Nos. 19-431 & 19-454

In The
Supreme Court of the United States

LITTLE SISTERS OF THE
POOR SAINTS PETER AND PAUL HOME,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
AND STATE OF NEW JERSEY,

Respondents.

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, ET AL.,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA
AND STATE OF NEW JERSEY,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTIONS PRESENTED

The Patient Protection and Affordable Care Act guarantees that women receive, without cost sharing, coverage for certain preventive health services through their insurers. One covered service is contraception. Since 2013, employers and universities with a religious objection to providing contraception have been allowed to opt out of the coverage requirement after providing notice of their objection, and a third party then fills the gap. In 2017, the Departments of Health and Human Services, Labor, and Treasury issued, without advance notice, "interim final rules" that exempt altogether employers and universities with either a religious or moral objection to providing contraception. After taking comments on those rules, the same agencies issued materially identical "final rules." The questions presented are:

1. Whether the agencies complied with the Administrative Procedure Act by promulgating legislative rules without first issuing, or taking comment on, a notice of proposed rulemaking.

2. Whether the Affordable Care Act or the Religious Freedom Restoration Act authorizes the agencies to exempt health plans from the preventive-services requirement.

3. Whether the district court's assessment of the remedy necessary to afford the plaintiffs complete interim relief from unlawful regulations was an abuse of discretion.

4. Whether an intervenor has standing to appeal a preliminary injunction that does not affect it.

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INTRODUCTION

Women have long been denied full and equal access to health care due to higher costs and discriminatory coverage. To address this inequity, Congress guaranteed that women receive access to basic preventive health care services, as identified by the Health Resources and Services Administration. One form of women's preventive care is contraception, which reduces unplanned pregnancies and associated negative health outcomes for women and their babies.

In 2013, the government created an accommodation that allows certain objecting employers to exclude contraception from their benefits packages while requiring third parties to provide the guaranteed contraceptive coverage to women directly. This approach balances the employers' sincere religious belief with the health of their female employees.

In 2017, three federal agencies disrupted this balance. Without any forewarning, those agencies promulgated two rules that allow anyone with a religious objection to contraception—including publicly traded corporations and large universities—to exclude contraception from their benefits package. So too could schools and employers with *any* moral objection. But the government would no longer require third parties to provide contraceptive coverage for women working for those employers or attending those schools—even for women without the same religious or moral beliefs.

Two courts enjoined the 2017 rules for violations of the Administrative Procedure Act, but the agencies, after taking comments on the unlawful rules, promulgated materially identical rules a year later.

This case concerns the legality of these rules. On one level, this case is about the appropriate balance between the health and autonomy of women and the religious and moral views of their employers. But it is also about the power of federal agencies to resolve such questions by relying on power never explicitly granted by Congress nor recognized by the courts.

First, the 2017 rules did not go through notice-and-comment rulemaking despite the agencies not having good cause or express statutory authority to forgo that requirement. Although the agencies took comments on the improper 2017 rules before reissuing materially identical rules in 2018, the APA does not allow for such a procedure.

Second, the ACA delegated to HRSA authority to determine *what* preventive services insurers must cover for women. But the agencies have decided *who* must cover these services, a determination Congress already made.

Third, the agencies went beyond what the Religious Freedom Restoration Act allows. The existing accommodation respects both the health of women and the religious liberty interests of employers and universities, precisely the type of "sensible balance" Congress expected when it passed RFRA. And RFRA does not grant executive branch agencies discretionary

rulemaking authority to issue exemptions when no violation exists.

Enjoining the rules nationwide was both within the district court's authority and an appropriate exercise of discretion. The APA contemplates only categorical remedies and any more limited injunction exposes respondent states to continuing harm. And the Third Circuit properly concluded that the Little Sisters of the Poor have no stake in this litigation.

The judgment should be affirmed.

