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, PRESIDENT OF THE
UNITED STATES, 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 THE *AMICI CURIAE* CHILD USA, DIGNITYUSA, NEW WAYS MINISTRY, THE QUIXOTE CENTER, THE WOMEN'S ALLIANCE FOR THEOLOGY, ETHICS AND RITUAL, AND THE WOMEN'S ORDINATION CONFERENCE IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are organizations representing women and men of faith, parents and children, and employees of numerous organizations. They respectfully ask this Court to recognize that women's religious and reproductive liberty should not be defeated by new government regulations that leave contraceptive coverage unavailable to women employees and their families.

CHILD USA is the leading national non-profit think tank working to end child abuse and neglect in the United States. CHILD USA pairs the best social science research with the most sophisticated legal analysis to determine the most effective public policies to end child abuse and neglect. CHILD USA produces evidence-based solutions and information needed by policymakers, organizations, media, and society as a whole to increase child protection and the common good. #SoKidsStayKids

DignityUSA was founded in 1969 and is an organization of lesbian, gay, bisexual, and transgender (LGBT) Catholics and supporters. Among the areas of concern outlined in its Statement of Position and Purpose is the promotion of "equal access and justice in all areas of health care and healing." DignityUSA is concerned that LGBT people could be denied equal access

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[1] No counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *Amici* or their counsel made a monetary contribution to this brief's preparation or submission. All parties have consented in writing to the filing of this *Amicus* brief.

to health care services if employers are allowed to restrict health coverage on the basis of the religious belief of the owners.

New Ways Ministry represents Catholic lay people, priests, and nuns who work to ensure that the human dignity, freedom of conscience, and civil rights of LGBT people are protected in all circumstances, including in making decisions about healthcare. New Ways Ministry is a national Catholic ministry of justice and reconciliation for people and the wider Catholic Church. Through education and advocacy, New Ways Ministry promotes the full equality of LGBT people in church and society. New Ways Ministry's network includes Catholic parishes and college campuses throughout the United States.

The **Quixote Center** is a social justice center founded in 1976, animated by Catholic social teaching, committed to the full participation of all people in church and society. A key expression of this commitment to inclusion in terms of gender and sexuality is the translation and publication of the *Inclusive Bible* and Lectionaries, which engage the organization in communication with church workers and the broader community in a variety of Christian denominations. This broader commitment to gender justice entails a commitment to reproductive justice and the recognition of equitable access to healthcare as a human right.

The **Women's Alliance for Theology, Ethics and Ritual (WATER)** is a non-profit educational organization made up of justice-seeking people, from a

variety of faith perspectives and backgrounds, who promote the use of feminist religious values to make social change. WATER believes that women's health decisions are private, and that the community's responsibility is to make health care available for everyone. WATER participates in this *Amicus* brief because a just society both respects privacy and promotes health.

The **Women's Ordination Conference (WOC)**, founded in 1975, is the oldest and largest national organization that works to ordain women as priests, deacons and bishops into an inclusive and accountable Catholic church. WOC affirms women's gifts, openly and actively supports women's voices, and recognizes and values all ministries that meet the spiritual needs and human rights of all people. WOC promotes respect and self-determination of all people based on personal discernment.

SUMMARY OF ARGUMENT

"[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). We ask this Court to respect those preferences by affirming the judgment of the Third Circuit in this case. *Pennsylvania v. President*, 930 F.3d 543 (3d Cir. 2019).

At issue are two government rules that reduce employees' access to contraceptive insurance. *See* Religious Exemptions and Accommodations for Coverage

of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (to be codified at 45 C.F.R. pt. 147); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (to be codified at 45 C.F.R. pt. 147). Those rules

> authorized all private entities to opt out of the contraceptive guarantee for religious reasons; allowed all but publicly traded corporations to do so for moral reasons; reiterated that compliance with the accommodation was voluntary; and affirmed that the rules do not impose any notice requirement on employers that opt out.

Resp'ts' Br. in Opp'n [to cert petition] 7–8.

On behalf of thousands of employees of religious organizations and their dependents, *Amici* urge this Court to affirm the Third Circuit's ruling that the government's amendments to the contraception insurance coverage rules are illegal. *Pennsylvania v. President*, 930 F.3d 543, 572 (3d Cir. 2019) ("Because [42 U.S.C.] § 300gg-13(a) [(2018)] does not authorize the Agencies to exempt plans from providing the required coverage, the Agencies' authority under the ACA to enact the Final Rules is without merit."). The rules limit employee access to contraception in two ways. First, they exempt more employers from the insurance requirement. Moreover, they end the previous accommodation, which had required objecting employers to notify *someone* of their decision not to provide coverage, so that an

alternative source of insurance coverage could be found. These new harsh rules leave many women of faith without contraceptive coverage and force them to pay for their own contraception.

