Nos. 17-3752, 18-1253, 19-1129, and 19-1189

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COMMONWEALTH OF PENNSYLVANIA and STATE OF NEW JERSEY,

Plaintiffs-Appellees,

v.

PRESIDENT, UNITED STATES OF AMERICA; SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY, U.S. DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE TREASURY; SECRETARY, U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF LABOR,

Defendants-Appellants,

and

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,

Intervenor-Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF FOR THE FEDERAL APPELLANTS

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INTRODUCTION

This action represents the latest chapter in years of litigation regarding the so-called contraceptive-coverage mandate. Since the adoption of the mandate pursuant to the Patient Protection and Affordable Care Act (ACA), numerous entities have challenged it, as well as a regulatory accommodation intended to address the religious objections of certain organizations not eligible for the regulatory exemption for churches. Dozens of lawsuits were left unresolved by the Supreme Court in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam). And despite numerous rounds of rulemaking and the solicitation of public comment, the administering agencies—the Departments of Health and Human Services (HHS), Labor, and the Treasury—were unable to find a way to amend the accommodation to both satisfy the organizations' conscience objections and ensure that women covered by those organizations' health plans receive seamless contraceptive coverage.

In an effort to resolve the ongoing litigation and alleviate the burden on those with conscience objections to contraceptive coverage, the agencies issued interim final rules expanding the religious

exemption to the mandate and creating a new exemption for organizations with moral objections. Pennsylvania challenged the interim rules, and the district court preliminarily enjoined them. While appeal was pending, and after considering public comments on the interim rules, the agencies issued final rules finalizing the exemptions. Pennsylvania, now joined by New Jersey, challenged the final rules, and the district court issued a nationwide preliminary injunction. That injunction should be vacated for multiple reasons.

The district court erred at the outset in holding that the plaintiff States have Article III standing. The States are not directly subject to the rules, which do not require them to take, or refrain from taking, any action. They instead speculate that (1) employers within their jurisdictions are likely to invoke the exemption from the mandate; (2) as a result, women will lose contraceptive coverage; and (3) those women will seek and receive state-funded benefits, resulting in a loss of money to the States. But the States have yet to identify a single resident who will lose contraceptive coverage, let alone seek and receive state-funded services, and this chain of speculative assumptions is insufficient to demonstrate concrete Article III injury. Nor can the States assert

parens patriae standing to protect the well-being of their residents. Even apart from the speculative injury to their residents, it is well settled that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).

The district court further erred in holding that the States demonstrated a likelihood of success on the merits. To begin, the court was wrong that the agencies lacked substantive authority to issue the rules. The same provision of the ACA that authorized the agencies to issue the original exemption for churches equally authorizes the expanded exemptions. Moreover, the Religious Freedom Restoration Act (RFRA) independently authorized, and indeed required, issuance of the religious exemption as a means of eliminating the substantial burden on religious exercise that *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), held was imposed by the contraceptive-coverage mandate.

Both RFRA and the ACA authorize the government to satisfy its obligation under RFRA by using the straightforward exemption provided by the current administration rather than attempting to rely only on the novel accommodation created by the prior administration.

That is especially true because the accommodation itself violates RFRA and is, at a minimum, subject to significant legal doubt: as the agencies concluded and some courts have held, the accommodation imposes a substantial burden on some employers by using the plans they sponsor to provide contraceptive coverage that they object to on religious grounds, which some employers sincerely believe makes them complicit in the provision of such coverage.

The district court was also wrong that the alleged procedural defect in the interim rules tainted the final rules. Regardless of whether the interim rules were procedurally valid, the final rules satisfy the Administrative Procedure Act's (APA's) notice-and-comment requirements, since they were issued only after the agencies requested and carefully considered public comments. In any event, in bypassing notice and comment to issue the interim rules, the agencies had express statutory authority, *e.g.*, 42 U.S.C. § 300gg-92, as well as "good cause" under the APA, 5 U.S.C. § 553(b).

Finally, apart from the merits, the balance of equities does not support a preliminary injunction. And even if one were warranted, the

nationwide injunction goes far beyond what is necessary to redress any plausibly alleged injuries to the two plaintiff States.

STATEMENT OF JURISDICTION

The plaintiff States' claims challenging the rules under the APA rested on the district court's jurisdiction under 28 U.S.C. § 1331. The district court entered a preliminary injunction against the interim rules on December 15, 2017. JA 51. The government filed a timely notice of appeal on February 6, 2018 (no. 18-1253). JA 1. On January 14, 2019, the district court entered a preliminary injunction against the final rules. JA 124. The government filed a timely notice of appeal on January 23, 2019 (no. 19-1189). JA 53. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the States lack Article III standing to bring this action. (Ruled on at JA 71-78)

2. Whether the agencies had statutory authority under the ACA and RFRA to expand the conscience exemption to the contraceptive-coverage mandate. (Ruled on at JA 92-110)

3. Whether the final rules, which were issued after notice and an opportunity for comment, satisfy the APA's procedural requirements. (Ruled on at JA 82-91)

4. Whether the district court erred in holding that the balance of harms supports a preliminary injunction. (Ruled on at JA 110-114)

5. Whether the district court erred in issuing a nationwide injunction that extends beyond the relief necessary to redress any cognizable injuries to the plaintiff States. (Ruled on at JA 115-123)

STATEMENT OF RELATED CASES

This Court previously reversed an order of the district court denying a motion to intervene in this case. *Pennsylvania v. President, United States*, 888 F.3d 52 (3d Cir. 2018). Similar challenges to the rules are pending in other courts: *California v. Azar*, Nos. 19-15072, 19-15118, & 19-15150 (9th Cir.); *Massachusetts v. HHS*, No. 18-1514 (1st Cir.); and *Irish 4 Reproductive Health v. HHS*, No. 3:18-cv-0491 (N.D. Ind.).

STATEMENT OF THE CASE

A. The Affordable Care Act and the Contraceptive-Coverage Mandate

The ACA requires most group health plans and health-insurance issuers that offer group or individual health coverage to provide coverage for certain preventive services without "any cost sharing requirements." 42 U.S.C. § 300gg-13(a). The Act does not specify the types of women's preventive care that must be covered. Instead, as relevant here, the Act requires coverage, "with respect to women," of such "additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA]," a component of HHS. *Id.* § 300gg-13(a)(4).

In August 2011, HRSA issued guidelines adopting the recommendation of the Institute of Medicine to require coverage of, among other things, all FDA-approved contraceptive methods. *See* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012). Coverage for such contraceptive methods was required for plan years beginning on or after August 1, 2012. *See* 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011).

At the same time, the agencies, invoking their authority under 42 U.S.C. § 300gg-13(a)(4), promulgated interim final rules authorizing HRSA to exempt churches and their integrated auxiliaries from the contraceptive-coverage mandate. *See* 76 Fed. Reg. at 46,623. The rules were finalized in February 2012. *See* 77 Fed. Reg. at 8725. Although various religious groups urged the agencies to expand the exemption to all organizations with religious or moral objections to providing contraceptive coverage, *see* 78 Fed. Reg. 8456, 8459-60 (Feb. 6, 2013), the agencies instead offered, in a later rulemaking, what they termed an "accommodation" limited to religious not-for-profit organizations with religious objections to providing contraceptive coverage, *see* 78 Fed. Reg. 39,870, 39,874-82 (July 2, 2013). The accommodation allowed a group health plan established or maintained by an eligible objecting employer to opt out of any requirement to directly "contract, arrange, pay, or refer for contraceptive coverage." *Id.* at 39,874. Under the regulations, that opt-out then generally required the employer's health insurer or third-party administrator (in the case of self-insured plans) to provide or arrange contraceptive coverage for plan participants. *See id.* at 39,875-80.

In the case of self-insured church plans, however, coverage by the plan's third-party administrator under the accommodation was voluntary. Church plans are exempt from the Employee Retirement Income Security Act of 1974 (ERISA), and the authority to enforce a third-party administrator's obligation to provide separate contraceptive coverage derives solely from ERISA. The agencies thus could not require the third-party administrators of those plans to provide or arrange for such coverage, nor impose fines or penalties for failing to do so. *See* 79 Fed. Reg. 51,092, 51,095 n.8 (Aug. 27, 2014).

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

employers that do provide nongrandfathered coverage must comply with the preventive-services requirement.

B. Challenges to the Contraceptive-Coverage Mandate and Accommodation

Many employers objected to the contraceptive-coverage mandate. In *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014), the Supreme Court held that RFRA prohibited applying the mandate to closely held for-profit corporations with religious objections to providing contraceptive coverage. The Court held that the mandate "impose[d] a substantial burden on the exercise of religion" for such employers, *id.* at 2779, and that, even assuming a compelling governmental interest, application of the mandate was not the least restrictive means of furthering that interest, *id.* at 2780. The Court observed that the agencies had already established an accommodation for not-for-profit employers and that, at a minimum, this less restrictive alternative could be extended to closely held for-profit corporations with religious objections. *Id.* at 2782. But although the Court held that such an option was a less restrictive means under RFRA, the Court did not decide "whether an approach of

this type complies with RFRA for purposes of *all* religious claims." *Id.* (emphasis added).

In response, the agencies promulgated rules extending the accommodation to closely held for-profit entities with religious objections to providing contraceptive coverage. *See* 80 Fed. Reg. 41,318, 41,323-28 (July 14, 2015). Numerous entities, however, continued to challenge the mandate. They argued that the accommodation burdened their exercise of religion because they sincerely believed that the required notice and the provision of contraceptive coverage in connection with their health plans made them complicit in providing such coverage.

A split developed in the circuits, *see* 82 Fed. Reg. at 47,798, and the Supreme Court granted certiorari in several of the cases. The Court vacated the judgments and remanded the cases to the respective courts of appeals. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam). The Court "d[id] not decide whether [the plaintiffs'] religious exercise ha[d] been substantially burdened, whether the Government ha[d] a compelling interest, or whether the current regulations [we]re the least restrictive means of serving that interest." *Id.* at 1560. Instead, the

Court directed that, on remand, the parties be given an opportunity to resolve the dispute. *See id.* In the meantime, the Court precluded the government from "impos[ing] taxes or penalties on [the plaintiffs] for failure to provide the [notice required under the accommodation]." *Id.* at 1561. Similar orders were entered in other pending cases.

In response to *Zubik*, the agencies sought public comment to determine whether further modifications to the accommodation could resolve the religious objections asserted by various organizations while providing a mechanism for contraceptive coverage for their employees. *See* 81 Fed. Reg. 47,741 (July 22, 2016). The agencies received over 54,000 comments, but could not find a way to amend the accommodation to both satisfy objecting organizations and provide coverage to their employees. *See* FAQs About Affordable Care Act Implementation Part 36, at 4 (Jan. 9, 2017).[1] The pending litigation—more than three dozen cases brought by more than 100 separate plaintiffs—thus remained unresolved.

