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14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
16 **OAKLAND DIVISION**

17 STATE OF CALIFORNIA, *et al.*

18 Plaintiffs,

19 STATE OF OREGON

20 Plaintiff-Intervenor,

21 v.

22 ALEX M. AZAR, II, Secretary of Health
and Human Services, *et al.*,

23 Defendants,

24 and

25 THE LITTLE SISTERS OF THE POOR,
JEANNE JUGAN RESIDENCE, *et al.*

26 Defendant-Intervenors.

Case No. 4:17-cv-5783-HSG

**DEFENDANTS' OPPOSITION TO
PLAINTIFF-INTERVENOR STATE
OF OREGON'S MOTION FOR
PRELIMINARY INJUNCTION**

Hearing Date: August 22, 2019

Time: 2:00 p.m.

Courtroom: 2, 4th Floor

Judge: Hon. Haywood S. Gilliam, Jr.

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INTRODUCTION

Under the Patient Protection and Affordable Care Act (“ACA”), employers are required to cover, without cost sharing, preventive services for women that are recommended by guidelines supported by the Health Resources and Services Administration (“HRSA”), an agency within the Department of Health and Human Services (“HHS”). The ACA does not mention contraceptive coverage. However, HRSA issued guidelines recommending coverage of all FDA-approved contraceptives for women. The government recognized that some employers hold sincere religious objections to providing insurance coverage for some or all forms of contraception, but decided at that time to exempt only a small number of those employers—churches and their integrated auxiliaries—from the requirement. Other religious employers remained subject to the contraceptive mandate (“Mandate”) and were left either to violate their sincerely held religious beliefs or to be liable for significant fines.

Years of litigation in dozens of cases followed. In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held that the “contraceptive mandate imposes a substantial burden on the exercise of religion” in violation of the Religious Freedom Restoration Act (“RFRA”). 134 S. Ct. 2751, 2779 (2014). Rather than extending the exemption, however, HHS tried to “accommodate” other types of religious objectors. Its decision triggered further litigation and generated decisions in nine federal courts of appeals. Ultimately, the Supreme Court vacated those decisions and instructed the courts of appeals to give the parties time to try to resolve their differences. *See Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016).

On October 6, 2017, to address serious religious and moral objections and to conclude litigation, the Departments of HHS, Labor, and the Treasury (“the Agencies”) issued interim final rules with requests for public comments (“IFRs”) that kept the Mandate in place, but exempted religious and moral objectors. *See* 82 Fed. Reg. 47,792 (Oct. 13, 2017); 82 Fed. Reg.

1 47,838 (Oct. 13, 2017). After reviewing all the comments received on the IFRs, and making
2 some changes in response, the Agencies promulgated final rules that superseded the IFRs. *See*
3 Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under
4 the ACA, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (the “Religious Exemption Rule”); Moral
5 Exemptions and Accommodations for Coverage of Certain Preventive Services Under the ACA,
6 83 Fed. Reg. 57,592 (Nov. 15, 2018) (the “Moral Exemption Rule”) (collectively, “the Rules”).
7

8 Oregon has now moved for a preliminary injunction that seeks to reverse this considered
9 decision. The State demands that religious and secular groups facilitate services to which they
10 deeply object on religious or moral grounds. Oregon contends that the Rules violate the
11 procedural and substantive requirements of the Administrative Procedure Act (“APA”).
12 However, the state fails to confront the implications of its position, which would apply equally to
13 the longstanding exemption for churches and their integrated auxiliaries, and would thus expose
14 churches to the Mandate for the first time.
15

16 Oregon’s motion for a preliminary injunction should be denied. Oregon has not shown
17 that it faces imminent irreparable harm, as demonstrated by the fact that it delayed seeking
18 emergency injunctive relief until over five months after the Agencies promulgated the Final
19 Rules, and because the Rules are already enjoined nationwide. The state is also not likely to
20 succeed on the merits of any of its claims. Oregon errs in contending that the Agencies acted
21 contrary to law by permitting only post-promulgation comments, because comments that were
22 post-promulgation comments with respect to the enjoined IFRs are now pre-promulgation
23 comments with respect to the Final Rules. In addition, the Rules are consistent both with the
24 Women’s Health Amendment and with other relevant ACA provisions. Furthermore, far from
25 being arbitrary and capricious, the Agencies reasonably exercised their rulemaking authority to
26
27
28

1 protect a narrow class of sincere religious and moral objectors from being forced to facilitate
 2 practices that conflict with their beliefs. Finally, the balance of harms and public interest weigh
 3 against the Court granting preliminary injunctive relief to Oregon.

4 **BACKGROUND**

5 **I. The Affordable Care Act and the Contraceptive-Coverage Mandate**

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

13 In August 2011, HRSA adopted the recommendation of the Institute of Medicine, a part of
 14 the National Academy of Sciences, to issue guidelines requiring coverage of, among other things,
 15 the full range of FDA-approved contraceptive methods, including oral contraceptives, diaphragms,
 16 injections and implants, emergency contraceptive drugs, and intrauterine devices. *See* 77 Fed.
 17 Reg. 8,725, 8,725 (Feb. 15, 2012). As a result, coverage for such contraceptive methods was
 18 required for plan years beginning on or after August 1, 2012. *See* 76 Fed. Reg. 46,621, 46,623
 19 (Aug. 3, 2011).

20 At the same time, the Agencies, invoking their statutory authority under 42 U.S.C. § 300gg-
 21 13(a)(4), promulgated interim-final rules authorizing HRSA to exempt churches and their
 22 integrated auxiliaries from the contraceptive-coverage mandate. *See* 76 Fed. Reg. at 46,623; 77
 23 Fed. Reg. at 8,725. Various religious groups urged the Agencies to expand the exemption to all
 24 religious not-for-profit organizations and other organizations with religious or moral objections to
 25 providing contraceptive coverage. *See* 78 Fed. Reg. 8,456, 8,459 (Feb. 6, 2013). Instead, in a
 26 subsequent rulemaking, the Agencies offered only what they termed an “accommodation” for
 27
 28

1 religious not-for-profit organizations with religious objections to providing contraceptive
2 coverage. *See* 78 Fed. Reg. 39,870, 39,874-82 (July 2, 2013). The accommodation allowed a
3 group health plan established or maintained by an eligible objecting employer to opt out of any
4 requirement to directly “contract, arrange, pay, or refer for contraceptive coverage,” *id.* at 39,874,
5 by providing notice of its objection. The regulations then generally required the employer’s health
6 insurer or third-party administrator to provide or arrange contraceptive coverage for plan
7 participants. *See id.* at 39,875-80.

8 In the case of self-insured church plans, however, coverage by the plan’s third-party
9 administrator under the accommodation was voluntary.¹ Church plans are exempt from the
10 Employee Retirement Income Security Act of 1974 (ERISA) under section 4(b)(2) of that Act, and
11 the authority to enforce a third-party administrator’s obligation to provide separate contraceptive
12 coverage derives solely from ERISA. The Agencies thus could not require the third-party
13 administrators of church plans—and, by extension, many nonprofit religious organizations
14 participating in those plans—to provide or arrange for such coverage or to impose fines or penalties
15 for failing to provide such coverage. *See* 79 Fed. Reg. 51,092, 51,095 n.8 (Aug. 27, 2014).

