Nos. 19-15072, 19-15118, 19-15150

In the United States Court of Appeals
for the Ninth Circuit

THE STATE OF CALIFORNIA, *et al.*,
Plaintiffs-Appellees,

v.

ALEX M. AZAR II, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,
Defendants-Appellants,

AND

The LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,
Intervenor-Defendant-Appellant,

AND

MARCH FOR LIFE EDUCATION DEFENSE FUND,
Intervenor-Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of California, No. 17-cv-05783-HSG

BRIEF OF AMICUS CURIAE PROGRAM FOR THE STUDY OF REPRODUCTIVE JUSTICE AT YALE LAW SCHOOL IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

PRISCILLA JOYCE SMITH
YALE LAW SCHOOL
319 Sterling Place
Brooklyn, NY 11238
Priscilla.Smith@yale.edu
Telephone: 718-399-9241
Attorney for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Congressional Records

INTEREST OF AMICUS CURIAE[1]

Amicus is the Program for the Study of Reproductive Justice (PSRJ) at Yale Law School, a national center for academic research and development of new ideas to promote justice with respect to reproductive health issues. Many of the scholars associated with the PSRJ are especially concerned with how restrictions on access to contraception reinforce unconstitutional sex stereotypes in violation of the Fourteenth Amendment.[2]

SUMMARY OF ARGUMENT

It is well-established that Congress has a compelling interest in combatting unconstitutional sex discrimination. Congress ensured access to contraception with no out-of-pocket costs in the Affordable Care Act ("ACA") as part of a broader effort to combat sex discrimination in health care. Eliminating restrictions on access to contraceptives combats the unconstitutional sex role stereotyping that motivated the first government restrictions on contraceptive access in the United States, and that continues to motivate efforts to restrict access today. Therefore, the contraceptive coverage requirement serves Congress's compelling interest in combatting

[1] This brief is submitted under Fed. R. App. P. 29(a) with the consent of all parties. No counsel for a party authored the brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting the brief; and no person other than the amicus curiae or their counsel contributed money intended to fund preparing or submitting the brief.

[2] This brief has been filed on behalf of a Center affiliated with Yale Law School but does not purport to present the school's institutional views, if any.

unconstitutional sex discrimination, satisfying the compelling interest prong of the Religious Freedom Restoration Act (RFRA).

Moreover, the Final Rules violate the Administrative Procedure Act (APA) for two reasons. First, the Agencies[3] do not have the statutory authority to issue the Final Rules because Congress rejected exactly the broad exemption scheme proposed here. Second, the Agencies' refusal to give sufficient consideration to Congressional intent and scientific evidence indicating the importance of contraceptive coverage render its decision arbitrary and capricious under the APA.

ARGUMENT

I. Congress Had a Compelling Interest Under RFRA in Remedying Historical Sex Discrimination Caused by Restrictions on Contraceptive Access.

Congress adopted the Women's Health Amendment ("WHA") to the Affordable Care Act ("ACA") to promote comprehensive access to health care for women as part of a broader effort to promote gender equity. It explicitly designed the broad requirement that insurers cover comprehensive women's preventive care to further its compelling interest in eliminating gender discrimination.[4] Preliminary data indicate that the fully enforced contraceptive mandate has been successful so

[3] "Agencies" refers to the Agencies that issued the Final Rule: the Internal Revenue Service, Department of the Treasury, Department of Labor, and Department of Health and Human Services.

[4] *See infra* Part I.D.

far: it has led to decreased out-of-pocket costs for contraceptives as well as resulting increased usage.[5] The new Rules threaten to undermine this progress and directly contravene Congress's explicit intent to promote women's equality through broad access to preventive care, including contraceptives. The sweeping new exemptions[6] in the Rules reinforce outdated and unconstitutional stereotypes of women's roles in social and economic life that have long motivated restrictions on access to reproductive care for women.

A. Restrictions on Contraceptives Have Been Used Historically to Promote Stereotyped Notions of Sex Roles Based on Gender.

State and federal laws blocking access to contraceptives were adopted to use women's fear of procreation to enforce the view that sex was appropriate only in the context of marriage and for the purpose of procreation.[7] The justifications for these laws and their selective enforcement, as outlined below, demonstrate that politicians and judges viewed contraceptives as a dangerous means of diverting women from their purported natural destiny to become mothers and to control male sexual desire.

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[5] Ashley H. Snyder et al, *The Impact of the Affordable Care Act on Contraceptive Use and Costs among Privately Insured Women*, 28 WOMEN'S HEALTH ISSUES 219 (2018).

