No. 19-431 & 19-454

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,
Petitioner,
v.
COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES,
Petitioner,
v.
COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AND THE HUMAN RIGHTS CAMPAIGN IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization working for full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and people living with HIV through impact litigation, policy advocacy, and public education. Representing more than three million members and supporters, the Human Rights Campaign ("HRC") works for a world where LGBT people are ensured of their basic equal rights, and can be open, honest and safe at home, at work, and in the community.

Amici submit this brief in support of Petitioners.[1]

SUMMARY OF THE ARGUMENT

Through the Women's Health Amendment, the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. 18001 *et seq.*, guarantees that employees receive access to basic preventive health care services, including contraceptives. In doing so, Congress recognized that access to contraceptives is necessary to remedy gender inequality, including discriminatory health care costs for women, and to protect patient health. Such care also is an essential part of a person's ability to plan meaningfully for the future and

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[1] All parties have consented to the filing of this brief. No counsel for a 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 *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

participate equally in society.

However, in 2017, the Departments of Health and Human Services, Labor, and Treasury (collectively, "the agencies") issued "interim final rules" without notice and comment that exempt altogether employers that claim a religious or moral objection to the contraceptive coverage requirement. 82 Fed. Reg. 47,792; 82 Fed. Reg. 47,838 (Oct. 13, 2017). The agencies later solicited notice and comment on the interim rules and in 2018 issued materially identical final rules. 83 Fed. Reg. 57,536; 83 Fed. Reg. 57,592 (Nov. 15, 2018). These cases consider the validity of both sets of rules ("the Exemption Rules" or "rules").

Amici agree with Respondents Commonwealth of Pennsylvania and the State of New Jersey ("the States") that the Exemption Rules violate the Administrative Procedure Act because they were issued without appropriate notice and comment. Additionally, *Amici* concur that enjoining the Exemption Rules nationwide was within the district court's authority and an appropriate exercise of discretion. *Amici* also agree that the agencies lacked statutory authority to promulgate the Exemption Rules under either the ACA or the Religious Freedom Restoration Act ("RFRA"). 42 U.S.C. 2000bb *et seq.*

Amici submit this brief to guide the Court solely with respect to a related consideration—that RFRA neither requires nor permits the Exemption Rules' broad religious exemptions. The agencies cannot reasonably maintain that the ACA's contraceptive coverage provision, with its accommodations as they existed prior to the rules at issue, infringes on the religious exercise of covered employers. Moreover, the Exemption Rules violate longstanding precedent

establishing that RFRA does not require, and government may not authorize, religious exercise under circumstances when such exercise results in significant harm to others. This is so because the Exemption Rules seek to extend employers' free exercise rights to the detriment of the health, financial, equality, and liberty rights of others.

That the care at issue concerns reproductive health and family planning spotlights the potential consequences of the agencies' attempt to expand employers' religious rights. These legally-guaranteed health services affect the "most intimate and personal choices a person may make in a lifetime." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). *See also Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (explaining that *Casey* confirmed that decisions concerning intimate adult relationships are a protected liberty for both married and unmarried persons, and are protected regardless of gender and sexual orientation).

Moreover, if the agencies were to prevail, it would invite employers to make similar objections whenever their employees need them to complete routine paperwork or to take other incidental steps related to government programs, benefits or laws concerning family or personal needs of which the employer disapproves. While these cases concern employer efforts to impede Congress's program to equalize health insurance costs and coverage as between women and men, and to improve public health, the agencies' expanded conception of institutional religious freedom as a right to curtail the freedom of others also could undermine other public benefit programs and laws designed to improve health and to

equalize opportunity for LGBT persons and those living with HIV or other disabilities.

Courts consistently in the past have rejected religious exercise claims that entail harm to others. The Court should do so here as well. The health and equality interests at stake are compellingly important. And they are only the beginning of the interests likely to be at risk if the Court releases the reasonable restraints that Congress wrote into RFRA.

ARGUMENT

I. RFRA Neither Authorizes Nor Requires The Exemption Rules Because The Contraceptive Coverage Provision, As Modified By The Prior Accommodation, Did Not Burden Religious Exercise For Any Employer, Let Alone Substantially So.

The agencies' conception of what constitutes a burden on religious exercise far exceeds what prior case law has recognized. Under RFRA, the federal government cannot "substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling government interest. 42 U.S.C. § 2000bb-1(a), (b). The agencies argue that the Exemption Rules are necessary or, at minimum, authorized under RFRA "as the most appropriate administrative response to the substantial burden identified by the Supreme Court in *Hobby Lobby*." Petitioners Brief ("Pet.Br.") 9. They are wrong. By its explicit terms, RFRA offers protection only against *substantial* burdens on religious exercise, not mere incidental burdens. Consequently, notwithstanding sincere religious beliefs, those who engage in regulated public activities must comply with

generally applicable laws, and government need only show that a challenged law is the least restrictive way to advance a compelling state interest when that law imposes a *substantial* burden on religious exercise.

Everyone in our society is free to identify with a particular religious tradition and to hold whatever beliefs inspire them; it is not for the courts to judge the reasonableness or logic of their beliefs. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). Courts are charged, however, with assessing as a legal matter, based on the record presented, whether a challenged law burdens a religious practice substantially or only incidentally. *See, e.g., Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989).

