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, SECRETARY OF HEALTH & HUMAN SERVICES, *et al.*,
*Respondents.*

And Consolidated Cases

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits

## BRIEF OF *AMICI CURIAE* BART STUPAK AND THE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether an unelected, unaccountable regulatory agency can create a compelling interest without clear authority from Congress, and thereby unilaterally burden the exercise of religion as long as it meets narrow tailoring?

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## INTEREST OF AMICI CURIAE[1]

Former Congressman Bart Stupak (D-Michigan) served as an active member of the Congressional Pro-Life Caucus throughout his 18 year career (1993-2011), including his last six years as Co-Chair. The Pro-Life Caucus is composed of both Republican and Democratic members of the U.S. House of Representatives. The principal tenet of Caucus members is their belief that the fertilized embryo is a human life and that any man-made disturbance of the embryo is a form of abortion.

The Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. Those principles include the idea that the Constitution's structural separation of powers was designed to protect individual liberty, including the religious liberty at issue in these cases. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance addressing separation of powers and religious liberty, including *Dep't of Transp. v. Ass'n of Am.*

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[1] Pursuant to this Court's Rule 37.3, global consents to amicus curiae briefs were filed with the Clerk by petitioners and respondents. Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in any manner, and no counsel or party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

*Railroads*, 135 S. Ct. 1225 (2015) ("*Amtrak*"); *Michigan v. E.P.A.*, 135 S. Ct. 2699 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

## SUMMARY OF ARGUMENT

The statute actually adopted by Congress, as opposed to the expansive regulations adopted by the Department of Health and Human Services ("HHS"), does not require employers to include in their health care plans coverage for contraceptives and abortifacients. "Preventive care"—the statutory language at issue—aims at life-saving screenings to detect things like breast and cervical cancer, not contraceptives and abortion services. That understanding, which was expressly confirmed in House debate and reaffirmed by Executive Order, was essential to the Act's adoption.

Not only did HHS exceed its statutory authority in adopting the regulations that gave rise to these cases, but it adopted those regulations in violation of the Administrative Procedures Act.

As a result, the regulations adopted by HHS—an unelected executive branch agency—cannot create a governmental interest that is compelling enough to override Congress's deliberate policy judgment, contained in the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et seq., to give heighted protection to religious liberty and religious conscience.

## ARGUMENT

### I. As a Preliminary Matter, Federal Law Does Not Require Employers to Provide Coverage for Contraceptives and Abortifacients.

At the very outset of their brief in opposition to the petition for writ of certiorari in this case, in the very first sentence of their Questions Presented, Respondents assert: "Under federal law, health insurers and employer-sponsored group health plans generally must cover certain preventive health services, *including contraceptive services prescribed for women by their doctors.*" Brief in Opposition, *Zubik v. Burwell*, Nos. 14-1418, 15-191, p. i (S. Ct. Aug. 2015). The latter part of that assertion is not true; as the Houston Baptist petitioners noted in their petition for writ of certiorari, the "text of the Affordable Care Act says nothing about contraceptive coverage . . . ." Pet'n for Cert., Question Presented, *Houston Baptist Univ., et al. v. Burwell, et al.*, No. 15-35 (S. Ct. 2015). Instead, the Government's erroneous assertion represents a troubling expansion of federal law by regulatory fiat. This Court should therefore first address the validity of the regulations that gave rise to the religious liberty claims at issue in these cases, lest it continue to "overse[e] and sanctio[n] the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure." *Amtrak*, 135 S. Ct., at 1254 (Thomas, J., conc. in judgment).

### A. "Preventive services" includes services such as breast and cervical cancer screenings, not contraceptives and abortifacients.

As originally proposed by then-Senate Majority Leader Harry Reid, Section 1001 of the Patient Protection and Affordable Care Act added the following

provision to Part A of Title XXVII of the Public Health Service Act, 42 U.S.C. §§ 300gg *et seq.*:

> Section 2713. Coverage of Preventive Health Services.
>
> (a) In General. A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—
>
> (1) evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force;
>
> (2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and
>
> (3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration.

