UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

IRISH 4 REPRODUCTIVE HEALTH, et al., *Plaintiffs,* v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., *Defendants*.	Case No. 3:18-cv-491-PPS-MGG Judge Philip P. Simon

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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INTRODUCTION

At stake here are the health and livelihoods of countless women nationwide—including Plaintiffs[1] and thousands of other students, employees, and dependents in health plans sponsored by the University of Notre Dame—who stand to lose meaningful access to essential reproductive health services unless the government's unlawful conduct is enjoined.[2]

The Women's Health Amendment (the "Women's Health Amendment" or the "Amendment") of the Patient Protection and Affordable Care Act of 2010 (the "ACA") requires insurance plans to provide coverage without cost-sharing for all Food and Drug Administration-approved methods of contraception for women, as well as related education, counseling, and services, alongside other critical women's preventive health services.[3] Congress intended the Amendment to reduce gender discrimination in health insurance by ensuring that: women receive coverage for their major health needs; women are no longer forced to pay more than men for health insurance and health services; and out-of-pocket costs for women's preventive services are reduced or eliminated. But through the actions challenged here, the government has eviscerated these statutory protections by giving entities like the University of Notre Dame a veto over the legal rights and health care benefits of the countless women whom Congress sought to protect.

This lawsuit challenges two official actions that work in tandem to deny contraceptive coverage that Plaintiffs are otherwise guaranteed by law: (1) Federal Defendants' promulgation of

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[1] "Plaintiffs" shall refer to Irish 4 Reproductive Health, Natasha Reifenberg, and Jane Does 1-3. The United States Departments of Labor, Health and Human Services, and Treasury shall be referred to as the "Departments," and, together with R. Alexander Acosta, Alex M. Azar II, and Steven Mnuchin, as the "Federal Defendants."

[2] This brief uses the term "women" because the rules target women, and the Affordable Care Act was intended to end discrimination against women. The denial of reproductive health care and related insurance coverage also affects some gender non-conforming people and transgender men, who will be equally harmed by the Rules and Settlement Agreement.

[3] 42 U.S.C. § 300gg-13(a)(4); Health Res. & Servs. Admin., Women's Preventive Services Guidelines, https://www.hrsa.gov/womens-guidelines-2016/index.html.

rules that unlawfully create sweeping exemptions from the ACA's contraceptive coverage requirement; and (2) Federal Defendants' execution of an unlawful settlement agreement with Notre Dame (the "Settlement Agreement") that impermissibly signs away the statutory and constitutional rights of Plaintiffs and other third parties.

Federal Defendants issued two rules, first as interim final rules ("IFRs") and later in the form of final rules that are materially identical to the IFRs, that exempt certain entities from the contraceptive coverage requirement. One of these rules allows all nongovernmental entities—including for-profit businesses, nonprofits, and universities—to declare themselves exempt from the ACA's contraceptive coverage requirement based on any religious beliefs (the "Religious Exemption"). *See* 45 C.F.R. § 147.132. The other allows all such entities except publicly traded corporations to exempt themselves based on "moral objections" (the "Moral Exemption"). *See* 45 C.F.R. § 147.133. The Final Rules have been preliminarily enjoined by two federal courts, *see California v. HHS*, 351 F. Supp. 3d 1267 (N.D. Cal. 2019) (injunction in 14 states for substantive illegality); *Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019) (nationwide injunction for both procedural and substantive illegality), but Federal Defendants have appealed the preliminary injunctions.

Just one week after issuing the IFRs, Federal Defendants executed a private settlement agreement with Notre Dame and some 70 other entities to resolve pending legal challenges to the preexisting accommodation process for the contraceptive coverage requirement. In direct contravention of legal requirements and long-standing Department of Justice policy, the Settlement Agreement impermissibly negotiates away the rights of third parties and permanently exempts the objecting entities from the ACA's contraceptive coverage requirement. Indeed,

signatories may even contend the Settlement Agreement exempts them from any and all existing or future requirements with respect to contraceptive coverage, be they regulatory or statutory.

Because of the Rules and the Settlement Agreement, Plaintiffs and thousands of other students, faculty, and dependents who get their health insurance through Notre Dame are now denied coverage altogether for many FDA-approved contraceptives and must pay co-payments and deductibles for the rest—all of which violate the ACA's contraceptive coverage requirement. Notre Dame has explicitly invoked both the Rules and the Settlement Agreement as grounds for withholding contraceptive coverage, even though it acknowledges that "most of [the 17,000 people] covered [by its health plans] have no financially feasible alternative but to rely on the University for such coverage."[4] In other words, the government has allowed Notre Dame to impose its religious views about contraception on the 17,000 people covered by its health plans. Its actions impose financial, administrative, and logistical burdens that federal law forbids, and which two federal courts have already preliminarily enjoined.

Plaintiffs thus state claims that the Rules and Settlement Agreement are unlawful and must be enjoined. The motions to dismiss should be denied.

BACKGROUND

A. The Women's Health Amendment of the Affordable Care Act

The Women's Health Amendment to the Affordable Care Act requires insurance plans to cover women's preventive health services—as determined by the Health Resources Services Administration ("HRSA")—without cost-sharing. Am. Compl. ¶ 51; 42 U.S.C. § 300gg-13(a)(4). Before the ACA, women paid much more than men paid out-of-pocket for health care, which was

[4] Am. Compl., ECF No. 43, ¶ 7 (citing Letter to Faculty and Staff by President Rev. John I. Jenkins, C.S.C. (Feb. 7, 2018)).

due in significant part to costs for basic and necessary preventive care, including contraception. Am. Compl. ¶¶ 54–55, 57. In some cases, women were unable to obtain critical preventive health care because of cost barriers. *Id.* ¶ 55.

Against this backdrop, Congress passed the Women's Health Amendment to protect women's health and to remedy the disparities and discrimination that women faced in health insurance and health care. Am. Compl. ¶ 52. The Amendment was meant to alleviate the "punitive practices of insurance companies that charge women more and give [them] less in a benefit" and to combat other forms of widespread sex discrimination in the health-insurance market. *Id.* ¶ 56 (citing 155 Cong. Rec. S12,021, S12,026 (daily ed. Dec. 1, 2009) (statement of Sen. Mikulski)). Congress specifically intended for the Amendment to provide "affordable family planning services" in order to "enable women and families to make informed decisions about when and how they become parents." *Id.* ¶ 57 (citing 155 Cong. Rec. S12,033, S12,052 (daily ed. Dec. 1, 2009) (statement of Sen. Franken)).

1. *The Contraceptive Coverage Requirement*

Congress directed HRSA, a component of the Department of Health and Human Services ("HHS"), to adopt guidelines on the women's preventive-care services that must be covered under the ACA without cost-sharing (the "Guidelines"). *Id.* ¶ 58. HRSA, in turn, commissioned the Institute of Medicine (now the National Academy of Medicine) to convene a committee of experts on women's health, adolescent health, and disease prevention to conduct a comprehensive review of women's preventive-health needs and to produce a report recommending the preventive services that should be included in the Guidelines. *Id.* ¶ 59; Inst. of Medicine, Clinical Preventive Services for Women: Closing the Gaps (2011) ("IOM Rep.").

The Institute of Medicine made detailed findings that access to contraception reduces unintended pregnancies, abortions, adverse pregnancy outcomes, and negative health consequences for women and children, and that even small out-of-pocket costs significantly reduce the use of contraception. Am. Compl. ¶ 60. Based on these findings, the expert committee recommended that HRSA include as critical preventive services for women that must be covered the "full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.*; *see* IOM Rep. at 109–10.

In August 2011, HRSA adopted the required Guidelines, including the experts' recommendation that the Guidelines include coverage without cost-sharing for contraception and related services. Am. Compl. ¶ 61; *see* HRSA, *Women's Preventive Services Guidelines*, http://hrsa.gov/womens-guidelines.

In regulations implementing the Women's Health Amendment, Federal Defendants acknowledged that Congress adopted the Amendment because "women have unique health care needs. . . includ[ing] contraceptive services." *See* 77 Fed. Reg. 8,725, 8,727 (Feb. 15, 2012). They further acknowledged that "cost sharing can be a significant barrier to effective contraception" and that "[c]ontraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating [the gender] disparity [in health coverage] by allowing women to achieve equal status as healthy and productive members of the job force." Am. Compl. ¶ 65; 77 Fed. Reg. at 8,728. Consequently, Federal Defendants "aim[ed] to reduce these disparities by providing women broad access to preventive services, including contraceptive services." 77 Fed. Reg. at 8,728.

At no point has HRSA ever removed contraception and related services from the Guidelines; on the contrary, as recently as December 2016, a panel of experts convened by the American College of Obstetricians and Gynecologists, through a cooperative agreement with HRSA, reaffirmed the ACA's contraceptive coverage requirement. Am. Compl. ¶¶ 62–63; *see* Women's Preventive Services Initiative, Recommendations for Preventive Services for Women (2017), https://www.womenspreventivehealth.org/final-report/.

2. *Objections to Contraceptive Coverage and the Accommodation Process*

In 2013, the government created a regulatory exemption from the contraceptive coverage requirement for houses of worship, rooted in provisions of the Internal Revenue Code; that exemption remains in effect today. Am. Compl. ¶ 66; *see* 78 Fed. Reg. 39,870-01, 39,874 (citing 26 U.S.C. §§ 6033(a)(1), (3)(A)(i), (3)(A)(iii)). Certain religiously affiliated employers and universities that did not qualify for the house-of-worship exemption objected to including coverage for contraception in insurance plans for their employees and students and their dependents. Am. Compl. ¶¶ 3, 66–67. To accommodate these entities' objections while still ensuring that women at the entities receive access to seamless, affordable contraceptive coverage, Federal Defendants developed and made available the "accommodation" process for certain religiously affiliated nonprofit institutions. *Id.* ¶ 68; *see* 78 Fed. Reg. 39,870, 39,871 (July 2, 2013).

Through that process, an objecting employer or university may inform the government, or the entity's insurer or third-party administrator, that it has religious objections to providing coverage for contraceptive services. Am. Compl. ¶¶ 3, 72. The entity's insurance issuer then fulfills its legal obligation by separately providing or arranging payments for contraceptive services without cost-sharing. Am. Compl. ¶¶ 3, 73. The accommodation process created a system intended to ensure that women covered by health plans at objecting employers or universities

obtain the full range of FDA-approved contraceptives—without cost-sharing—as guaranteed to them by law, while at the same time respecting employers' and universities' religious objections to the inclusion of contraception in their employees' and students' health insurance plans. Am. Compl. ¶¶ 3, 74.

Following the U.S. Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014), the government extended the accommodation to certain closely held for-profit entities with religious objections to contraception to ensure that women who work for these entities receive payment for contraceptive services. Am. Compl. ¶ 70; *see* 80 Fed. Reg. 41,318 (July 14, 2015).

B. Notre Dame and Others Challenge the Accommodation, Resulting in the Supreme Court's *Zubik v. Burwell* Decision

Notre Dame and several other entities filed litigation against the accommodation, contending that merely filling out the accommodation form (called the EBSA Form 700) or otherwise notifying the government or their insurance issuer of their religious objection violated the Religious Freedom Restoration Act ("RFRA") and the U.S. Constitution. Am. Compl. ¶¶ 72 75, 77, 85. Notre Dame and other objecting employers and universities argued that providing notification to opt out of the ACA's contraceptive coverage requirement is a "trigger" to women receiving contraceptive coverage, even though it is the operation of federal law—and not any action by the objecting entities—that guarantees the coverage, and even though the objecting entities are entirely relieved of "contracting, arranging, paying, or referring for contraceptive coverage." Am. Compl. ¶¶ 74, 76.

Eight of the nine federal courts of appeals to consider legal challenges to the accommodation rejected them.[5] Am. Compl. ¶¶ 78–79. Indeed, the Seventh Circuit held—twice—that the accommodation process does not substantially burden Notre Dame's exercise of religion and therefore does not violate RFRA. *See Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 618–19 (7th Cir. 2015), *vacated on other grounds*, 136 S. Ct. 2007 (2016); *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014), *vacated on other grounds*, 135 S. Ct. 1528 (2015). The Seventh Circuit likewise rejected the substantial-burden claims of other objecting entities that challenged the accommodation. *See Grace Schs. v. Burwell*, 801 F.3d 788, 791 (7th Cir. 2015), *vacated on other grounds*, 136 S. Ct. 2011 (2016); *Wheaton Coll. v. Burwell*, 791 F.3d 792, 795 (7th Cir. 2015).

The U.S. Supreme Court granted certiorari in seven of the cases and ultimately vacated and remanded them all, instructing that the parties "should be afforded an opportunity to arrive at an approach going forward that accommodates [the entities'] religious exercise *while at the same time ensuring that women covered by [the entities'] health plans receive full and equal health coverage, including contraceptive coverage*." *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (emphasis added) (internal quotation marks omitted).