[6] The District Court's opinion on this case details the original rules and the changes proposed by the Agencies. *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 798-805 (E.D. Pa. 2019).

[7] *See generally* Linda Gordon, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 7-9, 13-14 (3d ed. 2002); Priscilla J. Smith, *Contraceptive Comstockery: Reasoning from Immorality to Illness in the Twenty-first Century*, 47 CONN. L. REV. 971 (2015).

For millennia, women used various methods to control reproduction free from formal legal barriers. In the ancient world, long before humans understood the most basic facts about the human reproductive process, people used homemade folk remedies to prevent conception, with some success.[8] These remedies included: homemade suppositories to coat the cervix and prevent sperm from passing into the uterus, various spermicidal agents made with acidic liquids like citrus juices or vinegar, rudimentary diaphragms or other devices placed over the cervical opening, various medicines or "potions," douching or other attempts to "wash" sperm out of the vagina after intercourse, rudimentary condoms using animal skins or plants, withdrawal prior to ejaculation, and the "rhythm" method.[9] While these methods improved over millennia, the effectiveness of contraceptives did not significantly improve until the development of rubber condoms and diaphragms in the nineteenth century,[10] the introduction of hormonal contraceptives in the twentieth century,[11] and most recently the invention of both hormonal and non-hormonal long-acting

[8] *See* Gordon, *supra* note 6, at 13 ("Birth control was not invented by scientists or doctors. It is part of folk culture, and women's folklore in particular, in nearly all societies.").
[9] *See id.* at 14, 16, 18–21 (outlining and describing all of the aforementioned pre-modern contraception practices).
[10] *See id.* at 14, 32.
[11] *See also* Lara Marks, SEXUAL CHEMISTRY: A HISTORY OF THE CONTRACEPTIVE PILL 3–4 (2001); Brief for Appellants at 12, *Poe v. Ullman*, 367 U.S. 497 (1961) (No. 60) (citing Alan Guttmacher, et. al., *Contraception Among Two Thousand Private Obstetric Patients*, 140 J. Am. Med. Assoc. 1265, 1267 (1949)).

reversible contraceptives ("LARCs").[12] Despite the condemnation of contraceptives by many, though not all, religious authorities,[13] in post-Revolutionary America birth control techniques were widespread. Their use appears to have increased significantly from the late eighteenth century—when women on average gave birth to eight children—through the start of the twentieth century, when the average married woman gave birth to three children.[14]

While social disapproval drove contraceptive use underground, a legal framework restricting contraceptives was not established in the United States until the Victorian Era with its particularly regressive views of women's roles. In 1872, the Supreme Court upheld a prohibition on women joining the bar in *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872), reasoning that "[t]he constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain

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[12] The effectiveness of modern contraceptives has taken a huge leap forward in the last fifty years, with some methods now approaching 100% effectiveness, even with typical use. *See* Div. of Reprod. Health & Nat'l Ctr. For Chronic Disease Prevention and Health Promotion, *U.S. Medical Eligibility Criteria for Contraceptive Use, 2010*, 59 MORBIDITY AND MORTALITY WEEKLY REPORT, 1, 5 (Jun. 18, 2010), https://www.cdc.gov/mmwr/pdf/rr/rr59e0528.pdf (reporting rates of effectiveness with typical use of certain contraceptives, including 99.2% and 99.8% for the two forms of intra-uterine devices, 99.95% for the implant, 92% for the combined oral contraceptive pills and 92% for the pill (99.78% if use is perfect)).

[13] *See* Gordon, *supra* note 6, at 7, 9, 14 (discussing the condemnation of birth control by Judaism, Christianity, and Islam on the theory that interference with the procreative function of sex was immoral) .

[14] *See id.* at 22–23.

and functions of womanhood." Just one year later, Congress adopted the Comstock Act, named after the well-known "moral crusader" Anthony Comstock,[15] a federal law banning, among other things, the manufacture, sale, advertisement, distribution through the mails, and importation of contraceptives. Because the Comstock Act only pertained to materials sent through mail, the vast majority of states soon enacted their own laws banning contraception.[16]

Although attitudes towards the immorality of contraception began to change in the twentieth century,[17] and the Comstock law itself lost its teeth in 1936,[18] state

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[15] Comstock Act, ch. 258, 17 Stat. 598-99 (1873) (naming the law "An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use").

