No. 13-306

In the

Supreme Court of the United States

LIBERTY UNIVERSITY, *ET AL.*,

Petitioners,

v.

JACOB J. LEW, SECRETARY OF THE TREASURY, *ET AL.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Petition for Writ of Certiorari presents five separate questions. Amici here agree that all five questions presented warrant this Court's consideration, but this brief focusses on questions 1, 3, and 4, consolidated as follows:

1. Whether Congress has the authority under the Commerce Clause to force employers to buy or provide employees with government defined health insurance at a rate the government defines as affordable with no option to discontinue coverage without facing excessive punitive fines.

2. Whether the Individual and Employer Mandates of the Affordable Care Act and their implementing regulations violate the federal Religious Freedom Restoration Act and the First Amendment's Free Exercise of Religion Clause by forcing individuals and religious employers to purchase health insurance that provides contraceptives and abortion-inducing drugs and devices in violation of their sincerely-held religious beliefs.

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INTEREST OF AMICI CURIAE[1]

Amicus 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, including the foundational proposition that the powers of the national government are few and defined, with the residuary of sovereign authority reserved to the states or to the people. In addition to providing counsel for parties at all levels of state and federal courts, the Center and its affiliated attorneys have participated as amicus curiae or on behalf of parties before this Court in several cases addressing the constitutional limits on federal power, including *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *Bond v. United States*, 131 S.Ct. 2355 (2011); *Reisch v. Sisney*, No. 09-953, *cert. denied*, 130 S.Ct. 3323 (2010); *Rapanos v. United States*, 547 U.S. 715 (2006); *Rancho Viejo, LLC v. Norton*, No. 03-761, *cert. denied*, 540 U.S. 1218, *reh'g*

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent are being filed simultaneously with the Clerk of the Court. Counsel of record for all parties did not receive notice at least 10 days prior to the due date of intention by *these* amici to file a brief in support of the petition, but did receive the requisite 10-day notice from *other* amici and have consented to the filing of this brief despite the lack of 10-day notice by these amici. Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

denied, 541 U.S. 1006 (2004); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Schaffer v. O'Neill*, No. 01-94, *cert. denied,* 534 U.S. 992 (2001); and *United States v. Morrison*, 529 U.S. 598 (2000).

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tional rights, or to improperly expand federal intrusion on the exercise of state authority to validly exercise their core power under the Constitution to protect the safety of their citizens—all of which are fundamental components of individual rights in a free and diverse society.

SUMMARY

The power to regulate commerce "among" the States was never intended to be a general police power for the federal government to regulate for the health, safety, and morals generally by compelling the purchase of health insurance and compelling the inclusion of specific services. This Court has permitted Congress to stray very far indeed from the purpose of the Commerce Clause and the purpose of enumerated powers, but the decision of the Fourth Circuit obliterates any limits implied in the concept of enumerated powers and effectively holds that Congress has a general power to regulate for health, safety, and morals.

This expansion of federal power beyond the limits of what is granted in the text of the Constitution also has implications for other constitutionally protected liberties. Congress and the President have used this unconstitutional expansion of power to impose regulations on individuals that compel the violation of their firmly held religious beliefs. Review in this case is warranted to examine the circumstances under which government may compel individuals (both employees and employers) to abandon their religion in obedience to an unreviewable regulatory dictate.

REASONS FOR GRANTING THE WRIT

I. Certiorari Is Warranted to Clarify that Engaging in Some Economic Activity Does Not Provide Grounds for Congress to Compel Other Economic Activity.

A. By way of background, the Commerce Clause power was originally much more limited than modern assertions claim.

Congress's assertions of power under the Interstate Commerce Clause have long exceeded the original scope of that power. As originally conceived, Congress's power under the Commerce Clause was limited to the regulation of interstate trade. *See*, *e.g.*, *Corfield* v. *Coryell*, 6 F. Cas. 546, 550 (C.C.E.D.Pa. 1823) (Washington, J., on circuit) ("Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may"); *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) ("At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes"). Indeed, in the first major case arising under the clause to reach this Court, it was contested whether the Commerce Clause even extended so far as to include "navigation." Chief Justice Marshall, for the Court, held that it did, but even under his definition, "commerce" was limited to "intercourse between nations, and parts of nations, in all its branches." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824); *see also Corfield,* 6 F. CAS., at 550 ("Commerce . . . among the several states . . . must include all the means by which it can be carried on,

[including] . . . passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states").

