No. 19-1038

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Patient Protection and Affordable Care Act (ACA), 42 U.S.C. 18001 *et seq.*, requires many group health plans and health-insurance issuers that offer group or individual health coverage to provide coverage for preventive services, including women's preventive care, without cost-sharing. See 42 U.S.C. 300gg-13(a). Guidelines and regulations implementing that requirement promulgated in 2011 by the Departments of Health and Human Services, Labor, and the Treasury mandated that such entities cover contraceptives approved by the Food and Drug Administration. The mandate exempted churches, and subsequent rulemaking established an accommodation for certain other entities with religious objections to providing contraceptive coverage. In October 2017, the agencies promulgated interim final rules expanding the exemption to a broad range of entities with sincere religious or moral objections to providing contraceptive coverage. In November 2018, after considering comments solicited on the interim rules, the agencies promulgated final rules expanding the exemption. The question presented is as follows:

Whether the agencies had statutory authority under the ACA and the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, to expand the conscience exemption to the contraceptive-coverage mandate.

PARTIES TO THE PROCEEDING

Petitioners are the U.S. Department of Health and Human Services; the U.S. Department of Labor; Eugene Scalia, in his official capacity as Secretary of Labor; Alex M. Azar II, in his official capacity as Secretary of Health and Human Services; the U.S. Department of the Treasury; and Steven Terner Mnuchin, in his official capacity as Secretary of the Treasury.

Respondents are the State of California; the State of Delaware; the Commonwealth of Virginia; the State of Maryland; the State of New York; the State of Illinois; the State of Washington; the State of Minnesota; the State of Connecticut; the District of Columbia; the State of North Carolina; the State of Vermont; the State of Rhode Island; the State of Hawaii; the Little Sisters of the Poor Jeanne Jugan Residence; and March for Life Education and Defense Fund.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

State of California v. *Health & Human Services*, No. 17-cv-5783 (Jan. 13, 2019)

United States Court of Appeals (9th Cir.):

State of California v. *U.S. Department of Health & Human Services*, No. 19-15072 (Oct. 22, 2019) (affirming preliminary injunction)

Supreme Court of the United States:

Little Sisters of the Poor Jeanne Jugan Residence v. *State of California*, No. 18-1192 (June 17, 2019)

Little Sisters of the Poor Jeanne Jugan Residence v. *State of California*, No. 19A705 (Dec. 23, 2019)

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory and regulatory provisions involved 2
Statement 2
Reasons for granting the petition 14
Conclusion 15
Appendix A — Court of appeals opinion (Oct. 22, 2019) 1a
Appendix B — District court order (Jan. 13, 2019) 40a
Appendix C — Court of appeals opinion (Dec. 13, 2018) 105a
Appendix D — District court order (Dec. 21, 2017) 154a
Appendix E — Statutory and regulatory provisions 197a

TABLE OF AUTHORITIES

Cases:

Advocate Health Care Network v. *Stapleton*, 137 S. Ct. 1652 (2017) 4, 5
Burwell v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) 5, 6
Pennsylvania v. *President, United States*, 930 F.3d 543 (3d Cir. 2019), cert. granted, No. 19-454 (Jan. 17, 2020) 14
Pennsylvania v. *Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019) 14
Zubik v. *Burwell*:
136 S. Ct. 444 (2015) 7
136 S. Ct. 1557 (2016) 7

Statutes and regulations: Page

Administrative Procedure Act,
5 U.S.C. 551 *et seq.*, 701 *et seq.* 8
5 U.S.C. 553(b) 8, 197a
5 U.S.C. 553(b)(B) 8, 197a
5 U.S.C. 553(c) 8, 197a
5 U.S.C. 706(2)(A) 9
Employee Retirement Income Security Act of 1974,
Pub. L. No. 93-406, 88 Stat. 829
(29 U.S.C. 1001 *et seq.*) 2
29 U.S.C. 1002(33)(C)(i) 4
29 U.S.C. 1003(b)(2) 4
29 U.S.C. 1185d 2
29 U.S.C. 1191c 2, 8
Internal Revenue Code (26 U.S.C.):
26 U.S.C. 4980H(c)(2) 5
26 U.S.C. 9815(a)(1) 2
26 U.S.C. 9833 ..... 2, 8
Patient Protection and Affordable Care Act,
42 U.S.C. 18001 *et seq.* 2
42 U.S.C. 18011 5
Public Health Service Act, 42 U.S.C. 201 *et seq.* 2
42 U.S.C. 300gg-13(a) 2, 12, 198a
42 U.S.C. 300gg-13(a)(1) 3, 198a
42 U.S.C. 300gg-13(a)(2) 3, 198a
42 U.S.C. 300gg-13(a)(3) 3, 198a
42 U.S.C. 300gg-13(a)(4) 3, 11, 199a
42 U.S.C. 300gg-92 ..... 2, 8
Religious Freedom Restoration Act of 1993,
42 U.S.C. 2000bb *et seq.* 5

Regulations—Continued: Page

45 C.F.R. (2018):
Section 147.131-147.133 8
Section 147.132(a) 10
Section 147.132(b) 11
Section 147.133(a) 10
Section 147.133(b) 11

Miscellaneous:

47 Fed. Reg. 38,409 (Aug. 31, 1982) 3
76 Fed. Reg. 46,621 (Aug. 3, 2011) 3
77 Fed. Reg. 8725 (Feb. 15, 2012) 3
78 Fed. Reg. 8456 (Feb. 6, 2013) 4
78 Fed. Reg. 39,870 (July 2, 2013) 4
79 Fed. Reg. 51,092 (Aug. 27, 2014) 5
80 Fed. Reg. 41,318 (July 14, 2015) 6
81 Fed. Reg. 47,741 (July 22, 2016) 7
82 Fed. Reg. 47,792 (Oct. 13, 2017) 5, 6, 7, 8, 9
83 Fed. Reg. 57,536 (Nov. 15, 2018) 10, 11, 12
83 Fed. Reg. 57,592 (Nov. 15, 2018) 10

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Department of Health and Human Services, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-39a) is reported at 941 F.3d 410. The order of the district court granting a preliminary injunction (App., *infra*, 40a-104a) is reported at 351 F. Supp. 3d 1267. An earlier opinion of the court of appeals affirming a preliminary injunction but narrowing its scope (App., *infra*, 105a-153a) is reported at 911 F.3d 558. An earlier order of the district court granting a preliminary injunction (App., *infra*, 154a-196a) is reported at 281 F. Supp. 3d 806.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 2019. On January 8, 2020, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 19, 2020. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 197a-219a.

STATEMENT

1. a. The preventive-services provision of the Patient Protection and Affordable Care Act (ACA or Act), 42 U.S.C. 18001 *et seq.*, requires many group health plans and health-insurance issuers that offer group or individual health coverage to provide coverage for certain preventive services without "any cost sharing requirements." 42 U.S.C. 300gg-13(a). The preventive-services provision is part of the Public Health Service Act, 42 U.S.C. 201 *et seq.*, and it is also incorporated into the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (29 U.S.C. 1001 *et seq.*), see 29 U.S.C. 1185d, and the Internal Revenue Code, see 26 U.S.C. 9815(a)(1). The Departments of Health and Human Services (HHS), Labor, and the Treasury, respectively, enforce and have authority to promulgate regulations implementing the relevant portions of those statutes. *E.g.*, 42 U.S.C. 300gg-92; 29 U.S.C. 1191c; 26 U.S.C. 9833.

The ACA's preventive-services provision requires covered plans to provide coverage for "evidence-based items or services" that are recommended by the United

States Preventive Services Task Force, an independent panel of experts, 42 U.S.C. 300gg-13(a)(1); immunizations recommended by an advisory committee of the Centers for Disease Control and Prevention (CDC), 42 U.S.C. 300gg-13(a)(2); and, "with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for" in already-existing "comprehensive guidelines supported by the" Health Resources and Services Administration (HRSA), a component of HHS. 42 U.S.C. 300gg-13(a)(3); see 47 Fed. Reg. 38,409 (Aug. 31, 1982). In addition, as relevant here, Section 300gg-13(a)(4) requires covered plans to provide, "with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by [HRSA] for purposes of this paragraph." 42 U.S.C. 300gg-13(a)(4).

b. In August 2011, HRSA issued guidelines that adopted the recommendation of the Institute of Medicine to require coverage for women of (among other things) all contraceptive methods approved by the Food and Drug Administration (FDA). See 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012). Coverage for such contraceptive methods was required for plan years beginning on or after August 1, 2012. See 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). At the same time, the agencies that administer the ACA—HHS, the Department of Labor, and the Department of the Treasury—invoked their authority under 42 U.S.C. 300gg-13(a)(4) to promulgate interim final rules authorizing HRSA to exempt churches and their integrated auxiliaries from the contraceptive-coverage mandate. See 76 Fed. Reg. at 46,623. Those interim rules were finalized in February 2012. 77 Fed. Reg. at 8725.

Various religious groups urged the agencies to expand the church exemption to cover all organizations that had religious or moral objections to providing contraceptive coverage. See 78 Fed. Reg. 8456, 8459-8460 (Feb. 6, 2013). Instead, in a subsequent rulemaking, the agencies made available what they termed an "accommodation," which was limited to religious not-for-profit organizations that had religious objections to providing contraceptive coverage. See 78 Fed. Reg. 39,870, 39,874-39,882 (July 2, 2013). The accommodation purported to allow a group health plan established or maintained by an eligible objecting employer to opt out of any requirement that the plan "contract, arrange, pay, or refer for contraceptive coverage" by notifying its insurer—or, in the case of self-insured plans, the plan's third-party administrator —of its objection. *Id.* at 39,874. The insurer or administrator would then be required to provide or arrange contraceptive coverage for plan participants. See *id.* at 39,875-39,880.

For certain self-insured plans, however, coverage by the plan's third-party administrator under the accommodation was effectively voluntary. The authority to enforce a third-party administrator's obligation to provide separate contraceptive coverage derives solely from ERISA. But ERISA does not apply to so-called "church plan[s]," 29 U.S.C. 1003(b)(2), which it defines to "include[] a plan maintained by an organization" that has as its "principal purpose or function" the "administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches" and that "is controlled by or associated with a church or a convention or association of churches." 29 U.S.C. 1002(33)(C)(i); see *Advocate*

Health Care Network v. *Stapleton*, 137 S. Ct. 1652, 1656 (2017). Thus, in addition to exempting churches and their integrated auxiliaries from the contraceptive-coverage mandate, the agencies in effect also exempted self-insured plans for church-affiliated not-for-profit organizations—such as hospitals and universities—because the agencies could not require the third-party administrators of those plans to provide or arrange for contraceptive coverage, nor impose fines or penalties for failing to do so. See 79 Fed. Reg. 51,092, 51,095 n.8 (Aug. 27, 2014).

The ACA itself also exempted certain other employers from the contraceptive-coverage mandate. The Act exempts from many of its requirements, including the preventive-services requirement, so-called grandfathered health plans—generally, those plans that have not made certain specified changes since the Act's enactment. See 42 U.S.C. 18011. Grandfathered plans cover tens of millions of people. See 82 Fed. Reg. 47,792, 47,794 & n.5 (Oct. 13, 2017). Employers with fewer than 50 employees also are not subject to the tax imposed on employers that fail to offer health coverage, see 26 U.S.C. 4980H(c)(2), although small employers that do provide non-grandfathered coverage must comply with the preventive-services requirement.

2. a. Many employers objected to the contraceptive-coverage mandate on religious grounds and filed suits challenging it. They principally contended that it violated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* See 82 Fed. Reg. at 47,796-47,797. A circuit conflict developed, and this Court granted certiorari to resolve it in *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

Hobby Lobby held that RFRA prohibited applying the mandate to closely held for-profit corporations with religious objections to providing contraceptive coverage. See 573 U.S. at 705-736. The Court determined that the mandate "impose[d] a substantial burden on the exercise of religion" for such employers. *Id.* at 726; see *id.* at 719-726. The Court further concluded that, even assuming a compelling governmental interest in "guaranteeing cost-free access to the four challenged contraceptive methods," applying the mandate was not the least restrictive means of furthering that interest and therefore was prohibited by RFRA. *Id.* at 728; see *id.* at 726-732. The Court observed that the agencies had already established an accommodation available to not-for-profit employers and that, at a minimum, this less restrictive alternative could be extended to closely held for-profit corporations that have religious objections to the mandate but not to the accommodation. See *id.* at 730-731. The Court "d[id] not decide * * * whether an approach of this type complies with RFRA for purposes of *all* religious claims." *Id.* at 731 (emphasis added).

b. Following *Hobby Lobby*, the agencies promulgated rules that extended the accommodation to closely held for-profit entities that have religious objections to providing contraceptive coverage. 80 Fed. Reg. 41,318, 41,323-42,328 (July 14, 2015); see 82 Fed. Reg. at 47,797-47,798. Numerous entities, however, continued to challenge the mandate even with the extended accommodation. Such entities principally asserted that the accommodation made them complicit in providing coverage for contraceptives "because it utilized the plans the [entities] themselves sponsored to provide services to which they objected on religious grounds." 82 Fed. Reg. at 47,798. Another circuit split developed,

and this Court granted certiorari in several of the cases, which it consolidated. *Ibid.*; see, *e.g.*, *Zubik* v. *Burwell*, 136 S. Ct. 444 (2015).

After briefing and argument in *Zubik* and the consolidated cases, the Court vacated all of the judgments and remanded the cases to the respective courts of appeals without resolving the underlying merits. *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (per curiam). The Court "d[id] not decide whether [the plaintiffs'] religious exercise ha[d] been substantially burdened, whether the Government ha[d] a compelling interest, or whether the current regulations [we]re the least restrictive means of serving that interest." *Id.* at 1560. Instead, the Court directed that, on remand, the parties be given an opportunity to resolve the dispute. See *ibid.* In the meantime, the Court precluded the government from "impos[ing] taxes or penalties on [the plaintiffs] for failure to provide" the notice required under the accommodation. *Id.* at 1561.

c. In response to this Court's decision in *Zubik*, the agencies sought public comment on whether further modifications to the accommodation could resolve the religious objections asserted by various organizations while providing a mechanism for contraceptive coverage for their employees. See 81 Fed. Reg. 47,741 (July 22, 2016). The agencies received over 54,000 comments but could not identify a way to amend the accommodation that would both satisfy objecting organizations and ensure that women covered by those organizations' plans receive seamless contraceptive coverage. 82 Fed. Reg. at 47,798-47,799, 47,814.

As a result, as of January 2017, the pending litigation concerning the mandate and extended accommodation—consisting of more than three dozen cases, brought by

more than 100 separate plaintiffs—remained unresolved. In addition, some nonreligious organizations with moral objections to providing contraceptive coverage had filed suits challenging the mandate. That litigation also led to conflicting decisions by the courts. See 82 Fed. Reg. at 47,838.

3. a. In an effort "to resolve the pending litigation and prevent future litigation," the agencies subsequently "reexamine[d]" the contraceptive-coverage mandate's "exemption and accommodation scheme." 82 Fed. Reg. at 47,799. In October 2017, the agencies jointly issued two interim final rules that expanded the exemption to a broad range of entities that have either sincere religious objections or sincere moral objections to providing contraceptive coverage, while continuing to offer the existing accommodation as an optional alternative. See *id.* at 47,792 (religious exemption); *id.* at 47,838 (moral exemption); 45 C.F.R. 147.131-147.133.

The agencies explained that their statutory authority to issue "interim final rules," 26 U.S.C. 9833; 29 U.S.C. 1191c; 42 U.S.C. 300gg-92, permitted the issuance of immediately effective interim rules without the prior notice and opportunity for public comment that is ordinarily required by the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.*; see 5 U.S.C. 553(b) and (c); 82 Fed. Reg. at 47,813-47,815, 47,854-47,856. The agencies additionally concluded that the "good cause" exception to the APA's notice-and-comment requirement, 5 U.S.C. 553(b)(B), permitted them to issue interim rules without notice and comment in order to protect religious liberty and end the litigation that had beset the prior rules. 82 Fed. Reg. at 47,813-47,815, 47,854-47,856. The agencies did, however, solicit public

comments for 60 days following promulgation of the interim rules in anticipation of final rulemaking. See *id.* at 47,792, 47,838.