[16] Carol Flora Brooks, *The Early History of the Anti-Contraceptive Laws in Massachusetts and Connecticut*, 18 AM. Q. 3, 4 (1966) (noting that forty-six states had anti-contraceptive laws and obscenity statutes). *See also* C. Thomas Dienes, LAW POLITICS, AND BIRTH CONTROL 42-47 (1972) (discussing state laws restricting contraception).

[17] *See* Note, *Judicial Regulation of Birth Control Under Obscenity Laws,* 50 YALE L.J. 682, 685-86 n.35 (1941) (describing poll results which indicated public opposition to birth control laws had decreased). In addition, studies confirmed a rise in sexual activity. *See* Gordon, *supra* note 6, at 130–31 (describing a study of college-educated women which found that women born between 1890–1899 had "twice as high a percentage of premarital intercourse as those born before 1890," and the trend continued. Of those born before 1890, 13.5% experienced intercourse before marriage; of those born between 1890–99, the percentage increased to 26%; of those born between 1900–1909, 48.8% had premarital intercourse; and of those born after 1909, 68.3% had intercourse prior to marriage).

[18] *United States v. One Package*, 86 F.2d 737, 739 (2d Cir. 1936) (holding Act no longer applied to the use of contraception "employed by conscientious and competent physicians for the purpose of saving life or promoting the well-being of their patients.").

laws banning contraception enacted during the Comstock era remained in place well into the twentieth century. While these laws applied on their face to both men and women, and were upheld to protect "public morality," courts often explicitly relied on now-outdated stereotypes of men and women's proper sex roles, and specifically the notion that women's proper role was to have sex within marriage, and produce and raise children. Indeed, some courts cited women's fear of childbirth outside of marriage as a useful mechanism for deterring sex. *See, e.g.*, *People v. Byrne*, 163 N.Y.S. 682, 686 (N.Y. 1917).

For example, in New York, a court described contraceptive information pamphlets titled "What every girl should know" as containing information "which not only should not be known by every girl, but which perhaps should not be known by any." *Id.* at 684. The court upheld New York's law as protecting the "public morality," noting that information suggesting that individuals could engage in sexual intercourse "without the fear of resulting pregnancy . . . would unquestionably result in an increase of immorality." *Id*. at 686. Massachusetts similarly upheld a law prohibiting the advertising of contraceptives on "moral grounds," noting that the law's "plain [and legitimate] purpose" was to "protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus to engender in the state and nation a virile and virtuous race of men and women." *Commonwealth v. Allison*, 116 N.E. 265, 266 (Mass.1917). In upholding

these laws, courts endorsed the sex stereotypes, promoted by state legislatures, that viewed the sexuality of women—those who would be subject to pregnancy without contraception—as legitimate only in the context of marriage for the purpose of procreation.

States' selective relaxation of these laws in the decades that followed provide further evidence that they were based on sex role stereotypes. In many jurisdictions, the use of condoms—the only form of contraception controlled by men— became an exception to the ban on contraception, ostensibly to prevent the spread of sexually transmitted diseases. In Massachusetts, for example, the Supreme Judicial Court held that condoms were not covered by the contraception ban because "it does not appear to be any part of the public policy of the Commonwealth, as declared by the Legislature, to permit venereal disease to spread unchecked even among those who indulge in illicit sexual intercourse." *Commonwealth v. Corbett*, 29 N.E.2d 151, 152 (Mass. 1940). The Court recognized that two years earlier it had "refused to read into the statutory prohibition in question any exception permitting the prescription in good faith by physicians, in accordance with generally accepted medical practice." *Id.* In other words, the Court was willing to allow contraceptives for the purposes of preventing venereal disease—which affects men, as well as women—but not to protect women from the risk of life and/or health-endangering pregnancy.

In Connecticut, too, contraceptives became available for prevention of disease instead of conception. *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring). Nevertheless, a Connecticut court refused to recognize an exception from the ban for women with a medical need for contraception, advising women instead to abstain from sex altogether. *Tileston v. Ullman*, 26 A.2d 582, 586 (Conn. 1942). It left to the legislature the question of whether "the frailties of human nature and the uncertainties of human passions render it impracticable . . . that the husband and wife would and should refrain when they both knew that intercourse would very likely result in a pregnancy which might bring about the death of the wife." *Id.* In these ways, courts revealed the sex stereotypes underlying the efforts to block access to contraceptives.