The *Gibbons* Court specifically rejected the notion "that [commerce among the states] comprehend[s] that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Gibbons*, 22 U.S., at 194 (quoted in *Morrison*, 529 U.S., at 616 n.7). In other words, for Chief Justice Marshall and his colleagues, the Commerce Clause did not even extend to trade carried on between different parts of a State. The notion that the power to regulate "commerce among the states" included the power to regulate the wholly intrastate interaction between an employer and his or her employees would have been completely foreign to the Founders.

This originally narrow understanding of the Commerce Clause continued for nearly a century and a half. Manufacturing was not included in the definition of commerce, held the Court in *E.C. Knight*, 156 U.S., at 12, because "Commerce succeeds to manufacture, and is not a part of it." "The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce . . . ." *Id.*, at 13; *see also Kidd* v. *Pearson*, 128 U.S. 1, 20 (1888) (upholding a State ban on the manufacture of liquor, even though much of the liquor so banned was destined for interstate commerce). Neither were retail sales included in the definition of "commerce." *See The License Cases*, 46 U.S. (5 How.) 504 (1847) (upholding State ban on retail sales of liquor, as not subject to Congress's power to regulate

interstate commerce); *see also A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 542, 547 (1935) (invalidating federal law regulating in-state retail sales of poultry that originated out-of-state and fixing the hours and wages of the intrastate employees because the activity related only indirectly to commerce).

For the Founders and for the Courts which decided these cases, regulation of such activities as retail sales, manufacturing, and agriculture was part of the police powers reserved to the States, not part of the power over commerce delegated to Congress. *See, e.g.*, *United States* v. *E. C. Knight Co.*, 156 U.S. 1, 12 (1895) ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State") (citing *Gibbons,* 22 U.S., at 210; *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827); *The License Cases*, 46 U.S. (5 How.), at 599; *Mobile Co.* v. *Kimball*, 102 U.S. 691 (1880); *Bowman* v. *Railway Co.*, 125 U.S. 465 (1888); *Leisy* v. *Hardin*, 135 U.S. 100 (1890); *In re Rahrer*, 140 U.S. 545, 555 (1891)); *Baldwin* v. *Fish and Game Comm'n of Mont.*, 436 U.S. 371 (1978). And, as the Court noted in *E.C. Knight*, it was essential to the preservation of the States and therefore to liberty that the line between the two powers be retained:

> It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the auton-

> omy of the States as required by our dual form of government. . . .

156 U.S., at 13; *see also Carter v. Carter Coal*, 298 U.S. 238, 301 (1936) (quoting *E.C. Knight*); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor) ("federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties").

While these decisions have since been criticized as unduly formalistic, the "formalism"—if it can be called that at all—is mandated by the text of the Constitution itself. *See, e.g., Lopez*, 514 U.S., at 553 ("limitations on the commerce power are inherent in the very language of the Commerce Clause") (citing *Gibbons*); *Lopez,* 514 U.S., at 586 (Thomas, J., concurring) ("the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture"). And it is a formalism that was recognized by Chief Justice Marshall himself, even in the face of a police power regulation that had a "considerable influence" on commerce:

> The object of [State] inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation [reserved to the States]. . . . No di-

> rect general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.

Gibbons, 22 U.S., at 203; see also *id.*, at 194-95 ("Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State"). As this Court noted nearly two decades ago in *Lopez*, the "justification for this formal distinction was rooted in the fear that otherwise 'there would be virtually no limit to the federal power and for all practical purposes we would have a completely centralized government." 514 U.S., at 555 (quoting *Schechter Poultry*, 295 U.S., at 548).

As should be obvious, requiring employers to enter the health insurance market by purchasing unwanted health insurance products for their employees at a price determined by Congress is not "commerce among the states," as that phrase was understood by those who framed and those who ratified the Constitution. Under the original view of the Commerce Clause, therefore, this is an extremely easy case.

B. Even under the expanded view that this Court accepted during the New Deal era, there have always been "outer limits" on Congress's Commerce Clause authority so that the fundamental distinction between national and local governmental authority would not be destroyed.

