NO. _____

IN THE

Supreme Court of the United States

MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

Petitioner,

v.

CALIFORNIA, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court recently granted review in *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, No. 19-431, and *Trump* v. *Pennsylvania*, No. 19-454, to determine whether the federal government lawfully exempted religious and moral objectors from federal regulatory requirements to provide health plans that include abortifacient and contraceptive coverage. This case raises the identical issue for Petitioner March for Life, which holds a non-religious, moral conviction that all humans have worth and all abortions are wrong. If the Court rules for the petitioners in *Little Sisters* and *Trump*, the decision will be outcome dispositive of the second question presented here, warranting a GVR. But there is also a threshold standing issue that the Court could address either in *Little Sisters* and *Trump* or here.

The questions presented are:

1. Whether states have Article III standing to challenge the religious and moral exemptions based on a hypothetical increase in their discretionary, voluntary healthcare spending.

2. Whether the federal government lawfully exempted religious and moral objectors from the federal regulatory requirement to provide health plans that include abortifacient and contraceptive coverage.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioner is March for Life Education and Defense Fund, Intervenor-Defendant-Appellant below.

The state Respondents are the States of California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Minnesota, New York, North Carolina, Rhode Island, Washington, and Vermont, the Commonwealth of Virginia, and the District of Columbia, Plaintiffs-Appellees below.

The federal Respondents are the U.S. Department of Health & Human Services; Alex M. Azar II, in his official capacity as Secretary of the U.S. Department of Health & Human Services; U.S. Department of Labor; R. Alexander Acosta, in his official capacity as Secretary of the U.S. Department of Labor; U.S. Department of the Treasury; and Steven Terner Mnuchin, in his official capacity as Secretary of the U.S. Department of the Treasury; Defendants-Appellants below.

The private Respondent is the Little Sisters of the Poor Jeanne Jugan Residence, Intervenor-Defendant-Appellant below.

Petitioner March for Life Education and Defense Fund is a non-profit corporation with no parent entities that does not issue stock.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit, Nos. 19-15072, 19-15118, 19-15150, *California* v. *U.S. Department of Health & Human Services*, judgment entered October 22, 2019.

U.S. Court of Appeals for the Ninth Circuit, Nos. 18-15144, 18-15166, 18-15255, *California* v. *Azar*, judgment entered December 13, 2018.

U.S. District Court for the Northern District of California, No. 17-cv-05783-HSG, *California* v. *Health & Human* Services, final judgment entered January 13, 2019.

U.S. District Court for the Northern District of California, No. 17-cv-05783-HSG, *California* v. *Health & Human* Services, final judgment entered December 21, 2017.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE ii

LIST OF ALL PROCEEDINGS iii

TABLE OF AUTHORITIES viii

DECISIONS BELOW 1

STATEMENT OF JURISDICTION 2

PERTINENT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS 2

INTRODUCTION 3

STATEMENT OF THE CASE 7

A. The ACA's "preventive care and screenings" requirement for women. 7

B. The widespread litigation sparked by the agencies' choice and the modifications the agencies made pre-*Zubik*. 9

C. *Zubik* and its aftermath 13

D. March for Life and its lawsuit 15

E. The agencies reconsider and create broader conscience exemptions 16

F. The plaintiff States sue, and the Ninth Circuit affirms an injunction against the final rules. 18

REASONS FOR GRANTING THE WRIT 20

I. Article III standing is a basic constitutional requirement, and this Court has an independent duty to ensure it exists. 21

II. The States lack standing to challenge the final rules, and the Ninth Circuit erred in refusing to dismiss their suit. 22

A. The States bear the burden of proving standing's three elements. 22

B. Because the States have no rights or obligations at stake, and their standing theory depends on rank speculation and self-imposed harm, they cannot show an injury in fact. 23

1. The States have no right to an indirect financial windfall. 24

2. Any injury to the States' fiscs is entirely self-imposed. 25

3. The States' claimed fiscal injury is abstract and not certainly impending. 26

4. The States allege a non-particularized harm that treats federal courts as general complaint bureaus. 28

C. Because the States' alleged injury is self-inflicted and depends on the presumed choices of multiple third parties, they cannot show causation or redressability. 29

III. The agencies had statutory authority to issue the moral and religious exemptions, which are legally permissible (if not required) and not arbitrary or capricious. 30

A. The final regulations are within the agencies' gap-filling authority. 31

B. The agencies' conscious exemptions are not arbitrary or capricious..... 33

IV. The questions presented require this Court's resolution. 34

CONCLUSION..... 36

APPENDIX TABLE OF CONTENTS

United States Court of Appeals
for the Ninth Circuit,
Opinion in 19-15072, 19-15118, and 19-15150
Issued October 22, 2019.....1a

United States District Court
Northern District of California,
Opinion in 17-cv-05783-HSG
Issued January 13, 2019.....53a

U.S. Constitutional Provisions 122a

5 U.S.C. 706(2)(A) 123a

26 U.S.C. 4980D 124a

26 U.S.C. 4980H 131a

26 U.S.C. 5000A 139a

42 U.S.C. 300gg-13(a) 154a

42 U.S.C. 2000bb-1 ..... 156a

42 U.S.C. 2000bb-2(1) 157a

42 U.S.C. 2000bb-3(a) 157a

45 C.F.R. 147.131(a) (2013) 158a

45 C.F.R. 147.131 ..... 159a

45 C.F.R. 147.132 ..... 167a

45 C.F.R. 147.133 ..... 171a

Excerpt from 83 Fed. Reg. 57592
(Nov. 15, 2018) 175a

Excerpt from 83 Fed. Reg. 57536
(Nov. 15, 2018) 179a

TABLE OF AUTHORITIES

Cases

Alfred L. Snapp & Son, Inc. v. *Puerto Rico exrel. Barez*,
458 U.S. 592 (1982)..... 28

Allen v. *Wright*,
468 U.S. 737 (1984).....passim

Arizona Christian School Tuition Organization v. *Winn*,
563 U.S. 125 (2011)..... 21, 26

Arizonans for Official English v. *Arizona*,
520 U.S. 43 (1997)..... 21, 22

Burwell v. *Hobby Lobby Stores, Inc.*,
573 U.S. 682 (2014)..... 7, 8, 9, 11

California v. *Azar*,
911 F.3d 558 (9th Cir. 2018)..... 18, 19, 24

Clapper v. *Amnesty International USA*,
568 U.S. 398 (2013).....passim

Department of Commerce v. *New York*,
139 S. Ct. 2551 (2019)..... 19

Diamond v. *Charles*,
476 U.S. 54 (1986)..... 27, 28, 35

Doe v. *Bolton*,
410 U.S. 179 (1973)..... 3

FCC v. *Fox Television Stations, Inc.*,
556 U.S. 502 (2009) 33

Gill v. *Whitford*,
138 S. Ct. 1916 (2018) 28

Gillette v. *United* States,
401 U.S. 437 (1971) 32

Hein v. *Freedom From Religion Foundation, Inc.*,
551 U.S. 587 (2007) 28

Little Sisters of the Poor Home for the Aged, Colorado v. *Sebelius*,
571 U.S. 1171 (2014) 11

Lujan v. *Defenders of Wildlife*,
504 U.S. 555 (1992) ..... passim

March for Life v. *Azar*,
No. 15-5301, 2018 WL 4871092
(Sept. 17, 2018) 17

March for Life v. *Burwell*,
128 F. Supp. 3d 116 (D.D.C. 2015) 16

Mayo Foundation for Medical Education & Research v. *United States*,
562 U.S. 44 (2011) 31, 32

New Jersey v. *Sargent*,
269 U.S. 328 (1926) 24

Pennsylvania v. *New Jersey*,
426 U.S. 660 (1976) 25

Pennsylvania v. *President United States*,
930 F.3d 543 (3d Cir. 2019) 35

Roe v. *Wade*,
410 U.S. 113 (1973)..... 3

Spokeo, Inc. v. *Robins*,
136 S. Ct. 1540 (2016)..... 22

Steel Company v. *Citizens for a Better Environment*,
523 U.S. 83 (1998)..... 21

Summers v. *Earth Island Institute*,
555 U.S. 488 (2009).....21, 23, 25, 27

Town of Chester v. *Laroe Estates, Inc.*,
137 S. Ct. 1645 (2017)..... 21

United States v. *Mead Corp.*,
533 U.S. 218 (2001)..... 31

United States v. *Texas*,
136 S. Ct. 906 (2016)..... 34

United States v. *Texas*,
136 S. Ct. 2271 (2016)..... 34

Vermont Agency of Natural Resources v. *United States ex rel. Stevens*,
529 U.S. 765 (2000)..... 6

Virginia House of Delegates v. *Bethune-Hill*,
139 S. Ct. 1945 (2019)..... 21, 23, 35

Warth v. *Seldin*,
422 U.S. 490 (1975).....21, 22, 24, 27

Welsh v. *United States*,
398 U.S. 333 (1970) 32

Wheaton College v. *Burwell*,
573 U.S. 958 (2014) 12

Whitmore v. *Arkansas*,
495 U.S. 149 (1990) 26, 27

Wittman v. *Personhuballah*,
136 S. Ct. 1732 (2016) 23, 35

Zubik v. *Burwell*,
135 S. Ct. 2924 (2015) 13

Zubik v. *Burwell*,
136 S. Ct. 1557 (2016) 14

Statutes

26 U.S.C. 4980D 9

26 U.S.C. 4980H 9

26 U.S.C. 9833 ..... 8, 31

28 U.S.C. 1254(1) 2

28 U.S.C. 1291 2

28 U.S.C. 1331 2

29 U.S.C. 1003(b)(2) 11

29 U.S.C. 1132 9

29 U.S.C. 1191c 8, 31

42 U.S.C. 300gg-13 ..... 7, 8, 31

42 U.S.C. 300gg-92 ..... 8, 31

42 U.S.C. 2000bb *et seq.* 9

Other Authorities

U.S. Department of Labor, FAQs About Affordable Care Act Implementation Part 36 (Jan. 9, 2017), https://bit.ly/2Sv6Q3z 14

Regulations

29 C.F.R. 2510.3-16(b)&(c) 10, 12

45 C.F.R. 147.132 17

45 C.F.R. 147.133 17

77 Fed. Reg. 8,725 (Feb. 15, 2012) 8, 9

78 Fed. Reg. 39,870 (July 2, 2013) 10, 15

79 Fed. Reg. 51,092 (Aug. 27, 2014) 11, 12

80 Fed. Reg. 41,318 (July 14, 2015) 13

81 Fed. Reg. 47,741 (July 22, 2016) 14

83 Fed. Reg. 57,536 (Nov. 15, 2018) 16, 17, 26, 33

83 Fed. Reg. 57,592 (Nov. 15, 2018) .....passim

84 Fed. Reg. 7,714 (Mar. 4, 2019) 17

Executive Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017) 16

DECISIONS BELOW

The district court's decision granting the States' motion for a preliminary injunction enjoining the final rules is reported at 351 F. Supp. 3d 1267 (N.D. Cal. 2019) and reprinted in the Appendix ("App.") at App.53a–121a.

The Ninth Circuit's ruling affirming the preliminary injunction is reported at 941 F.3d 410 (9th Cir. 2019) and reprinted at App.1a–52a.

STATEMENT OF JURISDICTION

On October 22, 2019, the Ninth Circuit issued its opinion affirming the preliminary injunction. Lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1291. On January 8, 2020, Justice Kagan extended the time to file a petition for a writ of certiorari to February 19, 2020. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Pertinent constitutional, statutory, and regulatory provisions appear in the Appendix at App.122a–84a.

INTRODUCTION

This petition presents two questions arising out of a multi-state lawsuit challenging the federal government's decision to exempt religious and moral objectors from federal regulatory requirements to provide health plans that include abortifacient and contraceptive coverage. The second question—about the validity of the exemptions—is likely to be definitively resolved by this Court's decision in *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, No. 19-431, and *Trump* v. *Pennsylvania*, No. 19-454. If so, a GVR is appropriate. But either in *Little Sisters* and *Trump* or here, a threshold question is also ripe for this Court's review: whether the plaintiff States have Article III standing to challenge the religious and moral exemptions based on a hypothetical increase in their discretionary, voluntary healthcare spending. Because the States have no legal right to a federal regulatory rule that compels employers to provide abortifacients and contraception, the States lack standing.

Many conflicts are unavoidable after this Court created a constitutional right to abortion in *Roe* v. *Wade*, 410 U.S. 113 (1973). The conflict here is wholly avoidable. Moral or religious objections to abortion are millennia old, and our country has always respected them. In fact, the same day this Court decided *Roe*, it lauded Georgia's statutory exemption for hospitals and employees with "moral or religious" objections from facilitating or carrying out abortions. *Doe* v. *Bolton*, 410 U.S. 179, 197–98 (1973). Corporate and individual conscience protections like these kept peace in *Roe's* wake and served as a groundwork of our Nation's social policy for almost 40 years.

Earthshattering change came in 2011 when the U.S. Department of Health and Human Services (HHS) issued guidelines under the Affordable Care Act that forced many employers to cover all contraceptive methods approved by the Food and Drug Administration (FDA) in their private health plans. Some of these methods—including "emergency contraception"—may stop an embryo from implanting in the uterine wall, ending an early human life. Appalled by this requirement to deliver abortifacient drugs, dozens of employers with religious, pro-life convictions sued, as did March for Life and one other non-profit with equivalent moral beliefs.

Initially, objectors' pleas fell on deaf ears. Federal agencies' religious exemptions were sparing and their moral protections non-existent. But after years of litigation, multiple trips to this Court, and mounting legal losses, federal agencies returned to the Nation's status quo ante. They issued interim and then final regulations exempting private employers with moral or religious objections from offering objectionable forms of contraception and counseling in their health plans. The agencies retained a less protective "accommodation" that satisfied some, but not all, objectors by authorizing their health plan issuer or third-party administrator to provide contraception through their health plans in their stead. HHS also ensured access to government-subsidized contraception to any woman who lacked it based on her employers' moral or religious beliefs.

This compromise should have ended the conflict. But states that favor abortion subsidies and oppose freedom of conscience could not let it rest and sued.

In ruling for the plaintiff States, the Ninth Circuit made two critical mistakes. First, the Ninth Circuit erred in holding that the States had Article III standing. App.20a–22a. The States' theory is that when the federal government first promulgated the abortifacient and contraceptive mandate, it shifted the cost of providing abortifacients and contraceptives from the States to private employers. When the federal government created the limited religious and moral exemptions, some small percentage of those costs might shift back, because the States would provide free abortifacients and contraceptives to employees who no longer received them from their employers. Those hypothetical "exemption costs," claim the States, are enough to create Article III standing.

Not so. To begin, the States had no credible evidence that exempting moral and religious objectors would lead to the States voluntarily spending more discretionary funds on optional healthcare programs. Nobody knows how many employers the regulations will impact, or in which states. Employers who invoke the exemption are likely to have employees who also object to abortifacients and contraceptives. And the States have no obligation to provide abortifacients and contraceptives anyway. The States' "harm" was only ever a theory.

More important, the States had no right to this financial windfall in the first place. States have no entitlement to a federal-government abortifacient and contraceptive mandate. If the federal agencies had eliminated the mandate, the States would have no legal basis to complain. What the federal government gives, it can also take away.

Instead, the Ninth Circuit should have asked whether the States were seeking "compensation for, or preventing, the violation of a *legally protected right*." *Vt. Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) (emphasis added). And the answer is an obvious no. HHS had no obligation to force employers to cover all FDA-approved contraceptives; the mandate was a matter of agency discretion, as was the agencies' decision not to impose it on conscientious objectors.

The States lack standing to challenge every adjustment federal agencies make to discretionary regimes that may collaterally aid the States' voluntary social welfare spending. The regulations at issue are not aimed at the States and do not require—or prevent—the States from doing anything. The States have a free hand to increase or decrease funding, change eligibility requirements, eliminate their healthcare programs altogether, or take any number of intermediate steps without federal penalty. Thus, any harm to the States' fiscs is entirely self-imposed, and they lack standing.

Second, the Ninth Circuit said that the federal agencies probably lacked authority to issue the moral and religious exemptions, and those rules are likely arbitrary and capricious. App.28a–43a. Again, not so. In enacting the Affordable Care Act, Congress said nothing about requiring employers to provide abortifacients and contraception. Though the legislation left agencies with discretion to include such a requirement, the agencies had concomitant discretion to fashion religious and moral exemptions based on the Constitution, the Religious Freedom Restoration Act, and this Court's decisions.

The final exemptions are balanced and address concerns on all sides. They are not arbitrary or capricious. This Court should so hold in the *Trump* and *Little Sisters* cases and, at the very least, grant, vacate, and remand this case to the Ninth Circuit so that it can conform its views to this Court's decision.

STATEMENT OF THE CASE

A. The ACA's "preventive care and screenings" requirement for women.

The Affordable Care Act, commonly referred to as the ACA, regulates our Nation's health-insurance industry in unprecedented ways. It requires many employers not just to offer health insurance but plans that cover certain (1) items or services, (2) immunizations, (3) child preventive care and screenings, and (4) preventive care and screenings for women, without cost sharing. 42 U.S.C. 300gg-13. Exempt from these requirements are employers with fewer than 50 employees, who are not required to offer health coverage, and employers with grandfathered health plans that predated the ACA and have not undergone certain changes. *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 699 (2014).

Conscientious objectors have no quarrel with the ACA's mandatory-coverage provisions. They object not to the health insurance or preventive-care-and-screening requirement but to the agency gap filling that followed.

In the ACA itself, Congress provided that health plans offer "with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration," a division of HHS. 42 U.S.C. 300gg-13(a)(4). This discretionary grant of authority is buttressed by provisions giving federal agencies the power to "promulgate such regulations as may be necessary or appropriate to carry out" Congress' broad decree. 42 U.S.C. 300gg-92; 29 U.S.C. 1191c; 26 U.S.C. 9833.

In turn, HHS delegated the job of fleshing out the women's preventive-care-and-screenings requirement to the Institute of Medicine, "a nonprofit group of volunteer advisers." *Hobby Lobby*, 573 U.S. at 697. These consultants urged HHS to mandate free coverage of all FDA "approved contraceptive methods, sterilization procedures, and patient education and counselling." 77 Fed. Reg. 8,725, 8,725 (Feb. 15, 2012). HHS generally followed this recommendation and required many private employers to cover contraceptive methods that "may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus." *Hobby Lobby*, 573 U.S. at 697–98.

Simultaneously, HHS and the Departments of Labor and the Treasury granted the Health Resources and Services Administration "discretion to establish an exemption for group health plans established or maintained by certain religious employers," *i.e.*, churches and their integrated auxiliaries. 77 Fed. Reg. at 8,726.

The agencies' rationale was that churches' employees "would be less likely to use contraceptives even if contraceptives were covered under their health plans." *Id.* at 8,728. Though the same is true of the employees of many religious and non-religious non-profits opposed to abortion—including March for Life—the agencies made no exception for them.

No state ever challenged the agencies' church exemption, which does not require qualifying entities to do anything to obtain an exception. *Hobby Lobby* 573 U.S. at 698. In fact, many states provide similar or broader religious exemptions to their own contraceptive mandates. 77 Fed. Reg. at 8,726.

Originally, employers like March for Life who offered health insurance but refused to cover abortifacients in their health plans faced public or private lawsuits under ERISA and fines up to $100 per plan participant per day. 29 U.S.C. 1132; 26 U.S.C. 4980D. While employers who dropped health coverage altogether faced potential penalties of $2,000 per employee each year. 26 U.S.C. 4980H.

B. The widespread litigation sparked by the agencies' choice and the modifications the agencies made pre-*Zubik*.

The agencies' decision to exempt only churches and their integrated auxiliaries from the contraception mandate sparked intense backlash. Dozens of non-profit organizations and closely held, for-profit businesses sued, primarily under RFRA, the Religious Freedom Restoration Act of 1993. 42 U.S.C. 2000bb *et seq*.

Because the agencies' extreme position was legally indefensible, they quickly began making regulatory changes. They staunchly refused to exempt religious non-profits opposed to abortion from the contraception mandate—as they did churches. But they agreed to provide a regulatory "accommodation" or alternative means of compliance by which religious non-profits' health insurance issuers or third-party administrators could provide abortifacients and contraceptives in their stead.

To access the accommodation, religious non-profits had to submit a form to their health insurance issuer or third-party administrator. This form was more than just notice of a religious objection. It was an instrument under which objectors' health plans were operated. 29 C.F.R. 2510.3-16(b)&(c). And for self-insured plans, it served as a special designation of the third-party administrator as plan and claims administrator for making payments for contraceptive services. 78 Fed. Reg. 39,870, 39,880 (July 2, 2013).

Under this iteration of the regulatory scheme, (1) churches and their integrated auxiliaries were exempt from the contraception mandate, (2) religious non-profits with objections to abortion could authorize others to provide abortifacients via the non-profits' own health plans, (3) non-religious non-profits with objections to abortion—like March for Life—had to cover abortifacients directly, and (4) for-profit businesses also had to cover abortifacients directly no matter if their owners objected to abortion and their companies were closely held.

Because the agencies imposed a third-party administrator's duty to provide contraceptives under ERISA, and ERISA does not apply to church plans, 29 U.S.C. 1003(b)(2), the agencies effectively exempted certain church-affiliated non-profits from the contraceptive mandate, including some hospitals and universities. The agencies lacked any basis for compelling these entities' third-party administrators to deliver contraceptives. 79 Fed. Reg. 51,092, 51,095 n.8 (Aug. 27, 2014).

But some objectors' consciences were not assuaged, and this Court was forced to intervene. It first enjoined the agencies from enforcing the contraceptive mandate or the accommodation against a religious order pending appeal to the Tenth Circuit. Expressing no view on the merits, this Court allowed Little Sisters of the Poor to obtain an exemption by informing the Secretary of HHS, in writing, that it holds itself out as religious and has religious objections to covering contraceptives. *Little Sisters of the Poor Home for the Aged, Colo.* v. *Sebelius*, 571 U.S. 1171 (2014).

Several months later, this Court ruled on the merits that it violated RFRA for the agencies to impose the contraceptive mandate on closely-held, for-profit businesses whose owners objected to abortion on religious grounds. *Hobby Lobby*, 573 U.S. at 736. Whether or not the accommodation satisfied "RFRA for purposes of all religious claims," it satisfied Hobby Lobby's and Conestoga's objections and proved that the agencies had less restrictive means of obtaining their goals. *Id.* at 730–31.

This Court's ruling in *Hobby Lobby* made two things clear. First, the agencies could not impose the mandate directly on religious objectors, either for-profit or non-profit. And second, the accommodation suffices for those with no objection to it.

Not long after, this Court granted an injunction pending appeal barring the agencies from enforcing either the contraceptive mandate or the accommodation against a religious college. Wheaton College could obtain an exemption by informing the Secretary of HHS, in writing, that it is a non-profit that holds itself out as religious and has religious objections to covering contraceptives. *Wheaton Coll.* v. *Burwell*, 573 U.S. 958 (2014). Though this Court expressed no view on the merits, *ibid.*, this trend of granting interim relief to objectors suggested the existing accommodation could not pass muster.

The agencies went back to the drawing board. Still refusing to exempt religious non-profits from the mandate, they revised the accommodation. Religious non-profits could comply with the mandate either by submitting the official form to their health insurance issuer/third-party administer or sending a "notice" to HHS. The notice had to contain: (1) the entities' name and the reason it qualifies for the accommodation, (b) a description of its religious objection to covering contraceptives, (c) the name and type of its health plan, and (d) the name and contact information of its health insurance issuer or third-party administrator. 79 Fed. Reg. 51,092, 51,094–95 (Aug. 27, 2014). Then HHS would notify a religious non-profit's insurer or third-party administrator, on the non-profit's behalf, of its new obligation to provide contraceptive coverage to employees. *Id.* at 51,095; 29 C.F.R. 2510.3-16(b).

The agencies also made closely-held, for-profits whose owners objected to covering abortifacients eligible for the new accommodation. 80 Fed. Reg. 41,318, 41,324 (July 14, 2015). But they still offered no exemption or accommodation to non-religious, non-profits with moral objections to abortion. This gave March for Life *less* conscience protection than Hobby Lobby.

C. *Zubik* and its aftermath

Not all objectors' consciences were assuaged by the revised accommodation because it still required them to authorize use of their own health plans to provide abortifacient drugs. Dozens of lawsuits continued, and this Court granted emergency relief to a group of Catholic dioceses and related entities pending the filing and disposition of their cert. petition. *Zubik* v. *Burwell*, 135 S. Ct. 2924 (2015). Ultimately, this Court took and consolidated seven cases brought chiefly by religious non-profits.

Before this Court, the agencies admitted several key facts about the accommodation. First, contraceptive services provided by a religious non-profit's health insurance issuer or third-party administrator are "part of the same [health] plan as the coverage provided by the employer." Br. for Resp'ts at 38, *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418). They are not "separate," as the agencies had long claimed.

Second, the agencies claimed that they could not ensure the delivery of abortifacients without religious non-profits turning over the name and contact information of their health insurance issuer or third-party administrator. *Id.* at 87–88. Providing this

data, besides stating a religious objection, was a "but for" cause of abortifacients' delivery.

Third, the agencies confessed the need for religious non-profits to submit a written document legally authorizing others to provide abortifacients through their own private health plans. *Id.* at 16 n.4. Either the official form or notice to HHS served as religious non-profits' designation of someone else to provide abortifacients in their stead. *Ibid.*

Fourth, in a supplemental brief ordered by this Court, the agencies admitted that the regulatory scheme "could be modified" to better accommodate objectors' concerns. Suppl. Br. for Resp'ts at 3, 14, *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418). The accommodation was not the least restrictive means of accomplishing their goals.

Given this, and religious non-profits' assurance they did not object to their health insurers providing contraceptives without them, this Court vacated the judgments below and remanded the cases. *Zubik* v. *Burwell*, 136 S. Ct. 1557, 1560 (2016) (per curiam). It gave the agencies "an opportunity" to better accommodate religious non-profits' objections. *Ibid.*

The agencies solicited public comments on options to revise the accommodation yet again. 81 Fed. Reg. 47,741, 47,741 (July 22, 2016). But no regulatory changes resulted. Shortly after the 2016 presidential election, the agencies stated that it was impossible to modify the accommodation to resolve objectors' concerns. U.S. Dep't of Labor, FAQs About Affordable Care Act Implementation Part 36 (Jan. 9, 2017), https://bit.ly/2Sv6Q3z. Dozens of lawsuits remained pending, including one March for Life filed in 2014.

D. March for Life and its lawsuit

March for Life is one of the oldest and best-known pro-life organizations in the country. It is a non-religious, charitable organization that exists to protect, defend, and respect human life at every stage, and to promote the worth and dignity of all unborn children. To say that March for Life opposes abortion is an understatement: that opposition is the reason the organization exists.

One of March for Life's basic moral convictions is that human life begins at conception/fertilization and that a human embryo is a human life that should be protected. Because hormonal oral and implantable contraceptives, IUDs, and so-called "emergency contraception" may prevent a human embryo from implanting in the uterus, thereby causing an abortion, March for Life cannot include them in its health plan. Nor would its employees—all of whom share those beliefs—use these abortifacients.

Yet the agencies required March for Life to violate its reason for existence by paying for coverage of abortifacient drugs. They made no allowance for moral objections to abortion. So, March for Life was forced to sue in the U.S. District Court for the District of Columbia. It made a straightforward equal-protection claim. The agencies could not exempt churches from the contraceptive mandate because their employees were "*more likely*" to share their religious, pro-life beliefs, 78 Fed. Reg. at 39,874 (emphasis added), but apply the mandate to March for Life whose employees *certainly do* share its moral, pro-life convictions.

The district court agreed and permanently enjoined the agencies from enforcing the mandate against March for Life. *March for Life* v. *Burwell*, 128 F. Supp. 3d 116, 134 (D.D.C. 2015). But the agencies appealed and persuaded the D.C. Circuit to hold the case in abeyance for years. Eventually, March for Life's lawsuit partially inspired the agencies to reconsider their regulatory scheme. 83 Fed. Reg. 57,592, 57,595–96, 57,602–03 (Nov. 15, 2018).

E. The agencies reconsider and create broader conscience exemptions.

After prevailing in an election where the contraceptive mandate was a major matter, President Trump issued an executive order directing the agencies to consider regulatory changes "to address conscience-based objections." Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017).

The agencies later revisited the matter and issued final rules concluding: (1) Congress has protected moral and religious objectors in the healthcare context for decades, (2) the agencies had exempted many employers from the contraceptive mandate from its inception, (3) the mandate and revised accommodation violated RFRA in many instances, (3) creating an exemption for employers with moral objections and enlarging the existing religious exemption was justified, and (4) these carve outs were preferable to eliminating the contraceptive mandate altogether. 83 Fed. Reg. 57,536 (Nov. 15, 2018); 83 Fed. Reg. 57,592 (Nov. 15, 2018).

The final rules, issued after notice and comment, establish moral and religious exemptions from the contraceptive mandate for which March for Life and others had long advocated in court and the public square. The agencies agreed to no longer force entities such as churches, non-profits, for-profits that are not publicly traded, and private colleges to establish, maintain, provide, offer, or arrange for abortifacient drugs. But the mandate otherwise remains in place and qualifying employers must provide any FDA-approved contraceptive or sterilization items, procedures, services, and counseling to which they have no moral or religious objection. 45 C.F.R. 147.132; 45 C.F.R. 147.133.

Furthermore, the agencies kept the religious accommodation, which satisfied many employers, as a voluntary option and made it available to moral objectors. 83 Fed. Reg. at 57,561; 83 Fed. Reg. at 57,623–24. HHS also ensured that any low-income woman who might lose access to contraceptives due to her employer's moral or religious objection could receive them under Title X. 84 Fed. Reg. 7,714 (Mar. 4, 2019).

These regulatory changes eventually caused the agencies to voluntarily dismiss the appeal in March for Life's case. The D.C. Circuit granted that motion, leaving the district court's permanent injunction in place. *March for Life* v. *Azar*, No. 15-5301, 2018 WL 4871092, at *1 (Sept. 17, 2018).

F. The plaintiff States sue, and the Ninth Circuit affirms an injunction against the final rules.

This truce should have brought lasting peace. But California, 12 other states, and the District of Columbia (collectively, the "States"), sued to overturn the agencies' moral and religious exemptions, claiming they violated the Administrative Procedure Act ("APA"), Establishment Clause, and equal protection. March for Life intervened to defend the moral exemption.

The U.S. District Court for the District of Northern California ruled that the States had Article III standing because the final regulations were reasonably probable to damage the States' fiscs "through increased reliance on [voluntarily] state-funded family-planning programs and through the [voluntary] state-borne costs of unintended pregnancies." App.78a. After reimagining the contraceptive mandate as a statutory requirement, the district court preliminarily enjoined the agencies from enforcing the final rules because (1) RFRA did not require the religious exemption; (2) the religious accommodation was enough; and (3) the moral exemption was inconsistent with the ACA. App.84a–111a.

A divided Ninth Circuit panel affirmed. The States brought a substantive—not procedural—APA challenge to the final rules. Yet the Ninth Circuit held the States had Article III standing based on an earlier ruling that hinged on the States raising a procedural APA claim. App.21a–22a; see also *California* v. *Azar*, 911 F.3d 558, 571 (9th Cir. 2018) ("We hold that the states have standing to sue on their procedural APA

claim."); *id.* at 573 ("causation and redressability requirements are relaxed once a plaintiff has established a procedural injury") (cleaned up). The only new grounds the majority gave for identifying standing was that the States' causation theory relied on the "predictable effect of Government action on the decisions of third parties." App.22a (quoting *Dep't of Commerce* v. *New York*, 139 S. Ct. 2551, 2566 (2019)).

On the merits, the majority held that the agencies likely (1) lacked statutory authority to establish the moral or religious exemptions; (2) had no business pre-emptively avoiding serial violation of RFRA, which courts must litigate case-by-case; and (3) successfully avoided any RFRA violation by establishing the religious accommodation. App.28a–42a.

Judge Kleinfeld dissented because he believed that the Third Circuit's affirmance of a nationwide injunction against enforcing the final rules had mooted the case. App.45a–52a. Judge Kleinfeld also concluded that the States lacked Article III standing because any fiscal harm they might experience was entirely self-inflicted. App.50a (citing *California*, 911 F.3d at 585–88 (Kleinfeld, J., dissenting)).

On remand, the district court canceled summary judgment proceedings due to the nationwide injunction affirmed by the Third Circuit in *Little Sisters* and *Trump*, and it effectively put this case on hold.

REASONS FOR GRANTING THE WRIT

"Relaxation of standing requirements is directly related to the expansion of judicial power." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 408–09 (2013). The Ninth Circuit's decision all but erased Article III's criteria for suit, then redirected executive-branch policy on conscientious objections to abortion. It is hard to think of a recent federal case that has set the standing bar lower.

The reality is that the States are just concerned bystanders; no rights or obligations flow from the ACA to them. The States' standing theory is grounded in speculation and choice: in theory, the agencies' contraceptive mandate relieves them of healthcare costs they voluntarily assumed and may stop paying without consequence. And the States have no right to the federal government continuing to force *any* employer to cover abortifacients and contraception.

Besides the States' lack of standing, certiorari is warranted to correct the Ninth Circuit's merits analysis of the moral and religious exemptions. This is the issue squarely before the Court in *Little Sisters* and *Trump*, and any ruling in those cases should also be applied here to protect those like March for Life.

I. Article III standing is a basic constitutional requirement, and this Court has an independent duty to ensure it exists.

Article III asks if a litigant has standing to invoke a federal court's jurisdiction and obtain a ruling on the merits. *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). No inquiry is more central to sustaining federal courts' limited role in a democratic society. *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 492–93 (2009). Without it, courts would run roughshod over other governmental branches, deciding not cases or controversies but "questions and issues" about hot-button political topics. *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 132 (2011) ("*ACSTO*"). Standing, then, is more than an academic concern. It guards the separation of powers. *Allen* v. *Wright*, 468 U.S. 737, 752 (1984). Article III "preserves the tripartite structure of our Federal Government, prevents the Federal Judiciary from intruding upon the powers given to the other branches, and confines the federal courts to a properly judicial role." *Town of Chester* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (cleaned up).

When a litigant lacks standing, "courts have no charter to review and revise legislative and executive action." *Summers*, 555 U.S. at 492. They may only dismiss the case. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). And given its crucial importance, standing "cannot be waived or forfeited." *Va. House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). Courts have a duty to ensure jurisdiction, regardless whether the parties question or concede it. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 73 (1997).

II. The States lack standing to challenge the final rules, and the Ninth Circuit erred in refusing to dismiss their suit.

Federal courts must ask, "Is this conflict really necessary?" *Arizonans for Official English*, 520 U.S. at 75. But the Ninth Circuit failed to take that Article III question seriously, turning it into "a mechanical exercise" that states may swiftly bypass. *Allen*, 468 U.S. at 751. Only this Court can stop lower courts from overstepping their bounds to "decide abstract questions of wide public significance even though other governmental institutions may be more competent to address [them] and . . . judicial intervention [is] unnecessary to protect individual rights." *Warth*, 422 U.S. at 500.

A. The States bear the burden of proving standing's three elements.

Under Article III, federal courts "may exercise power only in the last resort, and as a necessity." *Allen*, 468 U.S. at 752 (cleaned up). So plaintiffs, like the States, bear the burden of proving that they have standing to sue. *Clapper*, 568 U.S. at 408. Establishing courts' jurisdiction requires the States to show (1) an injury in fact, (2) fairly traceable to the moral and religious exceptions (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016).

Claiming a nonobvious harm related to the final regulations is insufficient for the States to show standing. *Bethune-Hill*, 139 S. Ct. at 1951. They must prove "an injury by submitting affidavits or other evidence." *Wittman* v. *Personhuballah*, 136 S. Ct. 1732, 1737 (2016) (cleaned up). But all the States can muster are political grievances. None can prove standing's three elements. Thus, the Ninth Circuit should have dismissed this case.

B. Because the States have no rights or obligations at stake, and their standing theory depends on rank speculation and self-imposed harm, they cannot show an injury in fact.

Injury in fact "is a hard floor of Article III jurisdiction." *Summers*, 555 U.S. at 497. Standing cannot exist without it. A litigant must have "a legally protected" or "cognizable interest" in the matter at hand. *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560, 562 (1992). That interest must be real and urgent or "actual or imminent," as well as specific to the litigant or "concrete and particularized." *Id.* at 560.

Yet the States' alleged injuries are none of the above. States have no cognizable interest in the agencies' contraceptive mandate, which operates against private employers to benefit employees. Nothing gives the States a legal right to force the agencies to redirect contraceptive payments they voluntarily assumed to conscientious objectors. All the States claim is self-imposed financial harm based on the hypothetical actions of employers and employees that is speculative and remote.

1. The States have no right to an indirect financial windfall.

To articulate the States' novel theory of standing is to refute it. It goes as follows: (1) the States voluntarily instituted programs that provide contraceptives to low-income women, (2) the religious and moral exemptions will cause some employed women to lose access to contraceptives, and (3) those women will turn back to the States' voluntary contraceptive programs, costing the States money. App.21a (citing *California*, 911 F.3d at 570–74).

This logic shows no injury in fact. The States have no "personal right under the Constitution or any statute to be free of action by [federal agencies] that may have some incidental adverse effect" on them. *Warth*, 422 U.S. at 509. Any indirect fiscal benefit the contraceptive mandate provided to States was purely serendipitous, not a matter of right.

Virtually every federal policy increases or reduces the States' costs. That does not give them standing to freeze any beneficial administrative act. Federal agencies owe the States nothing under the ACA.

The agencies' contraceptive mandate and moral and religious exemptions accord the States no rights or duties. Nor do they "affect prejudicially any proprietary or other right of the state subject to judicial cognizance." *New Jersey* v. *Sargent*, 269 U.S. 328, 334 (1926). In fact, they leave the States free to do what they like. *Id.* at 338. The States may leave their voluntary contraceptive programs as is, modify their eligibility criteria, or cancel them altogether without federal punishment.

What the States seek is "not to enforce specific legal obligations whose violation works a direct harm" against them, but to "restructure[e] . . . the apparatus established by the Executive Branch to fulfill its legal duties" under the ACA. *Allen*, 468 U.S. at 761. And the Ninth Circuit allowed that improper gambit. But the States lack Article III standing to commandeer the federal government to support their social welfare spending, particularly as the judiciary grants the federal government "the widest latitude in the dispatch of its own internal affairs." *Ibid.*

2. Any injury to the States' fiscs is entirely self-imposed.

"No State can be heard to complain about damage inflicted by its own hand." *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976). Yet that is precisely the complaint the States make here. Any possible injury to the State's fiscs results "from decisions by their respective state legislatures" to pay for women's contraception. *Ibid.* That decision is unrelated to the federal agencies' contraceptive mandate.

If the States are concerned about the costs of their discretionary programs, "nothing prevents" them from altering or eliminating them. *Ibid.* (Just as the federal government is free to alter or eliminate its own program.) But self-inflicted injury in the form of voluntary spending does not open the door to federal court. The agencies "neither require nor forbid any action on" the States' part. *Summers*, 555 U.S. at 493. What the States are "really complaining about [is] their own statute[s]." *Pennsylvania*, 426 U.S. at 667 (Blackmun, J., concurring).

The Ninth Circuit's logic would allow the States to "manufacture standing" at will. *Clapper*, 568 U.S. at 416. States could draw the judiciary into the middle of almost any federal regulatory change, remaking courts as "continuing monitors of the wisdom and soundness of Executive action," *Allen*, 468 U.S. at 760, and undermining "the public's confidence in an unelected but restrained Federal Judiciary," *ACSTO*, 563 U.S. at 133.

3. The States' claimed fiscal injury is abstract and not certainly impending.

Though the States could formerly rely on the lower standard of immediacy that applies to procedural claims, *Lujan*, 504 U.S. at 572 n.7, they raise no procedural challenge to the final rules. So Article III's requirements apply in full force: the States' "threatened injury must be certainly impending to constitute injury in fact." *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990) (cleaned up). The problem is that the States' alleged fiscal harm is "pure speculation and fantasy." *Lujan*, 504 U.S. at 567.

The final regulations' economic impact is not known to the States or anyone else. 83 Fed. Reg. at 57,607–08, 57,618; 83 Fed. Reg. at 57,550, 57,572–81. For example, the States cannot cite a single employer that likely intends to rely on the new moral or expanded religious exemptions. That is because many objectors were satisfied with the accommodation and others—like March for Life—are already covered by injunctions. And that is just the start of the "highly attenuated chain of possibilities," *all* of which must align perfectly before the States could realize a financial hit. *Clapper*, 568 U.S. at 410.

Even if a relevant employer exists within the States' bounds, the States do not know what specific contraceptives it objects to and what contraceptives its health plan beneficiaries want. Assuming a real conflict, the States still cannot prove that it is likely: (1) plan beneficiaries have no other coverage or way to access their contraceptive of choice, (2) plan beneficiaries will turn to State healthcare programs, (3) plan beneficiaries will satisfy the States' programs' eligibility requirements, and (4) the States will leave their programs the same and spend more money on contraceptives or unintended pregnancies.

In short, the States claim an injury that is nothing "more than an ingenious academic exercise in the conceivable." *Warth*, 422 U.S. at 509 (cleaned up). Yet "standing theories that rest on speculation about the decisions of independent actors" generally collapse. *Clapper*, 568 U.S. at 414. Because this litigation is merely the flip side of the coin presented in *Diamond* v. *Charles*, 476 U.S. 54, 66 (1986), the Ninth Circuit erred in holding that the States have standing based on unmoored hypothesis.

No convincing evidence shows that "the string of occurrences [the States] alleged would [ever] happen"—let alone "immediately." *Whitmore*, 495 U.S. at 159. Thus, the States lack Article III standing, as even realistic threats are not enough to prove imminent harm. *Summers*, 555 U.S. at 499–500.

4. The States allege a non-particularized harm that treats federal courts as general complaint bureaus.

One-third of states have lodged suits against the moral and religious exemptions. That is strong evidence that the States lack a particularized interest and are simply airing their support for abortion in federal court. Yet the Ninth Circuit turned the federal judiciary into "general complaint bureaus" for those unhappy with the democratic process. *Hein* v. *Freedom From Religion Found., Inc.*, 551 U.S. 587, 593 (2007).

The States have not tried to hide the true reason they sued: they want a ruling that federal agencies violated the ACA by exempting moral and religious objectors from the contraceptive mandate. But "the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable." *Lujan*, 504 U.S. at 575. Article III requires more than a "general interest common to all members of the public." *Gill* v. *Whitford*, 138 S. Ct. 1916, 1931 (2018) (cleaned up). That is all the States possess, as the final rules do not impact them in any particularized way. They may be able to claim *parens patriae* standing, but not in a lawsuit against the federal government. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).

Though the States' policy disagreement may be more "sharp and acrimonious" than most, *Diamond*, 476 U.S. at 62, fervor alone does not satisfy Article III. Standing requires more than the States' general "desire to vindicate [a pro-abortion] value interest[ ]." *Id.* at 66.

C. Because the States' alleged injury is self-inflicted and depends on the presumed choices of multiple third parties, they cannot show causation or redressability.

States must do a cost-benefit analysis whenever they offer a discretionary benefit, such as providing contraceptives. Nothing requires federal agencies to insulate the States from the fiscal consequences of their own unconstrained choice. Societal and market conditions are always changing and the States, no less than others, must adapt. A stubborn refusal to do so creates nothing but manufactured harm. It is not enough for the States to throw open courts' doors and attempt to convince the judiciary to block any federal policy change the States dislike. Because any fiscal injury the States may experience is entirely "self-inflicted," their asserted "injuries are not fairly traceable" to the final rules, *Clapper*, 568 U.S. at 418, and they lack standing to sue.

What's more, the States' causation theory "involves numerous third parties . . . who may not even exist in [their] communities and whose independent decisions may not collectively have a significant effect on" their healthcare costs. *Allen*, 468 U.S. at 759. Any standing theory that relies "on the unfettered choices made by independent actors not before the courts" is highly suspect. *Lujan*, 504 U.S. at 562. The States must do more than hypothesize: they must "adduce facts showing" that employers' and employees' autonomous choices will align in a particular way that actually costs the States money. *Ibid.*

But the States cannot name a single employer inside their bounds who is likely to invoke the final rules' moral or religious exemption, let alone a woman whose access to contraception is likely to be hindered by that choice. It is impossible for the States to prove that either outcome is anything more than rank speculation. See Part II.B.3, above. The Ninth Circuit erred in concluding otherwise, as there is nothing "'predictable'" about the States' foretelling. App.22a. Employers' and employees' "exercise of broad and legitimate discretion" is not something that federal "courts can[ ] presume either to control or to predict." *Lujan*, 504 U.S. at 562.

III. The agencies had statutory authority to issue the moral and religious exemptions, which are legally permissible (if not required) and not arbitrary or capricious.

On the merits, the Ninth Circuit ruled that the agencies probably lacked authority to issue the moral and religious exemptions and those rules are likely arbitrary and capricious. Neither holding bears scrutiny. Congress left the preventive-care mandate a blank slate and invested the agencies with ample discretion to fashion not only its content, but limited exemptions based on the Constitution, RFRA, and this Court's decisions. Moreover, the final rules are balanced, address all relevant considerations, and attempt to restore societal peace. Just because the Ninth Circuit disagrees with objectors' views does not make accommodating them arbitrary or capricious.

A. The final regulations are within the agencies' gap-filling authority.

Any argument that the ACA does not allow the agencies much, if any, discretion is based on cherry-picked legislative history and value judgments—not the statute's text. App.29a–33a. What Congress actually said is that a component of HHS will enact "comprehensive guidelines" fleshing out what the ACA's preventive-care requirement means, 42 U.S.C. 300gg-13(a)(4), and that the agencies could "promulgate such regulations as may be necessary or appropriate to" accomplish that task, 42 U.S.C. 300gg-92; 29 U.S.C. 1191c; 26 U.S.C. 9833.

The agencies have done precisely what Congress asked: they enacted comprehensive guidelines that generally require employers to include all FDA-approved contraceptives in their health plans, but then issued regulations exempting moral or religious objectors that were necessary or appropriate based on constitutional or statutory concerns.

"The power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the marking of rules to fill any gap left, implicitly or explicitly, by Congress." *Mayo Found. for Med. Educ. & Research* v. *United States*, 562 U.S. 44, 55–56 (2011) (cleaned up). The ACA's preventive-care gap is explicit, and the discretion Congress granted the agencies to fill it is broad. Congress expressly delegated authority to the agencies to craft regulations interpreting the ACA's preventive-care provision. *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001).

"Regulation, like legislation, often requires drawing lines." *Mayo Found.*, 562 U.S. at 59. The only question is whether Congress would have expected courts to treat the final regulations as within the agencies' gap-filling authority. *Id.* at 58. Congress must have so expected because: (1) Congress is well-versed in the Constitution's limits, (2) Congress broadened those limits by enacting RFRA, and (3) this Court has long afforded conscience protections to those—like March for Life—whose moral convictions are held with the strength of traditional religious beliefs based on constitutional concerns, *Gillette* v. *United* States, 401 U.S. 437, 445 (1971); *Welsh* v. *United States*, 398 U.S. 333, 340 (1970) (plurality); *id.* at 344 (Harlan, J., concurring).

The Ninth Circuit's contrary decision directs executive officials to ignore the Constitution and this Court's precedents until each individual employer obtains a court judgment. App.34a–37a. That cannot be right, which is why the Ninth Circuit admitted the agencies may have authority to establish the church exemption. App.32a–33a. But if Congress gave the agencies discretion to craft that exemption, it necessarily gave them the power to enact the final rules too.

Under the Ninth Circuit's logic, the agencies lacked authority to address non-profits' religious liberty arguments proactively. App.34a–37a. Their only option to address the serial RFRA violations that *Hobby Lobby* unmasked would be to remove contraceptives from the preventive-care guidelines altogether. Nothing suggests that Congress intended to put the agencies to this all-or-nothing choice.

B. The agencies' conscious exemptions are not arbitrary or capricious.

The agencies' moral and religious exemptions are the culmination of years of rulemaking, litigation, and negotiation. Self-evidently, they are the agencies' good-faith effort to bring peace to a fractured society. All the APA demands is "good reasons for the new policy" and the agencies' belief it is better than the old one. *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Here, the Ninth Circuit held that the final rules were likely arbitrary and capricious by ignoring this history and substituting the States' policy "judgment for that of the agenc[ies]." *Id.* at 513. App.37a–42a. But the agencies "need not demonstrate to a court's satisfaction that the reason[s] for the new policy are *better* than the reasons for the old one." *Fox Television*, 556 U.S. at 515. They must simply "examine the relevant data and articulate a satisfactory explanation" for their actions. *Id.* at 513.

Nothing lacks in the agencies' inquiry or reasoning here. The final rules are a balanced attempt to provide FDA-approved contraceptives to as many women as possible through employer-based health plans, while respecting the freedom of conscience on which our Nation was founded. Even a cursory review of the final rules shows that the agencies paid close heed to: (1) the ACA's text and structure, (2) Congress' and our Nation's history of protecting freedom of conscience, (3) judicial decisions, and (4) the likely benefits and burdens associated with their chosen path. 83 Fed. Reg. at 57,594–57,613; 83 Fed. Reg. at 57,538–57,582.

IV. The questions presented require this Court's resolution.

The agencies and conscientious objectors have been in litigation for years. Though the final rules should have ended this conflict, the Ninth Circuit invalidated the truce. If the decision is left in place, federal courts (not the agencies) will force pro-life non-profits like March for Life to violate their only reason for existence. This Court should prevent that.

No doubt exists that the questions presented deserve this Court's attention. The Court has already granted review in *Little Sisters* and *Trump*. *Hobby Lobby* and *Zubik* also involved the agencies' contraceptive mandate, which has long been a national flashpoint. Moreover, the Court granted review to decide a similar standing question in *United States* v. *Texas*, 136 S. Ct. 906 (2016), but was unable to do so because the Court was equally divided, 136 S. Ct. 2271 (2016) (per curiam). Answering the standing question is a matter of critical importance, as states now often turn to courts to achieve outcomes voters did not support at the polls.

This is also an appropriate vehicle to fix the standing mess. First, March for Life raised the States' lack of standing below and includes standing as a fully briefed question presented.

Second, the Ninth Circuit affirmed enjoining the final rules' moral exemption without requiring the States to identity a single pro-life non-profit within their bounds that is likely to invoke it. Only two non-religious charities sued, 83 Fed. Reg. at 57,595–96, 57,602, 57,617, and neither falls into this category.

Third, the Ninth Circuit's holding that executive officials have no duty to uphold the constitutional or statutory rights of conscientious objectors absent a court order is wrong. App.34a–37a. It is hard to imagine courts requiring executive officials to disregard any other legal obligation in this way.

Fourth, March for Life has standing to file this petition. While some lower courts have required intervenors to show independent Article III standing even when the party they support appeals, *Pennsylvania* v. *President United States*, 930 F.3d 543, 559 n.6 (3d Cir. 2019), this Court has rejected that position. Because the agencies are petitioners in this Court, March for Life may "'piggyback' on [their] undoubted standing" and is "entitled to seek review." *Diamond*, 476 U.S. at 64. Intervening in support of the agencies does not entail invoking this Court's jurisdiction or require March for Life to show standing itself. *Bethune-Hill*, 139 S. Ct. at 1951; see also *Wittman*, 136 S. Ct. at 1736 (only parties "invoking a federal court's jurisdiction" must "demonstrate standing"). That a permanent injunction protects March for Life against the contraceptive mandate is irrelevant: the agencies' standing fulfills Article III.

At a minimum, the Court should hold this case and GVR it after issuing an opinion in *Little Sisters* and *Trump* so that the Ninth Circuit can conform its views to this Court's decision.

CONCLUSION

The petition for a writ of certiorari should be granted or held for the decision in *Little Sisters* and *Trump*.

Respectfully submitted,

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FEBRUARY 2020

APPENDIX

APPENDIX TABLE OF CONTENTS

United States Court of Appeals
for the Ninth Circuit,
Opinion in 19-15072, 19-15118, and 19-15150
Issued October 22, 2019 ..... 1a

United States District Court
Northern District of California,
Opinion in 17-cv-05783-HSG
Issued January 13, 2019 ..... 53a

U.S. Constitutional Provisions 122a

5 U.S.C. 706(2)(A) 123a

26 U.S.C. 4980D 124a

26 U.S.C. 4980H 131a

26 U.S.C. 5000A 139a

42 U.S.C. 300gg-13(a) 154a

42 U.S.C. 2000bb-1 ..... 156a

42 U.S.C. 2000bb-2(1) 157a

42 U.S.C. 2000bb-3(a) 157a

45 C.F.R. 147.131(a) (2013) 158a

45 C.F.R. 147.131 ..... 159a

45 C.F.R. 147.132 ..... 167a

45 C.F.R. 147.133 ..... 171a

Excerpt from 83 Fed. Reg. 57592
(Nov. 15, 2018) 175a

Excerpt from 83 Fed. Reg. 57536
(Nov. 15, 2018) 179a

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA; STATE OF DELAWARE; COMMONWEALTH OF VIRGINIA; STATE OF MARYLAND; STATE OF NEW YORK; STATE OF ILLINOIS; STATE OF WASHINGTON; STATE OF MINNESOTA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF NORTH CAROLINA; STATE OF VERMONT; STATE OF RHODE ISLAND; STATE OF HAWAII, *Plaintiffs-Appellees*, v. U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, in his official capacity as Secretary of the U.S. Department of Labor; ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services; U.S. DEPARTMENT OF THE TREASURY; STEVEN TERNER	No. 19-15072 D.C. No. 4:17-cv-05783-HSG

MNUCHIN, in his official capacity as Secretary of the U.S. Department of the Treasury,

Defendants,

and

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,

Intervenor-Defendant-Appellant.

STATE OF CALIFORNIA; STATE OF DELAWARE; COMMONWEALTH OF VIRGINIA; STATE OF MARYLAND; STATE OF NEW YORK; STATE OF ILLINOIS; STATE OF WASHINGTON; STATE OF MINNESOTA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF NORTH CAROLINA; STATE OF VERMONT; STATE OF RHODE ISLAND; STATE OF HAWAII,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; R.

No. 19-15118

D.C. No. 4:17-cv-05783-HSG

ALEXANDER ACOSTA, in his official capacity as Secretary of the U.S. Department of Labor; ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services; U.S. DEPARTMENT OF THE TREASURY; STEVEN TERNER MNUCHIN, in his official capacity as Secretary of the U.S. Department of the Treasury,

Defendants-Appellants,

and

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,

Intervenor-Defendant.

STATE OF CALIFORNIA; STATE OF DELAWARE; COMMONWEALTH OF VIRGINIA; STATE OF MARYLAND; STATE OF NEW YORK; STATE OF ILLINOIS; STATE OF WASHINGTON; STATE OF MINNESOTA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF NORTH CAROLINA; STATE OF VERMONT; STATE OF RHODE ISLAND; STATE OF HAWAII,

No. 19-15150

D.C. No. 4:17-cv-05783 HSG

OPINION

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, in his official capacity as Secretary of the U.S. Department of Labor; ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services; U.S. DEPARTMENT OF THE TREASURY; STEVEN TERNER MNUCHIN, in his official capacity as Secretary of the U.S. Department of the Treasury,

Defendants,

and

MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

Intervenor-Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of California
Haywood S. Gilliam, Jr., District Judge, Presiding

Argued and Submitted June 6, 2019
San Francisco, California

Filed October 22, 2019

Before: J. Clifford Wallace, Andrew J. Kleinfeld, and Susan P. Graber, Circuit Judges.

Opinion by Judge Wallace;
Dissent by Judge Kleinfeld

SUMMARY*

Affordable Care Act

The panel affirmed the district court's preliminary injunction barring enforcement in several states of final federal agency rules that exempt employers with religious and moral objections from the Affordable Care Act's requirement that group health plans cover contraceptive care without cost sharing.

The panel first held that the plaintiff states had standing to sue. The panel held that the panel's prior decision in *California v. Azar*, 911 F.3d 558, 566–68 (9th Cir. 2018), and its underlying reasoning foreclosed any arguments otherwise. The panel determined that plaintiffs failed to identify any new factual or legal developments since the panel's prior

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

decision that required the panel to reconsider standing here.

The panel noted that the day after the district court issued its injunction of limited scope, covering the territory of the thirteen plaintiff states plus the District of Columbia, a district court in Pennsylvania issued a similar nationwide injunction. *See Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 835 (E.D. Pa.), *aff'd* 930 F.3d 543 (3d Cir.), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Oct. 1, 2019) (No. 19-431). The panel held that despite the nationwide injunction from Pennsylvania, under existing precedent, this appeal was not moot.

The panel held that the district court did not abuse its discretion in concluding that the plaintiff states were likely to succeed on the merits of their claim brought under the Administrative Procedure Act. The panel held that given the text, purpose, and history of 42 U.S.C. § 300gg–13(a)(4), also known as the Women's Health Amendment, the district court did not err in concluding that the agencies likely lacked statutory authority under the Affordable Care Act to issue the final rules. The panel determined that, at the preliminary injunction stage, the evidence was sufficient to hold that providing free contraceptive services was a core purpose of the Women's Health Amendment and that nothing in the statute permitted the agencies to determine exemptions from the requirement.

The panel rejected the argument that the regulatory regime that existed before the rules' issuance—i.e., the accommodation process—violated the Religious Freedom Restoration Act and that the

Act required or at least authorized the federal agencies to eliminate the violation by issuing the religious exemption. The panel held that even assuming that agencies were authorized to provide a mechanism for resolving perceived Religious Freedom Restoration Act violations, the Act likely did not authorize the religious exemption at issue in this case. The panel held that the religious exemption contradicts congressional intent that all women have access to appropriate preventative care and the exemption operates in a manner fully at odds with the careful, individualized, and searching review mandated by the Religious Freedom Restoration Act.

The panel held that regardless of the question of whether the agencies had authority pursuant to the Religious Freedom Restoration Act to issue the exemption, the accommodation process likely did not substantially burden the exercise of religion and hence did not violate the Act. The panel noted that an organization with a sincere religious objection to arranging contraceptive coverage need only send a self-certification form to the insurance issuer or a third-party administrator or send a written notice to the Department of Health and Human Services. Once the organization has taken the simple step of objecting, all actions taken to pay for or provide the organization's employees with contraceptive care is carried out by a third party, i.e., insurance issuer or third-party administrator. The panel held that because appellants likely failed to demonstrate a substantial burden on religious exercise, there was no need to address whether the government had shown a compelling interest or whether it has adopted the least restrictive means of advancing that interest.

The panel held that the district court did not abuse its discretion by concluding that the plaintiff states were likely to suffer irreparable harm absent an injunction. Referring to the panel's discussion in its prior opinion, the panel reiterated that plaintiff states will likely suffer economic harm from the final rules, and such harm would be irreparable because the states will not be able to recover monetary damages flowing from the final rules. This harm was not speculative; it was sufficiently concrete and supported by the record. Finally, the panel held that there was no basis to conclude that the district court erred by finding that the balance of equities tipped sharply in favor of the plaintiff states and that the public interest tipped in favor of granting the preliminary injunction.

Dissenting, Judge Kleinfeld stated that because of the nationwide injunction from Pennsylvania, this case was moot and that the panel lacked jurisdiction to address the merits.

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OPINION

WALLACE, Circuit Judge:

The Affordable Care Act (ACA) and the regulations implementing it require group health plans to cover contraceptive care without cost sharing. Federal agencies issued final rules exempting employers with religious and moral objections from this requirement. The district court issued a preliminary injunction barring the enforcement of the rules in several states. We have jurisdiction under 28 U.S.C. § 1292, and we affirm.

I.

We recounted the relevant background in a prior opinion. *See California v. Azar*, 911 F.3d 558, 566–68 (9th Cir. 2018). We reiterate it here as necessary to resolve this appeal.

The ACA provides:

> 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 … with respect to women, such additional preventive 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) (also known as the Women's Health Amendment). HRSA established guidelines for women's preventive care that include any "[FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling." Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725-01, 8,725 (Feb. 15, 2012). The three agencies responsible for implementing the ACA—the Department of Health and Human Services, the Department of Labor, and the Department of the Treasury (collectively, agencies)—issued regulations requiring coverage of all

preventive care contained in HRSA's guidelines.[1] *See, e.g.*,45 C.F.R. § 147.130(a)(1)(iv).

The agencies also recognized that religious organizations may object to the use of contraceptive care and to the requirement to offer insurance that covers such care. For those organizations, the agencies provide two avenues for alleviating those objections. First, group health plans of certain religious employers, such as churches, are categorically exempt from the contraceptive care requirement. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). Second, nonprofit "eligible organizations" that are not categorically exempt can opt out of having to "contract, arrange, pay, or refer for contraceptive coverage." *Id*. To be eligible, the organization must file a self-certification form stating (1) that it "opposes providing coverage for some or all of any contraceptive services required to be covered under [the regulation] on account of religious objections," (2) that it "is organized and operates as a nonprofit entity," and (3) that it "holds itself out as a religious organization." *Id*. at 39,893. The organization sends a copy of the form to its insurance issuer or third-party administrator (TPA), which must then provide contraceptive care for the organization's employees without any further involvement by the organization. *Id*. at 39,875–76.

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[1] Certain types of plans, called "grandfathered" plans, were statutorily exempt from the contraceptive care requirement. *See generally* Final Rules for Grandfathered Plans, Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, Dependent Coverage, Appeals, and Patient Protections Under the Affordable Care Act, 80 Fed. Reg. 72,192-01 (Nov. 18, 2015).

The regulations refer to this second avenue as the "accommodation," and it was designed to avoid imposing on organizations' beliefs that paying for or facilitating coverage for contraceptive care violates their religion. *Id.* at 39,874.

The agencies later amended the accommodation process in response to legal challenges. First, certain closely-held for-profit organizations became eligible for the accommodation. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318-01, 41,343 (July 14, 2015); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014). Second, instead of directly sending a copy of the self-certification form to the issuer or TPA, an eligible organization could simply notify the Department of Health and Human Services in writing, which then would inform the issuer or TPA of its regulatory obligations. 80 Fed. Reg. at 41,323; *see also Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014).

Various organizations then challenged the amended accommodation process as a violation of the Religious Freedom Restoration Act (RFRA). The actions reached the Supreme Court, and the Supreme Court vacated and remanded to afford the parties "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage." *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (internal quotation marks and citation omitted). The Court "express[ed] no view on the merits of the cases," and did not decide "whether petitioners' religious

exercise has been substantially burdened, whether the [g]overnment has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest." *Id*.

The agencies solicited comments on the accommodation process in light of *Zubik*, but ultimately declined to make further changes. *See* Dep't of Labor, FAQs About Affordable Care Act Implementation Part 36, at 4, www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf. The agencies concluded, in part, that "the existing accommodation regulations are consistent with RFRA" because "the contraceptive-coverage requirement [when viewed in light of the accommodation] does not substantially burden the[ ] exercise of religion." *Id*.

On May 4, 2017, the President issued an executive order directing the secretaries of the agencies to "consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to" the ACA's contraceptive care requirement. Promoting Free Speech and Religious Liberty, Exec. Order No. 13,798, 82 Fed. Reg. 21,675, 21,675 (May 4, 2017). Thereafter, effective October 6, 2017, the agencies effectuated two interim final rules (IFRs) which categorically exempted certain entities from the contraceptive care requirement. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,792 (Oct. 13, 2017); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838-01, 47,838 (Oct. 13, 2017). The first exempted all entities "with

sincerely held religious beliefs objecting to contraceptive or sterilization coverage" and made the accommodation optional for them. 82 Fed. Reg. at 47,808. The second exempted "additional entities and persons that object based on sincerely held moral convictions," "expand[ed] eligibility for the accommodation to include organizations with sincerely held moral convictions concerning contraceptive coverage," and made the accommodation optional for those entities. 82 Fed. Reg. at 47,849.

California, Delaware, Maryland, New York, and Virginia sued the agencies and their secretaries, seeking to enjoin the enforcement of the IFRs and alleging that they are invalid under the Administrative Procedure Act (APA). The district court, in relevant part, held that the plaintiff states had standing to challenge the IFRs and issued a nationwide preliminary injunction based on the states' likelihood of success on their procedural APA claim—that the IFRs were invalid for failing to follow notice and comment rulemaking. After issuing the injunction, the district court allowed Little Sisters of the Poor, Jeanne Jugan Residence (Little Sisters) and March for Life Education and Defense Fund (March for Life) to intervene.

We affirmed the district court except as to the nationwide scope of the injunction. *See California*, 911 F.3d at 585. We limited the geographic scope of the injunction to the states that were plaintiffs in the case. *See id*. Shortly after the panel issued the opinion, the final rules became effective on January 14, 2019, superseding the IFRs. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable

Care Act, 83 Fed. Reg. 57,536-01, 57,536 (Nov. 15, 2018); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592-01, 57,592 (Nov. 15, 2018). The final rules made "various changes … to clarify the intended scope of the language" in "response to public comments," 83 Fed. Reg. at 57,537, 57,593. However, the parties agree that the final rules are materially identical to the IFRs for the purposes of this appeal.

The plaintiff states then amended their complaint to enjoin the enforcement of the final rules. They alleged a number of claims, including that the rules are substantively invalid under the APA. The amended complaint joined as plaintiffs the states of Connecticut, Hawaii, Illinois, Minnesota, North Carolina, Rhode Island, Vermont, and Washington, and the District of Columbia. The district court determined that the final rules were likely invalid as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and issued a preliminary injunction. In light of the concerns articulated in our prior opinion, *see California*, 911 F.3d at 582–84, the geographic scope of the injunction was limited to the plaintiff states. The district court then proceeded to ready the case for trial. The agencies, Little Sisters, and March for Life appeal from the preliminary injunction.

II.

We review standing de novo. *See Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1160 (9th Cir. 2017). We review a preliminary injunction for abuse of discretion. *See Network Automation, Inc. v.*

Advanced Sys. Concepts, Inc., 638 F.3d 1137, 1144 (9th Cir. 2011). "In deciding whether the district court has abused its discretion, we employ a two-part test: first, we 'determine de novo whether the trial court identified the correct legal rule to apply to the relief requested'; second, we determine 'if the district court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.'" *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (quoting *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098, 1104 (9th Cir. 2010)). The review is highly deferential: we must "uphold a district court determination that falls within a broad range of permissible conclusions in the absence of an erroneous application of law," and we reverse "only when" we are "convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012) (first quoting *Grant v. City of Long Beach*, 715 F.3d 1081, 1091 (9th Cir. 2002); then quoting *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000)).

III.

We again hold that the plaintiff states have standing to sue. As the agencies properly recognize, our prior decision and its underlying reasoning foreclose any arguments otherwise. *See California*, 911 F.3d at 570–74; *Nordstrom v. Ryan*, 856 F.3d 1265, 1270–71 (9th Cir. 2017) (holding that, where a panel previously held in a published opinion that the plaintiff has standing, that ruling is binding under "both the law-of-the-case doctrine and our law-of-the-circuit rules"); *see also Rocky Mountain Farmers*

Union v. Corey, 913 F.3d 940, 951 (9th Cir. 2019) ("[L]aw of the case doctrine generally precludes reconsideration of an issue that has already been decided by the same court, or a higher court in the identical case"); *Miranda v. Selig*, 860 F.3d 1237, 1243 (9th Cir. 2017) ("[U]nder the law-of-the-circuit rule, we are bound by decisions of prior panels[ ] unless an en banc decision, Supreme Court decision, or subsequent legislation undermines those decisions" (internal quotation marks and alterations omitted)).

Little Sisters and March for Life have not identified any new factual or legal developments since our prior decision that require us to reconsider standing here. To the contrary, a recent decision by the Supreme Court strongly supports our previous holding that the plaintiff states have standing. In *Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019), the Supreme Court held that the plaintiff states had standing, even though their claims of harm depended on unlawful conduct of third parties, because their theory of standing "relies . . . on the predictable effect of Government action on the decisions of third parties." *See also id.* ("Article III requires no more than *de facto* causality" (internal quotation marks omitted)). Here, the plaintiff states' theory of causation depends on wholly lawful conduct and on the federal government's *own* prediction about the decisions of third parties. *See California*, 911 F.3d at 571–73.

IV.

The thoughtful dissent suggests that this appeal is moot because, the day after the district court issued its injunction of limited scope, covering the territory

of the thirteen plaintiff states plus the District of Columbia, a district court in Pennsylvania issued a similar nationwide injunction. *See Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 835 (E.D. Pa.), *aff'd* 930 F.3d 543 (3d Cir.), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Oct. 1, 2019) (No. 19-431). According to the dissent, the nationwide injunction prevents us from giving effective relief to the parties here and, accordingly, moots this appeal. We ordered supplemental briefing on whether this appeal is moot, and the parties unanimously agreed that this appeal is not moot despite the nationwide injunction from Pennsylvania. We agree.

As an initial matter, to our knowledge, no court has adopted the view that an injunction imposed by one district court against a defendant deprives every other federal court of subject matter jurisdiction over a dispute in which a plaintiff seeks similar equitable relief against the same defendant. Instead, "in practice, nationwide injunctions do not always foreclose percolation." Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 Harv. L. Rev. F. 49, 53 (2017). For example, both this court and the Fourth Circuit recently "reviewed the travel bans, despite nationwide injunctions in both." *Id*. at n.27.

The dissent appears to raise the "potentially serious problem" of "conflicting injunctions" that arise from the "forum shopping and decisionmaking effects of the national injunction." Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 462–63 (2017). Although courts have addressed this problem in the past, no court has done so based on justiciability principles.

For example, we have held that, "[w]hen an injunction sought in one proceeding would interfere with another federal proceeding, considerations of comity require more than the usual measure of restraint, and such injunctions should be granted only in the most unusual cases." *Bergh v. Washington*, 535 F.2d 505, 507 (9th Cir. 1976). Significantly, however, the attempt "to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result" has always been a prudential concern, not a jurisdictional one. *W. Gulf Mar. Ass'n v. ILA Deep Sea Local 24, S. Atl. & Gulf Coast Dist. of ILA*, 751 F.2d 721, 729 (5th Cir. 1985).

The dissent claims that the majority is "making the same mistake today that we made in *Yniguez v. Arizonans for Official English*, when in our zeal to correct what we thought was a wrong, we issued an injunction on behalf of an individual regarding her workplace." Dissent at 43 (footnote omitted). *Yniguez* is inapposite.

There, the United States Supreme Court reversed our decision, holding that the plaintiff's "changed circumstances—her resignation from public sector employment to pursue work in the private sector—mooted the case stated in her complaint." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 72 (1997). Here, by contrast, the facts and circumstances supporting the preliminary injunction have not materially changed such that we are unable to affirm the relief that the plaintiff states seek to have affirmed. This is therefore not a case in which "the activities sought to be enjoined already have occurred, and the appellate courts cannot undo what has

already been done" such that "the action is moot, and must be dismissed." *Foster v. Carson*, 347 F.3d 742, 746 (9th Cir. 2003) (quoting *Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002)). Article III simply requires that our review provide redress for the asserted injuries, which the district court's preliminary injunction achieves.

The dissent's logic also proves too much. If a court lacks jurisdiction to consider the propriety of an injunction over territory that is already covered by a different injunction, then the Pennsylvania district court lacked jurisdiction to issue an injunction beyond the territory of the thirty-seven states not parties to this case. After all, when the Pennsylvania district court issued its injunction, the district court here had issued its injunction of limited geographic scope. We hesitate to apply a rule that means that the Pennsylvania district court plainly acted beyond its jurisdiction. At most, then, the dissent's reasoning would lead us to conclude that the Pennsylvania injunction is limited in scope to the territory of those thirty-seven non-party states. Under that interpretation, the two injunctions complement each other and do not conflict.

In any event, even if the Pennsylvania injunction has a fully nationwide scope, we nevertheless retain jurisdiction under the exception to mootness for cases capable of repetition, yet evading review. "A dispute qualifies for that exception only if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532,

1540 (2018) (internal quotation marks and citation omitted). The first part is indisputably met here because the interval between the limited injunction and the nationwide injunction was one day—clearly "too short [for the preliminary injunction] to be fully litigated prior to its cessation or expiration." *Id*. (quoting *Turner v. Rogers*, 564 U.S. 431, 439–40 (2011)).

The second part, too, is met because there is a reasonable expectation that the federal defendants will, again, be subjected to the injunction in this case. *See Enyart v. Nat'l Conf. of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1159 (9th Cir. 2011) (applying the "capable of repetition" exception on appeal from a preliminary injunction and querying whether the defendant would again be subjected to a preliminary injunction). In the Pennsylvania case, a petition for certiorari challenges, among other things, the nationwide scope of the Pennsylvania injunction. *See* Petition for Writ of Certiorari, *Little Sisters v. Pennsylvania*, at 31–33 (No. 19-431). Given the recent prominence of the issue of nationwide injunctions, the Supreme Court very well may vacate the nationwide scope of the injunction. *See* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1119 (2018) (collecting arguments for and against nationwide injunctions against the backdrop of "the recent surge in nationwide injunctions").

But no matter what action, if any, the Supreme Court takes, the preliminary injunction in the Pennsylvania case is, like all preliminary injunctions, of *limited duration*. Once the Pennsylvania district court rules on the merits of that case, the preliminary injunction will expire. At that point, the federal defen-

dants will once again be subjected to the injunction in this case.

One possibility is to the contrary: the Pennsylvania district court could rule in favor of the plaintiffs, choose to exercise its discretion to issue a permanent injunction, *and* choose to exercise its discretion to give the permanent injunction nationwide effect despite the existence of an injunction in this case. That mere possibility does not, however, undermine our conclusion that, given the many other possible outcomes in the Pennsylvania case, there remains a "reasonable expectation" that the federal defendants will be subjected to the injunction in this case. A "reasonable expectation" does not demand certainty.

We acknowledge that we are in uncharted waters. The Supreme Court has yet to address the effect of a nationwide preliminary injunction on an appeal involving a preliminary injunction of limited scope. Our approach to mootness in this case is consistent with the Supreme Court's interest in allowing the law to develop across multiple circuits. If, of course, our assessment of jurisdiction is incorrect such that, for example, we should stay this appeal pending the outcome in Pennsylvania, then we welcome guidance from the Supreme Court. Under existing precedent, however, we conclude that this appeal is not moot.

V.

A preliminary injunction is a matter of equitable discretion and is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC*, 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). "A party can obtain a

preliminary injunction by showing that (1) it is 'likely to succeed on the merits,' (2) it is 'likely to suffer irreparable harm in the absence of preliminary relief,' (3) 'the balance of equities tips in [its] favor,' and (4) 'an injunction is in the public interest.'" *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (quoting *Winter*, 555 U.S. at 20). Alternatively, an injunction may issue where the likelihood of success is such that "serious questions going to the merits" were raised and the balance of hardships "tips sharply toward the plaintiff," provided that the plaintiff can also demonstrate the other two *Winter* factors. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011).

The district court issued its injunction after concluding that all four factors were met here. We address each factor in turn.

A.

The APA requires that an agency action be held "unlawful and [be] set aside" where it is "arbitrary, capricious," "not in accordance with the law," or "in excess of statutory jurisdiction." 5 U.S.C. § 706(2). The district court concluded that the plaintiff states are likely to succeed on the merits of their APA claim or, at the very least, raised serious questions going to the merits. In particular, the district court determined that the agencies likely lacked the authority to issue the final rules and that the rules likely are arbitrary and capricious. The district court did not abuse its discretion in so concluding.

1.

"[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). In reviewing the scope of an agency's authority to act, "the question . . . is always whether the agency has gone beyond what Congress has permitted it to do." *City of Arlington v. FCC*, 569 U.S. 290, 297–98 (2013). The agencies have determined that the ACA gives them "significant discretion to shape the content, scope, and enforcement of any preventative-services guidelines adopted" pursuant to the Women's Health Amendment. Specifically, the agencies highlight that "nothing in the statute mandated that the guidelines include contraception, let alone for all types of employers with covered plans."

We examine the "plain terms" and "core purposes" of the Women's Health Amendment to determine whether the agencies have authority to issue the final rules. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 773 (2016). The statute requires that group health plans and insurance issuers "shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in the comprehensive guidelines supported by [HRSA]." 42 U.S.C. § 300gg-13(a)(4). First, "shall" is a mandatory term that "normally creates an obligation impervious to . . . discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). By its plain language, the statute states that group health plans and insurance issuers must cover preventative care

without cost sharing. *See BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) ("[S]tatutory terms are generally interpreted in accordance with their ordinary meaning").

The statute grants HRSA the limited authority to determine which, among the different types of preventative care, are to be covered. *See Hobby Lobby*, 573 U.S. at 697 ("Congress itself, however, did not specify what types of preventive care must be covered . . . . Congress authorized [HRSA] . . . to make that important and sensitive decision"). But nothing in the statute permits the agencies to determine exemptions from the requirement. In other words, the statute delegates to HRSA the discretion to determine *which types of preventative care* are covered, but the statute does not delegate to HRSA or any other agency the discretion to exempt *who must meet the obligation*. To interpret the statute's limited delegation more broadly would contradict the plain language of the statute. *See Arlington*, 569 U.S. at 296 ("Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion"). Although the agencies argue otherwise, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecomms Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994).

Our interpretation is consistent with the ACA's statutory scheme. When enacting the ACA, Congress did provide for religious and moral protections in certain contexts. *See, e.g.*, 42 U.S.C. § 18113 (assisted suicide procedures). It did not provide for similar protections regarding the preventative care require-

ment. Instead, Congress chose to provide for other exceptions to that requirement, such as for grandfathered plans. *See* 42 U.S.C. § 18011. "[W]hen Congress provides exceptions in a statute, . . . [t]he proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited that statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000). In fact, after the ACA's passage, the Senate considered and rejected a "conscience amendment," 158 Cong. Rec. S538–39 (Feb. 9, 2012); *id.* at S1162–73 (Mar. 1, 2012), that would have allowed health plans to decline to provide contraceptive coverage contrary to asserted religious or moral convictions. *See Doe v. Chao*, 540 U.S. 614, 622 (2004) (reversing award of damages, in part, because of "drafting history showing that Congress cut out the very language in the bill that would have authorized [them]"). While Congress's failure to adopt a proposal is often a "particularly dangerous ground on which to rest an interpretation" of a statute, *Interstate Bank of Denver, N.A. v. First Interstate Bank of Denver*, N.A., 511 U.S. 164, 187 (1994), the conscience amendment's failure combined with the existence of other exceptions suggests that Congress did not contemplate a conscience exception when it passed the ACA.

The "core purpose[ ]" of the Women's Health Amendment further confirms our interpretation. *FERC*, 136 S. Ct. at 773; *see also Sec. Indus. Ass'n v. Bd. of Governors of Fed. Reserve Sys.*, 468 U.S. 137, 143 (1984) ("A reviewing court 'must reject administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate

the policy that Congress sought to implement'" (quoting *FEC v. Democratic Senatorial Campaign Comm'n*, 454 U.S. 27, 32 (1981))). The legislative history indicates that the Amendment sought to "requir[e] that all health plans cover comprehensive women's preventative care and screenings—and cover these recommended services at little or no cost to women." 155 Cong. Rec. S12025 (Dec. 1, 2009) (Sen. Boxer); *id.* at S12028 (Sen. Murray highlighting that a "comprehensive list of women's preventive services will be covered"); *id.* at S12042 (Sen. Harkin stating that "[b]y voting for this amendment . . . we can ensure that all women will have access to the same baseline set of comprehensive preventive benefits"). While legislators' individual comments do not necessarily prove intent of the majority of the legislature, here the Amendment's supporters and sponsors delineated that the types of "preventive services covered . . . would be determined by [HRSA] to meet the unique preventative health needs of women." *Id.* at S12025 (Sen. Boxer); *see also id.* at S12027 (Sen. Gillibrand stating that "[t]his amendment will ensure that the coverage of women's preventive services is based on a set of guidelines developed by women's health experts"); *id.* at S12026 (Sen. Mikulski stating that "[i]n my amendment we expand the key preventive services for women, and we do it in a way that is based on recommendations . . . from HRSA"). In this case, at the preliminary injunction stage, the evidence is sufficient for us to hold that providing free contraceptive services was a core purpose of the Women's Health Amendment.

In response, the appellants highlight that they have already issued rules exempting churches from

the contraceptive care requirement, invoking the same statutory provision. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621-01, 46,623 (Aug. 3, 2011). The legality of the church exemption rules is not before us, and we will not render an advisory opinion on that issue. *See Alameda Conservation Ass'n v. California*, 437 F.2d 1087, 1093 (9th Cir. 1971). Moreover, the existence of one exemption does not necessarily justify the authority to issue a different exemption or any other exemption that the agencies decide. *Cf. California*, 911 F.3d at 575–76 (stating that "prior invocations of good cause to justify different IFRs—the legality of which are not challenged here—have no relevance").

Given the text, purpose, and history of the Women's Health Amendment, the district court did not err in concluding that the agencies likely lacked statutory authority under the ACA to issue the final rules.

2.

Under RFRA, the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)–(b). The appellants argue that the regulatory regime that existed before the rules' issuance—i.e., the accommodation process—violated

RFRA. They argue that RFRA requires, or at least authorizes, them to eliminate the violation by issuing the religious exemption[2] and "not simply wait for the inevitable lawsuit and judicial order to comply with RFRA."

As a threshold matter, we question whether RFRA delegates to any government agency the authority to determine violations and to issue rules addressing alleged violations. At the very least, RFRA does not make such authority explicit. *Compare* 42 U.S.C. § 2000bb-1, *with* 47 U.S.C. § 201(b) (delegating agency authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act"), *and* 15 U.S.C. § 77s(a) ("The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter"). Instead, RFRA appears to charge the *courts* with determining violations. *See* 42 U.S.C. § 2000bb-1(c) (providing that a person whose religious exercise has been burdened "may assert that violation . . . in a *judicial proceeding*" (emphasis added)); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006) ("RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress").

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[2] RFRA pertains only to the exercise of religion; it does not concern moral convictions. For that reason, the appellants' RFRA argument is limited to the religious exemption only. RFRA plainly does not authorize the moral exemption.

Moreover, even assuming that agencies are authorized to provide a mechanism for resolving perceived RFRA violations, RFRA likely does not authorize the religious exemption at issue in this case, for two independent reasons. First, the religious exemption *contradicts* congressional intent that all women have access to appropriate preventative care. The religious exemption is thus notably distinct from the accommodation, which attempts to accommodate religious objectors *while still meeting* the ACA's mandate that women have access to preventative care. The religious exemption here chooses winners and losers between the competing interests of two groups, a quintessentially legislative task. Strikingly, Congress already chose a balance between those competing interests and chose both to mandate preventative care and to reject religious and moral exemptions. The agencies cannot *reverse* that legislatively chosen balance through rulemaking.

Second, the religious exemption operates in a manner fully at odds with the careful, individualized, and searching review mandate by RFRA. Federal courts accept neither self-certifications that a law substantially burdens a plaintiff's exercise of religion nor blanket assertions that a law furthers a compelling governmental interest. Instead, before reaching those conclusions, courts make individualized determinations dependent on the facts of the case, by "careful[ly]" considering the nature of the plaintiff's beliefs and "searchingly" examining the governmental interest. *Wisconsin v. Yoder*, 406 U.S. 205, 215, 221 (1972). "[C]ontext matters." *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005); *see O Centro*, 546 U.S. at 430–31 ("RFRA requires the Government to

demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened" (quoting 42 U.S.C. § 2000bb-1(b)); *Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012, 1015–17 (9th Cir. 2016) (holding that, although plaintiffs in other cases had established that a prohibition on the use of certain drugs was a substantial burden on those plaintiffs' exercise of religion, the plaintiffs in this case had not met their burden of establishing that the prohibition on cannabis use imposed a substantial burden on the plaintiffs' exercise of religion). In sum, the agencies here claim an authority under RFRA—to impose a blanket exemption for self-certifying religious objectors—that far exceeds what RFRA in fact authorizes.[3] *See Hobby Lobby*, 573 U.S. at 719 n.30 (noting that a proposed "blanket exemption" for religious objectors "extended more broadly than the . . . protections of RFRA" because it "would not have subjected religious-based objections to the judicial scrutiny called for by RFRA, in which a court must consider not only the burden of

[3] The religious exemption's automatic acceptance of a self-certification is particularly troublesome given that it has an immediate detrimental effect on the employer's female employees. The religious exemption fails to "take adequate account of the burdens . . . impose[d] on nonbeneficiaries." *Cutter*, 544 U.S. at 720. Similarly, the exemption is not "measured so that it does not override other significant interests." *Id.* at 722; *see also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985) (invalidating a law that "arm[ed]" one type of religious objector "with an absolute and unqualified right" to violate otherwise applicable laws, holding that "[t]his unyielding weighting in favor of [a religious objector] over all other interests" violates the Religion Clauses).

a requirement on religious adherents, but also the government's interest and how narrowly tailored the requirement is").

Regardless of our questioning of the agencies' authority pursuant to RFRA, however, it is of no moment in this appeal because the accommodation process likely does not substantially burden the exercise of religion and hence does not violate RFRA. "[A] 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit. . . or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008); *see also Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) ("An inconsequential or de minimis burden on religious practice" is not a substantial burden). Whether a government action imposes a substantial burden on sincerely-held religious beliefs is a question of law. *Guam v. Guerrero*, 290 F.3d 1210, 1222 n.20 (9th Cir. 2002).

The Supreme Court has not yet decided whether the accommodation violates RFRA. In *Hobby Lobby*, the Court suggested that it did not. The Court described the accommodation as "effectively exempt[ing] certain religious nonprofit organizations . . . from the contraceptive mandate." 573 U.S. at 698. The Court characterized the accommodation as "an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs." *Id.* at 730. It observed that, "[a]t a minimum, [the accommodation did] 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." *Id.* at 731. Specifically, it highlighted that, "[u]nder the accommodation, the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to 'face minimal logistical and administrative obstacles . . . because their employers' insurers would be responsible for providing information and coverage." *Id.* at 732 (citing 45 CFR §§ 147.131(c)–(d)).

Indeed, before *Zubik*, eight courts of appeals (of the nine to have considered the issue) had concluded that the accommodation process did not impose a substantial burden on religious exercise under RFRA.[4] The Supreme Court then vacated the nine

[4] See *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014), *vacated*, *Zubik*, 136 S. Ct. at 1561; *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207 (2d Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015), *vacated*, *Zubik*, 136 S. Ct. at 1561; *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015), *vacated*, *Zubik*, 136 S. Ct. at 1561; *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738 (6th Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); *Grace Schs. v. Burwell*, 801 F.3d 788 (7th Cir. 2015), *vacated*, 136 S. Ct. 2011 (2016); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), *vacated*, *Zubik*, 136 S. Ct. at 1561; *Eternal Word Television Network v. Sec'y of U.S. Dep't Health & Human Servs.*, 818 F.3d 1122 (11th Cir. 2016), *vacated*, 2016 WL 11503064 (11th Cir. May 31, 2016) (No. 14-12696-CC), *as modified by* 2016 WL 11504187 (11th Cir. Oct. 3, 2016).

circuit cases addressing the issue without discussing the merits. *See, e.g.*, *Zubik*, 136 S. Ct. at 1560. After *Zubik*, the Third Circuit has reiterated that the accommodation process did not impose a substantial burden under RFRA. *See Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 356 n.18 (3d Cir. 2017) ("Although our judgment in *Geneva* was vacated by the Supreme Court, it nonetheless sets forth the view of our [c]ourt, which was based on Supreme Court precedent, that we continue to believe to be correct regarding . . . our conclusion that the regulation at issue there did not impose a substantial burden").

We have not previously expressed any views on the matter, whether before or after *Zubik*. We now hold that the accommodation process likely does not substantially burden the exercise of religion. An organization with a sincere religious objection to arranging contraceptive coverage need only send a self-certification form to the insurance issuer or the TPA, or send a written notice to DHHS. *See* 29 C.F.R. § 2590.715-2713A(b)(1)(ii). Once the organization has taken the simple step of objecting, all actions taken to pay for or provide the organization's employees with contraceptive care is carried out by a third party, i.e.,

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Only the Eighth Circuit has concluded otherwise. *See Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 945 (8th Cir. 2015) (affirming grant of preliminary injunction to religious objectors because "they [were] likely to succeed on the merits of their RFRA challenge to the contraceptive mandate and the accommodation regulations"), *vacated sub nom. Dep't of Health & Human Servs. v. CNS Int'l Ministries*, No. 15-775, 2016 WL 2842448, at *1 (U.S. May 16, 2016).

insurance issuer or TPA. *See, e.g.*, 45 C.F.R. § 147.131(d) (requiring that the issuer or third-party administrator notify the employees in separate mailing that that it will be providing contraceptive care separate from the employer, with the mailing specifying that employer is in no way "administer[ing] or fund[ing]" the contraceptive care); 45 C.F.R. § 147.131(d) (prohibiting third parties from directly or indirectly charging objecting organizations for the cost of contraceptive coverage and obligating the third parties to pay for the contraceptive care).

Once it has opted out, the organization's obligation to contract, arrange, pay, or refer for access to contraception is completely shifted to third parties. The organization may then freely express its opposition to contraceptive care. Viewed objectively, completing a form stating that one has a religious objection is not a substantial burden—it is at most a de minimis burden. The burden is simply a notification, after which the organization is relieved of any role whatsoever in providing objectionable care. By contrast, cases involving substantial burden under RFRA have involved more significant burdens on religious objectors. *See O Centro*, 546 U.S. at 425–26 (substantial burden where the Controlled Substances Act prevented the religious objector plaintiffs from ever again engaging in a sacramental ritual); *Hobby Lobby*, 573 U.S. at 719–26 (substantial burden, *in the absence of the accommodation*, where the contraceptive care requirement required for-profit corporations to pay out-of-pocket for the use of religiously-objectionable contraceptives by employees).

Appellants further argue that religious organizations are forced to be complicit in the provision of contraceptive care, even with the accommodation. But even in the context of a self-insured plan subject to ERISA, an objecting organization's only act—and the only act required by the government—is opting out by form or notice. The objector need not separately contract to provide or fund contraceptive care. The accommodation, in fact, is designed to ensure such organizations are not complicit and to minimize their involvement. To the extent that appellants object to third parties acting in ways contrary to an organization's religious beliefs, they have no recourse. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988) (government action does not constitute a substantial burden, even if the challenged action "would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," if the government action does not coerce the individuals to violate their religious beliefs or deny them "the rights, benefits, and privileges enjoyed by other citizens"). RFRA does not entitle organizations to control their employees' relationships with third parties that are willing and obligated to provide contraceptive care.

Because appellants likely have failed to demonstrate a substantial burden on religious exercise, we need not address whether the government has shown a compelling interest or whether it has adopted the least restrictive means of advancing that interest. *See Forest Serv.*, 535 F.3d at 1069. Because the accommodation process likely does not violate RFRA, the final rules are neither required by,

nor authorized under, RFRA.[5] The district court did not err in so concluding.

3.

"Unexplained inconsistency" between an agency's actions is "a reason for holding an interpretation to be an arbitrary and capricious change." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). A rule change complies with the APA if the agency (1) displays "awareness that it is changing position," (2) shows that "the new policy is permissible under the statute," (3) "believes" the new policy is better, and (4) provides "good reasons" for the new policy, which, if the "new policy rests upon factual findings that contradict those which underlay its prior policy," must include "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) (emphasis omitted); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124–26 (2016) (describing these principles).

The district court held that the states are also likely to prevail on their claim that the agencies failed to provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." We need not reach this issue, having already concluded that no

[5] Little Sisters also points to 42 U.S.C. § 2000bb-4, but that provision merely provides that exemptions that otherwise comply with the Establishment Clause "shall not constitute a violation" of RFRA. It does not address whether federal agencies have the authority affirmatively to create exemptions in the first instance.

statute likely authorized the agencies to issue the final rules and that the rules were thus impermissible. We will reach the full merits of this issue, if necessary, upon review of the district court's decision on the permanent injunction

B.

A plaintiff seeking preliminary relief must "demonstrate that irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis omitted). The analysis focuses on irreparability, "irrespective of the magnitude of the injury." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999).

The district court concluded that the states are likely to suffer irreparable harm absent an injunction. This decision was not an abuse of discretion. As discussed in our prior opinion, the plaintiff states will likely suffer economic harm from the final rules, and such harm is irreparable because the states will not be able to recover monetary damages flowing from the final rules. *California*, 911 F.3d at 581. This harm is not speculative; it is sufficiently concrete and supported by the record. *Id*.

C.

Because the government is a party, we consider the balance of equities and the public interest together. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). The district court concluded that the balance of equities tips sharply in favor of the plaintiff states and that the public interest tip in favor of granting the preliminary injunction. We have considered the district court's

analysis carefully, and we hold there is no basis to conclude that its decision was illogical, implausible, or without support in the record. Finalizing that issue must await any appeal from the district court's permanent injunction.

VI.

We affirm the preliminary injunction, but we emphasize that our review here is limited to abuse of discretion. Because of the limited scope of our review and "because the fully developed factual record may be materially different from that initially before the district court," our disposition is only preliminary. *Melendres v. Arpaio*, 695 F.3d 990, 1003 (9th Cir. 2012) (quoting *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 753 (9th Cir. 1982)). At this stage, "[m]ere disagreement with the district court's conclusions is not sufficient reason for us to reverse the district court's decision regarding a preliminary injunction." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 793 (9th Cir. 2005). The injunction only preserves the status quo until the district court renders judgment on the merits based on a fully developed record.

AFFIRMED.

KLEINFELD, Senior Circuit Judge, dissenting

I respectfully dissent. This case is moot, so we lack jurisdiction to address the merits.

The casual reader may imagine that the dispute is about provision of contraception and abortion services to women. It is not. No woman sued for an injunction in this case, and no affidavits have been submitted from any women establishing any question in this case about whether they will be deprived of reproductive services or harmed in any way by the modification of the regulation.

This case is a claim by several states to prevent a modification of a regulation from going into effect, claiming that it will cost them money. Two federal statutes are at issue, the Affordable Care Act[1] and the Religious Freedom Restoration Act,[2] as well as the Trump Administration's modification of an Obama Administration regulation implementing the Affordable Care Act. But the injunction before us no longer matters, because a national injunction is already in effect, and has been since January 14 of this year, preventing the modification from going into effect.[3] Nothing we say or do in today's decision has any practical effect on the challenged regulation. We are racing to shut a door that has already been shut. We are precluded, by the case-or-controversy requirement of Article III, section 2, from opining on whether

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[1] 42 U.S.C. §§ 18001 *et seq*.

[2] 42 U.S.C. §§ 2000bb *et seq*.

[3] *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 835 (E.D. Pa.), *aff'd sub nom. Pennsylvania v. President United States*, 930 F.3d 543 (3d Cir. 2019), *as amended* (July 18, 2019).

the door ought to be shut. We are making the same mistake today that we made in *Yniguez v. Arizonans for Official English*,[4] when in our zeal to correct what we thought was a wrong, we issued an injunction on behalf of an individual regarding her workplace. She no longer worked there, so the Supreme Court promptly corrected our error because the case was moot.

The case arises from the difficulty of working out the relationship between the two statutes, the regulations under the Affordable Care Act, and a sequence of Supreme Court decisions bearing on how the tensions between the two statutes ought to be relieved. The Affordable Care Act does not say a word about contraceptive or sterilization services for women. Congress delegated to the executive branch the entire matter of "such additional preventive care and screenings" as the executive agencies might choose to provide for.

Executive branch agencies, within the Department of Health and Human Services, created from this wide-open congressional delegation what is called "the contraceptive mandate." Here is the statutory language:

> 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–

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[4] *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), *vacated sub nom. Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

> with respect to women, such additional preventive care and screenings . . . *as provided for* in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.[5]

In 2011, the agencies (not Congress) issued the guideline applying the no-cost-sharing statutory provision to contraceptive and sterilization services. And since then, the public fervor and litigation has never stopped.

The agencies decided that an exemption ought to be created for certain religious organizations. An interim rule doing so was promulgated in 2011, after the agencies "received considerable feedback" from the public,[6] then in 2012, after hundreds of thousands more comments, the agencies modified the rule. The Supreme Court weighed in on the ongoing controversy about the religious accommodation exemption to the contraceptives mandate three times, in *Burwell v. Hobby Lobby*,[7] *Wheaton College v. Burwell*,[8] *and Zubik v. Burwell*,[9] in 2014 and 2016. None of the decisions entirely resolved the tension between the

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[5] 42 U.S.C. § 300gg-13(a)(4) (emphasis added).

[6] 76 Fed. Reg. 46,623.

[7] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 735 (2014).

[8] *Wheaton Coll. v. Burwell*, 573 U.S. 958 (2014).

[9] *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016) (per curiam).

Religious Freedom Restoration Act and the Affordable Care Act as extended by the contraceptive mandate regulations. The Court instead gave the parties "an opportunity to arrive at an approach going forward that accommodate petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage."[10] Thousands of comments kept coming to the agencies. After *Zubik*, the agencies basically said they could not do what the Supreme Court said to do: "no feasible approach . . . would resolve the concerns of religious objectors, while still ensuring that the affected women receive full and equal health coverage."[11] But in 2017, after an executive order directing the agencies to try again, the agencies did so, issuing the interim final rules at issue in our previous decision[12] and the final rule at issue now.

The reason why the case before us is moot is that operation of the new modification to the regulation has itself already been enjoined. The District Court for the Eastern District of Pennsylvania issued a nationwide injunction on January 14 of this year,

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[10] *Id*. at 1560 (internal quotation marks omitted).

[11] Dep't of Labor, FAQs About Affordable Care Act Implementation Part 36, at 4, *available at* https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf.

[12] 82 Fed. Reg. 47,792, 47,807–08 (Oct. 13, 2017); 82 Fed. Reg. 47,838, 47,849 (Oct. 13, 2017); *California v. Azar*, 911 F.3d 558 (9th Cir. 2018), *cert. denied sub nom. Little Sisters of the Poor Jeanne Jugan Residence v. California*, 139 S. Ct. 2716 (2019).

enjoining enforcement of the regulation before us.[13] The Third Circuit affirmed that nationwide injunction on July 12 of this year.[14] That nationwide injunction means that the preliminary injunction before us is entirely without effect. If we affirm, as the majority does, nothing is stopped that the Pennsylvania injunction has not already stopped. Were we to reverse, and direct that the district court injunction be vacated, the rule would still not go into effect, because of the Pennsylvania injunction. Nothing the district court in our case did, or that we do, matters. We are talking to the air, without practical consequence. Whatever differences there may be in the reasoning for our decision and the Third Circuit's have no material significance, because they do not change the outcome at all; the new regulation cannot come into effect.

When an appeal becomes moot while pending, as ours has, the court in which it is being litigated must dismiss it.[15] The Supreme Court has repeatedly held that "[t]o qualify as a case for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'"[16] "It is true, of course, that mootness can arise at any stage of litigation, . . . that federal courts

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[13] *Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019).

[14] *Pennsylvania v. President United States*, 930 F.3d 543, 556 (3d Cir. 2019), *as amended* (July 18, 2019).

[15] *Murphy v. Hunt*, 455 U.S. 478, 481 (1982).

[16] *Arizonans for Official English*, 520 U.S. at 67 (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)).

may not give opinions upon moot questions or abstract propositions."[17] "Many cases announce the basic rule that a case must remain alive throughout the course of appellate review."[18]

The states will not spend a penny more with the district court injunction before us now than they would spend without it, because the new regulation that they claim will cost them money cannot come into effect. Because of the Pennsylvania nationwide injunction, we have no case or controversy before us.

I disagree with the majority as well on standing and on the merits. The standing issue before us now is new. It is not the self-inflicted harm issue we resolved (incorrectly, as I explained in my previous dissent[19]), but the new question of whether there is any concrete injury affording standing to the states in

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[17] *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (internal quotation marks omitted).

[18] 13C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3533.10, pp. 555 (3d ed.); *see also U.S. v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018), *Kingdomware Technologies, Inc. v. U.S.*, 136 S. Ct. 1969, 1975 (2016), *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016), *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013), *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 609 (2013), *Chafin v. Chafin*, 568 U.S. 165, 171–72 (2013), *Federal Election Com'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 461 (2007), *Spencer v. Kemna*, 523 U.S. 1, 7 (1998), *Arizonans for Official English*, 520 U.S. at 67, *Calderon*, 518 U.S. at 150.

[19] *California v. Azar*, 911 F.3d 558, 585 (9th Cir. 2018) (Kleinfeld, J., dissenting), *cert. denied sub nom. Little Sisters of the Poor Jeanne Jugan Residence v. California*, 139 S. Ct. 2716 (2019).

light of the nationwide injunction. And on the merits, *Chevron*[20] deference ought to be applied, since Congress delegated the material issue, what "additional preventive care and screenings" for women ought to be without cost sharing requirements, to the Executive Branch, and that branch resolved it in a reasonable way not contrary to the statute. But it does not matter which of us is correct. Either view could prevail here, without any concrete consequence. The regulation we address cannot come into effect.

Of course I agree with the majority that the circumstances that mooted the case in *Arizonans for Official English* differ from the circumstances that moot the case before us. I cited it because there, as here, in our zeal to correct what we thought was wrong, we acted without jurisdiction because the case had become moot. As for the proposition that we ought to act under the exception for "cases capable of repetition, yet evading review," neither branch of the exception applies. Most obviously, the changes in the regulations, which are what matter, far from "evading review," have been reviewed to a fare-thee-well all over the country.[21] As for the likelihood of repetition,

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[20] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").

[21] *Pennsylvania v. President United States*, 930 F.3d 543, 555 (3d Cir. 2019), as amended (July 18, 2019); *Massachusetts v. United States Dep't of Health & Human Servs.*, 923 F.3d 209, 228 (1st Cir. 2019); *California v. Azar*, 911 F.3d 558, 566 (9th Cir.

so far the hundreds of thousands of comments about the regulation, and the continual changes in the regulation, suggest a likelihood that if the case comes before us again in one form or another, it is fairly likely to be at least somewhat different. Nor do I think that comity is well-served by our presuming to review whether the Eastern District of Pennsylvania, as affirmed by the Third Circuit, had jurisdiction to issue an injunction covering the Ninth Circuit.

We need not and should not reach the merits of this preliminary injunction. This case is resolved by mootness.

2018), *cert. denied sub nom. Little Sisters of the Poor Jeanne Jugan Residence v. California*, 139 S. Ct. 2716 (2019).

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al., Plaintiffs, v. HEALTH AND HUMAN SERVICES, et al., Defendants.	Case No. 17-cv-05783-HSG **ORDER GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION** Re: Dkt. No. 174

Pending before the Court is Plaintiffs' motion for a preliminary injunction. *See* Dkt. No. 174. In short, Plaintiffs seek to prevent the implementation of rules creating a religious exemption (the "Religious Exemption") and a moral exemption (the "Moral Exemption") to the contraceptive mandate contained within the Affordable Care Act ("ACA"). *See id*. at 1; Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018) ("Religious Exemption"); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018) ("Moral Exemption") (collectively, "the 2019 Final Rules" or "Final Rules"). Plaintiffs are the States of California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Minnesota (by and through its Department of Human Services), New York, North Carolina, Rhode Island,

Vermont, and Washington, the Commonwealth of Virginia, and the District of Columbia.[1] Federal Defendants are Alex M. Azar, II, in his official capacity as Secretary of the Department of Health and Human Services; the Department of Health and Human Services ("HHS"); Alexander Acosta, in his official capacity as Secretary of the Department of Labor; the Department of Labor; Steven Mnuchin, in his official capacity as Secretary of the Department of the Treasury; and the Department of the Treasury. Two additional parties were previously granted the right to enter this case as permissive intervenors: Little Sisters of the Poor, Jeanne Jugan Residence ("Little Sisters") and March for Life Education and Defense Fund ("March for Life"). *See* Dkt. Nos. 115, 134. Little Sisters is "a religious nonprofit corporation operated by an order of Catholic nuns whose faith inspires them to spend their lives serving the sick and elderly poor." Motion to Intervene, Dkt. No. 38 at 2. March for Life is a "non-religious non-profit advocacy organization" founded in response to the Supreme Court's 1973 decision in *Roe v. Wade*. Motion to Intervene, Dkt. No. 87 at 3. Its stated purpose is "to oppose the destruction of human life at any stage before birth, including by abortifacient methods that may act after the union of a sperm and ovum." *Id*.

For the reasons set out below, the motion is granted to maintain the status quo pending resolution of Plaintiffs' claims, and the enforcement of

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[1] The Court will refer to Plaintiffs collectively as "States," notwithstanding the District of Columbia's participation in the case.

the Final Rules in the Plaintiff States is preliminarily enjoined.

I. BACKGROUND

Before turning to the Plaintiffs' challenge to the Final Rules, the Court begins by recounting the sequence of relevant events, beginning with the enactment of the Affordable Care Act in 2010. Although much of this background was already recounted in the Court's prior order, the Court reiterates it here for the sake of clarity. *See California v. Health & Human Servs.*, 281 F. Supp. 3d 806 (N.D. Cal. 2017), *aff'd in part, vacated in part, remanded sub nom. California v. Azar*, 911 F.3d 558 (9th Cir. 2018).

A. The Affordable Care Act

In March 2010, Congress enacted the Affordable Care Act. The ACA included a provision known as the Women's Health Amendment, which states:

> 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 . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

42 U.S.C. § 300gg-13(a)(4).

About two years later, the Senate rejected a so-called "conscience amendment" to the Women's Health Amendment that would have allowed health

plans to decline to provide coverage "contrary to" an insurer or employer's asserted "religious beliefs or moral convictions." *See* 158 Cong. Rec. S538–39 (Feb. 9, 2012) (text of proposed bill); *id.* S1162–73 (Mar. 1, 2012) (debate and vote); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2789–90 (2014) (Ginsburg, J., dissenting) (recognizing that rejection of the "conscience amendment" meant that "Congress left health care decisions—including the choice among contraceptive methods—in the hands of women, with the aid of their health care providers").

B. The 2010 IFR and Subsequent Regulations

On July 19, 2010, under the authority of the Women's Health Amendment, several federal agencies (including HHS, the Department of Labor, and the Department of the Treasury) issued an interim final rule ("the 2010 IFR"). *See* 75 Fed. Reg. 41,726. It required, in part, that health plans provide "evidence-informed preventive care" to women, without cost sharing and in compliance with "comprehensive guidelines" to be provided by HHS's Health Resources and Services Administration ("HRSA"). *Id.* at 41,728.

The agencies found they had statutory authority "to promulgate any interim final rules that they determine[d were] appropriate to carry out the" relevant statutory provisions. *Id.* at 41,729–30. The agencies also determined they had good cause to forgo the general notice of proposed rulemaking required under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. *Id.* at 41,730. Specifically, the agencies determined that issuing such notice would be

"impracticable and contrary to the public interest" because it would not allow sufficient time for health plans to be timely designed to incorporate the new requirements under the ACA, which were set to go into effect approximately two months later. *Id*. The agencies requested that comments be submitted by September 17, 2010, the date the IFR was scheduled to go into effect.

On September 17, 2010, the agencies first promulgated regulations pursuant to the 2010 IFR. *See* 45 C.F.R. § 147.310(a)(1)(iv) (HHS); 29 C.F.R. § 2590.715-2713 (Department of Labor); 26 C.F.R. § 54.9815-2713 (Department of the Treasury).[2] As relevant here, the regulations were substantively identical to the 2010 IFR, stating that HRSA was to provide "binding, comprehensive health plan coverage guidelines."

C. The 2011 HRSA Guidelines

From November 2010 to May 2011, a committee convened by the Institute of Medicine met in response to the charge of HHS's Office of the Assistant Secretary for Planning and Evaluation: to "convene a diverse committee of experts" related to, as relevant here, women's health issues. Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps*, 1, 23 (2011), https://www.nap.edu/read/13181/chapter/1. In July 2011, the committee issued a report recommending that private health insurance plans be required to cover all contraceptive methods approved

[2] The Department of the Treasury's regulations were first promulgated in 2012, two years after those of HHS and the Department of Labor.

by the Food and Drug Administration ("FDA"), without cost sharing. *Id*. at 102–10.

On August 1, 2011, HRSA issued its preventive care guidelines ("2011 Guidelines"), defining preventive care coverage to include all FDA-approved contraceptive methods. *See* Health Res. & Servs. Admin., *Women's Preventive Services Guidelines*, https://www.hrsa.gov/womens-guidelines/index.html.[3]

D. The 2011 IFR and the Original Religious Exemption

On August 3, 2011, the agencies issued an IFR amending the 2010 IFR. *See* 76 Fed. Reg. 46,621 ("the 2011 IFR"). Based on the "considerable feedback" they received regarding contraceptive coverage for women, the agencies stated that it was "appropriate that HRSA, in issuing [its 2011] Guidelines, take[ ] into account the effect on the religious beliefs of certain religious employers if coverage of contraceptive services were required." *Id*. at 46,623. As such, the agencies provided HRSA with the "additional discretion to exempt certain religious employers from the [2011] Guidelines where contraceptive services are concerned." *Id*. They defined a "religious employer" as one that:

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[3] On December 20, 2016, HRSA updated the guidelines ("2016 Guidelines"), clarifying that "[c]ontraceptive care should include contraceptive counseling, initiation of contraceptive use, and follow-up care," as well as "enumerating the full range of contraceptive methods for women" as identified by the FDA. *See* Health Res. & Servs. Admin., *Women's Preventive Services Guidelines*, https://www.hrsa.gov/womens-guidelines-2016/index.html (last updated Oct. 2017).

> (1) [h]as the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under [the relevant statutory provisions, which] refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order.

Id.

The 2011 IFR went into effect on August 1, 2011. The agencies again found that they had both statutory authority and good cause to forgo the APA's advance notice and comment requirement. *Id.* at 46,624. Specifically, they found that "providing for an additional opportunity for public comment [was] unnecessary, as the [2010 IFR] . . . provided the public with an opportunity to comment on the implementation of the preventive services requirement in this provision, and the amendments made in [the 2011 IFR were] in fact based on such public comments." *Id.* The agencies also found that notice and comment would be "impractical and contrary to the public interest," because that process would result in a delay of implementation of the 2011 Guidelines. *See id.* The agencies further stated that they were issuing the rule as an IFR in order to provide the public with some opportunity to comment. *Id.* They requested comments by September 30, 2011.

On February 15, 2012, after considering more than 200,000 responses, the agencies issued a final rule adopting the definition of "religious employer" set

forth in the 2011 IFR. *See* 77 Fed. Reg. 8,725. The final rule also established a temporary safe harbor, during which the agencies

> plan[ned] to develop and propose changes to these final regulations that would meet two goals—providing contraceptive coverage without cost-sharing to individuals who want it and accommodating non-exempted, non-profit organizations' religious objections to covering contraceptive services . . . .

Id. at 8,727.

E. The Religious Accommodation

On March 21, 2012, the agencies issued an advance notice of proposed rulemaking ("ANPR") requesting comments on "alternative ways of providing contraceptive coverage without cost sharing in order to accommodate non-exempt, non-profit religious organizations with religious objections to such coverage." 77 Fed. Reg. 16,501, 16,503. They specifically sought to "require issuers to offer group health insurance coverage without contraceptive coverage to such an organization (or its plan sponsor)," while also "provid[ing] contraceptive coverage directly to the participants and beneficiaries covered under the organization's plan with no cost sharing." *Id*. The agencies requested comment by June 19, 2012.

On February 6, 2013, after reviewing more than 200,000 comments, the agencies issued proposed rules that (1) simplified the criteria for the religious employer exemption; and (2) established an accommodation for eligible organizations with religious objections to providing contraceptive coverage. *See* 78

Fed. Reg. 8,456, 8,458–59. The proposed rule defined an "eligible organization" as one that (1) "opposes providing coverage for some or all of the contraceptive services required to be covered"; (2) "is organized and operates as a nonprofit entity"; (3) "holds itself out as a religious organization"; and (4) self-certifies that it satisfies these criteria. *Id.* at 8,462. Comments on the proposed rule were due April 5, 2013.

On July 2, 2013, after reviewing more than 400,000 comments, the agencies issued final rules simplifying the religious employer exemption and establishing the religious accommodation. 78 Fed. Reg. 39,870.[4] With respect to the latter, the final rule retained the definition of "eligible organization" set forth in the proposed rule. *Id.* at 39,874. Under the accommodation, an eligible organization that met a "self-certification standard" was "not required to contract, arrange, pay, or refer for contraceptive coverage," but its "plan participants and beneficiaries . . . [would] still benefit from separate payments for contraceptive services without cost sharing or other charge," as required by law. *Id.* The final rules were effective August 1, 2013.

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[4] As to the definition of a religious employer, the final rule "eliminate[ed] the first three prongs and clarif[ied] the fourth prong of the definition" adopted in 2012. 78 Fed. Reg. 39,874. Under this new definition, "an employer that [was] organized and operate[d] as a nonprofit entity and [was] referred to in section 6033(a)(3)(A)(i) or (iii) of the Code [was] considered a religious employer for purposes of the religious employer exemption." *Id.*

F. The *Hobby Lobby* and *Wheaton College* Decisions

On June 30, 2014, the Supreme Court issued its opinion in *Burwell v. Hobby Lobby Stores, Inc.*, in which three closely-held corporations challenged the requirement that they "provide health-insurance coverage for methods of contraception that violate[d] the sincerely held religious beliefs of the companies' owners." 134 S. Ct. at 2759. The Court held that this requirement violated the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, because it was not the "least restrictive means" of serving the government's proffered compelling interest in guaranteeing cost-free access to certain methods of contraception. *See Hobby Lobby*, 134 S. Ct. at 2781–82.[5] The Court pointed to the religious accommodation as support for this conclusion: "HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. . . . HHS has already established an accommodation for nonprofit organizations with religious objections." *Id.* at 2782. The Court stated that the *Hobby Lobby* ruling "[did] not decide whether an approach of this type complies with RFRA for purposes of all religious claims," and said its opinion "should not be understood to hold that an insurance-coverage mandate must necessarily fall if

[5] The Court assumed without deciding that such an interest was compelling within the meaning of RFRA. *Hobby Lobby*, 134 S. Ct. at 2780.

it conflicts with an employer's religious beliefs." *Id*. at 2782–83.

Several days later, the Court issued its opinion in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014). The plaintiff was a nonprofit college in Illinois that was eligible for the accommodation. *Id*. at 2808 (Sotomayor, J., dissenting). Wheaton College sought an injunction, however, "on the theory that its filing of a self-certification form [would] make it complicit in the provision of contraceptives by triggering the obligation for someone else to provide the services to which it objects." *Id*. The Court granted the application for an injunction, ordering that it was sufficient for the college to "inform[ ] the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services." *Id*. at 2807. In other words, the college was not required to "use the form prescribed by the [g]overnment," nor did it need to "send copies to health insurance issuers or third-party administrators." *Id*. The Court stated that its order "should not be construed as an expression of the Court's views on the merits." *Id*.