The court of appeals below correctly determined that an employer's submission of a "self-certification" form does not render the employer "complicit" in providing contraceptive coverage. *Pennsylvania v. Trump*, 930 F.3d 543, 573 (3d Cir. 2019). "[T]he self-certification form does not trigger or facilitate the provision of contraceptive coverage because coverage is mandated to be otherwise provided by federal law." *Id.*, citing *Geneva Coll, v. Sec'y of U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 437-38 (3d Cir. 2015), vacated and remanded *sub nom Zubik v. Burwell*, 136 S. Ct. 1557 (2016). An employer's objection to what happens after submission of the form—the provision of health care by a third party (the federal government) to other third parties (employees)—cannot constitute a burden on the objector. As this Court has recognized, the accommodation "effectively exempt[s]" the objecting employer from providing contraceptive coverage, *Burwell v. Hobby Lobby*, 573 U.S. 682, 698 (2014). It thus relieves them of any

burden associated with such coverage, let alone a substantial one.

The agencies are simply incorrect to argue that *Hobby Lobby* renders courts unable even to weigh the substantiality of a claimed burden on religious exercise, or that courts must defer blindly to an employer's assertion. Pet.Br. 24. Courts instead must retain an independent obligation to review whether a burden is actually substantial or else any individual or organization could require that a law or rule must survive strict scrutiny review due to their sincere but subjective feelings of burden, even when the burden is obviously minuscule when assessed objectively. In such cases, if courts were to defer to RFRA claimants' subjective assertion of burden, that would collapse the burden assessment into the separate determination of the claimant's sincerity. Congress's requirement that only "substantial" burdens on religious exercise give rise to a RFRA claim should not be leeched of meaning. See *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1177 (10th Cir. 2015), vacated and remanded *sub nom Zubik*, 136 S. Ct. 1557 (citing 139 Cong. Rec. S14352 (daily ed. Oct. 26, 1993), statement of Sen. Kennedy noting that RFRA would not impose strict scrutiny for "governmental actions that have an incidental effect on religious institutions").

Indeed, the Court's decision in *Hobby Lobby* makes apparent that the Exemption Rules are not required under RFRA because the pre-existing accommodation process adequately satisfied employers' religious needs. The *Hobby Lobby* plaintiffs held the religious belief that they could not "'*be involved in* the termination of human life" after conception, which

they believe is a 'sin against God to which they are held accountable.'" *Hobby Lobby*, 573 U.S. at 701 (emphasis added). They also averred that "'it is immoral and sinful for [them] to intentionally *participate in, pay for, facilitate, or otherwise support* these drugs.'" *Id.* at 702 (emphasis added). The Court assumed that those beliefs were sincerely held and found that "arrang[ing] for such coverage . . . demands that they engage in conduct that seriously violates their religious beliefs." *Id.* at 720. Importantly, however, the Court determined that "arranging" did not include the minimal paperwork the government uses to implement the accommodation. Both the majority opinion and the concurrence perform the judicial function of assessing the burden claim, not simply accepting the religious adherent's subjective view. And both opinions conclude that the accommodation would respect the *Hobby Lobby* plaintiffs' religious beliefs, which closely resemble the employers' beliefs in these cases: that they may not directly provide insurance, nor "be involved in . . . participate in, pay for, facilitate, or otherwise support" use of the medications. *Id.* at 702.

The majority opinion concluded that, "The less restrictive approach we describe *accommodates the religious beliefs* asserted in these cases," *id.* at 731 n.40 (emphasis added), and "does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion." *Id.* The concurrence agreed that the "accommodation equally furthers the Government's interest but *does not impinge on the plaintiffs' religious beliefs*" and "*the means to reconcile those two priorities are at hand in the existing accommodation* the Government has designed,

identified, and used for circumstances closely parallel to those presented here." *Id.* at 738-39 (Kennedy, J., concurring) (emphasis added).

This conclusion also is consistent with numerous prior cases addressing religious liberty claims and accommodations. For example, in *Walden v. CDC & Prevention,* 669 F.3d 1277 (11th Cir. 2012), the Eleventh Circuit applied RFRA and determined that there was no burden on plaintiff counsellor's religious beliefs because she claimed no religious duty to tell her patients that she was referring them due to her religious objections to their relationships. *Accord Smith v. Fair Emp't and Hous. Comm'n,* 913 P.2d 909 (Cal. 1996) (under strict scrutiny, burden imposed by fair housing law on landlord with religious objection to unmarried tenants was not substantial because landlord had chosen to enter the rental housing market and was best positioned to avoid the religious conflict). Moreover, in a case applying RFRA's strict scrutiny test and recognizing that the burden on a religious school of completing paperwork to request a zoning variance was negligible, the Ninth Circuit rejected the college's appeal of the denial of its request, concluding that being required to complete another application to substantiate its request did not impose a substantial burden on its religious exercise. *San Jose Christian Coll. v. City of Morgan Hill,* 360 F.3d 1024 (9th Cir. 2004).