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

In addition, some nonreligious organizations with moral objections to providing contraceptive coverage had filed suits challenging the mandate. That litigation also led to conflicting decisions by the courts. *See* 82 Fed. Reg. 47,838, 47,843 (Oct. 13, 2017).

C. The Interim Final Rules

In an effort "to resolve the pending litigation and prevent future litigation from similar plaintiffs," the agencies reexamined the mandate's exemption and accommodation, and issued two interim final rules expanding the exemption to a broad range of entities with sincere religious or moral objections to providing contraceptive coverage, while continuing to offer the existing accommodation as an optional alternative. *See* 82 Fed. Reg. 47,792 (religious exemption); 82 Fed. Reg. 47,838 (moral exemption).

The agencies concluded that their express statutory authority to issue "interim final rules," 26 U.S.C. § 9833; 29 U.S.C. § 1191c; 42 U.S.C. § 300gg-92, provided them with authority to issue the rules without prior notice and comment. The agencies also concluded that they had "good cause" to do so under the APA, 5 U.S.C. § 553(b), in

order to protect religious liberty and end the litigation that had beset the prior rules. *See* 82 Fed. Reg. at 47,813-15; 82 Fed. Reg. at 47,854-56.

The agencies solicited public comments for 60 days post-promulgation in anticipation of final rulemaking. *See* 82 Fed. Reg. at 47,792; 82 Fed. Reg. at 47,838.

D. Pennsylvania's Challenge to the Interim Rules

Pennsylvania brought suit challenging the interim rules, claiming (as relevant here) that they (1) failed to comply with the APA's notice-and-comment requirements; and (2) are arbitrary and capricious, an abuse of discretion, or otherwise contrary to law because they violate the ACA and cannot be justified by RFRA. JA 193-196. Pennsylvania sought a preliminary injunction.

The government moved to dismiss, arguing, among other things, that Pennsylvania lacked standing. The government also opposed injunctive relief, arguing that the interim rules were procedurally and substantively valid and that equitable relief was unwarranted regardless. Without ruling on the motion to dismiss, the district court granted a preliminary injunction. The court rejected the objection to Pennsylvania's standing, *see* JA 19-23, and held on the merits that the

agencies had neither statutory authority nor good cause to issue the rules without notice and comment, *see* JA 25-35, and that the rules were unlawful because neither the ACA nor RFRA justified the expanded exemptions from the contraceptive-coverage mandate in light of the accommodation's availability, *see* JA 35-43. Finding that the equities warranted a preliminary injunction, *see* JA 43-50, the court enjoined the agencies from "enforcing" the interim rules, JA 52. The government appealed.

E. The Final Rules

In November 2018, after reviewing and considering the public comments solicited on the interim rules (and while the appeal of the preliminary injunction against the interim rules was pending in this Court), the agencies promulgated final rules superseding the interim rules. *See* 83 Fed. Reg. 57,536 (Nov. 15, 2018) (religious exemption); 83 Fed. Reg. 57,592 (Nov. 15, 2018) (moral exemption).

Like the interim rules, the final rules expanded the religious exemption to nongovernmental plan sponsors, as well as institutions of higher education in their arrangement of student health plans, to the extent that those entities have sincere religious objections to providing

contraceptive coverage. *See* 83 Fed. Reg. at 57,558-65. The agencies also finalized an exemption for entities (except publicly traded companies) with sincere moral objections to such coverage. *See* 83 Fed. Reg. at 57,614-21. Both rules retained the accommodation as a voluntary option. *See, e.g.*, 83 Fed. Reg. at 57,537-38. And both rules finalized an "individual exemption" that allowed—but did not require—willing employers and insurers to offer plans omitting contraceptive coverage to individuals with religious or moral objections to such coverage. *See, e.g.*, 83 Fed. Reg. at 57,567-69.

The agencies concluded that Congress granted HRSA discretion to determine the content and scope of any preventive-services guidelines adopted under 42 U.S.C. § 300gg-13(a)(4). *See* 83 Fed. Reg. at 57,540-42. They noted that "[s]ince [their] first rulemaking on this subject in 2011," they "have consistently interpreted the broad discretion granted to HRSA in [§ 300gg-13(a)(4)] as including the power to reconcile the ACA's preventive-services requirement with sincerely held views of conscience on the sensitive subject of contraceptive coverage—namely, by exempting churches and their integrated auxiliaries from the contraceptive [m]andate." *Id.* at 57,541. And "[b]ecause of the

importance of the religious liberty values being accommodated" and "the limited impact of these rules," the agencies concluded that the expanded exemptions "are good policy." *Id.* at 57,552. The agencies also took into account "Congress's long history of providing exemptions for moral convictions, especially in certain health care contexts," 83 Fed. Reg. at 57,598, state "conscience protections," *id.* at 57,601, and "the litigation surrounding the [m]andate," *id.* at 57,602.

With respect to the religious exemption, the agencies determined that "even if RFRA does not compel" the exemption, "an expanded exemption rather than the existing accommodation is the most appropriate administrative response to the substantial burden identified by the Supreme Court in *Hobby Lobby*." 83 Fed. Reg. at 57,544-45. They further concluded that RFRA in fact required the exemption. *See id.* at 57,546-48.

F. The States' Challenge to the Final Rules

Following issuance of the final rules, New Jersey joined Pennsylvania's suit, and the States filed an amended complaint challenging the final rules on essentially the same basis as

Pennsylvania had challenged the interim rules. The States once again sought a preliminary injunction.

The district court again rejected the government's objection to standing. On the merits, the court held that the final rules, like the interim rules, were substantively unlawful because neither the ACA nor RFRA justified the expanded exemptions from the contraceptive-coverage mandate. *See* JA 92-110. And, relying on its prior holding that the agencies had neither statutory authority nor good cause to issue the rules without following notice-and-comment procedures, the court further held that that procedural defect "fatally tainted" the final rules. JA 91. Finding that the equities warranted a preliminary injunction, *see* JA 110-114, and reasoning that an injunction limited to the plaintiff States would not fully redress their alleged injuries, *see* JA 115-123, the court enjoined the agencies from "enforcing" the final rules "across the Nation," JA 125.

SUMMARY OF ARGUMENT

I. The States' arguments for standing are fatally speculative. Indeed, the States have not identified a single resident who will lose contraceptive coverage because of the challenged rules, much less a resident who will then be eligible for and request benefits from a state-funded program. The States' alternative attempt to assert *parens patriae* standing to protect the well-being of their residents is squarely foreclosed by Supreme Court precedent.

II. The challenged rules are substantively lawful. The ACA authorized HRSA to decide what "additional preventive care and screenings" for women should be required, 42 U.S.C. § 300gg-13(a)(4), and since the agencies' first rulemaking on that subject in 2011—when they created both the contraceptive-coverage mandate and the church exemption—the agencies have reasonably interpreted that provision to authorize exemptions to the mandate for sincerely held conscience-based objections. RFRA also independently authorized—and indeed, required—the religious exemption. The Supreme Court held in *Hobby Lobby* that the contraceptive-coverage mandate, standing alone, substantially burdens the exercise of religion by employers that

sincerely object to providing such coverage. Nothing in RFRA or the ACA prevents the agencies from eliminating that burden through a straightforward exemption rather than the novel accommodation the agencies previously attempted to use. On the contrary, RFRA gives the agencies discretion to determine how best to alleviate the burden flowing from the ACA's regulatory regime. The agencies' decision to expand the preexisting religious exemption was particularly reasonable given the sincere religious objections to the accommodation itself, which violates RFRA as applied to some entities and at a minimum is subject to significant legal doubt.

III. The final rules satisfy the APA's procedural requirements regardless of whether the interim rules were procedurally sound, because the final rules were issued after the agencies requested and considered public comments, and are in no way "tainted" by the interim rules' lack of notice and comment. In any event, the agencies' issuance of the interim rules without prior notice and comment was supported by express statutory authority independent of the ACA, *e.g.*, 42 U.S.C. § 300gg-92, as well as "good cause" under the APA, 5 U.S.C. § 553(b).

IV. The balance of equities does not support the preliminary injunction. In addition to the irreparable injury the government suffers when its laws and regulations are set aside by a court, the injunction essentially restores rules that burden the sincere beliefs of employers with religious or moral objections to providing contraceptive coverage. Those injuries outweigh the speculative and undefined economic injury asserted by the States.

V. At a minimum, the district court erred in enjoining the rules nationwide. Any injunction should be no broader than necessary to provide full relief to Pennsylvania and New Jersey, and the States have not demonstrated the need for nationwide relief.

STANDARD OF REVIEW

When this Court reviews a preliminary injunction, "findings of fact are reviewed for clear error, legal conclusions are reviewed de novo, and the decision to grant or deny an injunction is reviewed for abuse of discretion." *Delaware Strong Families v. Attorney General*, 793 F.3d 304, 308 (3d Cir. 2015).

ARGUMENT

I. The States Have Not Demonstrated Standing to Challenge the Rules

To establish standing, a plaintiff must demonstrate an injury that is "concrete[,] particularized," and "actual or imminent, not conjectural or hypothetical"; "fairly traceable to the challenged action"; and "redress[able] by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (cleaned up). Because these requirements "are necessary elements of a plaintiff's case, mere allegations will not support standing at the preliminary injunction stage." *Doe v. National Bd. of Med. Exam'rs*, 199 F.3d 146, 152 (3d Cir. 1999). Rather, a plaintiff "'must set forth by affidavit or other evidence specific facts' . . . demonstrat[ing] a substantial likelihood of standing." *Electronic Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 377 (D.C. Cir. 2017) (quoting *Lujan*, 504 U.S. at 561). The States fail to carry their burden here.

A. The States' Allegations of Economic Injury Are Not Sufficient to Demonstrate Standing

The States contend that they will suffer economic loss due to the challenged rules, as they will have to either provide contraceptive

coverage themselves or fund medical treatment and other social services associated with unintended pregnancies. Where, as here, "the plaintiff is not himself the object of the government action or inaction he challenges," standing "is ordinarily substantially more difficult to establish" because it "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Lujan*, 504 U.S. at 562 (cleaned up). The States' claim of economic harm rests on precisely the type of speculative "chain of contingencies" that is insufficient to confer standing. *Finkelman v. NFL*, 810 F.3d 187, 193 (3d Cir. 2016).