The rationales for state laws and their selective enforcement had a common theme: blocking women's access to contraceptives was viewed as a legitimate endeavor to preserve the traditional conception of American women as chaste and pure who should only engage in sexual activity for the purpose of reproduction. Legislatures, run exclusively by men, viewed women as purer than men, in need of paternalistic protection from contraceptive devices that could tempt them into deviating from their preordained path toward motherhood.[19]

[19] *See* Gordon, *supra* note 7 at 9 ("C]onservatives . . . typically acceded to the notion that women were purer than men and that the only worthy purpose of sexual activity was reproduction.")

B. Greater Access to Contraception Promotes Gender Equity and Combats Unconstitutional Sex Stereotypes.

As state legislative restrictions on contraceptive access loosened, women with the ability to afford contraceptives were able to choose paths other than motherhood and increased their economic earning power. Allowing women to control when and whether they have children has empowered generations of women to advance professionally and obtain greater economic power on par with their male colleagues. Methodologically rigorous studies have found that access to contraceptives is related to increased enrollment in professional programs, which in turn allows women to access professions such as law and medicine in unprecedented numbers. *See generally* Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730 (2002). Recent studies have linked access to contraceptives to higher graduation rates, increased labor participation, and increased wages for women. Adam Sonfield, Kinsey Hasstedt, Megan L. Kavanaugh & Ragnar Anderson, *The Social and Economic Benefits of Women's Ability To Determine Whether and When to Have Children*, 7-14 GUTTMACHER INSTITUTE (March 2019), https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf.

Unfortunately, not all women have been equally able to access contraceptives and the attendant professional and economic benefits. Long-acting reversible contraceptives ("LARCs"), the most effective and reliable form of contraception, cost well over $1,000 for uninsured women. David Eisenberg, Colleeen McNicholas, & Jeffrey Peipert, *Cost as a Barrier to Long-Acting Reversible Contraceptive (LARC) Use in Adolescents*, 52 J. ADOLESCENT HEALTH 59, 60 (2013). Even for insured women, out-of-pocket costs such as deductibles and co-pays directly impact whether women choose LARCs. Aileen M. Gariepy et al., *The Impact of Out-of-Pocket Expense on IUD Utilization Among Women with Private Insurance*, 84 CONTRACEPTION 39 (2011). Because of these high out-of-pocket costs, low-income women and, disproportionately, women of color have lacked equal access to contraception and the gender equity facilitated by women's ability to time and plan their pregnancies. *Hearing Before the Institute of Medicine Committee on Preventive Services for Women* (2011) (written testimony of Dr. Hal C. Lawrence, Vice President of Practical Activities of the American College of Obstetrics and Gynecologists), http://www.nationalacademies.org/hmd/~/media/8BA65BAF76894E9EB8C768C01C84380E.ashx.

C. Congress Adopted the Women's Health Amendment to Promote Gender Equity in Health Care, and thus Women's Equality in Economic and Social Life.

In enacting the Affordable Care Act, Congress explicitly sought to promote gender equity by insuring access to contraception for all women regardless of income. The original bill included a provision prohibiting the practice of insurers charging women higher premiums than men. Additionally, Congress adopted the Women's Health Amendment ("WHA") to build on the ACA's overall objective to promote women's equality. Senator Barbara Mikulski, the sponsor of the WHA, stated that "what the overall bill does is end gender discrimination" in health care. She viewed her amendment as a guarantee that "preventive and screening services are comprehensive and available to women." Senate Democrats, *Women's Preventive Care Addressed in First Democratic Health Amendment*, YouTube (Dec. 1, 2009), https://www.youtube.com/watch?v=at2-QLaLDtc. Senator Kirsten Gillibrand echoed Senator Mikulski's concerns, noting that:

> In America today, too many women are delaying or skipping preventive care because of the costs of copays and limited access. In fact, more than half of women delay or avoid preventive care because of its cost. This fundamental inequity in the current system is dangerous and discriminatory and we must act. The prevention section of the bill before us must be amended so coverage of preventive services takes into account the unique health care needs of women throughout their lifespan.

155 Cong. Rec. S12027 (2009). Senators Gillibrand, Boxer, and Franken explicitly mentioned family planning as a critical component of comprehensive preventive

care that women require, *see* 155 Cong. Rec. S12025, S12027, and S12052 (2009), and Senator Feinstein framed the stakes of the WHA in terms of the historical fight for gender equity, comparing discriminatory lack of health care access to historical bars on the right to vote, inherit property and receive a higher education. 155 Cong. Rec. S12114 (2009).

D. Enactment of the Women's Health Amendment and its Requirement that Contraceptives are Available Without Cost Serves Congress's Compelling Interest in Preventing Discrimination on the Basis of Sex.

