No. 19-431

In the Supreme Court of the United States

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

v.

PENNSYLVANIA, ET AL.,
Respondents.

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

Brief of Christian Business Owners Supporting Religious Freedom as *Amicus Curiae* in Support of Petitioner

ERIN ELIZABETH MERSINO
Counsel of Record
WILLIAM WAGNER
JOHN S. KANE
KATHERINE HENRY
GREAT LAKES JUSTICE CENTER
5600 W. Mount Hope Highway
Lansing, MI 48917
(517) 322-3207
erin@greatlakesjc.org

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Amicus curiae Christian Business Owners Supporting Religious Freedom address the following question:

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *Amicus curiae*, Christian Business Owners Supporting Religious Freedom, respectfully submits this brief. *Amicus curiae* urges this Court to protect the freedom of religious exercise enshrined in the Religious Freedom Restoration Act, and the First and Fourteenth Amendments of the United States Constitution.[1]

Amicus curiae, Christian Business Owners Supporting Religious Freedom, has a significant interest in the protection of the constitutional rights and religious freedom of business owners nationwide. *Amicus curiae* are faithful Christians who strive to conduct their business operations with integrity and in compliance with the teachings, mission, and values of the Holy Bible. *Amicus curiae* believe that business owners have the freedom to conduct their business in a manner that does not violate their sincerely held religious beliefs and that follows the principles of their religious faith.

Amicus curiae include business owners who have been forced to file lawsuits to preserve the exercise of their Christian beliefs free from crippling fines and

---

[1] Petitioners and Respondents have granted blanket consent for the filing of *amicus curiae* briefs in this matter. *Amicus curiae* further states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

penalties that would strip them of their companies and livelihoods. *See, e.g.*, *Beckwith Electric Co., Inc. v. Sebelius*, 960 F.Supp.2d 1328 (M.D. Fla. June 25, 2013).

Amicus curiae, Christian Business Owners Supporting Religious Freedom, oppose the opinion of the Court of Appeals for the Third Circuit because it unlawfully violates the constitutionally protected rights of all business owners across the country to act, speak, and live out their Christian faith as free Americans. *Amicus curiae* refuse to kneel at the altar of the State and oppose the unjust rulings of the lower courts that quarantine religious liberty. *Amicus curiae* file this brief to support the arguments of the Petitioners.

BACKGROUND

The Patient Protection and Affordable Care Act ("ACA") requires non-exempt companies, including religious non-profit organizations, with over 50 employees to provide coverage for women's "preventative care and screenings" without cost sharing. 42 U.S.C. § 300gg-13(a). While an employer with fewer than 50 employees is not required to provide insurance coverage, should one choose to do so, the employer is required to include "preventative care." Congress itself did not define what was included in "preventative care," instead transferring the authority to define "preventative care" to the Health Resources and Services Administration ("HRSA"), a component of the Health and Human Services Department ("HHS"). *See* 42 U.S.C. § 300gg-13(a)(4). HRSA included all Food and Drug Administration ("FDA") approved "contraceptive methods, sterilization procedures, and

patient education and counseling for all women with reproductive capacity" in its definition of "preventative care," thereby mandating that employers provide these services without cost sharing. 77 Fed. Reg. 8725 ("HHS Mandate"). These FDA approved contraceptives include abortion causing drugs ("abortifacients"). *See* F.D.A. Birth Control: Medicines to Help You, *available at* http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm#EC (describing how IUDs and "emergency contraception" stop a fertilized egg from implanting in the mother's uterus). Failure to comply with the HHS Mandate exposes employers to fines of $100 a day per beneficiary. *See* 26 U.S.C. § 4980H(a), (c)(2)A); 26 U.S.C. § 4980D(a)-(b). Removing all health coverage subjects employers to substantial annual penalties of $2,000 per employee. 26 U.S.C. § 4980H(a), (c)(1). These monumental fines would necessitate closing the doors of most, if not all, non-profit and for-profit companies owned by individuals with religious objections to the HHS Mandate.

