Nos. 14-1418, 14-1453, 14-1505
15-35, 15-105, 15-119 & 15-191

IN THE
Supreme Court of the United States

DAVID A. ZUBIK, ET AL., PETITIONERS

v.

SYLVIA BURWELL, ET AL., RESPONDENTS

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth & District of Columbia Circuits

BRIEF OF 123 MEMBERS OF THE UNITED STATES CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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(Additional Captions Listed on Inside Cover)

PRIESTS FOR LIFE, ET AL., PETITIONERS

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

EAST TEXAS BAPTIST UNIVERSITY, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

SOUTHERN NAZARENE UNIVERSITY, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

GENEVA COLLEGE, PETITIONER

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

A complete list of the 33 U.S. Senators and the 90 Members of the House of Representatives participating as *Amici* is provided in an appendix to this brief. Among them are:

SEN. HARRY REID
Senate Democratic Leader

REP. NANCY PELOSI
House Democratic Leader

SEN. AL FRANKEN
SEN. PATTY MURRAY
Lead Senate Amici on Brief

REP. JERROLD NADLER
REP. DIANA DEGETTE
REP. LOUISE SLAUGHTER
Lead House Amici on Brief

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Ranking Member, Senate Committee on the Judiciary

REP. JOHN CONYERS, JR.
Ranking Member, House Committee on the Judiciary

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Ranking Member, Senate Committee on Health, Education, Labor and Pensions

REP. FRANK PALLONE, JR.
Ranking Member, House Committee on Energy and Commerce

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STATEMENT OF INTEREST OF *AMICI CURIAE* [1]

Amici are Members of the United States Congress who were in Congress when the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) was passed and who supported its passage.[2]

As Members of the Congress that voted to enact the ACA, *amici* have a substantial and unique interest in explaining how Congress's intent, as demonstrated by the legislative history of the ACA, supports the conclusion that the requirement to provide coverage of contraceptive services with no out-of-pocket costs, [3] and the subsequent administrative regulations providing means for accommodating certain employers' religious objections to providing such coverage (the "religious accommodation") fulfill compelling governmental

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[1] *Amici* affirm that no counsel for a party to these proceedings authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. Counsel for all parties have submitted blanket consents to the filing of *amicus curiae* briefs in this case.

[2] A complete list of Members of Congress participating as *amici* appears as an Appendix to this brief.

[3] This brief uses "cost-free," "no cost-sharing," and "no out-of-pocket costs" interchangeably to refer to a group health plan and health insurance issuer offering group or individual health insurance coverage for which women pay no co-payments or deductibles, as provided in 42 U.S.C. § 300gg-13.

interests in promoting public health and welfare and equality for women. The ACA's contraceptive coverage requirement provides for coverage for the full range of contraception methods approved by the Food and Drug Administration ("FDA"), as well as patient education and counseling. *See* 42 U.S.C. § 300gg-13. Amici have a strong interest in expressing to this Court their view that this provision and the final rules implementing the requirement and providing for the religious accommodation should be upheld because, as required under the Religious Freedom Restoration Act of 1993 ("RFRA") and this Court's jurisprudence, the provision and implementing rules appropriately balance relevant interests using the least restrictive means of accomplishing the government's compelling interests in advancing public health and welfare and promoting equality for women.

SUMMARY OF ARGUMENT

This Court should reject Petitioners' RFRA challenge to the religious accommodation, which ensures implementation of the requirement for cost-free contraceptive coverage under the ACA.

First, the ACA's requirement for cost-free coverage of preventive care benefits and services, including contraception, serves compelling governmental interests—long recognized by this Court—in advancing public health and welfare and promoting equality for women. The legislative history of the ACA makes clear that the inclusion of women's preventive services in the ACA's minimum requirement for insurance coverage was a critical

part of achieving Congress's goal of improving Americans' access to affordable health care and reducing inequalities for women in the health care system.

Second, the ACA has been successful in achieving Congress's goal of improving women's access to preventive care, including contraceptive coverage. Since the passage of the ACA, women's health care coverage has increased and out-of-pocket expenses for contraceptive services have decreased significantly for millions of American women. In light of the expanded number of organizations, including certain for-profit employers, that may object to providing cost-free contraception following the *Hobby Lobby* decision, it is essential that an effective mechanism remain in place to ensure women receive the benefit conferred on them by the ACA when their employers choose not to provide that coverage.

Third, RFRA was not intended to be used to inhibit access to basic public health services, as Petitioners are attempting to do here by impeding women's access to the contraceptive coverage to which they are entitled. Petitioners' arguments also have the potential to impede women's equality in the workplace. The cost-free contraceptive coverage requirement and the religious accommodation properly advance Congress's compelling interests without imposing an impermissible burden on employers' exercise of religious rights. The use of a comprehensive national insurance system based on the existing system of private and employer-sponsored health insurance, along with the carefully

crafted religious accommodation, are the least restrictive means of providing for cost-free contraception. Acceptance of Petitioners' claims would result in substantial impediments to cost-free contraception for women, contrary to the intent of the ACA the purpose of RFRA. RFRA protects free exercise but does not permit the imposition of religious beliefs on others. To allow such a result here could open the door to myriad other claims that could undermine critical government interests in prohibiting discrimination and protecting public health.

ARGUMENT

I. The ACA's Cost-Free Preventive Care Coverage and the Implementing Regulations Fulfill Compelling Governmental Interests in Promoting Public Health and Welfare and Equality for Women.

Providing for cost-free coverage of preventive benefits and services is necessary to achieve Congress's goal of ensuring access to basic health care for millions of Americans. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,872 (July 2, 2013). In enacting the ACA, Congress particularly focused on the importance of women's preventive care, including contraception, recognizing that it was essential to reform the health care system to "[i]ncrease[] health insurance coverage for women," and "require[] coverage of comprehensive reproductive health services." 77 CONG. REC. E1199-1200 (daily ed. May 19, 2009) (statement of former

Rep. Moran) (noting an increase in women who no longer have money to pay for medical care and that "[t]hese women are literally choosing between a month of birth control and bus fare.").