California and four other States (Delaware, Maryland, New York, and Virginia) brought this suit in the Northern District of California challenging the interim rules. The States alleged (as relevant here) that the rules (1) did not comply with the APA's notice-and-comment requirements; and (2) were arbitrary and capricious, an abuse of discretion, or otherwise contrary to law, 5 U.S.C. 706(2)(A), because they violated the ACA and were not justified by RFRA. 18-15144 C.A. E.R. 278-279. The district court granted the States' motion for a nationwide preliminary injunction. App., *infra*, 154a-196a. The court rejected the government's objection to the States' standing and held that the agencies lacked statutory authority or good cause to issue the rules without notice and comment. See *id.* at 170a-176a, 178a-189a.

The government appealed the preliminary injunction. The Little Sisters of the Poor Jeanne Jugan Residence (Little Sisters) and March for Life Education and Defense Fund (March for Life), which had intervened in the district court to defend the interim rules, also appealed, and the appeals were consolidated. 18-15144 C.A. Order 1-2 (Mar. 7, 2018).

A divided panel of the court of appeals affirmed in part and vacated in part the preliminary injunction. App., *infra*, 105a-153a. The panel majority held that the plaintiff States had standing to challenge the interim rules. *Id.* at 116a-125a. On the merits, the majority held that the interim rules likely failed to comply with the APA's notice-and-comment requirements. *Id.* at 125a-138a. And the majority concluded that the district court

had not abused its discretion in finding that the equities warranted a preliminary injunction. *Id.* at 138a-140a. The majority thus affirmed the preliminary injunction, but only insofar as it barred implementation of the interim rules in the plaintiff States. *Id.* at 146a. The majority held that the nationwide scope of the injunction was overbroad and vacated the portion of the injunction barring implementation of the rules in other States. *Id.* at 141a-146a.

Judge Kleinfeld dissented on the ground that the States lacked standing, without reaching the other issues in the case. App., *infra*, 147a-153a.

b. Meanwhile, in November 2018, while the government's appeal of the preliminary injunction against implementation of the interim rules was pending, and after considering the public comments received on the interim rules, the agencies promulgated final rules that superseded the interim rules. See 83 Fed. Reg. 57,536 (Nov. 15, 2018) (religious exemption); 83 Fed. Reg. 57,592 (Nov. 15, 2018) (moral exemption).

i. Like the interim rules, the final rules expanded the existing religious exemption to cover nongovernmental plan sponsors and institutions of higher education that arrange student health plans, to the extent that those entities have sincere religious objections to providing contraceptive coverage. See 83 Fed. Reg. at 57,558-57,565, 57,590 (45 C.F.R. 147.132(a)). The agencies also finalized an exemption for entities (except for publicly traded companies) that have sincere moral objections to such coverage. See *id.* at 57,614-57,621, 57,630-57,631 (45 C.F.R. 147.133(a)). Both rules retained the accommodation as a voluntary option. See, *e.g.*, *id.* at 57,537-57,538. And both rules finalized an individual exemption that allowed—but did not require—willing

employers and insurers to offer plans that omit contraceptive coverage to individuals who have religious or moral objections to such coverage. See *id.* at 57,590, 57,631 (45 C.F.R. 147.132(b), 147.133(b)).

The agencies concluded that Congress had granted HRSA discretion to determine the content and scope of any preventive-services guidelines adopted under 42 U.S.C. 300gg-13(a)(4). 83 Fed. Reg. at 57,540-57,542. The agencies observed that, "[s]ince the[ir] first rulemaking on this subject in 2011," they "ha[d] consistently interpreted the broad discretion granted to HRSA in section [300gg-13(a)(4)] as including the power to reconcile the ACA's preventive-services requirement with sincerely held views of conscience on the sensitive subject of contraceptive coverage—namely, by exempting churches and their integrated auxiliaries from the contraceptive [m]andate." *Id.* at 57,541. The agencies concluded that, "[b]ecause of the importance of the religious liberty values being accommodated" and "the limited impact of these rules," the expanded exemptions "are good policy." *Id.* at 57,552. The agencies also took into account "Congress's long history of providing exemptions for moral convictions, especially in certain health care contexts," *id.* at 57,598, state "conscience protections," *id.* at 57,601, and "the litigation surrounding the [m]andate," *id.* at 57,602.

The agencies additionally determined that the religious exemption was independently authorized by RFRA. See 83 Fed. Reg. at 57,544-57,548. They concluded that, "even if RFRA does not compel" the religious exemption, "an expanded exemption rather than the existing accommodation is the most appropriate administrative response to the substantial burden identified by the Supreme Court in *Hobby Lobby*." *Id.* at 57,544-57,545.

They further concluded that RFRA in fact required the exemption. See *id.* at 57,546-57,548.

ii. Following the issuance of the two final rules, the original plaintiff States—along with eight additional States and the District of Columbia—filed an amended complaint challenging the final rules, and also sought a preliminary injunction against implementation of the final rules. App., *infra*, 59a-60a. The district court granted a preliminary injunction barring the implementation of both rules in the plaintiff jurisdictions. *Id.* at 40a-104a.

The district court again held that the plaintiffs had standing. App., *infra*, 62a-69a. On the merits, the court concluded that the plaintiffs were likely to succeed on, or at a minimum had raised serious questions regarding, their claims that the final rules are not in accordance with the ACA and are neither authorized nor required by RFRA. *Id.* at 70a-93a. In passing, the court also concluded that the plaintiffs were likely to prevail on their claim that the agencies had failed to provide a reasoned explanation for their change in policy. *Id.* at 93a-94a. And the court held that the balance of harms favored injunctive relief. *Id.* at 96a-101a.

4. The government, as well as Little Sisters and March for Life, appealed. A divided panel of the court of appeals affirmed. App., *infra*, 1a-39a.

The panel majority again held that the plaintiffs had standing. App., *infra*, 10a-11a. On the merits, the court of appeals held that the district court had not abused its discretion in concluding that the agencies likely lacked authority to issue the final rules. *Id.* at 17a-31a. The court of appeals concluded that Section 300gg-13(a) does not confer authority to establish any exemptions to the contraceptive-coverage mandate. *Id.* at 18a-22a.

The court declined to address the government's contention that, if the ACA did not authorize the final rules' religious and moral exemptions, then it also did not authorize the already-existing exemption for churches. *Id.* at 21a-22a.

Turning to the question whether RFRA authorized the religious exemption, the panel majority expressed uncertainty about whether RFRA gives agencies authority to issue rules addressing alleged violations of the statute. App., *infra*, 22a-23a. Assuming arguendo that RFRA does provide such authority, the court of appeals held that RFRA likely did not authorize the religious exemption for two reasons: first, the court concluded that the exemption contradicts congressional intent that all women have access to appropriate preventive care; second, the court held that the exemption operates in a manner at odds with "the careful, individualized, and searching review mandate[d] by RFRA." *Id.* at 23a-25a. The court further concluded that the existing accommodation likely satisfies RFRA and that RFRA therefore did not require the agencies to provide the religious exemption. *Id.* at 25a-30a.

Having concluded that it was likely that the agencies lacked statutory authority for the religious and moral exemptions, the court of appeals found it unnecessary to reach the district court's holding that the plaintiffs were likely to prevail on their claim that the agencies failed to provide a reasoned explanation for their change in policy. App., *infra*, 30a-31a.

Finally, the court of appeals held that the district court did not abuse its discretion in concluding that the balance of equities supported injunctive relief. App., *infra*, 31a-32a.

Judge Kleinfeld dissented. App., *infra*, 33a-39a. In his view, the nationwide preliminary injunction issued by a federal district court in the Eastern District of Pennsylvania in a parallel case challenging the same rules (discussed below) rendered the case moot. *Id.* at 36a-38a. He also disagreed with the majority with respect to standing and the merits, concluding that the agencies' interpretation of the ACA as authorizing the exemptions was reasonable and entitled to judicial deference. *Id.* at 38a-39a.

5. As noted, Pennsylvania and New Jersey brought a separate challenge to the final rules in the Eastern District of Pennsylvania, and the district court in that case granted the motion of those States for a preliminary injunction, enjoining the final rules on a nationwide basis. See *Pennsylvania* v. *Trump*, 351 F. Supp. 3d 791 (2019). The Third Circuit affirmed. See *Pennsylvania* v. *President, United States*, 930 F.3d 543 (2019). This Court granted both the government's and intervenor Little Sisters' petitions for writs of certiorari. See *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, No. 19-431 (Jan. 17, 2020); *Trump* v. *Pennsylvania*, No. 19-454 (Jan. 17, 2020).

REASONS FOR GRANTING THE PETITION

The court of appeals held that neither the ACA nor RFRA authorizes the agencies to recognize conscience exemptions to the contraceptive-coverage mandate. As the government explained in its petition for a writ of certiorari in *Trump* v. *Pennsylvania*, cert. granted, No. 19-454 (Jan. 17, 2020), that conclusion is incorrect. The same question, however, is already presented in *Pennsylvania*. And the court of appeals in this case did not address any other questions not presented in *Pennsyl-*

vania. Accordingly, the government respectfully requests that the Court hold this petition pending the Court's decision in *Pennsylvania* and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The Court should hold the petition for a writ of certiorari pending disposition of *Trump* v. *Pennsylvania*, cert. granted, No. 19-454, and then dispose of the petition as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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FEBRUARY 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-15072
D.C. No. 4:17-cv-05783-HSG

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 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

No. 19-15118
D.C. No. 4:17-cv-05783-HSG

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 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

No. 19-15150
D.C. No. 4:17-cv-05783-HSG

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 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: Oct. 22, 2019

OPINION

Before: J. CLIFFORD WALLACE, ANDREW J. KLEINFELD, and SUSAN P. GRABER, Circuit Judges.

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

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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).

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. 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 Accommoda-

tions 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 an-

other 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 defendants 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 requirement. 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

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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.

"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").

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*

[3] The religious exemption's automatic acceptance of a self-certification is particularly troublesome given that it has an immedi-

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 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

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ate 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).

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 Su-

[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;

preme Court then vacated the nine 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").

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).

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).

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., 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).

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[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.

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 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 the door ought to be shut. We

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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).

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 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

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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).

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, 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

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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).

[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).

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

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[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)).

[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-

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 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.

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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).

[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.").

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, 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.

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

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 17-cv-05783-HSG
Re: Dkt. No. 174

STATE OF CALIFORNIA, ET AL., PLAINTIFFS

v.

HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

Filed: Jan. 13, 2019

ORDER GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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.*

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

For the reasons set out below, the motion is granted to maintain the status quo pending resolution of Plaintiffs' claims, and the enforcement of 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 by the Food and Drug Administration ("FDA"), without cost sharing. *Id.* at 102-10.

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

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:

> (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

[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).

> 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.

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 prof-

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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.*

fered 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 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

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

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 reli-

gion 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.

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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).

c. Ninth Circuit Appeal and Decision Limiting Scope of Injunction

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

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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has 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.

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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.

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).

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]

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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*

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 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.

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).

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 pol-

icy 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 requirements 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 with the eight courts that

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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 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);

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 of fact." *Priests for Life*, 772 F.3d at 247. Importantly, the Court may not, and does not here, question the "sincerity of [a

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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.

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 accommodation) 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.

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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

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 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").

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burden." 281 F. Supp. 3d at 581. This decision undercuts the Little Sisters' unanimity claim.

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

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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

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 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

"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.

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 nonbeneficiaries." *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 ade-

quate account of the burdens a requested accommodation may impose on nonbeneficiaries." 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.

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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.

at 57,551 n.26 (up to 126,400 women nationwide will lose coverage as result of Religious 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]

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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

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 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,

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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.

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.

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

/s/ HAYWOOD S. GILLIAM, JR.
HAYWOOD S. GILLIAM, JR.
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-15144
D.C. No. 4:17-cv-05783-HSG

STATE OF CALIFORNIA; STATE OF DELAWARE; COMMONWEALTH OF VIRGINIA; STATE OF MARYLAND; STATE OF NEW YORK, PLAINTIFFS-APPELLEES

v.

ALEX M. AZAR II, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; R. ALEXANDER ACOSTA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF LABOR; STEVEN TERNER MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE TREASURY, DEFENDANTS

AND

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE, INTERVENOR-DEFENDANT-APPELLANT

No. 18-15166
D.C. No. 4:17-cv-05783-HSG

STATE OF CALIFORNIA; STATE OF DELAWARE; COMMONWEALTH OF VIRGINIA; STATE OF MARYLAND; STATE OF NEW YORK, PLAINTIFFS-APPELLEES

v.

ALEX M. AZAR II, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; R. ALEXANDER ACOSTA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF LABOR; STEVEN TERNER MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE TREASURY, DEFENDANTS

AND

MARCH FOR LIFE EDUCATION AND DEFENSE FUND, INTERVENOR-DEFENDANT-APPELLANT

No. 18-15255
D.C. No. 4:17-cv-05783-HSG

STATE OF CALIFORNIA; STATE OF DELAWARE; COMMONWEALTH OF VIRGINIA; STATE OF MARYLAND; STATE OF NEW YORK, PLAINTIFFS-APPELLEES

v.

ALEX M. AZAR II, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; R. ALEXANDER ACOSTA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF LABOR; STEVEN TERNER MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE TREASURY, DEFENDANTS-APPELLANTS

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

Argued and Submitted: Oct. 19, 2018
San Francisco, California

Filed: Dec. 13, 2018

OPINION

Before: J. CLIFFORD WALLACE, ANDREW J. KLEINFELD, and SUSAN P. GRABER, Circuit Judges.

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 two interim final rules (IFRs) exempting employers with religious and moral objections from this requirement. Several states sued to enjoin the enforcement of the IFRs, and the district court issued a nationwide preliminary injunction. We have jurisdiction under 28 U.S.C. § 1292, and we affirm in part, vacate in part, and remand.

I.

A.

To contextualize the issues raised on appeal, we briefly recount the history of the ACA's contraceptive coverage requirement. The ACA provides that:

> 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). HRSA established guidelines for women's preventive services 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 services contained in HRSA's guidelines. *See, e.g.*, 45 C.F.R. § 147.130(a)(1)(iv) (DHSS regulation).

The agencies also recognized that religious organizations may object to the use of contraceptive care and offering health insurance that covers such care. For those organizations, the agencies provided two avenues. First, group health plans of certain religious employers, such as churches, are categorically exempt from the contraceptive coverage requirement. 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 cov-

ered 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 39,892. The organization sends a copy of the form to its insurance provider, which must then provide contraceptive coverage for the organization's employees and cannot impose any charges related to the coverage. *Id.* at 39,876. 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 subsequently amended the accommodation in response to several legal challenges. First, certain closely-held for-profit organizations became eligible for the accommodation. 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.*, 134 S. Ct. 2751, 2785 (2014). Second, instead of directly sending a copy of the self-certification form to the insurance provider, an eligible organization could simply notify the Department of Health and Human Services in writing, and the agencies then would inform the provider of its regulatory obligations. 80 Fed. Reg. at 41,323; *see also Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014).

Various employers then challenged the amended accommodation as a violation of the Religious Freedom Restoration Act (RFRA). *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016) (per curiam). The actions reached the Supreme Court, but, instead of deciding the merits of the claims, 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." *Id.* (internal quotation marks and citation omitted). The agencies solicited comments on the accommodation in light of *Zubik*, but ultimately declined to make further changes to the accommodation. 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.

B.