Sen. Amend. No. 2786 to H.R. 3590, 155 Cong. Rec. S11607, S11611 (Nov. 19, 2009).[2]

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[2] Senator Reid's amendment stripped the original House bill of everything except its bill number. *Id.*, at S11607. Whether such a complete "gut and amend" of a House bill not raising revenue, in order to create a bill that raises significant revenue, complies with the requirement in Article I, Section 7 of the Constitution that "All Bills for raising Revenue shall originate in the House of Representatives"—an issue made salient by this Court's holding

A week and a half later, Senator Barbara Mikulski offered an amendment to add, *inter alia*, the following additional subsection:

> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

Sen. Amend. No. 2791, 155 Cong. Rec. S11986-87 (Nov. 30, 2009). According to Senator Mikulski herself in the floor speech she gave when introducing the amendment, "[t]he essential aspect of [the] amendment is that it guarantees women access to lifesaving preventive services and screenings." *Id.*, at S11987. It does this, she added, "by getting rid of, or minimizing, high copays and high deductibles that are often overwhelming hurdles for women to access screening programs." *Id.* Screening programs such as annual mammograms and regular Pap smears save lives, she said, but also save money because they lead to early detection and treatment of otherwise deadly diseases, such as "breast cancer, cervical cancer, colorectal cancer, ovarian cancer," "lung cancer," "heart and vascular disease," and "silent killers . . . such as diabetes." *Id.*

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in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600 (2012), that the Affordable Care Act, Pub. L. 111-148, 124 Stat 119 (March 23, 2010), is a tax—is the subject of pending litigation from both the Fifth and D.C. Circuit Courts of Appeal. *Hotze v. Burwell*, 784 F.3d 984 (5th Cir. 2015) (affirming dismissal), *pet'n for cert. filed*, No. 15-622 (Nov. 13, 2015); *Sissel v. U.S. Dep't of Health & Human Servs.*, 760 F.3d 1 (D.C. Cir. 2014), *pet'n for reh'g denied*, 799 F.3d 1035 (D.C. Cir. Aug. 7, 2015), *pet'n for cert. filed*, No. 15-543 (Oct. 28, 2015).

In other words, her amendment "guarantees access to those critical preventive services for women to combat their No. 1 killers," she said. *Id.* Not once in her 1,377-word floor speech did she mention abortions, abortifacients, or contraceptives.

The next day, Senator Mikulski spoke again in favor of her amendment, focusing exclusively once again on the life-threatening diseases that would be prevented by greater access to preventative screenings—diseases such as breast, cervical, and ovarian cancer to which women are uniquely susceptible, as well as lung cancer, diabetes, heart disease and vascular disease. She made no mention of contraception or abortion in the nearly 1,000 word speech. 155 Cong. Rec. S12026-27 (Dec. 1, 2009) (Statement of Sen. Mikulski).

Several other Senators also spoke in favor of the Mikulski amendment. *Id.*, at S12025-28 (Statements of Senators Boxer, Shaheen, Gillibrand, Hagan, Murray, and Dodd). Indeed, the floor debate was staged so that several of the female members of the Senate would each speak in turn for about five minutes in favor of the amendment. *See id.*, at S12025 (Comments of Sen. Boxer) ("The plan is, women colleagues will be coming to the floor. As they come, I will yield to them, until Senator Mikulski gets here, and then she will yield the time"). Every one of the speakers focused exclusively or nearly exclusively on the same preventative screenings of potentially life-threatening diseases that Senator Mikulski had focused on. Out of the 4,207 words spoken in support of the amendment, only two phrases totaling five words—about one tenth of one percent—even arguably could be interpreted as addressing contraception and abortion, and then only

if the phrases are read euphemistically. Senator Barbara Boxer mentioned "family planning services" in her floor statement of 1727 words, and Senator Kirsten Gillibrand mentioned "family planning" in her 420-word floor statement. *Id.*, at S12025, S12027. Senator Gillibrand used the phrase in reference to "screening," however, not abortion or contraception, *id.*, at S12027, and at the close of the discussion over her amendment, Senator Mikulski expressly disavowed any notion that the amendment would cover abortion services, or expand coverage for other "family planning" services beyond what was already covered by existing law:

> I must say: Alert, alert, alert. We have just been informed that a shrill advocacy group is spreading lies about this amendment. They are saying that because it is prevention, it includes abortion services. There are no abortion services included in the Mikulski amendment. It is screening for diseases that are the biggest killers for women—the silent killers of women. It also provides family planning—but family planning as recognized by other acts. Please, no more lies. Let's get off of it and save lives.

*Id.*, at S12028 (Statement of Senator Mikulski).