STATEMENT

A. The contraceptive care guarantee

1. The Patient Protection and Affordable Care Act (ACA) guarantees individuals covered by a non-grandfathered "group health plan" or "health insurance issuer" access to four specified categories of preventive services at no cost. 42 U.S.C. 300gg-13(a).[1] One category relates specifically to preventive services for women: it requires coverage of "with respect to women, such additional preventive care and screenings * * * as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA] for purposes of this paragraph." 42 U.S.C. 300gg-13(a)(4).

[1] The ACA grandfathered some health plans "to ease the transition of the healthcare industry." 75 Fed. Reg. 34,541 (June 17, 2010). Until a grandfathered plan makes certain changes, it need not comply with several of the ACA's reforms, including the preventive services requirement. 42 U.S.C. 18011; see 45 C.F.R. 147.140(g).

This requirement was added to the ACA by the Women's Health Amendment, which Congress enacted to combat persistent gender disparities in health care. See 155 Cong. Rec. 28,800-02, 29,302 (2009) (Sen. Mikulski); *id.* at 28,841 (Sen. Boxer); *id.* at 29,070 (Sen. Feinstein). Women historically have borne disproportionately high costs for medical care and have faced other forms of discrimination in obtaining health services, keeping many from accessing lifesaving care. See *ibid*.

2. After the ACA was enacted, HRSA commissioned the Institute of Medicine, a nonprofit institution that provides objective advice on matters of science, health, and technology, to develop the recommendations required by the Women's Health Amendment. C.A.App. 1001. The Institute's committee of health specialists proposed eight health services to be covered, including "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education." C.A.App. 1009, 1034-35. The recommendation to include contraception was consistent with the expectations of supporters and opponents of the Women's Health Amendment. See, *e.g.*, 155 Cong. Rec. 28,841 (2009) (Sen. Boxer); *id.* at 28,843 (Sen. Gillibrand); *id.* at 28,844 (Sen. Mikulski); *id.* at 29,070 (Sen. Feinstein); *id.* at 29,311 (Sen. Nelson).

The Institute's recommendation rested on several conclusions: unintended pregnancies can jeopardize the health of women and their babies; contraception promotes healthy inter-pregnancy intervals and reduces unintended pregnancies and abortion; and elevated

costs impede access to contraception and therefore its effective use. C.A.App. 1027-34. Indeed, "reducing or eliminating cost barriers to women's contraceptive choices has a dramatic impact on women's ability to choose and use the most effective forms of contraception." C.A.App. 248. Before the ACA, contraceptives represented 30-44% of women's out-of-pocket health spending. C.A.App. 249. Use of more effective methods as well as more consistent use of any method has been linked to declines in unplanned pregnancies and abortions. C.A.App. 248-49. The benefits of contraception are all "commonly accepted." *Priests for Life v. HHS*, 808 F.3d 1, 22-23 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc).

In August 2011, HRSA adopted the Institute's recommendations and issued the initial "Women's Preventive Services Guidelines," which required coverage of FDA-approved contraceptive methods. C.A.App. 984-86. The guidelines have since been amended, but still include contraception as a covered service. HRSA, *Women's Preventive Services Guidelines* (Dec. 2019).[2]

One study estimated that the contraceptive care guarantee has saved users of prescription contraceptive methods an average of $250 annually in copayments. C.A.App. 249. As of 2015, at least 56 million women had access, without cost sharing, to preventive services, including contraception, because of the ACA. See 83 Fed. Reg. 57,578 (Nov. 15, 2018).

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[2] https://www.hrsa.gov/womens-guidelines-2019.

B. Prior challenges to the contraceptive care guarantee

1. The ACA's preventive services provision did not contain a conscience exemption, and in 2012, Congress rejected an effort to add one. 158 Cong. Rec. 2621-34 (2012). Nonetheless, since creation of HRSA's guidelines, the Departments of Health and Human Services, Labor, and Treasury (the "agencies") have recognized certain individuals and organizations have faith-based objections to providing coverage for contraception. To address some of those objections, the agencies exempted houses of worship from covering contraceptive services. 76 Fed. Reg. 46,623 (Aug. 3, 2011); 77 Fed. Reg. 8725 (Feb. 15, 2012); 78 Fed. Reg. 39,896 (July 2, 2013). This exemption, commonly called the church exemption, respects the "particular sphere of autonomy for houses of worship." 80 Fed. Reg. 41,325 (July 14, 2015); see also 78 Fed. Reg. 39,887.