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 coverage requirement. Promoting Free Speech and Religious Liberty, Exec. Order No. 13,798, 82 Fed. Reg. 21,675, 21,675 (May 4, 2017). On October 6, 2017, the agencies effectuated the two IFRs challenged here, without prior notice and comment. The religious exemption IFR expanded the categorical exemption to all entities "with sincerely held religious beliefs objecting to contraceptive or sterilization coverage" and made the accommodation optional for such entities. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,807-08 (Oct. 13, 2017). The moral exemption IFR expanded the categorical exemption to "include additional entities and persons that object based on sincerely held moral convictions." Moral Exemptions and Accommodations for Coverage of Certain Preventive

Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,849 (Oct. 13, 2017). It also "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. *Id.*

California, Delaware, Maryland, New York, and Virginia sued the agencies and their secretaries in the Northern District of California. The states sought to enjoin the enforcement of the IFRs, alleging that they are invalid under the Administrative Procedure Act (APA), the Fifth Amendment equal protection component of the Due Process Clause, and the First Amendment Establishment Clause. The district court held that venue was proper and that the states had standing to challenge the IFRs. The district court then issued a nationwide preliminary injunction based on the states' likelihood of success on their APA claim—that the IFRs were procedurally 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 in the case.

The agencies, Little Sisters, and March for Life appeal from the district court's order on venue, standing, and nationwide preliminary injunction.

II.

Venue is reviewed de novo. *Immigrant Assistance Project of the L.A. Cty. Fed'n of Labor (AFL-CIO) v. INS*, 306 F.3d 842, 868 (9th Cir. 2002). Standing is

also reviewed de novo. *Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 506 (9th Cir. 1991). Findings of fact used to support standing are reviewed for clear error. *Id.*

A preliminary injunction is reviewed for abuse of discretion. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012). In reviewing the injunction, we apply a two-part test. First, we "determine de novo whether the trial court identified the correct legal rule to apply to the relief requested." *Id.* (quoting *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098, 1104 (9th Cir. 2010). 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." *Id.* (quoting *Cal. Pharmacists*, 596 F.3d at 1104). The scope of the preliminary injunction, such as its nationwide effect, is also reviewed for abuse of discretion. *United States v. Schiff*, 379 F.3d 621, 625 (9th Cir. 2004).

III.

A.

We first address whether the appeal is moot. We have authority only to decide live controversies, and because mootness is a jurisdictional issue, we are obliged to raise it sua sponte. *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005) (en banc). We determine "questions of mootness in light of the present circumstances where injunctions are involved." *Mitchell v. Dupnik*, 75 F.3d 517, 528 (9th Cir. 1996). More specifically, the question before us is "whether changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief."

Gator.com, 398 F.3d at 1129 (quoting *West v. Sec'y of the Dep't of Transp.*, 206 F.3d 920, 925 n.4 (9th Cir. 2000)).

On November 15, 2018, the agencies published final versions of the religious and moral exemption IFRs. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 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 (Nov. 15, 2018). The final rules are set to supersede the IFRs and become effective on January 14, 2019. *Id.* The district court's preliminary injunction rested solely on its conclusion that the IFRs are likely to be procedurally invalid under the APA. If the final rules become effective as planned on January 14, there will be no justiciable controversy regarding the procedural defects of IFRs that no longer exist. Indeed, we have previously dismissed a procedural challenge to an interim rule as moot after the rule expired. *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1150 (9th Cir. 2002); *see also NRDC v. U.S. Nuclear Regulatory Comm'n*, 680 F.2d 810, 814-15 (D.C. Cir. 1982) (holding that procedural challenge to a regulation promulgated in violation of notice and comment requirements was rendered moot by re-promulgation of rule with prior notice and comment); *The Gulf of Me. Fishermen's All. v. Daley*, 292 F.3d 84, 88 (1st Cir. 2002) ("[P]romulgation of new regulations and amendment of old regulations are among such intervening events as can moot a challenge to the regulation in its original form").

However, it is not yet January 14. We agree with the parties that mootness is not an issue until the final rules supersede the IFRs as expected on January 14,

2019. The IFRs have not been superseded yet, and the procedural validity of the IFRs is a live controversy. We can still grant the parties effective relief. Mootness, if at all, will arise only after our decision has issued. Accordingly, we have jurisdiction to decide this appeal.

B.

We hold that venue is proper in the Northern District of California. A civil action against an officer of the United States in his or her official capacity may "be brought in any judicial district in which . . . the plaintiff resides if no real property is involved in the action." 28 U.S.C. § 1391(e)(1). There is no real property involved here. The inquiry thus turns on which judicial district(s)—for a state with multiple districts like California—a state is considered to reside. This is a question of first impression in this circuit.

The agencies argue that California resides only in the Eastern District of California, where the state capital is located. The agencies cite 28 U.S.C. § 1391(c), which defines residency for "a natural person," "an entity," and "a defendant not resident in the United States." Relevant here, "an entity with the capacity to sue and be sued . . . whether or not incorporated" is deemed to reside "only in the judicial district in which it maintains its principal place of business." *Id.* § 1391(c)(2). The agencies argue that California is an "entity" and that its capital Sacramento, located in the Eastern District of California, is the principal place of business for the state.

The agencies' argument is unconvincing. We must "interpret [the] statut[e] as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the

same statute inconsistent, meaningless or superfluous." *United States v. Thomsen*, 830 F.3d 1049, 1057 (9th Cir. 2016) (citation omitted and alterations in original). The venue statute explicitly refers to the incorporation status of the "entity," indicating that the term refers to some organization, not a state. *See* 28 U.S.C. § 1391(c)(2) ("an entity . . . whether or not incorporated"). The legislative history confirms this interpretation. According to the House Report underlying section 1391(c)(2), the section is a response to "division in authority as to the venue treatment of unincorporated associations" and that the section, as stated, would treat equally corporations and unincorporated associations like partnerships and labor unions. *See* H.R. Rep. No. 112-10, at 21 (2011). These types of entities do not encompass sovereign states. Finally, we highlight that the statute explicitly distinguishes between states and entities. 28 U.S.C. § 1391(d); *see also Spencer Enters., Inc. v. United States.*, 345 F.3d 683, 689 (9th Cir. 2003) ("[U]se of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words"). The agencies therefore improperly assume, without support from the text or legislative history, that "entity" encompasses a state acting as a plaintiff.

Instead, we interpret the statute based on its plain language. A state is ubiquitous throughout its sovereign borders. The text of the statute therefore dictates that a state with multiple judicial districts "resides" in every district within its borders. *See Alabama v. U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301, 1329 (N.D. Ala. 2005) (holding that, for purposes of 28 U.S.C. § 1391(e), "common sense dictates that a state resides throughout its sovereign borders"); *see also Atlanta & F.R. Co. v.*

W. Ry. Co. of Ala., 50 F. 790, 791 (5th Cir. 1892) (discussing that "the state government . . . resides at every point within the boundaries of the state"). Any other interpretation limiting residency to a single district in the state would defy common sense. *See Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 900 (9th Cir. 2005) ("[C]ourts will not interpret a statute in a way that results in an absurd or unreasonable result"). Venue is thus proper in the Northern District of California.

C.

We hold that the states have standing to sue. The states bear the burden of establishing "the irreducible constitutional minimum" of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (internal quotation marks omitted). The states must have suffered an injury-in-fact that is fairly traceable to the challenged conduct and that is likely to be redressed by a favorable judicial decision. *Id.* The states must also demonstrate standing for each claim they seek to press. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Standing as to one claim does not "suffice for all claims arising from the same 'nucleus of operative fact.'" *Id.*

The district court held that the states had standing to assert their procedural APA claim. To establish an injury-in-fact, a plaintiff challenging the violation of a procedural right must demonstrate (1) that he has a procedural right that, if exercised, could have protected his concrete interests, (2) that the procedures in question are designed to protect those concrete interests, and (3) that the challenged action's threat to the plaintiff's concrete interests is reasonably probable. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969-70 (9th Cir. 2003); *see also Spokeo*, 136 S. Ct. at 1540

(describing the applicable standards for Article III standing in the context of statutory procedural rights). "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). Relaxed standards apply to the traceability and redressability requirements. *See NRDC v. Jewell*, 749 F.3d 776, 782-83 (9th Cir. 2014) (en banc) ("One who challenges the violation of 'a procedural right to protect his concrete interests can assert that right without meeting all the normal standards' for traceability and redressibility." (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992))). The plaintiff need not prove that the substantive result would have been different had he received proper procedure; all that is necessary is to show that proper procedure *could* have done so. *Citizens for Better Forestry*, 341 F.3d at 976.

The states argue that the agencies issued the religious and moral exemption IFRs without notice and comment as required under the APA. They argue that the deprivation of this procedural right affected their economic interests. According to the states, the IFRs expanded the number of employers categorically exempt from the ACA's contraceptive coverage requirement, and states will incur significant costs as a result of their residents' reduced access to contraceptive care. The states specifically identify three ways in which the IFRs will economically harm them. First, women who lose coverage will seek contraceptive care through state-run programs or programs that the states are responsible for reimbursing. Second, women who do not qualify for or cannot afford such programs will be at risk for unintended pregnancies, which impose financial costs

on the state. Third, reduced access to contraceptive care will negatively affect women's educational attainment and ability to participate in the labor force, affecting their contributions as taxpayers. Because we conclude that the record supports the first theory, we do not reach the alternative theories. *See, e.g.*, *Washington v. Trump*, 847 F.3d 1151, 1161 & n.5 (9th Cir. 2017) (per curiam) (holding that the plaintiffs had standing and declining to reach alternative theories of standing).

Appellants do not dispute that the states were denied notice and opportunity to comment on the IFRs prior to their effective date. They do not dispute that the notice and comment process could have protected and was designed to protect the states' economic interests. Instead, the appellants dispute whether the threat to the states' economic interests is reasonably probable. They argue that the allegations of economic injury are based on a speculative chain of events unlikely to occur. *Cf. Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013) (rejecting standing where "respondents' speculative chain of possibilities does not establish that injury . . . is certainly impending or is fairly traceable"). Appellants highlight how the states have failed to prove (1) that employers will take advantage of the expanded religious and moral exemptions, (2) that women will lose contraceptive coverage as a result, and (3) that states will then incur economic costs.

We hold that the states have standing to sue on their procedural APA claim. 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. *See*

Citizens for Better Forestry, 341 F.3d at 969. Just because a causal chain links the states to the harm does not foreclose standing. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) ("A causal chain does not fail simply because it has several 'links,' provided those links are not hypothetical or tenuous" (internal quotation marks and citation omitted)). The states need not have already suffered economic harm. *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004) (requiring only that the protected concrete interest be "threatened"). There is also no requirement that the economic harm be of a certain magnitude. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (explaining that injuries of only a few dollars can establish standing).

First, it is reasonably probable that women in the plaintiff states will lose some or all employer-sponsored contraceptive coverage due to the IFRs. The agencies' own regulatory impact analysis (RIA)—which explains the anticipated costs, benefits, and effects of the IFRs—estimates that between 31,700 and 120,000 women nationwide will lose some coverage. *See* 82 Fed. Reg. at 47,821, 47,823. Importantly, when making these estimates, the agencies accounted for key factors likely to skew the estimate, including that some objecting employers will continue to use the accommodation instead of the new, expanded exemptions. *See id.* at 47,818 (estimating that 109 entities—of the 209 entities who have litigated the contraceptive care requirement and are currently using the accommodation process—would seek exemption); *id.* ("We expect the 122 nonprofit entities that specifically challenged the accommodation in court to use the expanded exemption"). The record also includes names of specific employers identified by the RIA

as likely to use the expanded exemptions, including those operating in the plaintiff states like Hobby Lobby Stores, Inc. Appellants fault the states for failing to identify a specific woman likely to lose coverage. Such identification is not necessary to establish standing. For example, in *Sierra Forest Legacy v. Sherman*, California challenged a forest-management plan that changed the standards governing logging on a parcel of land. 646 F.3d 1161, 1171-72 (9th Cir. 2011). The state's standing to do so was based on future injury resulting from any logging under the plan. *Id.* at 1178 (maj. op. of Fisher, J.). We emphasized that the state's standing to challenge the plan "is not defeated by its not having submitted affidavits establishing approval of specific logging projects under" the plan because "there is no real possibility that the [relevant agency] will . . . decline to adopt" any project under the plan. *Id.* at 1179. The same is true here. Evidence supports that, with reasonable probability, some women residing in the plaintiff states will lose coverage due to the IFRs.

Second, it is reasonably probable that loss of coverage will inflict economic harm to the states. The RIA estimates the direct cost of filling the coverage loss as $18.5 or $63.8 million per year, depending on the method of estimating. 82 Fed. Reg. at 47,821, 47,824. More importantly, the RIA identifies that state and local programs "provide free or subsidized contraceptives for low-income women" and concludes that this "existing intergovernmental structure for obtaining contraceptives significantly diminishes" the impact of the expanded exemptions. *Id.* at 47,803. The RIA itself thus assumed that state and local governments will bear additional economic costs.

The declarations submitted by the states further show that women losing coverage from their employers will turn to state-based programs or programs reimbursed by the state. For example, California offers the Family Planning, Access, Care, and Treatment (Family PACT) program to provide contraceptive care to those below 200% of the federal poverty level. As attested to by program administrators, loss of coverage due to the IFRs will result in increased enrollment to Family PACT. Increased enrollment translates into, for example, the state reimbursing Planned Parenthood about $74.96 for each enrollee who receives contraceptive care. The states provided similar evidence for New York, Maryland, Delaware, and Virginia, which all have state-funded family planning programs.

Appellants dispute various factual findings underlying standing, but they do not explain how those findings are clearly erroneous. Appellants also argue that four of the plaintiff states—California, Delaware, Maryland, and New York—will not suffer harm because they have state laws that independently require certain employer-provided plans to cover contraceptive care. Those state laws do not apply to self-insured (also called self-funded) plans. *See* 29 U.S.C. § 1144(a) (preempting "any and all state laws" on this subject). Evidence shows that millions of people are covered, in each of the four states, under self-insured plans. For example, Hobby Lobby Stores, Inc. covers its employees through self-insured plans. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Appellants' argument does not even apply to Virginia, which does not have any state law requiring coverage for contraceptive care.

Accordingly, the states have shown that the threat to their economic interest is reasonably probable, and they have established a procedural injury. *Cf. East Bay Sanctuary Covenant v. Trump*, No. 18-17274, 2018 WL 6428204, at *12 n.8 (9th Cir. Dec. 7, 2018) (order) (holding that the plaintiffs "have adequately identified concrete interests impaired by the Rule and thus have standing to challenge the absence of notice-and-comment procedures in promulgating it"). "[T]he causation and redressability requirements are relaxed" once a plaintiff has established a procedural injury, *Citizens for Better Forestry*, 341 F.3d at 975 (quoting *Pub. Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1016 (9th Cir. 2003)), and both requirements are met here. The injury asserted is traceable to the agencies' issuing the IFRs allegedly in violation of the APA's requirements, and granting an injunction would prohibit enforcement of the IFRs. The states have thus established standing.[1]

The dissent raises a theory not advanced by any party. According to the dissent, the states' economic injuries, if any, will be self-inflicted because the states voluntarily chose to provide money for contraceptive

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[1] In addition to establishing constitutional standing, "[a] plaintiff must also satisfy the non-constitutional standing requirements of the statute under which [it] seeks to bring suit." *City of Sausalito*, 386 F.3d at 1199. In a single sentence, Little Sisters argues that the states lack statutory standing. This argument is waived. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief . . . [and a] bare assertion does not preserve a claim" (citation omitted)); *Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083, 1090 (9th Cir. 2012) (holding that "statutory standing may be waived").

care to its residents through state programs. The dissent argues that the states lack standing because such "self-inflicted" injuries are not traceable to the agencies' conduct, citing *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (per curiam). In *Pennsylvania*, the plaintiff states challenged other states' laws that increased taxes on nonresident income. 426 U.S. at 662-63. The plaintiff states provided tax credits to their residents for taxes paid to other states. *Id.* at 662. Accordingly, the defendant states' tax increases also increased the amount of tax credits provided by the plaintiff states, and the plaintiff states lost revenue. *Id.* In denying leave to file bills of complaint invoking the Supreme Court's original jurisdiction, the Court held that the plaintiff states could not "demonstrate that the injury for which [they sought] redress was directly caused by the actions of another State" because the injuries to the plaintiff states' fiscs "were self-inflicted . . . and nothing prevents [them] from withdrawing [the] credit for taxes paid to [defendant states]." *Id.* at 664.

We question whether the holding of *Pennsylvania* applies outside the specific requirements for the invocation of the Supreme Court's original jurisdiction. Courts regularly entertain actions brought by states and municipalities that face economic injury, even though those governmental entities theoretically could avoid the injury by enacting new legislation. *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203 (1987) (addressing South Dakota's challenge to highway funding conditioned on a minimum drinking age, even though South Dakota could have avoided the injury by changing its minimum drinking age); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 110-11 (1979) (holding that a municipality suffered an injury from a reduction in its property tax base, even

though nothing required the municipality to impose property taxes). But we need not decide whether *Pennsylvania*'s "self-infliction" doctrine applies to the ordinary injury-in-fact requirement of Article III standing because, as explained below, the injury here is not "self-inflicted" within the meaning of *Pennsylvania*.

The Supreme Court later held, in *Wyoming v. Oklahoma*, that Wyoming had standing to challenge an Oklahoma statute that decreased Wyoming's revenue—from tax on coal mined in Wyoming—by requiring Oklahoma power plants to burn at least 10% Oklahoma-mined coal. 502 U.S. 437, 447-48 (1992). The Court highlighted that Wyoming suffered a "direct injury in the form of a loss of specific tax revenues" from the reduced demand for Wyoming coal caused by the Oklahoma statute. *Id.* at 448.

Both *Pennsylvania* and *Wyoming* involved harm to the plaintiff states' fiscs that were, as described by the dissent, "self-inflicted." What distinguishes the two cases, and what caused the Supreme Court to reach different results, is that the plaintiff states' laws in *Pennsylvania* directly and explicitly tied the states' finances (revenue loss caused by tax credit) to another sovereign's laws (other states' taxes on nonresident income). *See Maryland v. Louisiana*, 451 U.S. 725, 742 n.18 (1981) ("In *Pennsylvania*, the only reason that the complaining States were denied tax revenues was because their legislatures had determined to give a credit for taxes paid to other States, and, to this extent, any injury was voluntarily suffered"). *Wyoming* did not involve such state laws; the tax on Wyoming-mined coal was not so tethered to the legislative decisions of other sovereigns. The same is true of the contraceptive coverage

laws of the plaintiff states here. Accordingly, we are not convinced that *Pennsylvania* controls in this case. *Cf. Texas v. United States*, 809 F.3d 134, 158-59 (5th Cir. 2015), *as revised* (Nov. 25, 2015); *Texas v. United States*, 787 F.3d 733, 749 n.34 (5th Cir. 2015).

D.

We affirm the preliminary injunction insofar as it bars enforcement of the IFRs in the plaintiff states, but we otherwise vacate the portion of the injunction barring enforcement in other states. The scope of the injunction is overbroad.

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) (citation omitted). "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) (alteration in original) (quoting *Winter*, 555 U.S. at 20). When the government is a party, the last two factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

1.

Likelihood of success on the merits is "the most important" factor; if a movant fails to meet this "threshold inquiry," we need not consider the other factors. *Disney*, 869 F.3d at 856 (citation omitted). The district

court held that the states are likely to succeed on the merits of their APA claim. We agree.

The APA requires that, prior to promulgating rules, an agency must issue a general notice of proposed rulemaking, 5 U.S.C. § 553(b), and "give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments," *id.* § 553(c). A court must set aside rules made "without observance of [this] procedure." *Id.* § 706(2)(D). Again, the parties do not dispute that the religious and moral exemption IFRs were issued without notice and comment. The only remaining issue is whether prior notice and comment was not required because an exception to this rule applied.

Exceptions to notice and comment rulemaking "are not lightly to be presumed." *Marcello v. Bonds*, 349 U.S. 302, 310 (1955). "[I]t is antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later." *Paulsen v. Daniels*, 413 F.3d 999, 1005 (9th Cir. 2005). Failure to follow notice and comment rulemaking may be excused when good cause exists, 5 U.S.C. § 553(b)(B); when a subsequent statute authorizes it, *id.* § 559; and when it is harmless, *id.* § 706. Appellants argue that each of these three exceptions applies here.

We begin by examining whether the agencies had good cause for bypassing notice and comment. An agency may "for good cause find[] . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). "[T]he good cause exception goes only as far as its name implies: It authorizes departures from the APA's requirements only when compliance would interfere with

the agency's ability to carry out its mission." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992). Good cause is to be "narrowly construed and only reluctantly countenanced." *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984) (citation omitted). As such, the good cause exception is usually invoked in emergencies, and an agency must "overcome a high bar" to do so. *United States v. Valverde*, 628 F.3d 1159, 1164-65 (9th Cir. 2010). Because good cause is determined on a "case-by-case" basis, based on "the totality of the factors at play," *Valverde*, 628 F.3d at 1164 (quoting *Alcaraz*, 746, F.2d at 612), prior invocations of good cause to justify different IFRs—the legality of which are not challenged here—have no relevance.[2]

In the past, we have acknowledged good cause where the agency cannot "both follow section 553 and execute its statutory duties." *Riverbend*, 958 F.2d at 1484 n.2 (quoting *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983)). We have also acknowledged good cause where "'delay would do real harm' to life, property, or public safety." *East Bay Sanctuary Covenant*, 2018 WL 6428204, at *20 (quoting *Valverde*, 628 F.3d at 1165); *see also Haw. Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995) (good cause shown based on threat reflected in an increasing number of helicopter accidents); *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (upholding good cause determination that the rule

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[2] The Little Sisters argue that if the court invalidates the IFRs here, the court must also invalidate prior ones related to the exemption and accommodation. This argument is unpersuasive. Whether or not those IFRs were promulgated with good cause, they are not before us at this time.

was "necessary to prevent a possible imminent hazard to aircraft, persons, and property within the United States").

The agencies here determined that "it would be impracticable and contrary to the public interest to engage in full notice and comment rulemaking before putting these [IFRs] into effect." *See, e.g.*, 82 Fed. Reg. at 47,815; *see also* 82 Fed. Reg. at 47,856. They recited the immediate need to (1) reduce the legal and regulatory uncertainty regarding the accommodation in the wake of *Zubik*, (2) eliminate RFRA violations by reducing the burden on religious beliefs of objecting employers, and (3) reduce the costs of health insurance.[3] 82 Fed. Reg. at 47,813-15; 82 Fed. Reg. at 47,855-56. These general policy justifications are insufficient to establish good cause.

First, an agency's desire to eliminate more quickly legal and regulatory uncertainty is not by itself good cause. *See Valverde*, 628 F.3d at 1167 (concluding that an agency's "interest in eliminating uncertainty does not justify its having sought to forego notice and comment"). "If 'good cause' could be satisfied by an Agency's assertion that 'normal procedures were not followed because of the need to provide immediate guidance and information[,] . . . then an exception to the notice requirement would be created that would swallow the rule.'" *Id.* (alterations in original) (quoting *Zhang v. Slattery*,

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[3] Little Sisters argues that the agencies had good cause because the prior regulatory regime violated the Free Exercise Clause and the Establishment Clause. This assertion was not part of the agencies' original good cause findings, and we may not consider it now. *See Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself").

55 F.3d 732, 746 (2d Cir. 1995)); *see also Envtl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920-21 (D.C. Cir. 1983) ("[I]t was not at all reasonable for [the agency] to rely on the good cause exception" simply because of "an alleged pressing need to avoid industry compliance with regulations that were to be eliminated"). Furthermore, the agencies' request for post-promulgation comments in issuing the IFRs "casts further doubt upon the authenticity and efficacy of the asserted need to clear up potential uncertainty," *Valverde*, 628 F.3d at 1166, because allowing for post-promulgation comments implicitly suggests that the rules will be reconsidered and that the "level of uncertainty is, at best, unchanged," *United States v. Reynolds*, 710 F.3d 498, 510 (3d Cir. 2013) (citing *United States v. Johnson*, 632 F.3d 912, 929 (5th Cir. 2011)). This explanation therefore fails. It is always the case that an agency can regulate—or in this case, de-regulate—faster by issuing an IFR without notice and comment.

Second, we of course acknowledge that eliminating RFRA violations by reducing the burden on religious beliefs is an important consideration for the agencies. Any delay in rectifying violations of statutory rights has the potential to do real harm. *See Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982) ("The notice and comment procedures in Section 553 should be waived only when delay would do real harm"). Whether the accommodation actually violates RFRA is a question left open by the Supreme Court.[4] *See Zubik*, 136 S. Ct. at

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[4] Before *Zubik*, eight courts of appeals (of the nine to have considered the issue) have found that the regulatory regime in place prior to the IFRs did not impose a substantial burden on religious exercise

1560. But we need not determine whether there is a RFRA violation here because, even if immediately remedying the RFRA violation constituted good cause, the agencies' reliance on this justification was not a reasoned decision based on findings in the record. *See Valverde*, 628 F.3d at 1165, 1168 (agencies must provide "rational justification" and identify "rational connection between the facts found and the choice made to promulgate the interim rule" (internal quotation marks and citation omitted)). In January 2017, the agencies explicitly declined to change the accommodation in light of *Zubik* and RFRA. They then let nine months go by and failed to specify what developments necessitated the agencies to change their position and determine, in October 2017, that RFRA violations existed. *Cf. id.* at 1166 (reasoning that agency finding of urgent need was inadequate when agency had allowed seven months to pass without action). The agencies provided no explanation, legal or otherwise, for their changed understanding. *Cf. Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (holding that an agency's unexplained change in position does not warrant deference); *East Bay Sanctuary Covenant*, 2018 WL 6428204, at *20 (concluding that "speculative" reasoning is insufficient to support good cause). The IFRs are devoid of any findings related to the issue. Indeed, the agencies cited no intervening legal authority for their justification, in contrast to when they issued an IFR in light of *Wheaton*. Given these failures, the agency action cannot be upheld on unexplained about-face.

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under RFRA. *See, e.g., E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015), *vacated, Zubik*, 136 S. Ct. at 1561.

The agencies further argue that the new IFRs will decrease insurance costs for entities remaining on more expensive grandfathered plans—which are exempt from the contraceptive coverage requirement—to avoid becoming subject to the requirement. 82 Fed. Reg. at 47,815; 82 Fed. Reg. at 47,855-56. This is speculation unsupported by the administrative record and is not sufficient to constitute good cause. *See Valverde*, 628 F.3d at 1167 ("[C]onclusory speculative harms the [agency] cites are not sufficient" (citation omitted)).

We also highlight that there was no urgent deadline to issue the IFRs that interfered with the agencies from complying with the APA.[5] Congress had not imposed a deadline here on agency decisionmaking that interfered with compliance. The President's executive order merely asks the agencies to "consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate." 82 Fed. Reg. at 21,675. Neither did the Supreme Court mandate any deadline when it remanded the last challenge to the accommodation in order to give parties "an opportunity to arrive at an approach going forward." *Zubik*, 136 S. Ct. at 1560.

The agencies cite two cases in support of their good cause claim: Priests For Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229 (D.C. Cir. 2014), vacated and remanded sub nom. Zubik, 136 S. Ct. at 1557; and

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[5] We also point out that the agencies have not displayed urgency in reaching final resolution of this case. After filing this appeal from the district court's order granting a preliminary injunction, the agencies filed a stipulation staying further district court proceedings pending resolution of the appeal. Before the district court, this case has remained in abeyance for nearly a year.

Serv. Employees Int'l Union, Local 102 v. Cty. of San Diego, 60 F.3d 1346 (9th Cir. 1994). Both are distinguishable. The D.C. Circuit in *Priests for Life* rejected the plaintiffs' argument that the government lacked good cause to promulgate IFRs without notice and comment. 772 F.3d at 276-77. In so holding, it emphasized that the IFRs modified existing regulations that "were recently enacted pursuant to notice and comment rulemaking, and presented virtually identical issues" as the challenged IFRs. *Id.* at 276 (emphasis added); *see also id.* (describing the modifications in the new IFRs as "minor"). The IFRs here do not present minor changes. They substantially expanded the categorical exemption and effectively made accommodations voluntary. The IFRs also introduced an entirely new moral exemption that had never been the subject of previous regulations. These substantial changes came after the agencies previously determined that no change to the religious accommodation process was needed in light of RFRA. In Serv. Employees Int'l Union, we held that resolving uncertainty caused by conflicting judicial decisions is sufficient good cause. 60 F.3d at 1352 n.3. In that case, resolving uncertainty was sufficient because the agencies found that conflicting decisions were poised to cause "enormous" and "unforeseen" financial liability "threaten[ing] [the] fiscal integrity" of state and local governments. *Id.* When issuing the IFRs here, the agencies cited no such comparable financial threat.

Accordingly, based on the totality of the circumstances, the agencies likely did not have good cause for bypassing notice and comment.

We next turn to whether the agencies had statutory authority for bypassing notice and comment. The APA

cautions "that no subsequent statute shall be deemed to modify it 'except to the extent that it does so expressly.'" *Castillo-Villagra v. INS*, 972 F.2d 1017, 1025 (9th Cir. 1992) (quoting 5 U.S.C. § 559); *see also Asiana Airlines v. FAA*, 134 F.3d 393, 397 (D.C. Cir. 1998) (defining the inquiry as "whether Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm"). The agencies point to three statutory provisions enacted as part of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). These provisions specify:

> The Secretary, consistent with section 104 of the Health [Insurance] Portability and Accountability Act of 1996, may promulgate such regulations as may be necessary or appropriate to carry out the provisions of this subchapter. The Secretary may promulgate any interim final rules as the Secretary determines are appropriate to carry out this subchapter.

26 U.S.C. § 9833; 29 U.S.C. § 1191c; 42 U.S.C. § 300gg-92. When enacting the ACA, Congress codified the contraceptive coverage requirement in the same chapters of the United States Code as those provisions. The agencies argue that the provisions authorize them to issue IFRs implementing the ACA without notice and comment.

Their argument likely fails. The identified provisions authorize agencies to issue IFRs, but they are silent as to any required procedure for issuing an IFR. They do not provide that notice and comment is supplanted or that good cause is no longer required. They neither contain express language exempting agencies from the APA nor provide alternative procedures that could reasonably be understood as departing from the APA. *See Castillo-Villagra*, 972 F.2d at 1025 (holding

that a subsequent statute must "expressly" modify the APA). These provisions thus stand in contrast to other provisions that we have found to be express abdications of the APA. *See, e.g*, *id.* (holding that APA was supplanted by statute that stated "the procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section" (internal quotation marks omitted)); *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1236 n.18 (D.C. Cir. 1994) (holding that APA was supplanted by statute that stated "[t]he Secretary *shall* cause to be published in the Federal Register a notice of the interim final DRG prospective payment rates" (emphasis added)).

The agencies insist that we must read HIPAA's use of the word "interim" as singlehandedly authorizing the agencies to issue IFRs without notice and comment *whenever the agencies deem it appropriate*. Otherwise, the agencies warn, we will be rendering superfluous the second sentence of the quoted provisions. We disagree.

The first sentence of the quoted provisions authorizes the issuance of regulations "consistent with section 104 of the Health [Insurance] Portability and Accountability Act of 1996." Section 104 of HIPAA, entitled "Assuring Coordination," generally requires the three Secretaries to coordinate their regulations and policies.[6]

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[6] Section 104 states:

> The Secretary of the Treasury, the Secretary of Health and Human Services, and the Secretary of Labor shall ensure, through the execution of an interagency memorandum of understanding among such Secretaries that—

Notably, the second sentence of the quoted provisions does *not* contain the same consistency requirement; each Secretary is authorized to issue IFRs *without ensuring consistency with the rules of his or her partner Secretaries*. Reading both sentences together, Congress authorized the Secretaries to issue coordinated final rules in the ordinary course; and, if a Secretary met an inter-agency impasse but needed to regulate within his or her own domain temporarily while sorting out the inter-agency conflict, then a Secretary could issue an interim final rule. In this procedural posture, we need not delimit the full scope of the second sentence of the quoted provisions. For present purposes, it suffices to observe that we need not give the second sentence the agencies' expansive interpretation in order for the second sentence to retain independent effect.

Accordingly, the agencies likely did not have statutory authority for bypassing notice and comment.