Although RFRA requires that these employees' compelling interests in religious and reproductive freedom be considered in any accommodation of their employers' religious freedom, the government has now *expanded* the exemption and *ended* the accommodation that gave employees coverage. More employers have now received a *complete exemption* from the birth control benefit of the Affordable Care Act (ACA), with no requirement to tell anyone of their decision. This overbroad and total exemption unduly restricts employees of faith and their dependents from protecting their own compelling interests. Thus the government's exemption is prohibited by RFRA, which does not permit "requests for religious accommodations [that] become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize an institution's effective functioning." *Cutter v. Wilkinson*, 544 U.S. 709, 711 (2005) (interpreting RFRA's parallel statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc et seq. (2018)).

"At some point, accommodation [of religious freedom] may devolve into 'an unlawful fostering of religion'" and violate the Establishment Clause. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334-35 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145 (1987)). That point is reached here,

where the government gives Petitioners a complete exemption from the contraceptive benefit. Like the Connecticut statute that unconstitutionally "arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath," the requested exemption in this case violates the Establishment Clause through its "unyielding weighting in favor of [religious organizations] over all other interests," especially the interests of women of faith in furthering their reproductive health and protecting their religious freedom. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985); *Cutter*, 544 U.S. at 722.

ARGUMENT

According to the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1 (2018), the government may substantially burden a person's exercise of religion only if it uses the least restrictive means of furthering a compelling government interest. This Court has ruled that requiring religious organizations to provide contraceptive insurance coverage directly to their employees substantially burdened their religion. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014). This Court has *never* ruled that the organizations' related *accommodation*—namely, to notify either the government or their insurance company of their moral objection to contraception—placed a substantial burden on their religion. *See Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (*per curiam*) (declining to

rule on whether the accommodation imposes a substantial burden). Eight of nine courts of appeals *have* ruled, however, that the accommodation did not substantially burden the employers' religious freedom.[2]

Nonetheless, the government argues that RFRA authorized it to pass two new rules on contraceptive insurance coverage. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (to be codified at 45 C.F.R. pt. 147); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (to be codified at 45 C.F.R. pt. 147). These rules had two consequences that have affected *Amici*, who include women of faith who choose to use contraception. First, the rules expanded the numbers of employers who are exempt from the insurance mandate. Second, the rules turned the accommodation into a *voluntary* choice for employers, meaning they do not have to notify anyone

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[2] *See*, *e.g.*, *Little Sisters of Poor House v. Burwell*, 794 F.3d 1151 (10th Cir. 2015); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs*., 778 F.3d 422 (3d Cir. 2015); *Priests for Life v. U.S. Dep't of Health & Human Servs*., 772 F.3d 229 (D.C. Cir. 2014); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 459–63 (5th Cir. 2015); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 611–15 (7th Cir. 2015); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 218–26 (2d Cir. 2015); *Mich. Cath. Conf. & Cath. Family Servs. v. Burwell*, 807 F.3d 738, 749–50 (6th Cir. 2015); *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't Health & Human Servs.*, 818 F.3d 1122, 1148–51 (11th Cir. 2016); *but see Dordt Coll. v. Burwell*, 801 F.3d 946 (8th Cir. 2015).

of their choice not to provide contraceptive coverage. This has resulted in women losing their no-cost contraception, which the Affordable Care Act (ACA) guaranteed them.

In effect, the administration has removed a non-burden from employers and placed a substantial burden on employees like us women of faith. Government officials were vague in predicting how many employees would be affected by their new rules. *See* Religious Exemptions and Accommodations Under the ACA, 83 Fed. Reg. at 57,550 ("[T]here is not reliable data available to accurately estimate the number of women who may lose contraceptive coverage under these rules, and . . . [there are] various reasons why it is difficult to know . . . how many women will be impacted by those decisions."); Moral Exemptions and Accommodations Under the ACA, 83 Fed. Reg. at 57,627 ("[G]eneral comments did not . . . substantially assist the Departments in estimating the number of women that would potentially be affected by these exemptions for moral convictions specifically. . . . "). We would like the Court to understand that women are losing some insurance coverage and also *having to pay for contraception themselves.* This contradicts the lessons of this Court in *Hobby Lobby*, other RFRA cases, and the First Amendment itself—that women should enjoy the no-cost contraceptive insurance that the Affordable Care Act requires.