Companies with "grandfathered plans"—plans with at least one person continuously enrolled in the plan since March 23, 2010 with no changes to the plan—are exempt from the HHS Mandate. 42 U.S.C. § 18011(a)(2), 45 C.F.R. § 147.140. There is also an extremely limited exemption for religious employers, which includes only "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activity of any order." 26 U.S.C. § 6033(a)(3)(A)(i), (iii).

In a failed effort to avoid substantially burdening the religious exercise of non-profits that fall outside the narrow "religious employer" exemption, a non-profit organization receives an "accommodation" from directly providing contraceptives and abortifacients if it:

> (1) Opposes providing coverage for some or all of the contraceptive services required to be covered . . . on account of religious objections; (2) is organized and operates as a nonprofit entity; (3) holds itself out as a religious organization; and (4) self-certifies that it satisfies the first three criteria.

78 Fed. Reg. 37874. The self-certification required the employer to inform its third-party administrator ("TPA") of the TPA's obligation to provide contraceptive and abortifacient coverage. *See Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1163 (10th Cir. 2015). Alternatively, the objecting non-profit could submit a written notice to HHS that contains:

> (1) the name of the eligible organization and the basis on which it qualifies for an accommodation; (2) its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services . . . (3) the plan name and type . . . and (4) the name and contact information for any of the plan's third party administrators and health insurance issuers.

79 Fed. Reg. 51092.

Respondents' regulations required non-profit organizations to notify either their insurer or TPA of

their belief on the immorality of contraceptives and abortifacients. This thereby triggered the insurer or TPA to send written notice to all employees that contraceptives and abortifacients are available to them without cost sharing and triggers the insurer or TPA's obligation to provide those services without cost sharing. If the organization instead chose to notify HHS, it must provide it with all of the required information to notify the insurer or TPA of their obligation now to provide services Petitioners believe contraceptives and abortion causing drugs are morally reprehensible. These options are considered an "accommodation" for non-profits' religious beliefs.

Petitioners Little Sisters of the Poor and many other organizations sincerely believe that contraceptives and abortifacients are immoral. Despite this sincere belief, "accommodation" regulation compelled religious business owners and non-profits to participate in the distribution of contraceptives and abortifacients, face substantial fines, or cease providing health coverage altogether, which, in addition to violating sincere religious beliefs, also potentially imposes substantial fines. *See* 26 U.S.C. §§ 4980D(b), 4980H(a), (c)(1). This Court has already determined that the fines for noncompliance with the HHS Mandate impose a substantial burden on employers. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2776 (2014).

This Court examined the future of the "accommodation" in *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (per curiam). Instead of rendering a decision on the merits at that time, this Court

remanded the case so that the parties could be "afforded an opportunity to arrive at an approach going forward" that would satisfy their respective concerns and instructed that "the Government may not impose taxes or penalties on petitioners for failure to provide the relevant notice" that initiates the accommodation process. *Id.* at 1560-61.

In light of this direction, the federal Petitioners accepted public comment on how to change the accommodation to resolve the pending lawsuits. 82 Fed. Reg. at 47,798-47,799, 47,814 (July 22, 2016). On October 6, 2017, the federal Petitioners issued Interim Final Rules (IFRs) expanding protections for objecting organizations. 82 Fed. Reg. 47792 (Oct. 13, 2017). The federal Petitioners concluded that requiring objecting religious organizations to comply with the mandate through the accommodation's alternate mechanism "constituted a substantial burden on the religious exercise of many" religious organizations. *Id.* at 47806. The federal Petitioners determined that requiring compliance—with or without the accommodation—"did not serve a compelling interest and was not the least restrictive means of serving a compelling interest." *Id.* They thus concluded that "requiring such compliance led to the violation of RFRA in many instances." *Id.* In order to genuinely accommodate religious organizations' objections, the federal Petitioners expanded the "religious employer" exemption from the mandate to include "all bona fide religious objectors." *Id.* Respondents filed suit against the federal Petitioners arguing that expanding the religious exemption failed to comply with the Administrative Procedures Act (APA) and was not justified by the ACA

or RFRA. This brief focuses on the validity of the latest exemption and why the accommodation violates RFRA.