We last turn to whether bypassing notice and comment was harmless. The court "must exercise great caution in applying the harmless error rule in the administrative rulemaking context." *Riverbend*, 958 F.2d at

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(1) regulations, rulings, and interpretations issued by such Secretaries relating to the same matter over which two or more such Secretaries have responsibility under this subtitle (and the amendments made by this subtitle and section 401) are administered so as to have the same effect at all times; and

(2) coordination of policies relating to enforcing the same requirements through such Secretaries in order to have a coordinated enforcement strategy that avoids duplication of enforcement efforts and assigns priorities in enforcement.

Pub. L. No. 104-191, § 401, 110 Stat. 1976 (codified at 42 U.S.C. § 300gg-92 note).

1487. "[T]he failure to provide notice and comment is harmless only where the agency's mistake 'clearly had no bearing on the procedure used or the substance of decision reached.'" *Id.* (quoting *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764-65 (9th Cir. 1986)).

The circumstances here are similar to those in *Paulsen*, 413 F.3d at 1006. There, the Bureau of Prisons "failed to provide the required notice-and-comment period before effectuating [an] interim regulation, thereby precluding public participation in the rulemaking." *Id.* We held the error not harmless because "petitioners received no notice of any kind until after the Bureau made the . . . interim rule effective." *Id.* at 1007. We further emphasized that "an opportunity to protest an *already-effective* rule" did not render the violation harmless. *Id.* (emphasis added). We distinguished from prior cases where "interested parties received some notice that sufficiently enabled them to participate in the rulemaking process before the relevant agency adopted the rule." *Id.* (citing cases). The agencies' actions here are analogous. No members of the public received notice of the IFRs or were able to comment prior to their effective dates.

Appellants argue that the states "were afforded multiple opportunities to comment on the scope of the exemption and accommodation during multiple rounds of rulemaking." These "opportunities" refer to public comment on prior rules regarding the religious exemption and accommodation. Appellants' argument does not convince us. As previously discussed, those prior rules were materially different from the IFRs here, which dramatically expanded the scope of the religious exemption and introduced a moral exemption that was not the

subject of any previous round of notice and comment rulemaking. The public had no such notice or opportunity to comment on these potential changes, thus denying it the safeguards of the notice and comment procedure. This denial is comparable to failing to provide prior notice and comment before finalizing a rule that is not a "logical outgrowth" of the proposed rule, which an agency may not do without considering "whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule." *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002) (citation omitted); *see also CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009) (holding that notice of a proposed rule is sufficient to uphold a final rule if interested parties "should have anticipated" the content of the rule). Accordingly, the prior "opportunities" are irrelevant.

The agencies argue that the states have failed to identify any specific comment that they would have submitted. There is no such requirement for harmless error analysis. The agencies also argue that the states had an opportunity to comment on the IFRs post-issuance and that the agencies will consider the comments before issuing final rules. This argument also fails. "The key word in the title 'Interim Final Rule' . . . is not interim, but *final*. 'Interim' refers only to the Rule's intended duration—not its tentative nature." *Career Coll. Ass'n v. Riley*, 74 F.3d 1265, 1268 (D.C. Cir. 1996). We reiterate that "an opportunity to protest an *already-effective rule*" does not render an APA violation harmless. *Paulsen*, 413 F.3d at 1007 (emphasis added).

Accordingly, bypassing notice and comment likely was not harmless.

2.

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 standing analysis, it is reasonably probable that the states will suffer economic harm from the IFRs. Economic harm is not normally considered irreparable. *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980). However, such harm is irreparable here because the states will not be able to recover monetary damages connected to the IFRs. *See* 5 U.S.C. § 702 (permitting relief "other than money damages"); *see also Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015) (reaffirming that the harm flowing from a procedural violation can be irreparable). That the states promptly filed an action following the issuance of the IFRs also weighs in their favor. *Cf. Oakland Tribune, Inc. v. Chronicle Publ'g Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm").

Again, appellants argue that the economic harm is speculative, which "does not constitute irreparable in-

jury sufficient to warrant granting a preliminary injunction." *See Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (citation omitted). As we previously explained in our analysis of standing, the harm is not speculative; it is sufficiently concrete and supported by the record. Appellants also dispute the factual findings underlying the district court's holding of irreparable harm, but again fail to explain how the district court erred under our standard of review.

3.

Because the government is a party, we consider the balance of equities and the public interest together. *Jewell*, 747 F.3d at 1092.

The IFRs are an attempt to balance states' interest in "ensuring coverage for contraceptive and sterilization services" with appellants' interest in "provid[ing] conscience protections for individuals and entities with sincerely held religious [or moral] beliefs in certain health care contexts." 82 Fed. Reg. at 47,793. The district court concluded that the balance of equities and the public interest tip in favor of granting the preliminary injunction. The district court did not abuse its discretion.

The public interest is served by compliance with the APA: "The APA creates a statutory scheme for informal or notice-and-comment rulemaking reflecting a judgment by Congress that the public interest is served by a careful and open review of proposed administrative rules and regulations." *Alcaraz*, 746 F.2d at 610 (internal quotation marks and citation omitted). It does not matter that notice and comment could have changed the substantive result; the public interest is served from proper process itself. *Cf. Citizens for Better Forestry*, 341 F.3d

at 976 (stating, in standing context, that "[i]t suffices that the agency's decision *could be influenced*" by public participation (alterations and citation removed) (emphasis in original)). The district court additionally found that the states face "potentially dire public health and fiscal consequences as a result of a process as to which they had no input" and highlighted the public interest in access to contraceptive care. This finding is sufficiently supported by the record.

We acknowledge that free exercise of religion and conscience is undoubtedly, fundamentally important. Regardless of whether the accommodation violates RFRA, some employers have sincerely-held religious and moral objections to the contraceptive coverage requirement. *Cf. Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("[A]lthough the plaintiff's free exercise claim is statutory rather than constitutional, the denial of the plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily"). Protecting religious liberty and conscience is obviously in the public interest. However, balancing the equities is not an exact science. *See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring) ("Balancing the equities . . . is lawyers' jargon for choosing between conflicting public interests"). We do not have a sufficient basis to second guess the district court and 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 future determination of whether to issue a permanent injunction.

E.

The district court enjoined enforcement of the IFRs nationwide because the agencies "did not violate the APA just as to Plaintiffs: *no* member of the public was permitted to participate in the rulemaking process via advance notice and comment." The district court abused its discretion in granting a nationwide injunction. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) ("[A]n overbroad injunction is an abuse of discretion" (quoting *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991)). We vacate the portion of the injunction barring enforcement of the IFRs in non-plaintiff states.

Crafting a preliminary 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). "The purpose of such interim equitable relief is not to conclusively determine the rights of the parties but to balance the equities as the litigation moves forward." *Id.* (citation omitted). Although "there is no bar against . . . nationwide relief in federal district court or circuit court," such broad relief must be "*necessary* to give prevailing parties the relief to which they are entitled." *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987) (emphasis in original removed in part); *see also Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs" before the court). This rule applies with special force where

there is no class certification.[7] *See Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996) ("[I]njunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification").

Before we examine the scope of the injunction here, we highlight several concerns associated with overbroad injunctions, particularly nationwide ones. Our concerns underscore the exercise of prudence before issuing such an injunction. First, "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." *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011). The Supreme Court has repeatedly emphasized that nationwide injunctions have detrimental consequences to the development of law and deprive appellate courts of a wider range of perspectives. *See Califano*, 442 U.S. at 702 (highlighting that nationwide injunctions "have a detrimental effect by foreclosing adjudication by a number of different courts and judges"); *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (concluding that allowing nonmutual collateral estoppel against the government would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue" and "deprive [the Supreme] Court of the benefit it

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[7] Indeed, Congress has recently proposed a bill that would prohibit injunctions involving non-parties "unless the non-party is represented by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure." H.R. 6730, 115th Cong. (2018)

receives from permitting several courts of appeals to explore a difficult question before [the Supreme] Court grants certiorari"); *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court").

The detrimental consequences of a nationwide injunction are not limited to their effects on judicial decisionmaking. There are also the equities of non-parties who are deprived the right to litigate in other forums. *See* Zayn Siddique, *Nationwide Injunctions*, 117 Colum. L. Rev. 2095, 2125 (2017) ("A plaintiff may be correct that a particular agency action is unlawful or unduly burdensome, but remedying this harm with an overbroad injunction can cause serious harm to nonparties who had no opportunity to argue for more limited relief"). Short of intervening in a case, non-parties are essentially deprived of their ability to participate, and these collateral consequences are not minimal. Nationwide injunctions are also associated with forum shopping, which hinders the equitable administration of laws. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 458-59 (2017) (citing five nationwide injunctions issued by Texas district courts in just over a year).

These consequences are magnified where, as here, the district court stays any effort to prepare the case for trial pending the appeal of a nationwide preliminary injunction. We have repeatedly admonished district courts not to delay trial preparation to await an interim ruling

on a preliminary injunction. *See, e.g.*, *Melendres v. Arpaio*, 695 F.3d 990, 1002-03 (9th Cir. 2012); *Global Horizons, Inc. v. U.S. Dep't of Labor*, 510 F.3d 1054, 1058 (9th Cir. 2007). "Because of the limited scope of our review of the law applied by the district court and because the fully developed factual record may be materially different from that initially before the district court, our disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits." *Id.* at 1003 (quoting *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 753 (9th Cir. 1982)). The district court here failed to give any particular reason for the stay,[8] and this case could have well proceeded to a disposition on the merits without the delay in processing the interlocutory appeal. "Given the purported urgency of" implementing the IFRs, the agencies and intervenors might "have been better served to pursue aggressively" its defense of the IFRs in the district court, "rather than apparently awaiting the outcome of this appeal." *Global Horizons*, 510 F.3d at 1058.

In light of these concerns, we now address the preliminary injunction issued here. The scope of the remedy must be no broader and no narrower than necessary to redress the injury shown by the plaintiff states. The plaintiff states argue that complete relief to them would require enjoining the IFRs in all of their applications nationwide. That is not necessarily the case. *See L.A. Haven Hospice*, 638 F.3d at 665 (vacating the nationwide portion of an injunction barring the enforcement of

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[8] The district court stayed the case pending the outcome of this appeal based on the parties' stipulation. The order staying the case provides no other justification or analysis supporting the stay.

a facially invalid regulation); *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1244-45 (9th Cir. 2018) (vacating nationwide portion of injunction barring enforcement of executive order). The scope of an injunction is "dependent as much on the equities of a given case as the substance of the legal issues it presents," and courts must tailor the scope "to meet the exigencies of the particular case." *Int'l Refugee Assistance Project*, 137 S. Ct. at 2087 (citations omitted). The circumstances of this case dictate a narrower scope.

On the present record, an injunction that applies only to the plaintiff states would provide complete relief to them. It would prevent the economic harm extensively detailed in the record. Indeed, while the record before the district court was voluminous on the harm to the plaintiffs, it was not developed as to the economic impact on other states. *See City & Cty. of San Francisco*, 897 F.3d at 1231, 1244-45 (holding that the district court abused its discretion in issuing a nationwide injunction because the plaintiffs' "tendered evidence is limited to the effect of the Order on their governments and the State of California" and because "the record is not sufficiently developed on the nationwide impact of the Executive Order"). The injunction must be narrowed to redress only the injury shown as to the plaintiff states.[9]

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[9] Appellants did not clearly raise other arguments in support of a narrower injunction, including the potential for "substantial interference with another court's sovereignty," *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 770 (9th Cir. 2008), and the lack of need for courts to apply the law uniformly. Accordingly, we do not address them.

Accordingly, we conclude that the scope of the preliminary injunction is overbroad and that the district court abused its discretion in that regard. District judges must require a showing of nationwide impact or sufficient similarity to the plaintiff states to foreclose litigation in other districts, from Alaska to Puerto Rico to Maine to Guam.

IV.

We affirm that venue is proper in the Northern District of California. We affirm that the plaintiff states have standing to sue. Although we affirm the preliminary injunction, the record does not support the injunction's nationwide scope. We vacate the portion of the injunction barring enforcement of the IFRs in other states and remand to the district court. This panel will retain jurisdiction for any subsequent appeals arising from this case. Costs on appeal are awarded to Plaintiffs-Appellees. The mandate shall issue forthwith.

AFFIRMED IN PART, VACATED IN PART, and REMANDED.

KLEINFELD, Senior Circuit Judge, dissenting:

I respectfully dissent. The plaintiff state governments lack standing, so the district court lacked jurisdiction. The reason they lack standing is that their injury is what the Supreme Court calls "self-inflicted," because it arises solely from their legislative decisions to pay these moneys. Under the Supreme Court's decision in *Pennsylvania v. New Jersey*,[1] we are compelled to reverse.

Pennsylvania sued New Jersey on the theory that a new New Jersey tax law caused the Pennsylvania fisc to collect less money.[2] Pennsylvania granted a tax credit for income taxes paid to other states, and New Jersey under its new tax law had begun taxing the New Jersey-derived income of nonresidents.[3] Maine, Massachusetts, and Vermont sued New Hampshire on similar grounds.[4] The concrete financial injury was plain in all these cases. Like the plaintiff states' injury in the case before us, the reason why was the plaintiff states' laws.[5]

The Court in *Pennsylvania* invoked the long established principle that under *Massachusetts v. Missouri*,[6] the injuries for which redress was sought had to be "directly caused" by the defendant states.[7] They were held not to be "directly caused" in *Pennsylvania*, because the monetary losses resulted from the plaintiff

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[1] 426 U.S. 660 (1976) (per curiam).

[2] *Id.* at 662.

[3] *Id.* at 663.

[4] *Id.*

[5] *Id.*

[6] 308 U.S. 1, 15 (1939).

[7] *Pennsylvania*, 426 U.S. at 664.

states' own laws.[8] Though it was undisputed that the defendant states' tax schemes had cost the plaintiff states money, the defendant states were held not to have "inflicted any injury,"[9] because the monetary harms were "self-inflicted:"[10]

The injuries to the plaintiffs' fiscs were self-inflicted, resulting from decisions made by their respective state legislatures. Nothing required Maine, Massachusetts, and Vermont to extend a tax credit to their residents for income taxes paid to New Hampshire, and nothing prevents Pennsylvania from withdrawing that credit for taxes paid to New Jersey. No state can be heard to complain about damage inflicted by its own hand.[11]

California and the other plaintiff states in the case before us have pointed out that their legislative schemes were in place before the federal regulatory change that will cost them money. But *Pennsylvania* does not leave room for such a "first in time, first in right" argument. Vermont's law, for instance, long preceded New Hampshire's, but the court held that any "injury" was "self-inflicted" because Vermont need not have extended tax credits to its residents at all.[12] The states could also have prevented their financial injury by changing their laws.[13] As the concurring opinion put it, "[t]he appellants

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*; *see* 32 V.S.A. § 5825 (1966); N.H. R.S.A. § 77-B:2 (1970).

[13] *Pennsylvania*, 426 U.S. at 664.

therefore, [we]re really complaining about their own statute[s]."[14]

Pennsylvania differs from the case before us because the dispute was between coequal sovereigns in *Pennsylvania*, heard under the Court's original jurisdiction, and here it is between state governments and the federal government. But *Pennsylvania*'s rejection of "self-inflicted" injury has been applied outside the original jurisdiction context.[15] There is no conflict between the federal and state laws, so the sovereign rights of the plaintiff states cannot establish standing.[16] Though the plaintiff states may under their own laws spend additional money to provide benefits to some women that they would not have had to pay for before the federal change, they remain free to decide whether to do so.

As the majority acknowledges, the "irreducible minimum" for standing is that "the plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that

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[14] *Id.* at 667.

[15] *See Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 416 (2013).