As the Supreme Court has held, preventing gender discrimination qualifies as a compelling state interest. *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984). Moreover, laws that enforce sex-role stereotypes, such as these historical restrictions on contraceptive access, unconstitutionally discriminate on the basis of sex. *See United States v. Virginia*, 518 U.S. 515, 519, 533 (1996) (the state "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973). Impermissible stereotypes of women include their "need for special protection," *Orr v. Orr*, 440 U.S. 268, 283 (1979), and that they are "the center of home and family life," *Califano v. Westcott*, 443 U.S. 76, 88-89 (1979). Historically, "mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the

role of primary family caregiver." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

Because, as we show above, limited access to contraceptives undermines gender equity and has historically been based on enforcing gender stereotypes, Congress has a compelling interest in ensuring access to contraception without cost-sharing in order to combat sex discrimination. Consequently, the contraceptive mandate satisfies RFRA. 42 U.S.C. § 2000bb–1(b) (2017) (allowing incidental burdens on religion where federal government action is "in furtherance of a compelling governmental interest" and narrowly tailored to "the least restrictive means of furthering that compelling governmental interest").

For example, in *Roberts v. U.S. Jaycees*, the Court held that the state's compelling interest in eradicating discrimination against women justified the restriction on men's associational freedoms created by a policy that required the Jaycees organization to admit women to their membership. The Court explained "assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests," particularly given the Court's precedent that "discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions

that often bear no relationship to their actual abilities." 468 U.S. 609, 625 (1984).[20] Similarly here, Congress provided comprehensive access to contraceptives to serve its compelling interest in reducing sex discrimination. The pre-existing, limited exemptions ensured that the mandate was tailored as narrowly as possible without undermining Congress' compelling interest, which requires comprehensive coverage.

II. The Agencies' Final Rules Flout Congress's Intent to Combat Sex Discrimination in Violation of the APA.

The Final Rules' broad exemptions from the contraceptive equity provision represent a change in policy by the Agencies. Previously, the Agencies considered protection against sex discrimination a compelling government interest satisfying the requirements of imposing a burden on religious exercise under RFRA.[21] In enacting the new Rules, the Agencies have reversed course, arguing both that the

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[20] *See also Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (holding that the State was justified in enacting protections for persons, regardless of sex, to full and equal privileges in all business establishments because it had a compelling interest in preventing discrimination against women); *Presbytery of N.J. of the Orthodox Presbyterian Church v. Whitman*, 99 F.3d 101 (3d Cir. 1996) (holding that New Jersey had a compelling interest of preventing discrimination when it added sexual orientation to its list of protected classes); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018) (upholding a policy allowing students to use bathrooms consistent with their gender identity on the grounds that the state had a compelling interest in protecting transgender students from discrimination).

[21] Brief for Petitioner at 49, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (No. 13-354) (citing *United States Jaycees* for its establishment that prevention of sex discrimination is a compelling state interest that the agency may advance in that case).

government does not have a compelling governmental interest in combating sex discrimination with the contraceptive coverage requirement, and that broad application of the contraceptive coverage requirement serves *no* compelling state interest at all. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,546 (Nov. 15, 2018).[22] The Final Rules violate the APA both because the Agencies lack authority to create such broad exemptions, and because they have failed to provide adequate reasoning to show that their decision was not arbitrary and capricious. 5 U.S.C. §706 (2)(A) (2017).

A. The Agencies Lack Statutory Authority to Reject Congress's Intent to Combat Sex Discrimination by Broadening Contraceptive Access.

Because Congress already rejected a proposal to broaden the exemption from the contraceptive coverage mandate to include an exemption for "moral objectors," as proposed by the Final Rules, the Agencies lack the statutory authority to adopt these Final Rules. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (courts and agencies are required to carry out the intent of Congress

[22] In the announcement of the Final Rules, the Agencies dismissed the contention that the Rules would disproportionately burden women by increasing the cost of contraception with this statement: "The Departments do not believe that such differences rise to the level of a compelling interest." 83 Fed. Reg. 57,548 (Nov. 15, 2018).

in implementing its law); *id.* (agency interpretations of statutes do not receive deference where Congress has already directly spoken to the issue).

1. The Agencies Cannot Contravene Congress's Intent When Congress Has Considered and Rejected Broad Religious Exemptions Like Those in the Final Rules.