I. The Government's New Rules Have Taken Benefits Away from Employees.

In *Hobby Lobby*, this Court approved an *accommodation* for employers who were otherwise expected to provide their employees directly with contraceptive insurance, even though the employers morally disapproved of contraception. 573 U.S. at 693. Specifically, the employers did not have to provide the insurance directly. *Id.* at 731. Instead, their insurance companies provided it. *Id.* As this Court explained:

> To qualify for this accommodation, an employer must certify that it is such an organization. [45 C.F.R.] § 147.131(b)(4) [(2013)]. When a group-health-insurance issuer receives notice that one of its clients has invoked this provision, the issuer must then exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. § 147.131(c). Although this procedure requires the issuer to bear the cost of these services, HHS has determined that this obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from the services. 78 Fed. Reg. 39[,]877 [(July 2, 2013)].

Id. at 698–99. The accommodation system ensured that the employees would still have access to contraceptive insurance "without cost sharing." *Id.* at 692.

Therefore, this Court concluded, the "effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be **precisely zero**." *Id.* at 693 (emphasis added).

Some employers have nonetheless challenged the accommodation, arguing that it burdened their religion to notify either the government or the insurance company of their moral position on contraception. Eight of nine courts of appeals ruled there was no burden in the accommodation. *See Little Sisters of Poor House v. Burwell*, 794 F.3d 1151, 1195 (10th Cir. 2015) ("It is not a substantial burden to require organizations to provide minimal information for administrative purposes to take advantage of that accommodation."); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 442 (3d Cir. 2015) ("Under [the *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007) interpretation of the RFRA definition of substantial burden], can the submission of the self-certification form, which relieves the appellees of any connection to the provision of the objected-to contraceptive services, really impose a 'substantial' burden on the appellees' free exercise of religion? We think not."); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 246 (D.C. Cir. 2014) ("The Accommodation Does Not Substantially Burden Plaintiff's Religious Exercise . . . [i]nstead, the accommodation provides Plaintiffs a simple, one-step form for opting out. . . ."); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 459 (5th Cir. 2015) ("Because RFRA confers no right to challenge the

independent conduct of third parties, we . . . conclud[e] that the plaintiffs have not shown a substantial burden on their religious exercise."); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 618 (7th Cir. 2015) ("[W]hen we compare the burden on the government or third parties of having to establish some entirely new method of providing contraceptive coverage with the burden on Notre Dame of simply notifying the government . . . we cannot conclude that Notre Dame has yet established its right to [a preliminary injunction]."); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 220 (2d Cir. 2015) ("Viewed objectively, completing a form stating that one has a religious objection is not a substantial burden."); *Mich. Cath. Conf. & Cath. Family Servs. v. Burwell*, 807 F.3d 738, 752 (6th Cir. 2015) ("[A]s we held before, '[t]he government's imposition of an independent obligation on a third party does not impose a substantial burden on the appellants' exercise of religion.'" (quoting *Mich. Cath. Conf. v. Burwell*, 755 F.3d 372, 388 (6th Cir. 2014))); *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't Health & Human Servs.*, 818 F.3d 1122, 1148 (11th Cir. 2016) ("[We] conclude that the government has not put plaintiffs to the choice of violating their religious beliefs or facing a significant penalty. We hold there is no substantial burden."); *but see Dordt Coll. v. Burwell*, 801 F.3d 946, 950 (8th Cir. 2015) (relying on *Sharpe Holdings, Inc. v. United States HHS*, 801 F.3d 927 (8th Cir. 2015) to "conclude that by coercing Dordt and Cornerstone to participate in the contraceptive mandate and accommodation process under threat of severe monetary penalty, the government has substantially burdened

Dordt and Cornerstone's exercise of religion."), *vacated sub nom. Dep't of Health and Human Servs. v. CNS Int'l Ministries*, 136 S. Ct. 2006, 2006 (2016). This Court heard the employers' appeal in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (*per curiam*). This Court did not reach a decision on the employers' argument. *Id.*

Instead, this Court's remand offered a chance to develop a proposal that "accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage,' including contraceptive coverage." *Id.* at 1560 (citations omitted). The Court offered an opportunity for the parties to develop a resolution. *Id.* Specifically, the Court stated that it made no ruling on whether employers' religious freedom was burdened, whether the government had a compelling interest, and whether the regulations were the least restrictive means of the serving that interest. *Id.*

Nothing in *Zubik* supported a legal conclusion that women should not receive their no-cost contraceptive coverage. Justice Sotomayor's concurrence urged that women not be left "in limbo" without contraceptive coverage as the positions were debated. *Id*. at 1561 (Sotomayor, J., concurring).