Research also showed the direct connection of access to contraception for women and improvements in the social and economic status of women. *See, e.g.*, Testimony of Guttmacher Inst. Submitted to the Comm. on Preventive Servs. for Women, Inst. of Med. (Jan. 12, 2011) ("[H]aving a reliable form of contraception allowed women to invest in higher education and a career with far less risk of an unplanned pregnancy.") (citations omitted). Congress therefore included, as part of its comprehensive health care reform, coverage of women's preventive care services, with no cost-sharing, designed to advance women's access to health care, promote equality for women in health care, and advance women's social and economic status. *See* 42 U.S.C. § 300gg-13. As implemented by the Department of Health and Human Services ("HHS"), the Department of the Treasury, and the Department of Labor (collectively, the "Departments"), this coverage includes the full range of all FDA-approved contraceptive methods. *See* U.S. Dep't of Health and Human Servs., Health Res. and Servs. Admin., Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguide lines/ (last visited Feb. 15, 2016).

A. This Court Has Repeatedly Confirmed That the Advancement of Public Health and Welfare and Women's Rights Are Compelling Governmental Interests.

Congress's goals in enacting the ACA are among those that this Court has found to be compelling interests when balancing individual rights and the public interest. Specifically, this Court has repeatedly upheld laws designed to protect public health and welfare, and it has confirmed that promoting equality for women is a compelling governmental interest.

For instance, the Court recognized the government's interest in protecting public health when it upheld a mandatory vaccination program against a constitutional liberty challenge. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). The Court also upheld child labor laws against the objection that the laws encroached upon freedom of religion by precluding a child from working to sell religious literature on the streets. *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) ("The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."). And the Court upheld the social security tax against religious objections, recognizing that "[t]he social security system in the United States serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants." *United States v. Lee*, 455 U.S. 252, 258-59 (1982); *see also Bowen v. Roy*, 476 U.S. 693 (1986) (upholding a statutory requirement that a

state agency use a social security number in administering welfare programs over a free exercise clause challenge). The Court has also specifically recognized the protection of women's health as a compelling governmental interest. *See Simopoulos v. Virginia*, 462 U.S. 506 (1983) (finding a "compelling interest" in maternal health and safety); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) ("[T]he State has legitimate interests . . . in protecting the health of the woman. . . .").

This Court also has consistently found a compelling interest in protecting women against gender discrimination. *See, e.g., Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) and *Roberts v. United States Jaycees*, 468 U.S. 609, 625-26 (1984) (noting state's "compelling interest in eliminating discrimination against women" and the importance of creating rights of public access to private goods and services in order to promote women's equal access to leadership skills, business contacts, and employment promotions); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 732-37 (2003) (acknowledging the Family and Medical Leave Act's important governmental objectives in protecting the right to be free from gender-based discrimination in the workplace).

Finally, in *Burwell v. Hobby Lobby Stores*, the opinion of the Court assumed that the governmental interest in "guaranteeing cost-free access" to contraception was "compelling," *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2780 (2014), and a majority of the Court expressly concluded that a compelling interest existed. Justice Kennedy, concurring,

stated that "[i]t is important to confirm that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees," *id.* at 2786 (Kennedy, J., concurring), and the four dissenting justices stated that "the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well[-]being." *Id.* at 2799 (Ginsburg, J., joined by Sotomayor, J., Breyer, J., and Kagan, J., dissenting).

B. The Legislative History of the ACA Demonstrates That Congress Viewed the Provisions for Women's Preventive Care Benefits, Including Contraceptive Coverage, as Serving Compelling Governmental Interests in Advancing Public Health and Welfare and Equality for Women.

The inclusion of women's preventive services as a core part of the ACA's essential health benefits requirement, 42 U.S.C. § 18022, was critical to fulfilling Congress's goals of ensuring complete coverage of preventive care, better health for women, equality for women, and ending discrimination against women in health care. Although the early drafts of the ACA did not include preventive services specific to women, Congress recognized that increasing access to a wide range of services for women would remedy "a situation where many women [were] delaying going to a doctor, getting their preventive services," 155 CONG. REC. S12026 (daily ed. Dec. 1, 2009) (statement of Sen. Boxer),

and were being discriminated against by their insurance companies. *Id.* at S12019-S12020 (statement of Sen. Reid). Congress therefore added the Women's Health Amendment, proposed by Senator Barbara Mikulski, *see* 155 CONG. REC. S12277 (daily ed. Dec. 3, 2009), which included critically important preventive services specific to women in the ACA's minimum coverage requirement. *See* 155 CONG. REC. at S12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand) ("The prevention section of the bill before us must be amended so coverage of preventive services takes into account the unique health care needs of women throughout their lifespan.").

1. Congress provided for women's preventive services to improve women's health as part of the ACA's comprehensive preventive care coverage.

In crafting the ACA, Congress took a comprehensive and multi-tiered approach to improving access to health care for women. At a basic level, it ensured a minimum level of coverage to millions of Americans who previously had no access to health insurance or poor quality of existing coverage. But Congress also went further, providing for essential health benefits such as maternity and newborn care, prescription drug coverage, emergency services, and rehabilitative services, as well as coverage without cost-sharing for preventive services, including screening for cancer and diabetes, breastfeeding support and counseling, and folic acid supplements. The goal was to fill the gaps in

women's existing preventive services by expanding access to greater preventive services "such as cervical cancer screenings, osteoporosis screenings . . . pregnancy and post-partum screenings . . . and annual checkups for women." 155 CONG. REC. S12273 (daily ed. Dec. 3, 2009) (statement of Sen. Stabenow); *see also What Women Want: Equal Benefits for Equal Premiums, Hearing of the S. Comm. on Health, Educ., Labor, and Pensions*, 111th Cong. 36 (Oct. 15, 2009) (hereinafter "Equal Benefits Hearing") (statement of Marcia D. Greenberger, Co-President, National Women's Law Center) ("[T]he vast majority of individual market health insurance policies do not cover maternity care at all."). Congress required that "all health plans cover comprehensive women's preventive care and screenings . . . at little or no cost to women." 155 CONG. REC. S12025 (daily ed. Dec. 1, 2009) (statement of Sen. Boxer); *see also* 155 CONG. REC. S12114 (daily ed. Dec. 2, 2009) (statement of Sen. Feinstein) ("[Preventive care] may include mammograms, Pap smears, family planning, screenings to detect postpartum depression, and other annual women's health screenings.").