16 Even apart from the exemption for churches and their integrated auxiliaries, the Mandate
17 did not apply to many employers. The ACA itself exempts from the preventive-services
18 requirement, and therefore from any contraceptive-coverage mandate imposed as part of that
19 requirement, “grandfathered” health plans (generally, those plans that have not made specified
20 changes since the Act’s enactment), *see* 42 U.S.C. § 18011, which cover tens of millions of people,
21 *see* 83 Fed. Reg. 57,541 (Nov. 15, 2018) (estimating over 25 million individuals enrolled in such
22 plans). And employers with fewer than fifty employees are not subject to the tax imposed on
23 employers that fail to offer health coverage, *see* 26 U.S.C. § 4980H(c)(2), although such small
24 employers that provide non-grandfathered coverage must comply with the preventive-services
25

26 ¹ A church plan can include a plan maintained by a “principal purpose” organization regardless
27 of who established it. *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1655-63
28 (2017); *see also* 29 U.S.C. § 1002(33).

1 requirement.

2 **II. Challenges to the Contraceptive-Coverage Mandate and Accommodation**

3 Many employers objected to the contraceptive-coverage mandate. In *Hobby Lobby*, the
 4 Supreme Court held that RFRA prohibited applying the Mandate to closely held for-profit
 5 companies with religious objections to providing contraceptive coverage. The Court held that the
 6 Mandate “impose[d] a substantial burden on the exercise of religion” for employers with religious
 7 objections, 134 S. Ct. at 2779, and that even assuming a compelling governmental interest,
 8 application of the Mandate to such employers was not the least restrictive means of furthering that
 9 interest, *id.* at 2780. The Court observed that, at a minimum, the Agencies could extend the less-
 10 restrictive accommodation made available to not-for-profit employers to closely held for-profit
 11 companies with religious objections to the Mandate but not the accommodation. *Id.* at 2782. The
 12 Court did not decide, however, “whether an approach of this type complies with RFRA for
 13 purposes of all religious claims.” *Id.*

14 In response to *Hobby Lobby*, the Agencies promulgated rules extending the
 15 accommodation to closely held for-profit entities with religious objections to providing
 16 contraceptive coverage. See 80 Fed. Reg. 41,318, 41,323-28. But numerous entities continued to
 17 challenge the Mandate. They argued that the accommodation burdened their exercise of religion
 18 because they sincerely believed that the required notice and the provision of contraceptive
 19 coverage in connection with their health plans made them complicit in providing such coverage,
 20 in contravention of their faith.

21 A circuit split developed,² and the Supreme Court granted certiorari in several of the cases.
 22 The Court vacated the judgments and remanded the cases to the respective courts of appeals. See
 23 *Zubik*, 136 S. Ct. 1557 (2016) (per curiam). The Court “d[id] not decide whether [the plaintiffs’]
 24 religious exercise ha[d] been substantially burdened, whether the Government ha[d] a compelling

25 ² Compare, e.g., *Priests for Life v. HHS*, 772 F.3d 229 (D.C. Cir. 2014) (accommodation does
 26 not substantially burden religious exercise), *vacated and remanded*, 136 S. Ct. 1557 (2016), with
 27 *Sharpe Holdings, Inc. v. HHS*, 801 F.3d 927 (8th Cir. 2015) (accommodation violates RFRA),
 28 *vacated by HHS v. CNS Int’l Ministries*, 136 S. Ct. 2006 (2016).

1 interest, or whether the current regulations [we]re the least restrictive means of serving that
 2 interest.” *Id.* at 1560. Instead, the Court required that, on remand, the Courts of Appeals afford
 3 the parties an opportunity to resolve the dispute. In the meantime, the Court precluded the
 4 government from “impos[ing] taxes or penalties on [the plaintiffs] for failure to provide the [notice
 5 required under the accommodation].” *Id.* at 1561.

6 In response to the Supreme Court’s *Zubik* order, the Agencies requested public comment
 7 to determine whether further modifications to the accommodation could resolve the religious
 8 objections asserted by various organizations while providing a mechanism for coverage for their
 9 employees. *See* 81 Fed. Reg. 47,741 (July 22, 2016). The Agencies received over 54,000
 10 comments, but could not find a way to amend the accommodation to both satisfy objecting
 11 organizations and provide seamless coverage to their employees. *See* FAQs About Affordable
 12 Care Act Implementation Part 36, at 4 (Jan. 9, 2017).³ The pending litigation—more than three
 13 dozen cases brought by more than 100 separate plaintiffs—thus remained unresolved.

14 In addition, some nonreligious organizations with moral objections to providing
 15 contraceptive coverage challenged the Mandate. That litigation also led to conflicting decisions
 16 by the courts. *Compare Real Alternatives, Inc. v. Secretary, HHS*, 867 F.3d 338 (3d Cir. 2017)
 17 (rejecting challenge), with *March for Life v. Burwell*, 128 F. Supp. 3d 116 (D.D.C. 2015) (issuing
 18 permanent injunction against the government).

19 **III. The Interim Final Rules**

20 In an effort “to resolve the pending litigation and prevent future litigation from similar
 21 plaintiffs,” the Agencies concluded that it was “appropriate to reexamine” the Mandate’s
 22 exemption and accommodation. 82 Fed. Reg. at 47,799. Following that reexamination, in October
 23 2017, the Agencies issued two interim final rules, or IFRs, that requested public comments and
 24 that expanded the exemption while continuing to offer the existing accommodation as an optional
 25 alternative. The first rule expanded the religious exemption to all nongovernmental plan sponsors,

26
 27 ³ Available at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf>.

1 as well as institutions of higher education in their arrangement of student health plans, to the extent
2 that those entities have sincere religious objections to providing contraceptive coverage. *See id.*
3 at 47,806. The Agencies relied in part on their consistent interpretation of the preventive-services
4 provision to convey “broad discretion to decide the extent to which HRSA will provide for and
5 support the coverage of additional women’s preventive care and screenings in the Guidelines.” *Id.*
6 at 47,794.

7 The Agencies acknowledged that contraceptive coverage is “an important and highly
8 sensitive issue, implicating many different views.” 82 Fed. Reg. at 47,799. But “[a]fter
9 reconsidering the interests served by the [m]andate,” the “objections raised,” and “the applicable
10 Federal law,” the Agencies “determined that an expanded exemption, rather than the existing
11 accommodation, [wa]s the most appropriate administrative response to the religious objections
12 raised by certain entities and organizations.” *Id.* The Agencies also explained that the new
13 approach was necessary because “[d]espite multiple rounds of rulemaking,” and even more
14 litigation, they “ha[d] not assuaged the sincere religious objections to contraceptive coverage of
15 numerous organizations” or resolved the pending legal challenges that had divided the courts. *Id.*

16 The second rule created a similar exemption for entities with sincerely held moral
17 objections to providing contraceptive coverage; unlike the religious exemption, though, this rule
18 did not apply to publicly traded companies. *See* 82 Fed. Reg. 47,838 (Oct. 13, 2017). This rule
19 was issued “in part to bring the [m]andate into conformity with Congress’s long history of
20 providing or supporting conscience protections in the regulation of sensitive health-care issues,”
21 *id.* at 47,844, as well as similar efforts by states. *Id.* at 47,847. The IFR further reflected the
22 Agencies’ attempts to resolve legal challenges by moral objectors that had given rise to conflicting
23 court decisions. *Id.* at 47,843.