The agencies also sought to address the concerns of other entities that did not qualify for the church exemption but objected to providing contraceptive coverage. To do so, the agencies underwent a thorough rulemaking to establish an accommodation for such entities "that seeks to respect the religious liberty" of objectors while ensuring that their employees "have precisely the same access to all FDA-approved contraceptives as employees of [other] companies." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 692 (2014); see also 77 Fed. Reg. 16,501 (Mar. 21, 2012); 78 Fed. Reg. 8456 (Feb. 6, 2013); 78 Fed. Reg. 39,874.

Under the resulting accommodation, an employer with an objection to covering contraception

communicates the objection to either its insurer or the third-party administrator (TPA) of its health plan. Once the employer does so, it is no longer required to "contract, arrange, pay, or refer for contraceptive coverage." 78 Fed. Reg. 39,878. Instead, the federal government requires or encourages the insurer or TPA to provide contraceptive coverage.

The accommodation functions slightly differently depending on whether the employer has a "fully insured" or "self-insured" health plan. For "fully insured" plans—in which the employer contracts with an insurance company for health coverage and the insurance company assumes the associated financial risks—the notified insurer arranges for separate contraceptive coverage for the employer's female insureds, consistent with the ACA's preventive-services requirement. See 45 C.F.R. 147.131(c)-(d) (2015); 29 C.F.R. 2590.715-2713A(b)-(d) (2015). Because coverage for contraception is "at least cost neutral" for insurers, no reimbursement or other payments are necessary. 78 Fed. Reg. 39,877. For "self-insured" plans in which the employer pays its employees' health care costs and contracts with a TPA to manage the plan the notified TPA provides separate contraceptive coverage. See 45 C.F.R. 147.131(c)-(d) (2015); 29 C.F.R. 2590.715-2713A(b)-(d) (2015). The federal government then offers reimbursement to the TPA. 29 C.F.R. 2590.715-2713A(b)(2)-(3) (2015).

Following this Court's order in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), the agencies issued an "interim final rule" and subsequent final rule allowing an employer to inform HHS of its religious objection

instead of its insurer or TPA. 79 Fed. Reg. 51,092 (Aug. 27, 2014); 80 Fed. Reg. 41,323 (July 14, 2015). After notifying HHS, the religious objector need not "arrange, pay, or refer for [contraceptive] coverage." 79 Fed. Reg. 51,095. And after this Court's decision in *Hobby Lobby*, the agencies extended the accommodation to closely held for-profit employers with a religious objection. 79 Fed. Reg. 51,118; 80 Fed. Reg. 41,323-24.

2. Several employers challenged the accommodation under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb *et seq*. Eight of nine courts of appeals rejected those challenges.[3] The ninth concluded that the accommodation violated RFRA because a direct-to-HHS notification would be a less restrictive way to serve the same interest as the amended accommodation. *Sharpe Holdings, Inc. v. HHS*, 801 F.3d 927, 943-45 (8th Cir. 2015).

This Court consolidated four petitions seeking review of those decisions. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). After argument, the Court vacated all relevant lower court judgments and provided the parties an opportunity to identify a solution that

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[3] *Cath. Health Care Sys. v. Burwell*, 796 F.3d 207 (2d Cir. 2015); *Geneva Coll. v. HHS*, 778 F.3d 422 (3d Cir. 2015); *E. Texas Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015); *Michigan Cath. Conf. & Cath. Family Servs. v. Burwell*, 807 F.3d 738 (6th Cir. 2015); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606 (7th Cir. 2015); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015); *Eternal Word Television Network, Inc. v. HHS*, 818 F.3d 1122 (11th Cir. 2016); *Priests For Life v. HHS*, 772 F.3d 229 (D.C. Cir. 2014). A ninth court of appeals has more recently joined the consensus. *California v. HHS*, 941 F.3d 410 (9th Cir. 2019).

accommodated religious exercise while also "ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage." *Id.* at 1560 (internal quotations marks omitted). The Court advised that nothing in its opinion should "affect the ability of the Government to ensure that women covered by petitioners' health plans 'obtain, without cost, the full range of FDA approved contraceptives.'" *Id.* at 1560-61 (quoting *Wheaton College*, 134 S. Ct. at 2807).