Cost-free contraceptive coverage is an important part of the preventive care intended to improve both women's well-being and the health of children, in furtherance of Congress's goal of improving the health of all Americans. *See* 155 CONG. REC. H1632 (daily ed. Mar. 18, 2010) (statement of Rep. Lee) ("So I stand today to be able to say to all of the moms and nurturers who happen to be women that we have listened to your call. We have actually recognized that it is important to

provide for preventative care."). Congress recognized the importance of accessible and affordable preventive care in improving public health and lowering health care costs, because "[i]ndividuals are more likely to use preventive services if they do not have to satisfy cost-sharing requirements." Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,872 (July 2, 2013). As Senator Al Franken noted, "[p]revention is one of the key ways [the ACA] will transform our system of sick care into true health care." 155 CONG. REC. S12271 (daily ed. Dec. 3, 2009) (statement of Sen. Franken).

The Women's Health Amendment was specifically intended, among other goals, to improve women's health care by providing "affordable family planning services" to "enable women and families to make informed decisions about when and how they become parents." 155 CONG. REC. S12052 (daily ed. Dec. 1, 2009) (statement of Sen. Franken); *see also, e.g.*, 155 CONG. REC. S12671 (daily ed. Dec. 8, 2009) (statement of Sen. Durbin) ("Today, there are 17 million women of reproductive age in America who are uninsured. This bill will expand health insurance coverage to the vast majority of them, which . . . will reduce unintended pregnancies and reduce abortions."); 156 CONG. REC. H1893 (daily ed. Mar. 21, 2010) (statement of Rep. Kaptur) ("This legislation will help millions of women obtain health coverage and thus reduce abortion by enhancing broad coverage options for women's and children's health.").

Congress understood that cost-free preventive health care services for women, including contraception, would decrease maternal mortality, reduce unintended pregnancies and pregnancy-related complications, and also protect children's health and well-being by ensuring that women become pregnant when they are healthy and able to care for their child. *See, e.g.*, 155 CONG. REC. S12026 (daily ed. Dec. 1, 2009) (statement of Sen. Mikulski) ("We know early detection saves lives, curtails the expansion of disease, and, in the long run, saves money."); *id.* at S12052 (statement of Sen. Franken) ("These screenings catch potential problems such as cancer as early as possible. . . . For example, cervical cancer screenings every 3 to 5 years could prevent four out of every five cases of invasive cancer."); *see also* Martha J. Bailey et al., *Do Family Planning Programs Decrease Poverty? Evidence from Public Census Data*, 60(2) CESifo Econ. Studies 312, 312–337 (2014) (children born in years following federal family planning programs are less likely to live in poverty).

Congress recognized that "[w]omen are more likely than men to neglect care or treatment because of cost." 155 CONG. REC. S11987 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski) ("Fourteen percent of women report they delay or go without needed health care. Women of childbearing age incur 68 percent more out-of-pocket health care costs than men . . . ."). The high out-of-pocket costs for health care, especially reproductive health care, resulted in many women not having access to necessary services. *See* 155 CONG. REC. S12269 (daily ed. Dec. 3, 2009) (statement of Sen. Mikulski)

("[C]opayments are so high that [women] avoid getting [preventive and screening services] in the first place."); 155 CONG. REC. S12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand) ("[T]oo many women are delaying or skipping preventive care because of the costs of copays and limited access. In fact, more than half of women delay or avoid preventive care because of its cost."); *see also* Equal Benefits Hearing at 17 (statement of James Guest, President & CEO, Consumer Union) (women are more likely to put off a doctor's visit, not fill a prescription, or skip a treatment or procedure). Senator Harkin noted that many women "have given up on buying health insurance for themselves so they will have enough money to feed and clothe their kids and send them to school. Women should not be forced to make that kind of a choice." 155 CONG. REC. S12042 (daily ed. Dec. 1, 2009) (statement of former Sen. Harkin). The ACA therefore ensured that critical preventive services would be provided with no out-of-pocket cost, so that women would have access to basic health services. *See id.* at S12027-S12028 (statement of former Sen. Hagan).

2. Congress intended to address discrimination against women in health care by expanding comprehensive women's preventive services.

In addition to promoting women's health, Congress emphasized that the ACA in general, and the preventive care provisions for women in particular, were critical in combating discrimination against women. *See* 156 CONG. REC. H1711 (daily

ed. Mar. 19, 2010) (statement of Rep. Speier) ("If there ever was an issue on health care that must be addressed and is addressed in [the ACA], it is gender discrimination."). Congress saw that women "in ways both overt and beneath the radar" were discriminated against in the American health care system. *Id.* at H1719 (statement of former Rep. Woolsey); *see also* 155 CONG. REC. S10265 (statement of Sen. Mikulski) (daily ed. Oct. 8, 2009) ("[H]ealth care is [a] women's issue, health care reform is a must-do women's issue, and health insurance reform is a must-change women's issue . . . .").

For instance, prior to the enactment of the ACA, insurance companies were permitted to charge women higher premiums for insurance coverage. *See* 155 CONG. REC. S12042 (daily ed. Dec. 1, 2009) (statement of former Sen. Harkin) ("In most States, it is legal for insurance companies to charge women more than men for the same policy."); 155 CONG. REC. H12209 (daily ed. Nov. 3, 2009) (statement of Rep. Chu) ("Today, women are forced to settle for less health care at a higher price. We pay as much as 50 percent more than men, a practice of discrimination that is legal in 38 states."); *see also* Equal Benefits Hearing at 36 (statement of Marcia D. Greenberger) ("Under a practice known as gender rating, insurance companies are permitted in most States to charge men and women different premiums. This costly practice often results in wide variations in rates charged to women and men for the same coverage."); 156 CONG. REC. H1719 (daily ed. Mar. 19, 2010) (statement of former Rep. Woolsey) ("Insurance companies are allowed to

charge women more simply because they are women."); 155 CONG. REC. S12051 (daily ed. Dec. 1, 2009) (statement of Sen. Franken) ("Right now, health insurance companies can and do discriminate against women solely on the basis of their gender."); 155 CONG. REC. S10265 (daily ed. Oct. 8, 2009) (statement of Sen. Mikulski) ("[W]hen it comes to health insurance, [] women pay more and get less.").