[16] *Sturgeon v. Masica*, 768 F.3d 1066, 1074 (9th Cir. 2014), *vacated and remanded sub nom. Sturgeon v. Frost*, 136 S. Ct. 1061 (2016) (rejecting "standing based simply on purported violations of a state's sovereign rights" and requiring "evidence of actual injury" where state failed to "identify any actual conflict between [federal agency regulations] and its own statutes and regulations"); *Sturgeon v. Frost*, 872 F.3d 927, 929 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 2648 (2018) (explaining prior holding as to state standing was "unaffected by the Supreme Court's vacatur of [the] prior opinion"); *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 270 (4th Cir. 2011) (holding state lacked standing where it failed to identify enforcement of state statute that "conflict[ed]" with the individual mandate of the ACA).

is likely to be redressed by a favorable judicial decision."[17] All three minima are perhaps debatable, but causation, that is, "traceability," is controlled by *Pennsylvania*. That case establishes that harm to the fisc of a plaintiff state because of its own statute is "self-inflicted," and therefore not "traceable to the challenged conduct of the defendant."[18] Traceability fails if the expense to the state results from its own law and without that state legislative choice, could be avoided. The federal regulatory change itself imposes no obligation on the states to provide money for contraception. The plaintiff states choose to provide some contraception benefits to employees of employers exempted by the federal insurance requirement, so the narrowing of the federal mandate may lead to the states spending more because some employers may spend less. Nor can the plaintiff states invoke the doctrine of *parens patriae* to gain standing.[19]

I recognize that the Fifth Circuit took a different view in different circumstances in *Texas v. United States*.[20] There, the Fifth Circuit held that states did indeed have standing to challenge a new federal program relating to

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[17] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016).

[18] *Pennsylvania*, 426 U.S. at 664; *Spokeo*, 136 S. Ct. at 1547.

[19] *See Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) (explaining that state actions against the federal government "to protect [its] residents from the operation of federal statutes" are precluded); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011) ("California, like all states, 'does not have standing as *parens patriae* to bring an action against the Federal Government.'" (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982))).

[20] 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015).

immigration.[21] Texas was held to have standing because federal regulatory change on its administration of drivers' license—requiring it to issue drivers' licenses to illegal aliens—would cost it money.[22] The Fifth Circuit rejected application of the *Pennsylvania* "self-inflicted injury" rule, but stressed that its decision "is limited to these facts."[23] It is not plain that the Fifth Circuit would extend its view of standing to the quite different facts before us. The regulatory change regarding contraception poses no challenge to the sovereign authority of California to provide contraceptive benefits or not, but the regulatory change in *Texas* did limit the legislative choices Texas could make without "running afoul of preemption or the Equal Protection Clause."[24] Nor can we be sure that *Texas* is good law. The Supreme Court granted certiorari on the question whether "a State that voluntarily provides a subsidy" has standing to challenge a federal change that would expand its subsidy, and other issues.[25] The Court was "equally divided," so the questions were not answered.[26]

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[21] *Id.* at 162.

[22] *Id.* at 155-57.

[23] *Id.* at 154.

[24] *Id.* at 153; *see also Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) ("An amicus curiae generally cannot raise new arguments on appeal." (citations omitted)).

[25] *United States v. Texas*, 136 S. Ct. 906 (2016); Pet. for Writ of Cert. at I, *United States v. Texas*, No. 15-674 (U.S. Nov. 20, 2015).

[26] *United States v. Texas*, 136 S. Ct. 2271, 2272, *reh'g denied*, 137 S. Ct. 285 (2016).

The majority errs in treating *Wyoming v. Oklahoma*[27] as though it overruled *Pennsylvania*.[28] It does not say so. And the Court doubtlessly would have said so had that been its intent. Nor is the self-inflicted injury doctrine even relevant to *Wyoming*, which is doubtless why *Wyoming* does not discuss *Pennsylvania*. In *Pennsylvania*, the plaintiff states could have avoided any lost revenue by changing their own laws granting tax credits for taxes paid to the defendant states. By contrast, Wyoming could not prevent the expense to its fisc by changing its own law.[29] Wyoming lost severance tax revenue because the new Oklahoma law required major Oklahoma coal consumers to replace a substantial part of the Wyoming coal they burned with Oklahoma

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[27] 502 U.S. 437 (1992).

[28] Of course, it does not matter when jurisdiction is raised, since we must raise it whenever its absence appears likely. *See Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 891 n.9 (9th Cir. 2018) ("Because Article III standing is jurisdictional, we must *sua sponte* assure ourselves."). And the majority errs in saying that the self-inflicted harm doctrine was not raised by the parties. *See* Reply Br. of March for Life at 29, Dkt. No. 95. Much of the briefing before us addresses standing, and the appellee states were also provided an opportunity to address self-inflicted injury at oral argument. And it does not matter that the self-inflicted injury doctrine arose in the context of a case taken under the Court's original jurisdiction, because it is a straightforward application of the generally applicable causation requirement for standing. *See Clapper*, 568 U.S. at 416 (applying *Pennsylvania*'s "self-inflicted" doctrine outside the original jurisdiction context); *Texas*, 809 F.3d at 158-59 (same).

[29] *Wyoming*, 502 U.S. at 447; *see also Texas*, 809 F.3d at 158 ("Wyoming sought to tax the extraction of coal and had *no way to avoid being affected by other states' laws* that reduced demand for that coal." (emphasis added)).

coal, so less coal was mined in Wyoming.[30] Since the Wyoming legislature could not change the Oklahoma law, the harm to Wyoming's fisc was not self-inflicted. The Oklahoma law, which expressly targeted Wyoming, caused the injury.[31] In our case, as in *Pennsylvania*, the plaintiff states elected to pay money in certain circumstances, and can avoid the harm to their fiscs by choosing not to pay the money.

I agree with the federal position that the plaintiff states lack standing to bring this case in federal court. Because such a conclusion would preclude us from reaching the other issues in the case, I do not speak to them in this dissent. Nor do I address additional reasons why the plaintiff states may lack standing, since the "self-inflicted injury" disposes of the question without them.

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[30] *Id.* at 443, 445-47.

[31] *Id.* at 443.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 17-cv-05783-HSG
Re: Dkt. No. 28

STATE OF CALIFORNIA, ET AL., PLAINTIFFS

v.

HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

Filed: Dec. 21, 2017

ORDER GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

Pending before the Court is a motion for a preliminary injunction that would enjoin two interim final rules ("IFRs") exempting certain entities from the Affordable Care Act's mandate to employers to provide contraceptive coverage. Plaintiffs are the states of California, Delaware, Maryland, and New York, and the Commonwealth of Virginia. Defendants are the U.S. Department of Health & Human Services ("HHS"); Secretary of HHS Eric D. Hargan; the U.S. Department of Labor; Secretary of Labor R. Alexander Acosta; the U.S. Department of the Treasury; and Secretary of the Treasury Steven Mnuchin.

Defendants begin their brief in opposition to the motion for preliminary injunction with the contention that "[t]his case is about religious liberty and freedom of conscience." Dkt. No. 51 at 1. And without question, that is one of the important values at issue in this case. But Defendants' characterization leaves out an equally critical aspect of what this case is about. Since its enactment, the Affordable Care Act ("ACA") has required group health insurance plans to provide women access to preventive care, including contraceptives, without imposing any cost sharing requirement. Less than two years ago, in April 2016, Defendants (or, in the case of the individual defendants, their predecessors) represented to the Supreme Court that the United States Government has a compelling interest in ensuring access to such coverage for women. *See* Supplemental Br. for Resp'ts at 1, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam) (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"). Moreover, Defendants have consistently recognized the need to balance this compelling interest with the important goal of "minimiz[ing] any burden on religious exercise." *Id.*

But the Defendants have now changed their position, dramatically. In the IFRs that became effective on October 6, 2017, Defendants asserted that there is no such compelling interest after all. They also markedly expanded the scope of the exemption available to religious entities under the ACA's contraceptive coverage mandate, and created an entirely new exemption based on

moral objections. In sum, the IFRs represent an abandonment of the Defendants' prior position with regard to the contraceptive coverage requirement, and a reversal of their approach to striking the proper balance between substantial governmental and societal interests.

These highly-consequential IFRs were implemented without any prior notice or opportunity to comment. The Court finds that, at a minimum, Plaintiffs are likely to succeed in showing that this process violated the Administrative Procedure Act, and that this violation will cause them imminent harm if enforcement of the IFRs is not enjoined. Accordingly, for the reasons set forth below, Plaintiffs' motion is **GRANTED**.

II. BACKGROUND

Before turning to Plaintiffs' challenge to the IFRs at issue in this case, the Court recounts the sequence of events which began with the enactment of the Affordable Care Act in 2010.

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).

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' 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 (De-

partment of Labor); 26 C.F.R. § 54.9815-2713 (Department of the Treasury).[1] As relevant here, the regulations were substantively identical to the 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 ("IOM") met in response to the charge of HHS' 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. IOM Report[2] at 1, 23. In July 2011, the committee issued a report recommending that private health insurance plans be required to cover all contraceptive methods approved 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.[3]

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[1] The Department of Treasury's regulations were first promulgated in 2012, two years after those of the Health and Human Services and Labor departments.

[2] Institute of Medicine, Clinical Preventive Services for Women: Closing the Gaps (2011), *available at* https://www.nap.edu/read/13181/chapter/1.

[3] *See* HEALTH RES. & SERVS. ADMIN., Women's Preventive Services Guidelines, *available at* https://www.hrsa.gov/womens-guidelines/index.html. 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

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:

> (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. Specif-

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contraceptive methods for women" as identified by the FDA. *See* HEALTH RES. & SERVS. ADMIN., Women's Preventive Services Guidelines, *available at* https://www.hrsa.gov/womens-guidelines-2016/index.html.

ically, 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. 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 contracep-

tive coverage without cost sharing in order to accommodate non-exempt, non-profit religious organizations with religious objections to such coverage." 77 Fed. Reg. 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. 78 Fed. Reg. 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

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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

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.

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. 2751, 2759 (2014). 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 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 point: "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

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(iii) of the Code [was] considered a religious employer for purposes of the religious employer exemption." *Id.*

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

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," *id.*, and said its opinion "should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs," *id.* at 2783.

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 the order "should not be construed as an expression of the Court's views on the merits." *Id.*

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

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. 51,121. 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." *Id.* at 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. 41,324. 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. 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").[6] 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." FAQs at 4.

I. The 2017 IFRs at Issue

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. Subsequently, on October 6, 2017, the agencies issued the Religious Exemption IFR and the Moral Exemption IFR at issue in this case (collectively, "the 2017 IFRs").

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[6] DEP'T OF LABOR, FAQs About Affordable Care Act Implementation Part 36, *available at* https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf.

The 2017 IFRs departed from the prior 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. 47,807-08. 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. 82 Fed. Reg. 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.[7] 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." *Id.* at 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

[7] The Court will discuss Defendants' proffered justifications in more detail below.

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.

J. This District Court Action

On November 1, 2017, Plaintiffs filed the First Amended Complaint. Dkt. No. 24 ("FAC"). They filed this motion for a preliminary injunction on November 9, 2017. Dkt. No. 28 ("Mot."). On November 29, 2017, Defendants filed an opposition, Dkt. No. 51 ("Opp."), to which Plaintiffs replied on December 6, 2017, Dkt. No. 78 ("Reply"). The Court held a hearing on the motion on December 12, 2017. Dkt. No. 100.[8]

[8] The Court also granted several motions filed by groups seeking leave to file amicus curiae briefs. *See* Dkt. Nos. 72 (American Association of University Women, Service Employees International Union, and 14 additional professional, labor, and student associations); 74 (14 states and the District of Columbia); 76 (American Center for Law & Justice). The Court has considered those briefs along with the parties' moving papers.

III. 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 it is entitled to this extraordinary remedy. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010).

IV. ANALYSIS

The Court first addresses the threshold issues of standing and venue, then turns to the preliminary injunction analysis.

A. Plaintiffs Have Standing to Sue.

1. Plaintiffs have Article III standing.

The standing doctrine is "rooted in the traditional understanding of a case or controversy," and "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong."

Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). In this way, the doctrine, "which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). For this reason, the "standing inquiry has been especially rigorous when reaching the merits of a dispute would force [a court] to decide whether an action taken by one of the other two branches of the [f]ederal [g]overnment was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997).

"States are not normal litigants for the purposes of invoking federal jurisdiction," *Mass. v. Envtl. Prot. Agency*, 549 U.S. 497, 518 (2007), and are "entitled to special solicitude in [the] standing analysis," *id.* at 520. States have standing to protect their sovereign interests, such as the interest in their physical territory. *See Or. v. Legal Servs. Corp.*, 552 F.3d 965, 970 (9th Cir. 2009) (quoting *Mass.*, 549 U.S. at 518-19). They may also sue to assert their quasi-sovereign interests, like "the health and well-being—both physical and economic—of [their] residents in general." *Alfred L. Snapp & Son, Inc. v. P.R. ex rel. Barez*, 458 U.S. 592, 607 (1982). In the latter situation, however, "the State must be more than a nominal party." *Id.* at 608. "A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant." *Id.* at 602.

State or not, a plaintiff invoking federal jurisdiction bears the burden of establishing "the irreducible constitutional minimum" of standing. *Spokeo*, 136 S. Ct. at 1547 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). That is, "the plaintiff must have suffered an injury in fact—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). The plaintiff's injury must also be "fairly traceable to the challenged conduct of the defendant," as well as "likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547 (citing *Lujan*, 504 U.S. at 560-61).

Agency action that causes a state to "incur significant costs" is sufficient to constitute injury in fact. *See Tex. v. U.S.*, 809 F.3d 134, 155 (5th Cir. 2015) (finding that Texas had standing to sue federal government because Deferred Action for Parents of Americans and Lawful Permanent Residents program required the state to issue driver's licenses to program beneficiaries "at a financial loss"). Federal courts may also "recognize a 'procedural injury' when a procedural requirement has not been met, so long as the plaintiff also asserts a 'concrete interest' that is threatened by the failure to comply with that requirement." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004). Such a plaintiff "must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Citizens for a Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969 (9th Cir. 2003). The plaintiff must also "establish the reasonable probability of the challenged action's threat to [his or her] concrete interest." *Id.* (citation and internal quotation marks omitted) (original brackets). In such cases, once a plaintiff has established a procedural injury in fact, "the causation and redressability requirements are relaxed." *Id.* (citation and internal quotation marks omitted).

Plaintiffs have stated a procedural injury that is sufficient for the purposes of Article III standing. They assert that Defendants failed to comply with the APA's notice and comment requirement, resulting in Plaintiffs' being "denied the opportunity to comment and be heard, prior to the effective date of the [2017] IFRs, concerning the impact of the rules on the States and their residents." FAC ¶ 16. Plaintiffs must also show that these procedures "are designed to protect some concrete threatened interest" that "is the ultimate basis of [their] standing." *See Citizens for a Better Forestry*, 341 F.3d at 969. Plaintiffs do so by explaining that they have an "interest in ensuring that women have access to no-cost contraceptive coverage" under the ACA, in large part because without that access, Plaintiffs will incur economic obligations, either to cover contraceptive services necessary to fill in the gaps left by the 2017 IFRs or for "expenses associated with unintended pregnancies." Reply at 3; *see also* Dkt. No. 28-8 (Decl. of Lawrence Finer) ¶ 61 ("Unintended pregnancies cost the state approximately $689 million . . . in 2010."); Dkt. No. 28-14 (Decl. of Jenna Tosh) ¶ 27 (stating that California pays for 64 percent of unplanned births, with the average cost estimated at more than $15,000 per birth). Accordingly, Plaintiffs are more than merely a "nominal party" in this suit asserting a quasi-sovereign interest in the physical health and well-being of their citizens. *See Alfred L. Snapp & Son*, 458 U.S. at 607-08. Rather, they have shown that the 2017 IFRs will impact their fiscs in a manner that corresponds with the IFRs' impact on their citizens' access to contraceptive care. And, while the causation and redressability requirements are relaxed in cases of procedural injury, Plaintiffs also satisfy those prongs of the standing inquiry. The injury asserted is directly

traceable to Defendants' decision to issue the IFRs without advance notice and comment, and granting a preliminary injunction would enjoin enforcement of those IFRs until the Court can assess the merits.[9]

Plaintiffs thus have standing under Article III.