Following *Zubik*, the agencies solicited additional input via a request for information. 81 Fed. Reg. 47,741 (July 22, 2016). After reviewing responsive comments, the agencies determined that nothing short of a wholesale exemption would "be acceptable to those with religious objections to the contraceptive-coverage requirement." Dep't of Labor, *FAQs About Affordable Care Act Implementation Part 36* ("2017 FAQs") at 4 (Jan. 9, 2017).[4] But expanding the wholesale exemption available to churches would create "administrative and operational challenges" and "undermine women's access to full and equal coverage." *Ibid.*; see *id.* at 5-11. Therefore, the agencies retained the accommodation because it is "the least restrictive means of furthering the government's compelling interest in ensuring that women receive full and equal health coverage, including contraceptive coverage." *Id.* at 4-5.

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

C. The present controversy

1. In October 2017, the agencies issued—without prior notice or opportunity for public comment—two "interim final rules" that created broad exemptions from the preventive-services requirement for entities with a religious or moral objection to contraception. 82 Fed. Reg. 47,792 (Oct. 13, 2017); 82 Fed. Reg. 47,838 (Oct. 13, 2017) (the "2017 rules").

The first rule permits any private employer—including publicly traded corporations—or educational institution to self-exempt from the contraceptive care guarantee based on its "sincerely held religious beliefs." 82 Fed. Reg. 47,808-11. The second allows any non-profit or closely held entity to self-exempt because of "sincerely held moral convictions." 82 Fed. Reg. 47,850-51. Both rules require no specific notice and make the accommodation optional. The agencies acknowledged that women would lose contraceptive coverage, estimating that between 31,700 and 120,000 women would lose contraceptive coverage in one year as a result. 82 Fed. Reg. 47,821-23. Each rule was immediately effective and gave the public 60 days to comment. 82 Fed. Reg. 47,792; 82 Fed. Reg. 47,838.

Pennsylvania sought a preliminary injunction of the 2017 rules based on violations of the Administrative Procedure Act (APA). The district court granted Pennsylvania's motion and enjoined the agencies from enforcing the rules. Pet.App. 101a-03a.

3. Despite the injunction barring implementation of the rules—and one entered in a parallel lawsuit, see *California v. HHS*, 281 F. Supp. 3d 806 (N.D. Cal. 2017)—the agencies did not withdraw either rule. Instead, while appealing both injunctions, they replaced the 2017 rules with largely identical "final rules." See 83 Fed. Reg. 57,536; 83 Fed. Reg. 57,592 (Nov. 15, 2018) (the "2018 rules"). Like the earlier versions, the 2018 rules authorize all private entities—including publicly traded corporations—to self-exempt from the contraceptive guarantee for religious reasons; allow all but publicly traded corporations to do so for moral reasons; do not impose any notice requirement; and make the accommodation optional. 83 Fed. Reg. 57,558-65; 83 Fed. Reg. 57,614, 57,617-18. The agencies increased their estimate of the number of women who would lose access to contraception in one year to between 70,500 and 126,400. 83 Fed. Reg. 57,578-80.