SUMMARY OF THE ARGUMENT

Petitioners Little Sisters of the Poor sincerely believe that contraceptives and abortifacients, *i.e.*, abortion causing drugs and devices, are morally wrong. Thus, Petitioners' faith prohibits them from being complicit in the distribution of these products because it is a sin. Despite Petitioners' sincerely held religious beliefs, Respondents' regulations require Petitioners to either violate their sincere religious beliefs by participating in the distribution of contraceptives and abortifacients or pay crippling fines. The Court is not the arbiter of sacred scripture and cannot determine whether the notification form and letter is attenuated enough from the provision of contraceptives that it does not substantially burden Petitioners' religion. Delving into this inquiry requires the Court to interpret Petitioners' religious beliefs on the morality of the different levels of complicity with sin. *Thomas v. Review Bd. of Indian Employment Security Div.*, 450 U.S. 707, 718 (1981). Therefore, the Court should only determine whether the Petitioners are being compelled to do something that violates their faith—here, to fill out the notification form or write the notification letter to HHS, both triggering that contraceptives and abortifacients be disseminated to their employees in connection with their employee health plans. This Court has already determined that the fines Petitioners will face if they do not violate their beliefs by filling out the notifications constitute a substantial burden. *Hobby Lobby*, 134 S. Ct. at 2776.

Since the HHS Mandate places a substantial burden on the Petitioners' religious exercise, Respondents argue that the HHS Mandate uses the least restrictive means of furthering a compelling governmental interest. Respondents fail on both accounts. First, the HHS Mandate does not use the least restrictive means of providing free contraceptives and abortifacients. As this Court already determined, the government could easily just provide free contraceptives and abortifacients without involving Petitioners or their health plans at all. *See Hobby Lobby*, 134 S. Ct. at 2780. Indeed, the government already subsidizes contraceptives and abortifacients through its programs and could find ways to expand or increase the efficacy of those existing programs. *See, e.g.,* 4 C.F.R. § 59.5; Family Planning Annual Report: 2011 National Summary, *available at* http://www.hhs.gov/opa/pdfs/fpar-2011-national-summary.pdf.

Second, Respondents cannot argue that providing free contraceptives and abortifacients is a compelling governmental interest when the ACA regulations leave so many women without these services. The regulations already provide exemptions for narrowly construed religious employers, employers of fewer than fifty employees, and employers with grandfathered plans. *See* 45 C.F.R. § 147.131(a), (b) (exempting some religious employers but not others); 26 U.S.C. § 4980H(c)(2) (exempting employers with fewer than fifty employees from providing health insurance altogether); 42 U.S.C. § 18011(a), (e), (exempting grandfathered plans). Grandfathered plans are required to comply with provisions of the ACA the

regulations describe as "particularly significant." 75 Fed. Reg. 34540. Notably, Congress did not deem the HHS Mandate one of the particularly significant provisions of the ACA. *Id.*

ARGUMENT

Respondents urge this Court to strike down the narrow exemption granted to religious non-profits and business owners. Respondents' argument is a far cry from the position asserted in *Roe v. Wade*, 410 U.S. 113 (1973), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), which, at least ostensibly, centered around privacy and choice. But this case is about the absence of choice. Respondents seek to subvert the purpose of RFRA, to protect and secure religious freedom, by using the statute to limit protections granted to Petitioners Little Sisters of the Poor by the government after nine years of litigation and careful review of the problem. Respondents seek to conscript all religious business owners and non-profits into their pro-abortion dogmata. Respondents seek to eliminate the right to faithfully practice one's faith while operating a corporation in the United States of America. This Court has addressed Respondents' extreme position many times before and, in each turn, held that religious freedom requires protection.[2] The Court should do so again.