In other challenges to regulations governing religiously motivated employers, courts consistently have rejected employers' claims that regulatory schemes protecting employees substantially burdened the employer's religious exercise. For example, in *Donovan v. Tony and Susan Alamo Found.*, 722 F.2d

397, 403 (8th Cir. 1983), *aff'd* 471 U.S. 290 (1985), the court concluded that "enforcement of wage and hour provisions" against religious non-profits that employed convicts and recovering addicts to further their rehabilitation "cannot possibly have any direct impact on [the employers'] freedom to worship and evangelize as they please." *Id.*

Similarly, in *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990), the court rejected a religious school's free exercise claim seeking exemption from minimum wage and equal pay requirements. The school argued that these requirements impaired its ability to determine matters of internal church governance "as well as those of faith and doctrine," including "its head-of-household practice," which "was based on a sincerely-held belief derived from the Bible," and which required payment of a salary supplement to male but not female teachers. *Id.* at 1397. The school's employees intervened to support the school, arguing that having their wages set by the government, rather than by church governors, would deprive "them of blessings they would receive by allowing their Lord to supply their needs." *Id.* Nevertheless, the court concluded that "any burden [imposed by fair pay requirements] would be limited." *Id.* The "increased payroll expenses to conform to FLSA requirements is not the sort of burden that is determinative in a free exercise claim." *Id.* at 1397-98. *See also EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (school violated antidiscrimination law by offering unequal health benefits to female employees). *Cf. United States v. Lee*, 455 U.S. 252, 261 (1982) (applying statute that accommodated religious beliefs of employer by allowing him exemption from duty to pay into Social

Security system, but not to withhold payments with respect to his employees). In sum, courts have been weighing how substantially, or not, a challenged regulation burdens the religious exercise of religiously motivated employers for generations. The rules upheld in past cases further confirm that the opt-out paperwork of the pre-existing accommodation, and the insurance disconnect it accomplishes, fall far short of implicating RFRA concerns.

Moreover, these cases upholding regulation of employers—including religious non-profits—are consistent with precedent in other contexts finding that generally applicable rules governing professional or other marketplace conduct impose only minimal burdens, if any cognizable burden at all, on market participants' religious exercise. For example, courts repeatedly have rejected individuals' assertions that generally applicable constraints on conduct of health professionals impose improper burdens on their religious exercise. *See, e.g., Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014) (rejecting challenge to state law banning "sexual orientation change efforts" as mental health treatment for minors); *Knight v. Conn. Dep't. of Pub. Health,* 275 F.3d 156, 164-65 (2d Cir. 2001) (denying free exercise claims of two public employees whose religious speech at work was inconsistent with professional standards that protect patients); *Berry v. Dep't of Social Servs.,* 447 F.3d 642 (9th Cir. 2006) (county agency entitled to prohibit employee from discussing religion with clients); *Bruff v. North Miss. Health Servs., Inc.,* 244 F.3d 495, 497-98 (5th Cir. 2001) (statutory duty to accommodate counselor-employee's religious needs did not entitle her to refuse to counsel patients about non-marital relationships); *Moore v. Metro. Human Serv. Dist.,* No. 09–6470, 2010

WL 3982312, (E.D. La. Oct. 8, 2010) (publicly-employed social worker not entitled to religious accommodation allowing her to impose Christian views on others).

In a range of other contexts, too, courts likewise have held that decisions of religious believers to engage in market activity necessarily entails a duty to accept certain regulatory constraints. *See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.,* 493 U.S. 378, 389-91 (1990) (under strict scrutiny test comparable to RFRA standard, generally applicable sales tax did not impose "constitutionally significant" burden on ministry's sale of religious material because such a tax is "no different from other generally applicable laws and regulations—such as health and safety regulations—to which [the ministry] must adhere"); *Henderson v. Kennedy,* 253 F.3d 12 (D.C. Cir. 2001) (under RFRA, regulation banning T-shirt sales on National Mall did not substantially burden claimants' religious exercise).

The supposed burden of the accommodation is far more attenuated than the pay equity requirement in *Shenandoah Baptist Church,* the requirement to purchase health insurance challenged in *Hobby Lobby*, or the requirement to counsel patients concerning relationships considered sinful in *Bruff*. Those requirements demanded that complainants directly engage in conduct inconsistent with their religious beliefs. Here, the pre-existing accommodation did not force employers to provide contraception, to pay for contraception insurance, or to have any direct contact with contraception at all. Instead, the accommodation completely separated employers from their employees' independent

decisions about contraceptive use. Accordingly, employers' claimed burden is simply the separation of employer and employee information and conduct that prevents employers from burdening or restricting their employees' medical and sometimes-religious decision-making. In other words, it is no burden on these employers at all.

The Court also should reject any suggestion that an objecting employer's submission of a form to comply with a legal notice requirement constitutes some sort of endorsement of contraception or complicity in its use. Courts repeatedly have rejected assertions that compliance with generally applicable rules constitutes any form of expression, let alone endorsement of regulated conduct. For example, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) (*"FAIR"*), the Court rejected a claim by law schools that the schools' compliance with a statutory mandate to facilitate military recruitment on campus would send a message of agreement with the military's policies. Compliance with that mandate sent no message at all, let alone a message "that law schools agree with any speech by recruiters." *Id.* at 65 (citing *Pruneyard Shopping Ctr. v. Robins,* 447 U.S. 74, 88 (1980), which explained that views of those engaging in expressive activities in a privately owned shopping center were unlikely to be identified with the property owner, who remained free to disassociate himself from those views and was "not . . . being compelled to affirm [a] belief in any governmentally prescribed position or view").

