURIAE[1]

Like the United States, although we do not question the sincerity of petitioners' religious beliefs, we have doubts about whether, as a matter of law, the agencies' accommodation for religious nonprofit organizations imposes a substantial burden on petitioners' exercise of religion. *See* Brief for Respondents (U.S. Br.) at 32-53. Nevertheless, the focus of this brief is the provision of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, *et seq*. (RFRA), stating that the federal government may substantially burden a person's exercise of religion if it demonstrates that application of the burden to the religious objector "is the least restrictive means of furthering" a compelling governmental interest. *Id*. § 2000bb-1(b)(2).

INTEREST OF AMICI

Amici are scholars who for many years have taught and written on the subject of constitutional and statutory protection for religious liberty.

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[1] The parties have filed blanket consent letters for all amicus briefs. No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made a monetary contribution intended to fund this brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has invoked "least restrictive means" as a legal term of art with respect to an array of different sorts of constitutional claims, and its application of a "least restrictive means" test has varied depending on context. In cases involving laws that target religious conduct for disfavored treatment, explicitly regulate the content of communications, or discriminate on the basis of race, the Court has vigorously inquired into whether the government could have advanced its interests sufficiently by enacting alternative, constitutionally unobjectionable legislation.

By contrast, where the claim is that neutral legislation imposes incidental burdens on rights, the Court has sometimes applied a different sort of "compelling interest"/"least restrictive means" inquiry to laws that are facially constitutional. In those cases—including the Court's Free Exercise Clause jurisprudence in the three decades preceding *Employment Division v. Smith*, 494 U.S. 872 (1990)—

[2] Institutional affiliations are listed for identification purposes only.

the Court's methodology has been markedly different, and considerably less demanding.

Congress was well aware of this Court's pre-*Smith* Free Exercise jurisprudence of "least restrictive means" when it deliberated upon RFRA, and it specifically decided to "restore," as a matter of statutory law, the same "least restrictive means" test the Court had applied in the 30 years preceding *Smith*. Indeed, that limited scope of restoration was vital to RFRA's passage. In order to break an impasse that had prevented the legislation from going forward, the bill's lead sponsors agreed to add compromise language to the committee reports, making it "absolutely clear" that "the bill does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with free exercise jurisprudence, including Supreme Court jurisprudence, under the compelling governmental interest test prior to *Smith*." H.R. Rep. No. 103-88, at 8 (1993).

The Court's more pragmatic, and less rigid, variation of heightened scrutiny in the pre-*Smith* Free Exercise cases was not toothless. The Court required the government to demonstrate that its compelling interests would in fact be furthered by application of the law in question to the particular religious objectors and those similarly situated, and to explain why obvious and available alternatives might not equally advance the government's interests. The Court has continued to insist upon such showings in more recent cases involving the same "least restrictive means" test in RFRA and in the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc, *et seq.* (RLUIPA). *See Burwell v. Hobby*

Lobby Stores, Inc., 134 S. Ct. 2751 (2014); *Holt v. Hobbs*, 135 S. Ct. 853 (2015). When plaintiffs demonstrate that a generally applicable law will substantially burden their religious exercise, and administrators can accommodate the objectors without harm to the government's compelling interests and without imposing burdens on third parties, RFRA requires such accommodation.

In a telling series of decisions in the 1980's, however, Free Exercise claimants did not prevail, because the exemptions they sought from facially constitutional laws would have impeded the state's pursuit of compelling interests, and their proposed alternative means would have required additional legislation, imposed material costs on other persons, or otherwise impeded furtherance of the government's compelling interests. Because RFRA incorporates and restores all of the Court's pre-*Smith* jurisprudence, including such applications of the "compelling interest"/"least restrictive means" test, this analysis must be applied to RFRA claims, too.

In the cases under review here, the agencies have already made any accommodation RFRA arguably commands. Most of petitioners' proposed alternatives would require Congress to enact new appropriations statutes to mitigate the harms to the government or private individuals that the requested religious exemptions would cause. RFRA, however, does not in effect require future Congresses to enact laws to set off the costs of religious accommodations whenever a new religious objector comes forward and demonstrates a substantial burden. Therefore the mere prospect of such future congressional action cannot itself be deemed a "less restrictive" means under RFRA.

Moreover, as the government demonstrates, each of petitioners' proposed alternatives would be less effective than the challenged accommodation in furthering the government's compelling interests in reducing unintended pregnancies and ensuring that women have equal access to needed health care. RFRA therefore does not require the government to resort to them. Petitioners' reliance on more restrictive doctrinal rules, derived from the very different context in which the Court assesses the facial validity of laws that restrict speech on the basis of content, are misplaced in the context of RFRA claims for exemptions from valid, generally applicable laws.

ARGUMENT

I. RFRA Restores The "Compelling Interest"/"Least Restrictive Means" Test This Court Applied To Free Exercise Challenges To Generally Applicable Laws In The Three Decades Before *Employment Division v. Smith*.

1. As the title of the statute confirms, Congress enacted the Religious Freedom Restoration Act of 1993 in order to *restore* the Free Exercise test this Court had applied in the context of generally applicable laws before its 1990 decision in *Smith*. Congress expressly found that "prior Federal court rulings," including *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), set forth a "workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5). Congress's first declared purpose in RFRA is thus "to restore the compelling

interest test as set forth" in those decisions. *Id.* § 2000bb(b)(1).

To effectuate that purpose, RFRA provides that the federal government may substantially burden a person's exercise of religion "only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id*. § 2000bb-1(b).