---

[2] *See, e.g.*, *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006); *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014); *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

I. THE HHS MANDATE SUBSTANTIALLY BURDENS PETITIONERS' RELIGIOUS EXERCISE BY REQUIRING THEM TO PARTICIPATE IN, FACILITATE, AND TRIGGER THE DISTRIBUTION OF CONTRACEPTIVES AND ABORTIFACIENTS IN VIOLATION OF PETITIONERS' SINCERELY HELD RELIGIOUS BELIEFS

Under RFRA, the government cannot "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. RFRA protects "any exercise of religion," including providing health coverage to employees, "whether compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A); *see also Hobby Lobby*, 134 S. Ct. at 2775.

When determining that a law burdens religion, that determination cannot "turn upon judicial perception of the particular belief" and the "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit [] protection." *Thomas*, 450 U.S. at 714. The Court cannot delve into the complex religious analysis of the morality of complicity with sin. *Id*. at 716 ("Courts are not the arbiters of scriptural interpretation."). Instead, the Court must undertake the narrow function to determine whether Petitioners have an "honest conviction" that cooperation with the

HHS Mandate *and* the so-called accommodation is sinful. *See id.*

In *Thomas*, this Court held that courts cannot make determinations on the reasonableness of a person's line for moral complicity, where a Jehovah's Witness quit his job after being transferred to a position that required him to produce weapons. *Id.* at 715. His initial position was in the production of sheet steel, some of which was used to make weapons. *Id.* at 713 n. 3. Thomas found this position "sufficiently insulated from producing weapons of war . . . and it is not for [the Court] to say that the line he drew was an unreasonable one." *Id.* at 715. The Court could not determine whether an act by Thomas was sufficiently removed from the act he found objectionable. *Id.*

Distinguishably, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), Native Americans claimed that a government road near sacred places substantially burdened their exercise of religion. *Id.* at 441-42. The Court held that this did not burden religion because it involved *only* government conduct on publically owned land. *Id.* at 448-49. Notably, the Court stressed that the individuals ***were not "coerced by the Government's action into violating their beliefs."*** *Id.* at 449 (emphasis added).

Likewise, in *Bowen v. Roy*, 476 U.S. 693 (1986), a person refused to include the social security number ("SSN") of his daughter on an application for government benefits because of his religious beliefs. *Id.* at 698. His religious objections were twofold: (1) he objected to the government's use of the SSN; and (2) he objected to being required to put the SSN on the

application for benefits. *Id*. at 699. The Court held that his first objection did not violate free exercise because it objected to *exclusively* governmental conduct and did not require him to do or prohibit him from doing anything proscribed by his beliefs. *Id*. The second objection, which required *the man* to place his daughter's SSN on the form, did not violate the free exercise of religion *under the First Amendment* because it was "wholly neutral in religious terms and uniformly applicable." *Id*. at 703. However, this reasoning was prohibited by Congress seven years later when it enacted RFRA. RFRA prohibits the government from compelling a person to engage in conduct that his religion prohibits "***even if the burden results from a rule of general applicability***." 42 U.S.C. § 2000bb-1(a) (emphasis added).

This case is like *Thomas* because both Petitioners and Thomas drew a line of demarcation as to what conduct violates their religion. *Thomas*, 450 U.S. at 715. Like in *Thomas*, the Court cannot decide whether the act the government is compelling Petitioners to complete is attenuated enough from the conduct they find sinful. *Id*. Petitioners Little Sisters of the Poor believe that filling out the "accommodation" form or notifying HHS of their objection violates their religion. It is not for the Court to say otherwise.