Here, employers remain free to voice their opposition to contraceptive usage so that all employees and the public will know that the

employer's submission of the "self-certification" form is *not* the employer's endorsement of contraceptive usage, but instead is mere compliance with the law.

The pre-existing accommodation actually takes the step posited in *FAIR* and *Pruneyard*: when an institution submits its opt-out paperwork, the government's alternate coverage system communicates to the employee-insureds the separateness of the coverage and makes explicit that the employer has no involvement. There cannot be any mistaken impression that the employer is complicit, condoning, or causing the provision of contraception. Rather, the third party administrator ("TPA") confirms that the coverage is provided solely by the TPA, as required by federal law within a secular, public program.

In sum, because the protection for one's own exercise of religion does not include a right to control others' independent conduct or block access to publicly available benefits, the pre-existing accommodation did not burden employers' protected religious exercise at all, let alone substantially. Consequently, RFRA neither requires nor justifies the Exemption Rules.

II. RFRA Neither Authorizes Nor Requires The Exemption Rules Because The Rules Negate Sound, Settled Precedents That Limit Everyone's Right To Impose Religious Views To The Detriment Of Third Parties.

The Court's precedents establish that the accommodation of a person's religious or moral beliefs cannot be justified when it imposes harms on others. More specifically, it is long settled that religiously motivated employers cannot exempt themselves from

laws protecting others from harm by asserting a religious motive for their conduct. *See, e.g., Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985); *Lee*, 455 U.S. at 261. Thus, even when courts have found that a challenged regulation *does* burden an employer's religious exercise to an extent, the courts nevertheless generally have upheld such regulations as serving adequately compelling governmental interests, including protection of others who would be harmed if the employer were exempted from the law. *See, e.g., Lee*, 455 U.S. at 261.

The Court affirmed this principle in *Hobby Lobby*, stressing that the pre-existing accommodation should be available to for-profit employers with religious objections to contraception because the "effect . . . on the women employed by Hobby Lobby . . . would be precisely zero." *Hobby Lobby*, 573 U.S. at 693. Justice Kennedy reinforced that the accommodation was proper because it avoids burdens on employees who have their own compelling interests. *Id.* at 739.

Hobby Lobby thus honors the analysis provided in *Lee*, in which a small business owner objected to paying social security taxes for his employees because of his—and his employees'—religious beliefs that accepting social security benefits and paying social security taxes are sinful. This Court acknowledged a conflict between Mr. Lee's religious beliefs and his tax obligations, and that a statutory provision exempted him from the duty to pay such taxes for his own self-employment. 455 U.S. at 257. The Court determined that he nonetheless was required to pay these taxes for his employees because "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the

employees." *Id.* at 261. In other words, while it may be proper to accommodate an employer's religious objection to direct participation in a secular, public welfare program, the free exercise right does not extend to hindering employees' access to the benefits guaranteed for them by law.

This Court's decisions following *Lee* reinforced the core principle that protected free exercise of religion does not include a right to insist that either the government or third parties conform to one's own beliefs and practices. *See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (where government took steps to accommodate religious needs regarding land use, no religious right to block government plans for others' benefit); *Bowen v. Roy,* 476 U.S. 693 (1986) (despite religious objection, government may use Social Security numbers for effective administration of public benefits programs).

Thus, as *Lyng* and *Bowen* illustrate, although religious freedom may warrant accommodation, it does not entitle individuals to block or impose individual beliefs on government programs that aim to meet broad public needs, especially those involving compliance with a complex regulatory scheme. Just as "[t]here is surely no constitutional right, under the religion clauses of the First Amendment, to pay substandard wages" due to an employer's sincerely-held religious beliefs about employee compensation, *see Donovan*, 722 F.3d at 403 n.21, there is no religious liberty right under RFRA to block or burden employees' access to government-mandated, independently provided insurance for medically warranted health care.

This remains the governing rule. It rests on an extensive body of precedent in which courts have considered religious accommodation claims in diverse contexts and consistently have rejected such claims where accommodating the asserted religious belief could harm others. For example, applying the *Sherbert* test codified by RFRA, the Second Circuit emphasized that courts frequently "have held that the state's interest outweighs any First Amendment rights" where there is a "clear interest, either on the part of society as a whole or at least in relation to a third party, which would be substantially affected by permitting the individual to assert what he claimed to be his 'free exercise' rights." *Winters v. Miller*, 446 F.2d 65, 70 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971), *citing Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (violation of child labor laws); *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy); *People v. Handzik*, 102 N.E.2d 340 (Ill. 1951) (criminal prosecution of faith healers who practice medicine without a license); *People v. Pierson*, 68 N.E. 243 (N.Y. 1903) (serious illness of a child).

