Nos. 19-431, 19-454

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME, *Petitioner*,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*, *Respondents.*

DONALD J. TRUMP, *Petitioner*,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*, *Respondents.*

On Writs of Certiorari to the U.S. Court of Appeals for the Third Circuit

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus curiae addresses the following question only:

Whether the Affordable Care Act, 42 U.S.C. § 18001 *et seq.*, and the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, authorized federal agencies to expand the conscience exemption to the "Contraceptive Mandate."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

INTERESTS OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a nonprofit, non-partisan civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, administrative agencies, the States, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern. NCLA is particularly disturbed that the decision below concluded that federal agencies are not empowered to expand religious exemptions from the

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[1] Pursuant to Supreme Court Rule 37.6, NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing.

Contraceptive Mandate even after this Court held it to violate the Religious Freedom Restoration Act (RFRA), and even though those agencies were purportedly authorized to impose the mandate.

In adopting the Affordable Care Act (ACA), Pub. L. 111-148 (2010), Congress improperly delegated to the administrative state the power to write laws governing the conduct of health insurance providers. Administrative agencies responded to that delegation by adopting a contraceptive-coverage requirement Congress itself never enacted. Later concluding that the requirement substantially burdened the exercise of religion by some employers, those agencies expanded a religious exemption from the requirement. While the agencies lack constitutional authority to exercise legislative power vested in Congress, NCLA urges reversal on the theory that administrative relief is at least as constitutionally appropriate as administrative constraint; they travel together.

NCLA is also concerned that administrative agencies—because they focus their attention on a narrow range of delegated tasks and are not directly answerable to voters—are far more likely than Congress itself to systematically undervalue the constitutionally protected religious liberties of Americans. NCLA asks the Court to correct for that undervaluation when it addresses administrative-law issues.

STATEMENT OF THE CASE

The ACA broadly delegates to the Executive Branch authority to determine health insurance coverage that must be offered by group health plans and

health-insurance issuers. In particular, the ACA authorizes the Health Resources and Services Administration (HRSA), an agency of the U.S. Department of Health and Human Services (HHS), to specify coverage requirements, "with respect to women, such additional preventive care and screenings … as provided for in comprehensive guidelines supported by" HRSA. 42 U.S.C. § 300gg-13(a)(4).

Acting under that delegated authority, HRSA issued guidelines in 2011 that included within the required coverage all Food and Drug Administration approved contraceptive methods (the "Contraceptive Mandate"). HHS, in conjunction with the Departments of Labor and Treasury (collectively, "HHS"), simultaneously issued a rule directing HRSA to recognize an exemption from the Contraceptive Mandate for a narrow subset of religious employers.[2]

Other employers subject to the mandate objected to their exclusion from the exemption, asserting that the mandate imposed unwarranted burdens on the exercise of their religious beliefs. In response to those concerns and to the Court's decision in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), HHS broadened exemptions from the Contraceptive Mandate to "ensure that proper respect is afforded to sincerely held religious objections in rules governing this area of health

[2] HHS issued the exemption as an interim final rule (IFR) on August 3, 2011. The following year, it issued the exemption in final form "without change." 77 Fed. Reg. 8,725 (Feb. 12, 2012). In response to federal-court challenges to the Contraceptive Mandate and this Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), HHS issued final regulations modifying the scope of the exemption in 2013 and again in 2015.

insurance and coverage, with minimal impact on HRSA's decision otherwise to require contraceptive coverage." 83 Fed. Reg. 57,536, 57,537 (Nov. 15, 2018). After providing an opportunity for notice and comment, HHS issued final regulations expanding the religious exemption (the "Final Rule"), to take effect in January 2019. *See* 45 C.F.R. § 147.132.

Pennsylvania and New Jersey filed a federal-court challenge to the Final Rule, asserting *inter alia* that it violated the ACA by failing to mandate coverage of the "additional preventive care" specified by § 300gg-13(a)(4). The district court agreed and granted a nationwide preliminary injunction against the Final Rule on the day it was to take effect. Pet. App. 126a-137a.[3]

The Third Circuit affirmed. Pet. App. 1a-52a. It held that the ACA authorizes neither the Final Rule nor a related rule granting an exemption to employers with "moral" objections to the Contraceptive Mandate, and "[t]hus, they were enacted 'in excess of statutory jurisdiction, authority or limitations, or short of statutory right,' making them 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* at 38a (quoting 5 U.S.C. § 706(2)(A), (C)).