Even when this Court acquiesced in congressional assertions of power that exceeded the original understanding of the Commerce Clause in order to validate New Deal legislation enacted in the wake of the economic emergency caused by the Great Depression, it was careful to retain certain "outer limits" lest the police power of the States be completely subsumed by Congress. This Court has rejected, for example, any interpretation of that clause that "would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (quoted in *Lopez*, 514 U.S., at 557; *Morrison*, 529 U.S., at 608). It has resisted interpretations that would "convert" the carefully delineated powers of the federal government into "a general police power," *Lopez*, 514 U.S., at 567, which under our Constitution is reserved to the states or to the people, U.S. CONST. AMEND. X; *Lopez*, 514 U.S., at 618. As Justice Thomas noted in his concurring opinion in *Lopez*, the Court "*always* ha[s] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *Id.*, at 584 (Thomas, J., concurring)). "The Constitution . . . still allocates a general 'police power . . . to the States and the States alone.'" *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3093 (2010) (Stevens, J., dissenting) (quoting *United States v. Comstock*, 130 S.Ct. 1949, 1967 (2010) (Kennedy, J., concurring in judgment)); *see also Comstock*, 130 S.Ct., at 1964-65 (upholding statute permitting civil commitment of sexually dangerous federal prisoners upon release from federal prison only after confirming that its holding would not "confer on Congress a general 'police power, which the

Founders denied the National Government and reposed in the States.'" (quoting *Morrison*, 529 U.S., at 618)). "[T]he principle that "'[t]he Constitution created a Federal Government of limited powers,'" while reserving a generalized police power to the States, is deeply ingrained in our constitutional history." *Morrison*, 529 U.S., at 618 n.8 (quoting *New York v. United States*, 505 U.S. 144, 155 (1992) (quoting in turn *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991))).

Indeed, the police power—that power to regulate the *health*, safety, and morals of the people—is foremost among the powers *not* delegated to the federal government. *See, e.g.,* The Federalist No. 45, at 292-93 (Madison) (Rossiter ed. 1961) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State"); *Gibbons*, 22 U.S., at 203 ("No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation"); *E. C. Knight Co.*, 156 U.S., at 11 ("It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belong to the states, not surrendered by them to the general government"). Moreover, the asserted power at issue in this case—purportedly providing for the "health" of the citizenry (through mandates on employers to provide health insurance for their employees with specific levels and types of coverage mandated by government)—is the first item frequently mentioned by the courts in their definition of the "police power"

reserved to the States or to the people. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978); *Poe v. Ullman*, 367 U.S. 497, 539 (1961); *Lochner v. New York*, 198 U.S. 45, 53 (1905); *Mugler v. Kansas*, 123 U.S. 623 (1887); *The License Cases*, 46 U.S. (5. How) 504, 583 (1847).

If Congress is permitted to enact legislation to "protect" the "health" of individual employees by regulating an employer's inactivity (*i.e.*, the decision not to participate in the health insurance market), there would be no principled limit on the scope of federal power, effectively reallocating the police power from the States to the national government. *See NFIB*, 132 S.Ct., at 2588.

C. The Fourth Circuit's holding below ratifies a further and unwarranted expansion of Congress's Commerce Clause authority.

In its decision below, the Fourth Circuit acknowledged this Court's recent holding in *NFIB* that 26 U.S.C. § 5000A, the "individual mandate" provision of the Patient Protection and Affordable Care Act, Pub.L. No. 111–148, 124 Stat. 119 (2010), was unconstitutional because it forced individuals to engage in economic activity, which activity then became the basis for Congress's claimed assertion of power under the Commerce Clause. Pet.App.40a-42a. But the Fourth Circuit distinguished the "employer mandate" provision of the Act, 26 U.S.C. § 4980H, holding that "it is simply another example of Congress's longstanding authority to regulate employee compensation offered and paid for by employers in interstate commerce." Pet.App.42a. "[U]nlike the indi-

vidual mandate," the Fourth Circuit noted, "the employer mandate does not seek to create commerce in order to regulate it" because "all employers are, by their very nature, engaged in economic activity." Pet.App.43a. They "are in the market for labor," and therefore "the employer mandate is a valid exercise of Congress's authority under the Commerce Clause" to "impose conditions on terms of employment that substantially affect interstate commerce." Pet.App. 43a-44a (*citing, e.g.*, *United States v. Darby*, 312 U.S. 100 (1941)).

As the Petition persuasively describes, the Fourth Circuit erroneously redefined the relevant market as "labor" rather than "health insurance" in order to avoid the holding of *NFIB*. We agree that the Fourth Circuit's error in that regard warrants consideration by this Court.

But the Fourth Circuit's reliance on an expansive interpretation of *Darby* also warrants this Court's consideration.