At the time, "family planning" services funded by other laws did not include abortion services. Indeed, funding for abortions was explicitly prohibited. *See*, *e.g.*, P.L. 94-439, § 209, 90 Stat. 1434 (Sept. 30, 1976) (the original "Hyde Amendment," providing that "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term"). Moreover, no federal law mandated that

employers provide contraceptive services. *See*, *e.g.*, National Conference of State Legislatures, *Insurance Coverage for Contraception Laws* (Feb. 2012) (noting that, prior to the Affordable Care Act's implementing regulations, federal law required insurance coverage of contraceptives only "for federal employees and their dependents," although 26 states had laws requiring insurers that cover prescription drugs to also cover FDA-approved contraceptives).

In sum, the very Senator who sponsored the amendment adding the "preventive care and screenings" language to the Affordable Care Act expressly disavowed that the language encompassed abortion services, or contraceptive services beyond what were already recognized by federal law.

### B. Executive Order 13535, written to assuage concerns raised by pro-life Democrats in the House, confirms that "preventive care" did not include abortion services.

Despite Senator Mikulski's explicit disavowal of what she termed the "lie" that her amendment would mandate abortion coverage, pro-life Democrats in the House of Representatives, led by Congressman Bart Stupak, who otherwise supported the Affordable Care Act, refused to vote for the Senate bill because of concerns that another section of the act, using the even broader phrase, "preventive and wellness services," would result in taxpayer funds being used for abortions. *See, e.g.*, Stephanie Condon, "Stupak's Life a 'Living Hell' because of Abortion Position," CBS News (March 18, 2010)[3]; *see also* P.L. 111-148, Subtitle D,

[3] Available at http://www.cbsnews.com/news/stupaks-life-a-living-hell-because-of-abortion-position/ (last visited Jan. 3, 2016).

Part 1, § 1302(b)(1)(I) (requiring "Preventive and wellness services" in the "essential health benefits" necessary to be a "qualified health plan" permitted to operate on a state health insurance exchange); *id.* § 1303(a)(2) (allowing "qualified health plans" that receive certain federal funds to provide coverage for abortion services using segregated funds). The standoff, which threatened to derail the bill altogether, was finally broken when amicus Bart Stupak negotiated a deal with the President, pursuant to which the President would issue an Executive Order confirming that the Affordable Care Act did not mandate abortion services. Lori Montgomery and Shailagh Murray, "In Deal with Stupak, White House announces executive order on abortion," Wash. Post (March 21, 2010).[4]

In that Executive Order, issued three days later, President Obama offered his assurance that the Affordable Care Act "maintain[ed] current Hyde Amendment restrictions" on federal funding of abortions, and also that "longstanding Federal laws to protect conscience (such as the Church Amendment, 42 U.S.C. 300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8) remain intact . . . ." Executive Order No. 13535, "Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act," 75 Fed. Reg. 15599 (Mar. 24, 2010). The Weldon Amendment is particularly germane, as that provision, contained in appropriation bills since 2004, prohibits federal agencies from "subject[ing] any institutional or individual health care entity to discrimination on the basis that

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[4] Available at http://voices.washingtonpost.com/44/2010/03/white-house-announces-executiv.html (last visited Jan 3, 2016).

the health care entity does not provide, pay for, *provide coverage of*, or refer for abortions." *See, e.g.* Omnibus Appropriations Act of 2009, P.L. 111-8 § 508(d)(1), 123 Stat. 524, 803 (March 11, 2009) (emphasis added).

This understanding of the Act was also confirmed in a colloquy that Congressman Stupak held with Chairman Waxman on the House Floor on March 21, 2010:

> Mr. STUPAK: . . . The intent behind both this legislation and the Executive Order the President will sign is to ensure that, as is provided for in the Hyde amendment, that health care reform will maintain a ban on the use of Federal funds for abortion services except in the instances of rape, incest, and endangerment of the life of the mother.
>
> Mr. WAXMAN: If the gentleman will yield to me, that is correct. I agree with the gentleman from Michigan that the intent behind both the legislation and the Executive Order is to maintain a ban on Federal funds being used for abortion services, as is provided in the Hyde amendment.

156 Cong. Rec. H1860 (March 21, 2010).

In other words, the Affordable Care Act passed only after its House manager, Chairman Waxman, agreed with Congressman Stupak that it would not allow federal funding of abortion services, and only after the President agreed that it would not allow federal agencies to require that health care entities provide coverage for abortions, which necessarily includes contraceptives that act as abortifacients.

## II. HHS's Contraceptive Mandate Regulations Changed the Statutory Text and Violated the Administrative Procedures Act.

### A. Using an Outside Advisory Group, HHS Manipulated the Statutory Language to Reach Contraceptives and Abortifacients.