The appeals court held that the statutory authority to issue "comprehensive guidelines" (set out in 42 U.S.C. § 300gg-13(a)(4)) "concerns the type of services that are to be provided and does not provide authority to undermine Congress's directive concerning

[3] "Pet. App." refers to the Petition Appendix in No. 19-431.

who must provide coverage for these services." *Id.* at 39a. It held that by using the word "comprehensive" to describe the mandated guidelines, the ACA indicated that the guidelines should cover "health care services … for the identified group[ ]" [*i.e.*, women] without exempting specified employers from the mandate. *Id.* at 41a-42a.

The court also held that RFRA neither required nor permitted the Final Rule's expanded exemption for religious objectors. Pet. App. 43a-48a. Although RFRA imposes strict limits on the federal government's authority to "substantially burden a person's exercise of religion," 42 U.S.C. § 2000bb-1(a), the court held that the "Accommodation" mechanism adopted by HHS in its 2013 and 2015 final rules eliminated any substantial burden on an employer's exercise of religion. *Id.* at 46a.

SUMMARY OF ARGUMENT

Adoption of the Contraceptive Mandate—based on the authority delegated to HHS by 42 U.S.C. § 300gg-13(a)(4)—raises serious constitutional concerns. The statute does not set forth any congressional policy regarding what "additional" goods and services group health plans should be required to cover. It does not even supply an "intelligible principle" to guide HHS in its lawmaking effort. Instead, § 300gg-13(a)(4) simply states that the mandatory-coverage list is to be supplemented by including, "with respect to women, such additional preventive care and screenings" as are included in "comprehensive

guidelines" to be issued by HHS (through its subordinate agency, HRSA). Any such delegation of legislative power to an administrative agency—especially without an intelligible principle—is in derogation of the freedom of Americans to protect their religious interests via Congress.

No party to these proceedings has raised a "nondelegation doctrine" challenge to § 300gg-13(a)(4) or to the implementing regulations issued by HHS between 2011 and 2018. NCLA nonetheless urges the Court to examine these cases through the lens of that constitutional doctrine and, more substantively, through the words of the Constitution, which speaks not of delegation but of "vest[ing]." The Constitution vests all legislative powers in Congress, thereby barring Congress from divesting itself of such powers.

When, as here, a statute divests legislative authority to an administrative agency and fails to articulate constraints on that authority, the agency should never be faulted for deciding to reduce the scope of its regulatory reach. Applying that doctrine here means upholding the Final Rule, which expands the existing religious exemption and thereby decreases the Contraceptive Mandate's impact on the regulated community. Interpreting the ACA instead to bar HHS and other federal agencies from providing relief from their own rules deprives Americans of a key benefit of vesting legislative powers exclusively in Congress.

Reviewing courts have only one alternative: seek to discern in the ACA a clear directive regarding whether to adopt a Contraceptive Mandate and

whether exemptions from the mandate are authorized. The Third Circuit attempted that approach but failed badly. While individual Members of Congress may have supported adoption of a Contraceptive Mandate when they voted for the ACA, nothing in the language or structure of the statute indicates whether that was the view of a congressional majority. And while the Third Circuit faulted HHS for expanding the religious exemption, it never explained why that expansion violated the ACA if, as the court conceded, HHS was statutorily authorized to create more limited religious exemptions in 2011 and 2013.

Statutes should not be interpreted in derogation of the Constitution. Where a statute evidently contradicts the Constitution, it should be held unlawful and void. But where a statute is genuinely ambiguous, in a way that cannot be resolved by conventional techniques of constitutional interpretation, it should be interpreted consistently with the Constitution rather than in derogation of it.

Reversal of the decision below will also provide needed protection for rights guaranteed by the First Amendment's Free Exercise Clause. As the Court has recognized, Congress's institutional structure may render it receptive to concerns regarding the free exercise of religion. *See Employment Division v. Smith*, 494 U.S. 872, 890 (1990) (noting that legislatures are sometimes persuaded by constituents to adopt free-exercise protections). But administrative agencies do not operate under the same political constraints as legislatures. Their proceedings are rarely accessible

to citizens who oppose adoption of rules that, although neutral on their face, impose substantial free-exercise burdens.