Darby ratified an exercise of congressional authority under the Commerce Clause that even its supporters acknowledged was an unconstitutional break with the original meaning of the Constitution. *See*, *e.g.*, Jonathan Grossman, U.S. Department of Labor, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage* (noting President Franklin Roosevelt's repeated reference to the "unconstitutional bill" for minimum wages that his Secretary of Labor had proposed and which was upheld in *Darby*).[2] And yet, the scope of the Fair Labor

[2] Available at http://www.dol.gov/dol/aboutdol/history/flsa1938.htm.

Standards Act at the time it was upheld in *Darby* pales in comparison to the "control all aspects of the employment relationship" version upon which the Fourth Circuit based its decision. A classic case of mission creep has now become the basis for ratification of a Commerce power so expansive that virtually nothing can escape the regulatory arm of the federal government.

As originally adopted, the FLSA was a "legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act." *Darby*, 312 U.S., at 109. The Act only applied to businesses actually "engaged in [interstate] commerce or in the production of goods for [interstate] commerce,"[3] and only to those employees who were engaged in interstate commerce or in the production of goods for interstate commerce. Fair Labor Standards Act of 1938, 52 Stat. 1060, 1062, §§ 2(a), 6(a), 7(a). It explicitly did not apply to "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce," "any employee employed in [fishing or] agriculture," "any employee employed in connection with the publication of" local newspapers, or "any employee of a" local transportation system. *Id.* at 1067, §§ 13(a)(2), (5), (6), (8), and (9).

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[3] "Commerce" was defined as "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." 52 Stat. 1060, § 3(b).

In 1961, the FLSA was amended to expand coverage to all employees of an "enterprise" engaged in interstate commerce with gross sales of one million dollars or more, even employees who were not themselves engaged in interstate commerce or in the production of goods for interstate commerce. Pub.L. 87-30, § 5, 75 Stat. 67 (May 5, 1961). The FLSA was amended again in 1966 to extend its reach to a number of entities not involved in interstate commerce or the production of goods for interstate commerce at all: Schools, hospitals, nursing homes, or other residential care facilities, whether operated by private business or state and local governments, as well as purely local private transportation companies. Pub.L. 89-601, §§ 102(a), 102(c)(4), and 206, 80 Stat. 830, 831-32, 836 (Sept. 23, 1966). 1974 Amendments further expanded the FLSA to "virtually all state and local-government employees." *Garcia*, 469 U.S., at 533; Pub.L. 93-259, § 6, 88 Stat. 55 (April 8, 1974).

Employing a view of causation regarding effects on interstate commerce that has since been repudiated by this Court, *see, e.g.*, *Lopez*, 514 U.S., at 567, the 1966 expansion of the FLSA to entities not engaged in interstate commerce or the production of goods in interstate commerce was upheld in *Maryland v. Wirtz*, 392 U.S. 183 (1968). The 1966 expansion of the FLSA to hospitals owned by state and local governments was also upheld in *Wirtz*, but that decision was then overruled when the Court considered the 1974 expansion to all state and local government employees in *National League of Cities v. Usury*, 426 U.S. 833 (1976), which was in turn overruled by *Garcia*, on grounds bearing little resemblance to the original "engaged in interstate com-

merce" rationale that was offered in support of the original Act and upheld in *Darby*.

These incremental expansions of asserted power under the Commerce Clause, perhaps somewhat imperceptible at each step, have now so drastically altered the original tie to interstate commerce that it can fairly be said the Commerce power has morphed into a general police power. The Fourth Circuit's insistence that *Darby* supports this latest move just highlights the need for this Court to grant the petition in order to clarify that, as a deviation from the Constitution's original design, *Darby* must, at the very least, be confined to its narrow facts and not be allowed to serve as the basis for new assertions of congressional power completely unmoored from the authority delegated to Congress by the Constitution.

II. Certiorari Is Needed to Restore Important Freedom of Conscience Protections.

A. The interplay between the "generally applicable" rule of *Employment Division v. Smith* and the largely unfettered discretion given to the Executive Branch by the Affordable Care Act, ratified by the Fourth Circuit, undermines the First Amendment.

The Fourth Circuit gave relatively short shrift to Petitioners' serious religious liberty claims. Citing *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990), the court noted that the Free Exercise Clause "does not compel Congress to exempt religious practices from a 'valid and neutral law of general applicability.'" Pet.App.59a. But then, as the Petition quite adequately points out, the court

ignored the significant ways in which the Act is, on its face, not generally applicable. *See* Pet., at 29-33 (citing 26 U.S.C. § 5000A(d)(2)(A) (religious conscience exemption only for sects in existence at least since 1950 and opposed to all government benefits); 26 U.S.C. § 5000A(d)(2)(B) (health care sharing ministry for organizations in existence since 1999 that share medical expenses because of a shared set of ethical or religious beliefs); 26 U.S.C. § 5000A(e) (exemption for low-income people and members of Indian tribes). The fact that the law is not "generally applicable" on its face should have removed this case from the deferential rule of *Smith*. The Fourth Circuit's error in this regard is alone worthy of review, given the significant threat to Free Exercise rights that is at stake.