In July 2016, Federal Defendants, via a Request for Information, sought public comment on "whether there are alternative ways (other than those offered in current regulations) for eligible

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[5] *See, e.g.*, *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1160 (10th Cir. 2015); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs*., 778 F.3d 422, 427 (3d Cir. 2015); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 237 (D.C. Cir. 2014); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 459–63 (5th Cir. 2015); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 611–19 (7th Cir. 2015); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 217–26 (2d Cir. 2015); *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738, 749–50 (6th Cir. 2015); *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't Health & Human Servs.*, 818 F.3d 1122, 1148–51 (11th Cir. 2016); *but see Dordt Coll. v. Burwell*, 801 F.3d 946, 949–50 (8th Cir. 2015).

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 Food and Drug Administration-approved contraceptives without cost sharing." Am. Compl. ¶ 81; *see* 81 Fed. Reg. 47,741 (July 22, 2016). In January 2017, Federal Defendants announced that no "feasible approach had been identified" and reiterated that "the Departments continue to believe that the existing accommodation regulations are consistent with RFRA . . . ." Am. Compl. ¶ 82; *see* Dept. of Labor, FAQs About Affordable Care Act Implementation Part 36, 4–5 (Jan. 9, 2017).[6]

Meanwhile, on remand, the various cases were held in abeyance while the parties attempted to negotiate resolutions. Am. Compl. ¶ 83. Court filings in those cases stated that Federal Defendants met with objecting entities numerous times to negotiate a resolution, but Notre Dame students who had intervened in Notre Dame's litigation to protect their rights under the ACA were excluded from these discussions. Am. Compl. ¶¶ 84–85.

C. The Trump Administration Abandons the ACA's Contraceptive Coverage Requirement

1. *The Interim Final Rules*

Despite the Supreme Court's clear order in *Zubik* to find an approach that "ensur[es] that women covered by [objecting entities'] health plans receive full and equal health coverage, including contraceptive coverage," President Trump issued an Executive Order in May 2017 directing Federal Defendants to issue the Rules challenged here. Am. Compl. ¶ 86–87; *see* Exec.

[6] https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf.

Order No. 13,798, *Promoting Free Speech and Religious Liberty*, 82 Fed. Reg. 21,675 (May 9, 2017).

Without any public notice and comment or other pre-promulgation mechanism for receiving input from the public, Federal Defendants issued the IFRs on October 6, 2017, effective immediately. Am. Compl. ¶¶ 88–89.[7] The IFRs created sweeping exemptions from the ACA contraceptive coverage requirement for entities asserting religious and moral objections and made the accommodation process optional. 82 Fed. Reg. 47,792 (Oct. 13, 2017); 82 Fed. Reg. 47,838 (Oct. 13, 2017). Only after the IFRs went into effect did Federal Defendants solicit comments. Am. Compl. ¶ 90.

In December 2017, two federal courts issued nationwide preliminary injunctions blocking the IFRs. Am. Compl. ¶¶ 92, 95. The U.S. District Court for the Eastern District of Pennsylvania concluded that Pennsylvania would likely succeed on the merits of its claims that the IFRs were substantively unlawful because they were promulgated without statutory authority, and that the IFRs were procedurally infirm for failing to follow the Administrative Procedure Act's ("APA") notice-and-comment procedures. Am. Compl. ¶¶ 93–94; *Pennsylvania*, 281 F. Supp. 3d at 576, 577–81. The U.S. District Court for the Northern District of California also concluded that the agencies failed to follow APA's rulemaking procedures. Am. Compl. ¶ 95; *California v. HHS*, 281 F. Supp. 3d 806, 829 (N.D. Cal. 2017). And the U.S. Court of Appeals for the Ninth Circuit affirmed the ruling that the states in the *California* case were likely to succeed on their procedural APA claim. *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018).

[7] Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 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 (Oct. 13, 2017).

2. *The Settlement Agreement*

On October 13, 2017, just one week after issuing the IFRs, Federal Defendants executed the Settlement Agreement with Notre Dame and more than 70 other entities to resolve several pending challenges to the ACA's contraceptive coverage requirement. Am. Compl. ¶¶ 106–107. The Settlement Agreement purports to shield Notre Dame and other signatories, along with their "subsidiaries, affiliates, and successors; and related entities that offer coverage through the [signatories'] health plan[s]" from the contraceptive coverage requirement and "any law or regulation" of its kind, present or future. Am. Compl. ¶¶ 107–108; Settlement Agreement, ECF No. 1-1, ¶ 4 & Ex. A. Under the Settlement Agreement, "[n]o person may receive [contraceptive coverage] as an automatic consequence of enrollment in any health plan sponsored by Plaintiffs." Am. Compl. ¶ 109; Settlement Agreement ¶ 2(e).

3. *The Final Rules*

Despite two preliminary injunctions of the IFRs, Federal Defendants issued the Final Rules on November 7, 2018, with an effective date of January 14, 2019. Am. Compl. ¶ 97.[8] The Final Rules are substantively identical to the IFRs, creating sweeping new exemptions from the contraceptive coverage requirement. *Id.* ¶ 97–98. By making the accommodation process optional, Federal Defendants gave objecting entities the unilateral power to prevent employees and students from receiving the contraceptive coverage to which they are legally entitled. Am. Compl. ¶ 98–99. And in issuing the Final Rules, Federal Defendants ignored substantial empirical and scientific data regarding the benefits and effectiveness of contraception and contraceptive

[8] 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).

coverage—data that they had previously acknowledged and used. Am Compl. ¶¶ 65, 105(d); *see* Background A.1, *supra*, (citing 77 Fed. Reg. at 8,727–28).

The Religious Exemption allows all nongovernmental entities—including for-profit businesses, nonprofits, and universities—to declare themselves exempt from the ACA's contraceptive coverage requirement based on religious beliefs. Am. Compl. ¶ 100; 83 Fed. Reg. 57,536. The Moral Exemption allows all nongovernmental entities except publicly traded corporations to exempt themselves from the law based on "moral convictions." 83 Fed. Reg. 57,592. Entities that cease to provide contraceptive coverage under the Rules have no obligation to explain their decision, and the Rules provide no mechanism for governmental oversight to prevent abuse of the exemptions. Entities refusing to provide contraceptive coverage "do not need to file notices or certifications of their exemption, and [the Rules] do not impose any new notice requirements on them . . . ." 83 Fed. Reg. at 57,558, 57,614.

In January 2019, just before the Final Rules were scheduled to take effect, federal district courts in California and Pennsylvania preliminarily enjoined them. The Eastern District of Pennsylvania preliminarily enjoined the Final Rules nationwide, finding the final rules both substantively and procedurally unlawful. *Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019). The Northern District of California preliminarily enjoined the Final Rules for substantive illegality in 13 states and the District of Columbia. *California v. HHS*, 351 F. Supp. 3d 1267 (N.D. Cal. 2019). Federal Defendants have appealed both decisions. *See Pennsylvania v. Trump*, No. 19-1189 (3d Cir.); *California v. HHS*, No. 19-15118 (9th Cir.).

D. Notre Dame Amends its Health Plans and Plaintiffs File Suit

In reliance on the Settlement Agreement and the Rules, Notre Dame amended its health plans to terminate coverage for certain FDA-approved contraceptives and to impose cost-sharing,

including co-payments and deductibles, for others. Am. Compl. ¶¶ 128–49. The new plans went into effect for employees and their dependents on July 1, 2018, in the middle of the plan year, and for students beginning with the new plan year on August 15, 2018; both plans remain in effect today. Am. Compl. ¶¶ 128, 139, 149.

Members of Plaintiff Irish 4 Reproductive Health and the individual Plaintiffs are women of child-bearing age enrolled in health plans sponsored by Notre Dame. *Id.* ¶¶ 14–17. Because of Defendants' unlawful actions, the individual Plaintiffs and members of Irish 4 Reproductive Health are denied health-insurance coverage for certain contraceptives and are subject to cost-sharing for other contraception and related services, in violation of the ACA. *Id.* ¶¶ 13–17.

Plaintiffs filed this action on June 26, 2018. ECF No. 1. On December 5, 2018, Plaintiffs amended the Complaint to challenge the Final Rules. ECF No. 43. Plaintiffs allege that the Settlement Agreement is void for illegality and that the Settlement Agreement and the Rules are unlawful under the APA, the ACA, and the U.S. Constitution. On February 12, 2019, Federal Defendants and Notre Dame each moved to dismiss Plaintiffs' claims. ECF No. 58 ("Gov't MTD"); ECF No. 59 ("ND MTD").

ARGUMENT

In reviewing a motion to dismiss, the Court must accept as true the well-pleaded facts in the complaint and view them in the light most favorable to Plaintiffs. *See, e.g.*, *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443–44 (7th Cir. 2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiffs' Amended Complaint clearly meets this standard.

I. JUDICIAL REVIEW OF PLAINTIFFS' CLAIMS IS APPROPRIATE

A. Plaintiffs Have Standing to Challenge the Final Rules and the Settlement Agreement.

Unable to dispute that Plaintiffs have suffered an injury (cost-sharing and denial of coverage for their contraceptive needs), Federal Defendants incorrectly contend that Plaintiffs lack standing to challenge the Rules because "enjoining the . . . Rules will not redress" Plaintiffs' harms. Gov't MTD at 21. The crux of Federal Defendants' argument is that Notre Dame's refusal to provide contraceptive coverage is based solely on the Settlement Agreement, and that Plaintiffs "cannot establish standing by speculating that one day Notre Dame might rely on [the Rules] to take an action that might harm the Plaintiffs." *Id.* at 22. Yet Notre Dame has already made explicit that it relies on *both* the Rules *and* the Settlement Agreement as justification for its refusal to provide contraceptive coverage.

Indeed, the University argues here that "current regulations exempt Notre Dame from the Mandate wholly apart from the settlement agreement." ND MTD at 8. And Notre Dame even suggests that the Rules provide the paramount basis for its refusal to provide coverage, contending that "[a]s long as those regulations remain on the books (and the government continues to defend them in litigation), it would be premature to consider a challenge to the settlement." *Id.* Notre Dame's reliance on the Rules for its actions thus is not "speculative"—to the contrary, it is quite clear.

Accordingly, Plaintiffs' injuries can be redressed only if both the Rules are enjoined and the Settlement Agreement is held to be void. The fact that an injury is caused by two simultaneous harms cannot defeat standing—particularly when, as here, Plaintiffs are challenging both causes of their injury. *See Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 969 (7th Cir. 2016)

("Merely identifying potential alternative causes does not defeat standing."); *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015) (citing *Massachusetts v. EPA*, 549 U.S. 497, 525–26 (2007)) ("[T]he mere existence of multiple causes of an injury does not defeat redressability . . . ."); *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 315–16 (4th Cir. 2013) (recognizing that "the concept of concurrent causation" applies to standing).

Federal Defendants also incorrectly argue that Notre Dame's failure to provide the requisite contraceptive coverage cannot be "tethered to the moral exemption rule" because Notre Dame has not invoked the Moral Exemption. Gov't MTD at 22. But Notre Dame has never drawn any distinction between the Rules. Rather, it insists that the "current *regulations*" exempt it from the ACA's contraceptive coverage requirement, and that as long as "*those regulations*" are in place, the University is exempt. ND MTD at 8 (emphasis added). It is not surprising that Notre Dame has refused to distinguish between the Rules: if the Religious Exemption were to fail, Notre Dame would turn to the Moral Exemption as authorization for its coverage refusal. Plaintiffs therefore cannot obtain complete relief unless both Rules (and the Settlement Agreement) are enjoined.

B. Plaintiffs' Claims are Ripe for Review.

Notre Dame incorrectly contends that Plaintiffs' challenge to the Settlement Agreement is not "ripe for adjudication." ND MTD at 7. The ripeness doctrine "is based on the Constitution's case-or-controversy requirements as well as discretionary prudential considerations." *Wisconsin Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 148 (7th Cir. 2011). While "[r]ipeness concerns may arise when a case involves uncertain or contingent events . . . [c]laims that present purely legal issues are normally fit for judicial decision." *Id.* This case is ripe because Plaintiffs' claims regarding the Settlement Agreement address an active controversy that turns on Defendants' past actions and legal issues, not on uncertain future contingencies.

Plaintiffs have lost coverage for their necessary contraceptive care, and currently are paying out-of-pocket for those health care needs. Am. Compl. ¶¶ 8–10, 13–17. And there is no question that the Settlement Agreement is causing this injury: Notre Dame has explicitly and repeatedly invoked it as a basis for refusing to provide coverage. Indeed, on February 7, 2018, when Notre Dame announced that it would be terminating contraceptive coverage under its health plans, its President explained that the decision was sanctioned by a "favorable" settlement with the U.S. government, which purportedly gave "the University, its insurers and third party administrators the option of an exemption from providing" coverage. *Id.* ¶ 130. Thus, Notre Dame has been relying on the Settlement Agreement to deny contraceptive coverage from the outset. And the validity of the Settlement Agreement is not contingent on any "uncertain" events but rather turns purely on whether it was lawfully entered into in the first place. *See id.* ¶¶ 165–88.