In 2012, Congress rejected the Blunt Amendment, a proposal to create the broad religious and moral exemption to the Women's Health Amendment embodied in the Final Rules. *See* 158 Cong. Rec. S1,173 (daily ed. Mar. 1, 2012). During the debate over the Blunt Amendment, Senators specifically pointed out the damaging effect it would have on women and called for the Senate to reject it to uphold equal access to comprehensive healthcare. For example, Senator Bernie Sanders noted the regressive effects of passing such an amendment: "Members of Congress—mostly men, I should add— are trying to roll back the clock on women's reproductive rights." 158 Cong. Rec. S1,169 (daily ed. Mar. 1, 2012). Senator Frank Lautenberg agreed, specifically tying the proposed Amendment to previous damaging stereotypes about women's lack of autonomy in society. He explained that the amendment would:

> [A]llow a woman's employer to deny coverage for any medical service that they, the employer, have a moral problem with. Imagine that. Your boss is going to decide whether you are acting morally. The Republicans want to take us forward to the Dark Ages again when women were property that they could easily control and even trade if they wanted to. It is appalling that we are having this debate in the 21st century.

158 Cong. Rec. S1,162 (daily ed. Mar. 1, 2012). Senator Patrick Leahy similarly emphasized Congress's intent to combat sex discrimination in health care when it enacted the ACA, and argued that the Blunt Amendment would undermine that effort:

> At the core of the Affordable Care Act was the principle that all Americans, regardless of health history or gender, have the right to access health care services. This amendment turns that belief around . . . .This serves only to put businesses and insurance companies in the driver's seat, allowing them to capriciously deny women coverage of health care services.

158 Cong. Rec. S1,171 (daily ed. Mar. 1, 2012). When it voted against the Blunt Amendment, Congress unambiguously rejected a broad exemption that would undermine its goal to promote gender equity in health care.

The Final Rules undermine the government's compelling interest in combatting discrimination against women in exactly the way that Congress sought to avoid by rejecting the Blunt Amendment. It is "improper to give a reading to [an] Act that Congress considered and rejected." *Pacific Gas & Elec. Co. v. Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 220 (1983); *see also Doe v. Chao*, 540 U.S. 614, 622 (2004) (reversing grant of general damages because the "drafting history showing that Congress cut out the very language in the bill that would have authorized [them] . . ."). Therefore, Congress's rejection of the Blunt Amendment is "the end of the matter," and courts must enforce "the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Otherwise, allowing an

agency with delegated authority to violate the unambiguous will of Congress would violate separation of powers principles. *See Util. Air. Reg. Grp. v. EPA*, 573 U.S. 302, 327 (2014) (allowing an agency to act inconsistently with an "unambiguous statute" violates separation of powers).

2. The Agencies Lack Authority to Decide What RFRA Requires.

In addition, agencies generally do not have the authority to evaluate compliance with RFRA specifically. Courts have previously ruled that the issue of whether RFRA is satisfied by a law "is a legal determination that Congress had not exclusively entrusted to" an agency. *Iglesia Pentecostal Casa De Dios Para Las Naciones, Inc. v. Duke*, 718 F. App'x 646, 653 (10th Cir. 2017) (internal quotation marks omitted). Instead, RFRA assigns to the courts—not agencies with no expertise in this area—the power to decide whether exceptions are required under its test. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006) (holding that "RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress."); *see, e.g.*, *Burwell v. Hobby Lobby Stores, Inc*. 573 U.S. 682, 719-36 (2014). In fact, the Court in *Hobby Lobby* did not defer to the Agencies' interpretation of the ACA in interpreting RFRA. 573 U.S. at 719-36. Moreover, the Supreme Court recognized in *Hobby Lobby* that a blanket religious and moral exemption to the mandate "extend[s] more broadly than the . . . protections of RFRA." *Id.* at 719 n.30. Given that the

Supreme Court has previously ruled that prevention of sex discrimination is a compelling state interest, the Agencies' contrary interpretation is plainly precluded.

B. The Agencies' Rules Are Inconsistent with the Factual Record and Therefore Are Arbitrary and Capricious Under the Administrative Procedure Act.

The Agencies' reasoning for the Final Rules is disconnected from the factual record and offers insufficient explanation for their deviation from their original interpretation. The factual record before the Agencies indicates that Congress believed contraceptive coverage is necessary to remedy sex discrimination and promote gender equity. The Agencies' refusal to give sufficient consideration to Congressional intent and scientific evidence indicating the importance of contraceptive coverage render its decision arbitrary and capricious under the APA.

The APA's substantive requirements command that an administrative rule must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2019)). An agency action is arbitrary and capricious when there is a disconnect between the facts found and the decision made. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*, 463 U.S. 29, 43 (1983). Specifically:

> [A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it

> could not be ascribed to a difference in view or the product of agency expertise.