But the problem is even more profound than the lack of facial general applicability. The Affordable Care Act delegates a large and virtually unfettered discretion to the executive branch. That discretion has been used to provide additional exemptions from the law, further undermining any claim that the law is "generally applicable." *See* The Center for Consumer Information and Insurance Oversight, *Annual Limits Policy: Protecting Consumers, Maintaining Options, and Building a Bridge to 2014* (identifying 1,231 employers, employing more than two million employees, who have received exemptions from the Act's employer mandate and other requirements of the Act).[4]

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[4] Available at http://www.cms.gov/CCIIO/Resources/Files/approved_applications_for_waiver.html (last visited October 8, 2013).

Even more troubling, however, the discretion delegated by the Act is so broad that it can be (and has been) used to infringe religious liberty. This Court has previously warned of the threat to First Amendment rights that comes from such unfettered discretion. *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 56, 61-64 (1999) (holding unconstitutional an anti-loitering ordinance because the "absolute discretion" it gave to police might "authorize and even encourage arbitrary and discriminatory enforcement"). When joined with the highly deferential standard of *Smith*, the Act's delegation of unfettered discretion to unelected executive branch officials poses too great a risk of anti-religious targeting. The mandate that the "essential minimum coverage" required by the Act include abortion services, contraceptives, and abortifacient drugs, for example—a requirement in direct violation of the sincerely held religious beliefs of millions of Americans—is imposed not by the Act itself but by implementing regulations. *Compare* 42 U.S.C. § 300gg–13(a)(4) (mandating coverage, without cost-sharing by plan participants or beneficiaries, of "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration"), *with* 77 Fed.Reg. 8725, 8725 (Feb. 15, 2012) (recommending regulations later adopted by HHS that the guidelines require coverage for "[a]ll Food and Drug Administration [FDA] approved contraceptive methods [and] sterilization procedures . . . for all women with reproductive capacity").

Certiorari is warranted to consider whether the *Smith* rule is even applicable in such a context. After all, *Smith* involved a criminal prohibition of conduct, not a mandate to engage in conduct. *Compare*

Smith, 494 U.S., at 874, *with Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972) ("enforcement of the State's requirement of compulsory formal education . . . would gravely endanger if not destroy the free exercise of respondents' religious beliefs"). Moreover, with the non-delegation doctrine all but dead, *see, e.g., Whitman v. American Trucking Associations*, 531 U.S. 457, 474 (2001) (noting that this Court had found the requisite 'intelligible principle' lacking only in two cases, one in which the statute provided literally no guidance, and the other that allowed regulation of the entire economy by the imprecise standard of fair competition), the unfettered discretion delegated to unelected officials by the Act hardly qualifies as "leaving accommodation to the political process." *Smith*, 494 U.S., at 890. Instead, it sets up the very real risk that the religious beliefs of some will be targeted outside the view and accountability of the legislative process, "where a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." *Id.*

B. The Fourth Circuit's rejection of Petitioner's RFRA claim highlights the problem of how the Act's delegated discretion can impose significant burdens on the freedom of conscience.

The Fourth Circuit held that the Act's implementing regulations do not impose a substantial burden on Petitioners' religious exercise and therefore do not run afoul of the Religious Freedom and Restoration Act, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq*. Pet.App.61a. As the Petition correctly points out, that holding conflicts with the Tenth Circuit's hold-

ing in the *Hobby Lobby* case, in which the Tenth Circuit expressly held that "because the contraceptive-coverage requirement places substantial pressure on Hobby Lobby and Mardel to violate their sincere religious beliefs, their exercise of religion is substantially burdened within the meaning of RFRA." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137-38 (10th Cir. 2013).

Your amici share the Petition's identification of this conflict in the lower courts and its view that the conflict warrants the grant of certiorari by this Court. We raise the RFRA claim for the additional point that the substantial burden on religious liberty at issue on this precise point arises because of implementing regulations. The RFRA claim therefore highlights how the unfettered discretion delegated to executive branch officials poses a real threat to freedom of conscience. That, along with the *Smith* point addressed in Part II.A above, warrants this Court's considered attention.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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