This principle applies no less concerning licensed medical and social services, where standards of practice protect patients and clients. *See also, e.g., Pickup,* 740 F.3d at 1208; *Keeton v. Anderson-Wiley*, 664 F.3d 865, 880 (2011) (college not required to allow counseling student religious accommodation that would "evade the curricular requirement that she not impose her moral values on clients"); *Walden v. CDC*, 669 F.3d at 1277 (counselor not permitted to inform patients she was referring them for her own religious reasons); *Spratt v. Kent Cty.*, 621 F. Supp. 594, 600-02 (W.D. Mich. 1985) (employer justified in firing

social worker for inclusion of religious practices while counseling inmates); *North Coast Women's Care Med. Grp., Inc. v. San Diego Cty. Superior Court (Benitez)*, 189 P.3d 959, 967 (Cal. 2008) (under strict scrutiny, no religious exemption from nondiscrimination law for physicians objecting to treating lesbian patients).

The Exemption Rules flout the "respect for third parties" principle, putting in jeopardy both religious pluralism and all manner of secular interests. Just consider a few potential consequences in other contexts. Imagine if a religious school could block its students' access to a mobile public clinic for vaccines or dental care, contrary to parents' wishes. Or if a religious employer could forbid its employees from visiting a public clinic for testing or donating blood during the lunch hour. Employers or schools with religious dietary restrictions could contend it would violate that institution's exercise of religion to have to notify workers or students of the schedule for an off-site public nutrition or subsidized meal program. Given publicly stated positions,[2] *Amici* anticipate some religious employer refusals to making social security payments that likely would benefit a same-sex spouse, and to providing confirming documentation to enable social security disability payments for a dependent child of a married same-sex couple. Some religiously affiliated hospitals may argue that they are burdened by patients and employees whose same-sex spouses are entitled to

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[2] *See, e.g.,* US Conference of Catholic Bishops, *Marriage in a Post-Obergefell Context*, https://tinyurl.com/vtokr8j; Most Rev. Joseph C. Bambera et al., *Created Male and Female* (USCCB, Dec. 15 2017), https://tinyurl.com/ybrondqb.

bedside visits, decision-making or spousal employment benefits.

Our history teaches that we must not neglect the "protect third parties" principle as we honor everyone's religious liberty. In the United States, differing religious beliefs—especially beliefs about family life—have generated countless disputes not only in employment and medical settings, but also in education, public accommodations, housing, and other arenas. Damaging divisions have arisen when religious convictions prompted some to believe that others have sinned or should be kept apart, leading to discrimination in regulated, public settings. Although some forms of religiously motivated discrimination have receded, our history tells a recurring saga of successive generations asking anew whether the laws that shield religious liberty can be made into a sword against others' liberty and right to participate equally in civic life. Our courts properly and consistently have recognized that the answer to that question must remain the same: religious beliefs do not entitle any of us to harm others in defiance of generally applicable laws protecting all of us.

Thus, for example, during the past century's struggles over racial integration, some Christian schools restricted admission of African American applicants based on beliefs that "mixing of the races" would violate God's commands. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 580, 583 n.6 (1983). Some restaurant owners refused to serve African American customers citing religious objections to "integration of the races." *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944-45 (D.S.C. 1966), *rev'd* 377 F.2d 433 (4th Cir. 1967), *aff'd and modified*

on other grounds, 390 U.S. 400 (1968). Religious tenets also were used to support laws and policies against interracial relationships and marriage. *See*, *e.g.*, *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (in decision invalidating state interracial marriage ban, quoting trial judge's admonition that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix."); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (firing of white clerk typist for friendship with black person was not protected exercise of religion despite church's religious objection to interracial friendships).

As our society began coming to grips with the desire and need of women for equal treatment in the workplace, some who objected on religious grounds likewise sought exemptions from employment nondiscrimination laws as a free exercise right. Notwithstanding the religious traditions on which such claims often were premised, courts recognized that these religious views could not be accommodated in the workplace without vitiating the sex discrimination protections on which workers are entitled to depend. *See*, *e.g.*, *EEOC v. Fremont Christian Sch.*, 781 F.2d at 1362 (holding it was sex discrimination for school to offer unequal employment benefits to female employees, despite employer's religious motives); *Bollenbach v. Bd. of Educ.*, 659 F. Supp. 1450, 1473 (S.D.N.Y. 1987) (rejecting as improper employer's refusal to hire women bus drivers in deference to religious objections of Hasidic male student bus riders).

Similarly, after state and local governments enacted fair housing laws that protected unmarried couples, landlords unsuccessfully sought exemptions based on their belief that they would sin by providing residences in which tenants might commit what they considered to be the sin of fornication. *See*, *e.g.*, *Smith*, 913 P.2d at 925 (rejecting religious exercise claim of landlord because housing law did not substantially burden religious exercise); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (same).

Across generations, these questions have been asked and answered, echoing with reassuring consistency. Courts have held time and again that one's religious freedom does not include a right to restrict others' freedoms. As the Court has confirmed, RFRA did not change that principle. It neither authorizes nor requires exemptions for religious objectors that affirmatively deny others' rights and freedom.

Accordingly, the agencies' error is glaring. They attempt to cast the employees' statutory right to this insurance coverage as merely optional and negligible, such that its loss—if affirmatively blocked by employers—cannot be a cognizable harm. But the medical, public health, practical and personal truth is to the contrary. This is an "essential health benefit," and intentionally blocking access is precisely the sex discrimination that Congress acted to stop by passing the Women's Health Amendment.