Moreover, federal administrators tend to focus on accomplishing what they view as their narrow statutory mission in the most rational and efficient manner, and they rarely view accommodating the interests of religious minorities as part of that mission. Congress sought to counteract courts' and administrators' tendency to ignore religious concerns by adopting RFRA. But both Respondents and the Third Circuit argue that RFRA does not permit HHS to adopt any religious accommodation that is not absolutely required by the statute. That argument is not a plausible interpretation of RFRA, which Congress adopted in response to *Smith*'s invitation to the political branches to address the concerns of religious minorities. Granting agencies leeway, as here, to adopt measures encouraged (whether or not required) by RFRA will ensure that agencies will not shy away from providing the sorts of religious accommodations that they are predisposed to ignore.

ARGUMENT

I. INTERPRETING THE ACA TO LIMIT AGENCIES' AUTHORITY TO EXPAND RELIEF FROM THE CONTRACEPTIVE MANDATE IS IN DEROGATION OF THE CONSTITUTION'S VESTING OF ALL LEGISLATIVE POWERS IN CONGRESS

The ACA is silent regarding what (if any) specific "additional preventive care" should be mandated

in the guidelines the statute directed HHS/HRSA to issue. That delegation of legislative authority to a federal agency runs headlong into the Constitution's promise that only the people's elected representatives may adopt new federal laws restricting individual liberty. *See* U.S. Const., Art I, § 1 ("*All* legislative Powers herein granted shall be vested in a Congress of the United States.") (emphasis added). Even though no party to these proceedings has raised this nondelegation issue, it should inform the Court's resolution of the case. When asked to choose between two agency actions, both of which are arguably unconstitutional exercises of legislative authority, courts should uphold the action that imposes the least restraint on individual liberty. In this instance, that means upholding the Final Rule, which expands existing religious exemptions and thereby decreases the Contraceptive Mandate's impact on the regulated community.

A. The ACA Includes No Intelligible Principle to Guide the Agencies in Determining What "Additional Preventive Care" They Should Mandate

Section 1001(5) of the ACA requires many group health plans and health-insurance issuers to provide coverage for specified preventive health services without "impos[ing] any cost sharing requirements." 42 U.S.C. § 300gg-13(a).[4] The ACA also directed HRSA to prepare "comprehensive guidelines"

[4] Required services include: (1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force; (2) immunizations that have in effect a recommendation from

listing "with respect to women, additional preventive care and screenings" that group health plans and health insurance insurers would be required to cover without any cost-sharing requirements. 42 U.S.C. § 300gg-13(a)(4).

Acting under that delegated legislative authority, HHS/HRSA in 2011 issued guidelines (posted on HRSA's website, without advance opportunity for comment) specifying additional required insurance coverage, including mandated coverage for all FDA-approved contraceptive methods. HHS simultaneously issued a rule directing HRSA to recognize an exemption from the Contraceptive Mandate for a narrow subset of religious employers. The Final Rule, issued in 2018, left the Contraceptive Mandate in place but somewhat expanded the religious exemption. None of the administrative determinations made between 2011 and 2018 was based on any congressionally enacted policy directing adoption of a Contraceptive Mandate. HHS/HRSA acted based on its independent determination that a Contraceptive Mandate represented sound public policy. Indeed, the Final

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the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and (3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings supported by the Health Resources and Services Administration. 42 U.S.C. § 300gg-13(a)(1)–(3). These specified services were all readily identifiable at the time of enactment; *e.g.,* the referenced HRSA guidelines covering infants, children, and adolescents were issued before enactment of the ACA.

Rule expressly stated that HHS adopted the Contraceptive Mandate in 2011 as an exercise of "discretion." 83 Fed. Reg. at 57,539.

Congress's grant of unbridled authority to HHS/HRSA to mandate coverage of "additional preventive care and screenings" raises serious constitutional concerns under the nondelegation doctrine. This Court has held repeatedly that Article I's grant of "[a]ll legislative Powers" to Congress means that Congress may not transfer to others "powers which are strictly and exclusively legislative." *Wayman v. Southard,* 23 U.S. (10 Wheat.) 1, 42-43 (1825). Writing for the Court, Chief Justice John Marshall explained that while Congress may delegate to another branch of government the task of "fill[ing] up the details" of legislation, Congress itself must perform the task of announcing overriding general policies. *Id.* at 31, 43.[5]

> As Justice Gorsuch has explained:
>
> > If Congress could pass off its legislative power to the executive branch, the "[v]esting [c]lauses, and indeed the entire structure of the Constitution," would "make no sense." Without the involvement of representatives from across the

[5] John Locke—whose views on separation of powers were highly influential among the Founding Generation—wrote, "The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others." John Locke, *The Second Treatise of Civil Government and Letter Concerning Toleration* § 141, p. 71 (1947).