Nonetheless, Notre Dame argues that claims against the Settlement Agreement are not ripe, because the University is already exempt from providing contraceptive coverage under the Rules. This argument fails to acknowledge that Notre Dame has invoked the Settlement Agreement as an *independent* basis for refusing to provide the required coverage. Indeed, under cover of the Settlement Agreement, Notre Dame has been taking the position for over a year that it is exempt from the contraceptive coverage requirement, notwithstanding that the Rules have been enjoined nationwide for that entire time period. Am. Compl. ¶¶ 165–88.[9]

[9] The IFRs were preliminarily enjoined on a nationwide basis on December 15, 2017. Notre Dame announced on February 7, 2018, that it would change its insurance plans to no longer cover the full spectrum of FDA-approved contraceptives without cost-sharing. Those new policies went into effect on July 1 and August 15, 2018. Am. Compl. ¶¶ 139, 149. On January 14, 2019, while the IFRs were still enjoined, the Final Rules also were preliminarily enjoined nationwide, *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 797–98 (E.D. Pa. 2019). They remain enjoined today.

Notably, while Notre Dame argues that challenges to the Settlement Agreement are blocked by the Rules, Federal Defendants argue the exact opposite. *Compare* ND MTD at 8, *with* Gov't MTD at 20–21. That absurdity highlights the unlawful scheme at play here: the Settlement Agreement and the Rules *together* violate Plaintiffs' rights to contraceptive care. Defendants' contradictory positions only confirm that Plaintiffs' injury cannot be fully redressed absent injunction of *both* the Rules *and* the Settlement Agreement.

C. The Settlement Agreement is Not Committed to Agency Discretion and is Reviewable Under the APA.

Defendants also contend that the Settlement Agreement is nothing more than an individual enforcement decision, akin to a prosecutor's decision about whether to indict, and thus should be foreclosed from judicial review under *Heckler v. Chaney*, 470 U.S. 821 (1985).[10] But while prosecutors may pick and choose which criminal actions to prosecute, they do *not* have authority prospectively to authorize criminals to commit crime, nor do they have discretion to declare that crimes are no longer illegal. Yet that is what the Settlement Agreement does. *Heckler* concerns the Executive branch's discretion to exercise its enforcement powers over individual legal violations, based on the particular factual circumstances surrounding each violation. *See Heckler*, 470 U.S. at 831–33; *Crowley Caribbean Transp. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994). *Heckler* does *not* permit federal agencies to usurp legislative power by adopting a general policy authorizing ongoing violations of statutes that they administer, which is precisely what Federal Defendants have attempted to do.

[10] Federal Defendants contend that this purported defect is jurisdictional and seek to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). Federal Defendants' motion should be denied because 5 U.S.C. § 701(a)(2) is not jurisdictional. *See Builders Bank v. Fed. Deposit Ins. Corp.*, 846 F.3d 272, 274 (7th Cir. 2017).

It is thus an unlawful policy decision made by Federal Defendants not only to refuse to defend the contraceptive coverage requirement, but also affirmatively to authorize Notre Dame and other entities to violate that law and potentially other, future laws and to infringe the rights of students and employees. Accordingly, *Heckler* is inapposite, and the Settlement Agreement is subject to judicial review. *See generally United States v. Carpenter*, 526 F.3d 1237 (9th Cir. 2008); *Exec. Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759 (4th Cir. 1993).

1. *The Settlement Agreement is Not an Individual Enforcement Decision.*

In *Heckler*, the Supreme Court held that an agency's decision to refrain from instituting enforcement proceedings in any individual case is presumptively immune from judicial review under 5 U.S.C. § 701(a)(2). 470 U.S. at 828. The Court did not hold that an agency may categorically refuse to enforce *all* such violations, and it certainly did not permit agencies to authorize violations of the law prospectively and permanently.

Indeed, *Heckler* made clear that "Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers," *id.* at 833, and that it was not addressing reviewability of an agency decision to "'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities," *id.* at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc) (per curiam) (agency's wholesale failure to enforce Title VI of the Civil Rights Act of 1964 to desegregate schools was not committed to agency discretion)).[11]

[11] Justice Brennan wrote separately to underscore the narrow scope of *Heckler*'s holding, explaining that "the Court properly does not decide today that nonenforcement decisions are unreviewable in cases where (1) an agency flatly claims that it has no statutory jurisdiction to reach certain conduct . . . ; (2) an agency engages in a pattern of nonenforcement of clear statutory language . . . ; (3) an agency has refused to enforce a regulation lawfully promulgated and still in effect . . . ; or (4) a nonenforcement decision violates constitutional rights." 470 U.S. at 839 (Brennan, J. concurring).

Courts thus have distinguished "*single-shot* non-enforcement decision[s]," which are presumptively immune from judicial review, from an "agency's statement of a *general enforcement policy*," which is reviewable. *Crowley Caribbean Transp.*, 37 F.3d at 676–77 (emphases in original; citations omitted); *accord OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) ("[A]n agency's adoption of a general enforcement policy is subject to review."). Whereas individual enforcement decisions involve "the sort of mingled assessments of fact, policy, and law" that are "peculiarly within the agency's expertise and discretion," general enforcement policies "are abstracted from the particular combinations of facts the agency would encounter in individual enforcement proceedings." *Crowley Caribbean Transp., Inc.*, 37 F.3d at 677. Accordingly, only individual enforcement decisions are presumptively unreviewable. *Id.* at 676–77; *see also Edison Elec. Inst. v. U.S. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993) ("[S]ubstantive requirements of the law," are "not the type of discretionary judgment concerning the allocation of enforcement resources that *Heckler* shields from judicial review").

Judicial review is particularly appropriate where, as here, an agency's general enforcement policy amounts to "abdication of its statutory responsibilities" or abandonment of its lawfully promulgated regulations. *NAACP. v. Sec'y. of HUD*, 817 F.2d 149, 158–59 (1st Cir. 1987) (holding that HUD's pattern of failing "affirmatively . . . to further" the Fair Housing Act was reviewable as an "abdication of [HUD's] statutory responsibilities") (quoting *Heckler*, 470 U.S. 433 n.4)); *N. Ind. Pub. Serv. Co. v. FERC*, 782 F.2d 730, 745–46 (7th Cir. 1986) ("[W]e do not think that the Commission can essentially abandon its regulatory function . . . under the guise of unreviewable agency inaction.").

Thus, *Heckler* grants agencies discretion over whether to enforce against individual legal violations retrospectively, not *carte blanche* to disregard the law. None of the cases cited by

Defendants hold otherwise (Gov't MTD at 18–21, ND MTD at 11 & n.1), as none effectuated a policy that permanently authorized future violations of the law or otherwise "abdicat[ed]" statutory obligations. *See, e.g.*, *New York State Dep't of Law v. F.C.C.*, 984 F.2d 1209, 1220 (D.C. Cir. 1993) (recognizing that "[n]ot every agency settlement, whatever its terms or whenever it occurs, escapes review under *Chaney*," and that "an agency's consistent policy of nonenforcement" may be reviewable). A contrary rule would permit agencies to nullify congressional directives, violating separation-of-powers principles.

The Settlement Agreement here is a "conscious[] and express[]" adoption of a "general policy" to authorize individuals and entities prospectively to circumvent the contraceptive coverage requirement and hence "amount[s] to an abdication of [Federal Defendants'] statutory responsibilities" under the ACA. *Heckler*, 470 U.S. at 833 n.4. It not only exempts signatories from the existing contraceptive coverage requirement, but also purports to bind future administrations by exempting signatories from any future regulations and potentially even other existing or future statutes requiring contraceptive coverage. Settlement Agreement ¶ 2 (exempting signatories from "any materially similar regulation or agency policy"), *id.* ¶ 4 (no penalties will be assessed for noncompliance with "any law or regulation" requiring contraceptive coverage). This is a blatant attempt to make law by settlement. *See Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987) (agency action that cabins its own enforcement discretion "can in fact rise to the level of a substantive, legislative rule").

Indeed, contrary to Notre Dame's argument that the Settlement Agreement reflects Federal Defendants' decision not to enforce the contraceptive coverage requirement against a "discrete group" of entities that had brought a "small handful of cases," ND MTD at 12, Notre Dame is but one of 74 entities and individuals who, along with countless unknown "subsidiaries, affiliates, and

successors; and related entities that offer coverage through the [signatories'] health plan[s]," are granted a permanent exemption from the contraceptive coverage requirement by way of the same settlement instrument. Settlement Agreement, Ex. A. More damning still, Federal Defendants have refused to substantively defend *all* litigation challenging the contraceptive coverage requirement.[12]

Accordingly, the Settlement Agreement is not a fact-specific resource-allocation decision subject to *Heckler* discretion. Rather, it is a "general enforcement policy" based on Federal Defendants' flawed interpretation of the "substantive requirements of the law." *See Crowley Caribbean Transp.*, 37 F.3d at 676–77; *OSG Bulk Ships, Inc.*, 132 F.3d at 812; *Edison Elec. Inst.*, 996 F.2d at 333. Accordingly, the Settlement Agreement is reviewable.

2. *Settlement Agreements that Violate the Law and Infringe the Rights of Third Parties are Subject to Judicial Review.*

Even if the Court were to consider the Settlement Agreement an individual enforcement decision, *Heckler* discretion does not apply to claims that an agency has taken affirmative action that exceeds its legal authority and infringes the rights of third parties, including via settlement agreements executed by the Department of Justice.

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[12] *See Ass'n of Christian Schs. Int'l. v. Burwell*, No. 14-cv-2966, Docket No. 47 (D. Colo. Sept. 6, 2018) (declining to raise substantive defense to motion for permanent injunction); *Ave Maria Sch. of Law v. Sebelius*, 13-cv-795, Docket No. 67 (M.D. Fla. July 6, 2018) (same); *Colo. Christian Univ. v. Sebelius*, 13-cv-2105, Docket No. 82 (D. Colo. June 29, 2018) (same); *Ave Maria Univ. v. Sebelius*, 13-cv-630, Docket No. 69 (M.D. Fla. June 22, 2018) (same); *Little Sisters of the Poor Home for the Aged v. Burwell*, 13-cv-02611, Docket No. 81 (D. Colo. May 18, 2018) (same); *Dordt Coll. v. Sebelius*, 13-cv-4100, Docket No. 84 (N.D. Iowa May 17, 2018) (same); *S. Nazarene Univ. v. Burwell*, 13-cv-1015, Docket No. 108 (W.D. Okla. May 7, 2018) (same); *Grace Schs. v. Burwell*, 12-cv-459, Docket No. 113 (N.D. Ind. May 3, 2018) (same); *Geneva Coll. v. Sebelius*, 12-cv-00207, Docket No. 146 (W.D. Pa. Apr. 10, 2018) (same); *Reaching Souls Int'l, Inc. v. Burwell*, 13-cv-01092, Docket No. 93 (W.D. Okla. March 5, 2018) (same); *Wheaton Coll. v. Burwell*, 13-cv-8910, Docket No. 117 (N.D. Ill. Feb. 1, 2018) (same); *Sharpe Holdings Inc. v. Sebelius*, 12-cv-92, Docket No. 152 (E.D. Mo. Dec. 22, 2017) (same); *Catholic Benefits Ass'n v. Burwell*, 14-cv-240, Docket No. 174, 14-cv-685, Docket No. 69 (W.D. Okla. Dec. 22, 2017) (same).

Federal Defendants argue that the Attorney General has discretion under 28 U.S.C. §§ 516–19 to settle litigation in which the federal government is a party. Gov't MTD at 20. However, the Attorney General's litigation authority extends only to "legitimate objectives and does not include license to agree to settlement terms that would violate the civil laws governing the agency." *Exec. Bus. Media*, 3 F.3d at 762; *see also Carpenter*, 526 F.3d at 1241–42.[13]

In *Executive Business Media*, a nonparty to a settlement agreement between the government and a contractor challenged the settlement under the APA for violating the government's competitive-bidding procedures. 3 F.3d at 761. The Fourth Circuit concluded that the settlement agreement was reviewable, explaining:

> We think it alien to our concept of law to allow the chief legal officer of the country to violate its laws under the cover of settling litigation. The Attorney General's authority to settle litigation for its government clients stops at the walls of illegality.

Id. at 762 (citing *Garcia v. Neagle*, 660 F.2d 983, 988 (4th Cir. 1981) ("[W]hen the bounds of discretion give way to the stricter boundaries of law, administrative discretion gives way to judicial review.")); *cf. Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000) (a nonparty to a settlement agreement who claimed that the settlement was unlawful could "bring a suit under the APA challenging" the federal agency's actions under the settlement).

The Ninth Circuit adopted that reasoning in *United States v. Carpenter*, 526 F.3d 1237 (9th Cir. 2008). Curiously, Federal Defendants cite *Carpenter* to argue that the Settlement Agreement

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[13] Other decisions, including several by the Seventh Circuit, have recognized that settlement agreements entered into by government entities must be lawful and may not exceed lawful governmental authority. *See Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995); *People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205*, 961 F.2d 1335, 1337 (7th Cir. 1992); *Kasper v. Bd. of Election Comm'rs of Chicago*, 814 F.2d 332, 340–41 (7th Cir. 1987); *Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986); *see also League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052, 1055 (9th Cir. 2007); *United States v. Alex. Brown & Sons, Inc.*, 963 F. Supp. 235, 240 (S.D.N.Y. 1997), *aff'd sub nom. United States v. Bleznak*, 153 F.3d 16 (2d Cir. 1998).

is not reviewable. Gov't MTD at 19. But *Carpenter* permitted judicial review under the APA of an allegedly unlawful settlement between the United States and a Nevada county under circumstances quite similar to those presented here. 526 F.3d at 1239–40. The Ninth Circuit held that where, as here, the claim is not that the "Attorney General exercised his discretion poorly but that he settled the lawsuit in a manner that he was not legally authorized to do—in other words, that he exceeded his legal authority," judicial review under the APA is appropriate. *Id.* at 1242 (internal quotation marks and alterations omitted).[14] Even "[w]here an action is committed to absolute agency discretion by law, . . . courts have assumed the power to review allegations that an agency exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations." *Id.* at 1241 (citations omitted).

In executing the Settlement Agreement, Federal Defendants committed all three misdeeds, warranting judicial review: they "exceeded [their] legal authority, acted unconstitutionally, [*and*] failed to follow [their] own regulations." *Carpenter*, 526 F.3d at 1241; *Exec. Bus. Media*, 3 F.3d at 762. The Court has the power to review this unlawful and harmful agency action.

D. There is No Adequate Alternative Remedy for Plaintiffs' Claim that the Settlement Agreement Violates the APA.

Federal Defendants argue that "the availability of [] alternative remedies for Plaintiffs' alleged injuries bars Plaintiffs' APA challenges to the Settlement Agreement." Gov't MTD at

[14] *Carpenter* also assumed that the Attorney General's settlement agreement was "final agency action" for purposes of review under the APA, 5 U.S.C. § 704. *Carpenter*, 526 F.3d at 1241 (quoting *Banzhaf v. Smith*, 737 F.2d 1167, 1168 (D.C. Cir. 1984) (en banc) (per curiam)) ("Final actions of the Attorney General fall within the definition of agency action reviewable under the APA."). Defendants here do not dispute that the Settlement Agreement constitutes final agency action.

16.[15] They posit two theories about "alternative" options, neither of which is adequate, and both of which fail as a matter of law.

First, Federal Defendants contend that Plaintiffs' "non-APA challenges to the Settlement" can and should stand alone. *Id.* at 17. But all of Plaintiffs' claims challenging the Settlement Agreement are inextricably intertwined. Plaintiffs challenge the Settlement Agreement on the grounds that it is "illegal under and contrary to controlling orders and precedential decisions of the federal courts, federal statutes, and the U.S. Constitution," and maintain that it should be deemed void for those same reasons. Am. Compl. ¶¶ 166–88. The APA itself permits judicial review of and requires courts to "hold unlawful and set aside" any agency action that is "not in accordance with law" or "contrary to constitutional right." 5 U.S.C. § 706(2). Accordingly, Plaintiffs' APA and non-APA claims challenging the Settlement Agreement are effectively one and the same.

Second, Federal Defendants argue that Plaintiffs Natasha Reifenberg, Jane Doe 2, and Jane Doe 3 could instead file an ERISA claim against Notre Dame on the ground that "their plan did not conform to the contraceptive coverage mandate." Gov't MTD at 17.[16] Again, this argument misses the point. The core of this lawsuit is the fact that Defendants have unlawfully overridden the contraceptive coverage requirement, without the legal authority to do so, via the unlawful Settlement Agreement and the unlawful Rules. Thus, even though Notre Dame's health plan is

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[15] Defendants do not, and cannot, contend that there is any adequate alternative remedy for Plaintiffs' APA claims challenging the Rules. And for the reasons discussed in Section I.B, *supra*, Plaintiffs injuries cannot be remedied without an injunction against both the Settlement Agreement and the Rules.

[16] Notably, Defendants do not, and cannot, contend that an ERISA claim could dispose of this lawsuit in its entirety. The ACA's contraceptive coverage requirement is part of the Women's Health Amendment, which is incorporated into Title I of ERISA, but only Plaintiffs Natasha Reifenberg, Jane Doe 2, and Jane Doe 3 are on Notre Dame's faculty health plan. Am. Compl. ¶¶ 14, 16–17. Plaintiff Jane Doe 1 and the members of Plaintiff Irish 4 Reproductive Health are on Notre Dame's student health plan, *id.* ¶¶ 13, 15, which is not subject to ERISA. Accordingly, no ERISA claim is available to them. It would make no sense, and defy principles of judicial economy, to force Plaintiffs to litigate their identical claims in separate lawsuits.

inconsistent with ACA, the Settlement Agreement and the Rules stand in the way of any mechanism to address that injury.[17]

II. PLAINTIFFS HAVE STATED A CLAIM THAT THE SETTLEMENT AGREEMENT AND RULES VIOLATE THE SUBSTANTIVE PROVISIONS OF THE APA.

It borders on the frivolous to say that Plaintiffs cannot even state a claim that the challenged Rules exceed the scope of agency authority and are contrary to law when at least two federal courts have already granted preliminary relief on those grounds. *See Pennsylvania*, 351 F. Supp. 3d at 821, 827; *California*, 351 F. Supp. 3d at 1286, 1291. And the same constitutional and statutory defects that render the Rules unlawful also infect the Settlement Agreement.

A. The Settlement Agreement and Rules Are Unauthorized by and Contrary to the ACA.

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). "Thus, if there is no statute conferring authority, a federal agency has none." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). The Settlement Agreement and Rules cannot be reconciled with the language or purpose of the ACA. They therefore exceed the agencies' statutory authority and are contrary to law.

The Women's Health Amendment was added to the ACA to advance the health and equality of women by removing cost barriers to critical health care and ensuring that women do

[17] Nor could any ERISA claim exclusively against Notre Dame address the harms caused by the Settlement Agreement and the Rules. Federal Defendants are necessary parties to any challenge to the Settlement Agreement, Wright & Miller, 7 Fed. Prac & Proc. Civ. § 1613 (3d ed.) ("In cases seeking reformation, cancellation, rescission, or otherwise challenging the validity of a contract, all parties to the contract probably will have a substantial interest in the outcome of the litigation and their joinder will be required."); *U.S. ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 479 (7th Cir. 1996), and Federal Defendants are the only proper defendants for any claim challenging their Rules.

not pay more for health care than men do. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 741–42 (2014) (Ginsburg, J., dissenting). To that end, the Amendment requires that non-grandfathered "group health plan[s] and health insurance issuer[s] offering group or individual health insurance coverage . . . shall, at a minimum provide coverage" for "additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by" HRSA without "impos[ing] any cost sharing requirements." 42 U.S.C. § 300gg-13(a)(4). That provision delegates to HRSA the authority to issue guidelines defining "preventive care," which it did in 2011 when it released guidelines that define that term to include all FDA-approved "contraceptive methods, sterilization procedures, and patient education and counseling." Am. Compl. ¶ 60.

Federal Defendants contend, however, that 42 U.S.C. § 300gg-13(a)(4) also delegates to them the authority to define *who* must abide by the ACA (by purportedly authorizing the agencies to exempt entities from the coverage requirement based on religious or moral objections). But while an agency's reasonable interpretation of an ambiguous statute may generally be entitled to deference (assuming that Congress exclusively entrusted the statutory interpretation to that agency), no deference is due when an agency interpretation conflicts with a statute's plain language. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984). That is the case here.

Statutes that grant regulatory authority do not generally include the power to create exemptions from enforcement of the law—and especially not when a statute's text evidences Congress's intent that exemptions not be allowed. *See Nw. Envtl. Advocs. v. EPA*, 537 F.3d 1006, 1021 (9th Cir. 2008); *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977). Here, the ACA straightforwardly requires that all group health plans (including Notre Dame's faculty plan) and individual health insurance coverage (including Notre Dame's student health plan) "shall" cover "preventive care" as defined by HRSA.

"'[S]hall' is a mandatory term that 'normally creates an obligation impervious to judicial [or agency] discretion.'" *Pennsylvania*, 351 F. Supp. 3d at 818 (quoting *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)). "[B]y stating that the specified plans 'shall' provide coverage for 'preventive care,' the statute sets forth who is bound by the coverage mandate (any 'group health plan' . . .)" and delegates to HRSA only "the task of defining what counts as 'preventive care.'" *Id*. And nothing else in the ACA empowers any agency to waive the coverage requirement.

Federal Defendants nevertheless argue that Section 300gg-13(a)(4) confers unbridled agency discretion to exempt certain group health plans from covering preventive services—without the statute's directly saying so—because the provision requires coverage only "as provided for" in HRSA's guidelines. Gov't MTD at 32. And those guidelines, Federal Defendants contend, could themselves (or through agency enforcement) limit *who* provides the requisite coverage. But as the *Pennsylvania* court reasoned, the natural reading of "as provided for" is that Congress meant "to indicate that the HRSA guidelines would be *forthcoming*, *i.e.* in anticipation of HRSA issuing guidelines—not to [yield] the conclusion that the ACA implicitly provides the Agencies with the authority to create exemptions." 351 F. Supp. 3d at 820–21 (emphasis in original).[18] If Congress had intended a broad delegation of authority to exempt entities from the

[18] This view is even more clearly correct because where HRSA had already issued the guidelines referenced in the "parallel" statutory provision on which the government relies, Gov't MTD at 32, that statutory provision does not include the phrase "as provided for," *Cf.* 42 U.S.C. § 300gg-13(a)(3). These parallel guidelines, which the government acknowledges are the most natural counterpart to the women's preventive-care guidelines, "simply define a list of 'preventive care' services—that is, *what* must be covered"—and "do not speak at all to *who* must provide that coverage." *See Pennsylvania*, 351 F. Supp. 3d at 820–21 (citing HHS, *Preventive Care Benefits for Children*, https://healthcare.gov/preventive-care-children).

statutory mandate, it would have done so clearly and unequivocally: Congress "does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).[19]

What is more, Congress provided one, and only one, category of health plans that need not comply with the Women's Health Amendment—"grandfathered health plans"—which are being phased out over time. 42 U.S.C. § 18011(e).[20] "When Congress provides exceptions in a statute . . . [t]he proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000).[21] Indeed, the Senate rejected a statutory amendment that would have allowed exemptions from coverage for any health service otherwise required by the ACA that was contrary to an employer's "religious beliefs or moral convictions." S. Amend. 1520, 112th Cong. §2(A), Cong. Rec. S1,079 (daily ed. Feb. 28, 2012). The Court ought "not assume that Congress intended to enact statutory language that it has earlier discarded in favor of other language"—or that Congress meant to authorize an agency to do what Congress itself decided not to do. *See Chickasaw Nation v. United States*, 534 U.S. 84, 92–93 (2001) (internal quotations and citations omitted).

Perhaps most significantly, Federal Defendants' sweeping new exemptions directly contravene the congressional intent of the Women's Health Amendment to ensure access to

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[19] Federal Defendants' emphasis on the absence of the words "evidence-based" or "evidence-informed" in § 300gg-13(a)(4), when those phrases are found in parallel provisions §§ 300gg-13(a)(1) and (3), is similarly mistaken. Gov't MTD at 32. Had Congress wished to empower agencies to pick and choose which entities would be subject to the contraceptive coverage requirement, it could have said so plainly, rather than burying it behind phrases that have no obvious relation to the power that the agencies now seek to wield.

[20] There are two exemptions from the Amendment, but they were not created by the ACA. First, there is a pre-existing exemption under ERISA for church plans. *See* 26 U.S.C. § 414(e)(1); 29 U.S.C. § 1002(33)(A). Second is the regulatory exemption for houses of worship, rooted in provisions of the Internal Revenue Code. *See* 78 Fed. Reg. 39,870-01, 39,874 (citing 26 U.S.C. §§ 6033(a)(1), (a)(3)(A)(i), (a)(3)(A)(iii)).

contraceptive care. The Settlement Agreement and Final Rules "transform contraceptive coverage from a legal entitlement to an essentially gratuitous benefit wholly subject to their employer's discretion." *California*, 281 F. Supp. 3d at 830. Even if the agencies had been granted authority to exempt entities from the Amendment—and they were not—they would not be free to do so in a way that squarely contradicts Congress's express directives. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91–92, 95–96 (2002).

"Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge agency discretion." *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013)); *see also Nw. Envtl. Advocates*, 537 F.3d at 1021. Here, it did the former.

B. The Settlement Agreement and Rules are Neither Required Nor Authorized by RFRA.

Federal Defendants also assert that the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*, authorizes and requires the religious exemptions in the Settlement Agreement and Religious Exemption.[22] But as explained more fully in Section V.A, religious accommodations from generally applicable laws are authorized by RFRA only if, among other requirements, they address *substantial*, *government-imposed* burdens on religious exercise, and only if the accommodations do not detrimentally affect third parties. The Religious Exemption and Settlement Agreement fail in both respects.

[22] The government has elsewhere conceded that RFRA does not authorize the Moral Exemption. *See Pennsylvania*, 351 F. Supp. 3d at 821 n.22.

1. *RFRA Does Not and Cannot Require the Exemptions Because They Do Not Relieve Substantial Government-Imposed Burdens on Religious Exercise.*

RFRA provides for the possibility of religious accommodations from generally applicable laws that "substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1. The substantial-burden requirement is, however, a statutory prerequisite. *See Korte v. Sebelius*, 735 F.3d 654, 708 (7th Cir. 2013). To state a claim (or defense) under RFRA, the claimant must first establish that his or her religious exercise is substantially burdened; only if the claimant succeeds in making that showing does the burden then shift to the government to demonstrate that the challenged law is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b); *see also Korte*, 735 F.3d at 673.

As a threshold matter, Federal Defendants' assertions about substantial burdens on religious exercise are entitled to no deference. The determination whether an alleged burden is substantial and thereby meets RFRA's statutory prerequisites is a legal question, not a factual one. *See Grace Schs.*, 801 F.3d at 804–05 (citing five circuits, including the Seventh, for the proposition that "whether the government has imposed a substantial burden on religious exercise is a legal determination"). And that legal question, including the interpretation and application of RFRA necessary to answer it, is explicitly committed to the courts, not to any administrative agency. *See Gonazles v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006) ("RFRA . . . plainly contemplates that *courts* would recognize exceptions—that is how the law works . . . . RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress." (emphasis in original)). Hence, the government's assertions should not be entitled to *Chevron* deference. *See Pennsylvania*, 351 F.

Supp. 3d at 823; *see also Hobby Lobby*, 573 U.S. at 719–26 (analyzing whether the contraceptive coverage requirement violated RFRA without deferring to agency views).

This Court held, and the Seventh Circuit affirmed (though the Supreme Court vacated the Circuit's decision on other grounds), that the preexisting accommodation does not compel *Notre Dame* to change its "own actions and speech . . . in a manner contrary to [its] sincerely held religious beliefs" but instead asks merely that the University state its objections to contraceptive coverage. *Notre Dame*, 988 F. Supp. 2d at 923–24. Having to give notice of an exemption in order to receive one is not a substantial burden on religious exercise: it is the bare minimum needed for the government to retain any meaningful lawmaking authority while addressing religious objections. *See Notre Dame*, 786 F.3d at 623–24; *see also Wheaton Coll.*, 791 F.3d at 797 (holding that giving notice to HHS in order to invoke the accommodation is "hardly a burdensome requirement"). That Notre Dame might find the preexisting accommodation "less spiritually fulfilling than it would otherwise" because it cannot as effectively impose its religious choices on students and employees is simply not a legally cognizable burden. *See Notre Dame*, 988 F. Supp. 2d at 924.

In the face of all those legal determinations, it is preposterous for Defendants to contend that Plaintiffs' claims warrant dismissal. Simply put, RFRA's statutory prerequisites to religious accommodation are not met, so further exemptions from the accommodation process are not authorized, much less required.

Additionally, the Rules categorically assume that a substantial burden on religious exercise exists in the abstract for broad categories of employers, with no requirement that any objector actually demonstrate a burden—or even provide bare legal notice that it is availing itself of the exemption. That, too, is impermissible. The mere assertion that religious exercise is burdened is

insufficient as a matter of law to trigger RFRA's accommodation requirements because "accepting any burden alleged by [complainants] as 'substantial'" would "ignore the import . . . of the 'substantial' qualifier in the RFRA test." *Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 358 & n.24 (3d Cir. 2017) (quoting *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1176 (10th Cir. 2015)). Again, RFRA commits the authority to determine whether a burden is substantial to the courts—not to individual claimants. *See Pennsylvania*, 351 F. Supp. 3d at 823; *see also Real Alternatives*, 867 F.3d at 358 & n.23; *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 588 (6th Cir. 2018).

Moreover, although religious practices need not be "central to" an adherent's "system of religious belief" to give rise to a potential RFRA claim, 42 U.S.C. § 2000cc-5(7)(A); *see* 42 U.S.C. § 2000bb-2(4), there must always be a sufficient "nexus" between claimants' religious beliefs and the practices for which accommodations are sought. A legally cognizable burden on religious exercise exists only when the government is "'forc[ing claimants] to engage in conduct that their religion forbids or . . . prevent[ing] them from engaging in conduct their religion requires.'" *Mahoney v. Doe*, 642 F.3d 1112, 1121–22 (D.C. Cir. 2011) (omission in original) (quoting *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001)).

To be sure, the Rules purport to afford exemptions solely "to the extent" of objecting entities' religious beliefs. 45 C.F.R. § 147.132(a). But because objectors are not required even to state their beliefs, and there is no provision for inquiry into whether the exemption taken is tailored to an objector's religious requirements, that supposed limitation is meaningless.

2. *RFRA Does Not Authorize Exemptions That Harm Third Parties.*

It is well-settled that RFRA and its sister statute, the Religious Land Use and Institutionalized Persons Act (42 U.S.C. § 2000cc *et seq.*), must be read to incorporate the

Establishment Clause's safeguards against religious accommodations that detrimentally affect third parties. [23] *See* Section V.A, *infra*. The Supreme Court held in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), that to comply with the Establishment Clause, RLUIPA (and therefore also RFRA) must be interpreted to require courts to take "adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" to ensure that it would "not override other significant interests." *Id.* at 720, 722 (citing *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985)). Indeed, in *Hobby Lobby* the Court repeated that same requirement for exemptions from the very contraceptive coverage requirement at issue here. *See* 573 U.S. at 729 n.37; *id.* at 693 ("Nor do we hold . . . that . . . corporations have free rein to take steps that impose 'disadvantages . . . on others' or that require 'the general public [to] pick up the tab.'").

That is as Congress intended: RFRA was enacted to restore by statute what had been constitutional free-exercise jurisprudence before *Employment Division v. Smith*, 494 U.S. 872 (1990). *See Korte*, 735 F.3d at 679. In so doing, Congress intentionally adopted into RFRA the limitations on religious accommodations recognized before *Smith*, which define the constitutional metes and bounds of accommodation. *See, e.g.*, 139 Cong. Rec. S14,350–01 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); 139 Cong. Rec. S14,352 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch). And that jurisprudence absolutely bars the government from granting accommodations that shift costs or other burdens onto nonbeneficiaries. *See* Section V.A, *infra*.

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[23] RFRA and RLUIPA employ virtually identical language and serve the same congressional purpose. *Compare* 42 U.S.C. § 2000bb-1, *with* 42 U.S.C. § 2000cc-1. Accordingly, they apply "the same standard." *Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015) (citation omitted). And decisions under one apply equally to the other. *See, e.g.*, *Korte*, 735 F.3d at 682–83; *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661 (10th Cir. 2006); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226–27 (11th Cir. 2004).

Yet the Settlement Agreement and Rules impose on students and employees precisely this type of unlawful shifting of harms: Plaintiffs and other women who get their health insurance through entities that avail themselves of the exemptions will be denied the insurance coverage to which they are entitled by law. They will thus have to pay out-of-pocket for critical health services that otherwise would be available to them without cost-sharing. *See* Am. Compl. ¶¶ 13–17. By making Plaintiffs bear these added costs and burdens, the Settlement Agreement and Rules impose what RFRA does not and cannot authorize.

C. The Settlement Agreement and Rules are Arbitrary and Capricious.

An agency that "neglects to" "acknowledge and provide an adequate explanation for its departure from [its] established precedent . . . acts arbitrarily and capriciously." *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1119 (D.C. Cir. 2010). That is especially true when "serious reliance interests" are at stake or when a new policy "rests upon factual findings that contradict those which underlay" an agency's prior regulation—in which case a "detailed justification" for the policy change is required. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–51 (1983) (regulation rescinding previous administration's regulation was arbitrary and capricious where agency failed to address earlier factual findings); *Nat'l Women's Law Ctr. v. OMB*, 358 F. Supp. 3d 66, at *16–17 (D.D.C. 2019) (agency action was arbitrary and capricious where agency failed to explain inconsistencies with prior factual findings). Here, Federal Defendants have offered no substantial or reasoned justification for their about-face on requiring objecting entities to request an accommodation and there is none.

After the HRSA guidelines were adopted, Federal Defendants repeatedly reaffirmed the importance of providing women with access to contraception without cost-sharing.[24] Indeed, Federal Defendants forcefully argued in the Supreme Court that the government's interest in ensuring such coverage is a compelling one. *See Hobby Lobby*, 573 U.S. at 737 (Kennedy, J., concurring) (HHS "makes the case that the mandate serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee"). Thus, in *Zubik* and the remand orders following it, the Court directed Federal Defendants to create an accommodation that would "ensur[e] that women covered by [the entities'] health plans receive full and equal health coverage, including contraceptive coverage." *Zubik*, 136 S. Ct. at 1560.

As alleged in the Amended Complaint, the Settlement Agreement and Rules constitute a marked reversal: The agencies now eschew that compelling interest, subordinating it—and the women whom it protects—to the religious and moral objections of employers and universities. The agencies must therefore provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, 556 U.S. at 515.

[24] *E.g.*, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011) (recognizing critical need to extend "any coverage of contraceptive services under the HRSA Guidelines to as many women as possible"); 77 Fed. Reg. at 8,727–28 (describing benefits of contraception and problems with any broader exemption); *Certain Preventive Services Under the Affordable Care Act*, 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012) (requesting comment on how to "provide women access to the important preventive services at issue without cost sharing while accommodating religious liberty interests"); *Coverage of Certain Preventive Services Under the Affordable Care Act*, 78 Fed. Reg. 8,456, 8,459 (Feb. 6, 2013) (same); *Coverage of Certain Preventive Services Under the Affordable Care Act*, 78 Fed. Reg. 39,870, 39,872–73 (July 2, 2013) (describing benefits of contraception); 2017 FAQs at 5 (stating that government has "compelling interest in ensuring that women receive full and equal health coverage, including contraceptive coverage").

But neither the Settlement Agreement, nor the Final Rules, nor the Interim Final Rules before them, point to new facts or provide meaningful analysis to explain Federal Defendants' decision now to ignore their earlier, detailed, and highly persuasive factual findings as to their compelling governmental interest, as well as substantial empirical and scientific data submitted in comments opposing the IFRs regarding the benefits and effectiveness of contraception and contraceptive coverage. Am. Compl. ¶ 105(d);[25] *cf. State Farm*, 463 U.S. at 43 ("an agency rule would be arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency"). Instead, the Rules (i) reproduce, without analysis, some public comments that purport to question the efficacy, safety, and importance of contraception, *id.* at 57,552–57,555; while (ii) substantively ignoring thousands of weighty comments in support of the coverage requirement, which include data on the efficacy and benefits of contraception, *id.*; then (iii) formally decline to "take a position on the variety of empirical issues discussed" in those the comments, *id.* at 57,555, 57,556; and (iv) blithely assert that "significantly more uncertainty and ambiguity exists on these issues than the [agencies] previously acknowledged," *id.* at 57,555. But it is not "sufficient for an agency to merely recite the terms 'substantial uncertainty' as a justification for" reversing a policy. *State Farm,* 463 U.S. at 52. To do so is arbitrary and capricious as a matter of law. *Id.*[26]

[25] Federal Defendants misunderstand Plaintiffs' allegation that the Final Rules are "inconsistent with the weight of the hundreds of thousands of comments" submitted. Gov't MTD at 37–38 (citing Am. Compl. ¶ 208). It is the weighty *content* of those comments, not just the overwhelming number, that Federal Defendants improperly ignored.

[26] The supposed "uncertainty and ambiguity" here is also spurious. The Final Rules point, for example, to public comments doubting that contraceptives decrease the incidence of unintended pregnancies. Plaintiffs have pleaded and will show what the FDA has consistently recognized, that FDA-approved forms of contraception are safe and effective. Am. Compl. ¶¶ 22–41.

Federal Defendants also provide no rationale for their new-found disagreement with their own long-standing positions, with this Court, and with multiple federal courts of appeals, in now asserting that the preexisting accommodation substantially burdens religious exercise such that RFRA authorizes a broader exemption. Quite apart from the fact that RFRA commits to the courts, not the agencies, the authority to answer that question of law, *see* Section II.B.1, *supra*, the agencies must at least "show that there are good reasons" for the change. *Navarro*, 136 S. Ct. at 2125–26 (quoting *Fox Television Stations*, 556 U.S. at 515); *see also Nat'l Women's Law Ctr.*, 358 F. Supp. 3d 66, at *17. Yet, they have "offered barely any explanation" for it. *Navarro*, 136 S. Ct. at 2126.

The sole attempt in the Final Rules is a bald assertion that "the [Supreme] Court's analysis in *Hobby Lobby*" also requires broader exemptions from the pre-existing accommodation, purportedly to avoid "either . . . compelling an act inconsistent with [a religious] observance or practice, or . . . substantially pressuring the adherents to modify such observance or practice." 83 Fed. Reg. at 57,546. But Federal Defendants fail to explain how or why the accommodation—which does not compel entities to change their "own actions and speech . . . in a manner contrary to [their] sincerely held religious beliefs," *Notre Dame*, 988 F. Supp. 2d at 923–24—imposes a substantial burden by merely asking objectors to state that they *are* objectors.