Following promulgation of the 2018 rules, Pennsylvania, joined by New Jersey ("the States"), filed an amended complaint and again moved for a preliminary injunction, which the district court granted. Pet.App. 185a-87a.[5] The injunction operates nationally to protect the States from costs they would incur if, for example, a State resident's out-of-state employer dropped contraceptive coverage or if a student attending an

[5] The 2018 rules are also subject to a second injunction. *California v. HHS*, 351 F. Supp. 3d 1267, 1284-97 (N.D. Cal. 2019), affirmed by *California*, 941 F.3d 410. Defendants in that case have sought review in this Court. Nos. 19-1038, 19-1040, 19-1053.

in-State school lost contraceptive coverage through her out-of-state plan. Pet.App. 179a-84a.

The Little Sisters of the Poor, which had been permitted to defend "the portions of the [2017 religious rule] that apply to religious nonprofit entities," *Pennsylvania v. President*, 888 F.3d 52, 62 (3d Cir. 2018), immediately appealed. C.A.App. 53. The government appealed one week later. C.A.App. 53.

4. The Third Circuit unanimously affirmed. The court concluded that the agencies lacked statutory authorization or good cause to forgo notice-and-comment rulemaking. Pet.App. 23a-28a. And it found that accepting comments on the improperly issued 2017 rules before issuing the 2018 rules failed to satisfy the APA's procedural requirements. Pet.App. 29a-30a.

In addition, the court held that the 2018 rules exceed the agencies' authority under the ACA, which delegates to HRSA responsibility only to oversee guidelines that identify which preventive services must be covered for women, not authority to decide who must cover them. Pet.App. 32a-36a. Likewise, the court found that RFRA is not a basis for the religious rule because, even assuming RFRA grants rulemaking authority, the existing accommodation does not substantially burden religious exercise. Pet.App. 36a-41a. The agencies have never claimed that RFRA authorizes the moral rule. Pet.App. 36a n.27.

The court also ruled that the Little Sisters lacked appellate standing because they were "no longer aggrieved by the district court's ruling." Pet.App. 9a n.6. After the Little Sisters were allowed to intervene, but before the 2018 rules were preliminarily enjoined, a separate district court permanently enjoined the agencies from enforcing the contraceptive care guarantee or the accommodation against employers participating in the Christian Brothers Employee Benefit Trust, including the Little Sisters. Order at 2-3, Little Sisters of the Poor v. Azar, No. 13-2611 (D. Colo. May 29, 2018); see Pet.App. 173a-74a n.27 (excluding Little Sisters from scope of injunction here).

Finally, the Third Circuit concluded that the nationwide scope of the injunction was not an abuse of discretion because the APA contemplates universal vacatur as the proper remedy for invalid rules. Pet.App. 43a-44a. And only an injunction operating nationwide would fully protect the States from costs associated with providing contraceptive coverage to in-state employees and students covered by an exempted out-of-state plan. Pet.App. 44a-46a.

SUMMARY OF ARGUMENT

The rules are invalid for two independent reasons. First, neither the 2017 nor the 2018 rules complied with the APA's procedural requirements. Second, neither the ACA nor RFRA authorizes the agencies to create sweeping religious and moral exemptions from the

contraceptive care guarantee. The resulting injunction was no broader than necessary to provide the States complete relief and well within the district court's discretion. And the Little Sisters lack appellate standing, because they are not affected by the injunction

I. The agencies promulgated the 2017 rules without good cause or statutory authority to bypass notice-and-comment rulemaking. The 2018 rules are similarly invalid because they were preceded not by a notice of proposed rulemaking but by the improper 2017 rules.

A. The agencies lacked authority to promulgate the 2017 rules without undergoing notice-and-comment procedures. First, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), does not grant the express authorization necessary to bypass pre-promulgation notice and comment. Second, the agencies provided no evidence that the 2017 rules were so urgently needed that agencies could not provide notice and comment beforehand.

B. The 2018 rules were likewise invalidly promulgated. The APA's rulemaking process requires an agency to issue a notice of proposed rulemaking, accept comment, and then issue a final rule that responds to substantive comments. This process gives the public the opportunity to provide input when the agency is most receptive. Here, rather than withdraw the unlawful 2017 rules and initiate a new regulatory process with a notice of proposed rulemaking, the agencies chose to issue the 2018 rules to "finalize" the

improper 2017 rules. 83 Fed. Reg. 57,536. Claiming, as the agencies do, that their acceptance of comments following the unlawful 2017 rules is sufficient to satisfy the APA would write the requirement of pre-promulgation notice and comment out of the statute.