Despite Senator Mikulski's explicit disavowal on December 1, 2009, that her amendment to the Affordable Care Act did not include abortion services or other family planning not already covered by existing federal law, and despite President Obama's Executive Order reaffirming the same, federal regulators at the Department of Health and Human Services read the statutory language in subparagraph 4 as a broad delegation of authority to determine which services had to be included in basic insurance coverage without cost. In particular, the phrase "preventative care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" ("HRSA"), 42 U.S.C. §300gg-13(a)(4), was treated as allowing HHS to mandate anything that it chose to include in the HRSA guidelines as "preventative" care.

HRSA, the division of the Department of Health and Human Services tasked by the statute with creating the preventative care guidelines, commissioned an outside non-profit group, the Institute of Medicine, to make recommendations. *See Hobby Lobby*, 134 S. Ct., at 2762, citing 77 Fed. Reg. 8725-8726 (2012). On July 19, 2011, the Institute published its recommendations in a report entitled "Clinical Preventive Services for

Women: Closing the Gaps."[5] At the outset of its report, the Institute of Medicine noted that it had broadly interpreted the statutory language, "preventive care and screenings," to encompass all "measures—including medications, procedures, devices, tests, education and counseling—*shown to improve wellbeing*, and/or decrease the likelihood or delay the onset of a targeted disease or condition." *Id.*, at 3 (emphasis added). It specifically noted that "The committee [responsible for the report] looked at women's preventive service needs more broadly to account for women's health and well-being." *Id.*, at 4. Instead of just the common understanding of "preventive measures" dealing with "traditional indicators, such as morbidity and mortality,"—the kinds of life-threatening diseases repeatedly referenced by Senator Mikulski in her Senate floor speech supporting the amendment she had proposed—the Committee included in its understanding of "preventive measures" other things it thought to be "more generally supportive of a woman's well-being." *Id.*, at 6.

The committee's broadened methodology led it to include "reducing unintended pregnancies" as one of its "preventive" goals, and to recognize the "systematic evidence reviews and other peer-reviewed studies, which indicate that contraception and contraceptive counseling are effective" means of achieving that goal. It then recommended to the HRSA for "consideration as a preventive service for women: the full range of Food and Drug Administration-approved contracep-

[5] Available online at http://books.nap.edu/openbook.php?record_id=13181.

tive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity," *id*., at 10, including abortifacients.

Less than two weeks later, on August 1, 2011, the HRSA adopted the Institute of Medicine's recommendation almost verbatim as "amended interim final regulations," 76 FR 46621 (Aug. 3, 2011) , directly contradicting both the President's Executive Order and the Stupak/Waxman colloquy on the House floor on March 21, 2010.

### B. The contraceptive mandate regulations were adopted without the notice and comment required by the APA, and also took effect without the 1-year lead time mandated by the Affordable Care Act.

In addition to exceeding the substantive authority provided by the Affordable Care Act, HHS also violated the Act's procedural requirements, as well as those of the Administrative Procedures Act.

It issued and gave immediate effect to the regulations without providing a prior opportunity for public comment on the Institute of Medicine's recommendations, for example. 76 FR 46621 (Aug. 3, 2011). When the Department of Health and Human Services published its first set of "interim final regulations" addressing the Affordable Care Act a year earlier, seeking comment on a slew of regulations implementing other provisions of the Act, it merely noted "that HRSA is developing guidelines related to preventive care and screening for women that would be covered without cost sharing pursuant to PHS Act section 2713(a)(4), and that these guidelines were expected to be issued no later than August 1, 2011." Interim Final

Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 FR 41726-01 (July 19, 2010). It did not request comments, *see* 77 FR 8725-01 (Feb. 15, 2012) (noting that "comments on the anticipated guidelines were not requested in the interim final regulations"), because at the time there was nothing to comment on. Nevertheless, as the Department later noted, it "received considerable feedback regarding which preventive services for women should be covered without cost sharing." *Id.* But because HRSA had not yet proposed its guidelines mandating coverage for services not within the statutory language, there does not appear to have been any comment questioning the HRSA's authority to go beyond the kinds of preventive care and screenings that Senator Mikulski described when she introduced her amendment.