This case is dissimilar to *Lyng* and *Roy* because those cases involved ***only*** government conduct and the plaintiffs were not compelled to any actions by the government. *See Lyng*, 485 U.S. at 448-49; *Roy*, 476 U.S. at 699. Here, the government is compelling Petitioners to fill out a form or provide a detailed

notification to HHS ***in direct contradiction to their religious beliefs.*** This is not exclusively government conduct. It is compulsion to actively violate their religious beliefs.

Respondents' argument to revert back to the accommodation requires Petitioners Little Sisters of the Poor to be complicit with the distribution of contraceptives and abortifacients. This position results in a clear violation of RFRA. Four years ago, when this Court first examined the legality of the accommodation under RFRA, this Court vacated lower court holdings that found the insurers and TPAs were solely responsible for the distribution of contraceptives and abortifacients because of federal law, rather than any act of Petitioners. *Compare Zubik*, 136 S. Ct. at 1560 to *Geneva Coll. v. Sec'y United States HHS*, 778 F.3d 422, 437 (3d Cir. 2015); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 459 (5th Cir. 2015); *Priests for Life v. United States HHS*, 772 F.3d 229, 252 (D.C. Cir. 2014); *Little Sisters of the Poor*, 794 F.3d at 1173.

First, it is only because of Petitioners' health plans that the insurers have the obligation to provide contraceptives and abortifacients to the *specific* persons on Petitioners' health plan. Federal law does not independently require that women receive free contraceptives and abortifacients; it is only required when those women are in a health plan. It is the federal law *in conjunction with Petitioners' health plans* that requires the insurers to provide contraceptives and abortifacients to women *in Petitioners' health plans*. If Petitioners' actions were not triggering, complicity with, facilitating, or contributing to

providing contraceptives and abortifacients, insurers would have to provide free contraceptives and abortifacients to all women, regardless of whether they are in a health plan or not and regardless of whether Petitioners fill out a form. Without Petitioners' health plan, these women would not have free contraceptives and abortifacients. Without the notification to the insurers or HHS, the women would not have free contraceptives and abortifacients. Petitioners are a vital link in the causal chain of providing free contraceptives and abortifacients. This act by Petitioners is then undoubtedly complicity and undoubtedly against Petitioners' sincere religious beliefs, leaving Petitioners with the choice to either violate their beliefs or face fines this Court has already determined are substantially burdensome. *Hobby Lobby*, 134 S. Ct. at 2776.

Second, the justification for requiring insurers to provide free contraceptives and abortifacients to women clearly demonstrates the tight, dependent relationship between Petitioners' health plans and the provision of contraceptives and abortifacients. Respondents justify requiring insurers to pay for contraceptives and abortion causing drugs and devices, stating:

> [insurers] would find that providing contraceptive coverage is at least cost neutral because they would be insuring the same set of individuals under both the group health insurance policies and the separate individual contraceptive coverage policies and, as a result, would experience lower costs from

> improvements in women's health, healthier timing and spacing of pregnancies, and fewer unplanned pregnancies.

78 Fed. Reg. 39877. All of the "savings" insurers receive to justify requiring them to pay for contraceptives and abortifacients are costs that Petitioners are willing to pay for and do insure for in their health plans. The regulations justify requiring insurers to pay for abortifacients and contraceptives by "saving" under Petitioners' health plans. The contraceptive and abortifacient coverage and the Petitioners' health plans are inextricably intertwined. The Petitioners' health plans necessarily cause, facilitate, and trigger contraceptive and abortifacient coverage, even under the "accommodation." Otherwise, women would receive the contraceptive and abortifacient coverage regardless of whether or not they have a health plan with a specific insurer. The relationship between the Petitioners' health plans and the contraceptive and abortifacient coverage requires Petitioners to either violate their sincere, honest religious beliefs or face substantial fines. This is unquestionably a substantial burden on their religious exercise. *See Hobby Lobby*, 134 S. Ct. at 2776.