> country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President.

Gundy v. United States, 139 S. Ct. 2116, 2134-35 (2019) (Gorsuch, J., dissenting) (quoting Gary Lawson, *Delegation and the Original Meaning,* 88 Va. L. Rev. 327, 340 (2002)).

The Court has upheld congressional delegation of fact-finding responsibilities, so long as Congress makes clear in advance the policy determinations that will flow from specific factual findings. *See, e.g., Miller v. Mayor of New York*, 109 U.S. 385, 393 (1883) (upholding legislation making construction of the Brooklyn Bridge dependent on a finding by the Secretary of War that the bridge would not interfere with East River navigation). But where, as here, Congress has delegated to others authority to adopt binding laws without articulating any policies to guide the exercise of that authority—nor even establishing an intelligible principle underlying its delegation—the Court has struck down the delegation as a violation of Article I, § 1 of the Constitution. *See, e.g., Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935).

The Third Circuit sought to read into the ACA the requisite intelligible principle; it held that the Final Rule violated 42 U.S.C. § 300gg-13(a)(4) by expanding the religious exemption and thereby reducing the scope of the Contraceptive Mandate. Pet. App. 39a-43a. Noting that the ACA directs HRSA to adopt "comprehensive guidelines," the court interpreted the

word "comprehensive" as a prohibition against exempting any employers from covering "additional preventive care or services" included within the guidelines.

The appeals court's interpretation is misguided. The word "comprehensive" implies a broad scope, not all-encompassing coverage. The Third Circuit does not suggest that Congress required HRSA to include within the guidelines every type of preventive care. And there is no greater reason to conclude—based on the word "comprehensive"—that Congress intended any preventive care included in the guidelines to be applicable to 100% of employers.[6]

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[6] In a case challenging the constitutionality of Congress's delegation of legislative authority to the Attorney General, Justice Gorsuch rejected a similar effort to attach great significance to the word "comprehensive" in the delegating statute:

> Even if we were to pretend that § 20901 amounted to a directive *telling* the Attorney General to establish a "comprehensive national system" for pre-Act offenders, the plurality reads too much into the word "comprehensive." Comprehensive coverage does not mean coverage to the maximum extent feasible. "Comprehensive" means "having the attribute of comprising or including much; of large content or scope," "[i]nclusive of; embracing," or "[c]ontaining much in small compass; compendious." So, for example, a criminal justice system may be called "comprehensive" even though many crimes go unpursued.

Gundy, 139 S. Ct. at 2146 (Gorsuch, J., dissenting) (quoting 3 Oxford English Dictionary 632 (2d ed. 1989)).

Indeed, the Third Circuit's interpretation of "comprehensive" is belied by the numerous exemptions to coverage built into the ACA. The coverage mandated by § 300gg-13(a) applies only sometimes to employers with fewer than 50 employees[7] and not at all to the numerous "grandfathered" plans already in existence when the ACA was adopted in 2010. Given these broad exemptions, Congress could not possibly have intended the word "comprehensive" to mean that every employer must be required to provide coverage for the "additional preventive care" to be listed in HRSA's guidelines. Nor can the appeals court plausibly argue that Congress intended the exemptions expressly granted by the ACA to be the only permissible exemptions. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006) (rejecting federal government's claim that statutory exemption within Controlled Substances Act for sacramental use of peyote indicated that Congress barred recognition of other religious exemptions from the prohibition against use of Schedule I substances).

Finally, the Third Circuit failed to come to grips with an underlying inconsistency in its statutory interpretation. It held that the religious exemptions created by the Final Rule violated the ACA because the ACA does not permit HHS to establish exemptions. Pet. App. 41a. Yet the court simultaneously endorsed HHS's earlier determinations that the Contraceptive Mandate should include a more limited

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[7] Employers with fewer than 50 employers are under no obligation to provide health insurance and so need not comply with the mandate. *See* 26 U.S.C. § 4980H.

religious exemption. *Id.* at 40a n.26. If the court correctly determined that the ACA delegated to HHS the discretionary authority to create religious exemptions in 2011-2015, then it must also be true that HHS possessed that same discretion in 2018.