There was broad consensus among members of Congress, and a remarkably broad coalition of 66 religious and civil rights organizations, that Congress should enact legislation to respond to the *Smith* decision by restoring the pre-*Smith* jurisprudence of religious liberty.[3] Many legislators, however, including important sponsors, shared the concerns of some religious organizations within the coalition—including most significantly the U.S. Conference of Catholic Bishops—that the legislation might be construed to require religion-based exemptions to abortion restrictions.

The abortion question dominated the legislative hearings and debates about RFRA. *See, e.g.*, S. Rep.

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[3] *See* "Dear Senator" letter from Oliver S. Thomas, Oct. 20, 1993, in BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, THE RELIGIOUS FREEDOM RESTORATION ACT: 20 YEARS OF PROTECTING OUR FIRST FREEDOM, at 6 (2014), http://bjconline.org/wp-content/uploads/2014/04/RFRA-Book-FINAL.pdf (listing organizations in the "Coalition for the Free Exercise of Religion," ranging from the Christian Legal Society, Episcopal Church, and National Association of Evangelicals to the American Civil Liberties Union, American Humanist Association, and Americans United for Separation of Church and State).

No. 103-111. at 12 (1993); *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong., 2d Sess. 100, 106-110 (1992) ("1992 Senate Hearing") (testimony and statement of Mark E. Chopko, General Counsel, U.S. Catholic Conference); *id.* at 203-40 (testimony and statement of James Bopp, Jr., General Counsel, National Right to Life Committee, Inc.).; Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 231-38 (1994). The concerns were so pronounced, and seemingly intractable, that leading House Republican sponsors Paul Henry and Henry Hyde withdrew their support for the bill. *Id.* at 237. As Representative Hyde would later recount on the House floor, the standard articulated in the bill "was of particular concern to me in the area of abortion rights." 139 Cong. Rec. H2358 (daily ed. May 11, 1993). Under settled pre-*Smith* law, Hyde explained, there was no prospect of successful RFRA claims for exemptions to abortion restrictions; yet "[a] major issue of contention in the 102d Congress was whether the bill was a true restoration of the law as it existed prior to *Smith* or whether it sought to impose a more stringent statutory standard." *Id.*

Proponents accordingly changed the bill, prior to its reintroduction in the 103d Congress, to "make clear that the statutory standard of the Religious Freedom Restoration Act is the same free exercise standard that was applied by the U.S. Supreme Court prior to *Smith*." *Id.* As Representative Hyde recounted, in explaining his renewed support of the legislation, "the Religious Freedom Act is not seeking to impose a new and strengthened compelling State interest standard, but is seeking to replicate, by statute, the same free

exercise test that was applied prior to *Smith*." *Id.* In particular, "[t]he bill now clearly imposes a statutory standard that is to be interpreted as incorporating all Federal court cases prior to *Smith*." *Id.*[4] In the House Report, Hyde and fellow leading pro-life Representatives were thus able to write (and no other members suggested otherwise) that "the purpose of the statute is to 'turn the clock back' to the day before *Smith* was decided." H.R. Rep. No. 103-88, at 15 (statement of Reps. Hyde, Sensenbrenner, McCollum, Coble, Canady, Inglis, and Goodlatte).

The bill's bipartisan sponsors made sure to confirm this crucial understanding. They added carefully negotiated "compromise language" to the committee reports to guarantee that, in almost every material respect, RFRA would do no more than "restore" the law as it had existed before *Smith*. Laycock & Thomas, *supra*, 73 TEX. L. REV. at 237. The House and Senate reports thus specify that it is "absolutely clear [RFRA] does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with free exercise jurisprudence, including Supreme Court jurisprudence, under the compelling governmental interest test prior to *Smith*." H.R. Rep. No. 103-88, at 8; *see also* S. Rep. No. 103-

[4] In particular, the formal legislative findings were rewritten to declare that "the compelling interest test *as set forth in prior federal court rulings* is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5) (emphasis added).

111, at 12 (1993) (materially indistinguishable language).[5]

It made perfect sense for RFRA's sponsors to confirm that the Act was designed to "'turn the clock back' to the day before *Smith* was decided." H.R. Rep. No. 103-88, at 15 (statement of Reps. Hyde, et al.). With one exception not pertinent here, *see supra* note 5, members of Congress had not expressed any doubts about the propriety of the Court's earlier decisions, including the series of pro-government decisions in the decade or so before *Smith*. Those decisions, unlike *Smith*, did not prompt any "restoration" movement. Thus, the Senate Report accurately stated that "the purpose of this act is only to overturn the Supreme Court's decision in *Smith*," S. Rep. No. 103-111, at 12 (emphasis added)—rather than to challenge the manner in which the Court had applied its heightened scrutiny test before *Smith*. Indeed, the lead House sponsor went so far as to say that the legislation would "simply restore the legal standard for protecting religious freedom *that worked so well for more than a generation*." 137 Cong. Rec. 17836 (1991) (statement of Rep. Solarz) (emphasis added).

The sponsors' amendments to the statute and the committee reports did the trick: The 103d Congress

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[5] There was one exception to this general "restorative" design. This Court had held that the government was entitled to a more deferential standard of review in certain government-controlled "enclaves." *See Goldman v. Weinberger*, 475 U.S. 503 (1986) (armed forces); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (prisons). It was Congress's intent that RFRA's exemption standards are to apply in these enclaves, as well. *See* S. Rep. No. 103-111, at 9-12; H.R. Rep. No. 103-88, at 7-8.

promptly enacted RFRA with almost no dissent, and with the support of the extraordinarily broad and diverse Coalition for the Free Exercise of Religion (*see supra* note 3).[6] Such broad agreement among such diverse constituencies would not have been possible absent the express assurance that RFRA did not prescribe a sweeping new test that might significantly undermine the government's authority to enforce generally applicable laws.