The discussion suggested by *Zubik* did not reach an agreement. Instead, the administration passed two government rules that reduce employees' access to contraceptive insurance. *See* Religious Exemptions and

Accommodations Under the ACA, 83 Fed. Reg. 57,536; Moral Exemptions and Accommodations Under the ACA, 83 Fed. Reg. 57,592. Those rules effectively:

> [A]uthorized **all** private entities to opt out of the contraceptive guarantee for religious reasons; allowed **all but publicly traded corporations** to do so for moral reasons; reiterated that compliance with the accommodation was **voluntary**; and affirmed that the rules **do not impose any notice requirement** on employers that opt out.

Resp'ts' Br. in Opp'n [to cert petition] 7–8 (emphasis added).

On behalf of thousands of employees of religious or moral organizations and their dependents, *Amici* urge this Court to affirm the Third Circuit's ruling that the government's amendments to the contraception insurance coverage rules are illegal. *Pennsylvania v. President*, 930 F.3d 543, 573 (3d Cir. 2019) ("[T]he Religious Exemption and the new optional Accommodation would impose an undue burden on nonbeneficiaries—the female employees who will lose coverage for contraceptive care."). The rules limit employee access to contraception in two ways. First, they exempt more employers from the insurance requirement. Moreover, they end the previous accommodation, which had required objecting employers to notify *someone* of their decision not to provide insurance. The accommodation and the notification allowed for an alternative source of insurance to provide coverage. These new harsh rules leave many women of faith

without contraceptive coverage *unless they pay for it themselves. Id.* ("[T]he record shows that thousands of women may lose contraceptive coverage if the Rule is enforced and frustrate their right to obtain contraceptives.") (citations omitted).

In response to the new rules, for example, one Catholic employer, the University of Notre Dame, said it would exclude some methods of contraception from any insurance coverage, and then require co-pays and deductibles on the others. *See Irish 4 Reproductive Health v. U.S. Dep't of Health and Human Servs.*, 2020 WL 248009, at *5 (N.D. Ind. Jan. 16, 2020). Since the changes to Notre Dame's insurance coverage, I4RH Member 1 paid coinsurance for her oral contraceptive; I4RH Member 2 paid coinsurance for a NuvaRing and because of cost she switched to an intrauterine device, for which she pays cost-sharing; all I4RH Members pay cost-sharing for some contraceptives and are denied other contraceptives; Ms. Reifenberg's contraceptive plan would no longer cover all of her long-acting reversible form of contraception and is subject to a deductible; and many other Jane Does have paid coinsurance for their contraceptive coverage. Compl. at ¶¶ 12–16, *Irish 4 Reproductive*, 2020 WL 248009.

There are 70,514,657 Catholics identified in the United States. *See* P.J. KENEDY & SONS, THE OFFICIAL CATHOLIC DIRECTORY ANNO DOMINI 2116 (2019). The *Amici* respectfully ask this Court to consider the interests of employees of Catholic institutions in the United States. These institutions include 17,328 parishes, 2,868 missions, 358 pastoral centers, 56 new parishes,

545 Catholic hospitals, 519 health care centers, 1,958 specialized homes, 284 orphanages, 890 day care centers, 2,716 special centers for social services, 69 diocesan seminaries, 58 religious cemeteries, 228 colleges and universities, 705 high schools (diocesan and parish), 593 high schools (private), 4816 elementary schools (diocesan and parish), 365 elementary schools (private), and 126 non-residential schools for the disabled. *Id.*

The Catholic hospitals alone employ more than 536,396 full-time and 214,936 part-time employees. *See* CATH. HEALTH ASS'N OF THE U.S., U.S. CATHOLIC HEALTH CARE 1 (2020), https://www.chausa.org/docs/default-source/default-document-library/the-strategic-profile-of-catholic-health-care-in-the-united-states_2020.pdf?sfvrsn=0. The professional staff of the Catholic elementary and secondary schools was 146,367. *See Catholic School Data*, NAT'L CATH. EDUC. ASS'N, https://www.ncea.org/ncea/proclaim/catholic_school_data/catholic_school_data.aspx (last visited Mar. 30, 2020). "Catholic colleges and universities employ more than 107,000 members." *Jobs: Connecting the Catholic higher education community*, ASS'N OF CATH. CS. AND UNIVS., https://www.accunet.org/Jobs (last visited Mar. 30, 2020).