24 Invoking agency-specific statutory authority to issue interim final rules, 26 U.S.C. § 9833;
25 29 U.S.C. § 1191c; 42 U.S.C. § 300gg-92, the Agencies’ use of interim final rules on three prior
26 occasions with respect to the preventive service requirements, and the APA’s general “good cause”
27 exception, 5 U.S.C. § 553(b), the Agencies issued the IFRs without prior notice and comment.
28

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

3 **IV. Plaintiffs' Challenge to the IFRs, the District Court's Opinion, and the Ninth**
4 **Circuit's Ruling**

5 California and four other states sued, challenging the IFRs. They claimed that the IFRs (1)
6 failed to comply with the APA's notice-and-comment requirements; (2) were arbitrary and
7 capricious, an abuse of discretion, or otherwise contrary to law; (3) violated the Establishment
8 Clause; and (4) violated the Equal Protection Clause. Am. Compl., Nov. 1, 2017, ECF No. 24, ¶¶
9 116-137. The Court granted Plaintiffs' motion for preliminary injunctive relief on the first claim,
10 issuing a "nationwide" preliminary injunction against the IFRs. Order Granting Pls.' Mot. for a
11 Prelim. Inj., Dec. 21, 2017, ECF No. 105, at 28-29. On December 13, 2018, the Ninth Circuit
12 affirmed the Court's decision in part and vacated it in part. *California v. Azar*, No. 18-15144, 2018
13 WL 6566752 (9th Cir. Dec. 13, 2018). The Ninth Circuit held that Plaintiffs had standing to
14 challenge the IFRs because the "states show[ed], with reasonable probability, that the IFRs will
15 first lead to women losing employer-sponsored contraceptive coverage, which will then result in
16 economic harm to the states." *Id.* at *6. Next, the Court of Appeals decided that the Agencies
17 "did not have statutory authority for bypassing notice and comment" with respect to the IFRs, and
18 that doing so was not harmless. *Id.* at *13-14. The Ninth Circuit also found this Court did not
19 abuse its discretion in concluding that Plaintiffs had demonstrated irreparable harm and that the
20 balance of harms tipped in their favor, though it recognized that "[p]rotecting religious liberty and
21 conscience is obviously in the public interest." *Id.* at *14-15. But the Court of Appeals held that
22 the injunction "must be narrowed to redress only the injury shown as to the plaintiff states." *Id.* at
23 *16.

24 **V. The Final Rules**

25 After considering, for over 11 months, the more than 110,000 comments on the IFRs, on
26 November 15, 2018, the Agencies issued final versions of the religious exemption and the moral
27 exemption rules. The Final Rules address the significant comments received by the Agencies.
28

1 Changes were made in response to questions and concerns raised in various comments, while the
2 fundamental substance of the exemptions was finalized as set forth in the IFRs.

3 As was true of the IFRs, the final religious exemption rule is “necessary to expand the
4 protections for the sincerely held religious objections of certain entities.” 83 Fed. Reg. at 57,537.
5 It “minimize[s] the burdens imposed on their exercise of religious beliefs, with regard to the
6 discretionary requirement that health plans cover certain contraceptive services with no cost-
7 sharing.” *Id.* The rule “do[es] not remove the contraceptive coverage requirement generally
8 from HRSA’s Guidelines.” *Id.* What it does do is “finalize exemptions [for] the same types of
9 organizations and individuals for which exemptions were provided in the Religious [IFR]: Non-
10 governmental plan sponsors including a church, an integrated auxiliary of a church, a convention
11 or association of churches, or a religious order; a nonprofit organization; for-profit entities; an
12 institution of higher education in arranging student health insurance coverage; and, in certain
13 circumstances, issuers and individuals.” *Id.* “In addition, the [religious exemption] maintain[s] a
14 previously created accommodation process that permits entities with certain religious objections
15 voluntarily to continue to object while the persons covered in their plans receive contraceptive
16 coverage or payments arranged by their health insurance issuers or third party administrators.”
17 *Id.*

18 In response to comments on the religious IFR, the Agencies made numerous clarifying or
19 technical changes in the final religious exemption rule. For example, the final rule clarified the
20 prefatory language to the exemptions “to ensure exemptions apply to a group health plan
21 established or maintained by an objecting organization, or health insurance coverage offered or
22 arranged by an objecting organization, to the extent of the objections.” *Id.*; *see also id.* (listing
23 modifications). The Agencies also “revise[d] the exemption applicable to health insurance
24 issuers to make clear that the group health plan established or maintained by the plan sponsor
25 with which the health insurance issuer contracts remains subject to any requirement to provide
26 coverage for contraceptive services under Guidelines issued under §147.130(a)(1)(iv) unless it is
27 also exempt from that requirement.” *Id.*

1 The final moral exemption rule continues to fulfill the purpose that it did in interim form:
 2 to “protect sincerely held moral objections of certain entities and individuals.” 83 Fed. Reg. at
 3 57,592. The Agencies considered public comments asking for the moral exemption to be
 4 expanded to publicly traded or government entities, but declined to do so. *Id.* at 57,616-19.
 5 Importantly, like the religious exemption rule, the moral exemption rule “do[es] not remove the
 6 contraceptive coverage requirement generally from HRSA’s guidelines.” *Id.* at 57,593. And
 7 “[t]he changes to the rule[] being finalized will ensure clarity in implementation of the moral
 8 exemptions so that proper respect is afforded to sincerely held moral convictions in rules
 9 governing this area of health insurance and coverage, with minimal impact on HRSA’s decision
 10 to otherwise require contraceptive coverage.” *Id.*

11 **VI. Plaintiffs’ Second Amended Complaint and Second Motion for a Preliminary** 12 **Injunction**

13 Plaintiffs (joined by nine other states) filed a second amended complaint as well as a
 14 second motion for a preliminary injunction. Second Am. Compl., Dec. 18, 2018, ECF No. 170;
 15 States’ Notice of Mot. and Mot. for Prelim. Inj., with Memorandum of Points and Authorities
 16 (Second PI Mem.), December 19, 2018, ECF No. 174. In the new complaint, Plaintiffs raised
 17 claims under the APA, the Establishment Clause, and the Equal Protection Clause. Second Am.
 18 Compl. ¶¶ 235-260. They sought a preliminary injunction of the Final Rules on their APA
 19 claims, but not their constitutional claims. See ECF No. 174. The court issued the preliminary
 20 injunction on January 13, 2019, enjoining the Agencies from implementing the Final Rules in the
 21 Plaintiff states. *California v. Azar*, 351 F. Supp. 3d 1267, 1300 (N.D. Cal. 2019). That decision
 22 is on appeal in the Ninth Circuit. *California v. Little Sisters of the Poor et al.*, No. 19-15072 (9th
 23 Cir. 2019).