2. In *Hobby Lobby*, this Court remarked, without deciding, that perhaps "RFRA did more than merely restore the balancing test used in the *Sherbert* line of [Free Exercise] cases; it provided even broader protection for religious liberty than was available under those decisions." 134 S. Ct. at 2761 n.3; *see also id.* at 2767 (stating that "[f]or present purposes, it is unnecessary to adjudicate" whether RFRA's "least restrictive means" test "went beyond what was required by our pre-*Smith* decisions"). This suggestion was, in turn, based upon a dictum in *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997), in which the Court assumed that RFRA's "least restrictive means" requirement "was not used in the pre-*Smith* jurisprudence RFRA purported to codify." That dictum, however—most likely the product of an anomaly in the *City of Boerne* briefing[7]—was not an accurate

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[6] The House approved RFRA by unanimous voice vote, and only three Senators opposed the legislation. *See* 139 Cong. Rec. 26416 (1993) (Senate); 139 Cong. Rec. 27239-41 (1993) (House).

[7] The petitioner argued that "the least restrictive means test has not been a staple of [the Court's pre-*Smith*] free exercise doctrine," and was "a virtual novelty in the free exercise arena." Brief for Petitioner in *City of Boerne v. Flores* at 17, 22; *see also*

characterization of RFRA or of this Court's pre-*Smith* jurisprudence.

In various forms, a version of the "least restrictive means" test was part of this Court's constitutional inquiry in Free Exercise cases before *Smith*. In *Thomas v. Review Board*, 450 U.S. 707, 718 (1981), for instance, the Court wrote that "[t]he state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." The Court used similar expressions of the constitutional test in cases both before and after *Thomas*, including in *Sherbert v. Verner*, which RFRA expressly references (42 U.S.C. § 2000bb(b)(1)).[8] Indeed, by the time of *Smith*, that formulation had

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id. at 22 ("[T]he most oppressive aspect of RFRA for governments—the least restrictive means test—is a virtual novelty in the free exercise arena"). The issue was not central to the case, and so neither the respondent nor the United States contested this erroneous characterization.

[8] *See Sherbert*, 374 U.S. at 407 ("[I]t would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation would combat [the problem] without infringing First Amendment rights."); *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (plurality opinion) ("[I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance *unless the State may accomplish its purpose by means which do not impose such a burden.*") (emphasis added); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) ("The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, . . . and no 'less restrictive means,' . . . are available to achieve the governmental interest.") (internal citations omitted).

become so well-established that Justice O'Connor described the Court as having "consistently" applied a "least restrictive means" test. *Smith*, 494 U.S. at 899 (O'Connor, J., concurring in the judgment); *see also Bowen v. Roy*, 476 U.S. 693, 728 (1986) (O'Connor, J., concurring in part and dissenting in part); *Smith*, 494 U.S. at 907 (Blackmun, J., dissenting) (describing it as "a consistent and exacting standard" that the Court had "over the years painstakingly . . . developed").

The Congress that enacted RFRA was well aware that "least restrictive means" was a judicial term of art this Court had applied in its pre-*Smith* cases. During the legislative debates, the chief House sponsor, a leading scholar, and the Congressional Research Service all informed Congress that the "less restrictive means" component of RFRA derived from the Court's pre-*Smith* doctrine. *See Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 before the Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary*, 102d Cong., 2d Sess. 121 (1993) (written statement of Rep. Solarz); *id.* at 342 (statement of Prof. Douglas Laycock); 1992 Senate Hearing, *supra*, at 78-79 (statement of Prof. Laycock); David M. Ackerman, *The Religious Freedom Restoration Act and The Religious Freedom Act: A Legal Analysis* 6 (Cong. Research Serv. Report 92-366A, Apr. 17, 1992). Senator Kennedy, another principal sponsor, likewise commented that RFRA "would restore the compelling interest test for evaluating free exercise claims . . . by establishing a statutory right that adopts *the standards previously used by the Supreme Court*." 1992 Senate Hearing, *supra*, at 2 (1992) (emphasis added).

Thus, as the House Report explained, it was "the Committee's expectation that the courts will look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not . . . the least restrictive means have been employed in furthering a compelling governmental interest." H.R. Rep. No. 103-88, at 6-7.

To be sure, RFRA did not "merely restore[] this Court's pre-*Smith* decisions in ossified form," such that a plaintiff cannot prevail unless his claim precisely tracks one of the Court's precedents granting an exemption. *Hobby Lobby*, 134 S. Ct. at 2773. Congress plainly intended, however, that courts and officials should apply RFRA's "compelling-interest"/ "least restrictive means" provision in accord with the ways in which the Court, before *Smith*, applied that test in evaluating Free Exercise exemption claims.

II. RFRA Does Not Require The Government To Adopt Alternative Means That Would Require Additional Legislative Appropriations, Impose Harms On Third Parties, Or Otherwise Materially Undermine the Government's Compelling Interests.

In *City of Boerne*, this Court assumed that RFRA's "compelling interest"/"least restrictive means" test is equivalent to the "strict scrutiny" tests this Court has applied in other familiar constitutional contexts, such as the scrutiny it uses to evaluate racial classifications and content-based speech restrictions—"the most demanding test known to constitutional law," or, at a minimum, a test that would result in the "likelihood of invalidation" of the challenged law. 521 U.S. at 534;

see also Hobby Lobby, 134 S. Ct. at 2780 ("exceptionally demanding") (citing *City of Boerne*, 521 U.S. at 532).[9]

It is central to the disposition of this case, however, to understand that not every test that employs a "least restrictive means" analysis, or that is denominated as "strict scrutiny," is the same.