Before a State will bear any costs as a result of the rules, a number of events must occur:

1. An employer in that State must use the expanded exemption and thereby deprive employees of contraceptive coverage they previously had. That means

    a. the employer must have previously provided contraceptive coverage (or used the accommodation, under which coverage is arranged by its insurer or third-party administrator); and

    b. the employer must invoke the expanded exemption and decline to use the accommodation.[2]

2. As a result of that decision, the employer's health plan must no longer cover the specific contraceptive methods that women participating in the plan would otherwise choose (since employers need not opt out of coverage of all contraceptive methods).

3. Women who lose coverage of their chosen contraceptive method must be eligible for, and seek, services from state-funded programs. That means

    a. such women must lack access to the desired coverage under a spouse's (or parent's) plan; and

    b. such women must be unable to pay out of pocket for contraceptive services.

The States' showing fails at each step.

[2] The rules also apply to institutions of higher education in their arrangement of student health plans, but for ease of reference we refer generally to "employers" unless the context requires otherwise.

1. Neither Pennsylvania nor New Jersey has alleged—let alone demonstrated—facts sufficient to show, beyond speculation, that employers in these States will use the challenged rules to deprive employees of contraceptive coverage they previously had.

The States allege that "many" of the employers expected to use the expanded exemption "operate in Pennsylvania and New Jersey." JA 222 ¶ 135. The States identify eight such entities: Geneva College; Hobby Lobby; Conestoga Wood Specialties; Bingaman and Son Lumber; Cummins-Allison; DAS Companies; Earth Sun Moon Trading Company; and Holy Ghost Preparatory School. JA 223 ¶ 136. But the States are mistaken in suggesting that the agencies expect that these eight employers will use the expanded exemption. The agencies made no such determination. As the agencies explained, they "d[id] not have specific data" regarding how many—or which—employers would use the expanded exemption. 82 Fed. Reg. at 47,818.[3]

[3] There is one exception: the agencies stated that they "expect the 122 nonprofit entities that specifically challenged the accommodation in court to use the expanded exemption." 82 Fed. Reg. at 47,818. Among those entities was Geneva College. But, as discussed below, the government is permanently enjoined from enforcing the contraceptive-coverage mandate or accommodation against Geneva College.

Three of the eight employers—Hobby Lobby, Conestoga, and Geneva College—were included in a spreadsheet of entities that had brought litigation challenging the contraceptive-coverage mandate, which the agencies used to estimate the number of women who could be affected by the interim rules. *See* JA 352-354. For purposes of the regulatory-impact analysis, the agencies conservatively assumed that virtually *all* of the employers that had previously challenged the mandate (except those already exempt under the prior rules or effectively exempt because they used self-insured church plans, *see supra* p. 9) would use the expanded exemption under the interim rules. *See* 82 Fed. Reg. at 47,819. But that does not provide a sufficient basis to conclude for purposes of Article III standing that these three entities are in fact likely to use the expanded exemption to deprive women of contraceptive coverage they would otherwise have.

To start, Geneva College, like many other entities that challenged the contraceptive-coverage mandate and accommodation, received a permanent injunction precluding the government from enforcing the mandate against it. Order, *Geneva College v. Azar*, No. 2:12-cv-0207

(W.D. Pa. July 5, 2018). Geneva College thus would decline to provide contraceptive coverage even in the absence of the challenged rules.[4]

With respect to Hobby Lobby and Conestoga, the States provide no reason to believe that either will use the expanded exemption rather than the accommodation—which they did not object to in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780-83 (2014), and which thus was made available to them (as well as other closely held corporations) after their victory there. Indeed, the States provide no evidence that either entity has since objected to the accommodation.

Importantly, an employer's use of the accommodation cannot support the States' claimed injury. As explained (*supra* p. 8), the accommodation generally allows employees to continue to receive no-cost contraceptive coverage through the employer's insurer or third-

[4] In the updated analysis in the final rules, the agencies excluded litigating entities that had received permanent injunctions precluding the government from enforcing the contraceptive-coverage mandate against them. *See* 83 Fed. Reg. 57,536, 57,575 (Nov. 15, 2018); *see also* JA 384-390. Notably, one such entity is the Catholic Benefits Association, which represents more than 1,000 employers that are protected by its injunction. *See* Catholic Benefits Ass'n, https://catholicbenefitsassociation.org/; Order, *Catholic Benefits Ass'n v. Hargan*, No. 5:14-cv-0240 (W.D. Okla. Mar. 7, 2018); Order at 19-20, *Catholic Benefits Ass'n*, *supra* (June 4, 2014).

party administrator. To the extent an employer uses the accommodation—which the States are not challenging and which was not materially altered by the challenged rules—there will be no effect on employees.

The other five employers the States identify were included in the spreadsheet of entities that notified HHS of their religious objection to providing contraceptive coverage in order to invoke the accommodation. JA 357-383. And the States likewise provide no reason to believe that these employers will stop using the accommodation and instead invoke the expanded exemption under the challenged rules. While the agencies assumed, for purposes of the regulatory-impact analysis, that some entities using the accommodation under the prior rules would use the expanded exemption instead, the agencies lacked specific data as to which entities would make the switch and did not identify any such entities. *See* 82 Fed. Reg. at 47,818. While it is *possible* that any of the identified employers could opt to use the expanded exemption, any such eventuality is too conjectural to demonstrate the requisite injury to the plaintiff States.

2. Even assuming that an employer in these States will use the expanded exemption and cease providing coverage that it previously provided, the States do not identify any women who will be adversely affected by that employer's decision.

The exemptions created by the rules apply only "to the extent" of an entity's sincerely held religious or moral objections. 83 Fed. Reg. at 57,558; *see also* 83 Fed. Reg. at 57,614. An employer must still provide coverage for those contraceptives to which it does not object. *See* 83 Fed. Reg. at 57,558. Many of the employers that challenged the mandate (and accommodation) objected only to some contraceptives and covered many others. The plaintiffs in *Hobby Lobby*, for example, were willing to provide coverage for 14 of 18 FDA-approved contraceptive and sterilization methods. *See id*. at 57,575 & n.79. Likewise, Cummins-Allison and Bingaman object only to certain contraceptives. *See* JA 357. The States merely speculate that an employer that uses the exemption will choose not to cover the contraceptive method that a particular employee would otherwise choose. Moreover, women covered by plans that cease providing coverage of all or some contraceptive methods may share the entity's religious or moral objections to such coverage or may

switch to methods that remain covered. *See* 83 Fed. Reg. at 57,576 (noting that the agencies "do not have data" on "how many of [the litigating] entities would provide some contraception in their plans while only objecting to certain contraceptives" or on "how many of those women [participating in plans of the litigating entities] agree with their employers' or educational institutions' opposition to contraception").

3. Even assuming that Pennsylvania or New Jersey women will lose coverage of their chosen contraceptive method, the States fail to demonstrate economic injury as a result. A woman who loses coverage through her employer may still have access to coverage through a spouse's (or parent's) plan. Or she may otherwise be able to pay out of pocket for contraceptive services and thus may not seek, or be eligible for, state-funded services. It is wholly speculative that the States' alleged fiscal injury will ever materialize.

The conjectural nature of harm is reflected in the States' own declarations. For instance, Pennsylvania's Executive Deputy Insurance Commissioner stated only that his "Department *anticipates* that women who lose contraceptive coverage through employer plans . . . *may* seek contraceptive coverage from other sources, including state-funded

programs, *or face the financial burden of paying for the full cost of contraceptives themselves*." JA 299 ¶ 15 (emphases added). Likewise, the Deputy Commissioner of New Jersey's Department of Human Services stated that the Department "*anticipates* that some women, particularly low-income women, who lose contraceptive coverage through their employer's plans *may* seek contraceptive coverage from [state-funded] sources." JA 317 ¶ 19 (emphases added). Neither declarant identified any women who are likely to lose coverage, or offered a basis for concluding that any such women would in fact seek and be eligible for state-funded assistance.

4. Relying on the agencies' estimate that at least 70,500 women nationwide could lose contraceptive coverage and the agencies' observation that state programs provide free or subsidized contraceptives for low-income women, the district court asserted that "the States need not sit idly by and wait for fiscal harm to befall them." JA 76-77, 111 (citing 82 Fed. Reg. at 47,803; 83 Fed. Reg. at 57,578); *see also* JA 20. But the agencies' analysis does not show that it is likely rather than speculative that there is even a single woman who resides in Pennsylvania or New Jersey who would wish to use the particular

contraceptive method to which her employer objects, and would seek and qualify for state assistance.

One cannot simply assume that the challenged rules will affect a proportionate number of a State's residents. The rules do not operate on individual women, but on employers. And the threshold question here is whether a *Pennsylvania or New Jersey employer* will use the exemption, a question the agencies' analysis does not address.

The agencies' estimate is based in part on the number of women covered by health plans sponsored by entities that challenged the mandate or accommodation. We do not know whether those employers (or their employees) are distributed proportionately across the States. Moreover, plaintiffs have already identified the three litigating entities in the agencies' estimate that operate in Pennsylvania or New Jersey (Hobby Lobby, Conestoga, and Geneva College), but as explained, the States have provided no basis for concluding that the expanded exemptions will have any effect on their employees.

Similarly, although the agencies' estimate is also based on their assumption that some entities currently using the accommodation will switch to the exemption, the agencies had no "specific data" as to how

many—or which—employers might switch. 82 Fed. Reg. at 47,818; *see also* 83 Fed. Reg. at 57,577. The States have identified only five employers in Pennsylvania or New Jersey that were not litigating entities and that used the accommodation under the prior rules, and as discussed, the States provide no basis to conclude that those employers will stop using the accommodation.

Contrary to the district court's suggestion (JA 77, 111), the alleged injury in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), did not rely on the same sort of speculative contingencies as those relied on here (and in any event the case is not controlling). In *Texas*, the State claimed that it would incur significant costs in issuing driver's licenses to aliens accorded deferred action. *See id.* at 155. Under Texas law, otherwise ineligible aliens would automatically become eligible for driver's licenses once they were granted deferred action, *see id.* at 149, and because Texas subsidized its licenses, it lost money on each license issued, *see id.* at 155. As it was undisputed that such aliens were present in Texas and would apply for licenses, the court concluded that Texas had demonstrated economic injury. *See id.* Here, however, the States can only speculate that women who lose contraceptive coverage

will reside in Pennsylvania or New Jersey, let alone that they will qualify for and seek state-funded services.

5. The Ninth Circuit was also wrong to hold that several other States had standing to challenge the interim rules because the States purportedly had "shown that the threat to their economic interest is reasonably probable." *California v. Azar*, 911 F.3d 558, 573 (9th Cir. 2018). Relying on the agencies' regulatory-impact analysis, that court, like the district court here, failed to address the many layers of speculation on which the States' claim of injury rested.