24 **VII. Oregon’s Intervention and the Present Motion for Preliminary Injunction**

25 On January 7, 2019, the State of Oregon filed a Motion to Intervene, see ECF No. 210, which
 26 was granted by the Court on February 1, 2019. ECF No. 274. Oregon then filed its Intervenor-
 27 Complaint, ECF. No. 287, and a motion to join the Plaintiffs’ preliminary injunction motion.
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ECF No. 288. The Court denied this motion, because it was filed after the Court had already granted Plaintiffs' preliminary injunction motion. ECF No. 297. Oregon filed the instant Motion for a Preliminary Injunction on March 3, 2019. ECF No. 312.

ARGUMENT

I. The Nationwide Injunction Currently in Place and Oregon's Delay in Seeking Injunctive Relief Fatally Undermines Its Claim of Irreparable Injury.

Oregon cannot show irreparable injury because the nationwide injunction currently in place provides it with all the redress it seeks. *See Pennsylvania v. Trump*, No. 2:17-cv-4540-WB, Order, ECF No. 135 (Jan. 14, 2019). Indeed, Oregon only argues that it will suffer irreparable harm "if the nationwide injunction is lifted." *See* PI Mot. at 28. The requirement that a party show irreparable harm restricts this Court's authority to enter a duplicative injunction with respect to Oregon. *See e.g., Hawai'i v. Trump*, 233 F. Supp. 3d 850, 853 (D. Haw. 2017) ("[T]he Western District of Washington's nationwide injunction already provides the State with the comprehensive relief it seeks in this lawsuit. As such, the State will not suffer irreparable damage.").

An injury that is expressly contingent on a future event is, by definition, not an imminent, irreparable injury. *See Henke v. Dep't of Interior*, 842 F. Supp. 2d 54, 59 (D.D.C. 2012) ("Injury that is hypothetical or speculative does not rise to the level of irreparable harm."); *accord In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007) ("Speculative injury cannot be the basis for a finding of irreparable harm."). Because Oregon cannot show irreparable harm, the Court should at the very least stay consideration of this motion unless and until the *Pennsylvania* nationwide injunction is stayed, narrowed, or vacated. Unless and until that happens, however, Oregon will not suffer irreparable harm absent an injunction from this Court, and there is accordingly no basis for the Court to resolve Oregon's motions for preliminary injunction at this time.

1 Additionally, the fact that Oregon waited over five months after the Agencies
2 promulgated the Final Rules—and over eighteen months after the Agencies issued the IFRs—to
3 seek an injunction undermines its claim that it will suffer irreparable harm if the Court declines
4 to grant the preliminary injunction.⁴ “A delay in seeking a preliminary injunction is a factor to
5 be considered in weighing the propriety of relief.” *Lydo Enters., Inc. v. City of Las Vegas*, 745
6 F.2d 1211, 1213 (9th Cir. 1984). This is because a preliminary injunction “is sought upon the
7 theory that there is an urgent need for speedy action to protect the plaintiff’s rights. By sleeping
8 on its rights a plaintiff demonstrates the lack of need for speedy action.” *Id.* (citation omitted).
9 It is thus well established in this Circuit that a “[p]laintiff’s long delay before seeking a
10 preliminary injunction implies a lack of urgency and irreparable harm.” *Oakland Tribune, Inc.,*
11 *v. Chronicle Publ’g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *see also Garcia v. Google, Inc.*,
12 786 F.3d 733, 766 (9th Cir. 2015) (affirming district court’s conclusion that a several-month long
13 delay in seeking injunction “undercut [plaintiff’s] claim of irreparable harm”); *Hi-Rise Tech.,*
14 *Inc. v. Amateurindex.com*, 2007 WL 1847249, at * 4 (W.D. Wash. June 27, 2007) (“Such a long
15 delay in seeking relief weighs against granting a temporary restraining order or a preliminary
16 injunction.”).

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22 ⁴ The Court has determined that *Plaintiffs* are likely to suffer irreparable harm absent preliminary
23 injunctive relief. Defendants respectfully maintain that no irreparable harm will befall Plaintiffs
24 if the Rules are allowed to go into effect. But here, by contrast with Plaintiffs, Oregon’s
25 significant delay undercuts any notion that it will suffer irreparable harm absent a preliminary
26 injunction. *See also California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (“That the states
27 promptly filed an action following the issuance of the IFRs also weighs in their favor.”) (citing
28 *Oakland Tribune*, 762 F.2d at 1377).

1 Despite this established principle, when the Agencies promulgated the IFRs in October
2 2017, Oregon chose not to file suit and did not attempt to join the present action. Nor did
3 Oregon choose to file suit or attempt to join this action when the Agencies promulgated the Final
4 Rules in November 2018. Instead, Oregon waited for more than an additional five months
5 before filing a motion in this Court contending that absent emergency injunctive relief, it would
6 suffer irreparable harm. That contention is fatally undermined by Oregon's unexplained delay.
7 Moreover, Oregon's preliminary injunction motion, in overwhelming part, repeats *verbatim* the
8 arguments made by Plaintiffs in their Motion for Preliminary Injunction. *Compare* ECF No.
9 174, with ECF No. 312. Even Oregon's section on irreparable harm is largely identical to the
10 Plaintiffs' brief. *Compare* ECF No. 312 at 28-30 with ECF No. 174 at 28-31. Where Oregon
11 has not only filed late for preliminary relief, but has not even bothered to write a motion
12 particular to its state's own circumstances, this Court should conclude that Oregon has failed to
13 satisfy its burden to establish irreparable harm.
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16 **II. Oregon Is Unlikely to Succeed on the Merits.**

17 **a. Oregon Is Not Likely to Succeed on Its Claim That the Rules Are**
18 **Procedurally Deficient Under the APA.**

19 Oregon contends that the Agencies' use of a post-promulgation comment period after
20 issuing the IFRs renders the Final Rules invalid under the APA. *See* PI Mem. at 23-24. The
21 Agencies maintain that because they had independent statutory authority to issue the IFRs, and
22 had good cause to do so as well, post-promulgation comments were proper. *See* ECF No. 51 at
23 14-18 (arguing in favor of independent statutory authority to issue the IFRs, and in favor of the
24 Agencies' determination of good cause). But even assuming that the IFRs were procedurally
25 improper, the Final Rules now at issue were issued after receiving and carefully considering
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1 public comments (and at a time after the IFRs were enjoined). Therefore, the APA’s notice-and-
2 comment requirements were satisfied with respect to these Final Rules.

