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.

PENNSYLVANIA, ET AL.,
Respondents.

DONALD J. TRUMP, et al.
Petitioners,

v.

PENNSYLVANIA, ET AL,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Claremont Institute's Center for Constitutional Jurisprudence
c/o Dale E. Fowler School of Law
Chapman University
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae

QUESTIONS PRESENTED

1, Whether the federal government lawfully exempted religious objectors from the regulatory requirement to provide health plans that include contraceptive coverage?

2. Whether the court of appeals erred in affirming a nationwide preliminary injunction barring implementation of the final rules.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Constitutional Provisions

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. This includes a proper understanding of the constitutional structure of separated power that underlies the issues in this case. The Center has participated as amicus curiae before this Court in several cases of related constitutional significance, including *Kisor v. Wilke*, 139 S.Ct. 2400 (2019); *Zubik v. Burwell*, 136 S.Ct. 1557 (2016); *Dep't of Transp. v. Ass'n of Am. R.R.,* 575 U.S. 43 (2015); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015); and *Christopher v. SmithKline Beecham*, 567 U.S. 2156 (2012).

SUMMARY OF ARGUMENT

The court below ruled in a case where the parties before it had no standing and granted relief to parties that were not before the court. The basis of the ruling was that the agency had no authority to promulgate the regulation that this Court in *Zubik* had given the agency an opportunity to promulgate in order to resolve ongoing litigation over the so-called contraceptive mandate.

First, the nationwide injunction in this case is an abuse of the lower court's authority. As some of the

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[1] All parties have filed blanket consents to the filing of amicus briefs. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

Justices of this Court have noted, nationwide injunctions put pressure on this Court to hear cases before their time, forcing the Court to act before an issue has had a chance to "percolate" in the Circuit Courts of Appeals. Further, such injunctions grant relief to parties not before the court thus exceeding the judicial power to resolve "cases" or "controversies." Finally, it usurps the power of this Court as the "one Supreme Court."

Second, the argument that Congress did not authorize a conscience exemption from the contraceptive mandate is a pointless exercise since Congress never enacted a contraceptive mandate. Congress enacted a law requiring insurance plans to include preventative care for women. Congress did not specify in the statute what that meant (although floor debate made clear that it was aimed at cancer screenings and other such preventive care, not at anything related to abortion and contraception). It instead delegated that task, without any statutory definitional guidance, to the Health Resources and Services Administration. That agency in turn delegated the task, again without any guidance, to a semi-private organization that in turn delegated it to a committee of private individuals to develop the guidelines. Congress did not mention the need for a conscience objection for the simple reason that it never enacted a contraceptive mandate. Nothing in the law indicates that Congress considered the birth of children to be a negative health outcome requiring "preventative" care.

ARGUMENT

I. Nationwide Injunctions Exceed the Power of the District and Circuit Courts

A. The judicial power extends only to cases and controversies, and that limitation precludes an award of relief to parties who are not before the court.

The court below issued a nationwide or universal injunction. That is, the court granted relief to parties who were not before the court. Such relief exceeds the judicial power under the Constitution. The judicial power is the power to decide a case and to award relief to the specific parties who brought the case for decision. *Muskrat v. U.S.*, 219 U.S. 346, 356 (1911) (quoting Justice Samuel Miller, On the Constitution 314 (1891)); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 472 (2017).

In his concurring opinion in *Trump v. Hawaii*, 138 S.Ct. 2392 (2018), Justice Thomas has already laid out the case that the judicial power, as originally understood, did not include a power for single District Court judges or even single Circuit Courts of Appeals to issue a universal injunction. *Id.* at 224-26 (Thomas, J. concurring). As Justice Thomas explained, a court's power to grant a remedy must find its root in either a statute or the Constitution. *Id.* at 2225 (Thomas, J., concurring). There is no such statute here, nor does the Constitution provide the authority for this type of relief. *See id.* (Thomas, J., concurring).

Article III of the Constitution gives the judicial branch authority to decide cases or controversies.