Congress also noted that conditions specific to women were often treated as pre-existing conditions, such as pregnancy or being a victim of domestic violence, which resulted in denial of coverage for essential services under many plans. *See* 155 CONG. REC. S12026-S12027 (daily ed. Dec. 1 2009) (statement of Sen. Mikulski); 156 CONG. REC. H1659-1660 (daily ed. Mar. 19, 2010) (statement of Rep. McCollum); *id.* at H1719 (statement of former Rep. Woolsey); *see also* Equal Benefits Hearing at 36 (statement of Marcia D. Greenberger) ("Simply being pregnant or having had a Cesarean section is grounds enough for insurance companies to reject a woman's application. And in eight States and the District of Columbia, insurers are allowed to use a woman's status as a survivor of domestic violence to deny her health insurance coverage.").

Congress also understood that health care costs are greater for women than men, as a result of biological differences, especially reproductive health needs. *See, e.g.*, 155 CONG. REC. S12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand) ("[W]omen of childbearing age spend 68 percent more in out-of-pocket health care costs than men."); 155 CONG. REC. S10264 (daily ed. Oct. 8, 2009)

(statement of Sen. Shaheen) ("It should surprise no one that women and men have different health care needs. Despite this difference, it is unacceptable that women are not treated fairly by the system and do not always receive the care they require and deserve."); Equal Benefits Hearing at 37 (statement of Marcia D. Greenberger) (noting that maternity coverage could cost women an additional $1,000 per month in addition to regular insurance premiums); *see also* Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 19 (2011).

Furthermore, Congress recognized that because women are often subject to economic discrimination, earning less for every dollar that a man earns, women spend proportionally more of their income on health care. 155 CONG. REC. S10263 (daily ed. Oct. 8, 2009) (statement of Sen. Boxer) ("Women earn less than men, and that is why it is an impossible situation."); *see also* Equal Benefits Hearing, at 38 (statement of Marcia D. Greenberger) ("[Women] generally have less income, earning only 77 cents, on average, for every dollar that men earn.").

Congress saw that "[t]his fundamental inequity in the current system is dangerous and discriminatory," 155 CONG. REC. S12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand), and set out to change the health insurance system in which "women have been discriminated against for decades . . . ." 156 CONG. REC. H1711 (daily ed. Mar. 19, 2010) (statement of Rep. Speier). To that end, the ACA ensures that women cannot be charged higher premiums just for being female, ending gender

rating. It also prohibits women from being denied coverage for certain "pre-existing conditions" specific to women, including pregnancy, breast cancer, being victims of domestic violence, and more.

With respect to contraception specifically, Congress intended to eliminate the out-of-pocket costs relating to contraceptive services, as these costs were driving a significant portion of women's health care costs and preventing women from accessing the care that they needed. The Women's Health Amendment therefore required that group health plans include preventive health care services for women without cost-sharing, so that women and men would have equal access to the full range of health care services for their specific health needs, including contraception. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,887; *see also* 155 CONG. REC. S12052 (daily ed. Dec. 1, 2009) (statement of Sen. Franken) ("Access to contraception is . . . a fundamental right of every adult American.").

Guaranteeing women access to cost-free contraception furthers Congress's goal of combating discrimination. *See id.* at S12052 (statement of Sen. Franken) (the Women's Health Amendment "is a huge step forward for justice and equality in our country."). By reducing unplanned pregnancies, contraception allows women to invest in their careers and to participate on a more equal footing in the work force. *See* Testimony of Guttmacher Inst. Submitted to the Comm. on Preventive Servs. for Women, Inst. of Med. (Jan. 12, 2011) (citation omitted). When implementing the ACA, the

Departments understood that improving access to contraception coverage for women therefore "improves the social and economic status of women." Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,873.

3. The scope of women's preventive services in the ACA was recommended by established medical experts.

Congress made the specific choice to rely on the expertise of the federal regulatory agencies in implementing the ACA. HHS, as the Department primarily responsible for implementation, utilized the skills of its Health Resources and Services Administration ("HRSA") to determine the scope of preventive services to be covered cost-free. *See* 155 CONG. REC. S12026 (daily ed. Dec. 1, 2009) (statement of Sen. Mikulski). The goal was to "ensure that the coverage of women's preventive services is based on a set of guidelines developed by women's health experts." *Id.* at S12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand); 155 CONG. REC. S12273 (daily ed. Dec. 3, 2009) (statement of Sen. Stabenow) (Sen. Mikulski's amendment "requires coverage of women's preventive services developed by women's health experts to meet the unique needs of women."); *see also* 155 CONG. REC. S12058-S12059 (daily ed. Dec. 1, 2009) (statement of Sen. Cardin) (noting that HRSA "focuses on maternal and child health . . . [and] strives to develop 'best practices' and create uniform standards of care . . . .").

HRSA relied on a respected non-partisan group of experts in the health care field—the Institute of Medicine ("IOM"), a division of the National Academies of Sciences, Engineering, and Medicine—to evaluate and recommend the specific preventive care and screening services that should be included in the minimum coverage requirement. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725, 8,725-26 (Feb. 15, 2012). IOM released its research and recommendations on the necessary preventive services for women's health in *Clinical Preventive Services for Women: Closing the Gaps* ("IOM Report").

The IOM Report concluded that the full range of women's preventive services, including contraceptive methods and counseling, were necessary for women's health and well-being. Further, IOM found that the high cost of contraception meant that women often decided not to use those services or had to rely on less effective methods, because "even moderate copayments for preventive services" can "deter patients from receiving those services." IOM Report at 19; *see also* Testimony of Linda Rosenstock, Dean of the UCLA School of Public Health and Chair of the IOM Comm. on Preventive Servs. for Women, before the House Judiciary Comm., 2012 WL 624905 (Feb. 28, 2012) ("Because they need to use more preventive care than men on average due to reproductive and gender-specific conditions, women face higher out-of-pocket costs.").