1. To be sure, in various other settings—most commonly, where the Court confronts laws that expressly target religious practice,[10] that discriminate on the basis of race,[11] or that restrict speech on the basis of content[12]—the Court has employed a variant of the "compelling interest"/"least restrictive means" test (or a similar test in which the state is required to advance its compelling interests in a "narrowly tailored" fashion) in a manner that is very difficult for a state to satisfy. Those more strenuous versions of the test typically ask whether the legislature could have accomplished its goals by enacting a statute that avoids direct and intentional regulation of

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[9] On at least two other occasions—one in the Free Exercise context, the other under RFRA—the Court has referred to the test as a form of "strict scrutiny." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987).

[10] E.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

[11] E.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013).

[12] *E.g.*, *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011); *Ashcroft v. ACLU*, 542 U.S. 656, 665-70 (2004); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813-25 (2000).

constitutionally protected rights. If the answer is "yes," then the legislature's failure to have used such an alternative statute results in what the Court in *City of Boerne* referred to as the "likelihood of invalidation" of the challenged law. 521 U.S. at 534

Although the Free Exercise test this Court applied in the thirty years before *Smith*—and thus the test Congress "restored" in RFRA and RLUIPA—is couched in terms similar to that extraordinarily rigorous version, it works very differently in practice. It is analogous to forms of heightened scrutiny the Court has applied to assess other facially unobjectionable laws that incidentally burden a constitutionally protected interest—for example, antidiscrimination laws that incidentally restrict the right of "expressive association," *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and laws regulating conduct (e.g., public nudity or burning draft cards) that incidentally burden expressive activity, such as in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), and *United States v. O'Brien*, 391 U.S. 367 (1968).

In such cases the Court does often inquire whether there are "alternative means that would more precisely and narrowly" advance the government's interests, *O'Brien*, 391 U.S. at 381; *see also Barnes*, 501 U.S. at 571 ("the incidental restriction on First Amendment freedom [must] be no greater than is essential to the furtherance of the governmental interest"); *Roberts*, 468 U.S. at 623 (antidiscrimination law could not be applied to require the Jaycees to accept women as members unless such an application of the Act would "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of

associational freedoms"). But that inquiry is very different from the "least restrictive means" or "narrow tailoring" requirement the Court applies to statutes that intentionally target constitutionally protected interests. In cases challenging incidental burdens, the Court has not asked whether the legislature could have accomplished its goal by passing a completely different law. Instead, the Court has inquired whether the law must yield to an *exemption* because of its impact on a constitutionally protected interest. And, as the Court's decisions in *O'Brien*, *Barnes* and *Roberts* attest, the answer to that question is often "no."

2. A very similar sort of dynamic appears in the Court's Free Exercise and RFRA jurisprudence.

Both before and after *Smith*, for example, this Court has applied the familiar, most demanding form of strict scrutiny to declare that laws discriminating against religion are facially invalid. *See McDaniel v. Paty*, 435 U.S. 618 (1978); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

By contrast, in cases claiming a right to religious exemptions from *generally applicable* laws, the Court's inquiry has been far less demanding and more sensitive to context. Even so, that test has considerable force, as reflected in the cases in which this Court has required conferral of religious exemptions—including the two cases that RFRA expressly invokes, *Sherbert v. Verner* and *Wisconsin v. Yoder*.

In *Sherbert*, this Court held that a Seventh Day Adventist was entitled to unemployment insurance after losing her job due to her refusal to work on

Saturday, her Sabbath. 374 U.S. at 410. South Carolina law protected other worshippers from being fired for refusing to work on Sundays, and South Carolina officials were also authorized to grant benefits if the claimant showed "good cause" for refusing to accept "available suitable work" when offered. Yet those officials denied that Sherbert's religious obligation qualified as "good cause." *Id.* at 401.

South Carolina argued that giving benefits to Sherbert might lead to "fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work," which might, in turn, "not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work." *Id.* at 407. The Court rejected this speculative contention, not only because it was supported by "no proof whatever" in the record, *id.*, but also because the speculative risk was belied by the experience in other states. At least twenty-two such states had construed their own "good cause" (or similar) exceptions to allow benefits to be offered to persons who were physically available for work but unable to find suitable employment solely because of a religious prohibition. *Id.* at 407 n.7. Those states apparently had been able to detect or deter any fraudulent, nonreligious claims that might threaten to dilute their funds or disrupt work scheduling. Accordingly, it was "incumbent upon [South Carolina] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights," *id.* at 407—a showing that the State failed to make.

Sherbert's most revealing insight into the proper application of the Court's "least restrictive means" test

is reflected in the way the Court distinguished *Braunfeld v. Brown,* 366 U.S. 599 (1961), the case in which this Court first inquired into the availability of alternative means in a Free Exercise case (*see supra* note 8). The law at issue in *Braunfeld* required businesses to close on Sundays, thereby indirectly disadvantaging individuals who, for religious reasons, could not open on Saturdays. As the *Sherbert* Court described *Braunfeld*, there was "a strong state interest in providing one uniform day of rest for all workers," which could only be achieved "by declaring Sunday to be that day of rest." 374 U.S. at 408. Although "[r]equiring exemptions for Sabbatarians" was "theoretically possible," it would have "present[ed] an administrative burden of such magnitude," or "afford[ed] the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable." *Id*. at 408-09.