II. Neither the religious rule nor the moral rule can be justified by the ACA. That statute does not grant the agencies authority to exempt broad classes of employers from their obligations under the Women's Health Amendment. The ACA required health plans and insurers to cover, without cost sharing, four categories of preventive health services: three already-existing categories and a fourth specific to women to be issued by HRSA. 42 U.S.C. 300gg-13(a). The statute's text and structure make plain that HRSA's only task is to identify which preventive services for women must be covered. Petitioners' contrary arguments misread the statute's plain language and assume that Congress implicitly delegated limitless authority to grant non-health related exemptions to a sub-agency with narrow expertise in health care. Finally, affirming the judgment would not upset the church exemption, which is independently authorized by the well-established church autonomy doctrine.

III. The religious rule is likewise not authorized by RFRA. That statute does not require the religious rule, and it does not grant the agencies the broad rule-making authority they claim to create exemptions from other statutes when RFRA is not violated.

A. Because the accommodation is consistent with RFRA, there is no basis for issuing broader exemptions from the contraceptive care guarantee. The accommodation respects religious liberty by allowing objecting non-profit and closely held corporate employers to opt out of facilitating contraceptive coverage to which they have a sincere religious objection. It also respects the rights and autonomy of female students, employees, and beneficiaries by providing them access to the contraceptive coverage they are guaranteed by law.

The accommodation does not substantially burden religious exercise. Rather, it eliminates objecting employers' role in facilitating access to contraceptive coverage. That female employees, students, and beneficiaries may still receive access to contraception is a function of federal law, not an employer's objection. The accommodation also enabled women to retain access to all preventive services without a deterring impediment, such as enrolling in a separate program or paying money, which fulfills Congress's objective in enacting the Women's Health Amendment. Petitioners have identified no other mechanism that accomplishes this compelling interest in a less burdensome way for objecting employers.

B. If RFRA does not require the religious rule, RFRA cannot give the agencies discretion to create it. RFRA contains no affirmative grant of rulemaking authority, and nothing in RFRA's text, structure, or history suggests that Congress granted federal agencies the power to issue categorical exemptions from

laws they administer in the absence of a RFRA violation. Here, the religious rule goes beyond what RFRA requires even under the agencies' own interpretation of the statute, as it wholly exempts employers that have no objection to the accommodation.

IV. The geographic scope of the injunction entered in this case is consistent with the APA, which requires that unlawful rules be "set aside" without limitation and grants courts authority to enter preliminary orders "to postpone the effective date of an agency action or to preserve status or rights." 5 U.S.C. 705, 706(2). Furthermore, the district court did not abuse its discretion in finding that a nationwide injunction was necessary to fully redress the State's injuries.

V. The Little Sisters lack appellate standing. The agencies are enjoined from enforcing the contraceptive care guarantee against them and the district court expressly excluded them from the injunction now on appeal.

ARGUMENT

I. The agencies violated the APA's procedural requirements.

The APA's procedural requirements are uncomplicated. Legislative rules must ordinarily follow a "notice of proposed rule making" that describes the nature of the rulemaking proceeding, the legal authority "under which the rule is proposed" and "the terms or substance of the proposed rule or a description of the

subjects and issues involved." 5 U.S.C. 553(b). Following this notice, "the agency shall give interested persons an opportunity to participate in the rule making" through written comments or otherwise. 5 U.S.C. 553(c). And only "[a]fter consideration" of information received in response to the proposal may an agency finalize its rule. *Ibid.*

Neither the 2017 nor 2018 rules complied with this procedure. When the agencies promulgated the 2017 rules they claimed both express statutory authority, see 5 U.S.C. 559, and good cause, see 5 U.S.C. 553(b)(B), to dispense with the APA's requirements. They instead requested comments after the fact. After two courts rejected these contentions, the agencies did not initiate a new rulemaking consistent with the requirements of the APA; instead, they "finalize[d]" the 2017 rules through the materially-identical 2018 rules. 83 Fed. Reg. 57,536.

