No. 19-10754

In the United States Court of Appeals for the Fifth Circuit

RICHARD W. DEOTTE, on behalf of himself and others similarly situated; YVETTE DEOTTE; JOHN KELLEY; ALISON KELLEY; HOTZE HEALTH & WELLNESS CENTER; BRAIDWOOD MANAGEMENT, INCORPORATED, on behalf of itself and others similarly situated,

Plaintiffs – Appellees,

v.

STATE OF NEVADA,

Movant - Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
No. 4:18-CV-825-O

BRIEF OF AMICUS CURIAE INFORMATION SOCIETY PROJECT AT YALE LAW SCHOOL IN SUPPORT OF MOVANT - APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Case No. 19-10754 – *DeOtte, et al. v. Azar, et al.*

The undersigned counsel of record certifies that the following listed private (non-governmental) persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Named Plaintiffs and members of their nationwide class have a financial interest in the outcome of the litigation. In addition, employees of the nationwide class religious employers have a financial interest in the outcome of the litigation.

Law firms and/or counsel in the case are:

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2. Charles William Fillmore, for Plaintiffs-Appellees;
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6. Elizabeth N. Dewar, Counsel for Amici 21 States and the District of Columbia; and

7. Priscilla J. Smith, Counsel for Amicus Information Society Project at Yale Law School.

Amicus Curiae Information Society Project at Yale Law School has no parent corporation and no publicly owned corporation owns 10% or more of its stock.

DATED: December 24, 2019

/s/ Priscilla J. Smith
Priscilla J. Smith
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INTEREST OF AMICUS CURIAE[1]

Amicus Information Society Project (ISP) at Yale Law School,[2] is an intellectual center exploring the implications of new technologies for law and society. The ISP focuses on a wide range of issues such as the intersections between the regulation and dissemination of information, health policy, and privacy concerns, and the connections between First Amendment, Equal Protection, equality principles, and access to reproductive health care. Many of the scholars associated with the ISP have special expertise in First, Fourth, and Fourteenth Amendment jurisprudence, and share an interest in ensuring that the legality of regulations concerning access to reproductive health care is determined in accordance with settled Constitutional law.[3]

SUMMARY OF ARGUMENT

First, the district court "assume[d]—without finding—a compelling governmental interest in ensuring the availability of free contraception," *DeOtte v. Azar*, 393 F. Supp.3d 490, 503 (N.D. Tex. 2019) but there can be no doubt that the

[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 represent the school's institutional views, if any.

[3] 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.

contraceptive mandate satisfies the compelling interest prong of the Religious Freedom Restoration Act (RFRA). 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 governmental restrictions on contraceptive access in the United States, and that continues to motivate efforts to restrict access today. The governmental interest in combatting sex discrimination is compelling.

Second, the district court improperly relies in part on a new Rule interpreting the contraceptive mandate to require broad exemptions. That Rule violates the APA because, *inter alia*, the Agencies[4] did not have the statutory authority to issue the Rule. *See, e.g., Pennsylvania v. Trump*, 930 F.3d 543, 571 (3d Cir. 2019). Agencies may not adopt a reading of a statute that Congress explicitly considered and rejected, as they did in adopting the broad exemption scheme already rejected by Congress. *See Pacific Gas & Elec. Co. v. Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 220 (1983) (it is "improper to give a reading to [an] Act that Congress considered and rejected.").

[4] "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.

ARGUMENT

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

Restrictions on access to contraception for women have been used since the mid-1800s to entrench stereotypes of what women *should* be and undermine efforts to achieve women's equal citizenship status. 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 and further its compelling interest in eliminating gender discrimination.[5] Preliminary data indicate that the fully enforced contraceptive mandate has been successful so far. It has led to decreased out-of-pocket costs for contraceptives as well as resulting increased usage.[6] In turn, increased use of contraception results in a lower rate of unintended pregnancies; fewer unintended pregnancies, approximately half of which result in abortion, translates into fewer abortions.[7] Enjoining enforcement of the mandate will undermine this progress

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

[6] 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).