G. Post-*Hobby Lobby* and -*Wheaton* Regulatory Actions

Shortly thereafter, on August 27, 2014, the agencies initiated two regulatory actions. First, in light of *Hobby Lobby*, they issued proposed rules "amend[ing] the definition of an eligible organization [for purposes of the religious accommodation] to include a closely held for-profit entity that has a religious objection to providing coverage for some or

all of the contraceptive services otherwise required to be covered." 79 Fed. Reg. 51,118, 51,121. Comments were due on October 21, 2014.

Second, in light of *Wheaton*, the agencies issued IFRs ("the 2014 IFRs") providing "an alternative process for the sponsor of a group health plan or an institution of higher education to provide notice of its religious objection to coverage of all or a subset of contraceptive services, as an alternative to the EBSA Form 700 [*i.e.*, the standard] method of self-certification." 79 Fed. Reg. 51,092, 51,095. The agencies asserted they had both statutory authority and good cause to forgo the notice and comment period, stating that such a process would be "impracticable and contrary to the public interest," particularly in light of *Wheaton*. *Id*. at 51,095–96. The IFRs were effective immediately, and comments were due October 27, 2014.

After considering more than 75,000 comments on the proposed rule, the agencies issued final rules "extend[ing] the accommodation to a for-profit entity that is not publicly traded, is majority-owned by a relatively small number of individuals, and objects to providing contraceptive coverage based on its owners' religious beliefs"—*i.e.*, to closely-held entities. 80 Fed. Reg. 41,318, 41,324. The agencies also issued a final rule "continu[ing] to allow eligible organizations to choose between using EBSA Form 700 or the alternative process consistent with the *Wheaton* interim order." *Id*. at 41,323.

H. The *Zubik* Opinion and Subsequent Impasse

On May 16, 2016, the Supreme Court issued its opinion in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam). The petitioners, primarily non-profit organizations, were eligible for the religious accommodation, but challenged the requirement that they submit notice to either their insurer or the federal government as a violation of RFRA. *Zubik*, 136 S. Ct. at 1558. "Following oral argument, the Court requested supplemental briefing from the parties addressing 'whether contraceptive coverage could be provided to petitioners' employees, through petitioners' insurance companies, without any such notice from petitioners.'" *Id.* at 1558–59. After the parties stated that "such an option [was] feasible," the Court remanded to afford them "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise *while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.*'" *Id.* at 1559 (emphasis added). As in *Wheaton*, "[t]he Court express[ed] no view on the merits of the cases," and did not decide "whether petitioners' religious exercise has been substantially burdened, whether the [g]overnment has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest." *Id.* at 1560.

On July 22, 2016, the agencies issued a request for information ("RFI") on whether, in light of *Zubik*,

> there are alternative ways (other than those offered in current regulations) for eligible

> organizations that object to providing coverage for contraceptive services on religious grounds to obtain an accommodation, while still ensuring that women enrolled in the organizations' health plans have access to seamless coverage of the full range of [FDA]-approved contraceptives without cost sharing.

81 Fed. Reg. 47,741, 47,741 (July 22, 2016). Comments were due September 20, 2016. On January 9, 2017, the agencies issued a document titled "FAQs About Affordable Care Act Implementation Part 36" ("FAQs"). *See* Dep't of Labor, *FAQs About Affordable Care Act Implementation Part 36* (Jan. 9, 2017), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf.

The FAQs stated that, based on the 54,000 comments received in response to the July 2016 RFI, there was "no feasible approach . . . at this time that would resolve the concerns of religious objectors, while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage." *Id.* at 4.

I. The 2017 IFRs

On May 4, 2017, the President issued Executive Order No. 13,798, directing the secretaries of the Departments of the Treasury, Labor, and HHS to "consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive care mandate." 82 Fed. Reg. 21,675, 21,675. Subsequently, on October 6, 2017, the agencies issued the Religious Exemption

IFR and the Moral Exemption IFR (collectively, "the 2017 IFRs"), which were effective immediately. The 2017 IFRs departed from the previous regulations in several important ways.

1. The Religious Exemption IFR

First, with the Religious Exemption IFR, the agencies substantially broadened the scope of the religious exemption, extending it "to encompass entities, and individuals, with sincerely held religious beliefs objecting to contraceptive or sterilization coverage," and "making the accommodation process optional for eligible organizations." 82 Fed. Reg. 47,792, 47,807–08. Such entities "will not be required to comply with a self-certification process." *Id*. at 47,808. Just as the IFR expanded eligibility for the exemption, it "likewise" expanded eligibility for the optional accommodation. *Id*. at 47,812–13.

In introducing these changes, the agencies stated they "recently exercised [their] discretion to reevaluate these exemptions and accommodations," and considered factors including: "the interests served by the existing Guidelines, regulations, and accommodation process"; the "extensive litigation"; the President's executive order; the interest in protecting the free exercise of religion under the First Amendment and RFRA; the discretion afforded under the relevant statutory provisions; and "the regulatory process and comments submitted in various requests for public comments." *Id*. at 47,793. The agencies advanced several arguments they claimed justified the lack of an advance notice and comment process for the Religious Exemption IFR, which became effective immediately.

First, the agencies cited 26 U.S.C. § 9833, 29 U.S.C. § 1191c, and 42 U.S.C. § 300gg-92, asserting that those statutes authorized the agencies "to promulgate any interim final rules that they determine are appropriate to carry out" the relevant statutory provisions. *Id.* at 47,813. Second, the agencies asserted that even if the APA did apply, they had good cause to forgo notice and comment because implementing that process "would be impracticable and contrary to the public interest." *Id.* Third, the agencies noted that "[i]n response to several of the previous rules on this issue—including three issued as [IFRs] under the statutory authority cited above—the Departments received more than 100,000 public comments on multiple occasions," which included "extensive discussion about whether and by what extent to expand the exemption." *Id.* at 47,814. For all of these reasons, the agencies asserted, "it would be impracticable and contrary to the public interest to engage in full notice and comment rulemaking before putting these interim final rules into effect." *Id.* at 47,815. Comments were due on December 5, 2017.

2. The Moral Exemption IFR

Also on October 6, 2017, the agencies issued the Moral Exemption IFR, "expand[ing] the exemption[ ] to include additional entities and persons that object based on sincerely held moral convictions." 82 Fed. Reg. 47,838, 47,849. Additionally, "consistent with [their] expansion of the exemption, [the agencies] expand[ed] eligibility for the accommodation to include organizations with sincerely held moral convictions concerning contraceptive coverage," while also making the accommodation process optional for those entities. *Id.* The agencies included in the IFR a

section called "Congress' History of Providing Exemptions for Moral Convictions," referencing statutes and legislative history, case law, executive orders, and state analogues. *See id*. at 47,844–48. The agencies justified the immediate issuance of the Moral Exemption IFR without an advance notice and comment process on grounds similar to those offered regarding the Religious Exemption IFR, stating that "[o]therwise, our regulations would simultaneously provide and deny relief to entities and individuals that are, in the [agencies'] view, similarly deserving of exemptions and accommodations consistent[ ] with similar protections in other federal laws." *Id*. at 47,855. Comments were due on December 5, 2017.

3. Preliminary Injunction Against the 2017 IFRs

On October 6, 2017, the States of California, Delaware, Maryland, and New York, and the Commonwealth of Virginia filed a complaint, *see* Dkt. No. 1, which was followed by a First Amended Complaint on November 1, *see* Dkt. No. 24 ("FAC"). Plaintiffs alleged that the 2017 IFRs violated Sections 553 and 706 of the Administrative Procedure Act, the Establishment Clause, and the Equal Protection Clause. FAC ¶¶ 8–12, 116–37. Plaintiffs filed a motion for a preliminary injunction on November 9, 2017. *See* Dkt. No. 28.

a. The Court's Nationwide Injunction

On December 21, 2017, the Court granted Plaintiffs' motion for a preliminary injunction. *See* Dkt. No. 105. The Court held that Plaintiffs had "shown that, at a minimum, they are likely to succeed

on their claim that Defendants violated the APA by issuing the 2017 IFRs without advance notice and comment." *Id*. at 17. In addition, the Court held that Plaintiffs were likely to suffer irreparable harm, that the balance of equities tipped in Plaintiffs' favor, and that the public interest favored granting an injunction. *Id*. Accordingly, the Court issued a nationwide preliminary injunction enjoining implementation of the 2017 IFRs. *See id*. at 28. The Court's order reinstated the "state of affairs" that existed prior to October 6, 2017, including the exemption and accommodation as they existed following the *Zubik* remand as well as any court orders enjoining the Federal Defendants from enforcing the rules against specific parties. *See id*. at 29.[6]

b. Intervenors Little Sisters and March for Life Enter the Case

On December 29, 2017, the Court granted the Little Sisters' motion to intervene. *See* Dkt. No. 115. And on January 26, 2018, the Court granted March for Life's motion to intervene. *See* Dkt. No. 134.

c. Ninth Circuit Appeal and Decision Limiting Scope of Injunction

Following the Court's order granting Plaintiffs' motion for a preliminary injunction, the agencies,

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[6] A federal district court in the Eastern District of Pennsylvania also entered a preliminary injunction against the IFRs to "maintain the status quo" pending the outcome of a trial on the merits. *See Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 585 (E.D. Pa. 2017).

Little Sisters, and March for Life appealed. *See* Dkt. Nos. 135–38, 142–43.

On December 13, 2018, the Ninth Circuit issued an opinion largely affirming this Court's prior order, but shrinking the geographic scope of the injunction to encompass only the states that were plaintiffs at that time. *See California*, 911 F.3d at 584. First, the court held (on an issue of first impression) that venue was proper in the Northern District of California because "common sense" dictated that "a state with multiple judicial districts 'resides' in every district within its borders." *Id.* at 570. Second, the court held that the States had standing to bring their procedural APA claim because the States had shown "with reasonable probability[ ] that the IFRs will first lead to women losing employer-sponsored contraceptive coverage, which will then result in economic harm to the states." *Id.* at 571–72. The court noted that the States had no obligation to identify a specific woman who would lose coverage, particularly given that the agencies' regulatory impact analysis estimated that between 31,700 and 120,000 women would lose contraceptive coverage, and that "state and local governments will bear additional economic costs." *Id.* at 571–72. Third, the court held that the Plaintiffs were likely to succeed on the merits of their APA claim because the agencies had neither good cause nor statutory authority for bypassing the usual notice and comment procedure, and that the procedural violation was likely not harmless. *Id.* at 578–81. Fourth, the court affirmed this Court's ruling that the Plaintiffs had established the other requirements to entitle them to injunctive relief because they were likely to suffer irreparable harm absent an injunction, and the

balance of the equities and public interest tilted in favor of granting an injunction. *Id*. at 581–82. Fifth, the court concluded that the scope of the preliminary injunction was overbroad because an injunction applying only to the Plaintiff-States would "provide complete relief to them." *Id*. at 584.

J. The 2019 Final Rules

The 2017 IFRs included a call for comments, due by December 5, 2017. *See* 82 Fed. Reg. at 47,792; 82 Fed. Reg. at 47,838. Over the 60-day comment period, the agencies received over 56,000 public comments on the religious exemption rules, 83 Fed. Reg. at 57,540, and over 54,000 public comments on the moral exemption rules, 83 Fed. Reg. at 57,596.

On November 15, 2018, the agencies promulgated the Religious Exemption and Moral Exemption Final Rules. *See* 83 Fed. Reg. 57,536; 83 Fed. Reg. 57,592. The 2019 Final Rules are scheduled to take effect, superseding the enjoined IFRs, on January 14, 2019.

In substance, the Final Rules are nearly identical to the 2017 IFRs. *See* Defendants' Opposition, Dkt. No. 198 ("Federal Opp.") at 8 (noting that the "fundamental substance of the exemptions was finalized as set forth in the IFRs"); *see also* Supplemental Brief for the Federal Appellants at 1, *California v. Azar*, 911 F.3d 558 (9th Cir. 2018) (Nos. 18-15144, 18-15166, 18-15255), 2018 WL 6044850, at *1 ("The substance of the rules remains largely unchanged . . . and none of the changes is material to the States' substantive claims in this case."). The Religious Exemption made "various changes . . . to clarify the intended scope of the language" in "response to public comments." 83 Fed. Reg. at 57,537. Likewise, the

Moral Exemption Final Rule made "various changes . . . to clarify the intended scope of the language" in "response to public comments." 83 Fed. Reg. at 57,593.

At least three changes in the Final Rules bear mentioning. First, the Final Rules estimate that "no more than 126,400 women of childbearing age will be affected by the expanded exemptions," which is an increase from the previous estimate of up to 120,000 women. *Compare* 83 Fed. Reg. at 57,551 n.26 *with* 82 Fed. Reg. at 47,823. Second, the Final Rules increase their estimate of the expense of the exemptions to $67.3 million nationwide annually. *See* 83 Fed. Reg. at 57,581. Third, the Final Rules place increased emphasis on the availability of contraceptives at Title X family-planning clinics as an alternative to contraceptives provided by women's health insurers. *See* 83 Fed. Reg. at 57,551; 83 Fed. Reg. at 57,608; *see also* 83 Fed. Reg. at 25,502, 25,514 (proposed rule rendering women who lose contraceptive coverage because of religious or moral exemptions eligible for Title X services).

K. Plaintiffs Challenge the Final Rules

On December 18, 2018, Plaintiffs filed a Second Amended Complaint, alleging that the IFRs and Final Rules violate Section 553 of the APA, and that the Final Rules violate Section 706 of the APA, the Establishment Clause, and the Equal Protection Clause. *See* Dkt. No. 170 ("SAC") ¶¶ 235–60. Original Plaintiffs—the States of California, Delaware, Maryland, and New York, and the Commonwealth of Virginia—were joined by the States of Connecticut, Hawaii, Illinois, Minnesota, North Carolina, Rhode

Island, Vermont, and Washington, and the District of Columbia. *Id*. at 13–26.

On December 19, Plaintiffs filed a motion for a preliminary injunction, seeking to enjoin the implementation of the Final Rules. *See* Dkt. No. 174 ("Mot.") at 25. The Federal Defendants filed an opposition on January 3, 2019. *See* Federal Opp. That same day, both the Little Sisters, *see* Dkt. No. 197 ("Little Sisters Opp."), and March for Life, *see* Dkt. No. 199 ("March for Life Opp."), filed oppositions.[7] The States replied on January 8. *See* Dkt. No. 218 ("Reply").[8]

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[7] The Little Sisters filed a corrected opposition brief on January 10. *See* Dkt. No. 174.

[8] Numerous amici curiae also filed briefs to present their views on the case. *See* Dkt. Nos. 212 (American Nurses Association; American College of Obstetricians and Gynecologists; American Academy of Nursing; American Academy of Pediatricians; Physicians for Reproductive Health; California Medical Association); 230 (California Women Lawyers; Girls Inc., If/When/How: Lawyering for Reproductive Justice; Lawyers Club of San Diego; American Association of University Women; American Federation of State, County, and Municipal Employees; American Federation of Teachers; Colorado Women's Bar Association; National Association of Social Workers; National Association of Women Lawyers; Service Employees International Union; Women's Bar Association of Massachusetts; Women's Bar Association of the District of Columbia; Women Lawyers on Guard, Inc.; Women's Bar Association of the State of New York); 231 (National Association for Female Executives; U.S. Women's Chamber of Commerce); 232 (National Asian Pacific American Women's Forum; National Latina Institute for Reproductive Health; National Women's Law Center; SisterLove, Inc.); 233 (Commonwealth of Massachusetts; States of Iowa, Maine, Michigan, Nevada, New Jersey, New Mexico, Pennsylvania, and Oregon). The Court has

The Court held a hearing on January 11, after which it took the motion under submission.

II. LEGAL STANDARD

A preliminary injunction is a matter of equitable discretion and is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "A plaintiff seeking preliminary injunctive relief must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Id.* at 20. Alternatively, an injunction may issue where "the likelihood of success is such that serious questions going to the merits were raised and the balance of hardships tips sharply in [the plaintiff's] favor," provided that the plaintiff can also demonstrate the other two *Winter* factors. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011) (citation and internal quotation marks omitted). Under either standard, Plaintiffs bear the burden of making a clear showing that they are entitled to this extraordinary remedy. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). The most important *Winter* factor is likelihood of success on the merits. *See Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017).

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reviewed their filings and considered them in assessing this motion.

III. ANALYSIS

A. Venue Is Proper in the Northern District of California.

Despite a clear holding from the Ninth Circuit, Federal Defendants continue to press their argument that venue is not proper in the Northern District because the State of California resides for venue purposes only in the Eastern District, "where Sacramento, the seat of state government, is located." Federal Opp. at 10. But the Ninth Circuit held that 28 U.S.C. 1391 "dictates that a state with multiple judicial districts 'resides' in every district within its borders." *California*, 911 F.3d at 570. An "interpretation limiting residency to a single district in the state would defy common sense." *Id*. Given the clear precedent from the Ninth Circuit on this issue, the Court need not dwell on it: venue is proper in the Northern District.

B. Plaintiffs Have Standing to Sue.

The Little Sisters contend that the States lack standing to sue, *see* Little Sisters Opp. at 9, and the agencies "reserve the right to object" to relief for any plaintiff that has not established standing, *see* Federal Opp. at 10 n.4. The Court finds that Plaintiffs have established both Article III and statutory standing.

1. Plaintiffs Have Article III Standing.

A plaintiff seeking relief in federal court bears the burden of establishing "the irreducible constitutional minimum" of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 560 (1992)). First, the plaintiff must have "suffered an injury in fact." *Spokeo*, 136 S. Ct. at 1547. This requires "an invasion of a legally protected interest" that is concrete, particularized, and actual or imminent, rather than conjectural or hypothetical. *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). Second, the plaintiff's injury must be "fairly traceable to the challenged conduct of the defendant." *Spokeo*, 136 S. Ct. at 1547. Third, the injury must be "likely to be redressed by a favorable judicial decision." *Id*. (citing *Lujan*, 504 U.S. at 560–61).

"States are not normal litigants for the purposes of invoking federal jurisdiction," *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007), and are "entitled to special solicitude in [the] standing analysis," *id*. at 520. For instance, states may sue to assert their "quasi-sovereign interest in the health and well-being—both physical and economic—of [their] residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). In that case, however, the "interest must be sufficiently concrete to create an actual controversy between the State and the defendant" such that the state is more than a nominal party. *Id*. at 602.

Here, the Court need not rely on the special solicitude afforded to states, or their power to litigate their quasi-sovereign interests on behalf of their citizens. Much more simply, a state may establish standing by showing a reasonably probable threat to its economic interests. *See California*, 911 F.3d at 573; *see also Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015) (State of Texas had standing to mount APA challenge to Deferred Action for Parents of

Americans and Lawful Permanent Residents program because Texas would "incur significant costs in issuing driver's licenses to [program] beneficiaries"), *aff'd by equally divided Court*, 136 S. Ct. 2271, 2272 (2016). Plaintiffs have demonstrated at least two ways in which implementation of the Final Rules will damage their States' fiscs: through increased reliance on state-funded family-planning programs and through the state-borne costs of unintended pregnancies.

First, Plaintiffs have shown that the Final Rules will "lead to women losing employer-sponsored contraceptive coverage, which will then result in economic harm to the states" as these women "turn to state-based programs or programs reimbursed by the state." *California*, 911 F.3d at 571–72. The Little Sisters take issue with the Ninth Circuit's reasoning because "the States have still failed to identify anyone who will actually be harmed by the Mandate." Little Sisters Opp. at 9. But the Ninth Circuit was clear that the States need not identify a specific woman likely to lose contraceptive coverage to establish standing. *California*, 911 F.3d at 572. Even if the States have not identified specific women who will be impacted by the Final Rules, Federal Defendants themselves have done much of the work to establish that Plaintiffs have standing. The Religious Exemption states that up to approximately 126,400 "women of childbearing age will be affected by the expanded exemptions." 83 Fed. Reg. at 57,551 n.26. At an estimated expense of $584 per year per woman impacted, this amounts to

$67.3 million nationwide annually. *See id*. at 57,581.[9] Further, the Final Rules explicitly rely on Title X clinics as a backstop for women who lose contraceptive coverage as a result of the Final Rules. *See id.* at 57,551; 83 Fed. Reg. at 57,608; *see also* 83 Fed. Reg. at 25,502. But Plaintiffs have shown that in many of their States, these already cash-strapped Title X clinics are operated in conjunction with state family planning services, meaning that any increase in enrollment will likely increase costs to the state. *See* Declaration of Kathryn Kost ("Kost Decl."), Dkt. No. 174-19 ¶ 48 ("Title X is able to serve only one-fifth of the nationwide need for publicly funded contraceptive care" and "cannot sustain additional beneficiaries as a result of the Final Rules"); Declaration of Mari Cantwell ("Cantwell Decl."), Dkt. No. 174-4 ¶ 18 (all California Title X clinics are also California Family Planning, Access, Care, and Treatment program providers); Declaration of Lauren J. Tobias ("Tobias Decl."), Dkt. No. 174-33 ¶ 5 (New York Title X clinics are same as state family planning program clinics). Or the States will be forced to shoulder the costs of the Final Rules more directly, as Federal Defendants refer women to Title X clinics funded directly by the state. *See* Declaration of Karen Nelson ("Nelson Decl."), Dkt. No. 174-25 ¶ 20 ($6 million of Maryland's Title X budget comes from state, $3 million from federal government).

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[9] The Moral Exemption estimates that approximately 15 women of childbearing age will lose their access to cost-free contraceptives. *See* 83 Fed. Reg. at 57,627. At an average cost of $584 annually, this amounts to $8,760 each year. *See id*. at 57,628.

In addition, the States have submitted voluminous and detailed evidence documenting how their female residents are predicted to lose access to contraceptive coverage because of the Final Rules—and how those women likely will turn to state programs to obtain no-cost contraceptives, at significant cost to the States. *See*, *e.g.*, Cantwell Decl., Dkt. No. 174-4 ¶¶ 16–18 (Final Rules will result in more women becoming eligible for California's Family Planning, Access, Care, and Treatment program, meaning that "state dollars may be diverted to provide" contraceptive coverage); Nelson Decl., Dkt. No. 174-25 ¶ 20 ("it will be difficult for the current [State of Maryland] budget levels to accommodate the increase in women seeking [Title X services] after losing contraception coverage in their insurance plans"); Tobias Decl., Dkt. No. 174-33 ¶ 5 (exemptions in Final Rules "will result in more women receiving" New York Family Planning Program services, thus putting program at "risk [of] being overwhelmed by the increase in patients"); Declaration of Jonathan Werberg, Dkt. No. 174-36 ¶¶ 5–8 (identifying New York employers that are likely to invoke exemptions "because of their involvement in previous litigation": Hobby Lobby, with 720 New York employees; Nyack College, with 3,000 students and 1,100 employees in New York; and Charles Feinberg Center for Messianic Jewish Studies, whose parent university has 1,000 students nationwide). Of course, under the status quo, these women have a statutory entitlement to free contraceptives through their regular health insurance and thus impose no cost on the States. The States have established a causal chain linking them

to harm if the Final Rules were implemented. *See California*, 911 F.3d at 571–72.

Second, the States have shown that the Final Rules are likely to result in a decrease in the use of effective contraception, thus leading to unintended pregnancies which would impose significant costs on the States. Some of the most effective contraceptive methods are also among the most expensive. *See* Kost Decl. ¶¶ 15–18, 24. For example, long-acting reversible contraceptives are among the most effective methods, but may cost a woman over $1,000. *See id*. ¶ 25. Women who lose their entitlement to cost-free contraceptives are less likely to use an effective method, or any method at all—resulting in unintended pregnancies. *See id*. ¶ 27, 36–42; Declaration of Lisa M. Hollier ("Hollier Decl."), Dkt. No. 174-15 ¶ 6; Declaration of Walker A. Wilson ("Wilson Decl."), Dkt. No. 174-38 ¶ 5 (Final Rules may cause women in North Carolina to "forgo coverage and experience an unintended pregnancy"); Nelson Decl., Dkt. No. 174-25 ¶ 30 (unintended pregnancy rate of women not using contraception is 45% and loss of coverage will result in more unintended pregnancies); Declaration of Karyl T. Rattay ("Rattay Decl."), Dkt. No. 174-30 (Final Rules "will contribute to an increase in Delaware's nationally high unintended pregnancy rate as women forego needed contraception and other services"). Much of the financial burden of these unintended pregnancies will be borne by the States. *See, e.g.*, Rattay Decl., Dkt. No. 174-30 (in 2010, 71.3% of unplanned births in Delaware were publicly funded, costing Delaware $36 million); Declaration of Nicole Alexander-Scott ("Alexander-Scott Decl."), Dkt. No. 174-7 ¶ 3 (unintended pregnancies likely to

result from Final Rules will impose costs on state of Rhode Island); Wilson Decl., Dkt. No. 174-38 ¶ 5 (unintended pregnancies likely to result from Final Rules will impose costs on State of North Carolina); Declaration of Nathan Moracco ("Moracco Decl."), Dkt. No. 174-23 ¶ 5 (State of Minnesota "may bear a financial risk when women lose contraceptive coverage" because State is obligated to pay for child delivery and newborn care for children born to low-income mothers).[10]

In sum, Plaintiffs have shown that the challenged Final Rules pose a reasonably probable threat to their economic interests because they will be forced to pay for contraceptives that are no longer provided cost-free to women as guaranteed by the Affordable Care Act, as the Ninth Circuit found with respect to the five original Plaintiff States. *See California*, 911 F.3d at 570. The States also have established a reasonable probability that they will suffer economic harm from

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[10] Of course, these financial costs to the States do not capture the additional substantial costs—whether they be financial, professional, or personal—to women who unintendedly become pregnant after losing access to the cost-free contraceptives to which they are entitled. *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."); Brief of *Amici Curiae* U.S. Women's Chamber of Commerce and National Association for Female Executives, Dkt. No. 231 at 12 (58% of women paid out-of-pocket costs for intrauterine devices prior to Women's Health Amendment, but only 13% by March 2014); Brief of *Amici Curiae* American Association of University Women, et al., Dkt. No. 230 at 16–17 (explaining the "tremendous and adverse personal, professional, social, and economic effects" of reducing women's access to contraceptives).

the consequences of unintended pregnancies resulting from the reduced availability of contraceptives. These injuries are directly traceable to the exemptions created by the Final Rules. As the Ninth Circuit noted, under the APA, the States "will not be able to recover monetary damages." *Id*. at 581 (citing 5 U.S.C. § 702 (permitting "relief other than money damages")); *see also Haines v. Fed. Motor Carrier Safety Admin.*, 814 F.3d 417, 426 (6th Cir. 2016) (federal courts do not have jurisdiction to adjudicate suits seeking monetary damages under the APA). Thus, granting a preliminary injunction is the only effective way to redress the potential harm to the States until the Court can fully assess the merits. The States have established the requirements of Article III standing.

2. Plaintiffs Have Statutory Standing.

In addition to establishing Article III standing, a plaintiff must show that it "has a cause of action under the statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). The APA provides that a "person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Courts have interpreted this provision to mean that a plaintiff must "establish (1) that there has been final agency action adversely affecting the plaintiff, and (2) that, as a result, it suffers legal wrong or that its injury falls within the zone of interests of the statutory provision the plaintiff claims was violated." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 976 (9th Cir. 2003) (internal quotation omitted).

First, a final rule is, as the name suggests, a final agency action. *See id*. Second, Plaintiffs' alleged injury—increased costs from providing contraceptives and from the consequences of unintended pregnancies—is within the zone of interests of the Women's Health Amendment, which was enacted to ensure that women would have access to cost-free contraceptives through their health insurance. *Cf. City of Sausalito v. O'Neill*, 386 F.3d 1186, 1204–05 (9th Cir. 2004) (plaintiff city within zone of interests of Concessions Management Improvement Act because it "assert[ed] injury to its 'proprietary interest'"); *Citizens for Better Forestry*, 341 F.3d at 976 (plaintiffs had statutory standing because "trying to protect the environment" was within zone of interests of National Environmental Policy Act). Thus, Plaintiffs have established statutory standing.

C. Plaintiffs Have Shown They Are Entitled to a Preliminary Injunction.

Plaintiffs are entitled to a preliminary injunction as to the Final Rules. As to both rules, Plaintiffs have shown that they are likely to succeed, or at a minimum have raised serious questions going to the merits, on their claim that the Religious Exemption and the Moral Exemption are inconsistent with the Women's Health Amendment, and thus violate the APA. Plaintiffs also have shown that they are likely to suffer irreparable harm as a result of this violation, that the balance of hardships tips sharply in their favor, and that the public interest favors granting the injunction.

1. Plaintiffs are likely to succeed in, or have at a minimum raised serious questions regarding, their argument that the Religious Exemption is "not in accordance with" the ACA, and thus violates the APA.