This limits the authority of the courts to ruling on disputes of parties with a concrete and personal interest in the matter. *Department of Commerce v. New York*, 139 S.Ct. 2551, 2565 (2019). The courts only have power to grant relief to parties that have legal standing to assert their claims in court. *Id.*; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Nationwide injunctions, however, grant relief to individuals and entities who have no claims before the court and have not established the standing necessary to claim judicial relief.[2]

As a general matter, a plaintiff may assert only its own legal rights in the case. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342-44 (2006); *Allen v. Wright*, 468 U.S. 737, 751 (1984). Those individual rights of that particular plaintiff are what the court has the power to adjudicate. *Muskrat*, 219 U.S. at 356; *see Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016). That restriction limits the court's remedial power to the parties to the action. *See Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J. concurring in the grant of stay). Once an individual party's legal harm has been redressed, there is no longer a constitutional basis for the exercise of

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[2] In this case, state respondents base their claim of standing on their voluntary decision to spend state resources to cover contraceptive benefits for employees of companies who are not subject to the contraceptive mandate. Petitioner's Appendix A at 12a; *but see Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 414 (2013) ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors"). The court below did not explain how this voluntary action equated to a legally cognizable injury. Nonetheless, the relief granted extends to entities who never demonstrated any injury.

judicial power. *See Lujan*, 504 U.S. at 560-561; Bray, *supra* at 471. The relief granted to the party that brought the case exhausts the jurisdiction of the court.

Judicial precedent, of course, can affect the outcome of cases beyond the parties to particular litigation. However, only the decisions of this Court have binding nationwide precedential effect. The decisions of the Circuit Courts do not carry any binding precedential force outside of the circuit. *See Davis v. United States*, 564 U.S. 229, 247 (2011). And the decisions of a District Court have no binding precedential effect anywhere. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011). By issuing a nationwide injunction, the courts below sought to escape the jurisdictional boundaries of their authority.

B. Nationwide injunctions disrupt the normal course of judicial review.

"[B]ecause of the geographic breadth of government litigation and also, most importantly, because of the nature of the issues the government litigates," the federal government is not like private litigants. *United States v. Mendoza*, 464 U.S. 154, 160 (1984). One reason for this is that many constitutional questions, for the most part, might only arise in litigation where the federal government is a party. *Id.* A nationwide injunction, like the civil procedure doctrine of nonmutual collateral estoppel, freezes in the place the first District or Circuit Court final decision on a disputed question of constitutional interpretation. This Court is thus deprived of the opportunity of hearing the considered opinion of the other Circuit Courts of Appeals in similar litigation. *Id.*

Members of this Court have already noted that the practice of nationwide injunctions puts pressure on the Court to intervene in cases before a conflict among the circuits has even developed. *See*, *e.g.*, *Wolf v. Cook County, Ill.*, 140 S.Ct. 681, 683-84 (2020) (Sotomayor, J., dissenting from grant of stay); *Dep't of Homeland Sec.*, 140 S.Ct. at 600 (Gorsuch, J., concurring in the grant of stay); *Trump v. Hawaii*, 138 at 2425 (Thomas, J., concurring) (Nationwide "injunctions are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.").

In the normal course, the decision of a Circuit Court of Appeals applies only in that circuit is not binding on courts outside that circuit. *See Davis*, 564 U.S. at 247. That allows the federal government to decide whether to alter the challenged practice nationwide or to reserve the question for litigation in other circuits through nonacquiescence. *See* Ross E. Davies, *Remedial Nonacquiescence*, 89 Iowa L.Rev. 65, 70 (2003). Bringing the same issue to different circuits in similar litigation allows the legal question to "percolate," and gives this Court input from several different federal courts. *Id.* at 72. Finally, it allows for this Court's usual practice of not accepting a case for review unless there is a conflict between the circuits regarding the resolution of a legal question. *See Mendoza*, 464 U.S. at 160.

Nationwide injunctions disrupt this process and place pressure on this Court to accept review of legal issues that have not been thoroughly considered by the lower courts. *Mendoza*, 464 U.S. at 160. In the

words of Justice Thomas, nationwide injunctions make "every case a national emergency." *Trump v. Hawaii*, 138 at 2425 (Thomas, J., concurring).

Article III establishes but one Supreme Court "with a view to uniformity of decision." Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §1591. The nationwide injunction circumvents this constitutional structure. Instead of one Supreme Court, nationwide injunctions allow every federal judge in the nation to make a rule that purportedly binds the entire nation. Instead of "uniformity of decision," we end up with a "hodgepodge" as different federal judges issues different rulings that purport to cover a district, a state, or the entire nation. *Dep't of Homeland Sec.*, 140 S.Ct. at 600 (Gorsuch, J., concurring in the grant of stay).