Id. In this case, the Interim Final Rules and Final Rules indicate that the Agencies deviated from the evidence before it and relied on factors which Congress did not intend for it to consider, including the health risks of oral contraceptives, the possibility that contraceptives *increase* teen pregnancies, and the argument that the exemption will not affect women of childbearing age. Furthermore, the Agencies failed to offer sufficient justification for their deviation from the original interpretation of "eligible organizations" for religious objections and the status of moral objections. These actions are all arbitrary and capricious and therefore violate the APA.

1. The Agencies' Rejection of Evidence Showing the Benefits of Contraceptives Is Arbitrary and Capricious.

Insofar as they reject the causal link between increased access to contraceptives provided by the contraceptive coverage requirement and the reduction of unintended pregnancy, the Agencies' reasoning runs counter to the evidence before them and to Congress's intent. In the Interim Final Rules, the Agencies cite a study proposing that "[p]rograms that increase access to contraception are found to decrease teen pregnancies in the short run but increase teen pregnancies in the long run." Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed.

Reg 47,792, 47,804 (October 6, 2017) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147). But the evidence before the Agencies clearly showed that access to contraceptives does *not* increase teen pregnancies.[23] By relying on the assumption that access to contraception has no impact on unintended pregnancies or that it in fact causes them, the Agencies' decision-making "runs counter to the evidence before the agency" and "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

The Supreme Court has held that in cases where empirical evidence can be readily obtained, it is a crucial factor for judicial review. *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 519 (2009). Furthermore, the Congressional record indicates that when passing this statute Congress expressly understood that contraceptive access reduces unintended pregnancies: "Access to contraception is fundamental, a fundamental right of every adult American, and when we fulfill this right, we are able to accomplish a goal we all share—all of us on both sides of the aisle to reduce the number of unintended pregnancies." 155 Cong. Rec. 176, 12052 (2009). The Agencies' rejection of express Congressional intent emphasizes the arbitrariness and capriciousness of the Agencies' action, since its "reasons and policy choices" deviate

[23] *See, e.g.*, John S. Santelli & Andrea J. Melnikas, *Teen Fertility in Transition: Recent and Historic Trends in the United States*, 31 Ann. Rev. Pub. Health 371 (2010); H. Boonstra, et al., ABORTION IN WOMEN'S LIVES 18, GUTTMACHER INST. (2006).

"from or ignore the ascertainable legislative intent." *See Small Refiner Lead Phase-Down Task Force v. U.S. Envtl. Prot. Agency*, 705 F.2d 506, 520 (D.C. Cir. 1983); *accord Chem. Mfrs. Ass'n v. Envtl. Prot. Agency*, 217 F. 3d 861, 865-67 (D.C. Cir. 2000).

Similarly, the weight the Agencies place on the health risks of contraceptives compared to their health benefits is inconsistent with the factual record. In the Interim Final Rules, the Agencies cited studies finding a link between oral contraceptives and breast cancer. Religious Exemptions and Accommodations, 82 Fed. Reg at 47,804. Despite numerous comments suggesting that this link is not scientifically grounded, the Agencies affirmed their reliance on the study in the Final Rules. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592, 57,610 (January 14, 2019) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147). The Agencies ignore that the health *benefits* of oral contraceptives to women greatly outweigh the health risks; these benefits are not granted sufficient weight in the Agencies' analysis. For example, the same resources cited by the Agencies regarding oral contraceptives causing an increased risk of breast cancer also find a decreased risk of endometrial, ovarian, and colorectal cancers. *See, e.g.*, *Oral Contraceptives and Cancer Risk*, National Cancer Institute (Mar. 21, 2012), https://www.cancer.gov/about-cancer/causes-prevention/risk/hormones/oral-

contraceptives-fact-sheet; L.J Havrilesky et al., *Oral Contraceptive Use for the Primary Prevention of Ovarian Cancer*, Agency for Healthcare Research and Quality, Report No. 13-E002-EF (June 2013). The regulation is therefore arbitrary and capricious because "reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). The Agencies failed to conduct an even-handed analysis and thus violated the standards of the APA.

