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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STATE OF CALIFORNIA, *et al.*

Plaintiffs,

STATE OF OREGON

Plaintiff-Intervenor,

v.

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

Defendants,

and

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

Defendant-Intervenors.

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

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Hearing Date: September 5, 2019
Time: 2 p.m.
Courtroom: Two, Fourth Floor
Judge: Hon. Haywood S. Gilliam, Jr.

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INTRODUCTION

For the reasons stated below, as well as the reasons explained in Federal Defendants' opening brief, Defs.' Mot. to Dismiss, or in The Alternative, Mot. for Summ. J. (Defs.' SJ Mem.), ECF No. 366, the Court should deny Plaintiffs' motion for summary judgment and grant Federal Defendants' motion to dismiss, or, in the alternative, for summary judgment.

ARGUMENT

I. The ACA Authorizes the Rules

Plaintiffs misinterpret the scope of the ACA's statutory mandate. *See* States' Opp. to Defs.' Mot. to Dismiss and Mots. for Summ. J., (Pls.' Opp.) at 8, ECF No. 385. The term "shall" imposes a mandatory obligation on covered plans to cover the identified preventive services, but it does not limit HRSA's (that is, HHS's) authority to decide both what preventive services must be covered and by what categories of regulated entities.[1] As previously explained, the ACA's delegation of authority to HRSA (a component of HHS) authorized the Rules. *See* 42 U.S.C. § 300gg-13(a)(4) (requiring that certain health plans and health insurance issuers cover "with respect to women" such "additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the [HRSA]")). Plaintiffs misconstrue Federal Defendants' position as "seek[ing] to expand th[e] narrow delegation of authority" of 42 U.S.C. § 300gg-13(a) "into the ability to exempt any and all employers from the statutory mandate." Pls.' Opp. at 8. But the Final Rules do no such thing—they exempt only those with sincerely held religious and moral beliefs from the mandate, the authority for which derives from § 300gg-13(a) and from RFRA. *See* Defs.' SJ Mem. at 13-28.

Plaintiffs' contrary interpretation of the ACA cannot possibly be correct, for, if it were, that would doom not only the Rules, but also the prior exemption for churches and their integrated

[1] In its recent ruling affirming the preliminary injunction from the Eastern District of Pennsylvania, the Third Circuit also noted that "[t]he term 'shall' denotes a requirement." *Pennsylvania v. President United States*, No. 17-3752, 2019 WL 3057657, at *13 (3d Cir. July 12, 2019), *as amended* (July 18, 2019). Federal Defendants do not disagree that "shall" denotes a requirement, but dispute the scope of that requirement along the lines described here and in their previous filings.

auxiliaries. Plaintiffs assert that the authority for the church exemption "does not emanate from the Women's Health Amendment" at all, *see* Pls.' Opp. at 13, but they provide no alternative basis for it. *See id*. They also attempt to dismiss the relevance of the church exemption by noting that it "imported a long-standing and narrowly tailored category of employers defined in the Internal Revenue Code." *Id*. But it is § 300gg-13(a) that authorizes the exemption for churches and their integrated auxiliaries, not the Internal Revenue Code. Indeed, the Internal Revenue Code provisions Plaintiffs cite, 26 U.S.C. § 6033(a)(1), (a)(3)(A)(i) & (iii), are wholly unrelated to the provision of contraceptive coverage. Although the Agencies borrowed the definition of a "religious employer" from § 6033 when exercising their authority under 42 U.S.C. § 300gg-13(a) to provide the exemption for churches and their integrated auxiliaries, nothing in § 6033 serves as an independent source of authority for the government to create the exemptions at issue here. Given the absence of any plausible contrary source of authority, it is clear that the authority for the church exemption and the Final Rules are the same.

The church exemption is thus fully relevant here because it illustrates the unreasonable breadth of Plaintiffs' statutory interpretation. Where an interpretation would produce an absurd result, or an "unreasonable one plainly at variance with the policy of the legislation as a whole," it should be rejected. *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (internal quotation omitted). Plaintiffs' interpretation—under which HRSA could determine only the content but not the scope of coverage—would sweep away the prior exemptions along with the ones challenged here. *See* Pls.' Opp. at 8-12. That would be a decidedly unreasonable outcome and the Court should construe the statute to avoid it.

Plaintiffs suggest that Defendants' position means that "Congress [acted] sub silentio," *see id*. at 8, but that ignores statutory text indicating the preventive-services requirement applies only "as provided for" and "supported by" HRSA's guidelines. *See* 42 U.S.C. § 300gg-13(a)(4). Similarly, unlike the other provisions of the statute, § 300gg-13(a)(4) refers to "comprehensive guidelines" that did not exist at the time of the ACA's enactment—the statute thus left to HHS's discretion what, and to what extent, those guidelines provide for and support particular coverage

by particular entities. Since their first rulemaking on this subject in 2011, the Agencies have consistently interpreted the broad delegation to HRSA in § 300gg-13(a)(4) to include the authority to reconcile the ACA's preventive-services requirement with sincerely held views of conscience on the sensitive subject of contraceptive coverage by exempting churches and their integrated auxiliaries from the contraceptive-coverage mandate. *See* 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). (Notably, the church exemption has varied through time, as the Agencies responded to evidence that such exemption did not actually resolve conscience objections and exercised their discretion to balance competing interests, as they have also done in these Rules.) Any contrary interpretation would require scrapping both the Final Rules and the church exemption.

Plaintiffs also suggest that Congress's inclusion of the exemption for grandfathered plans and for religious exemptions in other ACA mandates suggests that Congress disfavored other exemptions, Pls.' Opp. at 10, 38, but that is also incorrect. Plaintiffs' argument relies on the canon of *expressio unius est exclusio alterius*, *i.e.*, that the inclusion of certain exemptions to the ACA precludes the possibility that the Agencies could create the Rules. Pls.' Opp. at 38. But "[t]he force of any negative implication . . . depends on context," and that presumption can apply 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) (citations and quotation marks omitted). No such inference is sensible here, where the ACA's legislative history suggests that religious and moral objections to providing contraceptive coverage fall within the category of unresolved questions that Congress left to the Agencies. *See* 158 Cong. Rec. S485 (Feb. 9, 2012) (urging Congress to "wait until there is at least a rule we can talk about" before addressing "first amendment" concerns). As the D.C. Circuit has explained, this canon is "an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Waterkeeper Alliance v. EPA*, 853 F.3d 527, 534 (D.C. Cir. 2017) (quoting *Cheney R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990)). None of the *expressio unius* cases Plaintiffs cite arises from the regulatory context.

In *Hillman v. Maretta*, 569 U.S. 483 (2013), cited by Plaintiffs, the Supreme Court was interpreting a single paragraph containing an express exemption, and that context may have reasonably suggested that Congress did not intend other exemptions. Pls.' Opp. at 10 (quoting *Hillman*, 569 U.S. at 496). No such implication is warranted, however, with respect to the ACA's preventive-services provision, when Congress was well aware that it had delegated authority relating to the scope of the provision to HRSA, and when Congress had declined to require that contraceptive coverage be included in HRSA's guidelines at all. Indeed, the exemption for grandfathered plans is an umbrella provision of the ACA that is not tied to § 300gg-13(a)(4), and thus provides no insight into HRSA's discretion under that provision. Even more, the grandfathering clause's inclusion, without any exception to grandfathering for contraceptive coverage, indicates that cost-free contraceptive coverage was not to be guaranteed at all costs.

Plaintiffs also incorrectly seek support from a proposed, but not enacted, conscience amendment to the ACA. Pls.' Opp. at 12. But failed legislation is a nullity, and Congress's failure to adopt a proposal can be a "particularly dangerous ground on which to rest an interpretation" of a statute. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). And contrary to Plaintiffs' suggestion that accommodating religious and moral liberty is at odds with the intent of the ACA, Opp. at 11-12, the reality is that, "under the A[CA], longstanding Federal laws to protect conscience (such as the Church Amendment, 42 U.S.C. 300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8) remain intact," Executive Order 13535, March 24, 2010—a preservation of protections that is in keeping with our nation's highest ideals.