Under the APA, "agency decisions may be set aside only if 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008) (quoting 5 U.S.C. § 706(2)(A). Plaintiffs argue that "[t]he Rules cannot be reconciled with the text and purpose of the ACA—which seeks to promote access to women's healthcare, not limit it." Mot. at 10. The Court agrees that Plaintiffs are likely correct, or have, at a minimum, raised serious questions going to the merits of this claim. To explain why, the Court must address three contentions made by the Federal Defendants and the Intervenors: (1) the Contraceptive Mandate is not actually a "mandate" at all, but rather a policy determination wholly subject to the agencies' discretion; (2) the changes codified in the Religious Exemption were mandated by RFRA; and (3) even if the agencies were not *required* under RFRA to adopt the Religious Exemption, they nonetheless had *discretion* to do so.

a. The "Contraceptive Mandate" in the Women's Health Amendment is in fact a statutory mandate.

Echoing the Final Rules, the Federal Defendants initially argue that "the ACA grants HRSA, and in turn the Agencies, significant discretion to shape the content and scope of any preventive-services guidelines adopted pursuant to § 300gg-13(a)(4)." Federal Opp. at 17; *see also* Little Sisters Opp. at 12 ("The ACA did not mandate contraceptive coverage. Instead, Congress delegated to HRSA discretion to determine the contours of the preventive services guidelines."). Federal Defendants thus contend that this section of the statute "must be understood as a positive grant of authority for HRSA to develop the women's preventive-service guidelines and for the Agencies, as the administering Agencies of the applicable statutes, to shape that development." Federal Opp. at 18. Federal Defendants' conclusion is that Section 300gg-13(a)(4) "thus authorized HRSA to adopt guidelines for coverage that include an exemption for certain employers, and nothing in the ACA prevents HHS from supervising HRSA in the development of those guidelines." *Id.*

The Court rejects the Federal Defendants' claim that the ACA delegated total authority to the agencies to exempt anyone they wish from the contraceptive mandate. The Federal Defendants never appear to have denied that the statutory mandate is a mandate until the issuance of the IFRs (and the ensuing litigation in this district and in the Eastern District of Pennsylvania challenging the IFRs and now the Final Rules). They cite no case in which a court has

accepted this claim. To the contrary, this Court knows of no Supreme Court, court of appeal or district court decision that did not presume that the ACA requires specified categories of health insurance plans and issuers to provide contraceptive coverage at no cost to women. *See, e.g., Zubik*, 136 S. Ct. at 1559 ("Federal regulations require petitioners to cover certain contraceptives as part of their health plans"); *Hobby Lobby*, 134 S. Ct. at 2762; *California*, 911 F.3d at 566 (ACA and its regulations "require group health plans to cover contraceptive care without cost sharing"). The United States government also has admitted as much in its consistent prior representations to the Supreme Court. *See* Brief for Respondents at 25, *Zubik*, 136 S. Ct. at 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191) (recognizing "the generally applicable requirement to provide contraceptive coverage"); *id*. at 37–38 (recognizing that "[t]he Affordable Care Act itself imposes an obligation on insurers to provide contraceptive coverage, 42 U.S.C. 300gg-13").

Federal Defendants' argument that the statute's language requiring coverage "as provided" by the regulations confers unbridled discretion on the agencies to exempt anyone they see fit from providing coverage, Federal Opp. at 18–19, is inconsistent with the ACA's mandate that women's contraceptive coverage "shall" be provided by covered plans and issuers without cost sharing. The statute's use of the phrase "as provided for in comprehensive guidelines" simply cannot reasonably be read as a Congressional delegation of the plenary authority claimed by the Federal Defendants. Instead, Congress permitted HRSA, a health agency, to determine *what*

"additional preventive care and screenings" in those guidelines must be covered with respect to women. *See Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 210 (2d Cir. 2015) ("The ACA does not specify *what types* of preventive care must be covered for female plan participants and beneficiaries. Instead, Congress left *that issue* to be determined via regulation by the [HRSA].") (emphasis added), *vacated and remanded*, 136 S. Ct. 2450 (2016). Without dispute, the guidelines continue to identify contraceptive services as among those for which health plans and insurers "shall, at a minimum provide coverage . . . and shall not impose any cost sharing requirements." *See* Health Res. & Serv. Admin., *Women's Preventive Services Guidelines*, https://www.hrsa.gov/womens-guidelines-2016/index.html (last updated Oct. 2017). Moreover, in 2012, "[t]he Senate voted down the so-called conscience amendment, which would have enabled any employer or insurance provider to deny coverage based on its asserted 'religious beliefs or moral convictions.'" *Hobby Lobby*, 134 S. Ct. at 2789 (Ginsburg, J., dissenting) (*citing* 158 Cong. Rec. S539 (Feb. 9, 2012) and S1162–73 (Mar. 1, 2012)).

Accordingly, the Court rejects the Federal Defendants' claim that the ACA delegates to the agencies complete discretion to implement any exemptions they choose, including those at issue here. *See Pennsylvania*, 281 F.Supp.3d at 579 (rejecting government's argument that "HRSA may determine not only the services covered by the ACA, but also the manner or reach of that coverage," because "the ACA contains no statutory language allowing the Agencies to create such sweeping exemptions to the require-

ments to cover 'preventive services,' which, as interpreted by those same agencies, include mandatory no-cost coverage of contraceptive services").

To the extent the Federal Defendants rely on the existence of the church exemption instituted in 2013 to support their position, Federal Opp. at 18–19, the legality of that exemption is not before the Court. The Court notes, however, that the church exemption was rooted in provisions of the Internal Revenue Code that apply to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order. *See* 78 Fed. Reg. at 39,874 (classifying "an employer that [was] organized and operate[d] as a nonprofit entity and [was] referred to in section 6033(a)(3)(A)(i) or (iii) of the Code [as] a religious employer for purposes of the religious employer exemption."). While a court could someday be presented with the question of whether the church exemption is uniquely required by law given the special legal status afforded to churches and their integrated auxiliaries, the existence of that exemption simply does not mean that the agencies have boundless authority to implement any other exemptions they choose.

b. The Religious Exemption likely is not required by RFRA.

Because the Women's Health Amendment, including the requirement to cover the preventive care and screenings identified in the guidelines, is a law of general applicability, the next question is whether RFRA requires the government to relieve

qualifying entities of the obligation to comply by providing the Religious Exemption, as opposed to the accommodation provided for under the pre-IFR version of the rules currently in force. The Court finds that the Religious Exemption likely is not required by RFRA.

"RFRA suspends generally applicable federal laws that 'substantially burden a person's exercise of religion' unless the laws are 'the least restrictive means of furthering a compelling governmental interest.'" *Oklevueha Native Amer. Church of Hawaii v. Lynch*, 828 F.3d 1012, 1015 (9th Cir. 2016) (internal quotation and citation omitted). The Ninth Circuit has held that "[u]nder RFRA, a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions . . . ." *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008). The government "is not required to prove a compelling interest for its action or that its action involves the least restrictive means to achieve its purpose, unless the plaintiff first proves the government action substantially burdens his exercise of religion." *Id*. at 1069.

The Federal Defendants and the Little Sisters argue that the current accommodation, under which eligible organizations are not required to contract, arrange, pay, or refer for contraceptive coverage, substantially burdens religious objectors' exercise of religion. Federal Opp. at 22; Little Sisters Opp. at 15 (contending that "RFRA mandates a broad religious exemption" from the contraceptive coverage

requirement). Federal Defendants and the Little Sisters argue that even requiring objectors to notify the government that they are opting out of the otherwise-applicable obligation to cover contraceptive services for their female employees, students, or beneficiaries makes them complicit in the provision of products incompatible with their religious beliefs. Federal Opp. at 22 ("The accommodation, like the Mandate, imposes a substantial burden because it requires some religious objectors to 'act in a manner that they sincerely believe would make them complicit in a grave moral wrong as the price of avoiding a ruinous financial penalty.'") (*quoting Sharpe Holdings, Inc. v. Dep't of Health & Human Serv.*, 801 F.3d 927, 941 (8th Cir. 2015), *vacated sub nom. Dep't of Health & Human Servs. v. CNS Int'l Ministries*, 84 U.S.L.W. 3630, 2016 WL 2842448, at *1 (2016); Little Sisters Opp. at 16 ("The Little Sisters cannot, in good conscience, provide these services on their health benefits plan or authorize others to do so for them.").

While the Ninth Circuit has not considered this question, nine other courts of appeal have. Of those courts, all other than the Eighth Circuit (in the *Sharpe Holdings* decision on which the Federal Defendants exclusively rely) concluded that the accommodation does not impose a substantial burden on objectors' exercise of religion.[11] This Court agrees

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[11] *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014), *vacated sub nom. Zubik*, 136 S. Ct. at 1561; *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207 (2d Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015), *vacated sub nom. Zubik*, 136 S. Ct. at 1561; *E. Tex. Baptist*

with the eight courts that so held, and finds that Plaintiffs are likely to prevail on this argument.

First, whether a burden is substantial is an objective question: a court "must assess the nature of a claimed burden on religious exercise to determine whether, as an objective legal matter, that burden is 'substantial' under RFRA." *Catholic Health Care Sys.*, 796 F.3d at 217.[12] In other words, "[w]hether a law substantially burdens religious exercise under RFRA is a question of law for courts to decide, not a question

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Univ. v. Burwell, 793 F.3d 449 (5th Cir. 2015), *vacated sub nom. Zubik*, 136 S. Ct. at 1561; *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738 (6th Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606 (7th Cir. 2015), *vacated*, 136 S. Ct. 2007 (2016); *Grace Schs. v. Burwell*, 801 F.3d 788 (7th Cir. 2015), *vacated*, 136 S. Ct. 2011 (2016); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), *vacated sub nom. Zubik*, 136 S. Ct. at 1561; *Eternal Word Television Network v. Sec'y of U.S. Dep't Health & Human Servs.*, 818 F.3d 1122 (11th Cir. 2016), *vacated* No. 14-12696, 2016 WL 11503064 (11th Cir. May 31, 2016). Only the Eighth Circuit has found that the religious accommodation as it existed before the promulgation of the 2017 IFRs imposed a substantial burden on religious exercise under RFRA. *See Sharpe Holdings*, 801 F.3d at 945 (affirming grant of preliminary injunction to religious objectors because "they [were] likely to succeed on the merits of their RFRA challenge to the contraceptive mandate and the accommodation regulations"), *vacated sub nom. Dep't of Health & Human Servs. v. CNS Int'l Ministries*, 84 U.S.L.W. 3630, 2016 WL 2842448, at *1 (2016); *Dordt Coll. v. Burwell*, 801 F.3d 946 (8th Cir. 2015) (applying reasoning of *Sharpe Holdings* to similar facts), *vacated*, 136 S. Ct. 2006 (2016).

[12] While all eight of the decisions finding no substantial burden were vacated by *Zubik* or other Supreme Court decisions, the Court finds the analysis and reasoning of those cases highly persuasive. The Eighth Circuit's decision in *Sharpe Holdings* has been vacated as well.

of fact." *Priests for Life*, 772 F.3d at 247. Importantly, the Court may not, and does not here, question the "sincerity of [a party's] belief that providing, paying for, or facilitating access to contraceptive services is contrary to [its] faith," or its judgment that "participation in the accommodation violates this belief." *Catholic Health Care Sys.*, 796 F.3d at 217. But "[w]hether the regulation objected to imposes a substantial burden is an altogether different inquiry." *Id*. at 218.

As several courts have noted, the Supreme Court's decision in *Hobby Lobby* "did not collapse the distinction between beliefs and substantial burden, such that the latter could be established simply through the sincerity of the former." *Catholic Health Care Sys.*, 796 F.3d at 218; *see also Eternal Word*, 818 F.3d at 1145 (noting that "nothing in RFRA or case law . . . allows a religious adherent to dictate to the courts what the law requires," and explaining that "questions about what a law means are not the type of 'difficult and important questions of religion and moral philosophy' for which courts must defer to religious adherents") (citing *Hobby Lobby*, 134 S. Ct. at 2778).

Both before and after the Supreme Court's decision in *Wheaton College*, all courts of appeal to consider the question, with the exception of the Eighth Circuit, have concluded that requiring religious objectors to notify the government of their objection to providing contraceptive coverage, so that the government can ensure that the responsible insurer or third-party administrator steps in to meet the ACA's requirements, does not impose a substantial burden on religious exercise. As the

Eleventh Circuit explained post-*Wheaton* in *Eternal Word*, under the accommodation "the only action required of the eligible organization is opting out: literally, the organization's notification of its objection," at which point all responsibilities related to contraceptive coverage fall upon its insurer or TPA. 818 F.3d at 1149. The Eleventh Circuit noted that "such an opt out requirement is 'typical of religious objection accommodations that shift responsibility to non-objecting entities only after an objector declines to perform a task on religious grounds.'" *Id.* (*citing Little Sisters of the Poor*, 794 F.3d at 1183).

The eight courts of appeal also found that an objector's "complicity" argument does not establish a substantial burden, because it is the ACA and the guidelines that entitle plan participants and beneficiaries to contraceptive coverage, not any action taken by the objector. As the *Eternal Word* court explained:

> The ACA and the HRSA guidelines—not the opt out—are . . . the 'linchpins' of the contraceptive mandate because they entitle women who are plan participants and beneficiaries covered by group health insurance plans to contraceptive coverage without cost sharing. In other words, women are entitled to contraceptive coverage regardless of their employer's action (or lack of action) with respect to seeking an accommodation. Because a woman's entitlement to contraceptive benefits does not turn on whether her eligible organization employer chooses to comply with the law (by providing contraceptive coverage or seeking an accommo-

> dation) or pay a substantial penalty (in the form of a tax) for noncompliance, we cannot say that the act of opting out imposes a substantial burden.

818 F.3d at 1149. *See also, e.g., Little Sisters of the Poor*, 794 F.3d at 1174 ("[S]hifting legal responsibility to provide coverage away from the plaintiffs relieves rather than burdens their religious exercise. The ACA and its implementing regulations entitle plan participants and beneficiaries to coverage whether or not the plaintiffs opt out."); *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449, 459 (5th Cir. 2015) ("[T]he plaintiffs claim that their completion of Form 700 or submission of a notice to HHS will authorize or trigger payments for contraceptives. Not so. The ACA already requires contraceptive coverage . . . .").

The Eleventh Circuit in *Eternal Word* summarized its analysis by holding that it "simply [could] not say that RFRA affords the plaintiffs the right to prevent women from obtaining contraceptive coverage to which federal law entitles them based on the de minimis burden that the plaintiffs face in notifying the government that they have a religious objection." 818 F.3d at 1150. This Court agrees.

Moreover, as several courts have noted, in *Hobby Lobby* the Supreme Court at least suggested (without deciding) that the accommodation likely was not precluded by RFRA. *See, e.g., Catholic Health Care Sys.*, 796 F.3d at 217 ("Indeed, in *Hobby Lobby*, the Supreme Court identified this accommodation as a way to alleviate a substantial burden on the religious exercise of for-profit corporations . . . ."), *East Texas Baptist Univ.*, 793 F.3d at 462 ("The *Hobby Lobby*

Court . . . actually suggested in *dictum* that the accommodation does not burden religious exercise . . . ."). *Hobby Lobby* described the accommodation as "effectively exempt[ing] certain religious nonprofit organizations . . . from the contraceptive mandate." 134 S. Ct. at 2763. The Court characterized the accommodation as "an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs." *Id*. at 2782. While making clear that it did not "decide today whether an approach of this type complies with RFRA for purposes of all religious claims," the Court said that "[a]t a minimum, [the accommodation did] 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." *Id*. Specifically, the Court said that "[u]nder the accommodation, the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to 'face minimal logistical and administrative obstacles . . . because their employers' insurers would be responsible for providing information and coverage . . . ." *Id*. (citation omitted).

The Little Sisters raise two arguments to suggest that the reasoning referenced above should not control. First, they contend that in the *Zubik* case, the government made factual concessions that "removed any basis for lower courts' prior holding that the Mandate did not impose a substantial burden on the religious exercise of objecting employers because the provision of contraceptives was separate from their

plans." Little Sisters Opp. at 6. Second, they point to what they characterize as "unanimous rulings" post-*Zubik* entering "permanent injunctions against the Mandate as a violation of RFRA." *Id.* at 16.[13] The Court does not find either argument persuasive at this stage.

With regard to the government's *Zubik* "concession," the Court cannot in the limited time available before the Final Rules are scheduled to take effect review the entirety of the *Zubik* record to place the statements identified in context. But even assessing on their face the handful of facts proffered, it is not self-evident that the representations have the definitive effect posited by the Little Sisters. *See id.* at 6 (citing following exchange during the *Zubik* oral argument: "Chief Justice Roberts: 'You want the coverage for contraceptive services to be provided, I think as you said, seamlessly. You want it to be in one insurance package. . . . Is that a fair understanding of the case?' Solicitor General Verrilli: "I think it is one fair understanding of the case.'") (ellipses as in Little Sisters Opp.). On the present record, the Court cannot conclude that the "one fair understanding" comment, or the other few representations cited, fatally undermined the core conclusion of the eight courts of appeal that requiring a religious objector simply to notify the government of its objection, consistent with *Wheaton College*, does not substantially burden

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[13] The Court notes that the district court in *Pennsylvania* found, post-*Zubik*, that the IFRs "are not required under RFRA because the Third Circuit—twice now—has foreclosed the Agencies' legal conclusion that the Accommodation Process imposes a substantial burden." 281 F.Supp.3d at 581. This decision undercuts the Little Sisters' unanimity claim.

religious exercise. The Court thus believes it likely that the answer to the legal question posed in that on-point authority is not altered by the position taken by the government in *Zubik*. This conclusion, like all of the Court's preliminary analysis in this order, is subject to re-evaluation once a fuller record is developed. *See California*, 911 F.3d at 584 (noting that "the fully developed factual record may be materially different from that initially before the district court").

Relatedly, the Court finds that nothing in the post-*Zubik* district court decisions cited by the Little Sisters compels the conclusion that the Religious Exemption was mandated by RFRA. The *Zubik* remand order gave the parties the "opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise *while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage*.'" 136 S. Ct. at 1560 (emphasis added). While expressing "no view on the merits of the cases," *id*., the Supreme Court said that "[n]othing in this opinion, or in the opinions or orders of the courts below, is to affect the ability of the Government to *ensure* that women covered by petitioners' health plans 'obtain, without cost, the full range of FDA approved contraceptives.'" *Id*. at 1560–61 (*quoting Wheaton College*, 134 S. Ct. at 2807) (emphasis added). In her concurrence, Justice Sotomayor stressed her understanding that the majority opinion "allows the lower courts to consider only whether existing or modified regulations could provide seamless contraceptive coverage to petitioners' employees, through petitioners' insurance

companies, without any notice from petitioners." *Zubik*, 136 S. Ct. at 1561 (Sotomayor, J., concurring) (internal quotations and ellipses omitted).

Following remand, however, as reflected in the IFRs and now the Final Rules, the Federal Defendants simply reversed their position and stopped defending the accommodation, and now seemingly disavow any obligation to ensure coverage under the ACA. As a result, the post-*Zubik* orders were entered without objection by the government, based on the agencies' new position that the accommodation violates RFRA. *See, e.g., Wheaton Coll. v. Azar*, No. 1:13-cv-08910, Dkt. 119 at 2 (N.D. Ill. Feb. 22, 2018) (noting that "[a]fter reconsideration of their position, Defendants now agree that enforcement of the currently operative rules regarding the 'contraceptive mandate' against employers with sincerely held religious objections would violate RFRA, and thus do not oppose Wheaton's renewed motion for injunctive and declaratory relief"). In other words, it appears to the Court that *no* party in these cases purported to represent, or even consider the substantial interests of, the women who now will be deprived of "full and equal health coverage, including contraceptive coverage." *Cf. Zubik*, 136 S. Ct. at 1560. Counsel for the Little Sisters confirmed at oral argument that none of those decisions have been appealed (presumably for the same reason). So the eight appellate courts upon whose reasoning this Court relies have not had the opportunity to decide whether any subsequent developments would change their conclusions. For all of these reasons, the Court finds that nothing about the post-*Zubik* orders cited by the Little Sisters changes its conclusion that Plaintiffs

are likely to succeed in their argument that the Final Rules are not mandated by RFRA.

c. There are serious questions going to the merits as to whether the Religious Exemption is otherwise permissible.

The Federal Defendants and the Little Sisters further argue that even if the Religious Exemption is not required by RFRA, the agencies have discretion under RFRA to implement it. Federal Opp. at 21 ("[N]othing in RFRA prohibits the Agencies from now employing the more straightforward choice of an exemption—much like the existing and unchallenged exemption for churches."); Little Sisters Opp. at 17 ("RFRA thus contemplates that the government may choose to grant discretionary benefits or exemptions to religious groups over and above those which are strictly required by RFRA."). As accurately summarized by the Little Sisters, the question is thus whether Congress has "delegated authority to the agencies to create exemptions to protect religious exercise," such that RFRA "operates as a floor on religious accommodation, not a ceiling." Little Sisters Opp. at 17. While addressed only relatively briefly by the parties, this argument raises what appears to be a complex issue at the intersection of RFRA, Free Exercise, and Establishment Clause jurisprudence.

The Court begins with a foundational premise: what the government is permitted to do under a statute or the Constitution presents a pure question of law for the courts, and the agencies' views on this legal question are entitled to no deference (except to the extent required by *Chevron* as to statutory

interpretation). *See Hobby Lobby*, 134 S. Ct. at 2775 n.30 (noting that "conscience amendment" rejected by Congress "would not have subjected religious-based objections to the judicial scrutiny called for by RFRA, in which a court must consider not only the burden of a requirement on religious adherents, but also the government's interest and how narrowly tailored the requirement is"); *see also Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 365 (2001) (recognizing the "long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees" (*citing City of Boerne v. Flores*, 521 U.S. 507, 519–24 (1997)); *Snoqualmie Indian Tribe*, 545 F.3d at 1212–13 ("An agency's interpretation or application of a statute is a question of law reviewed *de novo*," subject to *Chevron* deference to agency's permissible construction if statute is silent or ambiguous on a particular point). The Little Sisters acknowledged at oral argument that they do not contend the Court owes *Chevron* deference to the agencies' interpretation of RFRA.

On the other hand, the Federal Defendants assert, relying on *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009), that "[i]f agencies were legally prohibited from offering an exemption unless they concluded that no other possible accommodation would be consistent with RFRA, the result would be protracted and unnecessary litigation." Federal Opp. at 21–22. This argument is neither supported by the cited authority nor relevant.

First, *Ricci* does not support the Federal Defendants' argument. *Ricci* involved a city's decision not to certify the results of a promotion examination taken by its firefighters. 557 U.S. at 562. The city

based its decision on its apparent fear that it would be sued for adopting a practice that had a disparate impact on minority firefighters, in violation of Title VII. *Id*. at 563. The Supreme Court characterized its analysis as focused on how to "resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII." *Id*. at 584. The Court found that "applying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate impact provisions, allowing violations of one in the name of compliance with the other only in certain narrow circumstances"—specifically, when a government actor had a strong basis in evidence to conclude that race-conscious action was necessary to remedy past racial discrimination. *Id*. at 582–83. The Court described this standard as limiting employers' discretion in making race-based decisions "to cases in which there is a strong basis in evidence of disparate-impact liability," but said it was "not so restrictive that it allows employers to act only when there is a provable, actual violation." *Id*. at 583. Accordingly, the Court "h[e]ld only that under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action." *Id*. at 585.

The Court does not view *Ricci* as shedding any light on whether a federal agency has plenary discretion under RFRA to grant any exemption it chooses from an otherwise generally-applicable law passed by Congress. The Federal Defendants cite no

case applying *Ricci* in the RFRA context, or otherwise engaging in an analysis comparable to the Supreme Court's in that case.

Second, and more fundamentally, Federal Defendants' argument is irrelevant, because the courts, not the agencies, are the arbiters of what the law and the Constitution require. The Court questions the Little Sisters' contention that RFRA effected a wholesale delegation to executive agencies of the power to create exemptions to laws of general applicability in the first instance, based entirely on their own view of what the law requires.[14] As this case definitively demonstrates, such views can change dramatically based on little more than a change in administration. In any event, there is no dispute that both the prior and current Administrations have contended that they have administered the ACA in a manner consistent with RFRA. But the courts are not concerned, at all, with the Federal Defendants' desire to "avoid litigation," especially where that avoidance

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[14] The Court notes that *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002), the case cited by the Little Sisters, addressed *Congress's* power to carve out religious exemptions from statutes of general applicability. It is true that the ACA is subject to the requirements of RFRA. *See Hobby Lobby*, 134 S. Ct. at 2775 n.30 (explaining that "any Federal statutory law adopted after November 16, 1993 is subject to RFRA unless such law explicitly excludes such application by reference to RFRA (quoting 42 U.S.C. § 2000bb-3(b)) (internal quotations and emphasis omitted). But here, as noted earlier, in 2012 Congress declined to adopt a "conscience amendment" authorizing a "blanket exemption for religious or moral objectors" that was similar in many ways to the Final Rules at issue here. *See id*. at n.37 (majority opinion) and 2789 (Ginsburg, J., dissenting). Whether Congress could choose to amend the ACA to include exemptions like those in the Final Rules is not before the Court in this case.

means depriving a large number of women of their statutory rights under the ACA. Rather, the courts have a duty to independently decide whether the Final Rules comport with statutory and Constitutional requirements, as they have done in many analogous cases involving RFRA, and the Court rejects the Federal Defendants' suggestion that "an entity faced with potentially conflicting legal obligations should be afforded some leeway," Federal Opp. at 21. Ultimately, this Court (and quite possibly the Supreme Court) will have to decide the legal questions presented in this case, but no "leeway" will be given to the government's current position in doing so.

Moving to the substance of the issue, the Court first notes that the Ninth Circuit has held that a plaintiff's "failure to demonstrate a substantial burden under RFRA necessarily means that [it has] failed to establish a violation of the Free Exercise Clause, as RFRA's prohibition on statutes that burden religion is stricter than that contained in the Free Exercise Clause." *Fernandez v. Mukasey*, 520 F.3d 965, 966 n.1 (9th Cir. 2008). This holding is not dispositive of the dispute here, however, because the Supreme Court has said that "'there is room for play in the joints' between the Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (internal quotation and citation omitted).

As the Little Sisters note, "[g]ranting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation" of RFRA. 42 U.S.C. §

2000bb-4. But the Supreme Court has explained that "[a]t some point, accommodation may devolve into 'an unlawful fostering of religion.'" *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334–35 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145 (1987)). That is one of the core disputes here: given its plain impact on women's entitlement to coverage under the ACA, is the Religious Exemption permissible under RFRA even if it is not mandated by RFRA? The Court finds that Plaintiffs have raised at least "serious questions going to the merits" as to this legal question. *Alliance for the Wild Rockies*, 632 F.3d at 1131–32.

The Court knows of no decision that has squarely addressed this issue in the context of the ACA. As the Court has discussed above, the Religious Exemption has the effect of depriving female employees, students and other beneficiaries connected to exempted religious objectors of their statutory right under the ACA to seamlessly-provided contraceptive coverage at no cost. That deprivation appears to occur without even requiring any direct notice to the women affected by an objector's decision to assert the Religious Exemption. *See* 83 Fed. Reg. at 57,558. Courts, including the Supreme Court in *Hobby Lobby*, have recognized that a court evaluating a RFRA claim must "take adequate account of the burdens a requested accommodation may impose on non-beneficiaries." *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (citing *Cutter*, 544 U.S. at 720 (internal quotations omitted)); *see also Priests for Life*, 772 F.3d at 266 ("When the interests of religious adherents collide with an individual's access to a government program

supported by a compelling interest, RFRA calls on the government to reconcile the competing interests. In so doing, however, RFRA does not permit religious exercise to 'unduly restrict other persons, such as employees, in protecting their own interests, interest the law deems compelling.'") (*citing Hobby Lobby*, 134 S. Ct. at 2786–87 (Kennedy, J., concurring)); *Priests for Life*, 772 F.3d at 272 ("Limiting the exemption, but making the [accommodation] opt out available, limits the burdens that flow from organizations 'subjecting their employees to the religious views of the employer.'") (citing 77 Fed. Reg. at 8,728 (February 2012 final rule adopting definition of "religious employer" as set forth in 2011 IFR)).

In *Cutter*, the Supreme Court, in rejecting a facial constitutional attack on the Religious Land Use and Institutionalized Persons Act, cited *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), for the principle that courts "[p]roperly applying [RLUIPA] must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries." 544 U.S. at 720. The *Cutter* Court noted that if inmate requests for religious accommodations "impose[d] unjustified burdens on other institutionalized persons," "adjudication in as-applied challenges would be in order." *Id.* at 726. In dissent in *Hobby Lobby*, Justice Ginsburg observed that "[n]o tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect." 134 S. Ct. at 2801 (Ginsburg, J., dissenting). The *Hobby Lobby* majority, in turn, said that its holding "need not result in any detrimental

effect on any third party," because "the Government can readily arrange for other methods of providing contraceptives, without cost sharing, to employees who are unable to obtain them under their health-insurance plans due to their employers' religious objections," including by offering the accommodation. 134 S. Ct. at 2781 n.37 (citing discussion at 2781–82).