III. The Agencies' Assertion That RFRA Necessitates Exemptions From Contraception Coverage For Any Employer With A Religious Or Moral Objection Has Dangerous Implications For LGBT People.

If the Court were to adopt the agencies' unfounded assertion that RFRA requires exemptions permitting any employer effectively to block countless women's alternate access to necessary preventive care, that outcome would have devastating implications, not just for women and public health, but for LGBT people as well, who are disproportionately likely to experience discrimination in employment and health care settings. Despite a growing understanding that sexual orientation and gender identity are personal characteristics bearing no relevance to one's ability to contribute to society, *see*, *e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), there remain pervasive and fervent objections on the part of some with certain religious or moral beliefs to the existence and right to inclusion and equal treatment of LGBT people. For example, the United States Conference of Catholic Bishops ("USCCB") claims a religious right to disregard in medical programs and facilities operated under the Ethical Religious Directives for Catholic Health Care Services ("ERDs") the marriages of same-sex couples and the medical consensus about treatment of gender dysphoria.[3] Accordingly, the

[3] U.S. Conference of Catholic Bishops, *Nondiscrimination in Health Programs and Activities,* RIN 0945-AA02 (Nov. 6, 2015) (comments criticizing HHS's proposed rules for implementing Section 1557 of the ACA, which prohibits discrimination in

USCCB asserts a religious need to forbid gender-affirming care at hospitals, and to deny family benefits and spousal recognition to both patients and employees with a same-sex spouse.[4] Religiously-affiliated hospitals and social service programs may harbor similar objections when lesbian, bisexual, and gay health professionals with a same-sex spouse request leave pursuant to the Family and Medical Leave Act, or when patients and nursing home residents want a same-sex spouse respected for visitation and medical decision-making purposes. The stakes are high for LGBT people who are employed by, or receive services or medical treatment from religiously-affiliated entities. The prior accommodation protected the religious exercise rights of such entities, even while their employees were able to access contraceptives. If RFRA is interpreted as authorizing such health care to be cut off in service to employers' religious objections, LGBT people have reason for grave concern themselves.

The workforces of many religiously-affiliated entities such as hospitals, universities, and large non-profits providing licensed professional services to the general public can be diverse. Many such entities

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health care services and programs receiving federal funding on various grounds including sex, which HHS proposes to interpret to cover forms of discrimination against LGBT people), https://tinyurl.com/yx6kz6gr.

[4] *Id.* at p. 9, n.17; *see also* USCCB Comments re U.S. Dep't of Labor's proposed sex discrimination regulations (March 30, 2015) (addressing proposed OFCCP rules for federal contractors and employers covered by Title VII, the federal employment nondiscrimination law), https://tinyurl.com/t34lp93.

provide such services with substantial public funding. For example, Catholic Charities USA, a national network, is the twenty-first largest charity in the United States according to *Forbes*.[5] It had revenues of more than $4.4 billion in 2018, of which nearly $1.9 billion, or 42 percent, was taxpayer funded.[6] With those funds, Catholic Charities agencies serve many of the most vulnerable members of our society, including those who are sick or disabled, living in poverty, homeless, hungry, new immigrants, or experiencing disaster.[7] These services include a broad range of secular programs—including diverse health care services,[8] housing supports,[9] food services, and disaster relief efforts.[10] These large nonprofits have come to occupy a significant portion of the medical, nursing home, and rehabilitative marketplace.

Many of the workers for such entities do not share the same faith, and the services provided are not inherently religious. Courts—both factually and

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[5] Forbes, *Catholic Charities USA*, https://tinyurl.com/qsbyrp8.

[6] *Id.*

[7] Catholic Charities USA, Integrated Health, https://tinyurl.com/snkku32.

[8] *Id.* These include medical care, mental health and suicide prevention, substance abuse and addiction recovery, and other professional services. *See* https://tinyurl.com/snkku32.

[9] These include programs to reduce homelessness by providing supportive physical and behavioral health services as well as shelter. *See* https://tinyurl.com/wyj3rmm.

[10] *See* https://tinyurl.com/s3qzbrd.

legally—can and do distinguish between religious services and religiously inspired secular services. *See, e.g., Catholic Charities of Sacramento v. Superior Court (Sacramento),* 85 P.3d 67, 89 (2004).[11]

Amici emphasize the distinction between organizations that exist to perform religious functions for a congregation and those that serve the public and thus are subject to government regulation. Today, increasing amounts of medical and social services are delivered to the general public by faith-based or religiously affiliated providers that assert a religious right to discriminate based on sexual orientation or gender identity, or to refuse basic services needed by LGBT people, people living with HIV, women, people of other faiths, and others. A significant contributor to this problem is mergers of secular hospitals with Catholic hospitals, during which the ERDs are applied to the entire merged hospital system as a requirement of the merger.[12] Reports issued by MergerWatch in 2013 and 2016 compiled data about these mergers during the 2001 to 2011 decade, and for the next five years. The 2013 report found:

- in 2011, 10 of the 25 largest health systems in the nation were Catholic sponsored; and

- in 2011, these systems had combined gross patient revenues of $213.7 billion, $115 billion of

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[11] See Catholic Charities of Sacramento, https://tinyurl.com/rsbp3r5; see also Catholic Charities of California, Inc., https://tinyurl.com/scxnvxx.