II. THE ACCOMMODATION FAILS TO USE THE LEAST RESTRICTIVE MEANS OF FURTHERING A COMPELLING INTEREST AS THE HHS MANDATE ITSELF CONTEMPLATES LESS RESTRICTIVE ALTERNATIVES AND EXEMPTS MILLIONS OF HEALTH PLANS FROM ITS PURPORTED COMPELLING INTEREST

Because the Petitioners have a sincere religious belief that even the accommodation substantially burdens, the Court must determine whether the accommodation survives strict scrutiny, "the most demanding test known to constitutional law." *City of Boerne v. Flores,* 521 U.S. 507, 534 (1997).

A. The Accommodation is Not the Least Restrictive Means of Providing Free Contraceptives and Abortion Causing Drugs and Devices

Under RFRA, the government must show that the accommodation "is the least restrictive means." 42 U.S.C. § 2000bb-1(b). The government must use alternatives to achieve its desired end even when those alternatives are more costly or less effective. *See Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 799-800 (1988). The requirement for Respondents to use the least restrictive means is "exceptionally demanding." *Hobby Lobby*, 134 S. Ct. at 2780.

In *Hobby Lobby*, the Supreme Court listed a number of means far less restrictive than the so-called accommodation. The Court stated that the most straightforward way of providing contraceptives and

abortifacients is for the government to assume the cost of providing them to any woman whose health plan does not provide them. *Id*. This cost "would be minor when compared with the overall cost of ACA." *Id*. at 2781. In fact, the government already subsidizes contraceptives and abortifacients on a large scale. Since 1970, Title X of the Public Health Service Act has provided funding for contraception and "preventive" health services that involve family planning. *See* 4 C.F.R. § 59.5. In 2011, $276 million of the $1.3 billion spent on delivering Title X-funded family planning services came directly from Title X revenue sources. Certainly, forcing religious employers, like the Little Sisters of the Poor, to facilitate and trigger the supply of abortion causing drugs is more restrictive than finding a way to increase the efficacy of an already established program that has a reported revenue stream of $1.3 billion. *See* Family Planning Annual Report: 2011 National Summary, *available at* http://www.hhs.gov/opa/pdfs/fpar-2011-national-summary.pdf; *see also* 83 Fed. Reg. at 57,551; *Hobby Lobby*, 573 U.S. at 728-730.

Additionally, this Court ultimately determined that the requirement at issue in *Hobby Lobby*—for-profit corporations being required to provide contraceptives and abortifacients without an "accommodation" or exemption—was not the least restrictive means because HHS itself provided another way through the non-profit "accommodation" at issue here. *Id*. at 2782.

Likewise, HHS itself provides another less restrictive means to the accommodation—the religious employer exemption. *See Hobby Lobby*, 134 S. Ct. at 2786 ("[T]he record in these cases shows that there is an existing, recognized, workable, and already-implemented framework to provide coverage. That framework is one that HHS has itself devised . . . that is less restrictive than the means challenged by the plaintiffs in these cases.") (Kennedy, J. concurring). Under the regulations, religious employers are completely exempt from the HHS Mandate without filling out a form or providing a detailed notification to HHS. *See* 26 U.S.C. § 6033(a)(3)(A)(i), (iii) (providing an exemption for "churches, their integrated auxiliaries, and conventions or associations of churches" and "the exclusively religious activities of any religious order."). "RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same [exemption]." *Id*. at 2786 (Kennedy, J. concurring).

The government could offer grants, go directly to insurers themselves, or engage in countless other options that do not involve the cooperation of the Little Sisters of the Poor. Respondents claim that exempting additional religious adherents from the HHS Mandate would create a barrier to access of contraceptives and abortifacients. Respondents claim that obtaining access to free contraceptives through a secondary sign up or other means would be an unworkable less restrictive alternative. In many ways, this argument is overblown and unpersuasive.