In short, the Agencies had authority to promulgate the Rules under the Women's Health Amendment. And at the very least, in light of this statutory and regulatory backdrop, the Agencies' exercise of authority to expand the exemption is a reasonable construction of the statute entitled to deference. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

II. RFRA Authorizes and Compels the Religious Exemption Rule[2]

Although Plaintiffs present a bevy of objections to Federal Defendants' RFRA arguments, they elide the central flaw in their argument—if it was acceptable for the Agencies to use their authority under RFRA to create the exception for churches and their integrated auxiliaries, and then again to create the accommodation process, why would the Agencies' use of that same authority to implement the Religious Exemption Rule be any different?

As Federal Defendants have previously explained, Defs.' SJ Mem. at 21-32, the Religious Exemption Rule comprises the Agencies' solution to alleviate the substantial burden placed on some employers even after the accommodation (as RFRA requires) and to alleviate the substantial burden identified by the Supreme Court in *Hobby Lobby* (as RFRA permits, given that RFRA does not require that the Agencies take any particular response to remove a substantial burden). Plaintiffs continue to maintain that Congress enacted RFRA's mandate yet left the government with no power to actually comply with RFRA once it was aware of substantial burdens on religious exercise, but that position is facially untenable.[3]

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[2] Plaintiffs rely on evidence outside the administrative record to support their claims. This is improper for the reasons discussed in Federal Defendants' brief on the appropriate scope of the record. ECF No. 279. Moreover, the declarations submitted by Plaintiffs should also be rejected to the extent they (1) speculate about whether entities should find contraceptive coverage religiously or morally objectionable, Decl. of Phyllis C. Borzi, ECF No. 385-3, ¶ 22 (concluding that the "accommodation separates the objecting employer from the provision of contraceptive coverage"), or (2) opine on the wisdom of the Agencies' policy judgment, Decl. of Rev. Susan Russell, ECF No. 385-74, ¶ 6 ("For these reasons, the Clergy Advocacy Board condemns the Trump administration's attempts to use morality and religion to undermine access to contraception."). These are not appropriate topics for declarations. *See, e.g.*, *Soremekun v. Thrifty Payless, Inc*., 509 F.3d 978, 984 (9th Cir. 2007) ("Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment."); Wright & Miller, 10B Fed. Prac. & Proc. Civ. § 2738 (4th ed.) ("Thus, ultimate or conclusory facts and conclusions of law, as well as statements made on belief or on information and belief, cannot be utilized on a summary-judgment motion.") (quotation marks and footnotes omitted).

[3] The Third Circuit's recent decision states: "[N]either of the statutes upon which the Agencies rely, the ACA and RFRA, authorize or require the Final Rules." *Pennsylvania v. President United States*, No. 17-3752, 2019 WL 3057657, at *13. But the opinion is devoid of any

A. RFRA Authorizes the Government to Affirmatively Avoid Substantially Burdening Religious Exercise, Which Includes the Authority to Grant Exemptions

As Federal Defendants have previously explained, Defs.' SJ Mem. at 28-32, RFRA authorizes the government to act to eliminate substantial burdens on the exercise of religion unless the burden is the least restrictive means of furthering a compelling government interest. RFRA's text is clear: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." 42 U.S.C. § 2000bb-1(a); *cf.* Pls.' Opp. at 15 ("RFRA provides that the federal government cannot substantially burden a person's exercise of religion."). The most natural interpretation of this provision is that—as Congress said—the government shall not impose such unwarranted burdens on religious practice. Plaintiffs' contrary interpretation, Pls.' Opp. at 30-34, would re-write RFRA to mean something like: "Government shall not substantially burden a person's exercise of religion *once a court has told the government, with regard to that precise person, to stop*."

The actual RFRA statute also provides for judicial relief: "A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). This provision makes clear that judicial relief is an option once the government has already "violat[ed]" RFRA, and that governmental *compliance* with RFRA will avoid such undue substantial burdens on religious exercise and thus will not require the involvement of the courts. It is perfectly logical to conclude that Congress gave agencies the authority to cure their own imposition of substantial burdens in the first instance, while also providing for judicial review as a means of further ensuring the protection of religious liberty, especially since Congress provided that "[n]othing in this chapter [RFRA] shall be construed to authorize any government

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explanation for its conclusion that RFRA does not *authorize* the Religious Exemption Rule, so it does not constitute persuasive authority on that point. As discussed in this brief and Federal Defendants' opening brief, RFRA does, in fact, authorize the Religious Exemption Rule. Moreover, for the reasons stated in Federal Defendants' prior briefing, RFRA also requires the Religious Exemption Rule.

to burden any religious belief," 42 U.S.C. § 2000bb-3(c). Contrary to Plaintiffs' implication, Pls.' Opp. at 31, judicial review and agency-created exemptions can live side by side.

As Federal Defendants have previously noted, their interpretation is also the most logical one. The Agencies should not need to "await a lawsuit before they bring their actions into compliance with the law." Defs.' SJ Mem. at 28-29. Plaintiffs characterize this as a "red herring," Pls.' Opp. at 32, but continue to maintain that the Agencies' hands are tied until a court has ordered them to comply with the law. *See id.* at 32 ("[T]he plain language of RFRA requires a determination as to whether a government action constitutes a 'substantial burden,' which, as explained, is a legal determination for the courts."). Plaintiffs' only reasoning in support of this position appears to be their theory that *only* a court is capable of determining when a substantial burden on religious exercise exists. *Id.* But not only would it be "cumbersome" to wait on myriad lawsuits (and potentially expensive given the attorney's fees provision applicable to RFRA, *see* 42 U.S.C. § 1988(b)), *id.*, it would also be unlawful for the Agencies to continuously and knowingly violate RFRA.[4]

Plaintiffs tilt against a straw man, arguing that RFRA could not have given agencies "unlimited authority and unchecked 'leeway.'" Pls.' Opp. at 30-31. Yet Federal Defendants have never claimed unlimited and unchecked power. Federal Defendants already noted that the Agencies are not "authorized to create any exemptions they want"—instead, arbitrary and capricious review will still apply. Defs.' SJ Mem. at 31-32. Plaintiffs also suggest that the Religious Exemption Rule violates the ACA and the Establishment Clause, Pls.' Opp. at 35-38, but for the reasons explained below, that is not the case.

Plaintiffs argue that the Agencies seek the power to "choose religious winners and losers," *id*. at 34, but it is RFRA that requires the Agencies to alleviate undue substantial burdens, regardless of the specific religious beliefs at issue. To the extent, of course, that others were to

[4] Plaintiffs' citation to a case about limitations on the judicial power to rewrite statutes is inapposite to the question of what authority Congress granted the executive agencies through RFRA. *See* Pls.' Opp. at 32 (citing *Puerto Rico v. Franklin California TaxFreeTrust*, 136 S. Ct. 1938, 1949 (2016)).

believe that their religious beliefs were unduly burdened, judicial review as outlined in RFRA would be available.

Finally, Plaintiffs' argument that permitting the Agencies to affirmatively comply with RFRA's strictures would violate the nondelegation doctrine, Pls.' Opp. at 32-34, is meritless. As Plaintiffs acknowledge, Congress may delegate its law-making authority to another branch of government so long as it provides "an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr. Co. v. United States*, 276 U.S. 394, 409 (1928). To provide a constitutionally permissible "intelligible principle," Congress need only "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989). Here, of course, Congress has provided just such a principle—the government may not substantially burden religious exercise unless doing so is the least restrictive means of achieving a compelling government interest. This is more than sufficient to meet the nondelegation doctrine's requirements, which are low, as demonstrated by the eight decades that have elapsed since the Supreme Court last struck down a federal statute on nondelegation grounds. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001). Indeed, none of Plaintiffs' purported examples indicates such unchecked leeway. *See, e.g.*, Pls.' Opp. at 33 (complaining that the Agencies "can determine whether a federal statute imposes a 'substantial burden'" under RFRA); *id.* (complaining that the Agencies need not notify third parties when they identify a substantial burden under RFRA).

Most tellingly, Plaintiffs offer no rebuttal to Federal Defendants' argument that the accommodation itself would be improper if RFRA did not authorize agencies to create exemptions absent specific judicial order. Defs.' SJ Mem. at 29. Indeed, Plaintiffs' suggestion that agencies should continue to burden religious exercise until a court forces them to stop would have foreclosed the possibility of the accommodation ever existing—the Agencies would not have been able to proactively create the accommodation prior to lawsuits, and after a RFRA lawsuit, the Agencies may have been forced to provide objecting employers with a total exemption instead.

Perhaps recognizing these flaws, Plaintiffs at times acknowledge that RFRA affirmatively authorizes agencies to create exemptions. *See, e.g.*, Pls.' Opp. at 30 ("To the extent RFRA grants agencies some authority, that authority must be cabined to only those situations where authorized to do so by RFRA, namely where there is a 'substantial burden.'"); *id*. at 35 ("To the extent that RFRA grants agencies some authority, that authority may only be invoked where required under the 'substantial burden' framework . . . ."); *see generally id.* at 35-38. But the Religious Exemption Rule would meet Plaintiffs' purported limitations on the Agencies' RFRA authority, as absent the Religious Exemption Rule, the contraceptive mandate would impose a substantial burden on the religious exercise of some entities.

B. Entities are Substantially Burdened in the Absence of the Religious Exemption Rule

Plaintiffs argue that the accommodation process avoids substantial burdens, and thus removes the necessity for the Agencies to act further under RFRA. Pls.' Opp. at 15-23. As Federal Defendants previously explained, the Religious Exemption Rule is necessary to alleviate the substantial burden on employers with "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 Holdings, Inc. v. U.S. Dep't of Health & Human Servs*., 801 F.3d 927, 942 (8th Cir. 2015); *see also* 82 Fed. Reg. 47,792, 47,798, 47,800 (Oct. 13, 2017); Defs.' SJ Mem. at 22-25. Plaintiffs offer a variety of responses to this argument, none of which is convincing.

First, Plaintiffs reiterate their argument that the Agencies should be powerless to cure RFRA violations until a court has recognized the precise substantial burden that the Agencies seek to cure. Pls.' Opp. at 16-19. This argument fails for the reasons previously stated—RFRA instructs the Agencies to act affirmatively to remove substantial burdens, rather than to delay and drive each objecting entity to file its own lawsuit.

Plaintiffs further challenge the substantiality analysis, but it is not Federal Defendants' contention that "courts must completely defer to litigants on the substantial burden question," Pls.' Opp. at 17, or that agencies must do so. The Supreme Court has already addressed in *Hobby Lobby* the burden imposed by the significant financial penalties that objecting entities face if they do not comply with the mandate, and the Court had "little trouble" concluding that the mandate imposed a substantial burden. *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 719 (2014); *see also Priests for Life v. U.S. Dep't of Health & Human Servs*., 808 F.3d 1, 16 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc in case challenging the accommodation). That conclusion dictates the conclusion here that, if the accommodation burdens religious practice, that burden is substantial because the same penalties would potentially apply. Plaintiffs' arguments that RFRA does not apply to "every conceivable burden—no matter how slight" and that agencies should not simply defer to objectors about the substantiality of their objections are thus misplaced. Pls.' Opp. at 18.

Plaintiffs continue to misunderstand the significance of the financial penalties, arguing that because the accommodation exists, the financial penalties do not impose a substantial burden. *Id*. at 19-20. The question of substantiality of the burden turns on the severity of the pressure the government's action imposes on an objector to violate his religious beliefs—here, the penalties that apply if an objector refuses to use the accommodation because doing so would violate the objector's religious beliefs. Plaintiffs attempt to import *Hobby Lobby*'s discussion of least restrictive means, *id*. at 19 (citing *Hobby Lobby*, 573 U.S. at 731), but that is a separate analysis from substantial burden, and in any event, the *Hobby Lobby* plaintiffs did not object to complying with the accommodation. 573 U.S. at 731. Other employers, however, do have sincere religious objections to complying with the accommodation, and they face the same serious monetary policies that the Supreme Court held to impose a substantial burden in *Hobby Lobby*.

Finally, Plaintiffs make explicit their attempts to "tell the [objectors] that their beliefs are flawed," *id*. at 724, by arguing that the accommodation cannot burden anyone because the insurer provides separate payments for contraceptives. Pls.' Opp. at 20-23. But this is not the correct

RFRA analysis. No one has seriously contested the sincerity of the objectors' opposition to the accommodation, and no one can dispute the serious monetary penalties that apply to objectors who refuse to comply with the accommodation. Plaintiffs' lengthy explanation of the role played by insurers and third-party administrators does not address the burden placed on those employers that object to triggering, by their certification, the provision of contraceptives through the plan they sponsor. *See* 82 Fed. Reg. at 47,798.

In any event, the Religious Exemption Rule is the Agencies' response to two separate substantial burdens. First, it is a required response to the substantial burden of mandating that objectors who have a sincere religious belief that self-certifying through the accommodation process violates their religious beliefs. Second, it is a permissible response to the precise substantial burden already identified by the Supreme Court in *Hobby Lobby*—the substantial monetary penalties that accompany failure to comply with the mandate. Defs.' SJ Mem. at 22. As Federal Defendants previously noted, Defs.' SJ Mem. at 29-31, RFRA does not prescribe the precise remedy by which the government must eliminate a substantial burden, once one has been identified. To conclude otherwise would trap the Agencies in protracted litigation until they landed on the precise, single accommodation that would be *least* protective of the objector's religious exercise while still surviving a RFRA lawsuit brought by the objector. RFRA did not require the Agencies to select the accommodation—with all of its idiosyncratic features—as the one correct response to the substantial burden identified in *Hobby Lobby*. Instead, the Agencies could have simply offered a straightforward exemption to the objectors, as the Religious Exemption Rule does, and nothing prevents the Agencies from doing the same now.

C. Forcing the Objectors Covered by the Religious Exemption Rule to Provide Contraceptive Coverage is Not the Least Restrictive Means of Furthering a Compelling Government Interest

Plaintiffs begin their compelling interest argument, Pls.' Opp. at 23-27, from the wrong starting place, arguing that, in general "maintaining women's seamless access to contraceptives is a compelling government interest." Pls.' Opp. at 23. The right question is whether a compelling

government interest exists in requiring the *small percentage of employers with sincere religious objections to the mandate or accommodation* to violate their religious beliefs. Defs.' SJ Mem. at 25-27. As the Agencies reasonably concluded, there is not. The mandate itself is already replete with exceptions. These exceptions include the exemption for churches and their integrated auxiliaries, the grandfathered plan exception, and the accommodation when used by a self-insured church plan, all of which may result in women not receiving the benefit of subsidized contraceptives. Indeed, prior to the Religious Exemption Rule, the mandate did not appear to result in an increase in the use of most effective or moderately effective methods of contraception (except for a small increase in implant use), and thus the size of the benefit from the contraceptive coverage mandate is questionable. *Id.* at 26. Plaintiffs appear to acknowledge that the magnitude of any governmental interest in the contraceptive mandate must take into account the availability of contraceptive coverage through relatives' plans and the availability of contraceptives themselves from other programs, and thus the only interest at stake here is in how convenient obtaining those contraceptives would be. Pls.' Opp. at 25. Plaintiffs nevertheless contend that requiring objecting employers to subsidize contraceptives cures gender discrimination, *id.* at 25, but this suffers from the same flaws as their other arguments—including that any such effect is limited by the numerous other exceptions to such a requirement on employers.

Although Plaintiffs present reasons why "seamless" contraceptive coverage might be helpful, Pls.' Opp. at 25-26, they present no evidence that the Agencies ignored these reasons when they concluded that seamlessness was not a compelling interest based on the substantial disunity already present in the mandate. Defs.' SJ Mem. at 26 (citing 83 Fed. Reg. 57536, 57,548 (Nov.15, 2018)).

Plaintiffs attempt to distinguish between the numerous prior exemptions and the Religious Exemption Rule by arguing that the exemption for churches and their integrated auxiliaries was "narrowly drawn." Pls.' Opp. at 26. But the Religious Exemption Rule, too, is "narrowly drawn," as it applies only to entities that have sincere religious objections to the mandate.

Finally, Plaintiffs do not dispute at all the Agencies' conclusion that the administrative record does not contain adequate evidence to meet the high standard of demonstrating a compelling interest. Defs.' SJ Mem. at 26 (citing 83 Fed. Reg. at 57,547).

D. Alleged Third Party Harm Is Not a Reason to Neglect RFRA's Requirements

Plaintiffs also return to their argument that RFRA contains a separate requirement barring effects on third parties. Pls.' Opp. at 27-29. Not so. RFRA's text includes no such requirement. Plaintiffs do not address the fact that nearly all exemptions will affect third parties, and that Plaintiffs' argument would likewise doom the existing exemption for churches and their integrated auxiliaries (and the accommodation when used by self-insured church plans) because both of these existing exemptions can result in women not receiving the benefit of contraceptive coverage. Plaintiffs cite the language of *Hobby Lobby*, *id*. at 27 (citing *Hobby Lobby*, 573 U.S. at 730 n.37), but, as Federal Defendants have already explained, Defs.' SJ Mem. at 28 n.12, this language is referring to the Establishment Clause analysis as explained in *Cutter v. Wilkinson*, not any requirement of RFRA. And the Religious Exemption Rule does not violate the Establishment Clause, as described below.

III. The Agencies Engaged in Reasoned Decision-Making

A. The Agencies Reasonably Balanced Objections of Conscience Against the Net Benefits of Contraceptives and the Mandate

Plaintiffs continue to insist that the Rules are arbitrary and capricious for failing to adequately explain and support the Agencies' position on the "safety, efficacy, and benefits" of contraception. Pls.' Opp. at 44. This argument could find its genesis only in a studied indifference to the preamble to the Rules, bringing to mind the Seventh Circuit's admonition that while "[t]he ostrich is a noble animal," it is "not a proper model" for the law. *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011).

To start, Plaintiffs boldly proclaim that Federal Defendants "dismiss the safety, efficacy, and benefits of contraception." Pls.' Opp. at 44. Unfortunately for Plaintiffs, the boldness of this proclamation outstrips its accuracy. The Rules do not "dismiss the safety, efficacy, and benefits

of contraception." *Id.* Instead, they conclude that while contraceptives—and contraceptive coverage—provide some benefits, the net benefits are less certain than previously acknowledged and do not justify demanding that those with sincere conscience objections be required to provide contraceptive coverage. 83 Fed. Reg. at 57,556. In other words, the Rules are focused on establishing, as a policy matter, the proper *balance* between conscience objections and the contraceptive coverage requirement. *Id.* They are not the unscientific mandate on contraceptives that Plaintiffs imagine them to be.

Importantly, the Agencies' decision about the proper balance between contraceptive coverage and conscience objections is just one ground for the conclusion that applying the contraceptive coverage mandate to objecting employers is not the least restrictive means of furthering a compelling governmental interest as applied to those objectors. *See, e.g., id*. at 57,556. The Agencies clearly explained the multiple, independent reasons for this conclusion, *see, e.g.*, *id.* at 57,547-48, including that there can be no compelling interest in the provision of contraceptive coverage given that "the ACA does not apply the Mandate, or any part of the preventive services coverage requirements, to grandfathered plans," *id.* at 57,547.

Nevertheless, Plaintiffs focus their arguments on the Agencies' balancing rationale, and its component parts. For example, Plaintiffs contend that "Defendants' assertion that it is unclear whether the mandate has increased contraceptive use . . . is likewise unsupported by the record." Pls.' Opp. at 44 (citation omitted). In doing so, however, they make several fundamental errors.

First, they fail to heed the Ninth Circuit's admonition that "[a] court generally must be at its most deferential when reviewing scientific judgments and technical analyses within the agency's expertise"—such as the analyses conducted by the Agencies here, 83 Fed. Reg. at 57,552–555 nn. 28-50 (citing literature on the effects of contraceptives)—and that it "may not impose [itself] as a panel of scientists that instructs the [agency] . . ., chooses among scientific studies . . . , and orders the agency to explain every possible scientific uncertainty." *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1124 (9th Cir. 2012) (quotation marks omitted). Instead, Plaintiffs attempt to substitute their views of scientific and technical data for the Agencies'

views. To defend their approach, they argue that no deference is owed because the Agencies failed to "give a reasoned explanation for [their] actions." Pls.' Opp. at 45. But this is false: There's nothing unreasonable about the conclusion that while contraceptives—and contraceptive coverage—provide some benefits, the net benefits are less certain than previously acknowledged and do not justify demanding that those with sincere conscience objections be required to provide contraceptive coverage. 83 Fed. Reg. at 57,556.

Plaintiffs also contend that no deference is due because "[t]he record does not demonstrate that Defendants actually applied any scientific or technical expertise" because they "do not take a position on the variety of empirical questions discussed above." Pls.' Opp. at 46 (internal quotations omitted). This argument too comes up short of the mark. That the Agencies did not reach ultimate conclusions about certain empirical questions does not mean that they did not exercise expertise in identifying the questions and recognizing that contraceptives have effects that were not fully acknowledged in previous rulemaking. An analogy is instructive: A lawyer uses her legal expertise when identifying the legal issues presented by a transaction, even if she does not determine which side would have the better of the legal arguments, if ultimately litigated. Here, the Agencies exercised their expertise, as demonstrated by, for example, their canvassing of the literature on the medical effects of contraceptives. 83 Fed. Reg. at 57,552–55 nn. 28-50.

Second, Plaintiffs' arguments related to Federal Defendants' previous administrative positions fail to recognize that changed factual circumstances are not a prerequisite to policy change. *See* Pls.' Opp. at 44-45. In *Organized Village of Kake v. U.S. Department of Agriculture*—a case never addressed in Plaintiffs' brief, notwithstanding Federal Defendants' discussion of it in their opening brief, Defs.' SJ Mem. at 34—the Ninth Circuit concluded that an agency was entitled to "give more weight to socioeconomic concerns than it [previously] had [two years earlier], even on precisely the same record." 795 F.3d 956, 968 (9th Cir. 2015) (en banc). Just so here. The record before the Agencies justified a different balancing of "the various policy interests at stake." 83 Fed. Reg. at 57,556.

Plaintiffs, citing *California v. Azar*, 911 F.3d 558, 577 (9th Cir. 2018), *cert denied*, 2019 WL 1207008 (2019), contend that the Ninth Circuit has already concluded that the Rules were flawed for failing to explain what factual change drove the Agencies to conclude that "it is unclear whether the mandate has increased contraceptive use," Pls.' Opp. at 44. But the Ninth Circuit did no such thing. Rather, it addressed whether the Agencies had adequately justified the need to act initially through interim final rules. *California*, 911 F.3d at 577. Moreover, under Plaintiffs' interpretation, *California v. Azar* would require a change in factual circumstances as a prerequisite to a policy change, and thus would be inconsistent with *Village of Kake*, an en banc decision. Given that a panel opinion cannot overrule an en banc decision (absent special circumstances not present here), Plaintiffs' interpretation should be rejected for that reason as well. *See Rotec Indus., Inc. v. Mitsubishi Corp.*, 348 F.3d 1116, 1122 n.3 (9th Cir. 2003) ("A three-judge panel generally has no power to overrule a decision of this court.").

Finally, Plaintiffs erroneously contend that the Rules are arbitrary and capricious because "Defendants' assertion that it is not clear that the Exemption Rules will have a significant effect . . . conflicts with their own determination that over 100,000 women will be impacted and their prior determination that the coverage requirement is necessary to address healthcare inequities." Pls.' Opp. at 45 (citation omitted). They insist, in other words, that the Agencies have made conflicting factual findings. *Id.*

This argument is flawed. Whether the Rules will have a "significant effect" is a policy determination, not a factual finding: Significance cannot conclusively be proven or disproven—it is a policy judgment. And as the Agencies have not made conflicting factual findings, Plaintiffs' argument fails at its premise. In any case, the Agencies' judgment is legally sound. Courts review policy determinations under the APA's deferential arbitrary and capricious standard, *see White Mem'l Med. Ctr. v. Thompson,* 11 F. App'x 764, 766 (9th Cir. 2001), and there is nothing arbitrary or capricious about the Agencies' decision. The Rules state that "it is not clear that merely expanding exemptions [to contraceptive *coverage* requirements] as done in these rules will have a significant effect on contraceptive *use*." 83 Fed. Reg. at 57,556 (emphasis added). The italicized

words in the previous quotation are important: The supposed conflict identified by Plaintiffs depends not only on ignoring the difference between factual findings and policy conclusions, but on ignoring that the "significant effect" language in the rule is addressed to contraceptive use, not coverage. The Rules explain why "it is not clear" that there will be a significant effect on contraceptive "use": "there is conflicting evidence regarding whether the mandate alone, as distinct from birth control access more generally, has caused increased contraceptive use, reduced unintended pregnancies, or eliminated workplace disparities, where all other women's preventive services were covered without cost sharing." *Id.* In other words, even if 100,000 women see a change in their contraceptive coverage, it is not clear that the difference in the number of women using contraceptives will be significant, for the reasons identified in the previous sentence. This is a rational conclusion.[5]

B. The Agencies Appropriately Accounted for the Potential Costs of the Rules

Plaintiffs argue that the Rules are "arbitrary and capricious because Defendants failed to "consider all the relevant factors when considering the cost of the rules." Pls.' Opp. at 46. In support of this argument, Plaintiffs make three basic points: 1) the Agencies did not calculate the exact costs of the Rules and determine who would bear these costs; 2) the Agencies "failed to take any reasonable steps to determine the Rules' many impacts;" and 3) the Agencies unreasonably rejected an alternative. *Id.* at 46-47. None of these arguments has merit.

Plaintiffs' untenable view of the specificity with which agencies must predict the costs of a rule and who will bear them conflicts with blackletter administrative law, which requires only rationality, not omniscience. *CHW W. Bay v. Thompson*, 246 F.3d 1218, 1223 (9th Cir. 2001) (explaining that "arbitrary and capricious review under the APA focuses on the reasonableness of an agency's decision-making processes") (quotation marks omitted); *cf. O'Bryant v. Idaho Dep't*

[5] It is also worth noting that, in making estimates of the number of women who might see a change in their contraceptive coverage, the Agencies leaned in favor of more "broadly estimat[ing] the possible effects of these rules." 83 Fed. Reg. at 57,578. Moreover, "the number of women covered by entities likely to make use of the expanded exemptions in these rules is likely to be very small in comparison to the overall number of women receiving contraceptive coverage as a result of the Mandate," *id.* at 57,575, *i.e.*, a number far less than 1%, *id.* at 57,578.

of Health & Welfare, 841 F. Supp. 991, 998 (D. Idaho 1993) (concluding that "nothing in the APA requires the Secretary to engage in the virtually impossible task of listing every type of benefit which is not excluded from income") (quotation marks omitted). If adopted, Plaintiffs' position would make it impossible for any rule to be issued, because no agency has a crystal ball.

Plaintiffs' argument that the Agencies did not "take any reasonable steps to determine the Rules' many impacts," Pls.' Opp. at 46-47, fares no better. Specifically, Plaintiffs complain that the Agencies did not "survey regulated entities to estimate the possible impact of the Rules." *Id.* at 47. To the contrary, the Agencies did take "reasonable steps" to determine the Rules' impacts. Most notably, the Agencies solicited, accepted, and considered comments on the Rules. Contrary to Plaintiffs' suggestion, courts cannot impose procedural requirements—such as Plaintiffs' proposed "survey" requirement—above and beyond those required by the APA. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 545-48 (1978). Under the APA, the question is not whether Plaintiffs can envision additional procedural requirements that they would like the Agencies to follow, *see id.,* but whether the record compiled by the Agencies using the procedures established by the APA supports their decision. Here, the record adequately supports the Rules.

Finally, Plaintiffs' argument about the alternative not accepted by the Agencies—namely, "that women discuss their healthcare needs, including any purported uncertainty or risks related to contraceptives, with their personal physician," Pls.' Opp. at 47 (quotation marks and citations omitted)—is a nonstarter. (This argument has no apparent relationship to the consideration of costs, but Plaintiffs raise it in that section, and Federal Defendants will respond to it accordingly.) Federal Defendants explained in their opening brief that this alternative is, in fact, no real alternative because it would not "satisfy or mitigate the conscience objections to providing contraceptive coverage." Defs.' SJ Mem. at 38. Plaintiffs now reply that "[t]his response confirms that the Exemption Rules were not promulgated in response to any purported uncertainty about contraceptives, but were issued as a desire to end 'years of litigation.'" Pls. Opp. at 47. This is either a non sequitur or a revealing slip: Do Plaintiffs think that conscience objections exist only

as abstract notions bandied about in litigation? They do not have such a limited place in the world. They are real, and their existence means that the proposed alternative is no alternative at all.

C. The Rules Accord with Congressional Intent

Plaintiffs' arguments that the Rules diverge from congressional intent has two parts; they are equally meritless. The first part is a rehash of their argument that the ACA does not authorize the Rules. There is no need to restate the problems with that argument here. The second part is an argument that the Agencies have "act[ed] arbitrarily and capriciously [by] . . . ignor[ing] [their] own experts' advice." Pls.' Opp. at 48. The Agencies did not reject their "own experts' advice." Rather, the Agencies reached a different decision on certain issues, including medical issues, than some commenters that had advised them in the past. But, under Ninth Circuit precedent, the Court should defer to the Agencies' view of scientific and technical questions, not the view of Plaintiffs or of commenters whom they favor. *See Tri-Valley CAREs*, 671 F.3d at 1124. Moreover, in the decisions cited by Plaintiffs, the courts did not conclude that an agency acts arbitrarily and capriciously by ignoring its own experts' advice, rather, they concluded that the administrative record lacked evidence to support the agencies' decisions. *See Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1037-38 (9th Cir. 2001); *see also Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 969 (9th Cir. 2002). Here, however, the record supports the Agencies' decisions, as explained in the opening brief and this brief.

D. The Rules Are Properly Tailored

Plaintiffs complain that the Rules are not "narrowly tailored to the problems they are intended to address." Pls.' Opp. at 48. The problems with this argument, and the points made in support of it, are legion.

First, there is no "narrow[ ]" tailoring requirement under the APA—arbitrary and capricious review is not strict scrutiny. *See Assoc. Dog Clubs of N.Y. State, Inc. v. Vilsack*, 75 F. Supp. 3d 83, 92 (D.D.C. 2014) ("The APA does not, in any event, require agencies to tailor their regulations as narrowly as possible to the specific concerns that generated them."). Indeed, introduction of the "narrow" tailoring argument is new to this brief, as Plaintiffs' opening brief

argues that there is a "serious lack of alignment" between the Rules and the problems they are aimed at. Pls.' Opp. at 45. That argument fares no better. Defs.' SJ Mem. at 40-42.

Second, in response to Federal Defendants' assertion that the Rules are adequately tailored to address "how best to balance conscience objections with the provision of contraceptive coverage," Defs.' SJ Mem. at 41, Plaintiffs again oddly interpret this interest simply as "a 'desire to avoid litigation'" and intone that it is not a "rational basis for rulemaking," Pls.' Opp. at 48. But a desire to bring to an end years of litigation was only one of the reasons that prompted the Agencies to reexamine the scope of exemptions for religious objectors to the contraceptive mandate. Among others was the interest in respecting objections of conscience, which is not the same as a desire to avoid litigation. Indeed, the Ninth Circuit has stated, for example, that "we of course acknowledge that eliminating RFRA violations by reducing the burden on religious beliefs is an important consideration for the agencies. Any delay in rectifying violations of statutory rights has the potential to do real harm." *California*, 911 F.3d at 577.

Third, Plaintiffs continue to argue that "there is no evidence justifying the broad scope of the Religious or Moral Exemption Rules because there is no evidence that certain employers need the Rules." Pls.' Opp. at 49. More specifically, Plaintiffs complain about the extension of the Religious Exemption Rule to publicly traded companies and the application of the Moral Exemption Rule to any entity. In re-raising this argument, Plaintiffs fail to grapple with the fundamental flaws in the argument highlighted in the Federal Defendants' last brief. Defs.' SJ Mem. at 41-42. If the Rules create exemptions for entities that will never use them, then Plaintiffs have no standing to challenge that aspect of the exemptions because they do not face any imminent harm. If, on the other hand, the exemptions are invoked, then Plaintiffs' argument that the exemptions are unnecessary is wrong. Plaintiffs cite cases in which courts concluded, more or less, that rules were arbitrary and capricious because they were unnecessary. Pls.' Opp. at 49. But, in those cases, unlike this one, the plaintiffs were hurt by the unnecessary rules.[6]

[6] Plaintiffs argue that the alleged harm caused by the Rules "is compounded by the fact that under the Rules, employers need not give *any* notice to the government or their employees so

E. The Agencies Adequately Responded to Comments Regarding the Potential Burdens on Women

Plaintiffs assert that "Defendants once again summarily dismiss significant comments addressing the negative health impacts and financial burdens of the Rules." Pls.' Opp. at 50. This argument lacks merit. The Rules do not summarily discount the comments regarding the potential burdens on women referenced by Plaintiffs. To the contrary, the Rules spend more than a page responding to these comments. 83 Fed. Reg. at 57,548-57,550. Plaintiffs rely heavily on *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 15 (D.C. Cir. 2015), asserting that Defendants' "wan responses to [the] comments" do not fulfill their "obligations under the APA to respond to 'relevant and significant comments,'" *id.* (quotation marks omitted). *Id.* at 15-16. But the Court in that case concluded that the agency did not engage with the main point of the comments. *Id.* at 15-16. That is not the case here. The comments at issue here suggested that the Rules would cause certain negative effects, and the Agencies responded that the Rules relieve a burden on conscience previously imposed by the government and that any potential negative effects would be the product of private action. 83 Fed. Reg. at 57,549-550. Plaintiffs may not like the response, but that does not transform it into a "summar[y] dismiss[al]" of the comments, or otherwise render it inadequate.

IV. The Rules Do Not Violate § 1554 or § 1557 of the ACA

A. The Rules Do Not Create an Unreasonable Barrier to Obtaining Health Care

Section 1554 prohibits regulations that "*create* any *unreasonable* barriers to the ability of individuals to obtain appropriate health care." 42 U.S.C. § 18114(1) (emphasis added). Contrary to Plaintiffs' strained reading of the statute, Pls.' Opp. at 41, "creating" something requires an

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neither the public nor the government will ever know the extent to which employers are utilizing the Rules, depriving women of their healthcare benefits." Pls.' Opp. at 50 n.24. This statement is misleading. While an objecting employer need not provide notice to its employees that it is invoking one of the exemptions, under ERISA, employers must inform employees of changes to their plans, including changes to contraceptive coverage. *See* 29 U.S.C. § 1022(a), (b); 29 C.F.R. § 2520.104b-3.

affirmative act. The Supreme Court has recognized this common-sense distinction by differentiating between actions that affirmatively impede the public's ability to engage in an activity, and decisions to decline to subsidize that activity. *Rust v. Sullivan*, 500 U.S. 173, 200–01 (1991); *Harris v. McRae*, 448 U.S. 297, 316 (1980). Plaintiffs' brief reviews the out-of-pocket costs of obtaining a variety of forms of contraceptives, and notes that certain women may be required to absorb these costs or switch to a less expensive (and effective) form of contraception as a result of price pressure. Pls.' Opp. at 40–41. But the Agencies did not "create" through regulation the costs of contraceptives, and the Rules impose no barriers, cost or otherwise, on any woman who wishes to obtain contraceptives. Rather, the Rules create exemptions that narrow the scope of employers subject to the contraceptive-coverage requirement, which, as already noted, was not required by the preventive-services mandate in the first place. These Rules accordingly do not thwart the purposes of the preventive-services mandate, as Plaintiffs contend, *id.* at 39. No legislative scheme "pursues its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987), and the exemptions reflected in these Rules apply to only a small subset of employers. Finally, as explained above, even if the Court concludes the Rules impose "barriers" to coverage, those barriers are not "unreasonable" ones in light of the substantial burden on religious exercise the contraceptive-coverage requirement creates and the numerous exemptions to the requirement that already exist in law.

Plaintiffs rely upon a spate of recent decisions from district courts within the Ninth Circuit that applied § 1554 to temporarily block HHS's newly promulgated Title X rules. *See* Pls.' Opp. at 39. Plaintiffs characterize the Ninth Circuit's decision to stay these rulings as based on "other grounds" because the Ninth Circuit has not concluded that § 1554 is unenforceable. Nonetheless, what the Ninth Circuit has done does not support Plaintiffs' position, either. The panel held "that § 1554 does not affect § 1008's prohibition on funding programs where abortion is a method of family planning" because "there is a clear distinction between affirmatively impeding or interfering with something, and refusing to subsidize it." *California v. Azar*, 927 F.3d 1068, 1078 (9th Cir. 2019). Although this panel opinion can no longer be cited as precedent in light of the

Ninth Circuit's grant of en banc review, *see* 927 F.3d 1045 (9th Cir. July 3, 2019), the en banc court has subsequently refused to set aside the panel's order staying the preliminary injunctions of these district courts, 928 F. 3d 1153 (9th Cir. July 11, 2019). The en banc court's decision to allow the new Title X regulations to go into effect casts, at a minimum, serious doubt on the viability of the Plaintiffs' legal arguments regarding § 1554. As such, the Court should hold that the Rules do not fall afoul of § 1554.

B. The Rules Do Not Discriminate Against Women

The Agencies' opening brief explained that because the Rules "do not discriminate on the basis of sex, facially or otherwise," they do not violate § 1557 of the ACA, which prohibits the government from excluding, denying, or discriminating against individuals "on the grounds" prohibited by Title VI of the Civil Rights Act, Title IX of the Education Amendments of 1972, and the Age Discrimination Act of 1975. 42 U.S.C. § 18116. Plaintiffs assert that the Agencies have "wholly failed" to respond to their argument under § 1557 because it is a "separate claim" from an equal protection claim. Pls.' Opp. at 42. But Plaintiffs cite no authority for the proposition that a § 1557 claim differs substantively in terms of what constitutes discrimination on the basis of sex. In fact, at least one case they cite agrees that these inquiries are identical. *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 952 (W.D. Wis. 2018) (noting, in addressing Equal Protection claim, that court had "already found that plaintiffs have made a strong showing of sex discrimination" in their § 1557 claim, which the court analyzed first). If the Agencies show that the Rules do not discriminate on the basis of sex—and, as explained in greater detail in the Agencies' discussion of Plaintiffs' equal protection claim, they do not—then Plaintiffs cannot prevail on a § 1557 claim, either.

Plaintiffs also assert in support of their § 1557 claim that the Agencies' failure to create exemptions to other preventive service mandates on religious grounds, such as religious objections to vaccinations or to medication derived from pigs, demonstrates that the Agencies must have discriminatory intent. That is a red herring. Neither the court in *Real Alternatives v. U.S. Dep't*

of Health & Human Servs., 867 F.3d 338 (3d Cir. 2017), nor the Plaintiffs, put forward any evidence that Christian Scientists, Jews, Muslims, or Jehovah's Witnesses have actually sought exemptions from ACA mandates that might be objectionable to them, either through the agency or litigation. By contrast, dozens of objectors to the contraceptive coverage mandate were engaged in protracted litigation with the federal government over their objections to the contraceptive coverage requirement for the better part of a decade.

V. The Rules Are Constitutional

A. The Rules Comport with the Establishment Clause

Plaintiffs' Establishment Clause claims also fail. Their attempt to conflate the Rules' accommodation of religious exercise with an impermissible promotion of religion cannot be squared with *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), which recognized that alleviating significant governmental inference with religious exercise is a permissible legislative purpose. Plaintiffs unsuccessfully attempt to distinguish *Amos* on the grounds that "no reliance interests were at stake" in *Amos*. Pls.' Opp. at 54. This attempt fails because *Amos* neither discussed reliance interests, nor stated or implied that its outcome depended on the consideration of any such interests.

Neither of Plaintiffs' two theories as to why the Rules impermissibly advance religion possesses merit. First, Plaintiffs err in contending that the Agencies ran afoul of the Establishment Clause by replacing an exemption that Plaintiffs believe "imposed no cognizable burden on the exercise of religion" with the Rules. *Id*. at 51. Here, the government's secular purpose—to alleviate significant governmental interference with the exercise of religious and moral convictions—is not fully served by the accommodation. *See* 83 Fed. Reg. at 57,546-48 (explaining that requiring entities to choose between compliance with the accommodation or paying financial penalties violated RFRA in many instances). Some entities have sincere religious objections to the role that the accommodation forces them to play in the provision of contraceptive coverage. Plaintiffs' attempt to minimize these religious objections invites just what RFRA does not allow

and what the Supreme Court has prohibited: "it is not for [a court] to say that [an objector's] religious beliefs are mistaken." *Hobby Lobby*, 573 U.S. at 725.

Second, from the fact that Plaintiffs disagree with the Rules' outcome on policy grounds, it does not follow that the Agencies "elevated the religious beliefs of objectors" over "the affected women's interests." Pls.' Opp. at 52. As explained above, the Agencies provided reasoned explanations for the promulgation of the Rules, and responded meaningfully to comments regarding the impact of the Rules. Plaintiffs rely on inapposite cases to support their contrary arguments. A state law prohibiting the teaching of evolution in the public-school curriculum unless accompanied by lessons on creationism, at issue in *Edwards v. Aguillard*, 482 U.S. 578 (1987), is far afield from an exemption to a regulatory mandate regarding employer-provided contraceptive coverage. Similarly inapposite is *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), in which a state statute delegated "a power ordinarily vested in agencies of government"—the ability to veto applications for liquor licenses within a prescribed radius—to churches and schools. *Id*. at 122; *see also id*. at 117-18. The Rules do not vest governmental functions in any entity. And *United States v. Lee*, 455 U.S. 252 (1982), which rejected a claimed exception by an Amish employer to his obligation to pay Social Security taxes, merely stands for the principle that "the Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435 (2006). Because no such compelling interest in uniform application of the mandate is present here given, among other things, the contraceptive mandate's numerous other exemptions, *Lee* is inapposite.

And as Federal Defendants' opening brief explained, Plaintiffs err in suggesting that the religious exemption constitutes the kind of "absolute and unqualified" exception that the Supreme Court held unconstitutional in *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985). Defs.' SJ Mem. at 46. Unlike the Rules, the statute at issue in *Caldor* did not lift any government-imposed burden on religion, but instead imposed on employers an "absolute duty" to allow employees to

be excused from work on "the Sabbath [day] the employee unilaterally designate[d]," thereby intruding on private relationships and interfering with private contracts. *Caldor*, 472 U.S. at 709. By contrast, the lifting of a *government-imposed* burden on religious exercise is permitted under the accommodation doctrine referenced in *Amos*. *See Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality opinion) (explaining that "the application of Title VII's exemption for religious organizations that we approved in [*Amos*], *though it had some adverse effect* on those holding or seeking employment with those organizations (if not on taxpayers generally), prevented potentially serious encroachments on protected religious freedoms") (emphasis added). The existence of that doctrine explains why Plaintiffs are mistaken in responding that Federal Defendants' argument would render unconstitutional Title VII's religious exemption to the prohibition against religious discrimination in employment. Pls.' Opp. at 53 n.26. That exemption eliminates the government-imposed burden on religion that Title VII's prohibition of religious discrimination in employment would otherwise impose on certain religious employers absent an accommodation. Here—as in *Amos*, and unlike in *Caldor*—the promulgation of the Rules is necessary to prevent potentially serious encroachments on the exercise of religious (and moral) convictions.

As Federal Defendants' opening brief explained, before the mandate, women had no entitlement to contraceptive coverage without cost-sharing; thus, if the same Agencies that created and enforce the mandate also create a limited exemption to accommodate sincere religious objections, the women affected are not "burdened" in a meaningful sense, because they are no worse off than before the Agencies chose to act in the first instance. Defs.' SJ Mem. at 44-45. Contrary to Plaintiffs' suggestion that there is "little support" for this conclusion, Pls.' Opp. at 53, it is supported by *Amos*, which explained that although the plaintiff was "[u]ndoubtedly" adversely affected by the termination of his employment, "it was the [Mormon] Church[,] not the Government, who put him to the choice of changing his religious practices or losing his job." 483 U.S. at 337 n.15. Instead of burdening the Church's employees, the religious exemption simply left them where they were before Title VII's general prohibition and exemption had been enacted.

Finally, as Federal Defendants have explained, any adverse effects from the Rules result from a decision by private employers, and not the government; the burden at issue is much less than the loss of employment (as in *Amos*), as it is merely the loss of subsidized contraceptive coverage by an employer with sincerely-held religious or moral objections to providing such coverage. Defs.' SJ Mem. at 45. And though Plaintiffs respond by arguing that this conclusion does not take into account the importance of subsidized contraceptive coverage, Pls.' Opp. at 54 n.28, their reasoning fails to account for the fact that Congress did not require such coverage in the first place. Moreover, if accepted, this reasoning would also invalidate the church exemption.

B. Plaintiffs' Equal Protection Arguments Lack Merit

The Rules are consistent with principles of equal protection. As Federal Defendants' opening brief explained, the ACA's provision requiring coverage for additional preventive services supported by HRSA pertains only to such services for "women." Defs.' SJ Mem. at 49 (citing 42 U.S.C. § 300gg-13(a)(4)). Accordingly, the Rules and HRSA Guidelines generally require coverage for female contraceptives—while providing an exemption for those with religious and conscience objections—but do not require any coverage of male contraceptives. *See id.* Consequently, the Rules do not treat men more favorably than women, and any sex-based distinctions flow from the statute, which requires preventive services for women only.

As Federal Defendants' opening brief also explained, Plaintiffs have cited no authority that declining to require subsidization of contraception constitutes a sex-based equal protection violation. Defs.' SJ Mem. at 49.[7] Nor do Plaintiffs cast doubt on the above-stated conclusions. Pls.' Opp. at 55-56. Initially, Plaintiffs allege that the provision requiring coverage for additional preventive services for women was motivated by a desire to remedy inequities in the provision of health care to men and women. *Id.* at 55. Even if correct, it remains the case that the ACA provision itself requires only coverage of female contraceptives. Consequently, the Rules neither

[7] Plaintiffs' sole response under this rubric is to make one "threshold" and one "secondary" argument related to the general nature of the operation of the Rules and the accommodation, Pls.' Opp. at 56 n.29, while continuing to fail to cite any authority that declining to require subsidization of contraception constitutes an equal protection violation.

create any sex-based distinction nor treat men more favorably than women. Instead, Plaintiffs' assert that the "*result* of the[] Rules" will be that women will "not receiv[e] equal healthcare benefits"—in other words, despite the fact that the Rules do not draw any sex-based distinction, the exemption to subsidizing contraceptive coverage disparately affects women. *Id*. Such a claim does not state a cognizable equal protection claim on the basis of sex, which can be based only on a showing of discriminatory intent.

Nor do Plaintiffs remedy this deficiency by noting that the exemption to subsidizing contraceptive coverage "burdens women unequally" because it applies only to the Women's Health Amendment, which is one of five subparts to the ACA's preventive-services mandate. *Id*. at 55-56. It remains true that the Rules themselves neither create any sex-based distinction nor treat men more favorably than women. And an allegation that a legal provision "burdens women unequally" is clearly a disparate-impact claim, which equal-protection principles do not recognize.

Under the Rules, any distinctions in coverage among women are not premised on sex, but on the existence of an employer's religious or moral objection to facilitating the provision of contraceptives. Plaintiffs' rejoinder that "the *ability* of employers to exclude coverage for women is a result of the Rules," Pls.' Opp. at 56, once again, states only a disparate-impact claim. Specifically, Plaintiffs are contending that despite the fact that the preventive-services mandate only subsidizes female contraception, and the Rules draw no sex-based distinctions, as "a *result* of the Rules," "women's access to healthcare" is disparately affected in comparison with men's access to healthcare. *Id*. But disparate impact does not state a sex-based equal protection violation. Finally, nothing in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), supports Plaintiffs' equal protection claim; the Supreme Court has long distinguished between government *interference* with individual rights, and the government's decision *not to subsidize* or enhance the exercise of such rights. *See, e.g.*, *Rust*, 500 U.S. 173; *Harris*, 448 U.S. 297.

Because the Rules relate rationally to the legitimate governmental interests in accommodating religious and moral beliefs, they are consistent with equal-protection principles.

VI. The Agencies Complied with the APA's Procedural Requirements

In the Final Rules, the Agencies made numerous changes to the exemptions proposed in the IFRs in response to public comments. Plaintiffs argue that this was insufficient because "[t]hey were never afforded an unbiased comment period," and suggest that if the Agencies "want to promulgate the same Rules, they must issue a NPRM, take comments on that proposal, and then issue a final rule." Pls.' Opp. at 58. But this approach could not possibly assuage Plaintiffs' concerns that the Agencies will "read[] comments with an open mind." *Id.* Taken to its logical conclusion, Plaintiffs' position would prevent agencies from ever issuing rules substantively similar to those tainted by an initial procedural error. The Court should reject Plaintiffs' attempt to turn the APA's procedural requirements into a permanent roadblock to rulemaking.

Plaintiffs' argument hinges on Third Circuit case law, which that court recently addressed in *Pennsylvania v. Trump*. Relying on *NRDC v. EPA*, 683 F.2d 752 (3d Cir. 1982), and *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979), the Third Circuit held that the Agencies' actions did "not reflect any real open-mindedness toward the position set forth in the IFRs" because the government did not change the "fundamental substance of the exemptions" and relied on the same reasons for issuing the Final Rules that it used to issue the IFRs. *Pennsylvania*, 2019 WL 3057657, at *12. These determinations are meritless. "While changes and revisions are indicative of an open mind," the inverse is not true; "an agency's failure to make any [changes] does not mean its mind is closed." *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994). Indeed, "[a]n agency is not required to adopt a rule that conforms in any way to the comments presented to it. So long as it explains its reasons, it may adopt a rule that all commentators think is stupid or unnecessary." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992) (refusing to invalidate navel orange volume restrictions issued by the agency in violation of the APA under the "harmless error" rule). Plaintiffs' disagreement with the Final Rules does not mean that the Agencies had a closed mind or did not respond meaningfully to their comments on the IFRs. *See* Pls.' Opp. at 57–58.

The *Pennsylvania* court also contended that the IFRs "alter[ed] the Agencies' starting point in considering the Final Rules." *Pennsylvania*, 2019 WL 3057657, at *12. But the Agencies were not concerned with "upsetting the status quo by amending a rule only recently implemented" when promulgating the Final Rules. *Levesque v. Block*, 723 F.2d 175, 187 (1st Cir. 1983). Plaintiffs suggest they were prejudiced because they had to "simultaneously seek an injunction against the IFRs *and* draft a comment," and that the Agencies defended the IFRs in court knowing they would be receiving comments on those rules in the future. Pls.' Opp. at 58. These forms of prejudice are not germane to the concerns that animate the "open mind" test. What matters is that the IFRs had been enjoined for nearly a year by the time the Final Rules were promulgated. Accordingly, the Agencies could not have been concerned that, in promulgating the Final Rules, they would have to depart from regulations they were already implementing.

Plaintiffs also share in *Pennsylvania*'s mischaracterization of *NRDC*. As the Agencies explained, subsequent notice-and-comment did not cure the procedural defect of the IFRs in *NRDC* because the public did not comment on the question of whether to "further suspend" amendments that had already been in effect for some time; it was asked to comment on postponing amendments that had not yet gone into effect. 683 F.2d at 768. Plaintiffs assert that there is no authority for the Agencies' interpretation of *NRDC*, but courts outside the Third Circuit have upheld post-promulgation notice and comment under facts similar to those presented here. *See, e.g., Advocates for Highway & Auto Safety*, 28 F.3d at 1291–93 (concluding agency provided adequate opportunity for notice and comment on waiver program despite announcing intention to issue temporary waivers without notice and comment); *Levesque*, 723 F.2d at 188 (agreeing that post-promulgation comment period was adequate after interim rules were improperly issued). The Agencies have discharged their duty to permit the public to comment on the proposed exemptions and respond to those comments; the APA requires nothing more. Accordingly, Plaintiffs' procedural APA claim must be rejected.

VII. No Nationwide Injunction Should Issue

Plaintiffs argue that a nationwide injunction is mandated in this case by the APA. Pls.' Opp. at 59–60. But as this Court explained in *City & Cnty. of S.F. v. Sessions*, 349 F. Supp. 3d 924 (N.D. Cal. 2018), *appeal filed*, No. 18-1730 (9th Cir. Dec. 4, 2018), when considering a similar request for a permanent nationwide injunction, such injunctions remain "discretionary relief" under the APA. *Id.* at 971 n.7. Nationwide injunctions are only merited when they are "necessary to give prevailing parties the relief to which they are entitled." *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987) (emphasis omitted). And as the Ninth Circuit observed previously, it "is not necessarily the case" that a nationwide injunction is required to provide prevailing plaintiffs in an APA case with complete relief.[8] *California*, 911 F.3d at 584. That is because the APA's mandate of a "set aside" must be read in light of traditional equity practice and Article III standing principles, which limit "plaintiff's remedy . . . to the inadequacy that produced his injury in fact" in order to maintain "the Court's constitutionally prescribed role . . . to vindicate the individual rights of the people appearing before it." *Gill v. Whitford*, 138 S. Ct. 1916, 1930, 1933 (2017). Plaintiffs' ability to identify cases where this test was satisfied does not mean this case is an appropriate candidate for a nationwide injunction. As was the case at the preliminary injunction stage, a plaintiff-protective injunction is sufficient to redress Plaintiffs' injury, and is therefore the appropriate remedy should Plaintiffs prevail on the merits.

CONCLUSION

For the reasons stated above and in Federal Defendants' opening brief, the Court should dismiss this suit or, in the alternative, enter judgment in favor of Federal Defendants.

Dated: August 1, 2019

Respectfully submitted,

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[8] The Third Circuit did not consider these Ninth Circuit decisions, including the decision in *California*, in affirming the nationwide injunction entered by the district court in that case. *Pennsylvania*, 2019 WL 3057657, at *17–18.

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