3 The Agencies provided the notice and comment period required under APA § 553 with
4 respect to the Final Rules. Section 553 requires that an agency provide notice, an opportunity to
5 be heard, and publication of a final rule no less than 30 days before it is to go into effect. 5
6 U.S.C. § 553. Oregon had that full and timely notice and ample opportunity for comment, and it
7 participated in that process. *See* Dec. 5, 2017 Comment by State Attorneys General, *available at*
8 [https://www.regulations.gov/contentStreamer?documentId=CMS-2014-0115-](https://www.regulations.gov/contentStreamer?documentId=CMS-2014-0115-58168&attachmentNumber=1&contentType=pdf)
9 [58168&attachmentNumber=1&contentType=pdf](https://www.regulations.gov/contentStreamer?documentId=CMS-2014-0115-58168&attachmentNumber=1&contentType=pdf). Indeed, the Agencies received and considered
10 more than 110,000 public comment submissions across both rules, and detailed their
11 consideration of those submissions in the final rulemakings. *See* 83 Fed. Reg. 57,540 (religious
12 rule); 83 Fed. Reg. at 57,596 (moral rule). The Agencies also made numerous changes in
13 response to those comments, *see* 83 Fed. Reg. 57,556-73; 83 Fed. Reg. 57,613-26 (highlighting
14 comments, responses, and changes). Although Oregon may disagree with those changes, or with
15 the Rules generally, it is not the place of Plaintiff-Intervenor, nor this Court, to substitute its
16 judgment for that of the Agencies. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S.
17 402, 416 (1971). Instead, the Court should consider whether the Agencies examined the relevant
18 data and articulated a satisfactory explanation for their action, including a “rational connection
19 between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm*
20 *Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

21 Most of the cases Oregon cites address challenges to interim final rules, not final rules
22 promulgated after notice and comment, and are thus inapposite. In *Paulsen*, for example, the
23 court enjoined an IFR but specifically contrasted that case with others in which “interested
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1 parties received some notice that sufficiently enabled them to participate in the rulemaking
2 process before the relevant agency adopted the rule.” *Paulsen v. Daniels*, 413 F.3d 999, 1007
3 (9th Cir. 2005). Here, Oregon had a full opportunity for notice and comment. In *Levesque*,
4 similarly, the First Circuit voided an interim final rule for failure to provide notice and comment,
5 but let the final rule stand. *See Levesque v. Block*, 723 F.2d 175, 188 (1st Cir. 1983). Likewise,
6 in *NRDC*, the Third Circuit upheld a challenge to an interim rule that indefinitely suspended the
7 implementation of certain Clean Water Act Amendments. *See NRDC v. EPA*, 683 F.2d 752, 768
8 (3d Cir. 1982). Although in that case, the court’s remedy included enjoining a later rule to
9 “further suspend” the amendments, this aspect of the court’s ruling was not based on any
10 procedural inadequacy of the “further suspension” rules. *See id.* at 757. Instead, the court
11 enjoined both rules because the question on which the public commented, *i.e.*, whether to
12 “further suspend” the amendments, was not the question that would have been asked had the
13 APA’s procedures been followed. The question “would have been whether the amendments,
14 which had been in effect for some time, should be suspended, and not whether they should be
15 further postponed.” *Id.* at 768.

18 Unlike in *NRDC*, the question posed to the public for comment here was the same
19 question that would have been posed had the IFR been an NPRM. Moreover, the IFRs were
20 enjoined shortly after they went into effect, remedying any procedural defect. Thus, even given
21 this Court’s prior conclusion that the IFRs were procedurally defective, the proper remedy is one
22 that Oregon already received—notice of a proposed rule and an opportunity to comment on that
23 same rule. *See Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979). Because Oregon
24 had the opportunity to submit a comment in response to the IFRs—and did so—it has suffered no
25 procedural injury. On the contrary, the Final Rules amply “present[ed] evidence of a level of
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public participation and a degree of agency receptivity that demonstrate that a ‘real public reconsideration of the issued rule has taken place.’ *Levesque*, 723 F.2d at 188. The Ninth Circuit has left in place final rules despite the invalidation of prior interim rules for failure to provide notice and comment. *See Paulsen*, 413 F.3d at 1008 (invalidating an interim rule for failure to comply with notice-and-comment procedures and holding that the rule in effect was the final rule, where the rule previously in force erroneously interpreted a statutory provision); *Buschmann v. Schweiker*, 676 F.2d 352 (9th Cir. 1982) (invalidating interim rule and accepting parties’ agreement that final rule was valid). Moreover, the Ninth Circuit has also recognized that even where an agency has been found to have improperly dispensed with notice-and-comment procedures, the proper remedy is to offer the lost opportunity to comment rather than enjoining the final rules. *See Western Oil & Gas Ass’n v. EPA*, 633 F.2d 803, 812-13 (9th Cir. 1980) (in a case in which petitioners had not been afforded the opportunity to comment on an EPA rule, “the proper remedy . . . is a reenactment of the deliberative process with correct provision for the petitioners’ participation”). That participation has already been afforded to Oregon, which has thus suffered no procedural injury. For these reasons, Oregon is unlikely to succeed on the merits of its claim that the Rules are procedurally invalid.

b. Oregon Is Unlikely to Succeed on Its Substantive APA Claims.

i. The Rules are Not Contrary to the Women’s Health Amendment.

Oregon’s argument that the Rules violate the Women’s Health Amendment, 42 U.S.C. § 300gg-13(a)(4), fails because the ACA grants HRSA, and in turn the Agencies, significant discretion to shape the content and scope of any preventive-services guidelines adopted pursuant to § 300gg-13(a)(4). Although this Court ruled against the Agencies with respect to this question in the Plaintiffs’ preliminary injunction motion, the Agencies respectfully urge this Court to reconsider its position. *See Askins v. U.S. Dep’t of Homeland Sec.*, 899 F.3d 1035, 1042 (9th

1 Cir. 2018) (the law of the case doctrine “does not preclude a court from reassessing its own legal
2 rulings in the same case”); *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254
3 F.3d 882, 888 (9th Cir. 2001) (doctrine is “is discretionary, not mandatory and is in no way a
4 limit on a court’s power”) (internal citations and punctuation omitted).