The agencies now insist that they properly bypassed notice-and-comment procedures before issuing the 2017 rules and, if not, the comment period preceding the 2018 rules solved the problem. Neither contention is correct.

A. The 2017 rules are procedurally invalid.

In their petition, the agencies called the status of the 2017 rules "irrelevant" and focused the Court's attention on whether accepting comments on the 2017 rules satisfied the APA's requirements for the 2018 rules. Pet. 27-31; *id.* at I. Now, they ask the Court also

to address whether the agencies properly bypassed notice and comment before issuing the 2017 rules. The Court need not consider this argument, see Supreme Court Rule 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 536-37 (1992); if it does, the argument should be rejected.

1. The agencies lacked statutory authority to bypass notice-and-comment procedures.

No statute can supersede or modify the APA "except to the extent that it does so expressly." 5 U.S.C. 559. Exceptions from the APA's requirements "are not lightly to be presumed." *Marcello v. Bonds*, 349 U.S. 302, 310 (1955).

The agencies claimed authority from HIPAA in dispensing with notice-and-comment procedures before promulgating the 2017 rules. 82 Fed. Reg. 47,813; 82 Fed. Reg. 47,854. That law—enacted fourteen years before the ACA—authorizes the respective Secretaries to "promulgate any interim final rules as the Secretary determines are appropriate to carry out this subchapter." 42 U.S.C. 300gg-92; accord 26 U.S.C. 9833; 29 U.S.C. 1191c.[6] Nothing in that provision mentions the APA or notice-and-comment rulemaking.

[6] "Subchapter" is replaced with "chapter" in the Internal Revenue Code and "part" in the Employee Retirement Income Security Act of 1974 (ERISA).

When Congress means to supersede the APA, it does so explicitly: for example, in a law passed within a month of HIPAA, it authorized promulgation of regulations that "shall not be subject to the provisions of section 533 [sic] of title 5, United States Code, regarding notice or opportunity for comment." Pub. L. No. 104-208, § 577, 110 Stat. 3009 (1996); see also, *e.g.*, Pub. L. No. 107-295, § 102, 116 Stat. 2084 (2002); Pub. L. No. 110-53, § 1602, 121 Stat. 478 (2007); Pub. L. No. 111-281, § 617, 124 Stat. 2974 (2010); Pub. L. No. 114-1, § 303, 129 Stat. 28 (2015); Pub. L. No. 115-218, § 3, 132 Stat. 1554 (2018). The lack of similarly "express[ ]" language in HIPAA dooms the agencies' argument.

The agencies cannot save their argument by claiming that the term "internal final rule" was "widely understood" to describe rules issued without prior notice and comment. Br. 39. "Interim final rule" appears nowhere in the APA, and the agencies have not identified a statutory definition for it. Instead, they rely on an Administrative Conference of the United States report that was neither adopted by Congress nor referenced in HIPAA. *Ibid.*

In fact, "interim final rule" lacks the single meaning the agencies attribute to it. Contemporaneous regulations reveal: agencies have issued "interim final rules" *after* pre-promulgation notice and comment because the agency concluded there was need for both a governing rule and further consideration. See, *e.g.*, 60 Fed. Reg. 67,298 (Dec. 29, 1995); 56 Fed. Reg. 54,920 (Oct. 23, 1991); 55 Fed. Reg. 50,500 (Oct. 23, 1991) (Dec. 6, 1990). And in describing rules issued without prior

notice and comment, agencies have used 109 distinct terms. GAO-13-21, *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments* 14 (2012). If the "settled understanding" of "interim final rule" was a rule issued without prior comments, it seems unlikely that agencies would use so many other terms to describe such rules.