IOM advised that the elimination of cost sharing for these contraceptive services for women would increase the use of more effective and long-term contraceptive methods. IOM Report at 109. Reduction of unintended pregnancies would reduce the frequency of abortion, prevent the risks associated with unintended pregnancy, and minimize costs to society. *Id.* at 102-105. Furthermore, consistent use of contraception improves women's health outcomes because short intervals between pregnancies increase risk of maternal mortality and pregnancy-related complications. *Id.* at 103-04.

Based on IOM's review, HRSA ultimately recommended coverage of the full range of contraceptive methods approved by the FDA, effectuating Congress's intent to provide affordable coverage for contraceptive benefits and services. Congress's reliance on HHS and the use of IOM's expertise to determine the specific services and contraceptive methods to be covered does not detract from Congress's clear intent to provide for contraceptive coverage. To the contrary, this process ensured that medical experts determined the necessary benefits and services that would appropriately implement Congress's goals for women.

4. The exemptions from the ACA's contraceptive coverage requirement do not diminish the government's compelling interests.

The existence of certain exemptions from the ACA's contraceptive coverage requirement does not diminish the government's compelling interest in maximizing the number of women who have cost-free access to contraception. *See Priests for Life, v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 266 (D.C. Cir. 2014) ("The government's interest in a comprehensive, broadly available system is not undercut by . . . the exemptions for religious employers, small employers and grandfathered plans. The government can have an interest in the uniform application of a law, even if that law allows some exceptions.").

First, federal statutes "often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes." *Hobby Lobby*, 134 S. Ct. at 2800 (Ginsburg, J., dissenting).[4]

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[4] *See, e.g.*, Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(4)(A)(i) (applicable to employers with 50 or more employees); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(b) (originally exempting employers with fewer than 50 employees, Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 605 (1967), the statute now governs employers with 20 or more employees); Americans with Disabilities Act, 42 U.S.C. § 12111(5)(A) (applicable to employers with 15 or more employees); Title VII, 42 U.S.C. §

Second, although qualifying grandfathered plans do not have to comply with certain of the ACA's requirements, including but not limited to coverage of cost-free preventive care services, plans lose grandfathered status if coverage is modified so that it no longer meets specified minimum coverage requirements. 42 U.S.C. § 18011; Final Rules for Grandfathered Plans, 80 Fed. Reg. 72,192, 72,192-72,193 (Nov. 18, 2015). Far from the "widespread" exemption that Petitioners claim will continue in perpetuity, this exemption is intended as a temporary means for transitioning employers to full compliance. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,887 n.49; *Hobby Lobby*, 134 S. Ct. at 2800-01 (Ginsburg, J., dissenting). The number of employer-sponsored grandfathered plans has decreased steadily since 2010. Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,332 (July 14, 2015).

Third, the regulatory exemption crafted by the Departments for churches and other houses of worship, which was developed with substantial public comment, initially required that the employer primarily employ persons who share the religious tenets of the organization. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at 8,728-29. Although this requirement was eliminated in 2013

2000e(b) (originally exempting employers with fewer than 25 employees).

so as not to disqualify churches who might hire employees of a different faith, the Departments believed that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection," and who would therefore "be less likely than other people to use contraceptive services even if such services were covered under their plan." *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,874. In addition, the exemption was designed to be consistent with the policies of States that required coverage of contraception and also provided for religious exemptions. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. at 46,623. Ensuring that the rights of religious institutions and individuals are respected does not undermine the government's compelling interest in providing for cost-free contraceptive coverage for women.

II. The ACA Is Fulfilling Congress's Goal of Improving Women's Health Care, and It Is Essential That This Progress Be Continued.

In the years since the ACA's enactment, women's access to health care has improved dramatically, as reflected in the ability of women to obtain critical services, including contraception, and the reduced out-of-pocket costs of those services. Petitioners' arguments, coupled with the expanded number of employers that may object to the coverage

requirement after this Court's decision in *Hobby Lobby*, threaten this important progress and should be rejected.

A. The ACA Has Resulted in Increased Coverage for Women and Has Reduced Women's Out-of-Pocket Costs for Contraception.

Since the passage of the ACA, inequities in health care for women have been declining. The ACA eliminated the prior practices of insurance companies denying women coverage on the basis of a pre-existing condition, such as pregnancy or being the victim of domestic violence, and charging higher premiums to women than men for the same insurance. It has improved access to health care coverage for an estimated 65 million women with pre-existing conditions. *See* The White House, Office of the Press Secretary, *Key Facts on the 5th Anniversary of the Affordable Care Act* (Mar. 22, 2015), go.wh.gov/rD89dU (last visited Feb. 15, 2016); *see also* Adelle Simmons, Katherine Warren, & Kellyann McClain, ASPE Issue Brief, *The Affordable Care Act: Advancing the Health of Women and Children* 1 (Jan. 9, 2015) (hereinafter "ASPE Issue Brief"), https://aspe.hhs.gov/sites/default/files/pdf/77191/ib_mch.pdf (last visited Feb. 15, 2016) (since 2013, the uninsured rate among women ages 18 to 64 declined 5.5 percentage points). Because non-grandfathered health insurance plans offered in the individual and small group market are now required to cover essential health benefit categories, including maternity and newborn care, an estimated 8.7 million Americans with individual insurance

coverage gained maternity coverage. ASPE Issue Brief at 3; *see also* Domestic Policy Council, *Accomplishments of the Affordable Care Act* 12 (Mar. 23, 2015), http://go.wh.gov/GBhus2 (last visited Feb. 15, 2016). In addition, according to the HHS Assistant Secretary for Planning and Evaluation (ASPE), as of May 2015 an estimated 55 million women are benefiting from preventive services with no out-of-pocket cost. ASPE Data Point, *The Affordable Care Act is Improving Access to Preventive Services for Millions of Americans* 1 (May 14, 2015), https://aspe.hhs.gov/pdf-report/affordable-care-act-improving-access-preventive-services-millions-americans (last visited Feb. 15, 2016).