B. By Vesting "All Legislative Powers" in Congress, the Constitution Ensures that the Same Entity that Imposes a Constraint May also Relax It, but a Bar on Administrative Relief Would Defeat that Key Protection

To the Founders, an "excess of law-making" was one of "the diseases to which governments are most liable" and one of the principal reasons why Article I created so many hoops through which government officials must jump in order to create new laws. *The Federalist* No. 62, p. 378 (C. Rossiter ed. 1961) (J. Madison). They "believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J. dissenting) (citing *The Federalis*t No. 48, at 309-312 (J. Madison)). When (as here) an administrative agency's constitutional authority to exercise the unbridled powers delegated to it by Congress is in serious question, the courts should not hesitate to uphold that agency's efforts to amend existing regulations for the purpose of cutting back on "an excess of lawmaking" and thereby reducing "restricti[ons on] the people's liberty."

An important feature of the Constitution's vesting of "[a]ll legislative Powers" in Congress is an

assurance that a single body determines the extent to which the law will restrict the people's liberty—thereby assuring that any constraints were actually intended by that body. The decisions below undermine that assurance. The Third Circuit held that Congress, when it adopted the ACA, properly delegated to HHS/HRSA full authority to determine what "additional preventive care" is to be included within 42 U.S.C. § 300gg-13(a)'s mandated coverage. Yet, the appeals court also held that the ACA did not delegate to HHS/HRSA authority to determine which employers are required to provide the additional care and which are to be exempted.

As a result, no single body ever endorsed the constraints on liberty that the Third Circuit's decision below produce. Congress did not mandate the Contraceptive Mandate. The version of the mandate endorsed by HHS included an exemption for religious objectors. Yet the Third Circuit's decision imposes a constraint on liberty—a Contraceptive Mandate that does not include HHS's religious exemption—that is broader than one mandated by either of the political branches. By so holding, the Third Circuit ignored a key feature of the Constitution's limitations on the exercise of the "federal government's most dangerous power." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J. dissenting).

The circuit court's interpretation of the ACA—limiting federal agencies' authority to provide relief from their own rules—is in derogation of the Constitution's vesting of all legislative powers in Congress.

The Constitution vests all legislative powers in Congress and thereby protects Americans from overly severe laws by ensuring that the same body that imposes constraints can also relax them. It is bad enough that Congress in the ACA has divested itself of that power by giving it to HHS, but it would be all the worse to interpret the ACA to enable that agency to impose constraints while barring it from expanding relief from them. Not only would such an interpretation deprive Americans of their basic constitutional freedom to be bound only by laws made by their elected legislative body, but it also would subject them to the severity of an ersatz legislature comprised of agencies that can only act harshly, not with mercy.

Put simply, the Constitution subjects Americans to congressional authority both to constrain and to liberate from constraint. Accordingly, when a statute is interpreted to enable federal agencies to constrain *without* any ability to offer relief, that interpretation subjects Americans to a gross caricature of legislative power, in which it is exercised by unelected bureaucrats and consists only of constraint—never generosity or tolerance.

So, even if Congress could divest itself of the powers that the Constitution vests in it (which it may not), Congress cannot permit an agency to invent its own one-way ratchet—with a power merely to be hard and without any room to back off and go more softly. Accordingly, it is in derogation of the Constitution's vesting of legislative power in Congress to bar federal agencies like HHS from offering relief from their own prior rules.

C. When Agencies Undertake Lawmaking Functions that Were Vested in Congress, Rules that Reduce the Scope of Regulatory Reach Raise Fewer Self-Governance Concerns

An interpretation of the ACA that bars HHS from offering relief from its own rules deprives Americans of a key benefit of vesting legislative powers exclusively in Congress.

The ACA and the "additional preventive care" mandated by the HRSA guidelines (including the Contraceptive Mandate) impose significant burdens on private citizens. They require employers who wish to offer group health insurance to their employees to pay premiums for a broad array of health services that they might not otherwise wish to include in an employee-benefits package. They require employers with 50 or more employees who do not wish to offer group health insurance to pay substantial fees to the government.