[7] M.A. Biggs, et al., *Did Increasing Use of Highly Effective Contraception Contribute to Declining Abortions in Iowa?*, 91 CONTRACEPTION 167 (2015) (finding a decline in abortion followed increases in use of long-acting reversible contraception ("LARCs") in Iowa); Jeffrey F. Peipert, et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120 OBSTETRICS &

and directly contravene Congress's explicit intent to promote women's equality through broad access to preventive care, including contraceptives.[8]

A. Restrictions on Contraceptives Have Been Used Historically to Entrench 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.[9] 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

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GYNECOLOGY 1291 (2012) (finding that the teenage pregnancy rate among a cohort of adolescents given counseling on all reversible contraception with an emphasis on LARC methods was 6.3 per 1000, compared to that national average of 34.1 per 1000); Sue Ricketts, et al., *Game Change in Colorado: Widespread Use of Long-Acting Reversible Contraceptives and Rapid Decline in Births Among Young, Low-Income Women*, 46 PERSPS. ON SEXUAL & REPROD. HEALTH 125 (2014) (finding that an increase in provision of LARCs to women in Colorado as part of the Colorado Family Planning Initiative led to a 24% decline in the proportion of births that were high-risk between 2009 and 2011 and that abortion rates fell 34% and 18%, respectively, among women aged 15–19 and 20–24). *See also* Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2014*, 49 PERSPS. ON SEXUAL & REPROD. HEALTH 3 (2017) (drops in birth rates are better explained by increased contraception's facilitation of lower rates of unplanned pregnancy).

[8] *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 798-805 (E.D. Pa. 2019) (issuing nationwide injunction enjoining enforcement of the 2018 Final Rules allowing employers to opt out of providing no-cost contraceptive coverage under the Patient Protection and Affordable Care Act (ACA), and detailing the original Rules and the Agencies' 2018 Rules), *aff'd,* 930 F.3d 543 (3d Cir. 2019).

[9] *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).

women from their purported natural destiny to become mothers and to control male sexual desire.

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.[10] 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.[11] 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,[12] the introduction of hormonal

[10] *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.").
[11] *See id.* at 14, 16, 18–21 (outlining and describing all of the aforementioned pre-modern contraception practices).
[12] *See id.* at 14, 32.

contraceptives in the twentieth century,[13] and most recently the invention of both hormonal and non-hormonal long-acting reversible contraceptives ("LARCs").[14] Despite the condemnation of contraceptives by many, though not all, religious authorities,[15] 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.[16]

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,

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[13] *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)).

[14] 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)).

[15] *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) .

[16] *See id.* at 22–23.

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 and functions of womanhood." Just one year later, Congress adopted the Comstock Act, named after the well-known "moral crusader" Anthony Comstock,[17] 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.[18]

Although attitudes towards the immorality of contraception began to change in the twentieth century,[19] and the Comstock law itself lost its teeth in 1936,[20] state

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[17] 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").

[18] 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).

[19] *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

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

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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).

[20] *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.").

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.[21]

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*

[21] *See* Gordon, *supra* note 9 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.")

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 Be Available Without Cost Serves Congress's Compelling Interest in Preventing Discrimination on the Basis of Sex.

The Supreme Court has recognized that the interest in eliminating discrimination against women is compelling, indeed sufficiently compelling to justify incursions on rights to expressive association. *See Bd. of Dirs. Of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 549 (1987) ; *Roberts v. United States Jaycees*, 468 U.S. 609, 625-26 (1984). In *Roberts v. U.S. Jaycees*, for example, 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." *Id.* at 625 (1984).[22] 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.

Moreover, since the 1970s, the Court has recognized that government policies that enforce stereotypes about women violate the equal protection clause, as much as laws that discriminate on their face or with invidious purpose.[23] As Chief Justice Rehnquist held in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), laws and policies that use biological differences as an excuse to impose sex-based stereotypes, contravene the equal protection guarantee. *Hibbs*

[22] *See also Bd. of Dirs. of Rotary Int'l*, 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).

[23] *Orr v. Orr*, 440 U.S. 268, 279 (1979) ("'No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.'" (quoting *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975)); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977) (striking down a gender-based Social Security classification that rested on "archaic and overbroad generalizations" "such as assumptions as to [women's] dependency").

explained that regulations of pregnancy that enforce sex-role assumptions about women's role as mothers are a paradigmatic example of such unlawful sex-stereotyping.[24] *Id.* at 724-25, 731, 736.[25] *See also United States v. Virginia,* 518 U.S. 515, 533 & 542 n.12 (1996) (Physical differences between men and women "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women").