For example, while the Ninth Circuit asserted that the agencies "accounted" for the fact that "some objecting employers [would] continue to use the accommodation," *California*, 911 F.3d at 572, the court ignored the agencies' lack of specific data about how many—or which—employers might use the expanded exemption instead of the accommodation. Likewise, the court observed that the record identified specific employers as likely to use the expanded exemption, including Hobby Lobby. *Id.* But as discussed, the administrative record provides no basis to conclude that Hobby Lobby (or the other identified

employers) would decline to use the accommodation, and neither the plaintiff States nor the Ninth Circuit offered any such basis.

Further, the Ninth Circuit ignored that some employees—particularly those who share their employer's mission—may share their employers' objections to contraceptive coverage, and that many employers that challenged the mandate objected only to some contraceptives and covered many others. These facts render speculative any contention that an employer that uses the exemption will choose not to cover the contraceptive method that a particular employee would otherwise choose.

Finally, the Ninth Circuit asserted that the States' declarations demonstrated that "women losing coverage from their employers will turn to state-based programs or programs reimbursed by the state." *California*, 911 F.3d at 572. But the declarations themselves offered no basis to conclude that any women who lost contraceptive coverage would lack access to other private contraceptive coverage and would qualify for and seek state-funded benefits.

B. Plaintiffs' Status as Sovereign States Does Not Alter the Standing Analysis

1. The States argued below that they have "standing under the *parens patriae* doctrine based on their quasi-sovereign interests." Reply in Supp. of Mot. for Prelim. Inj. at 5, dkt. no. 118-2. The district court twice declined to reach this rationale (JA 23 n.5, 78 n.13), and this Court should reject it.

The Supreme Court has long held that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982). In other words, "a state may not attempt as parens patriae to enforce rights of its citizens 'in respect of their relations with the Federal Government.'" *Pennsylvania v. Porter*, 659 F.2d 306, 317 (3d Cir. 1981) (en banc) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923)). That is "no part of [a State's] duty or power," because the citizens of a State are also citizens of the United States, and "it is the United States, and not the state, which represents them as parens patriae, when such representation becomes appropriate." *Mellon*, 262 U.S. at 485-86.

Massachusetts v. EPA, 549 U.S. 497 (2007), is not to the contrary. There, the Supreme Court concluded that Massachusetts had standing to challenge the EPA's decision not to regulate greenhouse-gas emissions. But the Court did not invoke Massachusetts's *parens patriae* interests in protecting its citizens' well-being. Rather, the Court relied on Massachusetts's interests in protecting its sovereign territory. *Id.* at 522; *accord Center for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 476 (D.C. Cir. 2009).

In any event, even if a State could challenge the rules in its *parens patriae* capacity, the plaintiff States have not demonstrated standing to do so here. As discussed, they have not shown any injury to their residents traceable to the rules.

2. Contrary to the district court's conclusion (JA 16-19, 73-75), plaintiffs cannot overcome these obstacles to standing by invoking the "special solicitude" for States referred to in *Massachusetts*, 549 U.S. at 520. To begin, "special solicitude" would be of no help to the States, as it does not alter the requirement to demonstrate a concrete injury. *See Delaware Dep't of Nat. Res. & Envtl. Control v. FERC*, 558 F.3d 575, 579 n.6 (D.C. Cir. 2009) ("This special solicitude does *not* eliminate the

state petitioner's obligation to establish a concrete injury . . . ."). In *Massachusetts*, there was no dispute that Massachusetts was *already* being injured—"rising seas ha[d] already begun to swallow Massachusetts' coastal land." 549 U.S. at 522.

In any event, the States have not asserted the sort of sovereign interest that warrants special solicitude. In *Massachusetts*, the State asserted an injury akin to the injury that would occur if a contiguous State redrew its boundaries to assert dominion over part of Massachusetts's territory: Massachusetts alleged that rising seas would "lead to the loss of [its] sovereign territory." 549 U.S. at 523 n.21. That would mean the loss of Massachusetts's ability to regulate conduct—either because Massachusetts has no jurisdiction over adjacent water or because that loss of territory would move inland the outer boundaries of Massachusetts's jurisdiction over adjacent water.

The special solicitude afforded Massachusetts should not be extended to the type of injury asserted here—whether the alleged economic injury asserted directly by the States or the alleged injury to the well-being of their residents asserted by the States in their *parens patriae* capacity. The standing doctrine is built on separation-of-powers

principles and "concern about the proper—and properly limited—role of the courts in a democratic society." *Allen v. Wright*, 468 U.S. 737, 750, 752 (1984). These concerns apply with special force where the actions of one of the branches of the government are being challenged. *See Raines v. Byrd*, 521 U.S. 811, 819-20 (1997). In the absence of an overriding sovereign interest—such as the interest a State has in its own territorial boundaries—the Supreme Court's "standing inquiry has been especially rigorous." *Id.* at 819.

II. The Agencies Had Statutory Authority to Issue the Religious and Moral Exemptions

A. The ACA Gives the Agencies Discretion to Extend and Modify Exemptions for Any Contraceptive-Coverage Mandate

1. The ACA grants HRSA, and in turn the agencies, significant discretion to shape the content, scope, and enforcement of any preventive-services guidelines adopted pursuant to 42 U.S.C. § 300gg-13(a)(4). The ACA does not specify the types of preventive services that must be included in such guidelines. Instead, as relevant here, it provides only that, "with respect to women," coverage must include "such additional preventive care and screenings . . . as provided

for in comprehensive guidelines supported by [HRSA]." 42 U.S.C. § 300gg-13(a)(4). Several textual features of § 300gg-13(a) demonstrate that this provision grants HRSA broad discretionary authority.

First, unlike the other paragraphs of the statute, which require preventive-services coverage based on, *inter alia*, "current recommendations of the United States Preventive Services Task Force," recommendations "in effect . . . from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention," or "the comprehensive guidelines" that HRSA had already issued with respect to preventive care for children, the paragraph concerning preventive care for women refers to "comprehensive guidelines" that did not exist at the time. *Compare* 42 U.S.C. § 300gg-13(a)(1), (2), (3), *with id.* § 300gg-13(a)(4). That paragraph thus necessarily delegated the content of the guidelines to HRSA.

Second, nothing in the statute mandated that the guidelines include contraception, let alone for all types of employers with covered plans. The statute provides only for coverage of preventive services "as provided for in comprehensive guidelines supported by [HRSA] for purposes of this paragraph." 42 U.S.C. § 300gg-13(a)(4). The use of the

phrase "for purposes of this paragraph" makes clear that HRSA should consider the statutory mandate in shaping the guidelines, and the use of the phrase "as provided for"—absent in parallel provisions, *see* 42 U.S.C. § 300gg-13(a)(1)-(3)—suggests that HRSA may define not only the services to be covered but also the manner or reach of that coverage. That suggestion is reinforced by the absence of words like "evidence-based" or "evidence-informed" in this paragraph, as compared with § 300gg-13(a)(1) and (a)(3)—an omission demonstrating that Congress authorized HRSA to consider factors beyond the scientific evidence in deciding whether to support a coverage mandate for particular preventive services.

Accordingly, § 300gg-13(a)(4) must be understood as a positive grant of authority for HRSA to develop the women's preventive-services guidelines and for the agencies, which administer the applicable statutes, to shape that development. *See* 26 U.S.C. § 9833; 29 U.S.C. § 1191c; 42 U.S.C. § 300gg-92. That is especially true for HHS, which created HRSA and exercises general supervision over it. *See* 47 Fed. Reg. 38,409 (Aug. 31, 1982). The text of § 300gg-13(a)(4) thus plainly authorized HRSA to recognize an exemption from otherwise-applicable

guidelines that it adopts, and nothing in the ACA prevents HHS from directing that HRSA recognize such an exemption. Since their first rulemaking on this subject in 2011, the agencies have consistently interpreted the broad delegation in § 300gg-13(a)(4) to include the power to reconcile the ACA's preventive-services requirement with sincerely held views of conscience on contraceptive coverage—namely, by exempting churches and their integrated auxiliaries from the contraceptive-coverage mandate. *See* 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). At the time, no one filed a lawsuit challenging this basic authority of HRSA.

The agencies expressly invoked this statutory and regulatory backdrop in exercising their authority to expand the exemption. *See* 83 Fed. Reg. at 57,540-42. At the very least, this is a reasonable construction of the statute and thus entitled to deference. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

2. Seizing on § 300gg-13(a)'s use of the "mandatory term" *shall*, and observing that the statute applies to "any 'group health plan' or 'health insurance issuer offering group or individual insurance

coverage,'" JA 95, the district court concluded that § 300gg-13(a)(4) sets forth *who* must provide coverage for preventive services and precludes HRSA from creating any exemptions. But while the term "shall" imposes a mandatory obligation *on covered plans* to cover the preventive services that Congress authorized HRSA to specify, it does not limit *HRSA's* authority (which ultimately belongs to HHS and, through enforcement, the other agencies) to decide both what preventive services must be covered and by what categories of regulated entities.

Any contrary conclusion would mean that the agencies likewise lacked (and continue to lack) the statutory authority to create the exemption for churches. The district court sought to elide this point on the ground that the legality of that exemption "is not before this Court," JA 93 n.20, but the issue is not so readily put aside. The States have never contended that the agencies lack statutory authority to create an exemption for churches, and the court cannot simply ignore the wide-ranging legal consequences of its interpretation of the statute.

Notably, in ignoring the problem of how to square the church exemption with its reading of § 300gg-13(a)(4), the district court

implicitly abandoned its prior suggestion that the church exemption is "required under RFRA and the First Amendment's free exercise protections." JA 42. And for good reason, as that attempt to solve the problem fails. The church exemption, which applies to all churches whether or not they have asserted a religious objection to contraception, *see* 45 C.F.R. § 147.131(a) (2016), is not tailored to any plausible free-exercise concerns. As for RFRA, the court provided no explanation as to how RFRA could require the church exemption but not the expanded religious exemption in the interim rules, given that the accommodation is no less an available alternative for the former than the latter. *See infra* pp. 55. Although the district court purported to ground its position in what "the Supreme Court has held," it cited *a dissent*. *Compare* JA 42, *with Hobby Lobby*, 134 S. Ct. at 2794 & n.14 (Ginsburg, J., dissenting). Likewise, while the district court claimed that "the Third Circuit [has] confirmed that the Original Religious Exemption was plainly required by federal and constitutional law," JA 42, the cited case said only that such "accommodations may be extended" "[e]ven when . . . not strictly required," *Real Alternatives, Inc. v. Secretary, HHS*, 867 F.3d 338, 352 (3d Cir. 2017).