Most significantly for purposes of this case, until 2017 the Contraceptive Mandate required employers, despite their religious objections, to participate in procedures that (in the employers' sincere belief) facilitated the provision of coverage for contraceptives to which they had religious objections. *See Zubik*, 136 S. Ct. 1557. The Final Rule eliminated that burden by broadening the religious exemption from the Contraceptive Mandate.

The Final Rule self-evidently reduced the burdens previously imposed on employers by federal administrators exercising legislative authority delegated to them by 42 U.S.C. § 300gg-13(a)(4). As explained above, Article I, § 1 of the Constitution prohibits HHS from exercising legislative power under that statute. But HHS should not be faulted for taking steps designed to correct (at least partially) its previous error. By broadening the religious exemption to the Contraceptive Mandate, HHS is reducing an abridgement of personal liberty that it lacked authority to impose in the first place.

Under the Third Circuit's holding, HHS possesses unchecked discretion to specify "additional preventive care" for which employers are required to provide coverage. Yet (according to the Third Circuit) having once exercised its discretion to restrict the people's liberty by adopting the Contraceptive Mandate, HHS now lacks discretion to broaden the exemption for employers with sincerely held religious objections to the mandate. No principle of administrative or constitutional law—and nothing in the text of the ACA—requires that unjust result. The decision below should be reversed.

II. INTERPRETING THE ACA TO LIMIT AGENCIES' AUTHORITY TO EXPAND RELIEF FROM THE CONTRACEPTIVE MANDATE UNDERMINES THE CONSTITUTION'S AND RFRA'S PROTECTIONS FOR RELIGIOUS AMERICANS

A. The Constitution Secures the Religious Liberty of Americans Both Through the First Amendment and by Vesting "All Legislative Powers" in Congress

The Court's Free Exercise Clause case law (post *Smith*) is premised on the assumption that the people's elected representatives will respectfully consider the views of religious minorities when adopting generally applicable laws. That assumption is unwarranted when, as here, the legislature has delegated its lawmaking function to administrative agencies. Because federal administrative agencies are less likely than Congress to accommodate religious objectors, NCLA urges the Court not to extend *Smith* by applying it to laws written by administrative agencies.

The Free Exercise Clause of the First Amendment states that "Congress shall make no law … prohibiting the free exercise [of religion]." Its protections bar any law that "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). But *Employment Division v. Smith* held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the

ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

In support of its decision to "leave … to the political process" the decision whether to accommodate religious objectors by creating exemptions from laws of general applicability, *Smith* stated:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

Id. at 890. But that justification is unpersuasive in the context of delegated lawmaking authority (including the authority to create religious exemptions) exercised by federal agencies. For a variety of reasons, government administrators are far less likely than legislators to be "solicitous of [religious] value[s]."

In particular, a legislator (unlike an administrator) is directly answerable to voters and can be voted out of office if too many citizens come to believe

that he is not responding to their concerns. Legislators are thus inclined to take steps to avoid antagonizing religious voters, by creating religious exemptions from a generally applicable law if they conclude that the exemptions will not significantly undercut the law's effectiveness. Administrators, whose actions are largely obscured from public view, do not have to stand for re-election and thus lack similar incentives. As one administrative law expert has noted, "most Americans have no hope of even identifying most administrative lawmakers, let alone meeting or speaking with them." Philip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 Notre Dame L. Rev. 1919, 1939 (2015).

The ability of administrators to engage in "expert," "rational" decision-making free from the political pressures to which legislators are routinely subjected is often touted by defenders of the administrative state as one of the principal reasons for delegating legislative power away from the people's elected representatives. Legislation creating an administrative agency generally identifies a narrow range of goals on which the agency is directed to focus; accommodating the interests of religious minorities who might be burdened by the agency's rules is virtually never identified as one of those goals. Personnel are selected based on their expertise in fields related to the agency's goals, not for their sensitivity to religious concerns. So (not surprisingly) administrators only rarely consider the need for religious accommodations while pursuing their agency's mission.

Indeed, in extolling the Contraceptive Mandate as originally adopted by HHS/HRSA and striking down later efforts to expand exemptions from the mandate, the Third Circuit stressed the "expert" nature of the administrative decision-making process. *See, e.g.*, Pet. App. 9a (noting that HRSA commissioned an "expert panel" from the Institute of Medicine to recommend a list of services to be covered under § 300gg-13(a)(4)). Respondents similarly emphasize the rational, scientific underpinnings of the Contraceptive Mandate as initially issued:

> The Institute [of Medicine] convened a committee of specialists in women's health, disease prevention, adolescent health and evidence-based guidelines. … That committee's report proposed eight evidence-based health services to be covered, including [all FDA]-approved contraceptive methods.