Eighty nine percent of American Catholics disagree with their church's absolute ban on the use of contraception. *See* Rich Barlow, *The World Needs More Birth Control, Not Less. Can Someone Please Tell the Catholic Church?*, WBUR.ORG (Aug. 9, 2019), https://www.wbur.org/cognoscenti/2018/08/09/catholic-church-sex-contraception-

rich-barlow (citing Michael J. O'Loughlin, *Poll finds many U.S. Catholics breaking with church over contraception, abortion and L.G.B.T. rights*, AMERICA (Sept. 28, 2016), https://www.americamagazine.org/faith/2016/09/28/poll-finds-many-us-catholics-breaking-church-over-contraception-abortion-and-lgbt). Among sexually-active Catholic women, 99% have used contraception during their lives, and of at-risk Catholics, 89% currently use contraception. *See* GUTTMACHER INST., FACT SHEET: CONTRACEPTIVE USE IN THE U.S. 1 (July 2018), https://www.guttmacher.org/sites/default/files/factsheet/fb_contr_use_0.pdf; CATHOLICS FOR CHOICE, THE FACTS TELL THE STORY: CATHOLICS AND CHOICE 2014-2015, 4 (2014), http://www.catholicsforchoice.org/wp-content/uploads/2014/12/FactsTelltheStory2014.pdf. "Contraceptive services and supplies can be costly." *Id.*

These new rules violate women's reproductive and religious freedom rights. In *Hobby Lobby*, Justice Kennedy explained:

> Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise *unduly restrict other persons*, *such as employees, in protecting their own interests, interests the law deems compelling*.

Hobby Lobby, 573 U.S. at 739 (Kennedy, J., concurring) (emphasis added). The Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb et seq., does not authorize the government's proposed new restrictions on

the health interests of employees. The Religion Clauses of the First Amendment prohibit them.

Although RFRA requires that these employees' compelling interests in religious and reproductive freedom be considered in any accommodation of their employers' religious freedom, the government has now *expanded* the exemption and *ended* the accommodation that protected the employees' interests. More employers have now received a *complete exemption* from the birth control benefit of the Affordable Care Act (ACA), with no requirement to tell anyone of their decision. This overbroad and total exemption unduly restricts employees of faith and their dependents from protecting their own compelling interests. Thus, the government's exemption is prohibited by RFRA, which does not permit "requests for religious accommodations [that] become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize an institution's effective functioning." *Cutter v. Wilkinson*, 544 U.S. 709, 711 (2005) (interpreting RFRA's parallel statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc et seq. (2018)).

In the Catholic world alone, many workers could lose access to no-cost insurance. To apply RFRA properly, this Court "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter*, 544 U.S. at 720 (citing *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985)). In contrast to *Hobby Lobby*, in this case there is *no* "existing, recognized, workable, and already-implemented

framework to provide coverage," and the "mechanism for doing so is [*not*] already in place." *Hobby Lobby*, 573 U.S. at 739. Thus the burden on employees' rights would be immediate, excessive, and extreme if this Court were to grant Petitioners' request to approve the government's complete exemption of employers from the birth control benefit and the accommodation notice.

The new rules also endanger women (and their children and families) if they cannot get access to no-cost contraception, especially in these difficult economic times. Stephanie P. Brown & Sara LaLumia, *The Effects of Contraception on Female Poverty*, 33 J. OF POL. ANALYSIS & MGMT. 602, 620 (July 2014) ("[W]e estimate that birth control access reduces the probability that a woman is in poverty by 0.5 percentage points."); Anna Bernstein & Kelly M. Jones, *The Economic Effects of Contraceptive Access: A Review of the Evidence*, INST. FOR WOMEN'S POL. RES. 5–6 (2019), https://iwpr.org/wp-content/uploads/2019/09/B381_Contraception-Access_Final.pdf (finding that access to contraception improved women's educational attainment, labor force participation, career outcomes, earnings, and financial position); Kelli Stidham Hall et al., *Contraception and mental health: a commentary on the evidence of principle for practice*, AMER. J. OF OBSTETRICS & GYNECOLOGY 740, 741 (June 2015) ("Prospective population-based cohort studies and clinical placebo-controlled trials have consistently reported similar or even lower rates of depression or mood symptoms in COC [combined oral contraceptive pills] users compared with