2. Statutory Standing

In addition to the requirements of Article III, "[a] plaintiff must also satisfy the non-constitutional standing requirements of the statute under which [it] seeks to bring suit." *City of Sausalito*, 386 F.3d at 1199. 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.[10] Courts have interpreted this provision to require a petitioner bringing suit under the APA to "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

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[9] While Defendants' primary argument is that Plaintiffs lack standing, they fail to address, or even acknowledge, Plaintiffs' asserted procedural injury under the APA in this context, focusing instead on opposing Plaintiffs' standing to bring any substantive claims. *See* Opp. at 8-11. Defendants thus fail to contend with the "relaxed" causation and redressability requirements. *See Citizens for a Better Forestry,* 341 F.3d at 969. They also inaccurately cast Plaintiffs' allegations regarding their fiscal injury as "conclusory," failing to address the substantial declarations supporting Plaintiffs' motion. *See* Opp. at 9.

[10] The Court is satisfied that Plaintiffs are persons under the APA. *See, e.g.*, *Texas*, 809 F.3d at 162-63 (finding that Texas, the plaintiff, met the APA's statutory standing requirements); *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2259 (2013) (noting, in dicta, that a state may challenge the decision of a federal commission under the APA).

zone of interests of the statutory provision the plaintiff claims was violated." *Citizens for a Better Forestry*, 341 F.3d at 976 (citation and internal quotation marks omitted).

To qualify as "final agency action," (1) "the action must mark the consummation of the agency's decisionmaking process" and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. . . ." *Bennett v. Spear*, 520 U.S. 154, 177-78 (2014) (citations and internal quotations marks omitted). And the "zone of interests" inquiry is "construed generously" and is "not meant to be especially demanding": a court should only deny standing on this ground where "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *City of Sausalito*, 386 F.3d at 1200 (quoting *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399 (1987)) (internal quotation marks omitted).

The IFRs are final agency action. Despite the presence of the word "interim" in "interim final rule," "the key word . . . is not interim, but final," because interim "refers only to the Rule's intended duration—not its tentative nature." *See Beverly Enters. v. Herman*, 50 F. Supp. 2d. 7, 17 (D.D.C. 1999) (citing *Career Coll. Ass'n v. Riley*, 74 F.3d 1265, 1268 (D.C. Cir. 1996)). The IFRs are thus properly understood as the consummation of the relevant agencies' decisionmaking process. And it is plain that "rights or obligations have been determined" by the IFRs. For example, the Religious Exemption IFR extends the exemption to any entity with a "sincerely held religious belief[] objecting

to contraceptive or sterilization coverage," 82 Fed. Reg. 47,807-08, while the Moral Exemption IFR broadens eligibility even more dramatically by making the exemption available to those "with sincerely held *moral* convictions by which they object to contraceptive or sterilization coverage," *id.* at 47,849 (emphasis added).

Plaintiffs' asserted injury is also squarely within the APA's "zone of interests." Here, Plaintiffs allege a procedural injury because Defendants failed to comply with the APA's notice and comment requirement, arguing they "have been denied the opportunity to comment and be heard, prior to the effective date of the IFRs, concerning the impact of the rules on the States and their residents." FAC ¶ 16. The purpose of the APA's notice and comment provision is

> (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.

Envtl. Integrity Project v. Envtl. Prot. Agency, 425 F.3d 992, 996 (D.C. Cir. 2005) (citation omitted). Plaintiffs' right to be heard regarding the 2017 IFRs' prospective impact on them and their citizens is plainly within the ambit of the APA.

Plaintiffs accordingly have statutory standing under the APA.

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

Defendants next assert that venue is improper here, reasoning that the venue statute requires Plaintiffs to

bring suit in their principal place of business, and claiming that "there is no plausible 'principal place of business' for the State of California other than Sacramento," its capital, which is in the Eastern District of California. Opp. at 12-13. While there is scant authority on this issue, the Court finds venue in this district proper.

In a suit against the United States, its officers, or its agencies, a civil action "may, except as otherwise provided by law, be brought in any judicial district in which . . . the plaintiff resides if no real property is involved in the action." 28 U.S.C. § 1391(e)(1). There is no real property at stake in this action, so the venue inquiry turns on the question of Plaintiffs' residence. While this appears to be an issue of first impression in this district, common sense dictates that for venue purposes, a state plaintiff with multiple federal judicial districts resides in any of those districts. The only other federal court that appears to have examined the question in any detail reached the same conclusion, finding that a state may bring suit under 28 U.S.C. § 1391(e)(1) "in any district within the state":

> Given the complete absence of authority presented directly on this point, this court is not willing to create the new rule proposed by the Federal Defendants that would, for no just or logical reason, limit a state containing more than one federal judicial district to suing the Federal Government only in the district containing the state capital, regardless of any other consideration relevant to the case or the parties' convenience. Indeed, the absence of authority may be precisely because common sense dictates that a state resides throughout its sovereign borders and the idea has not previously been challenged.

Ala. v. U.S. Army Corp of Eng'rs, 382 F. Supp. 2d 1301, 1329 (N.D. Ala. 2005).[11] The Court finds this reasoning persuasive, and declines to adopt Defendants' rule that would limit the State of California to bringing suit in the Eastern District of California. Venue is therefore proper in this district.

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

Plaintiffs are entitled to a preliminary injunction because (1) they have 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; (2) they have shown that they are likely to suffer irreparable harm as a result of this procedural violation; and (3) the balance of equities tips in Plaintiffs' favor, and the public interest favors granting the injunction.

1. Plaintiffs are likely to succeed in showing that Defendants violated the APA in issuing the 2017 IFRs without advance notice and comment.

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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[11] Defendants, in contrast, cite a 27-year-old unpublished case from the Eastern District of Pennsylvania which involved a different section of the venue statute and addressed the residence of state agencies and state officials, not the states themselves. *See* Opp. at 13 (citing *Bentley v. Ellam*, No. 89-5418, 1990 WL 63734, at *1 (E.D. Pa. May 8, 1990)).

a. With few exceptions, the APA requires agencies to publish notice of proposed rules and consider public comment before final promulgation.

Plaintiffs contend that "Defendants evaded their obligations under the APA by promulgating rules without proper notice and comment." Mot. at 15. The Court agrees. Under the APA, an agency promulgating a rule normally must first publish a "[g]eneral notice of proposed rule making" in the Federal Register, including: "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b). After such notice has issued, "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." *Id.* § 553(c). The agency must then consider any "relevant matter presented. . . ." *Id.* As relevant here, these notice and comment requirements do not apply "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b)(3)(B).[12]

The APA's notice and comment requirement reflects Congress' "judgment that notions of fairness and informed administrative decisionmaking require that

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[12] Defendants do not argue that notice and comment was "unnecessary" for either the Religious Exemption IFR, *see* 82 Fed. Reg. 47,813, or the Moral Exemption IFR, *see id.* at 47,855.

agency decisions be made only after affording interested persons notice and an opportunity to comment." *Paulsen v. Daniels*, 413 F.3d 999, 1004-05 (9th Cir. 2005) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979)). "It is antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later." *Id.* at 1005. Accordingly, an agency "must overcome a high bar if it seeks to invoke the good cause exception to bypass the notice and comment requirement," given that the exception "is essentially an emergency procedure." *U.S. v. Valverde*, 628 F.3d 1159, 1164-65 (9th Cir. 2010) (citations, internal quotations marks, and brackets omitted). In other words, "a failure to comply with the APA's notice and comment procedures may be excused only in those narrow circumstances in which delay would do real harm." *Id.* (citation and internal quotation marks omitted); *see also Indep. Guard Ass'n of Nev., Local No. 1. v. O'Leary ex rel. U.S. Dep't of Energy*, 57 F.3d 766, 769 (9th Cir. 1995) (emphasizing that good-cause exceptions to section 553 are to be "narrowly construed and only reluctantly countenanced") (citation omitted). The inquiry as to whether an agency has demonstrated good cause "proceeds case-by-case, sensitive to the totality of the factors at play." *Valverde*, 628 F.3d at 1164 (citations and internal quotation marks omitted).

On October 6, 2017, Defendants promulgated the Religious Exemption IFR and Moral Exemption IFR, effective immediately. Although both IFRs solicited public comment until December 5, 2017, their immediate promulgation violated the APA's notice and comment requirement because Defendants failed to publish the required advance notice of proposed rulemaking. Nor did they provide the public with an advance opportunity

to comment, making it impossible for the agency to consider the input of any interested parties before enactment. Thus, the issuance of the 2017 IFRs was unlawful unless either (a) the APA does not apply or (b) the Defendants can show that an exception to its requirements applies.

b. Defendants had no statutory authority to forgo the APA's notice and comment requirement as to the 2017 IFRs.

Defendants first argue that they had "express statutory authorization" to promulgate the IFRs, thus exempting them from the APA's advance notice and comment requirement. *See* Opp. at 15. Specifically, Defendants cite the authority conferred upon them by 26 U.S.C. § 9833, 29 U.S.C. § 1191c, and 42 U.S.C. § 300gg-92. *See id.* Each of those provisions, in turn, contains this nearly identical phrase: "[t]he Secretary may promulgate any interim final rules as the Secretary determines are appropriate to" carry out its statutory duties in this realm. Defendants interpret this as a signal that Congress intended to free them from the APA's requirements. But "[t]he APA provides that no subsequent statute shall be deemed to modify it 'except to the extent that it does so expressly.'" *Castillo-Villagra v. Immigration & Naturalization Serv.*, 972 F.2d 1017, 1025 (9th Cir. 1992) (quoting 5 U.S.C. § 559); *see also Lake Carriers Ass'n v. Envtl. Prot. Agency*, 652 F.3d 1, 6 (D.C. Cir. 2011) (per curiam) (citing section 559 for the same principle). The D.C. Circuit has framed the question as "whether Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm." *Asiana Airlines v. Fed. Aviation Admin.*, 134 F.3d 393, 397 (D.C. Cir. 1998).

Here, the statutory authority cited by Defendants does not support their argument that Congress intended to displace the APA's notice and comment requirements. *Castilla-Villagra* involved the question of whether the APA or the Immigration and Naturalization Act ("INA") governed the court's analysis of an administrative notice. 972 F.2d at 1025. In deciding that the INA governed, the court cited the INA's exclusivity provision, as well as the Supreme Court's interpretation of that provision. *Id.* at 1026. In contrast, the authority cited by Defendants contains no such exclusivity provision. And in *Lake Carriers*, the court considered whether the Environmental Protection Agency ("EPA") violated the APA when it issued a permit without providing an opportunity for notice and comment regarding certain state certification conditions. 652 F.3d at 5-6. In support of its position, the EPA cited a provision of the Clean Water Act ("CWA") that required certifying states to "establish procedures for public notice . . . and, to the extent it deems appropriate, procedures for public hearings. . . ." *Id.* at 6 (quoting 33 U.S.C. § 1341(a)). While the court ultimately found on another ground that the EPA was not required to engage in notice and comment, *id.* at 10, the court "doubt[ed] that [the CWA provision's] requirement that states provide for notice and comment regarding proposed conditions constitute[d] the requisite 'plain express[ion]' of congressional intent to supersede the APA's requirements," *id.* at 6. This Court likewise finds that the statutory authority cited by Defendants—which is much more broadly worded than the CWA provision in *Lake Carriers*—is not so clearly different from the APA's procedures so as to reflect an intent to displace them. Finally, in *Asiana Airlines*, the court found that a statute directing the

Federal Aviation Administration to "publish in the Federal Register an initial fee schedule and associated collection process as interim final rule, pursuant to which public comment will be sought and a final rule issued" supplanted the APA's requirements. 134 F.3d at 396-98. In this case, the authority cited by Defendants makes no mention of any analogous procedure (or any procedure at all).

Defendants' arguments to the contrary are unavailing. No case cited by the parties or identified by the Court has held that the statutory provisions cited by the Defendants supplant the APA's procedural requirements. Defendants quote *Real Alternatives, Inc. v. Burwell*, 150 F. Supp. 3d 419, 427 n.6 (M.D. Pa. 2015), for the proposition that the "APA . . . did not apply to the 2011 IFR under this specific statutory authority." *See* Opp. at 15. But that reading is not supported by the case, which simply quoted the *agencies' argument* in the 2011 IFR that they had statutory authority to forgo notice and comment for that IFR. *See Real Alternatives*, 150 F. Supp. 3d at 427 n.6 (quoting 76 Fed. Reg. 46,624). Defendants also cite *Coalition for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10 (D.D.C. 2010), in support of their argument that the asserted statutory authority contemplates procedures that are "clearly different" from the APA's requirements. *See* Opp. at 15. But that case only undermines their argument, because there, the court considered the same statutory grants of IFR-promulgating authority cited by Defendants in this case (*i.e.*, 26 U.S.C. § 9833, 29 U.S.C. § 1191c, and 42 U.S.C. § 300gg-92), and found that they were not sufficiently different from the APA to displace the latter's requirements. *See Coalition for Parity*, 709 F. Supp. 2d at 17-19.

Defendants accordingly had no statutory authority to forgo notice and comment before issuing the 2017 IFRs.

c. The "totality of factors" establishes that Defendants had no good cause to forgo advance notice and comment for the 2017 IFRs.

The Court also finds that the "totality of factors" compels the conclusion that Defendants had no good cause to forgo notice and comment. Defendants argue that engaging in notice and comment before issuing the 2017 IFRs would have been "impracticable and contrary to the public interest." *See* 82 Fed. Reg. 47,813; *id.* at 47,855. "Notice and comment is 'impracticable' when the agency cannot 'both follow section 553 and execute its statutory duties.'" *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 n.2 (9th Cir. 1992) (quoting *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983)). And it is "contrary to the public interest" when "public rule-making procedures . . . prevent an agency from operating." *Id.* (citation and internal quotation marks omitted); *see also Levesque*, 723 F.2d at 185 ("Congress's view seems to have been that any time one can expect real interest from the public in the content of the proposed regulation, notice-and-comment rulemaking will not be contrary to the public interest.").

Defendants fail to show that their decision to forgo advance notice and comment was justified by good cause under section 553. In the Religious Exemption IFR, they set forth several purported justifications: (1) the "[d]ozens" of pending lawsuits challenging the contraceptive mandate; (2) the desire to cure violations of RFRA, based on the contention that "requiring certain objecting entities or individuals to choose between the

Mandate, accommodation, or penalties for [noncompliance]" constitutes such a violation; (3) the desire to bring HRSA guidelines into "accord with the legal realities" of the temporary injunctions issued in various cases; (4) the desire "to provide immediate resolution" to parties with religious objections to the mandate; (5) the desire to avoid increases in the costs of health insurance caused by entities remaining on more expensive grandfathered plans—which are exempt from the mandate—to avoid becoming subject to the mandate; and (6) the desire to avoid delay in making the accommodation available to a broader category of entities. 82 Fed. Reg. 47,813-15. In the Moral Exemption IFR, Defendants set forth similar justifications. *Id.* at 47,855-56.

None of these proffered reasons justified the use of the "emergency procedure" that is the good-cause exception. *See Valverde*, 628 F.3d at 1164-65. Defendants make no argument that the above considerations made it impossible for them to both satisfy the notice and comment requirement and execute their statutory duties under the ACA. Defendants also fail to establish (or even claim) that notice and comment would have effectively prevented them from operating. Instead, they argue that "any additional delay in issuing the Rules would be contrary to the public interest," because "[p]rompt effectiveness would provide entities and individuals facing burdens on their sincerely held religious beliefs and moral convictions with important and urgent relief." Opp. at 16.[13] But "[i]f 'good cause' could be satisfied by an Agency's assertion that 'normal procedures

[13] Indeed, as to the public interest justification, Defendants estimated at oral argument that they have received hundreds of thousands of comments regarding the 2017 IFRs. This weakens the

were not followed because of the need to provide immediate guidance and information . . . then an exception to the notice requirement would be created that would swallow the rule." *See Valverde*, 628 F.3d at 1166 (quoting *Zhang v. Slattery*, 55 F.3d 732, 746 (2d Cir. 1995)).[14]

Defendants also argue that they "demonstrated a willingness to consider public comment, both prior and following issuance of the rules." Opp. at 16. But Defendants' willingness to consider comments "on the exemption and accommodation issues" generally, *see id.* at 17, does not excuse their failure to do so before enacting the 2017 IFRs. This is particularly true because the 2017 IFRs represent a direct repudiation of Defendants' prior well-documented and well-substantiated public positions. Moreover, these IFRs are much broader in

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suggestion that engaging in advance notice and comment would have been contrary to the public interest, given the public's evident "real interest" in this matter. *See Levesque*, 723 F.2d at 185.