[12] Comprehensive information is available from MergerWatch, *Protecting Patients' Rights When Hospitals Merge*, https://tinyurl.com/cxhfhl4.

which came from the publicly funded Medicare and Medicaid programs.[13]

The 2016 update reported:

- over the full 15-year period, the number of Catholic-owned or affiliated acute care hospitals grew by 22 percent, while the overall number of acute care hospitals dropped by 6 percent;
- as of 2016, 14.5 percent of all acute care hospitals in the United States were Catholic owned or affiliated; and
- one in every six acute care hospital beds is in a Catholic owned or affiliated facility.[14]

The 2013 MergerWatch report concludes, based on the financial data and other data, that "Catholic hospitals have left far behind their humble beginnings as facilities established by orders of nuns and brothers to serve the faithful and the poor. They have organized into large systems that behave like businesses—aggressively expanding to capture greater market share."[15] Their thousands upon thousands of employees are entitled to the full essential health coverage that Congress has guaranteed them.

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[13] Lois Uttley et al., *Miscarriage of Medicine: The Growth of Catholic Hospitals and the Threat to Reproductive Health Care* (Dec. 18, 2013), https://tinyurl.com/swcgys9.

[14] Lois Uttley & Christine Khaikin, *Growth of Catholic Hospitals and Health Systems: 2016 Update of the Miscarriage of Medicine Report* 1 (MergerWatch, 2016), https://tinyurl.com/vxsa9d3

[15] Miscarriage of Medicine, *supra* n.13 at 1.

Among those employers covered by the prior accommodation (and which are now free under the Exemption Rules simply to ignore the law) are religiously affiliated schools credentialed by government to issue diplomas certifying satisfaction of secular standards. Like most religiously affiliated health care providers, many of these schools employ vast numbers of people of diverse faiths (and no faith) to perform the institutions' work. Without doubt, the decision in these cases will affect a large swath of our society.

Amici anticipate these problems not just due to formal statements by religious bodies such as the USCCB and some of the amici supporting the agencies. Unfortunately, religiously based disapproval of same-sex relationships and objections to interacting with LGBT people and people living with HIV remain common in many contexts. *See*, *e.g.*, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 569 (6th Cir. 2018) (secular employer cited religious beliefs as grounds for firing employee due to her transgender expression), cert. granted on other question, 139 S. Ct. 1599 (Apr. 22, 2019); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (anti-gay proselytizing intended to provoke coworkers); *Knight*, 275 F.3d at 156 (visiting nurse proselytizing to home-bound AIDS patient); *Erdmann v. Tranquility, Inc.*, 155 F. Supp. 2d 1152 (N.D. Cal. 2001) (supervisor harassment of gay subordinate with warnings he would "go to hell" and pressure to join workplace prayer services).

As laws and company policies have begun to offer more protections against this discrimination, some who object have been asking courts to change course and allow religious exemptions where they have not

done so in past cases. For the most part, longstanding principles have held true and the needs of third parties have remained a constraint on religion-based conduct in commercial contexts. *See*, *e.g.*, *Peterson*, 358 F.3d at 599 (rejecting religious accommodation claim); *Knight*, 275 F.3d at 156 (same); *Erdmann*, 155 F. Supp. 2d at 1152 (antigay harassment was unlawful discrimination); *Benitez*, 189 P.3d at 970 (rejecting physician's claim of religious exemption from nondiscrimination law).

The interpretation of RFRA advanced by the agencies would mark a sea change—not only in allowing employers' religious views about family planning to burden employees' access to a public program designed for society at large, but also in opening the door to similar denials of equal compensation, health care access, and other equitable treatment for LGBT people, persons living with HIV, and anyone else whose family life or health need diverges from their employers' religious convictions. As the Court has recognized, our federal laws and traditions have "afford[ed] constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence v. Texas*, 539 U.S. at 574, citing *Casey*, 505 U.S. at 851. The Court's explanation of the "respect the Constitution demands for the autonomy of the person in making these choices," *id.*, spotlights that the "person" whose autonomy is to be protected is the person herself—not the nonprofit institution that employs her.

Many employees, like many business owners, hold religious and other beliefs that guide their lives. Those beliefs remain with them when they enter their shared

workplaces. As recognized in the decisions discussed above, permitting employers to burden employees' decisions concerning fertility, birth control, and childbearing not only would encourage others to do the same, but would subvert compelling interests in autonomy, public health, and gender equity served by the pre-existing accommodation and the ACA as a whole. The agencies offer no limiting principle, and indeed, there is none.

Stepping back from the reproductive health context of these cases, imagine how our nation's workplace standards would be transformed were the Court to embrace the agencies' approach. Employers with religious objections to plasma transfusion could object to coverage for that life-saving service in their employees' health plan, and then could seek to block employees' access to alternate sources of care. Employers could selectively block access to medications that they consider "sinful" because those drugs control pain, alleviate depression, or manage HIV. Those who believe that all modern medical treatments interfere with divine will could hinder coverage for all but faith healing.