nonusers."); Kelli Stidham Hall et al., *Role of Young Women's Depression and Stress Symptoms in Their Weekly Use and Nonuse of Contraceptive Methods*, 53 J. OF ADOLESCENT HEALTH 241, 241 (Feb. 2013) ("women with moderate/severe stress symptoms had more than twice the odds of contraception nonuse that women without stress"); R. Wilcher et al., *From effectiveness to impact: contraception as an HIV prevention intervention*, 84 SEX. TRANSM. INFECT. ii54, ii54 (Oct. 2008), http://search.proquest.com.ezproxy.lib.uh.edu/docview/1781826674?accountid=7107 ("Increasing voluntary contraceptive use has been an underused approach, despite clear evidence that preventing pregnancies in HIV-infected women who do not wish to become pregnant is an effective strategy for reducing HIV-positive births."); CONTRACEPTIVE USE AND CONTROLLED FERTILITY 156 (Allan M. Parnell ed., 1989) ("[T]he psychosocial consequences to women of contraceptive use . . . are no less compelling than their physical health and life chances.") [hereinafter CONTRACEPTIVE USE]; *Adolescents: health risks and solutions*, WORLD HEALTH ORG. (Dec. 13, 2018), https://www.who.int/news-room/fact-sheets/detail/adolescents-health-risks-and-solutions ("The leading cause of death for 15-19 year-old girls globally is complications from pregnancy and childbirth."); *see generally* CONTRACEPTIVE USE, at 52-54 (various studies have found that use of oral contraceptives reduces endometrial and ovarian cancers,benign breast disease, fibrocystic disease, pelvic inflammatory disease, iron-deficiency anemia, and various types of ovarian cysts); Sarah R. Crissey, *Effect of pregnancy intention on child well-being and development*, 24 POP.

RES. & POL'Y REV. 593, 606 ("pregnancies reported as unintended are associated with higher risk, with children from unintended pregnancies where no birth control was used having significantly higher risks of less than excellent health compared with children from intended pregnancies where no birth control was used.").

This Court's RFRA and RLUIPA "decisions indicate that an accommodation must be measured so that it does not override other significant interests." *Cutter*, 544 U.S. at 722. Numerous significant interests are at stake in this case. In addition to the government's "legitimate and compelling interest in the health of female employees," *Hobby Lobby*, 573 U.S. at 737, the employees have religious freedom and reproductive freedom interests that will be negated if their employers are completely exempted from any obligation to comply with the law of health insurance. A complete exemption for Petitioners would not serve any of the government's or women employees' compelling interests.

II. The Government's Interpretation of RFRA Violates the Separation of Powers by Aggrandizing the Executive Branch's Power at the Expense of Congress and the Courts.

The Department's interpretation of its power under RFRA to sweep away duly enacted law is an unconstitutional aggrandizement of its power vis-à-vis Congress and the courts. For this reason, the attempt to shield all religious believers from a de minimis

burden at the expense of millions of women must be invalidated.

With respect to Congress, under Article I of the Constitution, Congress has the authority to make the law. *Loving v. United States*, 517 U.S. 748, 757–58 (1996); *Field v. Clark*, 143 U.S. 649, 692 (1892). The executive branch has the power to enforce the law, and when it veers into the lane of creating the law, it violates the separation of powers. *Gundy v. United States*, 139 S. Ct. 2116, 2121, 2123, 2129 (2019); *id.* at 2131 (Alito, J., concurring); *id*. at 2134, 2135, 2138, 2144 (Roberts, C.J., Thomas, J., and Gorsuch, J., dissenting). With RFRA, Congress enacted an accommodation calculus to be applied in specific cases, not a total-exemption-for-all-believers license.

It is important to understand RFRA's legislative history to see just how far the Trump Administration is going to turn RFRA from a vehicle for judicially-crafted religious accommodation of a law into a blank check to gut duly enacted federal statutes to serve certain religious believers. RFRA was passed in 1993 in response to *Employment Div. v. Smith*, 494 U.S. 872 (1990). It was pushed by a group of religious and civil rights organizations that has since splintered, *see* MARCI A. HAMILTON, GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY 23–31 (Cambridge Univ. Press ed., 2d ed. 2014) [hereinafter HAMILTON], but their primary message at the time was that the Supreme Court wrongly decided *Smith* and Congress should remedy it. They did not obtain in *Smith* the strict scrutiny standard they sought from this Court,

so they asked Congress to codify their preferred constitutional standard. RFRA is in fact the codification of a new constitutional standard for free exercise—hyper strict scrutiny. This is a standard that the Supreme Court had not previously embraced in its free exercise cases, as this Court pointed out in *City of Boerne v. Flores*, 521 U.S. 507, 533–34 (1997) (stating that the vast majority of laws, although passing scrutiny under the First Amendment's Free Exercise Clause, would fail under RFRA); *see also* HAMILTON, at 18–21 (laying out the differences between RFRA and the Supreme Court's free exercise doctrine).