Additionally, the Agencies' reasoning that the exemption will be inconsequential to nearly all women of childbearing age is inconsistent with the facts before it. In the Final Rules, the Agencies state: "the Departments estimate that nearly all women of childbearing age in the country will be unaffected by these exemptions," and that "it is not clear that these expanded exemptions will significantly burden women most at risk of unintended pregnancies." 83 Fed. Reg. 57,608. The Agencies state that women will be eligible to receive contraceptive coverage through other means. In fact, the studies they relied on in promulgating these Rules demonstrate significant gaps in coverage that render this assumption regarding the limited impact of the Rules inconsistent with the factual record before the Agencies.[24]

[24] *See, e.g.*, Refusing to Provide Health Services, The Guttmacher Institute, https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services (last visited Mar. 23, 2019); Alison Cuellar, Adelle Simmons & Kenneth Finegold,

Furthermore, this assumption is inconsistent with Congress's factual findings and stated intent. While the Agencies suggest women will receive contraceptive coverage through other means, the statute was explicitly created to *fill* an existing gap. This is evident in the Congressional record, wherein Senator Gillibrand stated that women lack preventative and contraceptive care "because of the costs of copays and limited access. In fact, more than half of women delay or avoid preventive care because of its cost," 155 Cong, Rec. S11987 (Nov. 30, 2009), and Senator Mikulski stated that "[w]omen are often faced with the punitive practices of insurance companies," *Women's Preventive Care Addressed in First Democratic Health Amendment*, YouTube (Dec. 1, 2009), https://www.youtube.com/watch?v=at2-QLaLDtc. Once again, in relying on this assumption the Agencies' actions are arbitrary and capricious because they are contrary to the factual record before the Agencies and deviate from the factual assessments made by Congress.

2. The Agencies Acted Arbitrarily and Capriciously in Failing to Justify Their Deviation from the Original Rules.

Finally, the Agencies' actions are also arbitrary and capricious because the Agencies have not offered sufficient justification for their deviation from their original interpretation of the Rules. Congress did not itself enumerate the

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The Affordable Care Act: Promoting Better Health for Women, Off. of the Assistant Secretary for Planning and Evaluation, Dep't of Health & Hum. Servs. (June 14, 2016).

"preventative care" mandated by the Women's Health Amendment. Instead, in 2011, HRSA commissioned the Institute of Medicine to provide recommendations, which it then adopted. These recommendations interpret "preventative care" to include all FDA-approved contraceptive methods. *See* HRSA, Women's Preventive Services Guidelines, https://www.hrsa.gov/womens-guidelines/index.html. In 2013, the Agencies issued a Rule providing accommodations to those with religious objections to contraception. *See generally Coverage of Certain Preventive Services Under the Affordable Care Act*, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013). This Rule presented four criteria organizations had to meet in order to qualify for the accommodation. And, the accommodation ensured that women would nonetheless receive seamless coverage for contraception.

In 2017, the Rules at issue significantly expanded eligibility for accommodations and exemptions by introducing protections for moral convictions; offering accommodations to for-profit entities, whether closely held or publicly traded; removing the self-certification requirement; and eliminating the notice requirement. The new Rules also allowed any covered entity to select an exemption, which would prevent seamless coverage for women, unlike the accommodation available under the old Rule. When changing a rule, an agency must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *F.C.C. v. Fox Television Stations, Inc.*, 556

U.S. 502, 516 (2009). Here, the Agencies failed to offer sufficient justification for the changes and therefore acted arbitrarily and capriciously. *See, e.g.*, *ANR Pipeline Co. v. F.E.R.C.*, 71 F.3d 897, 901 (D.C. Cir. 1995); *Wis. Valley Improvement v. F.E.R.C.*, 236 F.3d 738, 748 (D.C. Cir. 2001). In the Interim Final Rules, the Agencies stated:

> Our review is sufficient to lead us to conclude that significantly more uncertainty and ambiguity exists in the record than the Departments previously acknowledged when we declined to extend the exemption to certain objecting organizations and individuals as set forth herein, and that no compelling interest exists to counsel against us extending the exemption.

82 Fed. Reg. 47,805. However, agencies must justify their decisions with evidence beyond a "conclusory statement." *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993). The majority of the studies cited in the Interim Final Rules were available when the more narrowly-tailored accommodations were originally put forth in 2011. The Agencies' assessment that there is "significantly more uncertainty"—relying on studies that were available at the time the previous Rule was adopted— is conclusory and therefore an insufficient explanation for this drastic policy change.

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully requests that this Court affirm the decision below.

/S/ Priscilla J. Smith
PRISCILLA JOYCE SMITH
YALE LAW SCHOOL
319 Sterling Place
Brooklyn, NY 11238
Priscilla.Smith@yale.edu
718-399-9241
Attorney for Amicus Curiae

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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