5 The ACA does not specify the types of preventive services that must be included in such
6 guidelines. Instead, as relevant here, it provides only that, “with respect to women,” coverage
7 must include “such additional preventive care and screenings . . . as provided for in
8 comprehensive guidelines supported by [HRSA].” *Id.* § 300gg-13(a)(4). Several textual features
9 of § 300gg-13(a) demonstrate that this provision grants HRSA broad discretionary authority.
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11 First, unlike the other paragraphs of the statute, which require preventive-services
12 coverage based on, *inter alia*, “current recommendations of the United States Preventive
13 Services Task Force,” recommendations “in effect . . . from the Advisory Committee on
14 Immunization Practices of the Centers for Disease Control and Prevention,” or “the
15 comprehensive guidelines” that HRSA had already issued with respect to preventive care for
16 children, the paragraph concerning preventive care for women refers to “comprehensive
17 guidelines” that did not exist at the time. *Compare id.* § 300gg-13(a)(1), (2), (3), *with id.*
18 § 300gg-13(a)(4). That paragraph thus necessarily delegated the content of the guidelines to
19 HRSA.
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21 Second, nothing in the statute mandates that the guidelines include contraception at all,
22 let alone include all types of contraception for all types of employers with covered plans. On the
23 contrary, the statute provides only for coverage of preventive services “as provided for in
24 comprehensive guidelines supported by [HRSA] for purposes of this paragraph.” *Id.* § 300gg-
25 13(a)(4). The use of the phrase “for purposes of this paragraph” makes clear that HRSA should
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1 consider the particular context of the directive in shaping the guidelines, and the use of the
2 phrase “as provided for” indicates that HRSA has discretion to define not only the services to be
3 covered under that directive, but also the manner or reach of that coverage. *See also* 83 Fed.
4 Reg. at 57,540 n.10; 57,541 (discussing the Agencies’ interpretation of the word “as” to confer
5 discretion to the Agencies). That suggestion is further reinforced by the absence of the words
6 “evidence-based” or “evidence-informed” in this subsection, as compared with § 300gg-13(a)(1),
7 (3), which confirms that Congress authorized HRSA to consider factors beyond the scientific
8 evidence in deciding whether to support a coverage mandate for particular preventive services.
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10 Accordingly, § 300gg-13(a)(4) must be understood as a positive grant of authority for
11 HRSA to develop the women’s preventive-services guidelines and for the Agencies, as the
12 administering Agencies of the applicable statutes, to shape that development. *See* 26 U.S.C.
13 § 9833; 29 U.S.C. § 1191c; 42 U.S.C. § 300gg-92. That is especially true for HHS, as HRSA is
14 a component of HHS and is subject to the HHS Secretary’s general supervision. *See* 47 Fed.
15 Reg. 38,409 (Aug. 31, 1982). The text of § 300gg-13(a)(4) thus authorized HRSA to adopt
16 guidelines for coverage that include an exemption for certain employers, and nothing in the ACA
17 prevents HHS from supervising HRSA in the development of those guidelines. Indeed, since
18 their first rulemaking on this subject in 2011, the Agencies have consistently interpreted the
19 broad delegation to HRSA in § 300gg-13(a)(4) to include the authority to reconcile the ACA’s
20 preventive-services requirement with sincerely held views of conscience on the sensitive subject
21 of contraceptive coverage—namely, by exempting churches and their integrated auxiliaries from
22 the contraceptive-coverage mandate. *See* 76 Fed. Reg. at 46,623.
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25 In light of this statutory and regulatory backdrop, the Agencies’ exercise of authority to
26 expand the exemption is, at the very least, a reasonable construction of the statute entitled to
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1 deference. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43
2 (1984).

3 ii. RFRA Both Authorizes and Requires the Religious Exemption Rule.

4 Even apart from § 300gg-13(a)(4), RFRA independently authorizes the religious
5 exemption. RFRA prohibits the government from “substantially burden[ing] a person’s exercise
6 of religion” unless the application of the burden to that person is “the least restrictive means” of
7 furthering a “compelling governmental interest.” 42 U.S.C. § 2000bb-1(b). Under *Hobby Lobby*,
8 RFRA requires the government to eliminate the substantial burden imposed by the contraceptive-
9 coverage mandate. The expanded religious exemption is a permissible—and in the case of some
10 objecting employers, required—means of doing so.

12 In *Hobby Lobby*, the Supreme Court held that the contraceptive coverage mandate, standing
13 alone, “imposes a substantial burden” on objecting employers. 134 S. Ct. at 2779. And the Court
14 further held that application of the mandate to objecting employers was not the least restrictive
15 means of furthering any compelling governmental interest, because, at a minimum, the
16 accommodation was a less restrictive alternative that could be extended to the objecting
17 employers in that case. *See id.* at 2780-83. But the Court did not decide whether the
18 accommodation would satisfy RFRA for all religious claimants; nor did it suggest that the
19 accommodation is the only permissible way for the government to comply with RFRA and the
20 ACA, even assuming the existence of a compelling governmental interest. *See id.* at 2782.
21 Moreover, as the Agencies noted, other lawsuits have shown that “many religious entities have
22 objections to complying with the accommodation based on their sincerely held religious beliefs.”
23 82 Fed. Reg. at 47,806.
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1 The Agencies reasonably decided to adopt the religious exemption to satisfy their RFRA
2 obligation to eliminate the substantial burden imposed by the mandate. See 83 Fed. Reg. at
3 57,544-48. Although RFRA prohibits the government from substantially burdening a person's
4 religious exercise where doing so is not the least restrictive means of furthering a compelling
5 interest—as is the case with the contraceptive coverage mandate, per *Hobby Lobby*—RFRA does
6 not prescribe the remedy by which the government must eliminate that burden. The prior
7 administration chose to attempt to do so through the complex accommodation it created, but
8 nothing in RFRA compelled that novel choice or prohibits the current administration from
9 employing the more straightforward choice of an exemption—much like the existing and
10 unchallenged exemption for churches. Indeed, if the Agencies had simply adopted an exemption
11 from the outset—as they did for churches—no one could reasonably have argued that doing so
12 was improper because the Agencies should have invented the accommodation instead. Neither
13 RFRA nor the ACA compels a different result here based merely on path dependence.

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15 The Agencies' choice to adopt an exemption in addition to the accommodation is
16 particularly reasonable given the litigation over whether the accommodation violates RFRA. See
17 82 Fed. Reg. at 47,798; see also *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (holding that an
18 employer need only have a strong basis to believe that an employment practice violates Title
19 VII's disparate-impact ban in order to take certain types of remedial action that would otherwise
20 violate Title VII's disparate-treatment ban); cf. *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)
21 (recognizing “room for play in the joints” when accommodating exercise of religion).

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23 To be sure, if providing an exemption for an objecting religious employer would prevent
24 the contraceptive-coverage mandate from achieving a compelling governmental interest as to
25 that employer, then RFRA would not authorize that exemption. See *Hobby Lobby*, 134 S. Ct. at
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1 2779-80. But the Agencies expressly found that application of the mandate to objecting entities
2 neither serves a compelling governmental interest nor is narrowly tailored to any such interest.
3 That is so for multiple reasons, including that: Congress did not mandate coverage of
4 contraception at all; the preventive-services requirement was not made applicable to
5 “grandfathered” plans; the prior rules exempted churches and their related auxiliaries, and also
6 effectively exempted entities that participated in self-insured church plans; multiple federal,
7 state, and local programs provide free or subsidized contraceptives for low-income women; and
8 entities bringing legal challenges to the mandate have been willing to provide coverage of some,
9 though not all, contraceptives. *See* 83 Fed. Reg. 57,546-48. Accordingly, the Agencies
10 reasonably exercised their discretion in adopting the exemption as a valid means of complying
11 with their obligation under RFRA to eliminate the substantial burden imposed by the
12 contraceptive-coverage mandate, whether or not the accommodation is a valid means of
13 compliance.
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15 Of course, that is especially true because the accommodation *does* violate RFRA for at
16 least some employers, because it uses plan that the employers themselves sponsor to provide
17 contraceptive coverage that they object to on religious grounds, which they sincerely believe
18 makes them complicit in providing such coverage. *See* 82 Fed. Reg. at 47,798, 47,800. In light
19 of that sincere religious belief, forcing objecting employers to use the accommodation plainly
20 imposes a substantial burden under *Hobby Lobby*. *See Sharpe Holdings, Inc. v. HHS*, 801 F.3d
21 927, 939-43 (8th Cir. 2015), *vacated and remanded sub nom., HHS v. CNS Int’l Ministries*, 136
22 S. Ct. 2006 (2016) (mem.); *Priests for Life v. HHS*, 808 F.3d 1, 16-21 (D.C. Cir. 2015)
23 (Kavanaugh, J., dissenting from denial of rehearing en banc). Indeed, after extensive study, the
24 previous administration determined that it could identify no means short of an exemption that
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1 would resolve all religious objections; and on further examination the Agencies determined that
2 denying the exemption was not narrowly tailored to achieving any compelling interest. *See*
3 *supra* pp. 9-10, 30. It thus was not just reasonable, but required, for the Agencies to satisfy their
4 RFRA obligations concerning the contraceptive-coverage mandate by providing an exemption
5 rather than just the accommodation.