The district court also reasoned that, although § 300gg-13(a)(4)'s reference to "*comprehensive* guidelines" concerning women's preventive services "suggests a broad scope" of discretion for the agency, Congress could not have intended to delegate to HRSA "the authority to subvert the 'preventive care' coverage mandate through the blanket exemptions set out in the Final Rules." JA 96. But we do not suggest that the agencies had unfettered discretion to subvert the mandate through invidious or irrational exemptions. The agencies' exercise of their authority to shape the content and scope of any preventive-services guidelines is subject to "arbitrary and capricious" review under the APA. The point here is that the challenged exemption is eminently reasonable, given the tortured litigation history preceding it, its powerful justification for affected employers, and its minimal impact on women. Indeed, the agencies reasonably anticipate that the rules will at most only moderately expand the number of employers that use the exemption. Even before the ACA, "the vast majority of entities already covered contraception." 82 Fed. Reg. at 47,819. Moreover, employers have "no significant financial incentive" not to comply with the mandate, since compliance is "cost-neutral," and noncompliance with

the mandate in the past had led to "serious public criticism and in some cases organized boycotts." *Id.*

Nor does *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994), support the district court's cramped view of HRSA's authority. At issue there was the statutory requirement that common carriers file their rates with the Federal Communications Commission and charge only the filed rate—described by the Court as "the centerpiece of the [Communication] Act's regulatory scheme" and "the heart of the common-carrier section of the Communications Act." *Id.* at 220, 229. The Commission invoked a statutory provision permitting it to "modify any requirement made by or under the authority" of that section to eliminate the filing requirement for nearly all long-distance telephone service providers. *Id.* at 221-24. Noting that "[v]irtually every dictionary" defined "modify" to mean "to change moderately or in minor fashion," the Court rejected the Commission's argument that it was empowered to make this "radical" and "fundamental change in the Act's tariff-filing requirement." *Id.* at 225, 229. But the relevant statute here has no contraceptive-coverage requirement, and the requirement that a group health plan or health-insurance issuer cover preventive services

applies only to the extent provided for and supported by HRSA's guidelines. Expanding the prior exemption from the agency-created contraceptive-coverage mandate to cover a small additional class of employers with sincerely held conscience objections to contraceptive coverage does not work a "radical" or "fundamental change" in the statutory scheme.

The district court also failed to give adequate weight to the statutory text providing that the preventive-services requirement applies only "as provided for" and "supported by" HRSA's guidelines. The district court reasoned (JA 98-99) that "as" meant only that HRSA had not yet issued the "comprehensive guidelines" concerning women's preventive care and screenings, unlike the recommendations and guidelines referenced in other subparagraphs of § 300gg-13(a). But § 300gg-13(a)(4) already accounts for that difference by omitting the word "the" that precedes § 300gg-13(a)(3)'s reference to the already-existing HRSA guidelines concerning children. At a minimum, the statute is ambiguous when read as a whole, and the agency's construction is a reasonable one entitled to deference.

The district court also improperly invoked the *expressio unius* canon to conclude (JA 99-100) that Congress's inclusion elsewhere of an exemption from the preventive-services requirement for grandfathered plans demonstrates an intent to preclude the agencies from recognizing other exemptions to the requirement to cover particular preventive services. That canon applies "only when circumstances support a sensible inference that the term left out must have been meant to be excluded." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (cleaned up). The ACA's grandfathering exemption was "designed to ease the transition of the healthcare industry into the reforms established by the [ACA] by allowing for gradual implementation of reforms." 75 Fed. Reg. 34,538, 34,541 (June 17, 2010). Congress's decision to itself create an exemption from several of the ACA's requirements in light of that goal in no way suggests that Congress intended to foreclose the agencies from exercising discretion to adopt an exemption limited to the preventive-services requirement (like the church exemption) to accommodate conscience objections to contraceptive coverage, particularly given that contraceptive coverage did not need to be included in HRSA's guidelines at all.

Nor does Congress's rejection in 2012 of a conscience amendment (JA 100) show that the agencies lack authority to create an exemption. Congress's failure to adopt a proposal is a "particularly dangerous ground on which to rest an interpretation" of a statute. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). That is particularly so here, where the amendment was *broader* than the exemption here, and Congress may have determined simply *not to require* an exemption. *See Hobby Lobby*, 134 S. Ct. at 2775 n.30.

B. RFRA Both Authorizes and Requires the Religious Exemption

1. RFRA independently authorizes the religious exemption. RFRA prohibits the government from "substantially burden[ing] a person's exercise of religion" unless the application of the burden to that person is "the least restrictive means" of furthering a "compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Under *Hobby Lobby*, RFRA requires the government to eliminate the substantial burden imposed by the contraceptive-coverage mandate. The expanded religious exemption is a permissible—and in the case of some objecting employers, required—means of doing so.

In *Hobby Lobby*, the Supreme Court held that the contraceptive-coverage mandate, standing alone, "imposes a substantial burden" on objecting employers. 134 S. Ct. at 2779. The Court further held that application of the mandate to objecting employers was not the least restrictive means of furthering any compelling governmental interest, because, at a minimum, the accommodation was a less restrictive alternative that could be extended to the objecting employers in that case. *See id.* at 2780-83. But the Court did not decide whether the accommodation would satisfy RFRA for all religious claimants; nor did it suggest that the accommodation is the only permissible way for the government to comply with RFRA and the ACA, even assuming the existence of a compelling governmental interest. *See id.* at 2782. Moreover, as the agencies noted, other lawsuits have shown that "many religious entities have objections to complying with the accommodation based on their sincerely held religious beliefs." 82 Fed. Reg. at 47,806.

The agencies reasonably decided to adopt the religious exemption to satisfy their RFRA obligation to eliminate the substantial burden imposed by the mandate. *See* 83 Fed. Reg. at 57,544-48. Although RFRA prohibits the government from substantially burdening a person's

religious exercise where doing so is not the least restrictive means of furthering a compelling interest—as is the case with the contraceptive-coverage mandate, per *Hobby Lobby*—RFRA does not prescribe the remedy by which the government must eliminate that burden. The prior administration chose to attempt to do so through the complex accommodation it created, but nothing in RFRA compelled that novel choice or prohibits the current administration from employing the more straightforward choice of an exemption—much like the existing and unchallenged exemption for churches. Indeed, if the agencies had simply adopted an exemption from the outset—as they did for churches—no one could reasonably have argued that doing so was improper because the agencies should have invented the accommodation instead. Neither RFRA nor the ACA compels a different result here based merely on path dependence.

The agencies' choice to adopt an exemption in addition to the accommodation is particularly reasonable given the litigation over whether the accommodation violates RFRA. *See* 82 Fed. Reg. at 47,798; *see also Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (holding that an employer need only have a strong basis to believe that an employment

practice violates Title VII's disparate-impact ban in order to take certain types of remedial action that would otherwise violate Title VII's disparate-treatment ban); *cf. Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) (recognizing "room for play in the joints" when accommodating exercise of religion).

To be sure, if providing an exemption for an objecting religious employer would prevent the contraceptive-coverage mandate from achieving a compelling governmental interest as to that employer, then RFRA would not authorize that exemption. *See Hobby Lobby*, 134 S. Ct. at 2779-80. But the agencies expressly found that application of the mandate to objecting entities neither serves a compelling governmental interest nor is narrowly tailored to any such interest. That is so for multiple reasons, including that:

- Congress did not mandate coverage of contraception at all;
- the preventive-services requirement was not made applicable to "grandfathered plans";
- the prior rules exempted churches and their related auxiliaries, and also effectively exempted entities that participated in self-insured church plans;
- multiple federal, state, and local programs provide free or subsidized contraceptives for low-income women; and

- entities bringing legal challenges to the mandate have been willing to provide coverage of some, though not all, contraceptives.

See 83 Fed. Reg. 57,546-48. Accordingly, the agencies reasonably exercised their discretion in adopting the exemption as a valid means of complying with their obligation under RFRA to eliminate the substantial burden imposed by the contraceptive-coverage mandate, whether or not the accommodation is a valid means of compliance.

Of course, that is especially true because the accommodation *does* violate RFRA for at least some employers, by using plans that they themselves sponsor to provide contraceptive coverage that they object to on religious grounds, which they sincerely believe makes them complicit in providing such coverage. *See* 82 Fed. Reg. at 47,798, 47,800. In light of that sincere religious belief, forcing objecting employers to use the accommodation plainly imposes a substantial burden under *Hobby Lobby*. *See Sharpe Holdings, Inc. v. HHS*, 801 F.3d 927, 939-43 (8th Cir. 2015), *vacated and remanded sub nom. HHS v. CNS Int'l Ministries*, 136 S. Ct. 2006 (2016) (mem.); *Priests for Life v. HHS*, 808 F.3d 1, 16-21 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc). Indeed, after extensive study, the previous administration

determined that it could identify no means short of an exemption that would resolve all religious objections, and on further examination the agencies determined that denying the exemption was not narrowly tailored to achieving any compelling interest. *See supra* pp. 12, 52-53. It thus was not just reasonable, but required, for the agencies to satisfy their RFRA obligations concerning the contraceptive-coverage mandate by providing an exemption rather than just the accommodation.

2. In holding the religious exemption unlawful, the district court largely ignored the agencies' explanation that RFRA authorizes the exemption even if it does not require the exemption (83 Fed. Reg. at 57,544-46), and instead focused on the agencies' separate explanation (*id.* at 57,546-48) that RFRA in fact required the exemption. *See* JA 104-109. The court's analysis fails at multiple levels.

Most obviously, the court provided no explanation why the exemption must be the "required" means under RFRA of eliminating the substantial burden imposed by the contraceptive-coverage mandate, rather than simply a *permissible* means of doing so. Nothing in law or logic compelled the agencies to try to satisfy RFRA by choosing the accommodation rather than the exemption in the first place, and there

likewise is no reason the agencies cannot now make a different choice to satisfy their RFRA obligations to alleviate a substantial burden on objecting employers. *See supra* p. 50-51.

Indeed, under the district court's reasoning, it is not apparent why the accommodation itself would have been statutorily authorized: § 300gg-13(a) requires that any "group health plan" or "health insurance issuer offering group or individual health insurance coverage" *itself* "provide coverage for" contraceptives, not that it outsource that obligation to someone else. The agencies had no greater authority under § 300gg-13(a)(4) to deviate from the contraceptive-coverage mandate's requirements by creating the accommodation, and the accommodation too was not "required" by RFRA, in the sense that there was no other means of eliminating the substantial burden imposed by the contraceptive-coverage mandate. Conversely, under the district court's reasoning, the purported validity of the accommodation would imply that the church exemption would not be authorized by RFRA, because it too would not be "required."