A critical component of this improvement in women's health care is cost-free contraceptive coverage, which has resulted in dramatic savings for millions of women. According to a study published in the journal *Health Affairs*, "[b]efore the [requirement's] implementation, out-of-pocket expenses for contraceptives for women using them represented a significant portion (30-44 percent) of these women's total out-of-pocket health care spending." *See* Nora V. Becker & Daniel Polsky, *Women Saw Large Decrease in Out-of-Pocket Spending for Contraceptives After ACA Mandate Removed Cost Sharing*, 34 Health Affairs 1204, 1208 (July 2015). Between June 2012 (before the contraceptive coverage requirement went into effect) and June 2013 (six months after), the out-of-pocket expense for oral contraceptives and intrauterine devices fell by an estimated 38% and 68%, respectively. *Id.* The median out-of-pocket per

prescription cost dropped to zero for almost all contraceptives, suggesting that the majority of women no longer faced out-of-pocket costs for contraception—as intended by the ACA. *Id.* The study showed an estimated savings of $255 annually per person in out-of-pocket costs for oral contraceptives, resulting in a total estimated savings of $1.4 billion per year. *Id.* at 1204, 1207, 1209. In addition, the ACA has eliminated the high up-front costs of long-acting reversible contraceptive methods, which previously may have deterred women from using them. *Id.* at 1204. These figures show that the ACA has been successful in reducing the cost of contraceptive care for women and highlight the critical importance of protecting access to this care.

B. The *Hobby Lobby* Decision Increased the Importance of Having in Place a Workable Mechanism to Ensure Women's Access to the Contraceptive Care Benefit Under the ACA.

This Court's decision in *Hobby Lobby* increased the number of employers that may opt out of the ACA's contraceptive coverage requirement, thereby expanding the number of women who need to obtain coverage afforded to them under the law from another source. As a result, it is even more important that there be a workable mechanism to ensure that women have access to the cost-free contraceptive services that Congress intended that the ACA guarantee.

The Departments designed the original religious accommodation to permit eligible nonprofit religious organizations to opt out of the coverage requirement on the basis of religious objections, while ensuring that employees who do not share their employer's religious beliefs about contraception can still obtain coverage from their health insurance issuer or third party administrator ("TPA"). Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,874. Under this religious accommodation, eligible nonprofit organizations are not required to "contract, arrange, pay, or refer for contraceptive coverage," but plan participants and beneficiaries still receive coverage without cost-sharing. *Id.* The Departments explained that this religious accommodation would "advanc[e] the compelling government interests in safeguarding public health and ensuring that women have equal access to health care" in a "narrowly tailored fashion that protects certain nonprofit religious organizations." *Id.* at 39,872. In order to be treated as an eligible organization under the religious accommodation, the entity was required to "self-certify" to the health insurance issuer or TPA that it objects on religious grounds to providing coverage for some or all approved contraceptives by submitting the Employee Benefits Security Administration's Form 700 ("Form 700").

The Departments updated and revised the religious accommodation following this Court's decisions in *Hobby Lobby* and *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), to make it also available to certain for-profit employers. In addition, an objecting employer is now permitted, instead of

submitting Form 700 to the health insurance issuer, to notify HHS in writing of its religious objection, identifying its health plan and the TPA and/or health insurance issuer. Issuers, not employers, remain responsible for providing coverage without cost-sharing. Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. at 41,323.

A substantial number of large nonprofit employers already have elected the religious accommodation. A recent study conducted by the Kaiser Family Foundation estimated that as many as 1 in 10 large nonprofits with more than 1,000 employees have elected and used the religious accommodation. *See* Laurie Sobel, Matthew Rae & Alina Salganicoff, Kaiser Family Found., *Data Note: Are Nonprofits Requesting an Accommodation for Contraceptive Coverage?* 2 (Dec. 2015). The expansion of the religious accommodation to include for-profit employers increases the number of women who must rely on it to ensure coverage they are guaranteed under the ACA. The government must have a functional system to ensure that women employees from these businesses have access to the contraceptive services that Congress intended. *See Wheaton College*, 134 S. Ct. at 2814-15 (Sotomayor, J., dissenting).

III. RFRA Was Not Intended to Be Used as a Vehicle to Impair or Inhibit the Fulfillment of the Government's Compelling Interests and Rights of Third Parties.

A. The ACA and Its Implementing Regulations Meet RFRA's Standard Because They Appropriately Balance All Relevant Interests, Using the Least Restrictive Means to Protect the Government's Compelling Interests.

1. The religious accommodation was crafted to ensure cost-free contraceptive coverage for women while accommodating religious exercise.

In revising the religious accommodation in light of this Court's rulings in *Hobby Lobby* and *Wheaton College*, the Departments explained that the revised regulations were

> necessary in order to provide rules that plan sponsors and issuers can continue to use to determine how to provide coverage for certain recommended preventive services without the imposition of cost sharing, to ensure women's ability to receive those services, and to respect the religious beliefs of qualifying eligible organizations with respect to their objection to covering contraceptive services.

Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. at 41,331. The resulting framework meets RFRA's requirement of "striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5).

2. The ACA and its implementing regulations satisfy the least restrictive means test.

Congress chose to accomplish its goal of improving health care through a comprehensive national insurance program utilizing the existing system of private and employer-sponsored health insurance. This method was the most effective and the simplest means by which Congress could achieve its objective of instituting comprehensive care. *See* H.R. REP. NO. 111-443, pt. 2, at 984-86 (2010). The religious accommodation crafted by the Departments is the least restrictive means of respecting religious rights while implementing Congress's goal.

The religious accommodation relieves any eligible organization from complying with the requirement to provide contraceptive coverage, with no assessment of the sincerity of the religious belief underlying the objection. The notice required by the revised religious accommodation "represents the minimum information necessary for the Departments to determine which entities are covered by the accommodation, to administer the accommodation, and to implement the policies in the [] regulations." Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg.

at 41,323. This statutory and regulatory scheme is therefore the least restrictive means of furthering the government's compelling interests in women's health and in combating discrimination by ensuring that women still have access to this cost-free coverage, through the health insurance issuer or the TPA, while protecting employers' rights to religious freedom.[5]

Petitioners propose that women whose employers will not provide contraceptive coverage obtain such coverage through the health insurance Exchanges created by the ACA, 42 U.S.C. § 18031, or other government programs. But that proposal is inconsistent with Congress's intent, would impose an additional burden on women who are by law entitled to obtain the important benefit of contraceptive coverage, and conflicts with the operation and effect of the rest of the ACA. Further, the proposal is not workable by law for these women and their families. Individuals and families whose employers offer minimum essential coverage that is affordable under the implementing regulations are not eligible for advanced premium tax credits or cost-sharing subsidies afforded by the law that were designed to make coverage on the Exchanges more affordable.