[14] Defendants cite *Priests for Life v. U.S. Department of Health & Human Services*, 772 F.3d 229 (D.C. Cir. 2014), *vacated*, *Zubik*, 136 S. Ct. at 1561, as a decision finding good cause to forgo advance notice and comment in circumstances similar to these. *See* Opp. at 16-17. But *Priests for Life* is distinguishable. There, the court rejected the religious objector plaintiffs' argument that the government lacked the requisite good cause to promulgate the 2014 IFRs without advance notice and comment, noting that the 2014 IFRs modified regulations that "were recently enacted pursuant to notice and comment rulemaking, and *presented virtually identical issues*. . . ." *Priests for Life*, 772 F.3d at 276 (emphasis added); *see also id.* (describing the modifications in the 2014 IFRs as "minor" and "meant only to augment current regulations in light of" the Supreme Court's decision in *Wheaton*) (citation and internal quotation marks omitted). The 2017 IFRs, in contrast, represent a dramatic about-face in federal policy, and adopt sweeping changes with regard to the exemption and accommodation.

scope, and introduce an entirely new moral conviction basis for objecting to the contraceptive mandate. Until October 6, 2017, the public had no notice of Defendants' intent to dramatically broaden eligibility for the exemption and to make the accommodation optional. The fact that the public may have previously commented on these broad topics in the context of past iterations of the rules does not change that.

In addition, whether or not Defendants are willing to consider post-promulgation comments, it remains "antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later." *Paulsen*, 413 F.3d at 1005; *see also Valverde*, 628 F.3d at 1166 (noting that "[t]he Attorney General's request for post-promulgation comments in issuing the interim rule casts further doubt upon the authenticity and efficacy of the" asserted basis for good cause under section 553). The same reasoning defeats Defendants' argument that "the Rules are effective only until final rules are issued." *See* Opp. at 17. And that argument is further undercut by the fact that on November 30, 2017 the Centers for Medicare & Medicaid Services, which are part of HHS, issued guidance for the implementation of the 2017 IFRs.[15] The Court agrees with Plaintiffs that the issuance of this guidance, *before* the end of the post-promulgation comment period, suggests

[15] *See* CTRS. FOR MEDICARE & MEDICAID SERVS., Notice by Issuer or Third Party Administrator for Employer/Plan Sponsor of Revocation of the Accommodation for Certain Preventive Services, *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Notice-Issuer-Third-Party-Employer-Preventive.pdf.

that "it does not appear that the Defendants expect public comment to inform implementation." Reply at 10.

In short, Defendants had no good cause to forgo the APA's notice and comment requirements, because their asserted justifications do not "overcome the high bar" they must clear to do so. *See Valverde*, 628 F.3d at 1164-65.

d. Defendants' failure to provide an advance notice and comment process for the 2017 IFRs was not harmless error.

Defendants argue that, in any event, "any error in forgoing notice and comment was harmless," citing the APA's instruction to take "due account" of "the rule of prejudicial error." Opp. at 18 (quoting 5 U.S.C. § 706). The Court, however, exercises "great caution in applying the harmless error rule in the administrative rulemaking context," lest it "gut[] the APA's procedural requirements." *Paulsen*, 413 F.3d at 1006 (quoting *Riverbend Farms*, 958 F.2d at 1487). "[T]he failure to provide notice and comment is harmless only where the agency's mistake 'clearly had no bearing on the procedure used or the substance of decision reached.'" *Id.* (quoting *Riverbend Farms*, 958 F.2d at 1487). In *Paulsen*, the court found that the Bureau of Prisons' "violation of the APA was not merely technical," because "the Bureau failed to provide the required notice-and-comment period before effectuating [an] interim regulation, thereby precluding public participation in the rulemaking." *Id.* Defendants' actions here are analogous: they precluded public participation in the promulgation of the 2017 IFRs before those rules became effective. As such, there is no way to conclude that Defendants' violation "clearly had no bearing on the procedure used or the

substance of decision reached," meaning that the error was not harmless.

Defendant argues that "the Rules were issued after the Agencies received 'more than 100,000 public comments' throughout six years of publishing and modifying these regulations." Opp. at 18. But as discussed above, that does not render harmless *this* procedural error, regarding *these* IFRs. Nor does it take into account the substantial differences between the previous iterations of these rules and the IFRs at issue.[16] Far from being harmless, Defendants' error prevented Plaintiffs from vindicating the purpose of the APA's notice and comment requirement. For these reasons, Plaintiffs are, at a minimum, likely to succeed in showing that Defendants violated the APA's procedural requirements.

2. Plaintiffs are likely to suffer irreparable harm unless the Court enjoins the 2017 IFRs.

A procedural injury may serve as a basis for a finding of irreparable harm when a preliminary injunction is sought. *See N. Mariana Islands v. U.S.*, 686 F. Supp. 2d 7, 17 (D.D.C. 2009) (finding, in preliminary injunction analysis, that "[a] party experiences actionable harm when 'depriv[ed] of a procedural protection to which he is entitled' under the APA") (quoting *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002)); *Save Strawberry Canyon v. Dep't of Energy*,

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[16] *See* 75 Fed. Reg. 41,730 (2010 IFR was necessary to allow health plans sufficient time to comply with the requirements of the newly-enacted ACA within an approximately two-month timeframe); 76 Fed. Reg. 46,624 (2011 IFR was based on public comments received in response to the 2010 IFR, before HRSA's 2011 Guidelines were in effect); 79 Fed. Reg. 51,095-96 (2014 IFR was issued in direct response to the *Wheaton College* decision).

613 F. Supp. 2d 1177, 1189-90 (N.D. Cal. 2009) (finding irreparable harm requirement satisfied where plaintiff claimed procedural violation of National Environmental Policy Act). "[A] plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." *Boardman v. Pac. Seafood Group*, 822 F.3d 1011, 1022 (9th Cir. 2016) (citation and emphasis omitted). A threat is sufficiently immediate "if the plaintiff is likely to suffer irreparable harm before a decision on the merits can be rendered." *Id.* at 1023 (citation and internal quotation marks omitted). A court's analysis focuses on whether harm is irreparable, "irrespective of the magnitude of the injury." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999).

Plaintiffs are not only likely to suffer irreparable procedural harm in the absence of a preliminary injunction, they already have done so. Because the 2017 IFRs were effective immediately, Plaintiffs' harm is ongoing. Every day the IFRs stand is another day Defendants may enforce regulations likely promulgated in violation of the APA's notice and comment provision, without Plaintiffs' advance input. And Plaintiffs' right to provide such input does not exist in a vacuum. Rather, it is in large part defined by what is at stake: the health of Plaintiffs' citizens and Plaintiffs' fiscal interests. Under the 2017 IFRs, more employers than ever before are eligible for the exemption and the accommodation, the latter of which is now entirely optional for organizations asserting a religious or moral objection. Put another way, for a substantial number of women, the 2017 IFRs transform contraceptive coverage from a legal entitlement to an essentially gratuitous benefit wholly subject to their employer's discretion. *See generally* Dkt. No. 72 at 6-14 (amicus brief for American Association of University

Women et al., describing "wide and potentially boundless range" of employers who "will be able to claim religious or moral exemptions" under the 2017 IFRs). The impact on the rules governing the health insurance coverage of Plaintiffs' citizens—and the stability of that coverage—was immediate, which also implicates Plaintiffs' fiscal interests as described above. If the Court ultimately finds in favor of Plaintiffs on the merits, any harm caused in the interim by rescinded contraceptive coverage would not be susceptible to remedy. Thus, Plaintiffs have satisfied the irreparable harm prong of the inquiry.

3. The balance of the equities tips in Plaintiffs' favor, and a public interest favors granting preliminary injunctive relief.

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 coverage for contraceptive and sterilization services" as provided for under the ACA, and the interest in "provid[ing] conscience protections for individuals and entities with sincerely held religious beliefs [or moral convictions] in certain health care contexts." 82 Fed. Reg. 47,793; *see also id.* at 47,839. Here, but for the APA violation the Court has found likely to be shown, Plaintiffs could have participated in Defendants' rulemaking process, "explain[ed] the practical effects of [the] rule before [it was] implemented," and helped "ensure[]

that the agency proceed in a fully informed manner, exploring alternative, less harmful approaches" to expanding eligibility for the exemption and making the accommodation optional. *See* Mot. at 18-19. That does not mean the outcome necessarily would have been different, but section 553 is concerned with the important value served by proper process. *See Citizens for a Better Forestry*, 341 F.3d at 976 (stating that petitioners alleging procedural injury under an environmental statute were required to show only that adherence to statutory procedures *could influence* an agency's decision, and not that such adherence "would result in a different conclusion") (citation omitted).

With those interests in mind, the Court concludes that the balance of equities tips in Plaintiffs' favor. Plaintiffs face potentially dire public health and fiscal consequences as a result of a process as to which they had no input. On the other hand, returning to the state of affairs before the enactment of 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 Defendants pending resolution of the merits. While Defendants' interest in "protecting religious liberty and conscience" is unquestionably legitimate, *see* Opp. at 35, the Court believes it likely that the prior framing of the religious exemption and accommodation permissibly ensured such protection. That is to say, the Court views as likely correct the reasoning of the eight Circuit Courts of Appeals (of the nine to have considered the issue) which found that the procedure in place prior to the 2017 IFRs did not impose a substantial burden on

religious exercise under RFRA.[17] The balance of equities thus tips in Plaintiffs' favor.

For similar reasons, the public interest favors the granting of a preliminary injunction. The Court notes that "[t]he public interest is served when administrative agencies comply with their obligations under the APA." *N. Mariana Islands*, 686 F. Supp. 2d. at 21 (citation omitted); *see also Alcaraz v. Block*, 746 F.2d 593, 610 (9th Cir. 1984) ("The APA creates a statutory scheme

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[17] *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; *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; *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; *Univ. of Notre Dame v. Burwell*, 786 F.3d 606 (7th Cir. 2015), *vacated*, 136 S. Ct. 2007 (2016); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207 (2d Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); *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); *Eternal Word Television Network v. Sec'y of U.S. Dep't Health & Human Servs.*, 818 F.3d 1122 (11th Cir. 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, 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*, *Dep't of Health & Human Servs. v. CNS Int'l Ministries*, --- S. Ct. ---, 2016 WL 2842448 (2016); *Dordt Coll. v. Burwell*, 801 F.3d 946 (8th Cir. 2015) (applying reasoning of *Sharpe Holdings* to similar facts), *vacated*, *Burwell v. Dordt Coll.*, 136 S. Ct. 2006 (2016).

for informal or notice-and-comment rulemaking reflecting 'a judgment by Congress that the public interest is served by a careful and open review of proposed administrative rules and regulations.'") (citation omitted).

Plaintiffs have therefore shown that the balance of equities tips 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.[18]

D. This Preliminary Injunction Effectively Reinstates the Regime in Place Before the Issuance of the 2017 IFRs.

The Court next turns to the contours of Plaintiffs' remedy. "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). "Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid." *Paulsen*, 413 F.3d at 1008. "The effect of invalidating an agency rule is to reinstate the rule previously in force." *Id.*

Under the circumstances, the Court finds it appropriate to issue a nationwide preliminary injunction. Defendants did not violate the APA just as to Plaintiffs: *no* member of the public was permitted to participate in the rulemaking process via advance notice and comment. Accordingly, Defendants are (1) preliminarily enjoined from enforcing the 2017 IFRs, and (2) required to continue under the regime in place before October 6, 2017,

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[18] 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.

pending a determination on the merits. This is consistent with the general practice of invalidating rules not promulgated in compliance with the APA and reinstating the "rule previously in force," and maintains the status quo that existed before the implementation of the likely invalid 2017 IFRs.

The Court notes that simply enjoining Defendants from enforcing the 2017 IFRs, without requiring them to proceed under the prior regime pending resolution of the merits, would result in a problematic regulatory vacuum, in which the rights of both women seeking cost-free contraceptive coverage and employers seeking religious exemption or accommodation would be uncertain. *See* Opp. at 35 n.25. At oral argument, counsel for Defendants confirmed that they do not advocate for such a vacuum in the event the Court grants a preliminary injunction. This nationwide injunction does not conflict with the plaintiff-specific injunctions issued by the courts in the *Zubik* cases or any other case. Returning to the state of affairs before October 6, 2017 means just that: the exemption and accommodation as they existed following the *Zubik* remand remain in effect, as do any court orders enjoining Defendants from enforcing those rules against specific plaintiffs.

V. CONCLUSION

For the reasons set forth above, Plaintiffs' motion for a preliminary injunction is **GRANTED**, effective as of the date of this order. The case management conference currently set for January 9, 2018 at 2:00 p.m. is **ADVANCED** to January 9, 2018 at 10:00 a.m. The parties shall submit a joint case management statement by January 5, 2018 at 5:00 p.m.

IT IS SO ORDERED.

Dated: 12/21/17

/s/ HAYWOOD S. GILLIAM, JR.
HAYWOOD S. GILLIAM, JR.
United States District Judge

APPENDIX E

1. 5 U.S.C. 553(b) and (c) provide:

Rule making

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter

presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

2. 42 U.S.C. 300gg-13(a) provides:

Coverage of preventive health services

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

(1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force;

(2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and[1]

(3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines

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

supported by the Health Resources and Services Administration.[2]

(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.[2]

(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.

3. 42 U.S.C. 2000bb-1 provides:

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) of this section.

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[2] So in original. The period probably should be a semicolon.

(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.

4. 45 C.F.R. 147.131(a) (2016) provides:

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.

5. 45 C.F.R. 147.131 provides:

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 in guidance issued by the Secretary of the Department of Health and Human Services. If contraceptive coverage is currently being offered by an issuer through the accommodation process, the revocation will be effective on the first day of the first plan year that begins on or after 30 days after the date of the revocation (to allow for the provision of notice to plan participants in cases where contraceptive benefits will no longer be provided). Alternatively, 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.

(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) *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).

(g) *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.

6. 45 C.F.R. 147.131, as amended by 83 Fed. Reg. 57,589 (Nov. 15, 2018), provides in pertinent part:

Accommodations in connection with coverage of certain preventive health services.

* * * * *

(c) * * *

(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.

* * * * *

(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.

* * * * *

7. 45 C.F.R. 147.132 provides:

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, and 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) An institution of higher education as defined in 20 U.S.C. 1002 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 this paragraph (a)(1)(iii), the plan 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 to its establishing, maintaining, providing, offering, or arranging (as applicable) coverage, payments, or a plan that provides coverage or payments for some or all contraceptive services, based on its sincerely held religious beliefs.

(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 benefit package option, or a separate policy, certificate or contract of insurance, to any individual who objects to coverage or payments for some or all contraceptive services based on sincerely held religious beliefs.

(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.

8. 45 C.F.R. 147.132, as amended by 83 Fed. Reg. 57,590 (Nov. 15, 2018), provides in pertinent part:

Religious exemptions in connection with coverage of certain preventive health services.

(a) * * *

(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:

* * * * *

(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 con-

traceptives, and the individual agrees, then the exemption applies as if the individual objects to all contraceptive services.

* * * * *

9. 45 C.F.R. 147.133 provides:

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, and 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 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 to its establishing, maintaining, providing, offering, or arranging (as applicable) coverage or payments for some or all contraceptive services, or for a plan, issuer, or third party administrator that provides or arranges such coverage or payments, based on its sincerely held moral convictions.

(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 individual who objects to coverage or payments for some or all contraceptive services based on sincerely held moral convictions.

(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.

10. 45 C.F.R. 147.133, as amended by 83 Fed. Reg. 57,630 (Nov. 15, 2018), provides in pertinent part:

Moral exemptions in connection with coverage of certain preventive health services.

(a) * * *

(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:

* * * * *

(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

* * * * *

(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.

* * * * *