Braunfeld thus rejected an exemption claim because of the costs it would impose on the government's interests, including the interest in avoiding harm to other private parties. The fact that the Court in *Sherbert* embraced *Braunfeld*'s analysis in this respect is highly revealing of the nature of the "least restrictive" or "alternative" means inquiry.

In *Yoder*, Wisconsin pursued criminal charges against Amish parents who refused to send their children to public high schools in compliance with the state's compulsory education law. The parents, and the Amish community more broadly, had determined that mainstream education beyond grammar school would undermine the community's religious teachings; and testimony showed "that the Amish succeed in

preparing their high school age children to be productive members of the Amish community" by "learning through doing the skills directly relevant to their adult roles in the Amish community." 406 U.S. at 212.

The Court credited Wisconsin's compelling interest in ensuring that minors are prepared to be self-sufficient and to participate in democratic society, and acknowledged that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have the potential for significant social burdens." *Id*. at 233-34. Even so, the Court concluded that Wisconsin had failed to demonstrate that an "impediment to [its] objectives . . . would flow from recognizing the claimed Amish exemption," *id.* at 221, in light of the unique way in which that community treated its minors, *id.* at 223. Indeed, the Court found that the Amish themselves had demonstrated "the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education." *Id*. at 235. Because Wisconsin could not show "how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish," *id*. at 236, the Court granted the Free Exercise exemption, cabined to that particular community.[13] Importantly,

[13] In effect, the Court held that the Amish's own "alternative" means of advancing the state's interests rendered the state incapable of showing that it had a compelling interest in applying its otherwise legitimate law to that discrete religious

the *Yoder* Court emphasized that this did not mean the Wisconsin law was facially invalid, the way it would be if the Court had been applying the sort of strict scrutiny it uses when evaluating a discriminatory law: "Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes." *Id.* at 236.

The Court's recent decisions under RFRA and RLUIPA reflect these lessons of *Sherbert*, *Braunfeld* and *Yoder*, and shed further light on the demands of the "compelling interest"/"least restrictive means" test.

In *Holt v. Hobbs*, a state prisoner sought a religious exemption under RLUIPA so that he could grow a ½-inch beard. The Arkansas Department of Correction argued that if guards had to search a prisoner's beard for weapons, that would pose a risk to the physical safety of a guard if a razor or needle was concealed in the beard. However, as the Court explained, "that is no less true for searches of hair, clothing, and ¼-inch beards [which the officials had permitted]." 135 S. Ct. at 864. Moreover, the Department failed to explain why it could not simply use a readily available "less restrictive alternative of having the prisoner run a comb through his beard." *Id.* And, as in *Sherbert*, the Court held that because many

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community. *See also* 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 214 (2014) ("[T]he purpose of this [less restrictive means] component is achieved implicitly through the compelling interest question itself, which is properly seen as whether the government has a compelling interest in applying a law against the claimant and people like him.").

other jurisdictions had handled the same problem without impinging upon religious liberty, Arkansas was required, "at a minimum, [to] offer persuasive reasons why it believes that it must take a different course," rather than using those "less restrictive" means of avoiding the harm. *Id.* at 866. *Holt* thus illustrates that if obvious, alternative means of dealing with the asserted problems are available, administrators must grant the religious exemptions, unless they can show that doing so would threaten additional harms to the government's compelling interests.

So, too, in *Hobby Lobby* itself, the Executive agencies already had adopted a workable accommodation for religious non-profit organizations, and offered no reason why they did not have the authority or ability to make the same accommodation available to similarly situated, closely held for-profit corporations. 134 S. Ct. at 2782.[14]

These decisions, from 1961 through 2015, collectively reinforce that the "compelling

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[14] The Court's 2006 RFRA decision in *O Centro* was similar to *Yoder* in that the federal government there had failed to demonstrate that the "*particular use at issue*" of a controlled substance—the "circumscribed, sacramental use of *hoasca*" by a 130-member Christian Spiritist sect—would result in the harms ordinarily associated with the use of hallucinogens. 546 U.S. at 432 (emphasis added). Indeed, an exception the government had already recognized for tribal use of peyote in analogous, circumscribed circumstances showed that the sacramental use of hallucinogens by the sect would not necessarily result in the speculative harms to the government's compelling interests. *Id.* at 433-35.

interest"/"least restrictive means" test can require accommodations for religious exercise when those accommodations do not materially impinge on compelling governmental interests.

3. Nevertheless, the Court has never applied the Free Exercise/RFRA/RLUIPA variant of the "compelling interest"/"least restrictive means" test with remotely the same degree of scrutiny or skepticism as when the Court confronts a law that targets constitutionally protected rights or interests.

The Court's refusal to apply the most rigorous form of strict scrutiny in Free Exercise challenges to generally applicable laws is the product of sound judgment about the best way to protect valued religious freedoms while maintaining a functioning, secular government. As the Court recognized in *Smith*, if it were to apply strict scrutiny to religious exemption cases in the same manner as "in the other fields where it is applied," then "society . . . would be courting anarchy" by "open[ing] the prospect" of required religious exemptions "from civic obligations of almost every conceivable kind." 494 U.S. at 488. That is precisely why, in its pre-*Smith* Free Exercise cases, the Court did *not* apply the stronger form of "strict scrutiny" familiar from those "other fields."

It also explains why Congress designed RFRA to "restore the legal standard for protecting religious freedom that worked so well for more than a generation," 137 Cong. Rec. 17836 (1991) (remarks of Rep. Solarz), in a manner that would not "expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with . . . Supreme Court jurisprudence, under the compelling governmental

interest test prior to *Smith*." H.R. Rep. No. 103-88, at 8. Application of the more rigorous form of strict scrutiny—the version found in, for example, the Court's doctrine regarding content-based speech restrictions—would create ready opportunities for religious objectors to evade many generally applicable laws. That is precisely what RFRA's sponsors sought to avoid.