The Department of Health and Human Services appears to recognize that its failure to provide for prior notice and comment on the HRSA guidelines is contrary to mandates of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* ("APA"). On August 3, 2011—just two days after release of the HRSA preventative care guidelines—it announced in the Federal Register an amendment to the interim regulations it had announced back in July 2010. That amendment, which was given immediate effect simultaneously with its publication, included a lengthy section explaining (or rather, rationalizing) why HHS felt it could ignore the notice and comment requirements of the APA, even while recognizing that "a general notice of proposed rulemaking and an opportunity for public comment is generally required before promulgation of regulations, . . . ." Interim Final Rules, RIN 0938-

AQ07, 76 FR 46621, 46624 (Aug. 3, 2011). HHS offered several reasons, but none of them are sufficient to exempt the regulations adopting the HRSA guidelines from the notice and comment requirements of the APA.

First, the Department asserted that "an exception [to the APA requirements] is made when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest." *Id.* It cited no authority for this proposition.

Second, the Department claimed that "The provisions of the APA that ordinarily require a notice of proposed rulemaking do not apply here because of the specific authority to issue interim final rules granted by section 9833 of the [IRS] Code, section 734 of ERISA, and section 2792 of the PHS Act." *Id.* There is nothing in those three provisions that exempts HHS regulations from the APA; rather, the provisions simply give the HHS Secretary the authority to issue interim regulations implementing the Affordable Care Act. Were that sufficient to curtail the requirements of the APA, then every regulation issued by every department of government would likewise be exempt from the APA. Obviously, that is not the law. The Department cited no authority for this extraordinary proposition, nor did it explain why, when it proposed interim regulations a year earlier to implement other parts of the Affordable Care Act, it felt obliged to comply with the APA's notice and comment requirements that it subsequently claimed did not apply.

Third, the Department contended that "Even if the APA requirements for notice and comment were ap-

plicable to these regulations, they have been satisfied." *Id.*[6] The "July 19, 2010 interim final rules implementing section 2713 of the PHS Act provided the public with an opportunity to comment on the implementation of the preventive services requirements in this provision," the Department contended. *Id.* But as noted above, the July 2010 interim final rules did not "implement" section 2713 of the Act; the notice merely announced that guidelines would be forthcoming. And, as the Department itself later acknowledged, "comments on the anticipated guidelines were not requested in the interim final regulations." Final Rules, RIN 0938-AQ74, 77 FR 8725-01, 8726 (Feb. 15, 2012). The fact that the Department received some unsolicited comments does not meet the APA's mandate, and even if the HRSA guidelines were "based on such [unsolicited] public comments," as the Department claimed, Interim Final Rules, 76 FR at 46624, the guidelines themselves were not subject to comment before they took effect. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) ("the final rule . . . must be 'a logical outgrowth' of the rule proposed" in order to satisfy notice requirement).

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[6] By this point, the Department's rationalization is starting to sound like the proverbial defense lawyer's arguments on behalf of a client charged with murder: "My client was not even there, but if she was, she wasn't the one who pulled the trigger, but if she did, it was self-defense, and if not that, then she was crazy." *Cf.* Jane Velez-Mitchell, *More Police Interrogation Tapes Played in Jodi Arias Trial*, CNN Transcript (Jan. 16, 2013) ("Watch as Jodi changes her story from 'I wasn`t there, I didn`t kill Travis' to, 'Yes, I was there but two ninjas did it.'"), available at http://transcripts.cnn.com/transcripts/1301/16/ijvm.01.html (last visited Jan. 3, 2016).

The Department then claimed that providing "an additional opportunity for public comment"—it persisted in its false claim that it had previously requested public comment—"would be impractical and contrary to the public interest." *Id.* Allowing for the notice and comment required by the APA would, the Department claimed, delay implementation of the HRSA guidelines, and therefore delay compliance with the statutory mandate of Section 2713(a)(4). *Id.* "The requirement in section 2713(a)(4) that preventive services supported by HRSA be provided without cost-sharing took effect at the beginning of the first plan or policy year beginning on or after September 23, 2010," the Department claimed, *id.*, but that is also not true. The requirements established in recommendations or guidelines established pursuant to section 2713(a) were to become effective only after a "minimum interval" established by the Secretary following the time the recommendations or guidelines are issued, and that interval "shall not be less than 1 year." Section 2713(b)(2), 42 U.S.C. § 300gg-13(b)(2).[7] In other words, far from mandating that the preventative service requirements take effect on September 23, 2010, the statute actually prohibited them from taking effect until at least one year after the guidelines were adopted by HRSA.

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[7] Technically, the 1-year interval requirement applies only to subsections (1) to (3), but that appears to be an obvious oversight, inadvertently not corrected when the Mikulski amendment added subsection 4. Moreover, reading subsection 4 without the interval requirement would produce the absurd result that the preventative services requirement for women would become effective before the guidelines identifying just what services were required could even be drafted, much less formally adopted.