6 iii. The Rules Otherwise Comply with the ACA.

7 The Final Rules do not violate the ACA's nondiscrimination requirement, 42 U.S.C.
8 § 18116, or its prohibition on unreasonable barriers to healthcare, *id.* § 18114. *See* PI Mem. at
9 19-21. With respect to § 18116, the Rules do not discriminate on the basis of sex, facially or
10 otherwise. The Rules and HRSA Guidelines generally require coverage for female
11 contraceptives, while providing an exemption for those with religious and conscience objections.
12 But the Rules and Guidelines do not require any coverage of male contraceptives. *See* 78 Fed.
13 Reg. at 8,456, 8,458 n.3 (Feb. 6, 2013). Nor could they: the statutory provision requiring
14 coverage for additional preventive services supported by HRSA pertains only to such services
15 for "women." 42 U.S.C. § 300gg-13(a)(4). Thus, the Rules do not treat men more favorably,
16 and any sex-based distinctions flow from the statute requiring coverage of additional preventive
17 services for women only. Moreover, any distinctions in coverage among women are not
18 premised on sex, but on the existence of a religious or moral objection by an individual's
19 employer to facilitating contraceptive coverage.

20 No other factor reflects any invidious intent to discriminate on the basis of sex. Nor does
21 the Agencies' conclusion regarding the lack of a compelling interest in these circumstances
22 demonstrate an intention to discriminate against women: the Rules explain the non-
23 discriminatory reasons for the conclusion and address medical evidence in the course of doing
24 so, *see, e.g.*, 83 Fed. Reg. at 57,546-48, and the conclusion is not inconsistent with applicable
25 precedent, *Hobby Lobby*, 134 S. Ct. at 2766, 2780 (noting that the Tenth Circuit held that
26 enforcing the contraceptive mandate against objecting employers did not serve a compelling
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interest but “find[ing] it unnecessary to adjudicate this issue”). The final religious exemption rule accommodates religion by “expand[ing] exemptions to protect religious beliefs for certain entities and individuals with religious objections to contraception whose health plans are subject to a mandate of contraceptive coverage.” 83 Fed. Reg. at 57,540. The final moral exemption rule is designed to protect sincerely-held “moral convictions” by exempting those with such convictions from facilitating the provision of contraceptive services. *Id.* at 57,596. The government may permissibly accommodate deeply-held moral convictions and has furthered this important interest in a variety of contexts since the founding. *See Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965); *Doe v. Bolton*, 410 U.S. 179 (1973); 83 Fed. Reg. at 57,594 n.1. Indeed, Oregon, as well as some of the plaintiff states, protect moral beliefs in healthcare. *See, e.g.*, Or. Rev. Stat. Ann. § 435.435; Cal. Health & Safety Code § 123420; Md. Code Ann., Health – Gen. § 20-214.

With respect to § 18114, Oregon argues—also without legal authority—that the Rules create an unreasonable barrier to medical care. PI Mem. at 20-21. However, the Rules merely narrow the scope of the Mandate rather than impose affirmative barriers on access to contraception. *Cf. Harris v. McRae*, 448 U.S. 297, 316 (1980) (“[A]lthough government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation[, such as indigency].”). Worse, under Plaintiffs’ interpretation, § 18114 would mandate the provision of all “appropriate medical care,” rendering the ACA’s extensive discussion of Essential Health Benefits surplusage. *See generally* 42 U.S.C. §§ 18021, 18022.

iv. The Rules Are Not Arbitrary and Capricious.

Oregon contends the Rules are arbitrary and capricious because the Agencies did not provide adequate justification for their reversal in policy. *See* PI Mem. at 24-28. It alleges that the Agencies have not sufficiently justified “such a substantial shift” in policy, have not justified the scope of the Rules, have relied on “unfounded” information, and have ignored the structure

1 and legislative history of the Women’s Health Amendment. *Id.* But Oregon’s argument
2 overlooks the actual basis for the decision and substitutes Oregon’s judgment for that of the
3 Agencies. The Agencies recognized that the decision whether to expand the religious exemption
4 (and to create a moral exemption) required them to “balance the various policy interests at
5 stake,” 83 Fed. Reg. at 57,556, *i.e.*, interests in contraceptive coverage on the one hand, and
6 interests in freedom of religion and conscience on the other. They did just that, and decided as a
7 matter of policy to enact “rules [that] will provide tangible protections for religious liberty” and
8 conscience, thereby “impos[ing] fewer governmental burdens on various entities and individuals,
9 some of whom have contended for several years that denying them an exemption from the
10 [Mandate] imposes a substantial burden on their religious exercise.” *Id.*; *see also* 83 Fed. Reg. at
11 57,613 (moral exemption). In so doing, the Agencies reached a different balance than they had
12 previously. But neither that fact, nor Oregon’s contrary policy preference—nor anything else—
13 renders the decision arbitrary or capricious.

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15 “The scope of review under the ‘arbitrary and capricious’ standard is narrow,” *State*
16 *Farm*, 463 U.S. at 43, and while its requirements can change depending on the circumstances,
17 the Agencies satisfy that standard even as articulated in *FCC v. Fox Television Stations, Inc.*, 556
18 U.S. 502 (2009). The *Fox Television* articulation of the standard is itself not overly demanding;
19 it simply requires an agency to provide a “reasoned explanation” for treating differently “facts
20 and circumstances that underlay or were engendered by the prior policy.” *Id.* at 516. An agency
21 that changes policy need not demonstrate “that the reasons for the new policy are *better* than the
22 reasons for the old one,” but only that “the new policy is permissible under the statute, that there
23 are good reasons for it, and that the agency *believes* it to be better.” *Id.* at 515.

1 The Agencies did just that. The Final Rules contain voluminous explanations of the
2 Agencies' previous positions, their current positions, recognition that their positions changed,
3 discussions of both sides of the issue from public comments, and extensive reasoning why the
4 Agencies support their final conclusion. Over the course of four pages of the Federal Register,
5 83 Fed. Reg. at 57,552-56; *see also* 83 Fed. Reg. at 57,609-13 (moral rule), the Agencies discuss
6 the efficacy and health effects of contraceptive use as well as the effect, if any, the Mandate had
7 on contraceptive use. Thus, the Agencies did not ignore any prior findings or reliance interests.
8 *See* PI Mem. at 25-26. Rather, after reviewing a litany of competing comments and scientific
9 studies regarding the efficacy and health benefits of contraceptives, *see* 83 Fed. Reg. at 57,552-
10 55 nn.28-50, the Agencies concluded that an "examination of the record and review of the public
11 comments has reinforced the Departments' conclusion that significantly more uncertainty and
12 ambiguity exists on these issues than the Departments previously acknowledged when we
13 declined to extend the exemption to certain objecting organizations and individuals." *Id.* at
14 57,555. The Agencies' conclusion was not to eliminate the Mandate altogether, but to expand
15 the exemptions to a number of entities that are dwarfed by those who will still be subject to the
16 Mandate itself. This further demonstrates the Agencies did not ignore factors they had
17 considered in the past.