Because 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. *Priests for Life v. U.S. Dept. of Health and Human Services*, 772 F.3d 229, 263 (D.C. 2014) ("the government has overlapping and mutually reinforcing compelling interests in promoting public health and gender equality."). *See also Burwell v. Hobby Lobby Stores, Inc*. 573 U.S. 682, 719-36 (2014) ("assum[ing] without deciding, that the governmental interest in "guaranteeing cost-free access" to contraception was "compelling."). As then-Judge Kavanaugh wrote:

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[24] *See generally*, Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83 (2010).

[25] *See also United Auto Workers v. Johnson Controls*, 499 U.S. 187, 211 (1991) ("It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role.").

> Justice Kennedy strongly suggested in his *Hobby Lobby* concurring opinion—which appears to be controlling de facto if not also de jure on this particular issue—that the Government generally has a compelling interest in facilitating access to contraception for women employees.

Pries*ts for Life v. U.S. Dep't of Health & Human Servs*, 808 F.3d 1, 22 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of *reh'g en banc*) (citing *Hobby Lobby,* 573 U.S. at 735-36 (Kennedy, J., concurring); *see also id.* at 725-27 (majority opinion); *id.* at 760-763 (Ginsburg, J., dissenting)). Specifically, then-Judge Kavanaugh recognized that the Government had a compelling interest in facilitating access to contraception to, *inter alia,* advance women's equality interests:

> It is not difficult to comprehend why a majority of the Justices in *Hobby Lobby* (Justice Kennedy plus the four dissenters) would suggest that the Government has a compelling interest in facilitating women's access to contraception…It is commonly accepted that reducing the number of unintended pregnancies would further women's health, *advance women's personal and professional opportunities*, reduce the number of abortions, and *help break a cycle of poverty that persists when women who cannot afford or obtain contraception become pregnant unintentionally at a young age*.

808 F.3d at 22-23 (emphasis added). Consequently, for this reason and others, the contraceptive mandate satisfies the compelling interest prong of RFRA's test. 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").

II. The District Court's Reliance on the Agencies' New Rule is Improper Because the Agencies Lack the Authority to Adopt the Rule.

The district court relies in part on a new Rule issued by the Government granting an exemption from the contraceptive mandate to anyone claiming any religious or "moral" objection. *DeOtte v. Azar*, 393 F. Supp.3d 490, 503 (N.D. Tex. 2019) (citing 83 Fed. Reg. at 57,544). But this reliance is misplaced because the Rule violates the APA, 5 U.S.C. §706 (2)(A) (2017) for at least the following two reasons.

First, the Agencies lack statutory authority to issue the Rule. In 2012, Congress rejected the Blunt Amendment, a proposal to create the very same broad religious and moral exemption to the Women's Health Amendment embodied in the Final Rule. *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.

But courts and agencies are required to carry out the intent of Congress. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). They may not adopt a reading of a statute that "Congress considered and rejected," as the Agencies did here. *Pacific Gas*, 461 U.S. at 220; *see also Chevron*, 467 U.S.

at 842 (agency interpretations of statutes do not receive deference where Congress has already directly spoken to the issue); *Doe v. Chao*, 540 U.S. 614, 622 (2004) (reversing grant of general damages because the "drafting history show[ed] that Congress cut out the very language in the bill that would have authorized [them] . . ."). 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).

Congress's rejection of the Blunt Amendment is therefore "the end of the matter. *Chevron*, 467 U.S. at 842-43. *See also Pennsylvania*, 930 F.3d at 571 (enjoining enforcement of the Act because "]b]etween the substantially analogous exemption Congress rejected, and the one it decided to keep, Congress demonstrated that exempting specific actors from the ACA's mandatory requirements is its job, not the Agencies.)." The Rule is invalid.

Second, the Rule is also invalid because the Agencies improperly relied on their own interpretation of what exemptions RFRA requires. 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) ("RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test

set forth by Congress."). In fact, the Court has already declined to defer to Agency interpretation of RFRA as applied to the contraceptive mandate in *Burwell v. Hobby Lobby,* 573 U.S. 682 (2014). Instead, the Court conducted its own evaluation, recognizing that a blanket religious and moral exemption to the mandate "extend[s] more broadly than the . . . protections of RFRA." *Id.* at 719 n.30.

CONCLUSION

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

December 24, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation and typeface requirements of Fed. R. App. P. 32, because it contains 5,207 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(f), and has been prepared in a proportionally spaced typeface using Times New Roman 14-point font in Microsoft Word for Mac Version 16.23.

DATED: December 24, 2019

/s/ Priscilla J. Smith
Priscilla J. Smith

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on December 24, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/S/ Priscilla Joyce Smith