In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), this Court required all people who do not receive healthcare through an employer to "opt in" or purchase healthcare. This process of obtaining insurance is required under the Affordable Care Act. Claiming the "opt in" process itself poses a barrier is similar to asserting that the act of obtaining insurance pursuant to the Affordable Care Act amounts to a barrier. Afterall, it is the same "opt in" process that in 2010 Congress determined was necessary to extend the breadth and affordability of healthcare coverage that now Respondents argue poses a barrier. If we are honestly discussing barriers—isn't it more of a barrier for a woman seeking contraceptive coverage from her employer to apply and obtain a fulltime job that carries the benefit of healthcare? Then, once she is hired, she has to properly enroll in the employer's healthcare coverage, and suffer through the "barrier" of having to fill out the necessary new employment forms, follow the employer's insurance company's process to obtain employer sponsored healthcare, and obtain an insurance card or other proof of her insurance. Then, she still has to go through the "barriers" of finding a doctor, going to the doctor or participating in a telemedicine appointment, obtaining a prescription, going to the pharmacist, waiting in line at the pharmacist, giving the pharmacist her prescription and insurance information, waiting for the pharmacist to confirm her insurance, waiting for the pharmacist to fill the prescription, and then picking up the prescription or otherwise arranging for its delivery. All these steps, that the Respondents accept without complaint, pose much larger "barriers" than opting into secondary coverage via a few clicks on a website.

Furthermore, employees who specifically desire contraceptives and abortifacients to be included in their employer health plan are not forced to obtain jobs from the small minority of companies and non-profits run by individuals who seek refuge from the HHS Mandate under religious grounds. For example, *amicus curiae* communicate to potential employees how their religious beliefs effect their ability to offer certain abortifacient drugs and devices in their health insurance plan. *Amicus curiae* honestly and straightforwardly explain these parameters in their healthcare coverage to job applicants, providing the applicant with the option of looking elsewhere for employment if the applicant desires different health insurance benefits. *Amicus curiae* have excellent track records for providing generous salaries to their employees with benefits far better than the marketplace standard, and strive to treat women, not just equally, but in the model that Jesus Christ provided—that women should be valued, cherished, and deserve a heightened stature in society. *Amicus curiae* simply cannot violate their own sincerely held religious beliefs in order to forward the HHS Mandate's objective. And RFRA does not require that they do.

The accommodation is not the least restrictive means of providing free contraceptives and abortifacients. When the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983). The narrow exemption allowed by the federal Petitioners' falls squarely under RFRA by exempting religious

employers from the substantial burden of directly violating their faith or paying devastating fines to the Internal Revenue Service.

B. Providing Free Contraceptives and Abortifacients is Not a Compelling Government Interest

This Court already questioned HHS's faulty assertion that providing free contraceptives and abortifacients is a compelling governmental interest. RFRA "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person—the particular claimant whose sincere exercise of religion is being substantially burdened." *Hobby Lobby*, 134 S. Ct. at 2779 (internal quotation marks omitted). To do this, the government cannot just assert "broadly formulated interests." *Id.* The Court must "scrutinize the asserted harm of granting specific exemptions to particular religious claimants . . . [and] look to the marginal interest in enforcing the HHS Mandate in these cases." *Id.* (internal quotation marks and brackets omitted).

While women have a right to *obtain* contraceptives, *see Griswold v. Connecticut*, 381 U.S. 479, 485-486 (1965), this does not mean they have a right to free contraceptives and abortifacients.[3] Moreover, this right