The arguments of the Federal Defendants, and especially the Little Sisters, thus raise questions that the Supreme Court did not reach in *Hobby Lobby*, *Zubik*, or *Wheaton College*. There is substantial debate among commentators as to how to assess the legality of accommodations not mandated by RFRA when those accommodations impose harms on third parties, given the statute's directive that it does not preclude accommodations allowed by the Establishment Clause. *Compare* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. L. Rev. 343 (2014) *with* Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?*, 106 Ky. L.J. 603 (2018). Understandably, given the large number of substantive and procedural issues that must be addressed at the preliminary injunction stage, the parties have provided relatively brief arguments on this central question of law. See Mot. At 14–15; Federal Opp. at 20–23; Little Sisters Opp. at 17–19.

In light of the discussion in *Hobby Lobby* and *Cutter* regarding the requirement that a court consider harm to third parties when evaluating an accommodation claim under RFRA, the Court concludes under *Alliance* that serious questions going

to the merits have been raised by the Plaintiffs as to their APA claim that the Religious Exemption is contrary to law. The *Alliance* standard recognizes that the "district court at the preliminary injunction stage is in a much better position to predict the likelihood of harm than the likelihood of success." *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011) (quoting *Alliance for the Wild Rockies*, 632 F.3d at 1139 (Mosman, J., concurring)). As the Ninth Circuit explained in a pre-*Alliance* case applying the standard, "'serious questions' refers to questions which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of any judgment by altering the status quo." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). "Serious questions are 'substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.'" *Id.* (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1952) (Frank, J.)). Under these circumstances, the Court finds that this case involves just such substantial and difficult questions.

This is especially true given the Federal Defendants' complete reversal on the key question of whether the government has a compelling interest in providing seamless and cost-free contraceptive coverage to women under the ACA. The *Hobby Lobby* majority assumed, without deciding, that "the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA." 134 S. Ct. at 2780.

Justice Kennedy concurred, stating that it was "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). Until the reversal that led to the IFRs and Final Rules, the agencies agreed that this interest was compelling. *See* Supplemental Brief for Respondents at 1, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418), 2016 WL 1445915, at *1 (explaining that rules in existence in April 2016 "further[ed] the compelling interest in ensuring that women covered by every type of health plan receive full and equal health coverage, including contraceptive coverage").

The Court believes Plaintiffs are likely correct that "the Rules provide no new facts and no meaningful discussion that would discredit their prior factual findings establishing the beneficial and essential nature of contraceptive healthcare for women," Reply at 11. Instead, the Final Rules on this point rest, at bottom, on new *legal* assertions by the agencies. *See, e.g.*, 83 Fed. Reg. at 57,547 ("[T]he Departments now believe the administrative record on which the Mandate rested was—and remains—insufficient to meet the high threshold to establish a compelling governmental interest in ensuring that women covered by plans of objecting organizations receive cost-free coverage through those plans."). Given the "serious reliance interests" of women who would lose coverage to which they are statutorily entitled if the Final Rules go into effect, the Court believes that Plaintiffs are also likely to prevail on their claim that the agencies failed to provide "a

reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009). As this case proceeds to a merits determination, the Court will have to determine how to develop the relevant record regarding the compelling interest question. And the parties' positions on the legal issues described above will need to be laid out in substantially greater detail for the Court to sufficiently address the merits of this claim on a full record in the next stages of the case.

2. Plaintiffs are likely to succeed in showing that the Moral Exemption is "not in accordance with" the ACA, and thus violates the APA.

Further, Plaintiffs are likely to succeed in their argument that the Moral Exemption is not in accordance with the ACA. In contrast to the Religious Exemption, there is no dispute that the Moral Exemption implicates neither RFRA nor the Religion Clauses of the Constitution. Despite this, Intervenor March for Life's brief focuses primarily on defending the Religious Exemption, to which March for Life is not entitled. *See* March for Life Opp. at 3–4 (acknowledging that March for Life is a "pro-life, non-religious entit[y]"; *compare* March for Life Opp. at 6 ("RFRA requires the religious exemption"), 10 ("[T]he Final Rules are an entirely permissible accommodation of religion, which as a general matter does not violate the Establishment Clause."), 10 ("[T]he Final Rules do not compel women to participate in the religious beliefs of their employers, but rather merely ensure that a religious employer will not be

conscripted to provide what his or her conscience will not permit."). The main purpose of the March for Life brief appears to be to establish that the Religious Exemption could not possibly run afoul of the Establishment Clause because the Moral Exemption exists. *See id*. at 9 ("[T]he Final Rules protect both religious . . . and non-religious . . . actors, thereby dispelling any argument that the federal government intended to advance religious interests.").

Whatever complexities may exist with regard to the Religious Exemption, as discussed above, they do not apply to the Moral Exemption. Congress mandated the coverage that is the subject matter of this dispute, and rejected a "conscience amendment" that would exempt entities like March for Life from this generally-applicable statutory requirement. The Final Rules note that "[o]ver many decades, Congress has protected conscientious objections including based on moral convictions in the context of health care and human services, and including health coverage, even as it has sought to promote access to health services." 83 Fed. Reg. at 57,594. But that highlights the problem: here, it was the agencies, not Congress, that implemented the Moral Exemption, and it is inconsistent with the language and purpose of the statute it purports to interpret. The Court finds that Plaintiffs are likely to prevail on their claim that the Moral Exemption is contrary to the ACA, and thus unlawful under the APA. Again, the Court does not dispute the sincerity, or minimize the substance, of March for Life's moral objection.

3. Plaintiffs are likely to suffer irreparable harm unless the Court enjoins the Final Rules.

The Court finds that the Plaintiffs are likely to suffer irreparable harm unless the Final Rules are enjoined to maintain the status quo pending resolution of the case on the merits. In its order remanding this case, the Ninth Circuit found that "it is reasonably probable that the states will suffer economic harm from the IFRs." *California*, 911 F.3d at 581; *see also id*. at 571 ("The states show, with reasonable probability, that the IFRs will first lead to women losing employer-sponsored contraceptive coverage, which will then result in economic harm to the states."). As the Ninth Circuit explained, economic harm is not recoverable for a violation of the APA. *See id*. at 581 (citing 5 U.S.C. § 702 (permitting "relief other than money damages")); *see also Haines v. Fed. Motor Carrier Safety Admin.*, 814 F.3d 417, 426 (6th Cir. 2016) (federal courts do not have jurisdiction to adjudicate suits seeking monetary damages under the APA).[15]

The States have equally shown a likelihood of irreparable injury from the Final Rules. The Final Rules themselves estimate that tens of thousands of women nationwide will lose contraceptive coverage, and suggest that these women may be able to obtain substitute services at Title X family-planning clinics. *See* 83 Fed. Reg. at 57,551 n.26 (up to 126,400 women nationwide will lose coverage as result of Religious

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[15] The Federal Defendants contend the Ninth Circuit's "conclusion was in error," Federal Opp. at 24, presumably to preserve their argument for the record.

Exemption); *id.* at 57,551 (suggesting Title X family-planning clinics as alternative to insurer-provided contraceptives). The States have submitted substantial evidence documenting the fiscal harm that will flow to them as a result of the Final Rules. *See, e.g.*, Cantwell Decl., Dkt. No. 174-4 ¶¶ 16–18 (Final Rules will result in more women becoming eligible for California's Family Planning, Access, Care, and Treatment program, meaning that "state dollars may be diverted to provide" contraceptive coverage); Tobias Decl., Dkt. No. 174-33 ¶ 5 (exemptions in Final Rules "will result in more women receiving" New York Family Planning Program services, thus putting program at "risk [of] being overwhelmed by the increase in patients"); Rattay Decl., Dkt. No. 174-30 ¶ 7 (Final Rules "will contribute to an increase in Delaware's nationally high unintended pregnancy rate as women forego needed contraception and other services"); Moracco Decl., Dkt. No. 174-23 ¶ 5 (State of Minnesota "may bear a financial risk when women lose contraceptive coverage" because state is obligated to pay for child delivery and newborn care for children born to low-income mothers). Thus, Plaintiffs have satisfied the irreparable harm prong of the inquiry.

4. The balance of the equities tips sharply in Plaintiffs' favor, and the public interest favors granting preliminary injunctive relief to preserve the status quo pending resolution of the merits.

Plaintiffs also prevail on the balance of equities and public interest analyses. When the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest

factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Broadly speaking, there are two interests at stake in that balance: the interest in ensuring that health plans cover contraceptive services with no cost-sharing, as provided for under the ACA, and the interest in protecting "the sincerely held religious [and moral] objections of certain entities and individuals." *See* 83 Fed. Reg. at 57,537; *see also* 83 Fed. Reg. at 57,593.

With these interests in mind, the Court concludes that the balance of equities tips sharply in Plaintiffs' favor. As the Court found previously, Plaintiffs face potentially dire public health and fiscal consequences from the implementation of the Final Rules. Plaintiffs point out that under the Final Rules, contraceptive coverage for employees and beneficiaries in existing health plans could be dropped with 60 days' notice that the employer is revoking its use of the accommodation process, or when a new plan year begins. *See* Mot. at 20. These changes likely will increase the Plaintiffs' costs of providing contraceptive care to their residents. *See* Declaration of Phuong H. Nguyen, Dkt. No. 174-26 ¶¶ 11–15 (Final Rules likely to increase demand for no- and low-cost contraception services funded by State of California); Declaration of Jennifer Welch, Dkt. No. 174-35 ¶¶ 10–12 (some women who lose insurer-provided contraceptive coverage as result of Final Rules likely to enroll in State of Illinois's Medicaid program). Plaintiffs persuasively submit that the suggestion in the Final Rules that women turn to Title X clinics actually will increase the number of women who will have to be covered by state programs. Mot. at 23 (citing Cantwell Decl., Dkt. No. 174-4 ¶¶ 16–18; Tobias Decl., Dkt. No.

174-33 ¶ 5). Moreover, Plaintiffs face substantial costs stemming from a higher rate of unintended pregnancies that are likely to occur if women lose access to the seamless, no-cost contraceptive coverage afforded under the rules now in place. *See* Alexander-Scott Decl, Dkt. No. 174-7 ¶ 3 (unintended pregnancies likely to result from Final Rules will impose costs on State of Rhode Island); Wilson Decl., Dkt. No. 174-38 ¶ 5 (unintended pregnancies likely to result from Final Rules will impose costs on State of North Carolina). In essence, for many thousands of women in the Plaintiff States, the mandatory coverage structure now in place under the ACA will disappear, requiring them to piece together coverage from Title X clinics or state agencies, or to pay for such coverage themselves. This reality will cause substantial, and irreparable, harm to the Plaintiff States, and their showing compellingly establishes that the Final Rules do not in practice "ensur[e] that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'" *Cf. Zubik*, 136 S. Ct. at 1560.

On the other hand, maintaining the status quo that preceded the Final Rules and the 2017 IFRs—in which eligible entities still would be permitted to avail themselves of the exemption or the accommodation—does not constitute an equivalent harm to the Federal Defendants or Intervenors pending resolution of the merits. The Federal Defendants cite *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers), for the premise that "the government suffers irreparable institutional injury whenever its laws are set aside by a court." Federal Opp. at 24. But *Maryland* actually held that "any time a State is

enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." 133 S. Ct. at 3 (citation omitted). Here, of course, the "representatives of the people"—the United States Congress—passed the ACA, and the precise question in this case is whether the Executive's attempt to implement the Final Rules is inconsistent with Congress's directives.

The Federal Defendants also note—correctly—that "the government and the public at large have a substantial interest in protecting religious liberty and conscience." Federal Opp. at 24; *see also California v. Azar*, 911 F.3d at 582–83 (acknowledging that "free exercise of religion and conscience is undoubtedly, fundamentally important," and recognizing that "[r]egardless of whether the accommodation violates RFRA, some employers have sincerely-held religious and moral objections to the contraceptive coverage requirement."). However, it is significant that after the Court enjoined the IFRs in December 2017, the Federal Defendants and Intervenors stipulated to a stay of this case pending resolution of their appeals, which kept the existing structure, including the accommodation, in place for a year and delayed resolution of the merits of the claims. On balance, because the Court has concluded that Plaintiffs are likely to show that the Final Rules are not mandated by RFRA, and that the existing accommodation does not substantially burden religious exercise, it finds that maintaining the status quo for the time being, pending a prompt resolution of the merits of Plaintiffs' claims, is warranted based on the record

presented.[16] Plaintiffs have shown that the balance of equities tips sharply in their favor, and that the public interest favors granting a preliminary injunction. Because the standard set forth in *Winter* is met, the Court grants Plaintiffs' motion.[17]

D. This Preliminary Injunction Enjoins Enforcement of the Final Rules Only In the Plaintiff States.

Plaintiffs ask the Court to grant a nationwide injunction, contending that the Court "cannot simply draw a line around the plaintiff States and impose an injunction only as to those States to ensure complete relief." Mot. at 25. Federal Defendants and March for Life respond that even if the Court grants equitable relief, a nationwide injunction is inappropriate. *See* Federal Opp. at 25; March for Life Opp. at 22–24.

> "The scope of an injunction is within the broad discretion of the district court."

TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 829 (9th Cir. 2011). "Crafting a preliminary

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[16] Without question, religious and moral objectors similarly situated to the Little Sisters and March for Life are directly affected by a preliminary injunction against the implementation of the Final Rules. The Court notes that these two particular intervenors, and apparently many others, are subject to court orders prohibiting the Federal Defendants from enforcing the mandate or accommodation requirements against them. Those orders (and any other similar orders) are unaffected by the injunction entered here. *See* Little Sisters Opp. at 7 (listing orders); March for Life Opp. at 4.

[17] Because the Court finds that entry of a preliminary injunction is warranted on the basis discussed above, it need not at this time consider the additional bases for injunctive relief advanced by Plaintiffs.

injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). A nationwide injunction is proper when "necessary to give Plaintiffs a full expression of their rights." *Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 2392 (2018).

This is, of course, not the first time the Court has had to determine the proper geographic scope of a preliminary injunction in this case. In response to the Plaintiffs' challenge to the IFRs, the Court issued a nationwide injunction. *See* Dkt. No. 105 at 28–29. On appeal, the Ninth Circuit held that the nationwide scope of the injunction was overbroad and an abuse of discretion. *California*, 911 F.3d at 585.

In doing so, the Ninth Circuit made clear that injunctive relief "must be no broader and no narrower than necessary to redress the injury shown by the plaintiff states." *Id*. The court reasoned that prohibiting enforcement of the IFRs in the Plaintiff States only, rather than across the entire country, "would provide complete relief" because it "would prevent the economic harm extensively detailed in the record." *Id*. at 584. The court cautioned that "[d]istrict judges must require a showing of nationwide impact or sufficient similarity to the plaintiff states to foreclose litigation in other districts." *Id*. And the Ninth Circuit stressed that "nationwide injunctive relief may be inappropriate where a regulatory challenge involves important or difficult questions of law, which might benefit from development in different factual contexts and in multiple decisions by

the various courts of appeals." *Id*. at *15 (citation omitted). As discussed at length above, the issues presented on this motion, much more than the notice-and-comment requirement that was the basis of the Court's prior order granting a preliminary injunction, implicate exactly these types of important and difficult questions of law.

The Court fully recognizes that limiting the scope of this injunction to the Plaintiff States means that women in other states are at risk of losing access to cost-free contraceptives when the Final Rules take effect. Plaintiffs also contend that women who reside in their States may still lose their entitlement to cost-free contraceptives because they receive their health insurance coverage from an employer or family member located elsewhere. But Plaintiffs provide little evidence of the effect this will have on their own States. *Cf*. Declaration of Dr. Jennifer Childs-Roshak, Dkt. No. 174-8 ¶ 16 (discussing effect in Massachusetts); Declaration of Robert Pomales, Dkt. No. 174-28 ¶ 9 (same); Mot. at 25 n.24 (California hosts 25,000 students from out-of-state and New York hosts 35,000). Plaintiffs do note that women who live in the Plaintiff States may live in one state but commute to another state for work. *See* Reply at 15 n.17 (noting high percentage of Maryland, Virginia, Delaware, and District of Columbia residents who commute to work in another state).

On the present record, the Court cannot conclude that the high threshold set by the Ninth Circuit for a nationwide injunction, in light of the concerns articulated in the *California* opinion, has been met. The Court also finds it significant that a judge in the District of Massachusetts found in 2018 that the state

lacked standing to proceed as to claims similar to those here, in an order that has been appealed to the First Circuit. *See Massachusetts v. United States Dep't of Health & Human Servs.*, 301 F. Supp. 3d 248, 250 (D. Mass. 2018). This parallel litigation highlights the potential direct legal conflicts that could result were this Court to enter a nationwide injunction. Accordingly, this preliminary injunction prohibits the implementation of the Final Rules in the Plaintiff States only.

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IV. CONCLUSION

For the reasons set forth above, Plaintiffs' motion for a preliminary injunction is **GRANTED**, effective as of the date of this order. A case management conference is set for January 23, 2019 at 2:00 p.m. At the case management conference, the parties should be prepared to discuss a plan for expeditiously resolving this matter on the merits, whether through a bench trial, cross-motions for summary judgment, or other means. The parties shall submit a joint case management statement by January 18, 2019.

IT IS SO ORDERED.

Dated: 1/13/19

Haywood S. Gilliam, Jr.

HAYWOOD S. GILLIAM, JR.
United States District Judge

Excerpts from United States Constitution

Article III, § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . . [and] to Controversies to which the United States shall be a Party . . . .

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Amendment XIV, § 1

. . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Excerpts of 5 U.S.C. 706

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

* * * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * * * *

26 U.S.C. 4980D

Failure to meet certain group health plan requirements

(a) General rule.--There is hereby imposed a tax on any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements).

(b) Amount of tax.--

(1) In general.--The amount of the tax imposed by subsection (a) on any failure shall be $100 for each day in the noncompliance period with respect to each individual to whom such failure relates.

(2) Noncompliance period.--For purposes of this section, the term "noncompliance period" means, with respect to any failure, the period--

(A) beginning on the date such failure first occurs, and

(B) ending on the date such failure is corrected.

(3) Minimum tax for noncompliance period where failure discovered after notice of examination.--Notwithstanding paragraphs (1) and (2) of subsection (c)--

(A) In general.--In the case of 1 or more failures with respect to an individual--

(i) which are not corrected before the date a notice of examination of income tax liability is sent to the employer, and

(ii) which occurred or continued during the period under examination,

the amount of tax imposed by subsection (a) by reason of such failures with respect to such individual shall not be less than the lesser of $2,500 or the amount of tax which would be imposed by subsection (a) without regard to such paragraphs.

(B) Higher minimum tax where violations are more than de minimis.--To the extent violations for which any person is liable under subsection (e) for any year are more than de minimis, subparagraph (A) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(C) Exception for church plans.--This paragraph shall not apply to any failure under a church plan (as defined in section 414(e)).

(c) Limitations on amount of tax.--

(1) Tax not to apply where failure not discovered exercising reasonable diligence.--No tax shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such tax did not know, and exercising reasonable diligence would not have known, that such failure existed.

(2) Tax not to apply to failures corrected within certain periods.--No tax shall be imposed by subsection (a) on any failure if--

(A) such failure was due to reasonable cause and not to willful neglect, and

(B)(i) in the case of a plan other than a church plan (as defined in section 414(e)), such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such tax knew, or exercising reasonable diligence would have known, that such failure existed, and

(ii) in the case of a church plan (as so defined), such failure is corrected before the close of the correction period (determined under the rules of section 414(e)(4)(C)).

(3) Overall limitation for unintentional failures.--In the case of failures which are due to reasonable cause and not to willful neglect--

(A) Single employer plans.--

(i) In general.--In the case of failures with respect to plans other than specified multiple employer health plans, the tax imposed by subsection (a) for failures during the taxable year of the employer shall not exceed the amount equal to the lesser of--

(I) 10 percent of the aggregate amount paid or incurred by the employer (or predecessor employer) during the preceding taxable year for group health plans, or

(II) $500,000.

(ii) Taxable years in the case of certain controlled groups.--For purposes of this subparagraph, if not all persons who are treated as a single employer for purposes of this section have the same taxable year, the taxable years taken into account shall be determined under principles similar to the principles of section 1561.

(B) Specified multiple employer health plans.--

(i) In general.--In the case of failures with respect to a specified multiple employer health plan, the tax imposed by subsection (a) for failures during the taxable year of the trust forming part of such plan shall not exceed the amount equal to the lesser of--

(I) 10 percent of the amount paid or incurred by such trust during such taxable year to provide medical care (as defined in section 9832(d)(3)) directly or through insurance, reimbursement, or otherwise, or

(II) $500,000.

For purposes of the preceding sentence, all plans of which the same trust forms a part shall be treated as one plan.

(ii) Special rule for employers required to pay tax.--If an employer is assessed a tax imposed by subsection (a)

by reason of a failure with respect to a specified multiple employer health plan, the limit shall be determined under subparagraph (A) (and not under this subparagraph) and as if such plan were not a specified multiple employer health plan.

(4) Waiver by Secretary.--In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the tax imposed by subsection (a) to the extent that the payment of such tax would be excessive relative to the failure involved.

(d) Tax not to apply to certain insured small employer plans.--

(1) In general.--In the case of a group health plan of a small employer which provides health insurance coverage solely through a contract with a health insurance issuer, no tax shall be imposed by this section on the employer on any failure (other than a failure attributable to section 9811) which is solely because of the health insurance coverage offered by such issuer.

(2) Small employer.--

(A) In general.--For purposes of paragraph (1), the term "small employer" means, with respect to a calendar year and a plan year, an employer who employed an average of at least 2 but not more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year. For purposes of the

preceding sentence, all persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as one employer.

(B) Employers not in existence in preceding year.--In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is a small employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(C) Predecessors.--Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.

(3) Health insurance coverage; health insurance issuer.--For purposes of paragraph (1), the terms "health insurance coverage" and "health insurance issuer" have the respective meanings given such terms by section 9832.

(e) Liability for tax.--The following shall be liable for the tax imposed by subsection (a) on a failure:

(1) Except as otherwise provided in this subsection, the employer.

(2) In the case of a multiemployer plan, the plan.

(3) In the case of a failure under section 9803 (relating to guaranteed renewability) with respect to a plan described in subsection (f)(2)(B), the plan.

(f) Definitions.--For purposes of this section--

(1) Group health plan.--The term "group health plan" has the meaning given such term by section 9832(a).

(2) Specified multiple employer health plan. --The term "specified multiple employer health plan" means a group health plan which is--

(A) any multiemployer plan, or

(B) any multiple employer welfare arrangement (as defined in section 3(40) of the Employee Retirement Income Security Act of 1974, as in effect on the date of the enactment of this section).

(3) Correction.--A failure of a group health plan shall be treated as corrected if--

(A) such failure is retroactively undone to the extent possible, and

(B) the person to whom the failure relates is placed in a financial position which is as good as such person would have been in had such failure not occurred.

26 U.S.C. 4980H

Shared responsibility for employers regarding health coverage

(a) Large employers not offering health coverage.--If--

> **(1)** any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and
>
> **(2)** at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.--

> **(1) In general.**--If--
>
> > **(A)** an applicable large employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum

essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to $^1/_{12}$ of $3,000.

(2) Overall limitation.--The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

[**(3) Repealed.** Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169]

(c) Definitions and special rules.--For purposes of this section--

(1) Applicable payment amount.--The term "applicable payment amount" means, with respect to any month, $^1/_{12}$ of $2,000.

(2) Applicable large employer.--

(A) In general.--The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.

(B) Exemption for certain employers.--

(i) In general.--An employer shall not be considered to employ more than 50 full-time employees if--

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers.--The term "seasonal worker" means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including workers covered by section 500.20(s)(1) of title 29, Code of Federal Regulations and retail workers employed exclusively during holiday seasons.

(C) Rules for determining employer size.--For purposes of this paragraph--

(i) Application of aggregation rule for employers.--All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year.--In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) Predecessors.--Any reference in this subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties.--

(i) In general.--The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating--

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) Aggregation.--In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated among such persons ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees.--Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(F) Exemption for health coverage under TRICARE or the Department of Veterans Affairs.--Solely for purposes of determining whether an employer is an applicable large employer under this paragraph for any month, an individual shall not be taken into account as an employee for such month if such individual has medical coverage for such month under--

(i) chapter 55 of title 10, United States Code, including coverage under the TRICARE program, or

(ii) under a health care program under chapter 17 or 18 of title 38, United States Code, as determined by the Secretary of Veterans Affairs, in coordination with the Secretary of Health and Human Services and the Secretary.

(3) Applicable premium tax credit and cost-sharing reduction.--The term "applicable premium tax credit and cost-sharing reduction" means--

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee.--

(A) In general.--The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service.--The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.--

(A) In general.--In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of--

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(B) Rounding.--If the amount of any increase under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions.--Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible.--For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) Administration and procedure.--

(1) In general.--Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment.--The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or

other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc.--The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

26 U.S.C. 5000A

Requirement to maintain minimum essential coverage

(a) Requirement to maintain minimum essential coverage.--An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

(b) Shared responsibility payment.--

(1) In general.--If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).

(2) Inclusion with return.--Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

(3) Payment of penalty.--If an individual with respect to whom a penalty is imposed by this section for any month--

(A) is a dependent (as defined in section 152) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

(B) files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

(c) Amount of penalty.--

(1) In general.--The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of--

(A) the sum of the monthly penalty amounts determined under paragraph (2) for months in the taxable year during which 1 or more such failures occurred, or

(B) an amount equal to the national average premium for qualified health plans which have a bronze level of coverage, provide coverage for the applicable family size involved, and are offered through Exchanges for plan years beginning in the calendar year with or within which the taxable year ends.

(2) Monthly penalty amounts.--For purposes of paragraph (1)(A), the monthly penalty amount with respect to any taxpayer for any month during which any failure described in subsection (b)(1) occurred is an amount equal to $^1/_{12}$ of the greater of the following amounts:

(A) Flat dollar amount.--An amount equal to the lesser of--

(i) the sum of the applicable dollar amounts for all individuals with respect

to whom such failure occurred during such month, or

(ii) 300 percent of the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

(B) Percentage of income.--An amount equal to the following percentage of the excess of the taxpayer's household income for the taxable year over the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer for the taxable year:

(i) 1.0 percent for taxable years beginning in 2014.

(ii) 2.0 percent for taxable years beginning in 2015.

(iii) Zero percent for taxable years beginning after 2015.

(3) Applicable dollar amount.--For purposes of paragraph (1)--

(A) In general.--Except as provided in sub-paragraphs (B) and (C), the applicable dollar amount is $0.

(B) Phase in.--The applicable dollar amount is $95 for 2014 and $325 for 2015.

(C) Special rule for individuals under age 18.--If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall

be equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.

[**(D) Repealed.** Pub.L. 115-97, Title I, § 11081(a)(2)(B), Dec. 22, 2017, 131 Stat. 2092]

(4) Terms relating to income and families.--For purposes of this section--

(A) Family size.--The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year.

(B) Household income.--The term "household income" means, with respect to any taxpayer for any taxable year, an amount equal to the sum of--

(i) the modified adjusted gross income of the taxpayer, plus

(ii) the aggregate modified adjusted gross incomes of all other individuals who--

(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

(II) were required to file a return of tax imposed by section 1 for the taxable year.

(C) Modified adjusted gross income.--The term "modified adjusted gross income" means adjusted gross income increased by--

(i) any amount excluded from gross income under section 911, and

(ii) any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax.

[**(D) Repealed**. Pub.L. 111-152, Title I, § 1002(b)(1), Mar. 30, 2010, 124 Stat. 1032]

(d) Applicable individual.--For purposes of this section--

(1) In general.--The term "applicable individual" means, with respect to any month, an individual other than an individual described in paragraph (2), (3), or (4).

(2) Religious exemptions.--

(A) Religious conscience exemptions.--

(i) In general.--Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act which certifies that--

(I) such individual is a member of a recognized religious sect or division thereof which is described in section 1402(g)(1), and is adherent of established tenets or teachings of such sect or division as described in such section; or

(II) such individual is a member of a religious sect or division thereof which is not described in section

1402(g)(1), who relies solely on a religious method of healing, and for whom the acceptance of medical health services would be inconsistent with the religious beliefs of the individual.

(ii) Special rules.--

(I) Medical health services defined.--For purposes of this subparagraph, the term "medical health services" does not include routine dental, vision and hearing services, midwifery services, vaccinations, necessary medical services provided to children, services required by law or by a third party, and such other services as the Secretary of Health and Human Services may provide in implementing section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act.