The primary objection to *Smith* was this Court's approving nod toward legislative accommodation in the United States, wherein lawmakers have been the primary source of accommodation rather than a rule under the First Amendment that puts courts in the position of having to nullify legislative enactment:

> 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. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use.

Smith, 494 U.S. at 890 (citations omitted). The anti-*Smith* message was that it is unfair to ask religious entities, especially minority religions, to obtain legislative accommodation. Ironically, at the same time, the Native American Church achieved peyote exemptions across the United States. HAMILTON, at 33. The critics of *Smith* demanded that Congress enact a statute that would give such believers greater power to go to the courts to obtain exemptions. The result was RFRA.

No one was arguing that the federal agencies should be able to turn case-by-case judicial accommodation into a free pass for religious believers to avoid whatever law the executive selects. Of course, no one suggested that. Such an interpretation of RFRA would be a violation of the Establishment Clause, which does not permit the government to "aid one religion . . . or prefer one religion over another" or to "prefer religion over nonreligion." *Everson v. Dept. of Educ.*, 330 U.S. 1, 15 (1947); *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985). The possibility that RFRA might be interpreted beyond its own boundaries always existed, of course, which is why RFRA includes an explicit provision that states it will not exceed the Establishment Clause:

> Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent

> permissible under the Establishment Clause, shall not constitute a violation of this chapter.

42 U.S.C. § 2000bb-4.

With respect to the courts, Congress created in RFRA a private right of action in the courts for those individuals or entities aggrieved by a law, not a delegation to the executive branch to do whatever it chooses for believers. The plain language of RFRA provides for a private right of action in the courts for individuals or entities, period. *See* 42 U.S.C. § 2000bb-1(c) (providing that a person whose religious exercise has been burdened "may assert that violation . . . in a *judicial proceeding*") (emphasis added); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006) ("RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress."). It is not a license to permit the executive branch to unilaterally exempt all religious believers from a law as the Department argues in this case.

There is also strong evidence in RFRA's companion bill, the RLUIPA, 42 U.S.C. § 2000cc et seq., that Congress did not intend for federal agencies to be able to use RFRA as a sword to slice through duly enacted laws.[3] RLUIPA provides that local governments may

[3] After RFRA was held unconstitutional in *City of Boerne*, 521 U.S. at 536, the activists returned to Congress to demand reenactment. There was consideration of a law virtually identical to RFRA, the Religious Liberty Protection Act, but in the end, Congress passed a new RFRA to be applied solely to federal law, and RLUIPA, to create causes of action against local and state

"cure" a potential RLUIPA violation voluntarily before a lawsuit is filed. "A government may avoid the preemptive force . . . of this chapter by changing the policy . . . exempting the substantially burdened religious exercise, by providing exemptions from the policy . . . or by any other means that eliminates the substantial burden." § 2000cc-3. There is no such language in RFRA. Instead, RFRA was intended to be and is by its plain language, a private right of action for the courts.

Under the Department's interpretation of its power in this case, when Congress enacts a judicial mechanism to obtain accommodation that is triggered by a law's substantial burden placed on a religious believer, the federal government can simply nullify the law in toto for all religious believers. That leap is simply too far.

Even if the Department's blanket exemption were found to be a constitutional exercise of its power, the infringement on Congress' power is extreme, and crosses constitutional boundaries. As the Ninth Circuit has stated:

> [E]ven assuming that agencies are authorized to provide a mechanism for resolving perceived RFRA violations, RFRA likely does not authorize the religious exemption at issue in this case, for two independent reasons. First, the religious exemption *contradicts* congressional intent that all women have access to

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governments for religious landowners and religious institutionalized persons. HAMILTON, at 28.

> appropriate preventative care. The religious exemption is thus notably distinct from the accommodation, which attempts to accommodate religious objectors *while still meeting* the ACA's mandate that women have access to preventative care. The religious exemption here chooses winners and losers between the competing interests of two groups, a quintessentially legislative task. Strikingly, Congress already chose a balance between those competing interests and chose both to mandate preventative care and to reject religious and moral exemptions. The agencies cannot *reverse* that legislatively chosen balance through rulemaking.

California v. U.S. Dep't of Health & Human Servs., 941 F.3d 410, 427 (9th Cir. 2019) (emphasis added).