Nevertheless, because complying with the statutory timetable "would mean that many students could not benefit from the new prevention coverage without cost-sharing following from the issuance of the guidelines until the 2013-14 school year, as opposed to the 2012-13 school year," the Department unilaterally waived the 1-year interval requirement. Interim Final Rules, 76 FR at 46624. It "determined that such a delay in implementation of the statutory requirement that women receive vital preventive services without cost-sharing would be contrary to the public interest because it could result in adverse health consequences that may not otherwise have occurred." *Id.*

The Department also waived the APA requirement that final rules not take effect until 30 days after their publication in the Federal Register, asserting (without citation of authority) that this requirement can also be waived "if an agency finds good cause why the effective date should not be delayed, and the agency incorporates a statement of the findings and its reasons in the rule issued." *Id.* The APA specifically requires that "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date," 5 U.S.C. § 553(d), and although it allows for an exception "as otherwise provided by the agency for good cause found and published with the rule," 5 U.S.C. § 553(d)(3), the Agency did not bother to address governing D.C. Circuit precedent holding that the exception "will be narrowly construed and only reluctantly countenanced." *State of New Jersey, Dep't of Env'l Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C.Cir.1980). The exception is not an "'escape claus[e]' that may be arbitrarily utilized at the agency's whim," the D.C. Circuit has held. Rather, it "should be limited to emergency situations."

*Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C.Cir. 1981) (quoting S. Rep. No. 752, 79th Cong., 1st Sess. (1945), reprinted in Administrative Procedure Act, Legislative History, 79th Cong. 1944-46 at 200, 201). Because getting free contraceptives and abortifacients into the hands of co-eds a year earlier than the statute allowed (even assuming that the statute could be read broadly enough to cover them at all) hardly qualifies as the kind of "emergency situation" envisioned by the APA exception, the Agency had no authority to waive the 30-day effective date requirement.

So much for the Department's compliance with procedural requirements mandated by law. Its substantive compliance fared no better. Among the "additional preventive care and screenings" that were listed in the HRSA guidelines published on August 1, 2011, triggering (after the 1-year interval HHS ignored) the statutory requirement for mandatory coverage without "any cost sharing requirements," were "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." 77 FR 8725-01. Although the guidelines also included an exemption for churches, their integrated auxiliaries, and the exclusively religious activities of any religious order, 77 FR, at 8725-26, the narrowness of which led to the challenge this Court sustained in *Hobby Lobby*, the substance of this particular guideline exceeded the scope of the statute, certainly as asserted by its author, Senator Mikulski. Contraceptive methods, whether FDA-approved or not, and particularly those that induce abortion, were not among the kind of preventative services that Senator Mikulski claimed were to be covered by her

amendment. And even if one accepts that the brief references to "family planning" made by Senators Boxer and Gillibrand in floor statements demonstrated a legislative intent to include contraception in an amendment designed to provide free access to services and screenings that prevent life-threatening diseases, the HRSA's inclusion in its guidelines of "all" FDA-approved contraceptive methods, which includes methods that destroy a fertilized egg and therefore constitutes an abortion, simply cannot be squared with Senator Mikulski's explicit disavowal of "abortion" from her amendment's coverage.

So, at bottom, we have the Department of Health and Human Services issuing regulations beyond the statutory language, contrary to the intent of Congress as expressed in the Stupak/Waxman colloquy, contrary to the President's Executive Order, in violation of the notice and comment requirements of the Administrative Procedure Act, with an effective date that ignored the 1-year interval requirement of the statute as well as the 30-day requirement of the APA before they could be implemented. The narrowness of the religious exemption would not have generated the *Hobby Lobby* litigation, and the stingy proposed "accommodation" of religiously-affiliated entities at issue here would not have generated this litigation, had the HRSA guidelines themselves not reached more broadly than the statute envisioned. Together, however, the narrowness of the religious exemption and the broadening of the statutory mandate to include "all" FDA-approved contraceptive methods, including some that cause abortions, ran headlong into the religious beliefs of the several entities now before this

Court (and countless others across the country), setting up their statutory claims under the Religious Freedom Restoration Act.

## III. Because the HHS "Mandate" That All Health Insurance Plans Include All FDA-Approved Contraceptives and Abortifacients Is Not Even Authorized By Statute, It Cannot Qualify As A Compelling Interest.