---

[3] In *Harris v. McRae*, 448 U.S. 297 (1980), this Court held that while the Supreme Court has recognized the constitutional right to abortion, there is no constitutional right that a private party or a governmental entity subsidize that abortion. The Court reasoned in *Harris* that while the "government may not prohibit

certainly does not mean that a person has the right to obtain contraceptives and abortifacients—either directly or indirectly—from their employer at the expense of pillaging the employer's religious liberty. As this Court noted, aspects of the HHS Mandate support the view that free contraceptives and abortifacients via employers are not compelling governmental interests. *Hobby Lobby*, 134 S. Ct. at 2780. For example, many employees, such as those in grandfathered plans, those who work for employers with fewer than 50 employees, and those who work for exempted religious employers, may have no contraceptive or abortifacient coverage at all. 42 U.S.C. § 300gg-13(a)(4), 42 U.S.C. § 18011(a)(2), 45 C.F.R. § 147.140, 26 U.S.C. § 6033(a)(3)(A)(i), (iii); *see also Hobby Lobby*, 134 S. Ct. at 2780. The Court expressly called into doubt the "compelling interest" of contraceptive and abortifacient coverage in light of the exemption for grandfathered plans, stating:

> the interest served by one of the biggest exceptions, the exception for grandfathered plans, is simply the interest of employers in avoiding the inconvenience of amending an existing plan. Grandfathered plans are required "to comply with a subset of the Affordable Care Act's health reform provisions" that provide what HHS has described as "particularly

---

the use of contraceptives," the government also does not have an "obligation to ensure that all people have financial resources to obtain contraceptives." *Id*. at 318. Respondents are not entitled to force religious business owners and religious non-profit entities to provide contraceptives and abortifacients through their health care plans.

> significant protections." 75 Fed. Reg. 34540 (2010). But the contraceptive mandate is expressly excluded from this subset. *Ibid*.

Id.

Notably, through the religious employer exemption, HHS has also suggested that the exercise of religion is a more compelling interest than whatever the asserted interest free contraceptive and abortifacient coverage might provide. However, invalidating the federal Petitioners' latest exemption would limit its respect for religion to only certain employers' religious beliefs. The previous religious employer exemption sets the religious beliefs of whatever the government deems a religious employer above the same sincerely held beliefs of religious, non-profit organizations that cannot qualify for the religious employer exemption. 26 U.S.C. § 6033(a)(3)(A)(i), (iii). The government cannot determine that the effect of the HHS Mandate is more burdensome on churches than on other organizations run by religious individuals. *See Lyng*, 485 U.S. at 449-50 ("This Court . . . cannot weigh the adverse effects on [a person] and compare them with the adverse effects on [another person]. Without the ability to make such comparisons, we cannot say that the one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional analysis than the other."). The government cannot selectively choose who warrants RFRA protection; it "must apply to all citizens alike." *Id*. at 452. And, by narrowly extending the HHS Mandates' exemption scheme to apply equally to all religious adherents the federal Petitioners follow this

Court's unanimous holding in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006). In *Gonzales*, the Court held that offering an exemption to some religious adherents, but not to others, "fatally undermined" the assertion that the law's compelling interest could not be achieved without requiring all to follow the federal law. *Id.* at 433-35.

Respondents already exempt millions of employer health plans from the HHS Mandate. *Hobby Lobby*, 134 S. Ct. at 2751. If free contraceptives and abortifacients were such a compelling interest, Respondents could provide these services themselves without substantially burdening Petitioners' religious freedom. The many exemptions already provided for under the regulations necessarily destroy any argument that the HHS Mandate serves a compelling interest. As this Court stated, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 447 (1993) (internal citations omitted). Therefore, since the HHS Mandate already does not apply to millions of health plans, including some plans exempt from the HHS Mandate based on religious beliefs, it does not serve a compelling governmental interest.

CONCLUSION

Therefore, this Honorable Court should reverse the decisions below in order to protect and defend the free exercise of religion guaranteed by RFRA.

Respectfully submitted,

ERIN ELIZABETH MERSINO
Counsel of Record
WILLIAM WAGNER
JOHN S. KANE
KATHERINE HENRY
GREAT LAKES JUSTICE CENTER
5600 W. Mount Hope Highway
Lansing, MI 48917
(517) 322-3207
erin@greatlakesjc.org

Counsel for Amicus Curiae