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[5] Notably, although the Court in *Hobby Lobby* did not decide whether the accommodation initially established by the Departments in 2013 "complies with RFRA for purposes of all religious claims," it found that version of the accommodation "does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well." *Hobby Lobby*, 134 S. Ct. at 2782.

See Minimum Essential Coverage and Other Rules Regarding the Shared Responsibility Payment for Individuals, 79 Fed. Reg. 70,462, 70,464 (Nov. 26, 2014).

The ACA requires coverage of preventive services through the existing employer-based system of health insurance "so that women face minimal logistical and administrative obstacles." Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,888. Requiring women "to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit" would impede women's receipt of benefits, countering Congress's intent. *Id.*; *cf. Hobby Lobby*, 134 S. Ct. at 2783 (if religious employers drop health insurance coverage, employees would be required to find individual plans on government-run exchanges or elsewhere which is "scarcely what Congress contemplated" (citations omitted)). The Departments specifically explained that

> [c]onsistent with the statutory objective of promoting access to contraceptive coverage and other preventive services without cost sharing, plan beneficiaries and enrollees should not be required to incur additional costs—financial or otherwise—to receive access and thus should not be required to enroll in new programs or to surmount other hurdles to receive access to coverage.

Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. at 41,328.

The unavailability or inadequacy of contraceptive coverage not only fails to promote women's health but also creates a two-tiered system, one for women and one for everyone else that "places women in the workforce at a disadvantage compared to their male co-workers." Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at 8,728. Using the Exchanges would require these women to take additional steps, and potentially incur greater expense, to obtain an important part of their coverage elsewhere, when their male counterparts are not required to take such steps to obtain the full coverage mandated for them—the result that the ACA was intended to prevent.

In addition, the Federal Family Planning Program under Title X of the Public Health Service Act ("Title X") was not "designed to absorb the unmet needs of . . . insured individuals." *Hobby Lobby*, 134 S. Ct. at 2802 (Ginsburg, J., dissenting) (citation omitted). By law, the Title X program is designed to prioritize access to contraceptive services for persons from low-income families. 42 C.F.R. § 59.5(a)(6)-(9). It is already overburdened and underfunded, and it does not have the capacity to sustain an increase in its patient population. The need for publicly funded services has grown steadily since 2000, but the proportion of the need met by Title X-funded clinics has fallen from 28% in 2001 to 21% in 2013. Jennifer J. Frost et al., Guttmacher Inst., *Contraceptive Needs and Services, 2013 Update* 10 (July 2015).

B. RFRA Was Intended to Protect the Free Exercise Rights of Individuals, Not to Permit the Imposition of Religious Beliefs on Others.

Congress enacted RFRA as a shield, not a sword. It was intended as an important defense of religious liberties, but it does not permit the religious beliefs of employers to interfere with their female employees' access to the important preventive care services required by the ACA. In arguing that employers should not be required to submit the minimal paperwork to assert their objection and the identity of the insurance issuer or TPA, Petitioners are attempting to wield RFRA as an impediment to women's access to contraceptive services.

RFRA was enacted in response to this Court's decision in *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990), which eliminated the compelling interest test previously applicable to free exercise claims. Concerned that *Smith* would "dramatically weaken[] the constitutional protection for freedom of religion," Congress enacted RFRA to restore the compelling interest standard and require the government to justify restrictions on the exercise of religion. S. REP. 103-111, at 8 (1993).

Congress expected that courts would look to free exercise cases decided prior to *Smith* "for guidance in determining whether the exercise of religion has been substantially burdened and the least restrictive means have been employed in furthering a compelling governmental interest." *Id.*

at 8-9; *see also* H.R. REP. NO. 103-88, at 6-7 (1993). Those prior cases consistently held that the government is not required to accommodate religious beliefs if doing so imposes burdens on the compelling interests of third parties. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983) (rejecting university's claim that it was entitled to tax exempt status as a religious nonprofit since its policies on interracial dating were based on sincere religious beliefs because "racial discrimination in education violates deeply and widely accepted views of elementary justice"); *Braunfeld v. Brown*, 366 U.S. 599, 604 (1961) (recognizing that religious accommodations should be granted if "[t]he freedom asserted by [an objector] does not bring [the objector] into collision with rights asserted by any other individual"). This Court explicitly recognized these principles in *Hobby Lobby*. *See Hobby Lobby*, 134 S. Ct. at 2781 n.37 ("It is certainly true that in applying RFRA courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." (internal citation omitted)); *id.* at 2786-87 (Kennedy, J., concurring) ("[N]either may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.").

When individuals have sought exemptions from comprehensive government systems based on their religious beliefs, the Court has recognized the importance of balancing those religious rights against the interests of the government in the efficient administration of its programs and the impact any exemption would have on the rights of third parties. For example, in *United States v. Lee*,

an Amish business owner claimed that the payment of social security taxes interfered with his free exercise rights because the Amish have a religious responsibility to take care of their own elderly and needy. 455 U.S. at 254-55. The Court refused to grant an exemption from paying the tax, holding that the government had a compelling interest in the efficient and consistent application of the social security system and that "[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; *see also id.* at 259-61 ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.").

The ACA and its implementing regulations require insurance coverage for women's preventive services, whether that coverage is provided by the employer or the health insurance issuer or TPA, and thereby ensure that contraceptive services are affordable and accessible for any woman who decides that she needs or wants to use them. "That is their decision. It is not their employer's." 158 CONG. REC. S375 (daily ed. Feb. 7, 2012) (statement of Sen. Shaheen); *see also* 158 CONG. REC. S884 (daily ed. Feb. 17, 2012) (statement of Sen. Gillibrand) ("[The] simple nondebatable fact [is] that the power to decide whether a woman will use contraception lies with her, not her boss, not her employer."). These provisions were intended to "preserve[] the freedoms of conscience and religion for every American" but

also "protect[] the rights of the millions of Americans who do use contraceptives, who believe family planning is the right choice for them personally, and who do not deserve to have politics or an extreme minority's ideology prevent them from getting the coverage they deserve." 158 CONG. REC. S376 (daily ed. Feb. 7, 2012) (statement of Sen. Murray); 158 CONG. REC. S379 (daily ed. Feb. 7, 2012) (statement of Sen. Feinstein) ("Women should have access to comprehensive reproductive care and should be able to decide for themselves how to use that care.").