Remarkably, the district court itself volunteered such absurd results in a footnote. The court questioned (without purporting to

decide) "whether RFRA grants agencies independent authority to issue regulations of general applicability." JA 109 n.23. But contrary to the court's uncertainty, "[t]he statutory language does . . . provide a clear answer," *id.*: because RFRA applies to "the implementation of" "all Federal law," 42 U.S.C. § 2000bb-3(a), and provides that "Government shall not substantially burden a person's exercise of religion" unless strict scrutiny is satisfied, *id.* § 2000bb-1(a)-(b), the plain text of the statute itself prohibits a federal agency from promulgating a regulation that would impose such an unjustified burden.

RFRA's plain text thus requires the agency to eliminate the burden in some way, not simply wait for the inevitable lawsuit and judicial order to comply with RFRA. Moreover, the court's odd suggestion that a RFRA violation can be cured only through a "*judicial proceeding*," JA 109 n.23, would lead to perverse results: here, for example, the agencies would not have been able to create and provide the accommodation to employers that would not have objected to it, and thus the agencies would have been forced to provide even those employers a total exemption when they instead inevitably invoked

RFRA as "a claim or defense" against enforcement of the contraceptive-coverage mandate. *See* 42 U.S.C. § 2000bb-1(c).

In any event, the district court's conclusion that RFRA does not require the religious exemption is erroneous. To begin, the court wrongly concluded (JA 107-108) that the accommodation does not impose a substantial burden on religious exercise. Some employers "have a sincere religious belief that their participation in the accommodation process makes them morally and spiritually complicit" in providing contraceptive coverage, because their "self-certification" triggers "the provision of objectionable coverage through their group health plans." *Sharpe*, 801 F.3d at 942.

Although a panel of this Court concluded that this does not constitute a substantial burden, *see Geneva College v. Secretary, HHS*, 778 F.3d 422 (3d Cir. 2015), the Supreme Court vacated that decision, *Zubik*, 136 S. Ct. 1557 (2016) (per curiam). The district court emphasized (JA 107) that *Zubik* vacated *Geneva College* on other grounds, but this Court has correctly recognized that "*Geneva* is no longer controlling," *Real Alternatives*, 867 F.3d at 356 n.18. And while *Real Alternatives* expressed agreement with *Geneva College*'s

substantial-burden holding, *id.*, that was *dicta*: the question presented in *Real Alternatives* was whether the contraceptive-coverage mandate imposed a substantial burden on *employees*, *id.* at 343, and the panel held that it did not for reasons that do not apply to *employers*, *id.* at 362 (noting a "material difference between employers arranging or providing an insurance plan that includes contraception coverage . . . and becoming eligible to apply for reimbursement for a service of one's choosing"). Thus, the district court plainly erred in concluding that *Real Alternatives* "reaffirmed and reapplied the reasoning of *Geneva*," JA 108, which was incorrectly reasoned as explained above, *see, e.g.*, *Sharpe*, 801 F.3d at 942.[5]

Nor does *Hobby Lobby* provide any support for the district court's contention that "a 'blanket exemption' for religious objectors 'extend[s] more broadly'" than RFRA. JA 106 (quoting *Hobby Lobby*, 134 S. Ct. at 2775 n.30). The cited footnote merely explained that the conscience amendment rejected by Congress—which would have provided an exemption from *any* preventive-service requirement objected to on

[5] To the extent that *Real Alternatives* or *Geneva College* is nevertheless deemed to foreclose any of our arguments, we preserve those arguments for possible en banc or Supreme Court review.

religious or moral grounds—did not subject the objected-to requirement to the scrutiny required under RFRA, namely, an examination of the "government's interest and how narrowly tailored the requirement is." *Hobby Lobby*, 134 S. Ct. at 2775 n.30. The Court in no way suggested that a blanket exemption could never be required under RFRA, let alone where, as here, the Court has already determined that the contraceptive-coverage mandate imposes a substantial burden and the agencies have concluded that application of the mandate to religious objectors does not serve a compelling governmental interest.

Finally, citing *Hobby Lobby*, the district court held (JA 108-109) that the religious exemption goes beyond what RFRA requires insofar as the rule includes publicly traded corporations. But *Hobby Lobby* supports the agencies' decision to include publicly traded corporations within the religious exemption. In holding that a closely held for-profit corporation can be a "person" protected by RFRA, *see* 42 U.S.C. § 2000bb-1(a), (c), *Hobby Lobby* relied on the fact that the Dictionary Act's definition of "person" includes corporations, *see Hobby Lobby*, 134 S. Ct. at 2768; that definition does not exclude *publicly traded* corporations, *see* 1 U.S.C. § 1. To be sure, *Hobby Lobby* suggested that

publicly traded corporations would be unlikely in practice to be able to assert that they hold sincere religious beliefs, *see* 134 S. Ct. at 2774, but the exemption is not available to any person (corporation or otherwise) who cannot assert a sincere belief, and the agencies themselves agreed that publicly traded corporations would be unlikely to be able to invoke the exemption, *see* 83 Fed. Reg. at 57,562. And even if the court believed that publicly traded corporations were not properly included within the scope of the exemption, that would not be a basis for invalidating the rule facially rather than as-applied.

III. The Rules Are Procedurally Valid

The APA ordinarily requires agencies to publish a "[g]eneral notice of proposed rule making" and "give interested persons an opportunity to participate in the rule making." 5 U.S.C. § 553(b), (c). Regardless of whether the *interim rules* violated notice-and-comment requirements, the *final rules* plainly do not, because they were issued only after the agencies requested and considered public comment. In any event, in departing from notice-and-comment procedures when issuing the interim rules, the agencies had express statutory authority independent of the APA, as well as good cause under the APA.

A. The Final Rules Satisfy the APA's Notice-and-Comment Requirements

The agencies complied with the APA in issuing the final rules. Before promulgating the final rules, the agencies provided "a meaningful opportunity" for comment, including sufficient time "for the agenc[ies] to consider and respond to the comments." *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011). The agencies solicited comments for 60 days following issuance of the interim rules, *see* 82 Fed. Reg. at 47,792, and issued the final rules 11 months later, after "thoroughly considering" the comments received, 83 Fed. Reg. at 57,552. As in *Levesque v. Block*, 723 F.2d 175 (1st Cir. 1983), where the court upheld a final rule after voiding an interim final rule for failure to comply with notice-and-comment requirements, here the final rules "present evidence of a level of public participation and a degree of agency receptivity that demonstrate that a real public reconsideration of the issued rule has taken place." *Id.* at 188 (cleaned up). Indeed, the district court concluded that the States are unlikely to succeed on their claim that the final rules failed to comply with the APA's notice-and-comment requirements. *See* JA 85.

Nonetheless, citing its prior holding that the agencies had neither statutory authority nor good cause to issue the interim rules without notice and comment, *see* JA 83, the court held that the States are likely to prevail on their claim that the interim rules' alleged procedural defect "fatally tainted" the final rules, JA 91. In so holding, the court mistakenly relied on *Natural Resources Defense Council, Inc. (NRDC) v. EPA*, 683 F.2d 752 (3d Cir. 1982), and improperly conflated the question whether any procedural defect in the interim rules "taints" the final rules with the separate question whether compliance with notice-and-comment procedures in issuing the final rules "cures" any defect in the interim rules.

In *NRDC*, the petitioner challenged a rule—issued without prior notice and comment—that indefinitely postponed the effective date of certain amendments that had been scheduled to take effect on March 30, 1981. *See* 683 F.3d at 754-58. While the petitioner's challenge was pending, the agency "terminate[d] the indefinite postponement," set a new effective date for the amendments, and issued a notice of proposed rulemaking in which the agency proposed to "further suspend" the effective date and invited comment. *Id.* at 757. After considering

comments, the agency issued a final rule further postponing the effective date. *Id.* at 757-58.

The only challenge in *NRDC* was to the *initial* rule. After concluding that the challenge was not moot because the court could provide effective relief, 683 F.2d at 758-59, the court held that the agency had failed to comply with notice-and-comment requirements in issuing the initial rule. And the court further held that the subsequent rulemaking did not "cure the failure to provide such procedures prior to the promulgation" of the initial rule. *Id.* at 768.

As the district court recognized (JA 87), the petitioner in *NRDC*, unlike the States here, was not even challenging the final rule. And contrary to the district court's suggestion, when the *NRDC* court stated that the final rule was "likewise invalid," 683 F.2d at 768, it was not addressing the procedural validity of the final rule. Rather, the court was specifying the remedy for the procedural defects in the *initial* rule, which was to "plac[e] petitioner in the position it would have occupied had the APA been obeyed" when the initial rule was issued. *Id.* at 767. That required the court to "reinstate all of the amendments, effective March 30, 1981," because absent the (invalid) initial rule, the

amendments would have gone into effect on that date. *Id.* It also necessarily required the court to declare the final rule "ineffective," because the final rule would have postponed the effective date. *Id.*

Here, however, there is no similar basis for invalidating the final rules in order to remedy any procedural defects in the interim rules. If the interim rules were procedurally defective, the remedy would be to require the agencies to engage in notice-and-comment rulemaking. But that is exactly what the agencies did in issuing the final rules. The agencies received over 110,000 comments overall, and the district court (JA 83-85) rejected the States' claim that, in issuing the final rules, the agencies did not adequately respond to such comments. The court did not explain what more would be accomplished if the final rules were invalidated and the agencies required to engage in a new rulemaking—or why any such future rulemaking would not be similarly "tainted." Indeed, the logical import of the district court's ruling is that the agencies could *never* adopt the substance of the interim rules: if, as the district court held, there is no argument that the notice-and-comment process for the final rules was itself inadequate, then the "taint" from the interim rules would seem to last indefinitely. That cannot possibly

be correct, and it underscores the district court's error in extending *NRDC* to this very different context.

Finally, *NRDC* is additionally inapposite because here, the States are no longer challenging, and indeed could no longer challenge, the procedural validity of the interim rules: there is no relief that can be provided to redress any injury that might have occurred while the interim rules were in effect. *See Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1150 (9th Cir. 2002) (Because "the life of the interim rule is over, no purpose is served by reviewing its rulemaking procedures."); *cf.* *NRDC*, 683 F.2d at 758-59 & n.15 (concluding that challenge to initial rule was not moot where postponed amendments could be made effective as of originally scheduled effective date, which would affect "compliance obligations").