Amici sound alarm bells here because discriminatory denials of family health insurance and biased attitudes of health professionals—often rooted in religious views—already contribute to persistent health disparities affecting the constituencies they represent. The Institute of Medicine of the National Academies has published an authoritative overview of the public health research addressing these disparities, which repeatedly notes the adverse health consequences of anti-LGBT attitudes. *See* Institute of Medicine, *The Health of Lesbian, Gay, Bisexual, and*

Transgender People: Building a Foundation for Better Understanding (2011) ("IOM Report") (undertaken at the request of the National Institutes of Health), https://tinyurl.com/ug72d7j. For example, the IOM Report observes:

- Although LGBT people share with the rest of society the full range of health risks, they also face additional, profound health risks due to social stigma. *Id.* at 14.

- It is clear that stigma has exerted an enormous and continuing influence on the life and consequently the health status of LGBT individuals. *Id.* at 74-75.

- LGBT individuals face financial barriers, limitations on access to health insurance, insufficient provider knowledge, and negative provider attitudes that can be expected to have an effect on their access to health care. *Id.*[16]

In addition to its adverse effects for all who need access to contraception coverage—and on women's equality generally—the agencies' elevation of religious rights to the detriment of others' needs would worsen circumstances for LGBT people and people living with HIV that already are challenging. Responding to proposed regulations to implement the nondiscrimination provisions of the ACA, *Amicus*

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[16] See also U.S. Dep't Health & Hum. Svcs., *Lesbian, Gay, Bisexual, and Transgender Health* (2020), https://tinyurl.com/z4q9mzs; U.S. Substance Abuse and Mental Health Svcs. Admin., *Top Health Issues for LGBT Populations* (2012), https://tinyurl.com/vs4vrs9; U.S. HHS Agency for Healthcare Research and Quality, *National Healthcare Disparities Report*, 241-256 (2012), https://tinyurl.com/ruwet9h.

Lambda Legal provided examples of the urgent health needs of LGBT people and those living with HIV based on its litigation and the results of the first national survey to examine barriers to care for this vulnerable population.[17] The survey results were shocking. Of nearly 5,000 respondents, more than half reported that they had experienced at least one of the following types of discrimination at the hands of health care providers:

- Refusals to touch them or use of excessive precautions;
- Harsh or abusive language;
- Physical roughness or abuse;
- Blame for their health status.[18]

Numerous respondents reported their reluctance to seek medical care after interacting with health professionals who freely had expressed religiously grounded bias against them.

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[17] Lambda Legal, *Comments on HHS 1557 NPRM (RIN 0945-AA02) Regarding Nondiscrimination in Health Programs and Activities*, 19-23 (Nov. 9, 2015), https://tinyurl.com/t44kvqc, citing survey results published in Lambda Legal, *When Health Care Isn't Caring: Survey on Discrimination Against LGBT People and People Living with HIV* (2010), https://tinyurl.com/u2m7845 ("When Health Care Isn't Caring").

[18] *See When Health Care Isn't Caring*, at 5, 9-10. Almost 56 percent of lesbian, gay, or bisexual respondents had at least one of these experiences; 70 percent of transgender and gender nonconforming respondents had one or more of these experiences; and almost 63 percent of respondents with HIV experienced one or more of these types of discrimination. *Id.*

The stress deriving from social exclusion and stigma can lead to serious mental health problems, including depression, anxiety, substance abuse disorders, and suicide attempts. *See* Jennifer Kates, et al., *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender (LGBT) Individuals in the U.S.* (Kaiser Family Foundation, May 3, 2018), https://tinyurl.com/y3ll6f6t; Timothy Wang et al., *The Current Wave of Anti-LGBT Legislation: Historical context and implications for LGBT health* (Fenway Institute, June 2016), https://tinyurl.com/t75aqgy; Ilan Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, Psychological Bulletin, Vol. 129, No. 5, 674-97 (2003), https://tinyurl.com/y4ae5ksk.

Anti-LGBT bias often takes a physical toll as well. *See*, *e.g.*, David J. Lick et al., *Minority Stress and Physical Health Among Sexual Minorities*, 8 Perspectives on Psych. Science 521 (2013) (physical and mental health disparities are related to minority stress that follows exposure to stigma); Laura M. Bogart et al., *Perceived Discrimination and Physical Health Among HIV-Positive Black and Latino Men Who Have Sex With Men*, 17[4] AIDS & Behavior 1431 (May 2013) (stress of discrimination affects health of racial and sexual minorities, especially people living with HIV; chronic stressors increase vulnerability to illness), https://tinyurl.com/r78dty9.

The cases before this Court concern access to medical care, but the principle the agencies ask the Court to endorse would be hard to confine to employer-provided health insurance. The notion that an employer sins when it complies with laws or rules that

accept the "sinful" independent conduct of its employees could apply just as well to other administrative matters that allow employee access to public programs or legal rights. The position taken by the agencies in issuing the Exemption Rules thus poses a potentially devastating threat with disturbing historical echoes. *See generally* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2517 (2015) ("The distinctive features of complicity-based conscience claims matter . . . because accommodating claims of this kind has the potential to inflict material and dignitary harms on other citizens."), https://tinyurl.com/tkyjjhl.

CONCLUSION

The court of appeals' decision should be affirmed.

Respectfully submitted,

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April 8, 2020

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