C. Petitioners' Arguments Threaten the Critical Balance Between Protection of Religious Beliefs and the Government's Ability to Protect the Public Health and Welfare and Prohibit Discrimination Against Women.

Petitioners' arguments, if accepted, could erode the limits on religious exemptions not only with respect to contraception coverage but also in other areas of the law. *See Hobby Lobby*, 134 S. Ct. at 2797 (Ginsburg, J., dissenting) ("[There is] [l]ittle doubt that RFRA claims will proliferate, for the Court's expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.").

Such arguments might be advanced to support elimination of coverage for children's immunizations and prenatal care for children born to unmarried parents, or to allow an employer to refuse to cover

domestic violence screenings. *See* 158 CONG. REC. S1077-S1082 (daily ed. Feb. 28, 2012) (statements of Sens. Durbin, Reid, and Boxer, in rejecting a proposed amendment to the ACA allowing employers to refuse to provide coverage for contraceptive services and other medical services on the basis of religious beliefs); *see also Hobby Lobby*, 134 S. Ct. at 2802 (Ginsburg, J., dissenting) ("Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage . . . or according women equal pay for substantially similar work . . . . Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection?").

These types of challenges, which have the potential to upset the careful balance of religious rights and the broad public interest, have already begun to materialize in lower courts. For example, a member of the Fundamentalist Church of Jesus Christ of Latter-Day Saints successfully invoked religious freedom to refuse to answer questions in a Department of Labor investigation into potential child labor violations. *Perez v. Paragon Contractors Corp.,* No. 2:13CV00281, 2014 WL 4628572 (D. Utah Sept. 11, 2014). A print shop was permitted to refuse to fill an order for t-shirts for a local gay pride festival, despite a local anti-discrimination ordinance. *Hands on Originals, Inc. v. Lexington-Fayette Urban Cty. Human Rights Comm'n.,* No. 14-CI-04474, 13-15 (Fayette Cir. Ct. Civ. Branch, 3d Div. Apr. 27, 2015) (citing *Hobby Lobby*). And a detainee at Guantanamo Bay was initially successful (although the ruling was later reversed) in relying

on RFRA in asserting that having female guards escort and secure him violated his religious beliefs, an argument that has the potential to undermine equality for women in the workplace. Interim Order 1-2, *United States v. Abd Al Hadi Al-Iraqui*, No. AE021 (Military Comm'n Guantanamo Bay Nov. 7, 2014); Ruling (Feb. 24, 2015).

Amici do not question the sincerity of Petitioners' religious beliefs. But the means for accommodation of those beliefs cannot be permitted to upend the careful balance, developed by the Departments consistent with this Court's jurisprudence, between respect for religious freedom and Congress's intent to protect the public health and welfare and prohibit discrimination against women.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reject Petitioners' challenges to the ACA's contraceptive coverage requirements and the religious accommodation provisions, and uphold the decisions of the Third, Fifth, Tenth, and District of Columbia Circuits.

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APPENDIX

APPENDIX

List of Participating *Amici*

Senators

Tammy Baldwin
Michael F. Bennet
Barbara Boxer
Sherrod Brown
Maria Cantwell
Benjamin L. Cardin
Thomas R. Carper
Richard J. Durbin
Dianne Feinstein
Al Franken
Kirsten E. Gillibrand
Martin Heinrich
Mazie K. Hirono
Amy Klobuchar
Patrick Leahy
Edward J. Markey
Claire McCaskill
Robert Menendez
Jeff Merkley
Barbara A. Mikulski
Christopher Murphy
Patty Murray
Gary C. Peters
Jack Reed
Harry Reid
Bernard Sanders
Charles E. Schumer
Jeanne Shaheen
Debbie Stabenow
Jon Tester
Mark R. Warner
Sheldon Whitehouse
Ron Wyden

Appendix

Members of the U.S. House of Representatives

Xavier Becerra
Earl Blumenauer
Corrine Brown
Lois Capps
André Carson
Kathy Castor
Judy Chu
Yvette D. Clarke
James E. Clyburn
Steve Cohen
Gerald E. Connolly
John Conyers, Jr.
Joseph Crowley
Elijah E. Cummings
Danny K. Davis
Susan A. Davis
Diana DeGette
Rosa DeLauro
Lloyd Doggett
Donna F. Edwards
Keith Ellison
Eliot Engel
Anna G. Eshoo
Sam Farr
Chaka Fattah
Bill Foster
Marcia L. Fudge
John Garamendi
Alan Grayson
Al Green
Raúl M. Grijalva
Luis V. Gutiérrez
Alcee L. Hastings
Jim Himes
Rubén Hinojosa
Michael M. Honda
Steny H. Hoyer
Steve Israel
Sheila Jackson Lee
Eddie Bernice Johnson
Henry C. "Hank" Johnson
Marcy Kaptur
Ron Kind
Ann Kirkpatrick
Barbara Lee
Sander M. Levin
John Lewis
Dave Loebsack
Zoe Lofgren
Nita M. Lowey
Carolyn B. Maloney
Doris Matsui
Betty McCollum
Jim McDermott
James P. McGovern
Jerry McNerney
Gwen Moore
Jerrold Nadler
Grace F. Napolitano
Eleanor Holmes Norton
Frank Pallone, Jr.
Nancy Pelosi
Ed Perlmutter
Chellie Pingree

Jared Polis
David Price
Mike Quigley
Charles B. Rangel
Lucille Roybal-Allard
Tim Ryan
Linda T. Sánchez
Loretta Sanchez
John P. Sarbanes
Jan Schakowsky
Adam Schiff
Robert C. "Bobby" Scott
José E. Serrano
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Louise Slaughter
Adam Smith
Jackie Speier
Mike Thompson
Dina Titus
Paul Tonko
Niki Tsongas
Chris Van Hollen
Nydia M. Velázquez
Debbie Wasserman Schultz
Peter Welch
John Yarmuth