Even if this Court were to accept that the statutory language, "preventive care," could be stretched to include abortion and contraceptive services, and even if this Court were to accept that Congress delegated such a sensitive decision to an unelected regulatory agency, and even if this Court were to accept that, by so doing, Congress *sub silentio* authorized that agency to override long-standing statutory policy barring federal tax funds for abortion services, this Court should not countenance the creation through regulatory fiat of a "compelling interest" of the sort necessary to burden religious conscience under the terms of the Religious Freedom Restoration Act.

### A. Forcing the Little Sisters of the Poor and the other Petitioners to be complicit in the provision of abortifacients and contraceptives is a substantial burden on religious conscience.

*Amici* agree with the arguments of the two groups of petitioners that the Government's alternative method of allowing religiously-affiliated employers to comply with the abortifacient/contraceptive mandate is itself a substantial burden on religious conscience. Catholic doctrine, for example, prohibits

complicity in immoral conduct, not just the conduct itself. *See, e.g.*, Catechism of the Catholic Church § 1868.

There is no dispute in this case that Petitioners sincerely believe that the Government's proposed alternative method of compliance with the abortifacient/contraception mandate to which they are subject makes them complicit in abortion. Instead, the Government successfully argued below that such does not qualify as a substantial burden on petitioners' religious freedom. That is a troubling assertion, one that would allow government to determine the validity of religious belief, not merely its sincerity. As this Court has repeatedly held, that is an illegitimate undertaking. *See, e.g.*, *Hobby Lobby*, 134 S. Ct., at 2778-79 ("HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step"); *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim"); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 715 (1981). As this Court noted in *Hobby Lobby,* "it is not for [this Court] to say that [petitioners'] religious beliefs are mistaken or insubstantial. Instead, [this Court's] "narrow function . . . in this context is to determine" whether the line drawn reflects 'an honest conviction.'" *Hobby Lobby*, 134 S. Ct., at 2779 (quoting *Thomas*, 450 U.S., at 716). Here, as there, "there is no dispute that it does."

The Government's admission that the religious objections espoused by Petitioners are sincerely held therefore triggers RFRA's strict scrutiny requirement.

### B. "Compelling Interests" do not get created by regulatory fiat by an unelected agency.

Particularly when viewed against the non-delegation backdrop discussed in Parts I and II above, there is no "compelling interest" here that would allow the Department to override the religious conscience rights guaranteed by the Religious Freedom Restoration Act.

This Court has on several occasions recognized that, through the Religious Freedom Restoration Act, Congress "expressly adopted the compelling interest test 'as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).'" *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-32 (2006) (quoting 42 U.S.C. § 2000bb(b)(1)); *see also Hobby Lobby*, 134 S. Ct., at 2767-68 ("By enacting RFRA, Congress went far beyond what was constitutionally required").

That test requires that government can only impose a substantial burden on religious exercise by means that are narrowly tailored to further a compelling interest. Only "'interests of the highest order'" can qualify as "compelling" interests. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978). This is particularly evident when one harkens back to the language used by this Court in *Sherbert* and its antecedents. "[I]n this highly sensitive constitutional area [of religious liberty], '(o)nly the gravest abuses, endangering paramount interest,

give occasion for permissible limitation.'" *Sherbert*, 374 U.S., at 406-07 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

To our knowledge, this Court has not previously addressed in the RFRA context whether *only* the legislature can assert that an interest is sufficiently "compelling" to override RFRA's strong support for religious exercise, or whether unelected regulatory agencies can do so as well. But this Court's RFRA/strict scrutiny precedents, as well as the Constitution's requirement that basic policy judgments must be made by Congress, strongly suggest that if a governmental purpose is to be deemed compelling at all, not to mention compelling enough to override Congress's express protection for religious conscience contained in RFRA, it should be an interest advanced by the legislature rather than the unelected bureaucracy. *See* U.S. Const. Art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States"); *O Centro Espirita*, 546 U.S., at 439; *see also Sherbert*, 374 U.S., at 406 ("We must next consider whether some compelling state interest *enforced in the eligibility provisions of the South Carolina statute* justifies the substantial infringement of appellant's First Amendment right") (emphasis added); *id.*, at 408 (distinguishing *Braunfield v. Brown*, 366 U.S. 599, 605 (1961), because "*the statute*" in that case was "saved by a countervailing factor . . . —a strong state interest in providing one uniform day of rest for all workers") (emphasis added); *id.* at 409 (referring to "appellant's right to unemployment benefits *under the state statute*") (emphasis added); *Hobby Lobby*, 134 S. Ct., at 2779 (noting that RFRA "requires the Government to demonstrate that the compelling interest test is satisfied through application *of the challenged law*