(II) Attestation required.--Clause (i)(II) shall apply to an individual for months in a taxable year only if the information provided by the individual under section 1411(b)(5)(A) of such Act includes an attestation that the individual has not received medical health services during the preceding taxable year.

(B) Health care sharing ministry.--

(i) In general.--Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

(ii) Health care sharing ministry.--The term "health care sharing ministry" means an organization--

(I) which is described in section 501(c)(3) and is exempt from taxation under section 501(a),

(II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,

(III) members of which retain membership even after they develop a medical condition,

(IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and

(V) which conducts an annual audit which is performed by an independent certified public accounting firm in

accordance with generally accepted accounting principles and which is made available to the public upon request.

(3) Individuals not lawfully present.--Such term shall not include an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.

(4) Incarcerated individuals.--Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

(e) Exemptions.--No penalty shall be imposed under subsection (a) with respect to--

(1) Individuals who cannot afford coverage. --

(A) In general.--Any applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act. For purposes of applying this subparagraph, the taxpayer's household income shall be increased by any exclusion from gross income for any portion of the required contribution made through a salary reduction arrangement.

(B) Required contribution.--For purposes of this paragraph, the term "required contribution" means--

(i) in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-employer-sponsored plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage, or

(ii) in the case of an individual eligible only to purchase minimum essential coverage described in subsection (f)(1)(C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified health plan through the Exchange), reduced by the amount of the credit allowable under section 36B for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

(C) Special rules for individuals related to employees.--For purposes of sub-paragraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relation-ship to an employee, the determination under

subparagraph (A) shall be made by reference to[1] required contribution of the employee.

(D) Indexing.--In the case of plan years beginning in any calendar year after 2014, subparagraph (A) shall be applied by substituting for "8 percent" the percentage the Secretary of Health and Human Services determines reflects the excess of the rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period.

(2) Taxpayers with income below filing threshold.--Any applicable individual for any month during a calendar year if the individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act is less than the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer.

(3) Members of Indian tribes.--Any applicable individual for any month during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6)).

(4) Months during short coverage gaps.--

(A) In general.--Any month the last day of which occurred during a period in which the applicable individual was not covered by minimum essential coverage for a continuous period of less than 3 months.

(B) Special rules.--For purposes of applying this paragraph--

(i) the length of a continuous period shall be determined without regard to the calendar years in which months in such period occur,

(ii) if a continuous period is greater than the period allowed under subparagraph (A), no exception shall be provided under this paragraph for any month in the period, and

(iii) if there is more than 1 continuous period described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph shall only apply to months in the first of such periods.

The Secretary shall prescribe rules for the collection of the penalty imposed by this section in cases where continuous periods include months in more than 1 taxable year.

(5) Hardships.--Any applicable individual who for any month is determined by the Secretary of Health and Human Services under section 1311(d)(4)(H) to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

(f) Minimum essential coverage.--For purposes of this section--

(1) In general.--The term "minimum essential coverage" means any of the following:

(A) Government sponsored programs.--Coverage under--

(i) the Medicare program under part A of title XVIII of the Social Security Act,

(ii) the Medicaid program under title XIX of the Social Security Act,

(iii) the CHIP program under title XXI of the Social Security Act or under a qualified CHIP look-alike program (as defined in section 2107(g) of the Social Security Act),

(iv) medical coverage under chapter 55 of title 10, United States Code, including coverage under the TRICARE program;

(v) a health care program under chapter 17 or 18 of title 38, United States Code, as determined by the Secretary of Veterans Affairs, in coordination with the Secretary of Health and Human Services and the Secretary,

(vi) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers); or

(vii) the Nonappropriated Fund Health Benefits Program of the Department of Defense, established under section 349 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337; 10 U.S.C. 1587 note).

(B) Employer-sponsored plan.--Coverage under an eligible employer-sponsored plan.

(C) Plans in the individual market.--Coverage under a health plan offered in the individual market within a State.

(D) Grandfathered health plan.--Coverage under a grandfathered health plan.

(E) Other coverage.--Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health and Human Services, in coordination with the Secretary, recognizes for purposes of this subsection.

(2) Eligible employer-sponsored plan.--The term "eligible employer-sponsored plan" means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is--

(A) a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act), or

(B) any other plan or coverage offered in the small or large group market within a State.

Such term shall include a grandfathered health plan described in paragraph (1)(D) offered in a group market.

(3) Excepted benefits not treated as minimum essential coverage.--The term "minimum essential coverage" shall not include health insurance coverage which consists of coverage of excepted benefits--

(A) described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act; or

(B) described in paragraph (2), (3), or (4) of such subsection if the benefits are provided under a separate policy, certificate, or contract of insurance.

(4) Individuals residing outside United States or residents of territories.--Any applicable individual shall be treated as having minimum essential coverage for any month--

(A) if such month occurs during any period described in subparagraph (A) or (B) of section 911(d)(1) which is applicable to the individual, or

(B) if such individual is a bona fide resident of any possession of the United States (as determined under section 937(a)) for such month.

(5) Insurance-related terms.--Any term used in this section which is also used in title I of the Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

(g) Administration and procedure.--

(1) In general.--The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Special rules.--Notwithstanding any other provision of law--

(A) Waiver of criminal penalties.--In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

(B) Limitations on liens and levies.--The Secretary shall not--

(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

(ii) levy on any such property with respect to such failure.

[1] So in original. Probably should be followed by "the".

42 U.S.C. 300gg-13(a)

Coverage of preventative 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[1]

(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.

(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.

(5) for the purposes of this chapter, and for the purposes of any other provision of law, the current recommendations of the United States Preventive Service Task Force regarding breast cancer

screening, mammography, and prevention shall be considered the most current other than those issued in or around November 2009.

Nothing in this subsection shall be construed to prohibit a plan or issuer from providing coverage for services in addition to those recommended by United States Preventive Services Task Force or to deny coverage for services that are not recommended by such Task Force.

(b) Interval

(1) In general

The Secretary shall establish a minimum interval between the date on which a recommendation described in subsection (a)(1) or (a)(2) or a guideline under subsection (a)(3) is issued and the plan year with respect to which the requirement described in subsection (a) is effective with respect to the service described in such recommendation or guideline.

(2) Minimum

The interval described in paragraph (1) shall not be less than 1 year.

(c) Value-based insurance design

The Secretary may develop guidelines to permit a group health plan and a health insurance issuer offering group or individual health insurance coverage to utilize value-based insurance designs.

[1] So in original. The word "and" probably should not appear.

42 U.S.C. 2000bb-1

Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Excerpt of 42 U.S.C. 2000bb-2

Definitions

As used in this chapter--

> **(1)** the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

* * * * *

Excerpt of 42 U.S.C. 2000bb-3

Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

* * * * *

Excerpt of 45 C.F.R. 147.131 (2013)

Exemption and accommodations in connection with coverage of preventive health services.

(a) *Religious employers*. In issuing guidelines under §147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

* * * * *

45 C.F.R. 147.131

Accommodations in connection with coverage of certain preventive health services.

(a)–(b) [Reserved]

(c) Eligible organizations for optional accommodation. An eligible organization is an organization that meets the criteria of paragraphs (c)(1) through (3) of this section.

(1) The organization is an objecting entity described in § 147.132(a)(1)(i) or (ii), or 45 CFR 147.133(a)(1)(i) or (ii).

(2) Notwithstanding its exempt status under § 147.132(a) or 147.133, the organization voluntarily seeks to be considered an eligible organization to invoke the optional accommodation under paragraph (d) of this section; and

(3) The organization self-certifies in the form and manner specified by the Secretary or provides notice to the Secretary as described in paragraph (d) of this section. To qualify as an eligible organization, the organization must make such self-certification or notice available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (d) of this section applies. The self-certification or notice must be executed by a person authorized to make the certification or provide the notice on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(4) An eligible organization may revoke its use of the accommodation process, and its issuer must provide participants and beneficiaries written notice of such revocation, as specified herein.

(i) Transitional rule—If contraceptive coverage is being offered on January 14, 2019, by an issuer through the accommodation process, an eligible organization may give 60–days notice pursuant to section 2715(d)(4) of the PHS Act and § 147.200(b), if applicable, to revoke its use of the accommodation process (to allow for the provision of notice to plan participants in cases where contraceptive benefits will no longer be provided). Alternatively, such eligible organization may revoke its use of the accommodation process effective on the first day of the first plan year that begins on or after 30 days after the date of the revocation.

(ii) General rule—In plan years that begin after January 14, 2019, if contraceptive coverage is being offered by an issuer through the accommodation process, an eligible organization's revocation of use of the accommodation process will be effective no sooner than the first day of the first plan year that begins on or after 30 days after the date of the revocation.

(d) Optional accommodation—insured group health plans—

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers may voluntarily elect an optional accommodation under which its health

insurance issuer(s) will provide payments for all or a subset of contraceptive services for one or more plan years. To invoke the optional accommodation process:

(i) The eligible organization or its plan must contract with one or more health insurance issuers.

(ii) The eligible organization must provide either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of the Department of Health and Human Services that it is an eligible organization and of its objection as described in § 147.132 or 147.133 to coverage for all or a subset of contraceptive services.

(A) When a self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 147.130(a)(iv).

(B) When a notice is provided to the Secretary of the Department of Health and Human Services, the notice must include the name of the eligible organization; a statement that it objects as described in § 147.132 or 147.133 to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable) but that it would like to elect the optional accommodation process; the plan name and type (that is, whether it is a student health insurance plan within the meaning of § 147.145(a) or a church plan within the

meaning of section 3(33) of ERISA); and the name and contact information for any of the plan's health insurance issuers. If there is a change in any of the information required to be included in the notice, the eligible organization must provide updated information to the Secretary of the Department of Health and Human Services for the optional accommodation to remain in effect. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of the Deparement of Health and Human Services has received a notice under paragraph (d)(1)(ii) of this section and describing the obligations of the issuer under this section.

(2) If an issuer receives a copy of the self-certification from an eligible organization or the notification from the Department of Health and Human Services as described in paragraph (d)(1)(ii) of this section and does not have an objection as described in § 147.132 or 147.133 to providing the contraceptive services identified in the self-certification or the notification from the Department of Health and Human Services, then the issuer will provide payments for contraceptive services as follows—

(i) The issuer must expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan and provide separate payments for any contraceptive services required to be covered under § 141.130(a)(1)(iv) for plan

participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(3) A health insurance issuer may not require any documentation other than a copy of the self-certification from the eligible organization or the notification from the Department of Health and Human Services described in paragraph (d)(1)(ii) of this section.

(e) Notice of availability of separate payments for contraceptive services—insured group health plans

and student health insurance coverage. For each plan year to which the optional accommodation in paragraph (d) of this section is to apply, an issuer required to provide payments for contraceptive services pursuant to paragraph (d) of this section must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (e) "Your [employer/institution of higher education] has certified that your [group health plan/student health insurance coverage] qualifies for an accommodation with respect to the Federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your [employer/institution of higher education] will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of health insurance issuer] will provide separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your [group health plan/student

health insurance coverage]. Your [employer/institution of higher education] will not administer or fund these payments. If you have any questions about this notice, contact [contact information for health insurance issuer]."

(f) Reliance—

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (d) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any applicable requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any applicable requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (d) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(g) Definition. For the purposes of this section, reference to "contraceptive" services, benefits, or coverage includes contraceptive or sterilization items, procedures, or services, or related patient education or counseling, to the extent specified for purposes of § 147.130(a)(1)(iv).

(h) Severability. Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so

as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

45 C.F.R. 147.132

Religious exemptions in connection with coverage of certain preventive health services.

(a) Objecting entities.

(1) Guidelines issued under § 147.130(a)(1)(iv) by the Health Resources and Services Administration must not provide for or support the requirement of coverage or payments for contraceptive services with respect to a group health plan established or maintained by an objecting organization, or health insurance coverage offered or arranged by an objecting organization, to the extent of the objections specified below. Thus the Health Resources and Service Administration will exempt from any guidelines' requirements that relate to the provision of contraceptive services:

(i) A group health plan and health insurance coverage provided in connection with a group health plan to the extent the non-governmental plan sponsor objects as specified in paragraph (a)(2) of this section. Such non-governmental plan sponsors include, but are not limited to, the following entities—

(A) A church, an integrated auxiliary of a church, a convention or association of churches, or a religious order.

(B) A nonprofit organization.

(C) A closely held for-profit entity.

(D) A for-profit entity that is not closely held.

(E) Any other non-governmental employer.

(ii) A group health plan, and health insurance coverage provided in connection with a group health plan, where the plan or coverage is established or maintained by a church, an integrated auxiliary of a church, a convention or association of churches, a religious order, a nonprofit organization, or other non-governmental organization or association, to the extent the plan sponsor responsible for establishing and/or maintaining the plan objects as specified in paragraph (a)(2) of this section. The exemption in this paragraph applies to each employer, organization, or plan sponsor that adopts the plan;

(iii) An institution of higher education as defined in 20 U.S.C. 1002, which is non-governmental, in its arrangement of student health insurance coverage, to the extent that institution objects as specified in paragraph (a)(2) of this section. In the case of student health insurance coverage, this section is applicable in a manner comparable to its applicability to group health insurance coverage provided in connection with a group health plan established or maintained by a plan sponsor that is an employer, and references to "plan participants and beneficiaries" will be interpreted as references to student enrollees and their covered dependents; and

(iv) A health insurance issuer offering group or individual insurance coverage to the extent the issuer objects as specified in paragraph (a)(2) of this section. Where a health insurance issuer

providing group health insurance coverage is exempt under this subparagraph (iv), the group health plan established or maintained by the plan sponsor with which the health insurance issuer contracts remains subject to any requirement to provide coverage for contraceptive services under Guidelines issued under § 147.130(a)(1)(iv) unless it is also exempt from that requirement.

(2) The exemption of this paragraph (a) will apply to the extent that an entity described in paragraph (a)(1) of this section objects, based on its sincerely held religious beliefs, to its establishing, maintaining, providing, offering, or arranging for (as applicable):

(i) Coverage or payments for some or all contraceptive services; or

(ii) A plan, issuer, or third party administrator that provides or arranges such coverage or payments.

(b) Objecting individuals. Guidelines issued under § 147.130(a)(1)(iv) by the Health Resources and Services Administration must not provide for or support the requirement of coverage or payments for contraceptive services with respect to individuals who object as specified in this paragraph (b), and nothing in § 147.130(a)(1)(iv), 26 CFR 54.9815–2713(a)(1)(iv), or 29 CFR 2590.715–2713(a)(1)(iv) may be construed to prevent a willing health insurance issuer offering group or individual health insurance coverage, and as applicable, a willing plan sponsor of a group health plan, from offering a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option, to any group health plan

sponsor (with respect to an individual) or individual, as applicable, who objects to coverage or payments for some or all contraceptive services based on sincerely held religious beliefs. Under this exemption, if an individual objects to some but not all contraceptive services, but the issuer, and as applicable, plan sponsor, are willing to provide the plan sponsor or individual, as applicable, with a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option that omits all contraceptives, and the individual agrees, then the exemption applies as if the individual objects to all contraceptive services.

(c) Definition. For the purposes of this section, reference to "contraceptive" services, benefits, or coverage includes contraceptive or sterilization items, procedures, or services, or related patient education or counseling, to the extent specified for purposes of § 147.130(a)(1)(iv).

(d) Severability. Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

45 C.F.R. § 147.133

Moral exemptions in connection with coverage of certain preventive health services.

(a) Objecting entities.

(1) Guidelines issued under § 147.130(a)(1)(iv) by the Health Resources and Services Administration must not provide for or support the requirement of coverage or payments for contraceptive services with respect to a group health plan established or maintained by an objecting organization, or health insurance coverage offered or arranged by an objecting organization, to the extent of the objections specified below. Thus the Health Resources and Service Administration will exempt from any guidelines' requirements that relate to the provision of contraceptive services:

(i) A group health plan and health insurance coverage provided in connection with a group health plan to the extent one of the following non-governmental plan sponsors object as specified in paragraph (a)(2) of this section:

(A) A nonprofit organization; or

(B) A for-profit entity that has no publicly traded ownership interests (for this purpose, a publicly traded ownership interest is any class of common equity securities required to be registered under section 12 of the Securities Exchange Act of 1934);

(ii) An institution of higher education as defined in 20 U.S.C. 1002, which is non-governmental, in

its arrangement of student health insurance coverage, to the extent that institution objects as specified in paragraph (a)(2) of this section. In the case of student health insurance coverage, this section is applicable in a manner comparable to its applicability to group health insurance coverage provided in connection with a group health plan established or maintained by a plan sponsor that is an employer, and references to "plan participants and beneficiaries" will be interpreted as references to student enrollees and their covered dependents; and

(iii) A health insurance issuer offering group or individual insurance coverage to the extent the issuer objects as specified in paragraph (a)(2) of this section. Where a health insurance issuer providing group health insurance coverage is exempt under paragraph (a)(1)(iii) of this section, the group health plan established or maintained by the plan sponsor with which the health insurance issuer contracts remains subject to any requirement to provide coverage for contraceptive services under Guidelines issued under § 147.130(a)(1)(iv) unless it is also exempt from that requirement.

(2) The exemption of this paragraph (a) will apply to the extent that an entity described in paragraph (a)(1) of this section objects, based on its sincerely held moral convictions, to its establishing, maintaining, providing, offering, or arranging for (as applicable):

(i) Coverage or payments for some or all contraceptive services; or

(ii) A plan, issuer, or third party administrator that provides or arranges such coverage or payments.

(b) Objecting individuals. Guidelines issued under § 147.130(a)(1)(iv) by the Health Resources and Services Administration must not provide for or support the requirement of coverage or payments for contraceptive services with respect to individuals who object as specified in this paragraph (b), and nothing in § 147.130(a)(1)(iv), 26 CFR 54.9815–2713(a)(1)(iv), or 29 CFR 2590.715–2713(a)(1)(iv) may be construed to prevent a willing health insurance issuer offering group or individual health insurance coverage, and as applicable, a willing plan sponsor of a group health plan, from offering a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option, to any group health plan sponsor (with respect to an individual) or individual, as applicable, who objects to coverage or payments for some or all contraceptive services based on sincerely held moral convictions. Under this exemption, if an individual objects to some but not all contraceptive services, but the issuer, and as applicable, plan sponsor, are willing to provide the plan sponsor or individual, as applicable, with a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option that omits all contraceptives, and the individual agrees, then the exemption applies as if the individual objects to all contraceptive services.

(c) Definition. For the purposes of this section, reference to "contraceptive" services, benefits, or coverage includes contraceptive or sterilization items, procedures, or services, or related patient education

or counseling, to the extent specified for purposes of § 147.130(a)(1)(iv).

(d) Severability. Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

Excerpt from 83 Fed. Reg. 57592 (Nov. 15, 2018)

Moral Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act

I. Executive Summary and Background

A. Executive Summary

1. Purpose

The primary purpose of these final rules is to finalize, with changes in response to public comments, the interim final regulations with requests for comments (IFCs) published in the Federal Register on October 13, 2017 (82 FR 47838), "Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act" (the Moral IFC). The rules are necessary to protect sincerely held moral objections of certain entities and individuals. The rules, thus, minimize the burdens imposed on their moral beliefs, with regard to the discretionary requirement that health plans cover certain contraceptive services with no cost-sharing, which was created by HHS through guidance promulgated by the Health Resources and Services Administration (HRSA), pursuant to authority granted by the ACA in section 2713(a)(4) of the Public Health Service Act. In addition, the rules finalize references to these moral exemptions in the previously created accommodation process that permit entities with certain objections voluntarily to continue to object while the persons covered in their plans receive contraceptive coverage or payments arranged by their issuers or third party administrators. The rules do not remove the contraceptive coverage requirement generally from HRSA's

guidelines. The changes to the rules being finalized will ensure clarity in implementation of the moral exemptions so that proper respect is afforded to sincerely held moral convictions in rules governing this area of health insurance and coverage, with minimal impact on HRSA's decision to otherwise require contraceptive coverage.

2. Summary of the Major Provisions

a. Moral Exemptions

These rules finalize exemptions provided in the Moral IFC for the group health plans and health insurance coverage of various entities and individuals with sincerely held moral convictions opposed to coverage of some or all contraceptive or sterilization methods encompassed by HRSA's guidelines. As in the Moral IFC, the exemptions include plan sponsors that are nonprofit organization plan sponsors or for-profit entities that have no publicly traded ownership interests (defined as any class of common equity securities required to be registered under section 12 of the Securities Exchange Act of 1934). The exemptions also continue to include institutions of higher education in their arrangement of student health insurance coverage; health insurance issuers (but only with respect to plans that are otherwise also exempt under the rules); and objecting individuals with respect to their own coverage, where their health insurance issuer and plan sponsor, as applicable, are willing to provide coverage complying with the individual's moral objection. After considering public comments, the Departments have decided not to extend the moral exemptions to non-federal governmental entities at this time, although individuals

receiving employer-sponsored insurance from a governmental entity may use the individual exemption if the other terms of the individual exemption apply, including that their employer is willing to offer them a plan consistent with their moral objection.

In response to public comments, various changes are made to clarify the intended scope of the language in the Moral IFC's exemptions. The prefatory exemption language is clarified to ensure exemptions apply to a group health plan established or maintained by an objecting organization, or health insurance coverage offered or arranged by an objecting organization, to the extent of the objections. The Departments add language to specify that the exemption for institutions of higher education applies to non-governmental entities. The Departments also modified language describing the moral objection applicable to the exemptions, to specify that the entity objects, based on its sincerely held moral convictions, to its establishing, maintaining, providing, offering, or arranging for (as applicable) either: Coverage or payments for some or all contraceptive services; or a plan, issuer, or third party administrator that provides or arranges such coverage or payments.

The Departments also clarify language in the exemption applicable to plans of objecting individuals. The clarification is made to ensure that the HRSA guidelines do not prevent a willing health insurance issuer offering group or individual health insurance coverage, and as applicable, a willing plan sponsor of a group health plan, from offering a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option, to any group health plan sponsor (with respect

to an individual) or individual, as applicable, who objects to coverage or payments for some or all contraceptive services based on sincerely held moral convictions. The exemption adds that, if an individual objects to some but not all contraceptive services, but the issuer, and as applicable, plan sponsor, are willing to provide the plan sponsor or individual, as applicable, with a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option that omits all contraceptives, and the individual agrees, then the exemption applies as if the individual objects to all contraceptive services.

b. References to Moral Exemptions in Accommodation Regulations and in Regulatory Restatement of Statutory Language

These rules finalize without change the references to the moral exemptions that were inserted by the Moral IFC into the rules that regulatorily restate the statutory language from section 2713(a) and (a)(4) of the Public Health Service Act. Similarly, these rules finalize without change from the Moral IFC references to the moral exemptions that were inserted into the regulations governing the optional accommodation process. These references operationalize the effect of the moral exemptions rule, and they allow contraceptive services to be made available to women if any employers with non-religious moral objections to contraceptive coverage choose to use the optional accommodation process.

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Excerpt from 83 Fed. Reg. 57536 (Nov. 15, 2018)

Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act

I. Executive Summary and Background

A. Executive Summary

1. Purpose

The primary purpose of this rule is to finalize, with changes in response to public comments, the interim final regulations with requests for comments (IFCs) published in the Federal Register on October 13, 2017 (82 FR 47792), "Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act" (the Religious IFC). The rules are necessary to expand the protections for the sincerely held religious objections of certain entities and individuals. The rules, thus, minimize the burdens imposed on their exercise of religious beliefs, with regard to the discretionary requirement that health plans cover certain contraceptive services with no cost-sharing, a requirement that was created by HHS through guidance promulgated by the Health Resources and Services Administration (HRSA) (hereinafter "Guidelines"), pursuant to authority granted by the ACA in section 2713(a)(4) of the Public Health Service Act. In addition, the rules maintain a previously created accommodation process that permits entities with certain religious objections voluntarily to continue to object while the persons covered in their plans receive contraceptive coverage or payments arranged by their health insurance issuers or third party administrators. The rules do not

remove the contraceptive coverage requirement generally from HRSA's Guidelines. The changes being finalized to these rules will ensure that proper respect is afforded to sincerely held religious objections in rules governing this area of health insurance and coverage, with minimal impact on HRSA's decision to otherwise require contraceptive coverage.

2. Summary of the Major Provisions

a. Expanded Religious Exemptions to the Contraceptive Coverage Requirement

These rules finalize exemptions provided in the Religious IFC for the group health plans and health insurance coverage of various entities and individuals with sincerely held religious beliefs opposed to coverage of some or all contraceptive or sterilization methods encompassed by HRSA's Guidelines. The rules finalize exemptions to the same types of organizatons and individuals for which exemptions were provided in the Religious IFC: Non-governmental plan sponsors including a church, an integrated auxiliary of a church, a convention or association of churches, or a religious order; a nonprofit organization; for-profit entities; an institution of higher education in arranging student health insurance coverage; and, in certain circumstances, issuers and individuals. The rules also finalize the regulatory restatement in the Religious IFC of language from section 2713(a) and (a) (4) of the Public Health Service Act.

In response to public comments, various changes are made to clarify the intended scope of the language in the Religious IFC. The prefatory language to the exemptions is clarified to ensure exemptions apply to

a group health plan established or maintained by an objecting organization, or health insurance coverage offered or arranged by an objecting organization, to the extent of the objections. The Departments add language to clarify that, where an exemption encompasses a plan or coverage established or maintained by a church, an integrated auxiliary of a church, a convention or association of churches, a religious order, a nonprofit organization, or other nongovernmental organization or association, the exemption applies to each employer, organization, or plan sponsor that adopts the plan. Language is also added to clarify that the exemptions apply to nongovernmental entities, including as the exemptions apply to institutions of higher education. The Departments revise the exemption applicable to health insurance issuers to make clear that the group health plan established or maintained by the plan sponsor with which the health insurance issuer contracts remains subject to any requirement to provide coverage for contraceptive services under Guidelines issued under § 147.130(a)(1)(iv) unless it is also exempt from that requirement. The Departments also restructure the provision describing the religious objection for entities. That provision specifies that the entity objects, based on its sincerely held religious beliefs, to its establishing, maintaining, providing, offering, or arranging for either: coverage or payments for some or all contraceptive services; or, a plan, issuer, or third party administrator that provides or arranges such coverage or payments.

The Departments also clarify language in the exemption applicable to plans of objecting individuals. The final rule specifies that the individual

exemption ensures that the HRSA Guidelines do not prevent a willing health insurance issuer offering group or individual health insurance coverage, and as applicable, a willing plan sponsor of a group health plan, from offering a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option, to any group health plan sponsor (with respect to an individual) or individual, as applicable, who objects to coverage or payments for some or all contraceptive services based on sincerely held religious beliefs. The exemption adds that, if an individual objects to some but not all contraceptive services, but the issuer, and as applicable, plan sponsor, are willing to provide the plan sponsor or individual, as applicable, with a separate policy, certificate or contract of insurance or a separate group health plan or benefit package option that omits all contraceptives, and the individual agrees, then the exemption applies as if the individual objects to all contraceptive services.

b. Optional Accommodation

These rules also finalize provisions from the Religious IFC that maintain the accommodation process as an optional process for entities that qualify for the exemption. Under that process, entities can choose to use the accommodation process so that contraceptive coverage to which they object is omitted from their plan, but their issuer or third party administrator, as applicable, will arrange for the persons covered by their plan to receive contraceptive coverage or payments.

In response to public comments, these final rules make technical changes to the accommodation regu-

lations maintained in parallel by HHS, the Department of Labor, and the Department of the Treasury. The Departments modify the regulations governing when an entity, that was using or will use the accommodation, can revoke the accommodation and operate under the exemption. The modifications set forth a transitional rule as to when entities currently using the accommodation may revoke it and use the exemption by giving 60-days notice pursuant to Public Health Service Act section 2715(d)(4) and 45 CFR147.200(b), 26 CFR 54.9815-2715(b), and 29 CFR 2590.715-2715(b). The modifications also express a general rule that, in plan years that begin after the date on which these final rules go into effect, if contraceptive coverage is being offered by an issuer or third party administrator through the accommodation process, an organization eligible for the accommodation may revoke its use of the accommodation process effective no sooner than the first day of the first plan year that begins on or after 30 days after the date of the revocation.

The Departments also modify the Religious IFC by adding a provision that existed in rules prior to the Religious IFC, namely, that if an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation, and the representation is later determined to be incorrect, the issuer is considered to comply with any applicable contraceptive coverage requirement from HRSA's Guidelines if the issuer complies with the obligations under this section applicable to such issuer. Likewise, the rule adds pre-existing "reliance" language deeming an issuer serving an accommodated organization compliant

with the contraceptive coverage requirement if the issuer relies reasonably and in good faith on a representation by an organization as to its eligibility for the accommodation and the issuer otherwise complies with the accommodation regulation, and likewise deeming a group health plan compliant with the contraceptive coverage requirement if it complies with the accommodation regulation.

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