B. In Any Event, the Interim Rules Were Procedurally Valid

1. Congress Expressly Authorized the Agencies to Issue Interim Rules Without Prior Notice and Comment

a. The agencies promulgated the contraceptive-coverage mandate, and the interim rules expanding the exemptions from that mandate, pursuant to the ACA's preventive-services provision,

42 U.S.C. § 300gg-13. Congress placed that provision in titles of the Public Health Service Act (PHSA), ERISA, and the Internal Revenue Code that expressly authorize the Secretaries of HHS, Labor, and the Treasury, respectively, to promulgate "such regulations as may be necessary or appropriate to carry out [the specified title]," along with "any interim final rules as the Secretary determines are appropriate to carry out [that title]." *Id.* § 300gg-92 (PHSA section 2792); *see also* 29 U.S.C. § 1191c (ERISA section 734); 26 U.S.C. § 9833 (Internal Revenue Code section 9833); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1001, 1562(e)-(f), 124 Stat. 119, 130-32, 270 (2010).

Since the 1996 enactment of these provisions, the agencies have relied on them as authority to issue interim final rules in a wide variety of contexts related to group health plans.[6] Indeed, the agencies

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[6] *See, e.g.*, 62 Fed. Reg. 16,979 (Apr. 8, 1997) (ERISA disclosure requirements for group health plans); 62 Fed. Reg. 66,932 (Dec. 22, 1997) (mental-health parity); 63 Fed. Reg. 57,546 (Oct. 27, 1998) (implementing Newborns' and Mothers' Health Protection Act); 65 Fed. Reg. 7152 (Feb. 11, 2000) (multiple employer welfare arrangements); 66 Fed. Reg. 1378 (Jan. 8, 2001) (nondiscrimination in health coverage in group market); 74 Fed. Reg. 51,664 (Oct. 7, 2009) (prohibiting discrimination based on genetic information).

expressly relied on this statutory authority to issue interim final rules relating to the contraceptive-coverage mandate in 2010, 2011, and 2014. *See* 75 Fed. Reg. 41,726, 41,729-30 (July 19, 2010); 76 Fed. Reg. at 46,624; 79 Fed. Reg. 51,092, 51,095 (Aug. 27, 2014).

These provisions granted the agencies discretion to depart from notice-and-comment requirements in promulgating the rules at issue here. While Congress must act "expressly" to authorize departure from the APA's notice-and-comment requirement, 5 U.S.C. § 559, Congress need not "employ magical passwords," *Marcello v. Bonds*, 349 U.S. 302, 310 (1955). "The import of the § 559 instruction is that Congress's intent to make a substantive change be clear." *Asiana Airlines v. FAA*, 134 F.3d 393, 397 (D.C. Cir. 1998) (cleaned up).

The statutes' reference to "interim final rules" clearly manifests Congress's intent to confer discretion on the agencies to depart from the APA's notice-and-comment requirement. *See Asiana Airlines*, 134 F.3d at 398 (finding express congressional intent to allow departure from notice-and-comment requirement where statute authorized "not a proposed rule, but an 'interim final rule'"); *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1237 (D.C. Cir. 1994) (statute

authorizing issuance of interim final rules followed by opportunity for comment expressed Congress's "clear intent" that notice-and-comment procedures "need not be followed"). "Interim final rule" is a term of art that refers to rules issued without prior notice and comment, *see* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703, 704 (1999), and failing to construe it as waiving the APA's notice-and-comment requirement would render the term superfluous, especially where, as here, the statutes at issue separately authorize the agencies to promulgate regulations.

Moreover, each statute authorizes the respective Secretary to "promulgate *any* interim final rules *as the Secretary determines are appropriate to carry out [specified provisions]*." This broad language confirms Congress's clear intent to delegate to the agencies the decision whether and when to issue these interim final rules. *Cf. Webster v. Doe*, 486 U.S. 592, 600 (1988) (holding that statute authorizing CIA to terminate employees "whenever the Director 'shall *deem* such termination necessary or advisable in the interests of the United States'" "foreclose[s] the application of any meaningful judicial standard of review").

At a minimum, these statutes should be read to relax the APA's standard for departing from normal notice-and-comment requirements. At most, the district court should have reviewed the Secretaries' determination of "appropriate[ness]" required by these statutes, not the Secretaries' additional finding of "good cause" under the APA. And while neither determination was "arbitrary or capricious" under the APA, 5 U.S.C. § 706, the Secretaries' authority is especially clear if the standard for issuing these interim final rules is merely "appropriate" rather than "good cause." *See infra* subsection B.2.

b. The district court (JA 28) found the statutory language insufficiently clear to demonstrate congressional intent to dispense with notice and comment absent good cause. But that conclusion is contrary to the plain statutory text, which expressly authorizes the agencies to issue "interim final rules" that their Secretaries "determine[] are appropriate." Under the district court's reasoning, this express authorization serves no function because the APA already permits issuance of interim final rules for "good cause." 5 U.S.C. § 553(b).

The Ninth Circuit in *California*, 911 F.3d at 579, speculated that the statutory authorization to issue "interim final rules" was intended

only to allow an agency to issue a rule without complying with the first sentence of 42 U.S.C. § 300gg-92 and its companion provisions, pursuant to which the Secretary, "consistent with section 104 of the Health [Insurance] Portability and Accountability Act of 1996 [HIPAA], may promulgate" necessary and appropriate regulations. Section 104 of HIPAA, in turn, instructs the agencies to "ensure" that "regulations, rulings, and interpretations" issued by the agencies "relating to the same matter over which two or more" agencies have statutory responsibility "are administered so as to have the same effect at all times," and that the agencies "have a coordinated enforcement strategy that avoids duplication of enforcement efforts and assigns priorities in enforcement." 42 U.S.C. § 300gg-92 note.

The Ninth Circuit suggested that the statutory authorization to issue interim final rules would permit an agency that "met an inter-agency impasse but needed to regulate within [its] own domain temporarily" to do so. *California*, 911 F.3d at 579. But even assuming that the statute authorizes each agency to issue its own "interim final rules" when there is an "inter-agency conflict," *id.*, nothing in the statute *limits* the agencies' authorization to issue such rules to those

circumstances. The court ignored both the modifier "any" before "interim final rules" and the phrase "as the Secretary determines are appropriate," which suggest broad discretion on the part of the Secretary. If Congress meant to limit the authorization to specific instances of "inter-agency impasse," Congress could easily have said so. Similarly, if Congress intended to retain the APA's good-cause requirement for interim rules, Congress could have said "consistent with 5 U.S.C. § 553(b)," just as it said "consistent with section 104 of [HIPAA]" in the prior sentence.

The district court (JA 28) distinguished the D.C. Circuit's holdings in *Asiana Airlines* and *Methodist Hospital* on the basis that the statutes at issue there *commanded* the issuance of interim final rules, whereas the statutes here provide *discretion* to do so. But the D.C. Circuit made no such distinction. Moreover, nothing in the text or purpose of 5 U.S.C. § 559 suggests that Congress may expressly authorize departure from APA notice-and-comment procedures only by *requiring* such a departure. Nor was the fact that "Congress imposed an expeditious timetable on the agencies" in those cases to issue rules, JA 29 n.7, necessary to the D.C. Circuit's findings of express congressional intent

to displace APA notice-and-comment procedures. *See Asiana Airlines*, 134 F.3d at 398; *Methodist Hosp.*, 38 F.3d at 1237. Just as the timetables there expressly departed from the APA's timetable, the "appropriate" standard here for interim final rules expressly departs from the APA's "good cause" standard.

2. Alternatively, the Agencies Had Good Cause to Issue Interim Final Rules

a. An agency may issue rules without notice and comment when the agency for good cause finds that prior notice-and-comment procedures "are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b). Here, as the preamble to the religious exemption explains, notice and comment was both "impracticable" and "contrary to the public interest." 82 Fed. Reg. at 47,813. The agencies issued the interim rules in response to (1) conflicting court decisions regarding the legality of the accommodation; (2) an inability up to that time to administratively resolve the issues presented by those cases, despite more than 54,000 public comments on that question; and (3) the need to protect objecting employers that were not already protected by court injunctions from the threat of devastating civil penalties for following their religious and moral precepts.

Given this unsustainable state of affairs and the agencies' determination that "requiring certain objecting entities or individuals to choose between the [m]andate, the accommodation, or penalties for noncompliance has violated RFRA," 82 Fed. Reg. at 47,814, good cause existed to bypass normal notice-and-comment requirements. Issuing the expanded religious exemption as an interim final rule served "to cure such violations (whether among litigants or among similarly situated parties that have not litigated), to help settle or resolve cases, and to ensure, moving forward, that [the agencies'] regulations are consistent with any approach [they] have taken in resolving certain litigation matters." *Id.*; *see also Philadelphia Citizens in Action v. Schweiker*, 669 F.2d 877, 881 (3d Cir. 1982) (noting that notice and comment "[is] not required inexorably or inflexibly in situations where [it is] unnecessary or even counter-productive").

For similar reasons, the agencies also had good cause to issue the moral exemption as an interim final rule. There, too, the agencies faced conflicting decisions by the federal courts. *See* 82 Fed. Reg. at 47,855. And the agencies determined that "relief from Government regulations that impose such a burden [on entities' sincerely held moral convictions]

is an important and urgent matter," and that "delay in doing so injures those entities in ways that cannot be repaired retroactively." *Id.*

b. In concluding that the agencies lacked good cause, the district court emphasized (JA 30) that "urgency alone" establishes good cause "only when a deadline imposed by Congress, the executive, or the judiciary requires agency action in a timespan that is too short to provide a notice and comment period." *United States v. Reynolds*, 710 F.3d 498, 511 (3d Cir. 2013). The Ninth Circuit in *California* similarly reasoned that "an agency's desire to eliminate more quickly legal and regulatory uncertainty is not by itself good cause." 911 F.3d at 576. But the agencies here are not relying on "urgency alone," or the need to eliminate "any possible uncertainty" regarding existing law. *Reynolds*, 710 F.3d at 511. In the face of conflicting court decisions regarding the legality of the accommodation, the agencies sought to protect objecting employers that were threatened with devastating civil penalties for following their religious and moral precepts.

The Ninth Circuit also reasoned that the desire to remedy RFRA violations did not constitute good cause because the agencies did not act sufficiently quickly post-*Zubik*. But the agencies were attempting in

good faith to resolve various employers' religious objections while also providing a mechanism for contraceptive coverage for their employees—a process *Zubik* recognized would take some time. *See* 136 S. Ct. at 1560. That the effort failed does not diminish the interest in protecting employers' religious and moral beliefs from serious burdens without first undergoing a lengthy notice-and-comment period.

IV. The States Do Not Satisfy the Equitable Factors for Preliminary Injunctive Relief

In addition to showing a likelihood of success on the merits, a plaintiff seeking a preliminary injunction must demonstrate "that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Here, the "balance of equities" tips in favor of the government, and requires reversal of the preliminary injunction. *See*, *e.g.*, *id.* at 23-24 (public interest and harm to government required reversal of preliminary injunction, even where plaintiffs showed

irreparable harm, and independent of likelihood of success on the merits).[7]

The States' speculative allegations of injury are not even sufficient to establish standing, *see supra* section I, let alone the kind of likely, imminent, and irreparable harm necessary to support a preliminary injunction. *See Winter*, 555 U.S. at 22 (irreparable injury must be "likely," not merely "possib[le]").