Finally, the Settlement Agreement is also arbitrary and capricious because it was made in total disregard of longstanding DOJ policy. As discussed in Section IV.B, *infra*, binding DOJ policy prohibits DOJ from executing settlements that cabin its own enforcement discretion and that infringe the rights of third parties. *See* Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys 3 (Mar. 13, 1986), reprinted in U.S. Dep't of Justice, Office of Legal Pol'y, Guidelines on Constitutional Litigation

150, 152–53 (Feb. 19, 1988)). Yet, without any discussion or reasoned explanation, this is precisely what the Settlement Agreement purports to do. Where, as here, federal agencies "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books," *Fox Television Stations, Inc.*, 556 U.S. at 515, their actions are arbitrary and capricious and must be set aside.

III. PLAINTIFFS HAVE STATED A CLAIM THAT THE FINAL RULES VIOLATE THE PROCEDURAL REQUIREMENTS OF THE APA.

The IFRs were issued without notice and comment, thus lacking "observance of procedure required by law," 5 U.S.C. § 706(2)(D). *See California*, 911 F.3d at 577; *California*, 281 F. Supp. 3d at 825; *Pennsylvania*, 281 F. Supp. 3d at 571. The post-promulgation solicitation of comments does not cure the procedural defect, as the court in *Pennsylvania* has already held. *See* 351 F. Supp. 3d at 816. It is bizarre for Federal Defendants to contend that Plaintiffs cannot even survive a motion to dismiss when preliminary relief has already been granted elsewhere on this very claim.

Under the APA, rulemaking requires a "[g]eneral notice of proposed rule making" in the Federal Register, 5 U.S.C. § 553(b), and a comment period to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," *id.* § 553(c). The agency must then consider any "relevant matter presented." *Id.* These requirements reflect Congress's "judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *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." *Paulsen v. Daniels*, 413 F.3d 999, 1005 (9th Cir. 2005). Yet that is precisely what the government did here.

A. Federal Defendants Have No Excuse For Their Failure To Comply With Notice-And-Comment Requirements When Issuing The IFRs.

Federal Defendants assert that they had independent statutory authority and good cause for their defective process in issuing the IFRs. Gov't MTD at 28. But exceptions to notice-and-comment requirements "are not lightly to be presumed." *Marcello v. Bonds*, 349 U.S. 302, 310 (1955). And as every court to consider the issue has held, they do not apply here. *See California*, 911 F.3d at 577; *California*, 281 F. Supp. 3d at 825; *Pennsylvania*, 281 F. Supp. 3d at 571.

In the first instance, Federal Defendants contend that 42 U.S.C. § 300gg-92 and 29 U.S.C. §§ 1191c and 9833 provide "independent statutory authority" to disregard the APA's procedural requirements. Gov't MTD at 28. But those statutory sections are nothing more than a general (and brief) grant of authority to issue interim final rules. The APA mandates that no subsequent statute may be read to modify the APA's requirements "except to the extent that it does so expressly." *Five Points Road Joint Venue v. Johanns*, 542 F.3d 1121, 1126–1127 (7th Cir. 2008) (quoting 5 U.S.C. § 559). And the statutory provisions to which Federal Defendants point do not "expressly state[] that the APA is inapplicable." *Id.* at 1127. "The identified provisions authorize agencies to issue IFRs, but they are silent as to any required procedure for issuing an IFR . . . . They neither contain express language exempting agencies from the APA nor provide alternative procedures that . . . depart[] from the APA." *Azar*, 911 F.3d at 579; *see also Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 18 (D.D.C. 2010) (concluding that 42 U.S.C. § 300gg-92 does not modify APA's requirements). Hence, the Public Health Service Act does not provide procedures "so clearly different from those required by the APA that [Congress] must have intended to displace the norm." *Asiana Airlines v. FAA*, 134 F.3d 393, 397 (D.C. Cir. 1998).

Federal Defendants argue in the alternative that they had "good cause" under 5 U.S.C. §§ 553(b)(3)(B) and (d)(3) to ignore the APA's requirements. Gov't MTD at 30. But the good-cause exception "must be narrowly construed and only reluctantly countenanced," *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 6 (D.C. Cir. 2011), and "should be limited to emergency situations" rather than "arbitrarily utilized at the agency's whim," *Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

The proffered reasons fall far short of an emergency. Federal Defendants complain that ongoing litigation and supposedly unresolved and divergent court orders under the preexisting system had created an "unsustainable state of affairs" in which following congressionally mandated procedures was "impracticable." Gov't MTD at 30. But litigation over regulations is commonplace. If it were good cause to jettison the APA's procedural requirements, those protections would be hollow. What is more, the contraceptive coverage requirement had been in effect for more than six years—and the preexisting regulatory accommodation for more than four years—when the IFRs were issued (and it was another 13 months after that before the Final Rules were issued). This belies any claim of emergency. With a fully functioning accommodation system already in place, it can hardly be said that there was a crisis sufficient to warrant issuing new exemptions without first obtaining stakeholder comments or reasoned agency analysis of all the pertinent facts, as the APA requires.

B. The Solicitation of Post-Promulgation Comments Did Not Cure the Procedural Defects.

Federal Defendants insist that, notwithstanding their complete disregard for APA processes when reversing their long-standing policy, their call for comments after issuing the IFRs somehow retroactively cured the procedural defects under Section 553. Gov't MTD at 25. But that section

provides that "notice and an opportunity for comment are to *precede* rule-making," not follow it. *New Jersey, Dep't of Envtl. Protection v. EPA*, 626 F.2d 1038, 1050 (D.C. Cir. 1980) (emphasis added). Accordingly, multiple circuits have held that the "provision of post promulgation notice and comment procedures cannot cure the failure to provide such procedures prior to the promulgation of the rule at issue." *NRDC v. EPA*, 683 F.2d 752, 768 (3d Cir. 1982); *accord Steel Corp. v. EPA*, 595 F.2d 207, 214–15 (5th Cir. 1979). Post-promulgation notice and comment simply makes no sense because, if allowed, it "would make the provisions of § 553 virtually unenforceable." *Steel Corp.*, 595 F.2d at 214–15. Any agency could at any time "dispense with pre-promulgation notice and comment . . . [by] invit[ing] post-promulgation comment, and republish[ing] the regulation before a reviewing court could act." *Id.* Further, solicitation of post-promulgation comments requires commenters to "come hat-in-hand and run the risk that the decision maker is likely to resist change." *NRDC v. EPA*, 683 F.2d at 768.

Although the D.C. Circuit has recognized a bare possibility of curing a Section 553 violation with post-promulgation notice and comment, in doing so it has "emphasized that we could reach such a conclusion *only* upon a *compelling* showing that the agency's mind remained open enough at the later stage." *Air Transport Ass'n v. Dep't of Transp.*, 900 F.2d 369, 379–80 (D.C. Cir. 1990) (emphasis added) (internal quotation marks omitted), *remanded*, 498 U.S. 1077 (1991), *and vacated as moot*, 933 F.2d 1043 (D.C. Cir. 1991). And the court underscored that "[w]e strictly enforce th[e] requirement" that notice and comment precede rather than follow rulemaking "because we recognize that an agency is not likely to be receptive to suggested changes once the agency put[s] its credibility on the line in the form of 'final' rules. People naturally tend to be more close-minded and defensive once they have made a 'final' determination." *Id.* Critically, therefore, there must at the very least be a strong presumption, even on this approach,

that the agency did not maintain an open mind, *id.* at 380; and the heavy burden to make a "compelling showing" otherwise, *id.* at 379, rests squarely with the government, *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir 1994).

Several facts, taken together, demonstrate that the government has not met its heavy burden, if curing a Section 553 defect is even possible. As the government has conceded, the IFRs and the Final Rules are fundamentally the same. Gov't MTD at 13; *see also* Am. Compl. ¶ 197(a). Notre Dame describes the changes as "minor" and "immaterial." ND MTD at 7. In other words, nothing meaningful was changed, despite the fact that courts had enjoined the IFRs for substantive as well as procedural defects. *See* Am. Compl. ¶ 197(b).

Moreover, the government executed dozens of settlement agreements immediately after issuing the IFRs to extend the exemptions that would also be provided in the Rules. These agreements bind future administrations to these expansive exemptions, regardless of any subsequent regulations and potentially even future legislation to the contrary. *Id.* ¶ 197(f). Thus, the government was contracting to foreclose any possibility of meaningful regulatory changes (and potentially even attempting to preempt Congress) on behalf of Notre Dame and many other entities, at the same time that the agencies were supposed to be taking seriously the comments about and objections to the scheme that they had already put in place.

Finally, even before the post-promulgation comment period closed, the government took affirmative steps to implement the Final Rules by soliciting comments on the EBSA Form 700 and model notice to be used by entities participating in the regulatory accommodation, specifying that participation was wholly optional. Am. Compl. ¶¶ 91, 197(c). These premature measures show that Federal Defendants had every intention of moving ahead regardless of the comments received on the IFRs—many of which provided overwhelming scientific and empirical evidence regarding,

for example, the effectiveness and importance of contraception and contraceptive coverage (though none of that was considered, as Plaintiffs allege, *id.* ¶ 197(d), and the Final Rules show).

In the end, Plaintiffs have pleaded substantial facts that the government did not keep an open mind. *Cf. Prometheus Radio Project v. FCC*, 652 F.3d 431, 452 (D.C. Cir. 2011) (concluding that agency did not keep open mind when draft order was circulated two weeks before, and final vote was taken a week before, comment period closed). Dismissal is thus inappropriate.[27]

IV. PLAINTIFFS HAVE STATED A CLAIM THAT THE SETTLEMENT AGREEMENT IS VOID FOR ILLEGALITY.

Contracts for performance of an illegal act are void and unenforceable. *See, e.g., U.S. Nursing Corp. v. Saint Joseph Med. Ctr.*, 39 F.3d 790, 792 (7th Cir. 1994); *Zimmer, Inc. v. Nu Tech Med., Inc.*, 54 F. Supp. 2d 850, 863 (N.D. Ind. 1999). The Settlement Agreement is unlawful on its face and therefore is void *ab initio*.

In the first instance, the Settlement Agreement is unlawful because it violates the ACA, *see* Section II.A, *supra*, and the United States Constitution, *see* Section V, *infra*. Through these violations, the Settlement Agreement violates the rights of third parties, including Plaintiffs.[28] For

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[27] Federal Defendants also proffer another supposed exception based on *U.S. Steel Corp. v. EPA*, 605 F.2d 283 (7th Cir. 1979), to excuse putting the cart before the horse. Gov't MTD at 26–27. But the conclusion in *U.S. Steel* that post-promulgation notice and comment was permissible came under a special provision of the Clean Air Act requiring that "[i]n reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." *See* 42 U.S.C. § 7607(d)(8)). In other words, Congress required the *plaintiffs* to show that the EPA's procedural failing caused a substantively worse rule for them. That is precisely the opposite of APA § 553, even under the *Air Transport* approach, which still requires the *government* to make a "compelling showing" of an "open mind."

[28] Notably, despite repeated requests by students who intervened in the *Notre Dame* lawsuit to be included in settlement negotiations, the student-intervenors were excluded from all settlement discussions and were never informed by either Notre Dame or Federal Defendants that a settlement agreement had been negotiated or executed. Am. Compl. ¶ 114. Instead, Defendants traded away the students' constitutional and statutory rights without so much as a word to the parties to the suit who were being harmed.

those reasons alone, the Settlement Agreement should be deemed void and unenforceable. *See U.S. Nursing Corp.*, 39 F.3d at 792; *Zimmer*, 54 F. Supp. 2d at 863; *see also People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205*, 961 F.2d 1335, 1337 (7th Cir. 1992) (quoting *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986) ("[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement.")); *accord State v. City of Chicago*, 912 F.3d 979, 988 (7th Cir. 2019).

But the Settlement Agreement also is unlawful both because it violates directives from the United States Supreme Court, and because it unlawfully purports to limit federal agencies' discretion going forward.

A. The Settlement Agreement Violates the Supreme Court's Orders in *Zubik* and *Notre Dame*.

In *Zubik* and *Notre Dame*, the Supreme Court vacated and remanded with the instruction that the parties "should be afforded an opportunity to arrive at an approach going forward that accommodates [objectors'] religious exercise while at the same time ensuring that women covered by [objectors'] health plans receive full and equal health coverage, including contraceptive coverage." *Zubik*, 136 S. Ct. at 1560 (emphasis added) (internal quotation marks omitted); *Univ. of Notre Dame v. Burwell*, 136 S. Ct. 2007 (2016) ("Nothing in the *Zubik* 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 petitioner[s]' health plans obtain, without cost, the full range of FDA approved contraceptives.").

The Settlement Agreement violates the Supreme Court's directives in *Zubik* and *Notre Dame*. *See Florida Steel Corp. v. NLRB*, 713 F.2d 823, 831 (D.C. Cir. 1983) (striking down agency

action that "do[es] not respond to this court's guidance on remand" and is not "remotely responsive to the 'concern' expressed by this court in its opinion accompanying remand"). The settlement does not ensure that women receive "full and equal health coverage, including contraceptive coverage," as required by the Court. Rather, it gives Notre Dame *carte blanche* to opt out of providing such coverage unilaterally, and thereby to prevent its students and employees from receiving contraceptive coverage directly from Notre Dame's insurance provider—notwithstanding that women on the University's health plans have no other realistic option. Am. Compl. ¶ 109. Thus, Federal Defendants' contention that the Settlement Agreement still allows for "full coverage" in accordance with the *Zubik/Notre Dame* directives because Notre Dame's insureds can simply go find "a separate or distinct health plan" elsewhere, Gov't MTD at 24, cannot be credited.[29] Likewise, no separate contraceptive-only health plan or "other arrangement" exists that could remedy Plaintiffs' loss of contraceptive coverage through their regular Notre Dame health plan. Gov't MTD at 24. Rather, the Settlement Agreement authorizes Notre Dame to leave Plaintiffs and others with no contraceptive coverage at all, much less the seamless coverage without cost-sharing required by the ACA. *See* Section II.A, *supra*.

B. The Settlement Agreement is Unlawful Because it Prospectively Limits the Discretion of the Executive Branch.

The Settlement Agreement is also unlawful because it promises future action (and inaction) by the federal government, which inhibits the discretion of executive agencies and departments

[29] Defendant Notre Dame goes even further. At least six times, it contends that the *Zubik* Court "enjoined" the "accommodation" or the "Mandate" as to Notre Dame. *See, e.g.*, ND MTD at 1, 6, 13, 16. On the contrary, the Supreme Court merely explained that the litigation itself provided the government with sufficient notice that Petitioners wished to opt out of the contraceptive coverage requirement in accordance with the established accommodation process. In other words, the Court held only that the government could not exact a financial penalty for failure to provide notice when the government already had that notice.

going forward. Specifically, the Settlement Agreement purports to exempt in perpetuity Notre Dame and the health plans that it sponsors from complying with either the existing contraceptive coverage requirement or any "materially similar regulation or agency policy." Am. Compl. ¶ 108. The Settlement Agreement further promises that "[n]o person may receive [contraceptive coverage] as an automatic consequence of enrollment in any health plan sponsored by Plaintiffs" going forward. *Id.* ¶ 109. This kind of settlement agreement, which binds federal agencies to future behavior, is prohibited by the Department of Justice's own binding interpretations of its settlement authority.

The Department of Justice, on behalf of the Executive Branch, has a long-standing and binding formal policy that restricts it from entering into settlement agreements that "limit[] the discretion of a[n executive] department or agency." *See* Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys 3 (Mar. 13, 1986) (the "Meese Memo"), reprinted in U.S. Dep't of Justice, Office of Legal Pol'y, Guidelines on Constitutional Litigation 150, 152–53 (Feb. 19, 1988).[30] Several key aspects of the Meese Memo have been reaffirmed by the DOJ's Office of Legal Counsel, including that the executive branch's settlement authority is constrained by the APA, and that it "may not settle on terms that would infringe the constitutional rights of third parties." *See* Memorandum from Randolph D. Moss, Acting Assistant Attorney General, to Raymond C. Fisher, Associate Attorney General 4 (June 15, 1999) ("Moss Memo"). And the Acting Assistant Attorney General recently expressed DOJ's "renewed commitment" that "[u]nder the 'Meese Memo,' we are restricted from entering a settlement on behalf of a federal agency that would somehow convert a discretionary authority of

[30] https://www.archives.gov/files/news/samuel-alito/accession-060-89-1/Acc060-89-1-box9-memoAyer-LSWG-1986.pdf

that agency into a mandatory duty for the agency. In other words, we can't and won't use settlement agreements to make new law." Acting Assistant Atty. Gen. Jeffrey H. Wood, Remarks at Air Force Judge Advocate General School's Advanced Environmental Law Course (Feb. 28, 2018).[31]

Opinions from the Attorney General and the Office of Legal Counsel, such as the Meese and Moss Memos, are considered quasi-judicial, binding determinations of the law within the executive branch that "necessarily become the executive branch interpretation of the law." Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. REV. 217, 236–37 (2013); *see also Hispanic Affairs Project v. Acosta*, 263 F. Supp. 3d 160, 178 (D.D.C. 2017) ("The plaintiffs are correct to point out that [Office of Legal Counsel] memoranda are akin to legal authority for an agency engaging in rulemaking on a related subject and therefore may now be considered by the Court, even if the agency elected not to consider such materials").[32]

Accordingly, because the Settlement Agreement purports to limit federal agencies' discretion going forward and is inconsistent with DOJ's own binding interpretation of its settlement authority, the Settlement Agreement should be held illegal and void.

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[31] https://www.justice.gov/opa/speech/acting-assistant-attorney-general-jeffrey-h-wood-delivers-remarks-air-force-judge.

[32] The Attorney General is authorized to render opinions on questions of law when requested by the President or a head of an Executive Branch department. *See* 28 U.S.C. §§ 511–513. And OLC's authority to render legal opinions derives from the authority of the Attorney General. *See* 28 U.S.C. § 510; 28 C.F.R. § 0.25.

V. PLAINTIFFS HAVE STATED A CLAIM THAT THE SETTLEMENT AGREEMENT AND RULES VIOLATE THE CONSTITUTION.

A. Plaintiffs Have Stated a Claim That the Rules and Settlement Agreement Violate the Establishment Clause.

While "the government may (and sometimes must) accommodate religious practices," *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144–45 (1987), the Establishment Clause mandates that for accommodations to be constitutionally permissible they must be limited to alleviating substantial, government-imposed burdens on religious exercise, and must not detrimentally affect third parties—or otherwise promote religion or any particular faith. *See, e.g.*, *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 US. 573, 613 n.59 (1989); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15, 18 n.8 (1989) (plurality opinion); *Caldor*, 472 U.S. at 709–10). The Settlement Agreement and Rules fail in all respects.

1. *The Settlement Agreement and Rules Impermissibly Harm Innocent Third Parties.*

When evaluating religious exemptions from generally applicable laws, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). If, in purporting to accommodate the religious exercise of some, the government imposes costs and burdens of that religious exercise on others, it favors the faith of the benefitted over the beliefs and rights of the burdened, violating the Establishment Clause. *See Caldor*, 472 U.S. at 709–10; *Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion). That is why RFRA requires courts to consider harms to third parties in evaluating religious accommodations. Otherwise, the accommodations, and RFRA itself, would be unconstitutional.

The Supreme Court's free-exercise jurisprudence embodies this same principle. In *United States v. Lee*, the Court rejected an Amish employer's request for an exemption from paying social-security taxes because the exemption would "operate[] to impose the employer's religious faith on the employees." 455 U.S. 252, 261 (1982). And in *Braunfeld v. Brown*, the Court refused an exemption from Sunday-closing laws that would have provided Jewish business-owners with "an economic advantage over their competitors who must remain closed on that day." 366 U.S. 599, 608–09 (1961); *cf. Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (recognizing Seventh-Day Adventist's right to exemption from unemployment-benefits law because exemption would not "serve to abridge any other person's religious liberties").[33]

Because the Settlement Agreement and Rules not only authorize Notre Dame to opt out of providing contraceptive coverage but also afford the University the power to prevent students and employees from obtaining the coverage through the pre-existing accommodation, their practical effect is to deny Plaintiffs and others the coverage to which they are entitled by law. *See* Am. Compl. ¶¶ 13–17. And if Plaintiffs cannot afford the resulting out-of-pocket contraceptive costs, they will be forced to choose less appropriate health services or to forgo the needed care altogether. *See* Am. Compl. ¶¶ 43, 46–47, 220. Requiring Plaintiffs to bear the burdens and pay the costs of

[33] In only one narrow set of circumstances (in two cases) has the Supreme Court ever upheld religious exemptions that burdened third parties in any meaningful way—namely, when the core Establishment and Free Exercise Clause protections for the autonomy and ecclesiastical authority of religious institutions required it. *See Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 196 (2012) (holding that Americans with Disabilities Act could not be enforced in way that would interfere with a church's selection of its ministers); *Corp. of the Presiding Bishop of the Church of Latter-Day Saints v. Amos*, 483 U.S. 327, 330, 339 (1987) (upholding, under Title VII's statutory religious exemption, a church's firing of an employee who was not in religious good standing). In those cases, these exemptions did not amount to impermissible religious favoritism, and therefore were permissible under the Establishment Clause, because they directly implicated the "church-autonomy doctrine" that "protect[s] the institutional freedom of the church." *Korte*, 735 F.3d at 678. Concerns for church autonomy have no bearing here, as houses of worship were already exempted from the contraceptive coverage requirement by 45 C.F.R. § 147.131(a) (2015).

Notre Dame's religious exercise thus exceeds permissible religious accommodation and unconstitutionally advances and prefers Notre Dame's religious beliefs over Plaintiffs' religious beliefs, health, liberty interests, and other fundamental rights.

2. *The Settlement Agreement and Rules Impermissibly Promote Religion.*

An "accommodation of religion, in order to be permitted under the Establishment Clause, must lift 'an identifiable [government-imposed] burden *on the exercise of religion*.'" *Allegheny*, 492 U.S. at 613 n.59 (quoting *Amos*, 483 U.S. at 348 (O'Connor, J., concurring)). Absent a substantial burden of this sort, granting a religious accommodation impermissibly "creates an incentive or inducement (in the strong form, a compulsion) to adopt [the exempted religious] practice or conviction," Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992), by "singl[ing] out a particular class of [religious observers] for favorable treatment [thus] . . . implicitly endorsing a particular religious belief," *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145 n.11 (1987). This the Establishment Clause forbids.

As noted, this Court, the Seventh Circuit, and seven other circuits all previously held that the objected-to accommodation procedure does not substantially burden Notre Dame's or anyone else's religious exercise.[34] There being no substantial burden on religious exercise, the challenged exemptions are unconstitutional religious preferences.[35]

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[34] *See, e.g.*, *Univ. of Notre Dame*, 786 F.3d at 611–15; *Univ. of Notre Dame*, 988 F. Supp. 2d at 927.

[35] As for Federal Defendants' assertions with respect to supposed secular purpose for the new exemptions, Gov't MTD at 40, the government misstates the law: "A" secular purpose is not enough. "[T]he secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cty., Ky. v. ACLU*, 545 U.S. 844, 864 (2005). And the religious purpose in favoring the religious beliefs of some over the religious beliefs and rights of others is manifest.

More broadly, the Establishment Clause cannot countenance affording categorical religious exemptions without first requiring objecting entities to show, or even assert, substantial government-imposed burdens on their religious exercise. Yet the Rules extend religious exemptions to any corporate entity, including publicly held for-profit corporations, without any basis for concluding that a single one is substantially burdened by the underlying coverage requirement—much less by the pre-existing regulatory accommodation.

This failing is noteworthy because, as the Court explained, "the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable." *Hobby Lobby*, 573 U.S. at 717. And though the government contends that "[t]he mechanisms for determining whether a company has adopted and holds such principles or views is [sic] a matter of well-established State law with respect to corporate decision-making," it has assigned to itself no requirement and no mechanism to ascertain whether "such principles or views . . . have been adopted and documented in accordance with the laws of the jurisdiction under which [exemption-seeking businesses] are incorporated." 82 Fed. Reg. at 47,810 & n.60.

Thus, not only do Federal Defendants provide religious exemptions to entities that are not substantially burdened (as this Court previously determined that Notre Dame is not), but given the absence of oversight mechanisms, they encourage and enable sham opt-outs, to the detriment of employees and students, by entities that have no religious objection but simply wish for economic or other reasons not to provide the legally mandated insurance coverage. The Rules and Settlement Agreement therefore unconstitutionally promote objectors' religious beliefs (whether or not genuine) over others' fundamental rights, interests, and beliefs, contrary to the Establishment Clause.

3. *The So-Called Moral Exemption Compounds the Establishment Clause Violations.*

Defendants also contend that the Religious Exemption does not unconstitutionally promote religion because the exemption for objectors based on "moral" convictions supposedly balances things out and avoids "convey[ing] a message that a religion or a particular religious belief is *favored* or *preferred*." ND MTD at 20 (quoting *Allegheny*, 492 U.S. at 593); Gov't MTD at 41. Because there is no statutory authorization for the moral exemption—not in RFRA, as the government concedes, and not in the ACA—making it unlawful in its own right, *see Pennsylvania*, 281 F. Supp. 3d at 577, 579, it can provide no counterbalance to the Religious Exemption. But Defendants' arguments also fail for several additional reasons.

First, the Religious Exemption covers at least one massive class—publicly traded companies—that the Moral Exemption does not. *Compare* 45 C.F.R. § 147.132(a)(1)(i)(D), *with id.* § 147.133(a)(1)(i)(B). Hence, even considered together, the Rules still give religion impermissibly privileged status.

Second, there is also strong reason to conclude that the Moral Exemption is not, after all, a secular counterpart to the religious exemption but instead is just the latter by another name. In that regard, the Moral Exemption is expressly premised on *Welsh v. United States*, 398 U.S. 333, 339–40 (1970), a conscientious-objector case in which the Supreme Court held that when "purely ethical or moral . . . beliefs function as a religion in [an individual's] life, such an individual is as much entitled to a 'religious' . . . exemption . . . as is someone who derives his [objection] from traditional religious convictions," *id.* at 340. *See* Moral Exemption, 83 Fed. Reg. at 57,601. Quoting directly from *Welsh*, the Rule explains that the "moral convictions" entitled to an exemption are those:

> (1) That the "individual deeply and sincerely holds"; (2) "that are purely ethical or moral in source and content"; (3) "but that nevertheless impose upon him a duty"; (4) and that "certainly occupy in the life of that individual [']a place parallel to that filled by . . . God' in traditionally religious persons," such that one could say "his beliefs function as a religion in his daily life."

83 Fed. Reg. at 57,604–05 (quoting 398 U.S. at 330–40).

In other words, the Moral Exemption applies to moral convictions that are sufficiently "deeply and sincerely" held to constitute a religion for legal purposes, whether or not they are traditional faiths or denominations.[36] *Cf., e.g.*, *Kaufman v. McCaughtry*, 419 F.3d 678, 681–82 (7th Cir. 2005). Thus, because only legally cognizable 'religions' under *Welsh* qualify for the Moral Exemption, it, too, impermissibly privileges certain religious beliefs, exempts religious objectors from a general law without any showing of a substantial burden on religious exercise, and imposes the costs and burdens of the objectors' religion on third parties. In other words, it, too, authorizes what the Establishment Clause forbids.[37]

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[36] Although the Moral Exemption relies on *Welsh* to explain *how deeply held* the moral conviction must be, it does nothing to circumscribe *what types of convictions* may be invoked to claim the exemption. Thus, as the *Pennsylvania* court explained:

> A simple hypothetical illustrates the insidious effect of the Moral Exemption. It would allow an employer with a sincerely held moral conviction that women do not have a place in the workplace to simply stop providing contraceptive coverage. And, it may do so in an effort to impose its normative construct regarding a woman's place in the world on its workforce, confident that it would find solid support for that decision in the Moral Exemption. It is difficult to comprehend a rule that does more to undermine the Contraceptive Mandate or that intrudes more into the lives of women.

281 F. Supp. 3d at 577.

[37] Applying *Welsh*, Notre Dame's objections to contraception are encompassed by the Moral Exemption and would receive regulatory license even if the Religious Exemption were invalidated. Thus, the Settlement Agreement and both Rules must be invalidated to afford full relief to Plaintiffs.

B. Plaintiffs Have Stated a Claim that the Settlement Agreement and Rules Violate the Due Process Clause and the Equal Protection Guarantees of the Fifth Amendment.

The Fifth Amendment guarantees equal protection of the law and prohibits both infringement of fundamental rights and unjustified discrimination based on suspect classification. *See United States v. Virginia*, 518 U.S. 515, 531 (1996); *Caban v. Mohammed*, 441 U.S. 380 (1979). The Settlement Agreement and Rules violate the Fifth Amendment because they improperly impose discriminatory burdens on those who exercise the fundamental right to contraception; and they discriminate based on gender by imposing burdens specifically on women.

1. *The Settlement Agreement and Rules Interfere with Individuals' Fundamental Right to Contraception.*

Defendants concede that the Constitution protects the right to reproductive autonomy—including the use of contraception—as a fundamental right. *See* Gov't MTD at 47 ("a fundamental right to privacy . . . encompasses certain decisions about contraceptive use") (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). Access to contraception is a core aspect of liberty, dignity, and equality, and of sexual, marital and familial privacy. As explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, "[t]he 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." 505 U.S. 833, 856 (1992).

Because Defendants cannot deny that the right to contraception is fundamental, they argue instead that the Rules and the Settlement Agreement do not implicate that right, on the theory that they do not ban contraception directly. *See* ND MTD at 21. But indirect interference with an individual's access to contraception is also constitutionally suspect. *See Carey. v. Pop. Servs. Int'l*, 431 U.S. 678, 689 (1977). In *Carey*, the Supreme Court invalidated part of a state law that

prohibited the distribution of contraception by anyone other than licensed pharmacists. The Court recognized that, even without banning contraception directly, the restriction nonetheless "clearly impose[d] a significant burden on the right of the individuals to use contraceptives if they cho[se] to." 431 U.S. at 689. The restriction impermissibly made contraceptives less accessible, diminished price competition, and "reduce[d] the opportunity for privacy of selection and purchase." *Id*.

Defendants do not even mention *Carey*. Instead, they rely on cases that are materially different from the matter at hand for multiple reasons. *See* Gov't MTD at 43; ND MTD at 21 (citing *Harris v. McRae*, 448 U.S. 297 (1980), *Rust v. Sullivan*, 500 U.S. 173 (1991), and their progeny).

First, unlike *McRae* and its progeny, this case involves exemptions that empower *private* entities—not the government—to decide selectively whether they will block women's access to contraception to which the women are otherwise entitled under federal law.

Second, in *McRae*, the Court's view was that the government was not placing obstacles in a woman's path and "it need not remove those not of its own creation." 448 U.S. at 316. Here, Federal Defendants actively imposed Rules and executed a Settlement Agreement that stand as roadblocks between women and contraception, which would otherwise be covered through their existing health plans.

The Rules and Settlement Agreement impose severe burdens on the fundamental right to contraception. They empower employers and universities to exclude contraceptive coverage from their otherwise comprehensive health plans, thereby penalizing individuals who choose to use contraception by making it simultaneously more expensive and less accessible. The penalties are particularly burdensome because there are few, if any, realistic alternatives to employer-sponsored

insurance for employees or to university-provided plans for students who are not covered under a parent's plan. As Notre Dame has recognized, purchasing a separate insurance policy is financially infeasible for most people. Am. Compl. ¶ 7.[38]

Under these circumstances, individuals are left with little option but to accept whatever incomplete insurance package their employers or universities offer. It follows that, by authorizing entities to exclude contraceptive coverage—and *only* contraceptive coverage—in their benefits packages, this regulatory environment hollows out the fundamental right to reproductive decision-making. "Constitutional rights would be of little value if they could be thus indirectly denied." *Smith v. Allwright*, 321 U.S. 649, 664 (1944).

2. *The Settlement Agreement and Rules Discriminate Against Women Who Seek Access to Preventive Health Care.*

By singling out a critical element of preventive health care upon which millions of women depend, the Settlement Agreement and Rules create an explicit and constitutionally impermissible gender-based classification that discriminates against women. *See generally Int'l Union v. Johnson Controls*, 499 U.S. 187 (1991); *Caban v. Mohammed*, 441 U.S. 380 (1979).

The Settlement Agreement and Rules do not create generally applicable religious or moral exemptions, but rather apply explicitly and exclusively to the Women's Health Amendment. They thus *specifically target* for special burdens preventive health care essential for women's reproductive health and decision-making. As previously articulated by the Equal Employment Opportunity Commission in the context of Title VII of the Civil Rights Act of 1964, "prescription

[38] In light of Notre Dame's prior admission that it is "financially infeasible" for most of its employees and students to obtain contraceptive coverage elsewhere, *id.*, it is troubling that Notre Dame now argues that the Settlement Agreement does not interfere with any of Plaintiffs' asserted liberty interests because Plaintiffs "remain entirely free to obtain and use contraceptives." ND MTD at 21.

contraceptives are available only for women. As a result, [the] explicit refusal to offer insurance coverage for them is, by definition, a sex-based exclusion . . . . [A] policy need not specifically refer to that group in order to be facially discriminatory." *Commission Decision on Coverage of Contraception*, EEOC, 2000 WL 33407187, at *4 (Dec. 14, 2000). Moreover, the Settlement Agreement and Rules force female employees and students either to pay more than male peers out-of-pocket for their health care or to forgo contraceptive care altogether.

The Settlement Agreement and Rules also stigmatize women's reproductive health in a manner that perpetuates sex stereotypes and antiquated notions of women's role in society. *See Johnson Controls*, 499 U.S. at 211 ("It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role."). Contraceptive coverage is a necessary component of gender equality because it allows women to make decisions about their health, reproduction, education, and livelihoods. *Cf. Casey*, 505 U.S. at 856. By allowing employers and universities to deny contraceptive coverage, the Settlement Agreement and Rules deny women the ability to preserve and protect their health and well-being to the same extent as men.

3. *The Court Should Apply Strict Scrutiny.*

The applicability of exacting judicial scrutiny here is straightforward. The right to contraception is a recognized component of the fundamental right of reproductive decision-making. *See Carey*, 431 U.S. at 687; *Casey*, 505 U.S. at 851. Because the Settlement Agreement and Rules discriminate against individuals' exercising this fundamental right, strict scrutiny applies.

The Settlement Agreement and Rules are particularly ripe for heightened scrutiny because they burden the fundamental right to reproductive decision-making *and* discriminate against

women. Constitutional liberties warrant the highest level of protection when fundamental rights and equal protection intersect.[39] The Settlement Agreement and Rules here burden the fundamental right to reproductive decision-making based on gender, a classification that itself warrants heightened scrutiny. *See Virginia*, 518 U.S. at 531; *Hogan*, 458 U.S. at 723; *Frontiero v. Richardson*, 411 U.S. 677 (1973). And laws that selectively burden a fundamental constitutional right based on a suspect classification are subject to *strict* scrutiny. *See Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942) (coercive sterilization law that drew classifications among criminals failed strict scrutiny under equal protection because individuals were deprived of "a basic liberty," the right to procreate); *see also, e.g.*, *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 911 (1986) (striking down state policy favoring in-state veterans under strict scrutiny as deprivation of equal protection and right to travel).

4. *The Settlement Agreement and Rules are Not Sufficiently Tailored to Advance a Compelling or Substantial Government Interest.*

The Rules cannot survive any form of heightened scrutiny,[40] let alone the strict scrutiny that applies to this burdening of a fundamental right.[41]

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[39] *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015) ("This interrelation of the two principles [of equal protection and liberty] furthers our understanding of what freedom is and must become"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("To deny this fundamental freedom [to marry] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."); *Harper v. Virginia State Bd. of Ed.*, 383 U.S. 663, 670 (1966) ("[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

[40] At a minimum, the discriminatory treatment of female employees and students requires heightened scrutiny. Laws that treat men and women differently on the basis of sex or gender must be justified by an "exceedingly persuasive justification." *Virginia*, 518 U.S. at 531. And "the discriminatory means employed [must be] substantially related to the achievement of those objectives." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (quoting *Virginia*, 518 U.S. at 533).

[41] Defendants' insistence that "minimal" or rational-basis review applies is premised on their incorrect view that no fundamental right or suspect classification is at stake. *See* ND MTD at 20; Gov't MTD at 45. For this same reason, Notre Dame's reliance on *Amos*, 483 U.S. at 338–39, is misplaced. ND

Federal Defendants have not shown that important or compelling interests justify the Settlement Agreement or the Rules. Defendants' asserted justification—that the exemptions created by the Settlement Agreement and the Rules are required under RFRA—is spurious for the reasons explained in Section II.B, *supra*.

Nor have Federal Defendants shown that the Settlement Agreement and Rules are substantially related (let alone narrowly tailored) to advance their purported objectives. By (1) offering exemptions to virtually all nongovernmental employers and universities, (2) making the pre-existing accommodation process optional, and (3) providing no mechanism for oversight, the Settlement Agreement and Rules are much broader than necessary to achieve any purported goal with respect to reasonably accommodating sincere religious objections.

The means employed by the government—namely, forcing women to bear the cost of their employers' or universities' objections—fail to account for the compelling interest in providing equitable health care access to women.[42] Therefore, the Settlement Agreement and Rules are not sufficiently tailored to survive any level of scrutiny under the Fifth Amendment.

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss should be denied.

MTD at 20. In *Amos*, the exemption at issue allowed a religious employer to refuse employment to non-church members. 483 U.S. at 329–30. The Court applied rational-basis review to determine that no suspect classification or fundamental right was burdened as a result of the religious exemption there. *Id.* By contrast, the Rules here discriminate on their face against a fundamental right (contraception) and a suspect classification (women).

[42] In contrast to the Rules, there is no question that the essential purpose of the Women's Health Amendment itself is constitutionally compelling. The government has a compelling interest in ensuring women have access to health care coverage that is equal to that of their male colleagues. *See Hobby Lobby*, 573 U.S. at 737 (Kennedy, J., concurring). This conclusion necessarily follows from the Supreme Court's established jurisprudence recognizing a substantial governmental interest in remedying sex discrimination in all aspects of public, social, and economic life. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss Plaintiffs' Amended Complaint was served on counsel for all parties using the Court's CM/ECF system on March 19, 2019.

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