The Court's treatment of the "substantial burden" component of RFRA is another reason why it has adopted a more sensitive, context-specific application of the "least restrictive means" test. The Court has taken very seriously the notion that civil authorities are not competent to second-guess believers about the nature of their faith. Thus, for example, courts generally may not probe sincere claims about the legitimacy or truth of an individual's particular religious beliefs. *See Hobby Lobby*, 134 S. Ct. at 2778. Such deference may be appropriate, but it also provides significant advantages to objectors, as well as incentives for insincere claimants to assert religious claims,[15] and even for sincere religious objectors to describe their opposition to legal requirements in terms that would more readily establish a qualifying "substantial burden."[16]

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[15] *See* IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE 227-32 (2014) (discussing such concerns in the context of the institutionalized persons provision of RLUIPA).

[16] *See* Kent Greenawalt, Hobby Lobby: *Its Flawed Interpretive Techniques and Standards of Application*, 115 COLUM. L. REV. SIDEBAR 153, 168-69 (2015).

These inevitable risks establish a need for a counterweight in order to maintain the delicate balance Congress struck in RFRA. The only plausible candidate for such a counterweight is to acknowledge that courts must apply the "least restrictive means" test in a practical way, with due respect for the challenges inherent in creating and implementing exemptions to generally applicable laws. Otherwise, RFRA would also often inflict significant harms upon third parties. In certain cases, such third-party harms would raise serious Establishment Clause concerns. At a minimum, however, the government has a compelling interest in avoiding the imposition of such harms, in light of the "fundamental principle of the Religion Clauses" that "[t]he First Amendment gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Estate of Thornton v. Caldor, Inc.*, 473 U.S. 703, 710 (1985) (quoting *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (L. Hand, J.)).

The Court has been sensitive to these concerns, and the consequent need to apply practical reason in the administration of the "least restrictive means" test. In particular, both before and after *Smith*, the Court has *not* required the government to adopt alternatives that would impose harm on third parties; nor has the Court credited as a less restrictive alternative the mere possibility that the legislature might enact new statutes—including additional appropriations—in order to avoid those third-party harms or to ameliorate the impact of religious exemptions on other compelling interests. Most recently, in *Hobby Lobby*, every Justice recognized that "cost may be an important factor in

the least-restrictive-means analysis," and that "in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'" 134 S. Ct. at 2781 & n.37 (quoting *Cutter v. Wilkinson,* 544 U.S. 709, 720 (2005)); *see also id*. at 2786-87 (Kennedy, J., concurring) (explaining that the state may not permit religious exercise to "unduly restrict other persons, such as employees, in protecting their own interests" that "the law deems compelling"); *id.* at 2801 (Ginsburg, J., dissenting).

These same concerns animated the Court's Free Exercise jurisprudence in the pre-*Smith* era, which the RFRA test is designed to restore. From 1961 to 1990, the Court rejected most claims for exemptions to generally applicable laws, even while applying a form of heightened scrutiny. Many of those cases involved forms of commercial regulation as to which exemptions would implicate third-party interests or make claims on the public fisc, including wage and hour legislation[17]; Sunday closing laws[18]; tax obligations[19]; and antidiscrimination guarantees.[20] The results in these cases differed dramatically from cases in which

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[17] *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985).

[18] *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kosher Super Mkt.*, 366 U.S. 617 (1961).

[19] *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378 (1990); *Hernandez v. Commissioner*, 490 U.S. 680 (1989); *United States v. Lee*, 455 U.S. 252 (1982).

[20] *Newman v. Piggie Park Enters.*, 390 U.S. 400 (1968); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

the Court has applied strict scrutiny to assess the facial validity of discriminatory enactments.

The anti-discrimination cases illustrate the Court's understanding that when a religious accommodation would harm the civil rights of third parties—even a relatively small group of third parties—the government is not required to grant the exemption.

In *Bob Jones University*, the Internal Revenue Service refused to grant tax-exempt status to private schools that practiced racial discrimination. That ruling was challenged by two schools of higher education, one of which prohibited its students from dating or being married to persons of another race, and the other of which was one of the few remaining institutions that prohibited admission of African American students. Both petitioners claimed that their discriminatory policies were religiously compelled, thereby entitling them to Free Exercise Clause exemptions.

The Court applied a form of heightened scrutiny. The government, it explained, "'may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.'" 461 U.S. at 603 (*quoting Lee*, 455 U.S. at 257). The Court concluded, however, that the government's "fundamental, overriding interest in eradicating racial discrimination in education" was grounds for denying the exemptions claims, because they "cannot be accommodated with that compelling governmental interest, and no 'less restrictive means' are available to achieve the governmental interest." *Id.* at 604 (quoting *Thomas*, 450 U.S. at 718).

Notably, it did not matter in *Bob Jones* that very few schools in the nation refused to admit African Americans, or that, in the case of Bob Jones University, presumably few of its students would choose to date persons of another race. The Court thus held, in effect, that the government had a compelling interest in eradicating race discrimination even as to the relatively small number of African American students who would choose to attend the handful of schools that retained discriminatory practices. *See also* Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 Yale L.J. F. (forthcoming March 2016) (discussing *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968)).