The drafters of RFRA directed the courts to engage in a case-by-case analysis to determine accommodation through the "substantial burden" calculus. "Federal courts accept neither self-certifications that a law substantially burdens a plaintiff's exercise of religion nor blanket assertions that a law furthers a compelling governmental interest. Instead, before reaching those conclusions, courts make individualized determinations dependent on the facts of the case. . . ." *Id.* at 427–28.

The facts of this case also demonstrate the government regulations violate the Establishment Clause.

III. The Government's New Rules Violate the First Amendment.

"At some point, accommodation [of religious freedom] may devolve into 'an unlawful fostering of religion'" and violate the Establishment Clause. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334–35 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145 (1987)). That point is reached here, where the government gives Petitioners a complete exemption from the contraceptive benefit. Like the Connecticut statute that unconstitutionally "arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath," the requested exemption in this case violates the Establishment Clause through its "unyielding weighting in favor of [religious organizations] over all other interests," especially the interests of women of faith in furthering their reproductive health and protecting their religious freedom. *Caldor*, 472 U.S. at 709; *Cutter*, 544 U.S. at 722.

This Court has distinguished between religious exemptions and accommodations, which are permitted by the "play in the joints" between the Religion Clauses, and religious preferences, which the Establishment Clause prohibits. *Compare Amos*, 483 U.S. at 334 (discussing how the government is able to "accommodate religious practices . . . without violating the Establishment Clause"), *with Caldor*, 472 U.S. at 709–11 (holding that the Connecticut statute allowing employees that observe a Sabbath to be able to do so

without any exceptions for special circumstances was unconstitutional). The government must heed this Court's warning that "[a]t some point, accommodation may devolve into 'an unlawful fostering of religion'" and violate the Establishment Clause. *Amos*, 483 U.S. at 334–35 (quoting *Hobbie*, 480 U.S. at 145); *see also Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause"). The point of unlawful fostering of religion is reached with the government's complete exemption.

In *Cutter*, this Court observed that a religious exemption may violate the Establishment Clause if it does not take account of the burden of the exemption on nonbeneficiaries. 544 U.S. at 720 (citing *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994)); *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.*, 512 U.S. at 722 (Kennedy, J., concurring) ("[A] religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents."). The government's two rules have not taken into account the contraceptive needs of employees and the result is that employees have to pay for no-cost insurance. The rules are thus different from the government's other exemptions, which generally "involve legislative exemptions that did not, or would not, impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989).

In *Caldor*, this Court approvingly identified "a fundamental principle of the Religion Clauses, so well articulated by Judge Learned Hand: 'The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.' " *Caldor*, 472 U.S. at 709–10 (quoting *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)). *Amici* endorse this constitutional principle as a matter of faith; as Catholics *Amici* believe that *every person* must enjoy "freedom or immunity from coercion in matters religious." Pope Paul VI, *Declaration on Religious Freedom* Dignitatis Humanae *on the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious*, THE HOLY SEE 681 (Dec. 7, 1965), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html. Nonetheless, this coercion is precisely what Petitioners received in this case: the right to block their employees from contraceptive insurance. In defiance of the First Amendment, the government requests an "absolute and unqualified" exemption where "religious concerns automatically control over all secular interests in the workplace," "no matter what burden or inconvenience this imposes on the . . . workers." *Caldor*, 472 U.S. at 708–09.

Neither RFRA nor the Free Exercise Clause of the First Amendment grants Petitioners a right to complete and costly exemption from the ACA, and the Establishment Clause prohibits it. The exemption does not take account of the burden on nonbeneficiaries and

is therefore unconstitutional. *See Cutter*, 544 U.S. at 720 ("courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries, and they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths") (citations omitted).

The best way to prevent RFRA from acquiring such "breadth and sweep" is for this Court "to ensure that interests in religious freedom are protected." *Hobby Lobby*, 573 U.S. at 736 (Kennedy, J., concurring) (citation omitted). *Amici* respectfully ask this Court to ensure that the religious interests of Catholic and non-Catholic workers and their dependents are protected so that they may "preserv[e] their own dignity" and receive the contraceptive insurance without cost to which they are entitled. *Id*. We ask you to affirm the Third Circuit's decision.

CONCLUSION

The *Amici Curiae*—CHILD USA, DignityUSA, New Ways Ministry, the Quixote Center, the Women's Alliance for Theology, Ethics and Ritual, and the Women's Ordination Conference—respectfully ask this Court to reject the government's complete exemption of employers from providing the birth control benefit

of the Affordable Care Act and to affirm the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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