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20 The Agencies' view of the medical evidence is accorded deference because it falls within
21 HHS's expertise. *Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798-99 (9th
22 Cir. 2005). It cannot be deemed arbitrary and capricious given the highly deferential character of
23 that standard. Similarly, the Agencies addressed any reliance interests that may have arisen,
24 concluding, after reviewing applicable studies and comments, that "it is not clear that merely
25 expanding exemptions as done in these rules will have a significant effect on contraceptive use,"
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1 given that “there is conflicting evidence regarding whether the Mandate alone, as distinct from
2 birth control access more generally, has caused increased contraceptive use, reduced unintended
3 pregnancies, or eliminated workplace disparities, where all other women’s preventive services
4 were covered without cost sharing.” 83 Fed. Reg. at 57,556.

5 In short, the Agencies thoroughly and rationally explained their views on the efficacy and
6 health effects of contraceptives and any reliance interests engendered by the Mandate. In doing
7 so, they demonstrated why, in their judgment, the policy interests in favor of expanding the
8 exemptions outweigh the interests in leaving the contraceptive coverage mandate unchanged: the
9 evidence on the benefits of contraceptives and the Mandate is more mixed—and the religious
10 and conscientious objections to complying with the Mandate more substantial—than previously
11 acknowledged. Accordingly, the record before the Agencies justified a different balancing of
12 “the various policy interests at stake.” *Id.*

14 Oregon’s more specific objections fare no better. It contends that the Agencies provided
15 no justification for the scope of the Rules. *See* PI Mem. at 26. But this is simply untrue—the
16 Rules provide multiple pages of discussion regarding the scope of the Rules, comments that the
17 Agencies received regarding the scope of the Rules, and the Agencies’ response to those
18 comments. *See* 83 Fed. Reg. at 57,542-44. Oregon further points out that the Agencies are not
19 aware of particular publicly traded entities that have objected to providing contraceptive
20 coverage on the basis of religion. *See* PI Mem. at 26. But the Agencies discuss this objection
21 specifically: they note that “in a country as large as the U.S., comprised of a supermajority of
22 religious persons, some publicly traded entities might claim a religious character for their
23 company, or the majority shares (or voting shares) of some publicly traded companies might be
24 controlled by a small group of religiously devout persons so as to set forth such a religious
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1 character.” 83 Fed. Reg. at 57,562. For this reason, the Agencies determined that they should
2 equalize the availability of religious exemptions for for-profit entities that are not closely held.
3 *See id.* at 57,562-63. It is clear that Oregon’s real issue is that it disagrees with the Agencies’
4 conclusion, not that the Rules lack a rational justification in violation of the APA. Disagreement
5 is not an injury for which the APA can provide relief. Moreover, even if (contrary to fact) the
6 Agencies had not provided sufficient justification for extending the exemption to publicly traded
7 companies, that could be a basis only for enjoining the portion of the Religious Exemption Rule
8 that applies to such companies, not the Rules in their entirety.
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10 Second, Oregon claims that the Rules “rely on information about women’s health that is
11 ‘unfounded’” according to Plaintiffs’ declarants. But Oregon has not argued that the decision
12 runs counter to the conclusions of the record, simply that it runs counter to evidence provided by
13 Plaintiffs’ declarants. PI Mem. at 26. This is irrelevant. The Agencies’ decision is consistent
14 with the record evidence, as is evident from a review of the studies cited by the Agencies. 83
15 Fed. Reg. at 57,552-55 nn.28-50. The Agencies made clear they were not taking a “definitive
16 position” on “evidentiary issues” concerning contraception broadly—they were only considering
17 whether expanding the religious and moral exemptions is appropriate in light of numerous
18 competing public comments citing various studies on those issues. *Id.* at 57,556. Under the
19 APA, the Agencies’ decision should be reviewed on the basis of the administrative record. *See*
20 *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (“The task of the reviewing
21 court is to apply the appropriate APA standard of review to the agency decision based on the
22 record the agency presents to the reviewing court.”) (internal citation omitted). Although there
23 are “limited exceptions” that “operate to identify and plug holes in the administrative record,”
24 *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005), they do not apply here. *See id.*
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1 (extra-record admissions are necessary only (1) “to determine ‘whether the agency has
2 considered all relevant factors and has explained its decision, (2) if the agency has relied on
3 documents not in the record, (3) when supplementing the record is necessary to explain technical
4 terms or complex subject matter, or (4) when plaintiffs make a showing of agency bad faith.’”)
5 (internal citation and quotation marks omitted). Oregon’s use of the declarations submitted by
6 Plaintiffs goes far beyond that. Oregon relies on these declarations to attempt to show that the
7 Agencies erred in the exercise of their judgment about the efficacy and health benefits of
8 contraceptives and number of women affected. This is improper. As the Ninth Circuit has
9 explained, “[c]onsideration of the [extra-record] evidence to determine the correctness or
10 wisdom of the agency’s decision is not permitted, even if the court has also examined the
11 administrative record.” *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

13 Finally, Oregon claims that the Agencies’ extension of exemptions ignored the legislative
14 history of the Women’s Health Amendment and the conclusions of the Institute of Medicine
15 report. See PI Mem. at 26-27. For the reasons discussed below in section [next section], the
16 Agencies’ action does not violate the Women’s Health Amendment, § 300gg-13(a)(4). Oregon
17 apparently assumes that imposing anything less than a categorical, exemption-free contraceptive-
18 coverage requirement is irrational—yet Oregon does not argue that the exemption for churches is
19 improper and, indeed, several plaintiffs confer broad religious exemptions to their own state
20 contraceptive-coverage laws. See “State Laws and Policies: Insurance Coverage of
21 Contraceptives,” available at [https://www.guttmacher.org/state-policy/explore/insurance-](https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives)
22 [coverage-contraceptives](https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives) (stating that Oregon has a “limited” religious exemption). Oregon is not
23 irrational to provide such exemptions, and neither are the Agencies.
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VIII. The Balance of Equities and Public Interest Make Injunctive Relief Inappropriate.

Oregon argues that the balance of equities favors expanding the preliminary injunction to include Oregon, because doing so would “preserv[e] the status quo.” PI Opp. at 31. But the status quo in this case is a preliminary injunction that does not include Oregon. Where the federal government is a party, the balance of equities and public interest inquiries merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). As discussed, Oregon has not alleged sufficient harm to establish irreparable harm. On the other side of the ledger, the government suffers irreparable institutional injury whenever its laws are set aside by a court. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). Moreover, the government and the public at large have a substantial 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).

Even if Oregon’s supposition were correct, however, churches have long been able to claim an exemption from the Mandate—the Rules simply equalize the availability of the exemptions for others with similar sincerely held religious beliefs or moral convictions. “RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers . . . when it may treat both equally by offering both of them the same accommodation.” *Hobby Lobby*, 134 S. Ct. at 2786. The government, the public, and employers with burdened beliefs have a strong interest in having the Rules implemented.

CONCLUSION

For these reasons, the Court should deny Oregon’s motion for a preliminary injunction.

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