Opp. Br., No. 19-454, at 1-2.[8] Absent from the administrative record is any indication that those to whom lawmaking authority was delegated included anyone with expertise in religion or that they were tasked with ensuring reasonable accommodations for religious objectors.

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[8] Respondents emphasize the Institute's scientific expertise, noting that it is "a private, nonprofit institution providing objective advice on matters of science, health, and technology." *Id.* at 1 n.1.

In sum, *Smith*'s rationale for exempting laws of general application from Free Exercise Clause restraints is inapplicable when the laws in question are adopted not by legislatures but by administrative agencies.

Moreover, the interests of religious Americans are protected not only by the Free Exercise Clause but also by Article I's vesting of "[a]ll legislative Powers" in Congress and by barring Congress from divesting itself of those same powers. Article I ensures that legislation constraining the rights of the people will not be adopted lightly and that religious Americans will have an opportunity to be heard by their elected representatives before any such constraints are enacted. By delegating its legislative powers to HHS/HRSA (especially when, as here, the delegation was unaccompanied by any "intelligible principle" to guide HHS in the exercise of those powers), Congress acted in derogation of the freedom of Americans to protect their religious interests in Congress.

B. Congress Adopted RFRA in Part to Counteract the Tendency of Unelected Courts and Administrative Agencies to Devalue Free-Exercise Interests

Congress responded to *Employment Division v. Smith* by adopting RFRA in 1993. Congress rejected the distinction that *Smith* drew between laws intended to interfere with religious exercise and laws that are "neutral" toward religion. 42 U.S.C. § 2000bb(a)(2). RFRA states that "Government shall

not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a), and that any law imposing such a burden should be scrutinized under a "compelling governmental interest" test. 42 U.S.C. § 2000bb-1(b). RFRA thereby implicitly called into question *Smith*'s conclusion that "leaving accommodation to the political process" provided sufficient protection to religious objectors.

RFRA demonstrates Congress's doubts about its own ability to craft legislation that will adequately accommodate religious objectors. For all the reasons explained above, Congress had even greater reason to doubt that federal and state administrators could perform that task absent explicit legislative guidance.

The Third Circuit largely discounted RFRA's relevance to this case, limiting its application to cases in which religious objectors can "prove" to the court's satisfaction that "the government [has] imposed a substantial burden on religious exercise." Pet. App. 44a. But that approach ignores agencies' independent statutory obligation to ensure that regulations they adopt do not "substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a).

As explained above, federal agencies are by nature predisposed to give little thought to whether their scientism and rationalist lawmaking imposes substantial burdens on the exercise of religion. *Hobby Lobby* determined that HHS's earlier versions of the Contraceptive Mandate imposed such burdens and

that HHS failed to demonstrate that its policy satisfied RFRA's "exceptionally demanding" least-restrictive-means standard. *Hobby Lobby,* 573 U.S. at 728-732.

The Final Rule responded to *Hobby Lobby* and *Zubik* by expanding the mandate's religious exemption to ensure that HHS's legislation does not "substantially burden a person's exercise of religion." This case involves an unusual instance in which a federal agency is exercising its discretion to undo the consequences of its earlier administrative discrimination against religious Americans. RFRA authorizes the exercise of such discretion, even if a reviewing court later determines that a narrower accommodation would also have satisfied the minimum requirements of federal law.

Nor is the Final Rule subject to challenge based on (unsubstantiated) claims that it will deprive some women of no-cost access to every FDA-approved contraceptive, provision of which (the Third Circuit asserted) serves a compelling government interest. HHS has a far less restrictive means available to it of satisfying that interest: it can bear the minimal costs of supplying contraceptives rather than implicating religious objectors in the supply chain. As *Hobby Lobby* explained:

> [B]oth RFRA and its sister statute RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs. Cf. [42 U.S.C.] § 2000cc-

> 3(c) (RLUIPA: "[T]his chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."). HHS's views that RFRA can never require Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law.

Hobby Lobby, 573 U.S. at 730.

CONCLUSION

The judgment of the Third Circuit should be reversed.

Respectfully submitted,

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