The government, on the other hand, suffers irreparable institutional injury whenever its laws and regulations are set aside by a court. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). Moreover, there is a substantial governmental and public interest in protecting religious liberty and conscience. *See Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (allegation of RFRA violation satisfies irreparable-harm requirement); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (same). The preliminary injunction here requires the agencies to maintain rules that they believe, and that some courts have

[7] The interests of the government and the public merge where, as here, the government is a defendant. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

held, substantially burden employers with sincere, conscience-based objections to contraceptive coverage.

These institutional injuries to the government and conscience injuries to employers far outweigh the speculative economic injuries to the States and their residents that may flow from the inability to conscript employers into paying for employees' contraceptive coverage. The Supreme Court confirmed the relevance and weight of such conscience injuries when on four occasions it took the extraordinary step of issuing interim injunctions to ensure that objecting organizations would not be required to violate their sincere religious beliefs while they challenged the accommodation, despite expressing no view on whether the accommodation actually violated RFRA. *See Zubik v. Burwell*, 135 S. Ct. 2924 (2015) (mem.); *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014); *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171 (2014) (mem.); *see also Zubik*, 136 S. Ct. at 1560-61.

The district court erred in reasoning that Congress "already struck the balance" in the States' favor in § 300gg-13(a)(4). JA 113. That analysis skews the balance of equities for a *preliminary* injunction by

improperly treating the merits of the agencies' authority to issue these rules as *definitively* resolved rather than the subject of ongoing litigation.

The court also erred in concluding (JA 114) that the public interest supports enjoining the rules. No one disputes that some employers have sincere conscience objections to complying with the accommodation. Regardless of whether those objections permit (if not require) the expanded exemption on the merits, the public interest at least requires recognizing that the exemptions protect important religious-liberty and moral-conscience interests that the prior rules left unguarded.

V. The Nationwide Injunction Exceeds the District Court's Equitable Power to Redress Plaintiffs' Injuries

1. Under Article III, a plaintiff must "demonstrate standing . . . for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). The Supreme Court recently applied this principle to hold that a set of voters had not demonstrated standing to challenge alleged statewide partisan gerrymandering beyond the legislative districts in which they resided, reasoning that a "plaintiff's

remedy must be limited to the inadequacy that produced his injury in fact" and that "the Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it." *Gill v. Whitford*, 138 S. Ct. 1916, 1930, 1933 (2018) (cleaned up). This Court too has recognized that a plaintiff lacks "standing to seek an injunction" beyond what is necessary to "provide [it] full relief." *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 888 (3d Cir. 1986).

Equitable principles likewise require that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs" before the court. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also Meyer v. CUNA Mut. Ins. Soc'y*, 648 F.3d 154, 170-71 (3d Cir. 2011). The equitable jurisdiction of federal courts is grounded in historical practice, *see Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999), yet nationwide injunctions are a modern invention, *see* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 428-44 (2017).

Moreover, nationwide injunctions "take a toll on the federal court system—preventing legal questions from percolating through the

federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch." *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring). That concern has already materialized in the context of challenges to the interim rules. *See* Order, *Washington v. Trump*, No. 2:17-cv-1510 (W.D. Wash. Jan. 19, 2018) (staying litigation in light of nationwide injunction of interim rules in this case).[8]

Nationwide injunctions also create an inequitable "one-way-ratchet" under which any prevailing party obtains relief on behalf of all others, but a victory by the government does not preclude other plaintiffs from "run[ning] off to the 93 other districts for more bites at the apple." *City of Chicago v. Sessions*, 888 F.3d 272, 298 (7th Cir. 2018) (Manion, J., concurring in the judgment and dissenting in part), *reh'g en banc granted*, Order of June 4, 2018 (vacating panel judgment "insofar as it sustained the district court's decision to extend preliminary relief nationwide"), *reh'g en banc vacated as moot*, Order of Aug. 10, 2018; *cf.*

[8] Washington dismissed its lawsuit in December 2018, after the final rules were issued, and joined the California litigation. *See* Stipulation of Dismissal, *Washington*, *supra* (Dec. 18, 2018); Second Am. Compl., *California v. Azar*, No. 4:17-cv-5783 (N.D. Cal. Dec. 18, 2018).

United States v. Mendoza, 464 U.S. 154, 158-62 (1984) (holding that nonparties to an adverse decision against the federal government may not invoke the decision to preclude the government from continuing to defend the issue in subsequent litigation). Indeed, this Court has repeatedly held that nonparty injunctions should not be used as an end-run around the class-action procedure. *Ameron*, 787 F.2d at 888; *Meyer*, 648 F.3d at 170.

That concern is fully actualized here, given another district court's rejection—on Article III standing grounds—of Massachusetts's challenge to the rules. *See Massachusetts v. HHS*, 301 F. Supp. 3d 248 (D. Mass. 2018), *appeal docketed*, No. 18-1514 (1st Cir. June 6, 2018). Allowing the injunction here to apply nationwide would effectively grant Massachusetts the relief that the district court in Massachusetts refused to provide.

2. Indeed, the Ninth Circuit recently held that another district court abused its discretion in enjoining the interim rules nationwide. *See California*, 911 F.3d at 582-84 (limiting injunction to the plaintiff States). The district court here, however, rejected "the Ninth Circuit's approach," concluding that an injunction limited to the plaintiff States

in this case would not afford them "complete relief," as it would not reach residents who work for out-of-state employers or students covered under the insurance plans of parents who live out-of-state. JA 120. But plaintiffs failed to provide sufficient non-speculative evidence of such "cross-border" harm to support a nationwide injunction.

While the district court placed substantial weight on the fact that 548,040 New Jersey residents and 299,970 Pennsylvania residents "travel to jobs in other states," JA 120, 123,650 of those New Jersey residents *work in Pennsylvania,* and 121,698 of those Pennsylvania residents *work in New Jersey*, *see* U.S. Census Bureau, *Out-of-State and Long Commutes: 2011*, at 11 tbl.7 (Feb. 2013).[9] Furthermore, it seems likely that most of the remaining "cross-border employees" work in bordering States: New York, Delaware, Maryland, Ohio, and West Virginia. Of the 424,390 New Jersey residents who work outside of Pennsylvania or New Jersey, for example, 396,520 work in New York. *See id.* Importantly, except for Ohio, each of those bordering States has a law requiring health-insurance plans to provide contraceptive

[9] Available at https://www.census.gov/library/publications/2013/acs/acs-20.html.

coverage, which limits the availability of the expanded exemption to the subset of employers that are self-insured. *See* Second Am. Compl. ¶¶ 89-90 (Delaware), ¶ 129 (Maryland), ¶¶ 149-150 (New York), *California v. Azar*, No. 4:17-cv-5783 (N.D. Cal. Dec. 18, 2018); Guttmacher Inst., *Insurance Coverage of Contraceptives*, https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives (last visited Feb. 14, 2019).[10]

The number of "cross-border employees" may also include employees of governmental entities, which are not eligible for the expanded exemption under the challenged rules, or employees of public companies, which are unlikely to use the religious exemption and are not eligible for the moral exemption. It may also include employees of entities that are already exempt from the contraceptive-coverage mandate under the prior rules (*i.e.*, under the exemption for churches) or effectively exempt under the prior rules (*i.e.*, because they use self-

[10] Unlike the federal contraceptive-coverage mandate, West Virginia's law permits cost-sharing, *see Insurance Coverage of Contraceptives*, *supra*, and Delaware's law permits cost-sharing "as long as at least 1 drug, device, or other product for that [contraceptive] method is available without cost-sharing," Second Am. Compl. ¶ 90, *California*, *supra*.

insured church plans) or protected by injunctions precluding the government from enforcing the mandate against them.

All of that makes it too speculative to conclude that plaintiffs have adequately shown they will be harmed if the rules are not enjoined in other States. The number of "cross-border employees" who could *potentially* be affected by the rules is relatively small. And the likelihood that any of those employees will not only lose coverage of their chosen contraceptive method, but also qualify for and seek state assistance as a result, is too remote to support an injunction extending beyond the plaintiff States.

In any event, the balance of equities tips decisively in the government's favor, as it makes little sense to enjoin the rules *nationwide* to address entirely theoretical harm related to the relatively small number of "cross-border employees" in the plaintiff States, especially when not a single such employee has brought suit on her own behalf.

The district court's justifications for the "potential over-inclusiveness" of a nationwide injunction, JA 122, do not withstand scrutiny. The court questioned "how burdensome a nation-wide

injunction would be on [the agencies] given that when 'agency regulations are unlawful, the ordinary result is that the rules are vacated.'" *Id.* (quoting *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)). But the D.C. Circuit's practice represents an improper exception to the ordinary rule that relief should be limited to the parties. The practice reflects in large measure the unique circumstance that even party-specific relief in the D.C. Circuit will often effectively have nationwide consequences because venue rules permit aggrieved parties to seek review in the District of Columbia, where the federal defendant is located. *See National Mining Ass'n*, 145 F.3d at 1409-10 (discussing 28 U.S.C. § 1391(e)).

Insofar as the D.C. Circuit has relied more generally on the APA's instruction that unlawful agency action shall be "set aside," 5 U.S.C. § 706(2), other courts of appeal have properly recognized that they are not required to set aside the action as to anyone other than the plaintiff. *See, e.g.*, *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393-94 (4th Cir. 2001) ("Nothing in the language of the APA" requires that a unlawful regulation be set aside "for the entire country."). And in any

event, this appeal does not involve vacatur of a rule but rather a preliminary injunction, and the APA itself reaffirms the general rule that such relief should be limited as "necessary to prevent irreparable injury" to the parties. 5 U.S.C. § 705.

3. Finally, the scope of the injunction is also overbroad to the extent it applies to the portion of the rules that permits willing employers and issuers to offer plans omitting contraceptive coverage to *requesting individuals* who have sincerely held religious or moral objections to such coverage (the "individual exemption"). That aspect of the rules is lawful for all the reasons above, but more importantly, the States have never demonstrated *any* harm from that exemption—and indeed, the district court did not even mention it.

CONCLUSION

Accordingly, the preliminary injunction should be vacated.

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1. Government counsel are not required to be members of the bar of this Court.

2. This brief complies with the type-volume limitation of 16,000 words set forth in this Court's order of February 14, 2019, because the brief contains 15,971 words, excluding the parts of the brief exempted under Rule 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

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/s/ Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.

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/s/ Lowell V. Sturgill Jr.
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