An additional problem is presented in this case where the ruling of the court below appears to overrule this Court's action in *Zubik v. Burwell*, 136 S.Ct. 1557 (2016). In that case, this Court vacated the judgments in several cases concerning the legality of the contraceptive mandate as applied to individuals and entities with religious objections to providing the drugs covered by the mandate. *Id*. at 1560. The Court vacated those judgments so that the parties could work out a regulation that recognized a conscience objection in a manner acceptable to both the government and those raising religious objections. Yet the court below ruled that the agency had no authority to create any sort of conscience objection procedure because such a procedure was not authorized by Congress. Petitioner's Appendix at 32a. But the only reason there is no express congressional authority for a conscience exemption from the contraceptive

mandate is because Congress never enacted the mandate in the first place.

II. The Department of Health and Human Services Had No Authority to Enact a Contraceptive Mandate, With or Without a Conscience Objection

A. Congress never enacted a contraceptive mandate.

The Affordable Care Act included a requirement that that insurance plans governed by the law include the provision of "preventative-health" services for women without cost sharing. 42 U.S.C. § 300gg-13(a)(4). This provision was added by an amendment offered by Senator Barbara Mikulski. Sen. Amend. No. 2791, 155 Cong. Rec. S11986-87 (Nov. 30, 2009). According to Senator Mikulski herself in the floor speech she gave when introducing the amendment, "[t]he essential aspect of [the] amendment is that it guarantees women access to lifesaving preventive services and screenings." *Id.*, at S11987. These screenings, according to Senator Mikulski, would include programs such as annual mammograms and regular Pap smears that save lives but also save money because they lead to early detection and treatment of otherwise deadly diseases, such as "breast cancer, cervical cancer, colorectal cancer, ovarian cancer," "lung cancer," "heart and vascular disease," and "silent killers . . . such as diabetes." *Id.* Not once in her 1,377-word floor speech did she mention abortions, abortifacients, or contraceptives.

There was no mention in the floor debates that this provision concerned the provision of contraceptives or abortifacients. Indeed, Senator Mikulski

expressly argued that the provision only provided for "screening for diseases that the biggest killers of women" and for "family planning as recognized by other acts." *Id.*, at S12028 (Statement of Senator Mikulski). At that time, no federal law mandated that employers provide contraceptive services.

The text of the Act, however, did not specify what was to be included in the required preventative services. Instead, the law required the Health Resources and Services Administration to promulgate "comprehensive guidelines." In its brief to this Court in *Burwell v. Hobby Lobby*, the Secretary of Health and Human Services noted that term "preventative-health" services, as used by Congress in the ACA, generally included things such as "cholesterol screening, colorectal cancer screening, and diabetes screening" in addition to vaccinations for preventable diseases. *Sebelius v. Hobby Lobby*, No. 13-354, Brief for the Petitioners at 4. Based on the Secretary's description, the Congress intended "preventative-health services" to mean screening for early diagnosis of disease and measures for the prevention of disease. This is consistent with the floor arguments of Senator Mikulski.

In response to the law's requirement that it create "comprehensive guidelines" for preventative health services for women, the Health Resources and Services Administration delegated to the Institute of Medicine (a "semi-private" organization) the task of developing recommendations for what to include in the guidelines. *Id.* at 5. The Institute, in turn, convened a group of "experts" outside of government to recommend services that "decrease the likelihood or delay the onset of a targeted disease or condition."

Notwithstanding this charge, the Institute's expert panel recommended that the guidelines for the required "preventative services" include access to all "contraceptive methods" that had been approved by the FDA. *Id.* at 6. Here the Institute noted that its recommendation was meant to reduce the birth of children from "unintended" pregnancies. But this recommendation had nothing to do with the prevention or early diagnosis of disease that Congress included within the term "preventative-health services. *See id*. at 4.

Congress has yet to define children as a disease or childbirth as an adverse medical condition. Indeed, the Hyde Amendment seems to indicate an opposite conclusion. Under the Hyde Amendment, Congress prohibited the use of federal funds to pay for an abortion unless "the life of the mother would be endangered if the fetus was carried to term." *Webster v. Reproductive Health Services*, 492 U.S. 490, 508 (1989). A contraceptive mandate that includes provision of abortifacients seems to be well outside of what Congress may have intended to include in its mandate for "preventative-health services" for women.