'to the person'" (quoting *O Centro,* 546 U.S., at 430-31 (quoting § 2000bb–1(b))) (emphasis added); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 119-20 (1991) ("The force of [the State's undisputed interest in ensuring that criminals do not profit from their crimes] is evidenced by the State's *statutory provisions* for the forfeiture of the proceeds and instrumentalities of crime" (citing N.Y. Civ. Prac. Law §§ 1310-52)); *cf. Swanner v. Anchorage Equal Rights Comm'n*, 513 U.S. 979, 981 (1994) (Thomas, J., dissenting from denial of cert.) (rejecting claim that eliminating marital status discrimination was a compelling interest because "Alaska law" did not "attest to any firm state policy against marital status discrimination").

Perhaps the clearest example of this comes from *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006). That case involved the federal Controlled Substances Act, in which *Congress itself* had decreed the specific list of drugs that should be regulated as Schedule I controlled substances because Congress determined them to be "exceptionally dangerous." *Id.*, at 432. Even then, this Court held that "the Government's mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day." *Id.* [T]here [wa]s no indication," this Court found, "that *Congress*, in classifying DMT, considered the harms posed by the particular use at issue here—the circumscribed, sacramental use of hoasca by the" O Centro Espirita church. *Id.* (emphasis added).

So even had Congress itself clearly indicated that it viewed the imposition of a mandate on employers to

provide their employees with health insurance covering free abortifacients and contraceptives as furthering "an interest 'of the highest order,'" that would still not alone have met RFRA's strict scrutiny test. Congress would also have had to consider the particular asserted harms at issue here, namely, whether exempting religious objectors from the mandate would thwart that compelling interest. Since Congress was in this case at best silent on the first question, it did not even have the occasion to consider the second.

Another provision of the Act further undercuts any claim that Congress considered the preventive care mandate itself (much less the regulation-driven expansion to include abortifacients and contraceptives) to be a "compelling" "interest of the highest order." Congress exempted health insurance plans that were in existence on the March 23, 2010 effective date of the Act—the so-called "grandfathered plans"—from most of the Act's requirements, including the preventive care mandate. 42 U.S.C. § 18011(a)(2). That is hardly the thing Congress would do if it considered the preventive care mandate to be a governmental interest of the highest order. Indeed, under this Court's strict scrutiny jurisprudence, "'a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Church of Lukumi Babalu Aye,* 508 U.S., at 547 (quoting *Florida Star v. B.J. F.,* 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and concurring in judgment)); *cf. Employment Div.*, 494 U.S., at 884 ("where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason" (citing *Bowen v.*

*Roy*, 476 U.S. 693, 708 (1986) (plurality opinion of Burger, C.J., joined by Powell and Rehnquist, JJ.)).

Moreover, Congress excluded from this exemption—which is to say, required even grandfathered health plans to comply with—a couple of the Act's *other provisions*, such as the elimination of lifetime limits and covering dependents up to age 26. 42 U.S.C. § 18011(a)(4); *Hobby Lobby*, 134 S. Ct., at 2780. HHS itself has claimed that these other provisions—but not the preventive care provision—were applied even to grandfathered plans because they were "particularly significant protections." Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 FR 34538, 34540 (June 17, 2010). In so doing, HHS appears to have recognized that Congress did not view the provisions from which grandfathered plans were exempt, including the preventive care provision at issue here, to be "particularly significant." *Id.*; *see also Hobby Lobby*, 134 S. Ct., at 2780 (suggesting, but not deciding, that the exemption of grandfathered plans from the preventive care mandate undercuts any claim of compelling interest).

If Congress itself did not view this particular mandate as sufficiently compelling to be articulated in the statute itself, or "particularly significant" enough to apply even to grandfathered plans, then *a fortiori* a regulatory agency exercising only the authority it receives from Congress cannot manufacture an interest compelling enough to get past the "'more focused' inquiry" mandated by RFRA.

## CONCLUSION

By expanding the statutory phrase, "preventive care," to include abortifacients and contraceptives, HHS exceeded its statutory authority. The regulations themselves are therefore invalid. But even if this Court were to accept that HHS was within its authority to expand the statutory language in the way that it did, the policy judgment of an executive agency, which exercises only a derivative power from Congress, cannot be deemed compelling enough to override Congress's express policy judgment, contained in the Religious Freedom Restoration Act, in favor of religious liberty and religious conscience. The judgments in favor of the government below must be reversed.

Respectfully submitted,

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