The taxation cases are also instructive. In *United States v. Lee*, for example, a member of the Old Order Amish sought an exemption from the requirement to remit Social Security taxes for his employees because he believed it was sinful for those employees to accept Social Security benefits and therefore religiously impermissible for him to contribute to the program. The Court unanimously denied the exemption, explaining that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." 455 U.S. at 260. The Court also emphasized that such exemptions are disfavored because "[g]ranting an exemption from social security taxes to an employer" might "operate[] to impose the employer's religious faith on the employees." *Id*. at 261.

Lee exemplifies another important aspect of the "least restrictive means" test. As Justice Stevens pointed out in his concurring opinion, Lee was merely seeking an exemption for the taxes of fellow members of his religious order, whose religious obligations presumably would have precluded them from collecting Social Security payments from the government. "]I]t would be a relatively simple matter," Justice Stevens explained, for Congress to craft an exemption limited to a discrete religious community with its own welfare system, to be applied with respect to employees who would voluntarily forfeit their right to collect benefits. *Id.* at 262 (Stevens, J., concurring in the judgment). Such a statutory amendment surely was possible—indeed, several years after the Court's decision, Congress enacted precisely such a law. Pub. L. 100-647, tit. VIII, § 8007(a)(1), 102 Stat. 3781 (1988), codified at 26 U.S.C. § 3127 (exempting employers of certain religious sects from making payments respecting any of their employees, also members of the same sect, who filed a parallel application opting out of the right to receive benefits). The Court in *Lee*, however, did not consider the mere possibility of such action to be a constitutionally relevant "less restrictive" means.

That disposition made sense. When conferral of a religious exemption would cause harms to third parties, or to the state fisc, a subsequent legislature could almost always ameliorate such harm by passing a new statute—including, in many cases, an additional appropriation. If such a new law were deemed a "less restrictive" alternative, then the government would always be compelled to afford exemptions that harm third parties, because in theory Congress could

compensate those third parties for their losses by the simple expedient of more taxing and spending.[21] In such cases, the result of granting the religious accommodation would almost invariably produce serious harm to the government's compelling interests. That cannot be what Congress intended RFRA to require. *See infra* at 32-34.

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This half-century of precedents, from *Braunfeld* and *Sherbert* and *Yoder*, through *Jones* and *Lee* and the other cases of the 1980's, right through to recent cases such as *Hobby Lobby* and *Holt*, reflects a unified and longstanding approach. In the context of requests for religious exemptions to valid and generally applicable laws, the Court has appropriately construed and applied the "least restrictive means" component of the religious exemption test pragmatically, with due respect for the government's need to provide for the health and wellbeing of all the people. The test has never been an exercise in hypothetical alternatives, especially if (as in *Lee*) those alternatives would require subsequent legislative action. Nor has the Court applied the test to privilege religiously motivated conduct above the burdens that accommodations can impose on the government and on

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[21] Take, for example, the religious objection to the federal minimum wage at issue in *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985). Congress in theory *could have* passed a law providing supplemental payments to the employees who did not receive the minimum wage from their religiously objecting employers; but that hypothetical possibility had no effect on the Court's resolution of the employer's Free Exercise claims.

third parties. Accordingly, as the Court itself put the point in *Yoder*, the inquiry under the "compelling interest"/"least restrictive means" test of the pre-*Smith* Free Exercise cases—now incorporated into RFRA—is in effect a pragmatic assessment of whether the facially neutral regulation "in its application . . . *unduly* burdens the free exercise of religion." 406 U.S. at 220 (emphasis added); *see also Lee*, 455 U.S. at 259; Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J. L. & RELIG. 139, 151-52 (2009) ("The compelling interest test is best understood as a balancing test with the thumb on the scale in favor of protecting constitutional rights.").

III. The Challenged Accommodation Satisfies RFRA's "Compelling Interest"/"Least Restrictive Means" Test.

The government's brief ably explains why the agencies' accommodation for nonprofit religious organizations satisfies the "least restrictive means" test this Court has applied since 1961. The agencies have already struck the "sensible balance[]" RFRA requires. 42 U.S.C. § 2000bb(a)(5). By offering an accommodation that allows nonprofit religious employers to avoid paying for, administering, or offering reimbursements for the costs of contraception, while also ensuring that women employees and dependents have seamless and cost-free access to the most effective forms of contraception and equal access to health care, the government has reconciled RFRA's two competing imperatives. Critically, this "accommodation may be made to the employers without the imposition of a whole new program or

burden on the government." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).[22]

Petitioners insist that the "least restrictive means" requirement of RFRA should be applied much more stringently. But they rely upon principles this Court has articulated in cases involving the very different context of statutes regulating speech on the basis of content—cases in which the Court has declared such statutes *facially* unconstitutional. As we explained in Part II, those more restrictive principles are inapposite in this very different context, and are inconsistent with this Court's precedents under the Free Exercise Clause and RFRA.

1. Almost all of petitioners' proposed alternatives would require Congress to enact appropriations statutes to ameliorate the harms to governmental interests caused by the requested religious exemptions—for example, a new law allowing employees of objecting employers (and their dependents) to purchase a subsidized, second insurance plan on an insurance exchange. *See* Brief for Petitioners in Nos. 15-35, et al. (*ETBU* Br.) at 73-74. Invoking cases challenging the facial validity of

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[22] As the government notes, U.S. Br. at 12, the agencies have thus been more solicitous of objecting religious organizations than several states have been in implementing analogous, state-law contraception obligations. *See also Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 92-94 (Cal. 2004) (upholding California's law under state constitutional provision requiring application of a "compelling interest"/"least restrictive means" test).

content-discriminatory speech restrictions, *see supra* note 12, petitioners argue that "[t]his Court routinely identifies options that would require congressional action as feasible less restrictive means." *Id.* at 74 (citing *Ashcroft v. ACLU*, 542 U.S. 656, 669 (2004); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 815 (2000); *see also* Brief for Petitioners in Nos. 14-1418, et al. (*Zubik* Br.), at 81.

Inquiring about the prospect of alternative legislation makes perfect sense where the question is whether the legislature was justified in enacting a law that directly regulates speech on the basis of its content. In such cases, the operative question is whether Congress could have addressed its interests by *enacting a different, content-neutral law*. Therefore, when the Court holds that a "neutral" law would have sufficed as a "less restrictive" means of dealing with the problem, the Court also declares that the challenged law is facially invalid, so that the legislature, if it wishes to address the problem, must go back to the drawing board.

In a RFRA case, by contrast, the government has not set out to restrict the exercise of religion. It has, instead, enacted a law that is constitutionally valid on its face, but that might on occasion incidentally impact the religious exercise of some persons. Religious objectors of many kinds might then seek exemptions from such a law, perhaps many years after its enactment. Even if the executive and legislature at that later time share the enacting Congress's views of the government's compelling interests, they will rarely have the incentive or political capital to pass legislation to pay for the costs of specific RFRA exemptions: Other, more pressing legislative

initiatives will almost invariably take precedence. *See* Lederman, *Reconstructing RFRA*, *supra*.

If the mere theoretical possibility of such a newly enacted law sufficed to defeat the government's required showing under RFRA, the government would have lost many pre-*Smith* cases, such as *Lee* (*see supra* at 27-28). Yet the Court never imposed such an obligation, because it would make little sense in this context. Therefore the mere prospect that a future legislature might do so is not a "less restrictive" means that requires the conferral of those exemptions. Indeed, it is implausible to think that when Congress enacted RFRA it anticipated it would be compelled to enact a never-ending series of substitute policies to achieve its important ends every time a RFRA exemption is conferred.

Nor did Congress expect judicially mandated pressure to tap the federal fisc every time an employer refuses on religious grounds to provide required benefits to its employees. It is true, as the Court noted in *Hobby Lobby*, that RFRA and RLUIPA "may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs." 134 S. Ct. at 2781.[23] And, so, for instance, if the Executive branch already has such funds available that it could use for the purpose of ameliorating the harms suffered by others, it might have to use those funds to do so, all else being equal. It is another thing

[23] RLUIPA, for instance, expressly provides that "this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." 42 U.S.C. § 2000cc-3(c).

entirely, however, to suggest that the theoretical prospect of a new appropriations statute is a "less restrictive means" for purposes of the RFRA inquiry. *Accord Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 94 (Cal. 2004).

2. As the government demonstrates, U.S. Br. at 76-85, all of petitioners' proposed alternatives, including those that would require new legislation, would be considerably less effective than the agencies' nonprofit accommodation in furthering the government's compelling interests in reducing unintended pregnancies and ensuring women's equal access to health care.

The *Zubik* petitioners, once again citing an inapposite precedent involving a content-based speech restriction, argue that the government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Zubik* Br. at 70 (quoting *Brown v. Entm't Merchants Ass'*n, 131 S. Ct. 2729, 2741 n.9 (2011). As we have explained however—especially with reference to *Braunfeld* and *Bob Jones*, *see supra* at 17-18, 26-27—in this very different context of religious exemptions, an alternative is not an acceptable "less restrictive" option if it results in meaningful harm to even a few third parties. In part because of serious constitutional concerns and fundamental principles underlying the Religion Clauses, *see supra* at 24, the government has a compelling interest in not requiring even a small number of nonbelievers to bear the costs of others' religious exercise. Thus, as this Court recognized in *Hobby Lobby*, courts applying RFRA "'must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'" 134

S. Ct. at 2781 n.37 (quoting *Cutter*, 544 U.S. at 720); *see also Catholic Charities of Sacramento*, 85 P.3d at 93-94 ("Nor are any less restrictive (or more narrowly tailored) means readily available for achieving the state's interest in eliminating gender discrimination. Any broader exemption increases the number of women affected by discrimination in the provision of health care benefits.").

3. The government demonstrates (U.S. Br. at 74-76) that it has compelling interests in making it as easy as possible for women to use effective contraception by ensuring that they have cost-free and "seamless" access to the full range of contraceptive options; and in guaranteeing that women receive *equal* health coverage appropriate to their medical needs. The petitioners' proposed alternatives, by contrast, would impose significant, and unequal, financial, administrative, and logistical obstacles on many women.

Petitioners—once again invoking a precedent involving a content-based speech restriction—argue that a less restrictive alternative might be one in which the onus is put on private third parties to "take action" to avoid the relevant harms. *See ETBU* Br. at 72; *Zubik* Br. at 73 (both citing *Playboy Entm't Grp.*, 529 U.S. at 824).

As we have explained, however, the Court has never applied the Free Exercise/RFRA version of heightened scrutiny to require the government to resort to options that would impose such burdens on third parties—especially not where, as here, such burdens would be borne only by persons of one sex.

* * * *

RFRA requires reasonable judgments, and the determination of sensible balances between religious concerns and competing governmental and private interests. The accommodation challenged in this case, and cited with approval in *Hobby Lobby*, is such a tailored balancing. The petitioners' view of the "least restrictive means" test, by contrast, would destroy RFRA's carefully calibrated arrangements, and would, in this case, result in foreseeable and substantial harm to tens or hundreds of thousands of women. The Court should reject that view of what RFRA requires.

CONCLUSION

For the foregoing reasons, the decisions below should be affirmed.

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