Further, there is the issue of delegating this important government decision to a nongovernmental agency. Justice Alito has noted that "[e]ven the United States accepts that Congress 'cannot delegate regulatory authority to a private entity.'" *Dept. of Trans.*, 575 U.S. at 60-61 (2015) (Alito, J., concurring). Nor can Congress delegate its lawmaking power to the executive. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001). When Congress grants some decision-making authority to an executive agency it

must cabin that authority with an "intelligible principle." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

Thus, the question of whether the agency had the authority to enact the conscience exemptions at issue here is tied to what "intelligible principle" Congress established to guide the agency on development of the "preventative-health" services requirement. Based on Congress's use of that term to mean prevention and detection of disease, it is difficult to understand how the agency could impose a contraceptive mandate under the rubric of preventative-health services.

The court below asked the wrong question. The issue is not whether Congress authorized a conscience exemption from the contraceptive mandate. Instead, the question is whether Congress authorized the contraceptive mandate at all.

There is good reason to rule that Congress did not authorize a contraceptive mandate without a robust conscience exemption. A "no-exemption" contraceptive mandate raises serious constitutional questions and there is not a hint in the ACA that Congress intended to push the bounds of its constitutional authority under the First Amendment. In such a situation, the Court should reject the argument that Congress would have authorized any contraceptive mandate without protections for Free Exercise of Religion. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001).

B. The First Amendment was meant to protect rights of conscience.

The Framers understood "Free Exercise of Religion" to prohibit government interference with the exercise of religion "according to the dictates of conscience." Virginia Declaration of Rights, sec. 16. This included not merely private worship, but also living one's life according to the dictates of one's faith.

Similarly, the early constitutions of Delaware and New Jersey both protected religious practices according to the dictates of the individual's conscience. *Sources of Our Liberties*. (Richard L. Perry ed. (1952)); Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* (1909). The founding generation treated "conscience" and "religious exercise" as inextricably linked. They believed that it was vitally important for the nation to respect the "liberty of conscience." St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* (1803) ("Liberty of conscience in matters of religion consists in the absolute and unrestrained exercise of our religious opinions, and duties, in that mode which our own reason and conviction dictate, without the control or intervention of any human power or authority whatsoever"). In fact, the "legal culture" at the time of the founding recognized religious exemptions and a robust guarantee on the right to religious exer-

cise. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1501 (1990). This legal culture is demonstrated by calls during the ratification to ensure no penalties imposed on individuals for their religious beliefs. Ellsworth, A Landholder VII, in 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 448, 449 (J. Kaminski & G. Saladino eds. 1983).

Another example of the protection of the rights of conscience can be found in the actual practices of government at the time of the founding. During the War of Independence, when the British Army was advancing in the colonies, George Washington issued orders for all who were able to bear arms to repel the advance "except such as are Conscientiously scrupulous against." George Washington, Letter of January 19, 1777, reprinted in Stephen M. Kohn, *Jailed For Peace, The History Of American Draft Law Violators*, 10 (1987). The importance of religious objections was so paramount to the founders that even in time of war and under the most compelling circumstances concerning the security of the new nation, an exemption from the call to arms was made for those with religious objections. *Id.*

These practices show that the free exercise of religion recognized and protected by the First Amendment reflects the founding generation's view that the duty one owes to the Creator is both prior to and higher than any duty owed to government. Because this fundamental right pre-existed the Constitution,

the Court should not lightly cast aside conscience objections to regulations such as the contraceptive mandate. This is especially true where there is no evidence that Congress intended the agency to ever impose such a mandate.

A contraceptive mandate without a robust conscience objection tests the outer bounds of Congress's power under the First Amendment. The Court ought not to infer that the Department of Health and Human Services has the authority to impose the mandate without conscience objections. *See Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 172-73.

CONCLUSION

A federal court may only exercise judicial power consistent with the grant of power contained in the Constitution. This means that remedies are limited to the parties before the court. Once the plaintiff has a remedy, it no longer had authority to bring a case.

Beyond the question of the injunction, there is no showing that Congress ever intended to enact a contraceptive mandate. Therefore, the question of whether Congress intended there to be a conscience exemption from that mandate simply asks the wrong question. This Court should reverse the judgment of the court below and dissolve the injunction.

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Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Claremont Institute's Center for Constitutional Jurisprudence
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae