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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**THE STATE OF CALIFORNIA; THE
STATE OF CONNECTICUT; THE STATE
OF DELAWARE; THE DISTRICT OF
COLUMBIA; THE STATE OF HAWAII;
THE STATE OF ILLINOIS; THE STATE
OF MARYLAND; THE STATE OF
MINNESOTA, BY AND THROUGH ITS
DEPARTMENT OF HUMAN SERVICES; THE
STATE OF NEW YORK; THE STATE OF
NORTH CAROLINA; THE STATE OF
RHODE ISLAND; THE STATE OF
VERMONT; THE COMMONWEALTH OF
VIRGINIA; THE STATE OF
WASHINGTON,**

Plaintiffs,

THE STATE OF OREGON,

Plaintiff-Intervenor,

**THE STATE OF COLORADO; THE STATE
OF MICHIGAN; THE STATE OF NEVADA,**

Proposed-Plaintiffs-Intervenors,

v.

**ALEX M. AZAR II, IN HIS OFFICIAL
CAPACITY AS SECRETARY OF THE U.S.
DEPARTMENT OF HEALTH & HUMAN
SERVICES; U.S. DEPARTMENT OF
HEALTH AND HUMAN SERVICES;**

4:17-cv-05783-HSG

STATES' SUPPLEMENTAL BRIEF

Date: December 16, 2020
Time: 2:00 p.m.
Dept: 2, 4th floor
Judge: The Honorable Haywood S.
Gilliam, Jr.
Action Filed: October 6, 2017

**EUGENE SCALIA,¹ IN HIS OFFICIAL
CAPACITY AS SECRETARY OF THE U.S.
DEPARTMENT OF LABOR; U.S.
DEPARTMENT OF LABOR; STEVEN
MNUCHIN, IN HIS OFFICIAL CAPACITY AS
SECRETARY OF THE U.S. DEPARTMENT OF THE
TREASURY; U.S. DEPARTMENT OF THE
TREASURY; DOES 1-100,**

Defendants,

and,

**THE LITTLE SISTERS OF THE POOR,
JEANNE JUGAN RESIDENCE; MARCH
FOR LIFE EDUCATION AND DEFENSE
FUND,**

Defendant-Intervenors.

¹ Secretary Scalia replaces former Secretary Acosta as a defendant, in his official capacity, by operation of Federal Rule of Civil Procedure 25(d).

TABLE OF CONTENTS

	Page
Introduction	1
Argument	3
I. The Exemption Rules Are Arbitrary and Capricious	3
A. The Exemption Rules Are Too Broad for the Problem They Purport to Solve	4
B. Defendants Ignored the Harm the Exemption Rules Cause to Women	7
C. Defendants Failed to Provide a Reasoned Explanation for Their Policy Reversal.....	14
D. Defendants Failed to Meaningfully Respond to Comments Concerning the Rules’ Impact.....	15
E. Defendants Impermissibly Weighed Nonstatutory Factors in Promulgating the Moral Exemption.....	16
II. The Religious and Moral Exemption Rules Are Contrary to Law.....	16
A. The Exemption Rules Violate Section 1554 by Creating Unreasonable Barriers to Care and Impeding Timely Access to Healthcare	16
B. The Exemption Rules Violate Section 1557 By Discriminating Against Women.....	19
Conclusion	20

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<i>Allied Local & Reg'l Mfrs. Caucus v. EPA</i> 215 F.3d 61 (D.C. Cir. 2000)	3, 15
<i>Ariz. Cattle Growers Ass'n v. U.S. Fish & Wildlife</i> 273 F.3d 1229 (9th Cir. 2001).....	6
<i>Bhd. of Locomotive Engineers & Trainmen v. Fed. R.R. Admin.</i> 972 F.3d 83 (D.C. Cir. 2020)	15
<i>Bostock v. Clayton County</i> 140 S. Ct. 1731 (2020)	20
<i>Burwell v. Hobby Lobby Stores, Inc.</i> 573 U.S. 682 (2014)	passim
<i>California v. Azar</i> 950 F.3d 1067 (9th Cir. 2020).....	18, 19
<i>California v. Health & Human Servs.</i> 351 F. Supp. 3d 1267 (N.D. Cal. 2019)	passim
<i>City of Oberlin v. FERC</i> 937 F.3d 599 (D.C. Cir. 2019)	15
<i>City of Portland v. EPA</i> 507 F.3d 706 (D.C. Cir. 2007)	15
<i>Del. Dep't of Nat. Res. & Envtl. Control v. EPA</i> 785 F.3d 1 (D.C. Cir. 2015)	5, 7
<i>Dep't of Commerce v. New York</i> 139 S. Ct. 2551 (2019)	5
<i>Dep't of Homeland Sec. v. Regents of the Univ. of Cal.</i> 140 S. Ct. 1891 (2020)	passim
<i>Encino Motorcars, LLC v. Navarro</i> 136 S. Ct. 2117 (2016)	14
<i>F.C.C. v. Fox Television Stations, Inc.</i> 556 U.S. 502 (2009)	14
<i>Getty v. Fed. Savs. & Loan Ins. Corp.</i> 805 F.2d 1050 (D.C. Cir. 1986)	13

TABLE OF AUTHORITIES
(continued)

		<u>Page</u>
3	<i>Gresham v. Azar</i>	
4	950 F.3d 93 (D.C. Cir. 2020)	16
5	<i>In re Ozenne</i>	
6	841 F.3d 810 (9th Cir. 2016).....	20
7	<i>Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania</i>	
8	140 S. Ct. 2367 (2020).....	<i>passim</i>
9	<i>Massachusetts v. EPA</i>	
10	549 U.S. 497 (2007)	6, 16
11	<i>Michigan v. EPA</i>	
12	576 U.S. 743 (2015)	5
13	<i>Morris v. Cal. Physicians’ Serv.</i>	
14	918 F.3d 1011 (9th Cir. 2019).....	13
15	<i>Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i>	
16	463 U.S. 29 (1983)	2, 10, 16
17	<i>Nat’l Urban League v. Ross</i>	
18	977 F.3d 770 (9th Cir. 2020).....	10, 12, 15
19	<i>Or. Nat’l Res. Council v. Thomas</i>	
20	92 F.3d 792 (9th Cir. 1996).....	3, 10
21	<i>Planned Parenthood of Md., Inc. v. Azar</i>	
22	No. 20-361, 2020 WL 3893241 (D. Md. July 10, 2020).....	19
23	<i>State v. Bureau of Land Mgmt.</i>	
24	286 F. Supp. 3d 1054 (N.D. Cal. 2018)	5
25	<i>Wheaton College v. Burwell</i>	
26	573 U.S. 958 (2014)	8
27	<i>Whitman-Walker Clinic, Inc. v. HHS</i>	
28	--- F. Supp. 3d ---, 2020 WL 5232076 (D.D.C. Sept. 2, 2020).....	13
	<i>Zubik v. Burwell</i>	
	136 S.Ct. 1557 (2016)	7, 8

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

United States Code

Title 5 § 706	3
Title 20 § 1681(a)	19
Title 42 § 18114(1)	17
Title 42 § 18114(2)	17
Title 42 § 18114(6)	17, 18
Title 42 § 18116	20
Title 42 § 18116(a)	19, 20

OTHER AUTHORITIES

77 Fed. Reg. 8,725 (Feb. 15, 2012)	14
78 Fed. Reg. 39,870 (July 2, 2013)	12, 14, 17
82 Fed. Reg. 47,792 (Oct. 13, 2017)	2, 4
83 Fed. Reg. 37,160 (Aug. 18, 2020)	20
83 Fed. Reg. 57,536 (Nov. 15, 2018)	<i>passim</i>
83 Fed. Reg. 57,592 (Nov. 15, 2018)	<i>passim</i>
Code of Federal Regulations	
Title 45 § 92.1	20
<i>Women’s Preventive Services Guidelines</i> , Health Res. & Serv. Admin.	
www.hrsa.gov/womens-guidelines-2019 (Dec. 2019)	13
Respondents’ Brief, <i>Zubik v. Burwell</i>	
2016 WL 537623 (Feb. 10, 2016)	<i>passim</i>

INTRODUCTION

On July 8, 2020, the Supreme Court issued its decision in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania* and *Trump v. Pennsylvania*, 140 S. Ct. 2367 (2020) (“*Little Sisters*”). The Court held that the ACA “gives [the Health Resources and Services Administration (HRSA)] broad discretion to define preventive care and screenings and to create religious and moral exemptions.” *Id.* at 2381. The Court further held that the Exemption Rules are not procedurally invalid under the Administrative Procedure Act (APA). *Id.* at 2384-86. The Court’s decision resolves the States’ statutory authority and procedural claims. Accordingly, the States hereby simultaneously file a Notice of Voluntary Withdrawal of Certain Claims.

However, other claims asserted in this case, including the arbitrary and capricious claim, contrary to law claims, and constitutional claims, have not been resolved by the holdings in *Little Sisters* because the Court did not reach and left unresolved significant issues. For instance, the Court did not address whether that the Exemption Rules were required under the Religious Freedom Restoration Act (RFRA). Nor did the Court conclude that the accommodation—which allows religious employers to opt-out of the Mandate while still ensuring critical contraceptive coverage for their employees—constitutes a substantial burden on the free exercise rights of employers. The Court also did not reach the issue of whether the Rules are arbitrary and capricious. *See id.* at 2387 (Alito, J., concurring) (“[w]e now send these cases back to the lower courts, where the [States] are all but certain to pursue their argument that the current rule is flawed on yet another ground, namely, that it is arbitrary and capricious and thus violates the APA”); *id.* at 2398, 2399 (Kagan, J., concurring in judgment) (noting that the issue of whether the Rules are arbitrary and capricious “is now ready for resolution, unaffected by today’s decision,” and explaining that several “aspects of the Departments’ handiwork may [] prove arbitrary and capricious”). Finally, the Court did not decide whether the Rules are contrary to Sections 1554 or 1557 of the ACA, or violate any constitutional provision.

With the opportunity to address the merits of the remaining issues on remand, this Court should conclude that these Rules are arbitrary and capricious. “An agency acting within its sphere of delegated authority can of course flunk the test of ‘reasoned decisionmaking.’” *Little*

1 *Sisters*, 140 S. Ct. at 2398 (Kagan, J., concurring). “Assessed against that standard of
 2 reasonableness, the exemptions HRSA and the Departments issued give every appearance of
 3 coming up short.” *Id.* at 2397. Indeed, this Court already concluded that “[g]iven the ‘serious
 4 reliance interests’ of women who would lose coverage to which they are statutorily entitled if the
 5 Final Rules go into effect, the Court believes that Plaintiffs are also likely to prevail on their
 6 claim that the agencies failed to provide ‘a reasoned explanation . . . for disregarding facts and
 7 circumstances that underlay or were engendered by the prior policy.’” *California v. Health &*
 8 *Human Servs.*, 351 F. Supp. 3d 1267, 1296 (N.D. Cal. 2019). As the States outlined in prior
 9 briefing, Defendants’ decisionmaking is arbitrary and capricious for several reasons. *See* States
 10 Mot. at 37-51, States Opp’n at 43-50, States Sur-Reply at 8-12. Drawing on recent case law, this
 11 supplemental brief highlights some of the ways that the Rules are arbitrary and capricious.

12 First, Defendants crafted Exemptions which suffer from a striking “mismatch between the
 13 scope of the” Exemptions “and the problem the agencies set out to address.” *Little Sisters*, 140 S.
 14 Ct. at 2398 (Kagan, J., concurring). Although Defendants claim to be protecting employers with
 15 sincerely held religious beliefs against providing, arranging, or participating in plans that comply
 16 with the Mandate, 82 Fed. Reg. 47,792, 47,806 (Oct. 13, 2017), their “solution” was to create
 17 Exemption Rules that encompass entities with *no* objections to the accommodation, entities which
 18 cannot be said to have religious beliefs, and entities that do not even claim to have religious
 19 beliefs (such as those covered under the “moral objection” exemption). “The rule thus went
 20 beyond what the Departments’ justification supported,” and “lacks a ‘rational connection’ to the
 21 problem described.” *Little Sisters*, 140 S. Ct. at 2399 (Kagan, J., concurring) (quoting *Motor*
 22 *Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

23 Second, Defendants failed to give adequate weight to the imperative of the Mandate and the
 24 serious reliance interests of the intended beneficiaries of the Women’s Health Amendment. In
 25 their rulemaking, Defendants failed to adequately consider the interests of the millions of women
 26 who have benefitted from the contraceptive coverage mandate, and failed to provide adequate
 27 explanations for several of its decisions, particularly given that the effect of the Exemption Rules
 28 is to upend what Congress intended—to provide full and equal healthcare coverage to women.

1 *Or. Nat'l Res. Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996). Because they were “not
 2 writing on a blank slate,” Defendants’ failure to properly assess reliance interests and weigh those
 3 reliance interests against competing policy concerns renders the Rules arbitrary and capricious.
 4 *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) (*Regents*).

5 Third, Defendants failed to provide a reasoned explanation for their policy reversal.
 6 “[T]he Rules provide no new facts and no meaningful discussion that would discredit their prior
 7 factual findings establishing the beneficial and essential nature of contraceptive healthcare for
 8 women.” *California*, 351 F. Supp. 3d at 1296. Additionally, Defendants failed to meaningfully
 9 respond to comments and impermissibly weighed nonstatutory factors in promulgating the Moral
 10 Exemption. *Allied Local & Reg’l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000) (“For
 11 an agency’s decisionmaking to be rational, it must respond to significant points raised during the
 12 public comment period.”); *Little Sisters*, 140 S. Ct. at 2400 (Kagan, J., concurring) (“RFRA cast a
 13 long shadow over the Departments’ rulemaking . . . [but] that statute does not apply to those with
 14 only moral scruples.”).

15 The Rules are also contrary to Sections 1554 and 1557 of the ACA because they create
 16 barriers for women to obtain healthcare coverage, impede women’s timely access to healthcare,
 17 and permit employers to exclude women from full and equal participation in their employer-
 18 sponsored health plan. *See* States Mot. at 35-37, States Opp’n at 39-43, States Sur-Reply at 7-8.

19 **ARGUMENT**

20 **I. THE EXEMPTION RULES ARE ARBITRARY AND CAPRICIOUS**

21 The Religious and Moral Exemption Rules are arbitrary and capricious and must be set
 22 aside under 5 U.S.C. § 706 of the APA because Defendants: (1) crafted Exemptions which are
 23 significantly broader in scope than the problem they purport to solve; (2) failed to give adequate
 24 weight to the imperative of the Mandate and the serious reliance interests of the intended
 25 beneficiaries of the Women’s Health Amendment; (3) failed to provide a reasoned explanation for
 26 their policy reversal; (4) failed to meaningfully respond to comments; and (5) impermissibly
 27 weighed nonstatutory factors in promulgating the Moral Exemption Rule.
 28

A. The Exemption Rules Are Too Broad for the Problem They Purport to Solve

Defendants promulgated the broad Religious and Moral Exemption Rules purportedly to protect employers who assert sincerely held religious beliefs or moral objections against providing contraceptive coverage or using the accommodation. 82 Fed. Reg. at 47,806; 83 Fed. Reg. 57,592, 57,593 (Nov. 15, 2018). To achieve this objective, Defendants vastly expanded the scope of the prior exemption to the contraceptive-coverage requirement by permitting any employer (regardless of corporate structure or religious affiliation), individual, or even a health insurer with religious objections to covering all or a subset of FDA-approved contraceptives, to self-exempt. The Moral Exemption Rule likewise provides that nearly any employer could stop covering contraceptive services for their employees if they have a “moral” objection. Like the Religious Exemption, the Moral Exemption extends to employers, insurers, and individuals. To be clear, under the Exemption Rules, employers do not need to use the regulatory accommodation, which ensures that women receive their statutorily guaranteed contraceptive coverage. The Rules also do not require that employers notify the federal government or even tell their affected employees. Rather, employers “object” by simply ceasing to provide contraceptive coverage. The only way a woman would discover that her employer has exempted itself is by examining her annual notice of benefits and coverage or by receiving a surprise medical bill.

Defendants concede that these broad Rules will sweep in employers without an objection to the accommodation and will allow them to switch from the accommodation to the exemption. See 83 Fed. Reg. 57,536, 57,577 (Nov. 15, 2018) (“Of course, some of the[] religious [institutions that ‘do not conscientiously oppose participating in the accommodation’] may opt for the expanded exemption . . . but others might not”); *id.* at 57,561 (“[I]t is not clear to the Departments that all or most of such large nonprofit employers will choose to use the expanded exemption instead of the accommodation”). Indeed, during the Supreme Court oral argument, the Solicitor General “could offer no evidence that, since the rule took effect, employers without the Little Sisters’ complicity beliefs had declined to avail themselves of the new exemption.” *Little Sisters*, 140 S. Ct. at 2399 n.3 (Kagan, J., concurring) (citing Tr. of Oral Arg. 22). Thus, by their

own admissions, Defendants’ “solution” sweeps much more broadly than their stated goal, thereby failing the test of “reasoned decisionmaking.” *Michigan v. EPA*, 576 U.S. 743, 750 (2015); *see also Del. Dep’t of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 17-18 (D.C. Cir. 2015) (setting aside a regulation because it was not tailored to address the identified problems); *see also States Mot. at 44-46, States Opp’n at 48-50.*

Given Defendants’ own rationale, at most Defendants “should have exempted only employers who had religious objections to the accommodation—not those who viewed it as a religiously acceptable device for complying with the mandate.” *Little Sisters*, 140 S. Ct. at 2399 (Kagan, J., concurring). Defendants offer little reason for allowing employers who do not object to the accommodation to utilize the exemption, other than asserting that it is within their purview to do so.² This “significant mismatch” between the problem identified and the solution adopted demonstrates that the Rules are arbitrary and capricious. *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019); *State v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1066-67 (N.D. Cal. 2018) (agency action “not properly tailored” and thus arbitrary and capricious where the agency asserted that the prior rule harmed small operators and as a “solution,” the agency promulgated a “blanket suspension as to all operators, regardless of size”). And, while Defendants view the Exemption Rules as the “more straightforward choice,” 83 Fed. Reg. at 57,545, Defendants continue to provide the accommodation to any employer who requests that option, thus maintaining a two-track system. Therefore, this choice does not support Defendants’ “decision to offer the exemption more broadly than needed.” *Little Sisters*, 140 S. Ct. at 2399 n.4 (Kagan, J., concurring).

Similarly, Defendants’ decision to make publicly traded companies eligible for the exemption is likewise an illustration of the solution sweeping too broadly, and in and of itself “is

² *See* 83 Fed. Reg. at 57,544 (“[T]he Departments believe that agencies . . . have discretion in determining whether the appropriate response is to provide an exemption from the burdensome requirement, or to merely attempt to create an accommodation that would mitigate the burden”); *id.* at 57,544 (“even if RFRA does not compel the Departments to provide the religious exemptions set forth in the IFC, the Departments believe the exemptions are the most appropriate administrative response to the religious objections that have been raised”); 83 Fed. Reg. at 57,603 (“[T]he Departments have concluded that it is appropriate to provide moral exemptions and access to the accommodation, as set forth in these final rules.”).

unusual enough to raise a serious question about whether the Departments adequately supported their choice.” *Little Sisters*, 140 S. Ct. at 2399 (Kagan, J., concurring) (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717 (2014) (noting the oddity of “a publicly traded corporation asserting RFRA rights”)). Indeed, Defendants admit that they “are not aware of any publicly traded entities that have publicly objected to providing contraceptive coverage on the basis of religious belief.” 83 Fed. Reg. at 57,562. With no evidence of any public company being forced to violate its sincerely held religious belief, and despite the improbability that “unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs,” *Burwell*, 573 U.S. at 717, Defendants nevertheless expanded the scope of the exemption to include such hypothetical employers—without regard for the women impacted by such an expansion. *See Ariz. Cattle Growers Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1244 (9th Cir. 2001) (agency action may not be based on mere “speculation”); *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (agency does not have “roving license” to ignore underlying statute); *see also* States Mot. at 46; States Opp’n at 49.

While Defendants promulgated an exemption that reaches every possible type of employer who might have been covered by the provisions of the Women’s Health Amendment, Defendants nevertheless insisted that this process would not be abused by those without sincere religious beliefs. 83 Fed. Reg. at 57,558. However, the record does not support Defendants’ assertion. First, they offer conflicting information on this score: in one breath, they reason that contraceptive coverage is cost-neutral for issuers, therefore giving no financial incentives to misrepresent their beliefs, 83 Fed. Reg. at 57,564, while in another they suggest that “premiums would adjust to reflect changes in coverage,” thus lowering employers’ costs, 83 Fed. Reg. at 57,580. Second, as noted, Defendants “acknowledged the prospect that some employers without a religious objection to the accommodation would switch to the exemption.” *Little Sisters*, 140 S. Ct. at 2399 n.3 (Kagan, J., concurring) (citing 83 Fed. Reg. at 57,576-57,577, 57,561). And, because there are no notice requirements, Defendants have been unable—and will always be unable—to ensure that employers without objections to the accommodation “had declined to avail themselves of the new exemption.” *Id.* The consequence of such a broad rule is that women will

1 lose their contraceptive coverage when an employer whose religious objections would have been
 2 satisfied by the accommodation opts instead for the exemption or when an employer with no
 3 objection at all opts to exercise the exemption; that outcome “yield[s] all costs and no benefits,”
 4 and is therefore “hard to see as consistent with reasoned judgment.” *Id.* at 2397.

5 Defendants also make no serious effort to address alternatives to the Exemption Rules that
 6 would adequately protect the interests of women. *See Zubik v. Burwell*, 136 S.Ct. 1557, 1560
 7 (2016) (per curiam) (“[T]he parties on remand should be afforded an opportunity to arrive at an
 8 approach . . . ensuring that women covered by petitioners’ health plans ‘receive full and equal
 9 health coverage, including contraceptive coverage.’” (emphasis added)); 83 Fed. Reg. at 57,544-
 10 57,546. Defendants merely provide conclusory assertions about alternatives.³
 11 “Because [Defendants] too cavalierly sidestepped [their] responsibility to address reasonable
 12 alternatives, [their] action was not rational and must, therefore, be set aside.” *Del. Dep’t of Nat.*
 13 *Res. & Envtl. Control*, 785 F.3d at 18. As the Supreme Court recently emphasized, where an
 14 agency’s earlier rulemaking stressed the importance of an underlying program, the agency must
 15 consider alternatives before implementing a subsequent rule. *Regents*, 140 S. Ct. at 1912 (“given
 16 DHS’s earlier judgment that forbearance is ‘especially justified’ for ‘productive young’ people
 17 who were brought here as children and ‘know only this country as home,’ the DACA
 18 Memorandum could not be rescinded in full ‘without any consideration whatsoever’ of a
 19 forbearance-only policy” (internal citations omitted)).

20 **B. Defendants Ignored the Harm the Exemption Rules Cause to Women**

21 Defendants cannot ignore and minimize the serious reliance interests of women with
 22 employer-provided healthcare coverage, particularly when the U.S. Supreme Court has repeatedly

23
 24 ³ 83 Fed. Reg. at 57,544 (“[I]t would be inadequate to merely attempt to amend or expand the
 25 accommodation process instead of expanding the exemption”); *id.* at 57,544 (“[M]erely amending
 26 that accommodation process without expanding the exemptions would not adequately address
 27 religious objections”); *id.* at 57,545 (“[T]he Departments reaffirmed their conclusion that there is
 28 not a way to satisfy all religious objections by amending the accommodation”); *id.* at 57,545-
 57,546 (“the Departments are not aware of the authority, or of a practical mechanism, for using
 section 2713(a)(4) to require contraceptive coverage be provided specifically to persons covered
 by an objecting employer, other than by using the employer’s plan, issuer, or third party
 administrator, which would likely violate some entities’ religious objections.”).

1 stressed the importance of those interests. *See also* States Mot. at 38-39.⁴ As outlined below,
 2 Defendants: (1) failed to meaningfully consider women’s interests, foisting upon women all of
 3 the burdens associated with obtaining full healthcare coverage and allowing employers to provide
 4 unequal benefits to their female employees; and (2) provided inadequate explanations for
 5 disregarding their prior rules. Defendants’ failure to appreciate the reliance interests at stake falls
 6 squarely within the type of arbitrary rulemaking the Supreme Court recently outlined in *Regents*.

7 1. Throughout this rulemaking Defendants discussed the interests of employers at
 8 length, while addressing the interests of millions of American women who stand to lose their
 9 contraceptive coverage only in terse and dismissive statements.⁵

10 ⁴ *See Zubik*, 136 S.Ct. at 1560 (HHS shall “ensur[e] that women covered by petitioners’ health
 11 plans receive full and equal health coverage, including contraceptive coverage.” (internal
 12 quotation marks omitted)); *Wheaton College v. Burwell*, 573 U.S. 958, 959 (2014) (“Nothing in
 13 this interim order affects the ability of applicant’s employees and students to obtain, without cost,
 14 the full range of [FDA] approved contraceptives.”); *Hobby Lobby*, 573 U.S. at 692 (“HHS has
 15 already devised and implemented a system that seeks to respect the religious liberty of religious
 16 nonprofit corporations while ensuring that the employees of these entities have precisely the same
 access to all FDA-approved contraceptives as employees of [other] companies.”); *id.* at 729 (the
 accommodation serves “a Government interest of the highest order,” *i.e.*, providing women “with
 cost-free access to all FDA-approved methods of contraception”).

17 ⁵ *See, e.g.*, 83 Fed. Reg. at 57,548 (“Some commenters contended that obtaining contraceptive
 18 coverage from other sources could be more difficult or more expensive for women than obtaining
 19 it from their group health plan or health insurance plan. The Departments do not believe that
 20 such differences rise to the level of a compelling interest or make it inappropriate for us to issue
 21 the expanded exemptions set forth in these final rules. Instead, after considering this issue, the
 22 Departments conclude that the religious liberty interests that would be infringed if we do not offer
 23 the expanded exemptions are not overridden by the impact on those who will no longer obtain
 24 contraceptives through their employer sponsored coverage as a result.”); 83 Fed. Reg. at 57,552
 (“Because of the importance of the religious liberty values being accommodated, the limited
 impact of these rules, and uncertainty about the impact of the Mandate overall according to some
 studies, the Departments do not believe these rules will have any of the drastic negative
 consequences on third parties or society that some opponents of these rules have suggested.”); 83
 Fed. Reg. at 57,556 (“Moreover, we conclude that the best way to balance the various policy
 interests at stake in the Religious IFC and these final rules is to provide the expanded exemptions
 set forth herein, even if certain effects may occur among the populations actually affected by the
 employment of these exemptions. These rules will provide tangible protections for religious
 liberty, and impose fewer governmental burdens on various entities and individuals, some of
 whom have contended for several years that denying them an exemption from the contraceptive
 Mandate imposes a substantial burden on their religious exercise.”); 83 Fed. Reg. at 57,574
 (“These final rules will result in some persons covered in plans of newly exempt entities not
 receiving coverage or payments for contraceptive services. As discussed in the Religious IFC,
 27 the Departments did not have sufficient data on a variety of relevant factors to precisely estimate
 28 how many women would be impacted by the expanded exemptions or any related costs they may
 incur for contraceptive coverage or the results associated with any unintended pregnancies.”).

1 As a threshold matter and by Defendants’ own admissions, “[t]he medical evidence
 2 prompting the contraceptive coverage requirement showed that even minor obstacles to obtaining
 3 contraception led to more unplanned and risky pregnancies, with attendant adverse effects on
 4 women and their families.” Resp. Br., *Zubik v. Burwell*, 2016 WL 537623, at *74-75 (Feb. 10,
 5 2016). Expert panels involved in the reviews that underlie the HRSA guidelines recognized the
 6 importance of cost reductions in improving access to contraception, and increasing consistent and
 7 correct usage of contraception. Ex. 9 (D4 000405-07); Ex. 24 (D9 668960-65); *see also Hobby*
 8 *Lobby*, 573 U.S. at 727 (“HHS tells us that ‘studies have demonstrated that even moderate
 9 copayments for preventive services can deter patients from receiving those services.’”); Ex. 57
 10 (D10 00207393-98). As Defendants previously asserted, “[c]ontraceptive coverage also furthers
 11 the compelling interest in ensuring that women have *equal* health coverage.” *Zubik* Resp. Br.,
 12 2016 WL 537623 at *58.

13 Despite these findings and admissions, Defendants failed to explain why it was rational to
 14 so strongly prioritize employers’ interests, at the expense of the millions of women who have
 15 benefitted from the Women’s Health Amendment. For instance, Defendants do not require any
 16 form of reporting, self-certification, or notice from exempt entities because of their concern for
 17 the “additional paperwork burden” imposed on employers. 83 Fed. Reg. at 57,558. But this
 18 “paperwork” would enable the Defendants to track the number of employers who might opt in to
 19 the new exemption regime. Given that HHS itself estimated that 30 million women gained access
 20 to contraceptive coverage due to the Women’s Health Amendment, it flouts reason to enact a rule
 21 allowing unlimited numbers of employers to exempt themselves from the Mandate, without any
 22 way of tracking the millions of women potentially impacted. Ex. 17 (D9 571363); 83 Fed. Reg.
 23 at 57,551 (estimating that up to 126,400 women stand to lose contraceptive coverage due to the
 24 Religious Exemption Rule). Defendants also fail to explain their rationale for allowing all
 25 employers the ability to access the Exemption as quickly as possible, despite the fact that
 26 Defendants did not identify employers in need of immediate relief. 83 Fed. Reg. at 57,570.
 27 Likewise, Defendants go so far as to allow publicly-held for-profit entities to exempt themselves
 28

1 without any evidence that such entities need an exemption,⁶ and allow closely held for-profit
 2 corporations to exempt themselves so as not to inconvenience them when they might at some
 3 point in the future wish to sell stock.⁷ In myriad ways, Defendants failed to explain why it was so
 4 strongly privileging the interests of employers over the interests of the women who receive their
 5 contraceptive care through employer- and university-sponsored plans.

6 In so doing, Defendants have saddled women with the burdens of seeking out and obtaining
 7 contraceptive care—burdens Congress intended to remove by promulgating the Women’s Health
 8 Amendment. By ignoring what the underlying statute—the Women’s Health Amendment—
 9 makes “important,” Defendants engaged in arbitrary and capricious rulemaking. *Or. Nat’l Res.*
 10 *Council v. Thomas*, 92 F.3d at 798 (part of arbitrary and capricious analysis requires considering
 11 what the underlying statute makes “‘important’”); *see, e.g., State Farm*, 463 U.S. at 43 (agency’s
 12 failure to consider adopting a rule requiring airbags in new cars arbitrary and capricious, where
 13 agency’s own evidence showed such a rule would save lives and the National Highway
 14 Transportation Safety Act required agency to make rules enhancing auto safety); *see also Nat’l*
 15 *Urban League v. Ross*, 977 F.3d 770, 2020 WL 5940346, at *4 (9th Cir. 2020) (agency action
 16 arbitrary and capricious where the government failed to address the reliance interests of the
 17 public).

18 2. Defendants’ explanations fall short of the reasoned decisionmaking that would be
 19 necessary to justify such a dramatic departure from the Departments’ prior policies, at the
 20 expense of the fundamental policy interests underlying the Women’s Health Amendment. For
 21 instance, Defendants averred that women “in plans that reduce or eliminate contraceptive benefits

22
 23 ⁶ *But see* 83 Fed. Reg. at 57,562 (“[T]he Departments are not aware of any publicly traded entities
 24 that have publicly objected to providing contraceptive coverage on the basis of religious belief.”);
 25 83 Fed. Reg. at 57,602 (“Although... the Departments assume the number of entities and
 individuals that may seek exemption from the Mandate on the basis of moral convictions, as these
 two sets of litigants did, will be small, the Departments know from the litigation that it will not be
 zero.”).

26 ⁷ 83 Fed. Reg. at 57,563 (“The Departments do not want to preclude such a closely held
 27 corporation from having to decide between relinquishing the exemption or financing future
 28 growth by sales of stock, which would be the effect of denying it the exemption if it changes its
 status and became [sic] a publicly traded entity.”).

1 as a result of the exemption will know whether their health plan claims an exemption and will be
 2 able to raise appropriate challenges to such claims” by referencing their plan benefit documents.
 3 83 Fed. Reg. at 57,558. This *ignores* that the Women’s Health Amendment was designed to
 4 ensure women receive full and equal coverage (*see* States Mot. at 4)—not force them to scour
 5 their healthcare documents and then challenge their employer’s religious claim or moral
 6 objection.⁸ Defendants also fail to explain *how* women would “challenge” their employer’s claim
 7 when HHS has not set forth any type of process for employees to assert such challenges.

8 Similarly, Defendants assume that women are able to both identify and select a potential
 9 future employer based on whether that employer will cover their contraceptive care. 83 Fed. Reg.
 10 at 57,560. Such an assumption ignores the socioeconomic and institutional barriers different
 11 women face. Defendants merely assume that all women have the luxury of choosing an employer
 12 on the basis of whether that employer will include full and equal healthcare coverage for women.
 13 Unsurprisingly, Defendants provide *no* evidence to support their assumption, which is also built
 14 on the entirely speculative notion that employers advertise the details of their health plans to
 15 prospective employees. Defendants’ assumptions also fail to account for those women who are
 16 dependents on their parents’ or partner’s health plan and who have no opportunity to exercise
 17 their hypothetical choice at all. While Defendants’ assumptions on this score strain the
 18 imagination for many women in the workforce, it is even more patently absurd when applied to
 19 seventeen-year old high school students choosing a college. For those women, Defendants
 20 blithely contend that “[n]o student is required to attend” an institution that does not provide full
 21 and equal healthcare to women. 83 Fed. Reg. at 57,564. “At a minimum, students who attend
 22 private colleges and universities have the ability to ask those institutions in advance what
 23 religious tenets they follow, including whether the institutions will provide contraceptives in
 24 insurance plans.” *Id.* Once again, Defendants’ rulemaking is premised upon baseless and
 25 pernicious assumptions, including that students choosing a college would—despite financial

26 ⁸ And, even once women learn that their employer is not providing them full and equal healthcare
 27 coverage, the plan documents themselves will not indicate that an employer is utilizing an
 28 exemption created by these Rules based on a religious belief or moral conviction. Impacted
 women would simply know that their employer dropped coverage—thus, further undermining
 Defendants’ suggestion that women could allegedly challenge their employer’s religious claim.

1 considerations and other factors—change their institution due to the restrictions of its healthcare
 2 coverage. For women of all ages, Defendants already conceded that requiring women “to take
 3 steps to learn about, and to sign up for, a new health benefit” imposes “additional barriers,”
 4 “mak[ing] that coverage accessible to fewer women.” 78 Fed. Reg. 39,870, 39,888 (July 2,
 5 2013).

6 3. Defendants’ general characterization of women’s interests’ in contraceptive coverage
 7 as incidental, and the protections offered by the Women’s Health Amendment and the Mandate as
 8 lightly conferred and therefore easily removed,⁹ demonstrates Defendants’ complete failure to
 9 appreciate the reliance interests at stake, and is contrary to Supreme Court precedent.

10 The U.S. Supreme Court recently reiterated the importance of agencies’ consideration of
 11 reliance interests. In *Regents*, the government alleged that DACA recipients had “no ‘legally
 12 cognizable reliance interests’ because the DACA Memorandum stated that the program
 13 ‘conferred no substantive rights’ and provided benefits only in two-year increments.” 140 S. Ct.
 14 at 1913. The Court rejected this narrow view of reliance interests. *Id.* The Court held that when
 15 an agency changes course, it must give careful consideration to the reliance interests engendered
 16 by the previous policy, and must “consider the alternatives that are within the ambit of the
 17 existing policy.” *Id.*

18 Like the government in *Regents*, Defendants here argue that the characteristics of the
 19 Contraceptive Coverage Mandate—“a subregulatory creation that does not apply in various
 20 contexts,” 83 Fed. Reg. at 75,552—make its protections insubstantial. This Court should reject
 21 that argument as a basis for ignoring the substantial reliance interests of women, especially
 22 where, as here, the Mandate was the “the centerpiece of the policy.” *Regents*, 140 S. Ct. at 1913;
 23 *see also Nat’l Urban League*, 2020 WL 5940346, at *4 (agency action is arbitrary and capricious
 24 where the agency’s analysis fails to consider an important aspect of the problem—an analysis
 25

26 ⁹ *See, e.g.*, 83 Fed. Reg. at 57,549 (“These final rules do not create a governmental burden; rather,
 27 they relieve a governmental burden”); *id.* (“If some third parties do not receive contraceptive
 28 coverage from private parties who the government chose not to coerce, that result exists in the
 absence of governmental action—it is not a result the government has imposed”); *id.* (“[T]he
 government has simply restored a zone of freedom where it once existed.”).

1 which “‘turns on what [the] relevant substantive statute makes ‘important’”). Because
 2 Defendants were “not writing on a blank slate,” their failure to “assess whether there were
 3 reliance interests, determine whether they were significant, and weigh any such interests against
 4 competing policy concerns” renders the rules arbitrary and capricious. *Regents*, 140 S. Ct. at
 5 1915. Though Defendants may now tacitly acknowledge such reliance interests, *see* Defs. Opp’n
 6 at 33, merely claiming to have considered such interests does not make it so. *Getty v. Fed. Savs.*
 7 *& Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986) (“[s]tating that a factor was considered .
 8 . . is not a substitute for considering it”); *Whitman-Walker Clinic, Inc. v. HHS*, --- F. Supp. 3d ---,
 9 2020 WL 5232076, at *28 (D.D.C. Sept. 2, 2020) (concluding that where HHS’s rulemaking
 10 “said almost nothing” about the important issues HHS raised in prior rulemaking, and failed to
 11 consider the “consequences” of religious exemptions for access to care, “despite the fact that ‘the
 12 ACA’s intended purpose [is] to broaden access to health care,’” it was arbitrary and capricious
 13 (quoting *Morris v. Cal. Physicians’ Serv.*, 918 F.3d 1011, 1014 (9th Cir. 2019)). And, the Rules
 14 themselves do not reflect that Defendants engaged in the required consideration of reliance
 15 interests. *Regents*, 140 S. Ct. at 1907 (“judicial review of agency action is limited to ‘the grounds
 16 that the agency invoked when it took the action’”).

17 Given that HRSA continues to require that contraceptive coverage be provided, Defendants
 18 have “committed themselves to minimizing the impact on contraceptive coverage, even as they
 19 [seek] to protect employers with continuing religious objections.” *Id.* at 2399 (Kagan, J.,
 20 concurring) (citing *Women’s Preventive Services Guidelines*, HRSA (Dec. 2019),
 21 www.hrsa.gov/womens-guidelines-2019; 83 Fed. Reg. at 57,537). By promulgating Exemption
 22 Rules that disregard the critical interests of the women who rely on the protections of the
 23 Women’s Health Amendment, Defendants acted in an arbitrary and capricious manner and have
 24 “failed to fulfill that commitment to women.” *Id.*; *see also California*, 351 F. Supp. 3d at 1296
 25 (“[g]iven the ‘serious reliance interests’ of women who would lose coverage to which they are
 26 statutorily entitled if the Final Rules go into effect, the Court believes that Plaintiffs are also
 27 likely to prevail on their claim that the agencies failed to provide ‘a reasoned explanation . . . for
 28 disregarding facts and circumstances that underlay or were engendered by the prior policy’”).

C. Defendants Failed to Provide a Reasoned Explanation for Their Policy Reversal

Defendants must provide a reasoned and detailed explanation and justification for disregarding facts and circumstances that underlay their prior policy. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). They have not done so. See States' Mot. at 38-44; States' Opp'n at 44-48; States' Sur-Reply at 8-10. Indeed, in prior rulemaking, Defendants made several findings that the Exemption Rules do not reject—and, yet, the Exemption Rules fail to provide justification for such a fundamental change in course. For instance, Defendants previously stated:

- The contraceptive coverage requirement furthers the government's compelling interest "in safeguarding public health by expanding access to and utilization of recommended preventive services for women" and "assuring that women have equal access to health care services." 78 Fed. Reg. at 39,887.
- The scientific and medical evidence demonstrates the health and other benefits of contraceptive services, and it is for a woman and her provider to consider benefits and risks in selecting treatment. 78 Fed. Reg. at 39,872-73, 39,887-88.
- "Researchers have shown that access to contraception improves the social and economic status of women." 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012).
- "Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating [] disparit[ies] by allowing women to achieve equal status as healthy and productive members of the job force." 77 Fed. Reg. at 8728. That is, "by providing women broad access to preventive services, including contraceptive services," disparities are reduced. *Id.*
- The ACA "contemplates providing coverage of recommended preventive services through the existing employer-based system of health coverage so that women face minimal logistical and administrative obstacles." 78 Fed. Reg. at 39,888.
- "[W]omen in the workforce were at a disadvantage compared to their male co-workers." 77 Fed. Reg. at 8,728.
- A broader exemption would sweep in employers "more likely to employ individuals who have no religious objection to the use of contraceptive services," and thereby risk "subject[ing] [such] employees to the religious views of [their] employer." 77 Fed. Reg. at 8728.
- Every added burden or barrier increases the likelihood that some women will experience an unintended pregnancy, which in turn increases the health risks to those women and their children. *Zubik* Resp. Br., 2016 WL 537623, at *57.

- Requiring “women—and only women—to take burdensome steps . . . in order to get coverage for an important aspect of their medical care” “thwart[s] the basic purposes of the Women’s Health Amendment, which was enacted to ensure that women receive *equal* health coverage and to remove barriers to use of preventive services.” *Zubik Resp. Br.*, 2016 WL 537623, at *29 (emphasis in original) (quoting *Hobby Lobby*, 573 U.S. at 732).

Given these prior findings, and the fact that the Exemption Rules do not challenge or disavow those findings, this Court already correctly concluded that the States are “likely correct that ‘the Rules provide no new facts and no meaningful discussion that would discredit their prior factual findings establishing the beneficial and essential nature of contraceptive healthcare for women.’” *California*, 351 F. Supp. 3d at 1296. “Instead, the Final Rules on this point rest, at bottom, on new legal assertions by the agencies.” *Id.*; see also *Bhd. of Locomotive Engineers & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 116-17 (D.C. Cir. 2020) (where rule contains a “total explanatory void” and the court comes up “empty-handed” in its review of the record for a reasoned explanation, the rule is vacated). Because the reasons that Defendants proffer “are inadequate,” Defendants’ Rules may not be sustained. *Regents*, 140 S. Ct. at 1907; *City of Oberlin v. FERC*, 937 F.3d 599, 606-607 (D.C. Cir. 2019) (Decision-making was arbitrary and capricious where Commission “failed to adequately answer” outstanding, fundamental questions).

D. Defendants Failed to Meaningfully Respond to Comments Concerning the Rules’ Impact

Defendants failed to meaningfully respond to comments during the rulemaking process and ignored the overwhelming body of scientific evidence and expertise documented in those comments. See States Mot. at 46-50; States Opp’n at 50; States Sur-Reply at 11-12. “For an agency’s decisionmaking to be rational, it must respond to significant points raised during the public comment period.” *Allied Local & Reg’l Mfrs. Caucus*, 215 F.3d at 80; see also *Nat’l Urban League*, 2020 WL 5940346, at *5 (agency action arbitrary and capricious where agency fails to provide “‘satisfactory explanation’ to the numerous statements” that the proposed agency action would undermine the underlying statute). Although Defendants need not address every comment, Defendants must address “significant” comments or those “which, if true, raise points relevant to the agency’s decision.” *City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007);

1 *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020) (Agency must consider concerns raised in
 2 public comments lest its action be deemed arbitrary and capricious). Defendants failed to meet
 3 this standard. *See* States Mot. at 46-50; States Opp’n at 50; States Sur-Reply at 11-12.

4 **E. Defendants Impermissibly Weighed Nonstatutory Factors in Promulgating**
 5 **the Moral Exemption**

6 As noted *supra*, the Religious Exemption Rule is unsupported and irrational and should
 7 therefore be set aside. In the case of the Moral Exemption Rule, those arguments apply with even
 8 greater force, as RFRA does not contemplate or protect such objections at all. *See Little Sisters*,
 9 140 S. Ct. at 2400 (Kagan, J., concurring) (“RFRA cast a long shadow over the Departments’
 10 rulemaking . . . and that statute does not apply to those with only moral scruples.”). In the
 11 absence of any competing statutory considerations such as those provided in RFRA, “a careful
 12 agency would have weighed anew, in this different context, the benefits of exempting more
 13 employers from the mandate against the harms of depriving more women of contraceptive
 14 coverage.” *Id.* at 2400 (Kagan, J., concurring). Defendants nonetheless chose to adopt a
 15 sweeping Moral Exemption Rule, reflecting an impermissible consideration of non-religious
 16 “moral” objections to contraceptive coverage without any indication that Congress intended the
 17 agency to consider such objections. *See Massachusetts*, 549 U.S. at 533-34 (EPA’s “laundry list”
 18 of policy reasons for its rulemaking did not “amount to a reasoned justification for declining to
 19 form a scientific judgment”); *State Farm*, 463 U.S. at 43 (proscribing reliance on factors “which
 20 Congress has not intended it to consider.”).

21 **II. THE RELIGIOUS AND MORAL EXEMPTION RULES ARE CONTRARY TO LAW**

22 As discussed in the States’ pleadings, the Exemption Rules are contrary to Sections 1554
 23 and 1557 of the ACA. *See* States Mot. at 35-37; States Opp’n at 39-43; States Sur-Reply at 7-8.

24 **A. The Exemption Rules Violate Section 1554 by Creating Unreasonable**
 25 **Barriers to Care and Impeding Timely Access to Healthcare**

26 Section 1554 provides that “the Secretary of [HHS] shall not promulgate any regulation
 27 that: (1) creates *any* unreasonable barriers to the ability of individuals to obtain appropriate
 28 medical care; (2) impedes *timely access* to health care services; . . . or (6) *limits* the availability of

1 health care treatment for the full duration of a patient’s medical needs.” 42 U.S.C. § 18114(1),
 2 (2), (6) (emphases added). The Exemption Rules violate each of these proscriptions. *See States*
 3 *Mot.* at 35-36; *States Opp’n* at 39-41; *States Sur-Reply* at 7-8.

4 First, the Exemption Rules create unreasonable barriers to accessing contraceptive care. 42
 5 U.S.C. § 18114(1). The Exemption Rules will cause—by Defendants’ own estimates—up to
 6 126,400 women to lose their contraceptive coverage. 83 Fed. Reg. at 57,551 n.26, 57,578.
 7 Without such coverage, women will need to pay out-of-pocket for contraceptives, which cost \$50
 8 per month or upwards of \$600 per year. *States Mot.* at 2; *see also id.* at 36 (cost of IUD exceeds
 9 \$1,000, which equates to a month’s salary for a woman working full time at the federal minimum
 10 wage of \$7.25 an hour). Because of the Contraceptive Coverage Mandate, “[w]omen now save
 11 an average of 20% annually in out-of-pocket expenses, including \$248 savings for IUDs and \$255
 12 for the contraceptive pill.” *States Mot.* at 2; *see also* 83 Fed. Reg. at 57,538 (predicting \$68.9
 13 million in “transfer costs” to be paid by “women previously receiving contraceptive coverage”).
 14 Cost is always a barrier to obtaining medical care, and the most effective forms of contraception
 15 (e.g. IUDs) have the highest upfront costs. Forcing women to pay for contraceptives will result in
 16 some women forgoing contraceptives or switching to cheaper, but less effective, methods of
 17 contraception. *See States Mot.* at 36 (collecting record evidence); *States Opp’n* at 5-6, 40 (same).

18 Second, the Exemption Rules impede timely access to contraceptives. 42 U.S.C.
 19 § 18114(2). As Defendants have acknowledged, providing preventive services through the
 20 existing, employer-based system of health coverage helps ensure that “women face minimal
 21 logistical and administrative obstacles.” 78 Fed. Reg. at 39,888. Singling out and removing
 22 contraceptive coverage from that system will necessarily increase the administrative obstacles
 23 that the ACA sought to remove. For example, women who lose contraceptive coverage may need
 24 to locate and secure a separate, new qualified medical provider, which may require transferring
 25 medical records or submitting a complete medical history to the new provider to ensure proper
 26 care. *See States Mot.* at 36 (collecting record evidence); *States Opp’n* at 40 (same). Such efforts
 27 necessarily delay and impede timely access to contraceptives. And even minor obstacles to
 28

1 obtaining contraception lead to more unplanned and risky pregnancies, with adverse effects on
2 women and their families. *See* States Opp’n at 41 (citing record).

3 The evidence in the record further demonstrates the importance of holistic coverage, to
4 ensure that a woman’s “chosen provider” can “manage all health conditions and needs at the same
5 time.” *See* States Mot. at 36 (citing record evidence). Eliminating coverage for one component
6 of a woman’s healthcare—contraceptives—introduces hurdles which, “in turn, will increase those
7 women’s risk of unintended pregnancy and interfere with their ability to plan and space wanted
8 pregnancies. These barriers could therefore have considerable negative health, social and
9 economic impacts for those women and their families.” *Id.*

10 Third, the Exemption Rules will “limit the availability” of contraceptives “for the full
11 duration” of time during which women need them. 42 U.S.C. § 18114(6). Contraceptives are a
12 routine and constant healthcare need for women of childbearing age. Nearly two-thirds of the
13 over 72 million women between the ages of 15-49 in the United States use contraceptives. States
14 Mot. at 1. A typical woman wishing to have only two children will, on average, spend three
15 decades avoiding unintended pregnancy. *Id.* at 45. Because contraceptives must be used without
16 interruption for such an extended period of time, the Exemption Rules will curb the availability of
17 contraceptives for some women during the multi-decade period when they need them. For all of
18 these reasons, the Exemption Rules violate multiple requirements imposed by Section 1554.

19 The Ninth Circuit’s recent *en banc* decision in *California v. Azar*, 950 F.3d 1067 (9th Cir.
20 2020), *petitions for cert. filed* is readily distinguishable. In that case, HHS promulgated a rule
21 imposing new limitations on the Title X family planning program, including forbidding funding
22 recipients from making referrals for abortion services and requiring recipients to be physically
23 and financially separated from abortion-related activities. *Id.* at 1081-82. The Ninth Circuit
24 determined that these new Title X funding requirements did not run afoul of Section 1554
25 because of the “distinction between regulations that impose burdens on health care providers and
26 their clients, and those that merely reflect Congress’s choice not to subsidize certain activities.”
27 *Id.* at 1092. Federal funding restrictions “ensure that government funds are spent for the purposes
28

1 for which they were authorized” and, as the Ninth Circuit opined, Section 1554 is not meant “to
2 affect Title X funding decisions.” *Id.* at 1094.

3 The Exemption Rules, however, are not restrictions imposed on a federally-funded program
4 and thus the holding of *California* is wholly inapplicable. The loss of contraceptive coverage
5 caused by the Exemption Rules will directly interfere with the ability of women to access the
6 contraceptive healthcare that they need. *California*, 950 F.3d at 1094 (Section 1554 “is meant to
7 prevent direct government interference with health care”). Providers may be unable to prescribe
8 contraceptives that are not covered by their patients’ insurance, or those prescriptions will go
9 unfilled because of the out-of-pocket costs that women will bear. That is precisely the type of
10 governmental regulatory burden that Section 1554 was intended to prevent. *See, e.g., Planned*
11 *Parenthood of Md., Inc. v. Azar*, No. 20-361, 2020 WL 3893241, at *9–10 (D. Md. July 10, 2020)
12 (holding regulation violated Section 1554 by requiring insurers to provide two separate bills to
13 policyholders, as opposed to one combined bill, thereby “mak[ing] it harder for consumers to pay
14 for insurance,” and distinguishing *California* because that case concerns “ensuring government
15 funds are not spent on unauthorized purposes”).

16 In promulgating Section 1554, Congress intended to “ensure that HHS, in implementing the
17 broad authority provided by the ACA, does not improperly impose regulatory burdens on doctors
18 and patients.” *California*, 950 F.3d at 1094. The Exemption Rules violate this provision by
19 creating unreasonable barriers to care, impeding women’s timely access to services, and limiting
20 the availability of care for the full span of time during which women need it.

21 **B. The Exemption Rules Violate Section 1557 By Discriminating Against**
22 **Women**

23 Section 1557 of the ACA states that an “individual shall not . . . be excluded from
24 participation in, be denied the benefits of, or be subjected to discrimination under, any health
25 program or activity” on the basis of sex. 42 U.S.C. § 18116(a); 20 U.S.C. § 1681(a). The
26 Exemption Rules must be held unlawful and set aside because they permit employers to exclude
27 women from full and equal participation in their employer-sponsored health plan, deny women
28

1 full and equal healthcare benefits, and license employers to discriminate on the basis of sex. 42
 2 U.S.C. § 18116; *see* States Mot. at 36-37; States Opp’n at 41-43; States Sur-Reply at 8.

3 The Exemption Rules permit employers to exempt themselves from providing only one
 4 type of preventive service: contraceptives, which women (and only women) use. Women are
 5 forced either to accept incomplete health coverage unequal to that received by male colleagues or
 6 forgo employer-provided coverage and purchase a comprehensive healthcare package out-of-
 7 pocket. That unfair choice directly violates Section 1557 by subjecting female employees (and
 8 employees’ female dependents) to discrimination on the basis of sex with respect to access to
 9 federally-entitled coverage. 45 C.F.R. § 92.1.

10 This conclusion is bolstered by the Supreme Court’s recent decision in *Bostock v. Clayton*
 11 *County*, 140 S. Ct. 1731 (2020). In *Bostock*, the Court held that discrimination based on
 12 transgender status or sexual orientation “necessarily entails discrimination based on sex,” and
 13 accordingly falls within Title VII’s sweep. *Id.* at 1747.¹⁰ Even assuming that “sex” “refer[red]
 14 only to biological distinctions between male and female,” the Court determined that “it is
 15 impossible to discriminate against a person for being homosexual or transgender without
 16 discriminating against that individual based on sex.” *Id.* at 1739, 1741. Here, as Defendants
 17 previously explained, requiring “women—and only women—to take burdensome steps ‘to learn
 18 about, and to sign up for, a new government funded and administered health benefit’ in order to
 19 get coverage for an important aspect of their medical care” necessarily discriminates on the basis
 20 of sex. *Zubik Resp. Br.*, 2016 WL 537623, at *29 (quoting *Hobby Lobby*, 573 U.S. at 732).

21 CONCLUSION¹¹

22 The Court should grant the States’ motion for summary judgment, and deny Defendants’
 23 and Intervenor’s motions to dismiss and motions for summary judgment.

24 _____
 25 ¹⁰ Section 1557 incorporates the definition of “on the basis of sex” under Title IX, 42 U.S.C.
 26 § 18116(a), and “Title VII case law has often informed Title IX case law with respect to the
 meaning of” sex discrimination. 83 Fed. Reg. 37,160, 37,168 (Aug. 18, 2020).

27 ¹¹ Because the States’ APA and contrary to law claims demonstrate that this Court should set
 28 aside the Exemption Rules, this Court need not reach the Constitutional claims. *See In re Ozanne*,
 841 F.3d 810, 814 (9th Cir. 2016) (“as a ‘fundamental rule of judicial restraint,’ [the court] ‘must
 consider nonconstitutional grounds for decision’ before ‘reaching any constitutional questions’”).

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