The use of "interim final rule" to describe a binding rule subject to change makes sense. The word "interim" more naturally suggests the possibility of future modification, not the failure to follow required procedures beforehand. Reading HIPAA as the agencies do would give them free rein to ignore the APA's requirements for any regulation related to group health insurance. That unbounded authority would be at odds with Congress's practice of permitting agencies to bypass notice and comment for discrete rulemaking tasks. See *supra* at 20 (collecting express modifications of the APA).

Context also supports this reading of the term. The grant of interim rulemaking authority in HIPAA follows general authority granted to the Secretaries to promulgate rules, provided they coordinate with one another on matters of shared responsibility. 26 U.S.C. 9833; 29 U.S.C. 1191c; 42 U.S.C. 300gg-92, see 42 U.S.C. 300gg-92 note. No similar coordination requirement is imposed on the Secretaries' authority to issue interim final rules. The statute thus grants the Secretaries authority to issue "interim" binding rules independent of one another, but only temporarily to allow for the required inter-agency coordination. *California v. Azar*, 911 F.3d 558, 579-80 (9th Cir. 2018).

The agencies cannot demonstrate that "interim final rule" had a single meaning when HIPAA was passed, much less that the mere use of the term is an "express[ ]" modification of the APA's procedures. Congress knows how to speak clearly when it wishes to modify the requirements of an earlier statute and it did not do so here.

2. The agencies lacked "good cause" to bypass notice-and-comment procedures.

An agency also may issue a rule without prior notice and comment when the agency "for good cause finds * * * that notice and public procedure thereon are impracticable * * * or contrary to the public interest." 5 U.S.C. 553(b)(B). The agencies have not put forward evidence to satisfy this "meticulous and demanding" standard. *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014) (citations and internal quotation marks omitted).

a. Pending litigation, or any uncertainty it causes, is not good cause to circumvent the APA's ordinary procedures. Br. 41-42. Every regulation addresses uncertainty to an extent, and litigation is a constant for some agencies. If these factors constitute good cause, the exception would swallow the rule. Nor does this Court's decision in *Zubik* justify forgoing notice-and-comment procedures. 82 Fed. Reg. 47,814. While the agencies presented the 2017 rules as their long-awaited response to *Zubik*, they ignored this Court's

admonition that nothing in the opinion should affect women's access to approved contraception without cost sharing. 136 S. Ct. at 1561. And even if the rules were consistent with the Court's opinion, there is no reason why they could not have gone through prior notice and comment. This is especially true given the agencies' abrupt decision to abandon the accommodation as an enforceable means of ensuring access to contraception and to create an unprecedented and vaguely defined moral exemption.

While the agencies also claim "potentially devastating fines" were reason to abandon notice-and-comment procedures, Br. 42, religious objectors that were parties to any of the consolidated *Zubik* cases were protected by this Court's decision, 136 S. Ct. at 1561. For the rest, penalties are the responsibility of the agencies themselves. The agencies could have created an enforcement safe harbor during the rulemaking process, as they did during the rulemaking process leading to the accommodation. 77 Fed. Reg. 8728. The lack of evidence that employers were subject to these fines after the rules were enjoined casts further doubt on this assertion.

b. The Little Sisters erroneously claim that "virtually every aspect" of the government's efforts relating to the contraceptive mandate "began with an [interim final rule]." LS-Br. 45. The agencies conducted a full rulemaking process, including an advance notice of proposed rulemaking, before promulgating the accommodation. 77 Fed. Reg. 16,501, 78 Fed. Reg. 8456, 78 Fed. Reg. 39,870. The agencies also issued a notice

of proposed rulemaking before implementing this Court's decision in *Hobby Lobby*. 79 Fed. Reg. 51,118, 80 Fed. Reg. 41,318. In only two prior instances did the agencies issue rules relating to the contraceptive care guarantee without advance notice and comment. For the first the agencies noted that even a brief delay in the rule's effective date would lead to a two-year wait before student plans would be required to cover preventive services, despite the Women's Health Amendment's having been in effect for almost one year. 76 Fed. Reg. 46,624. For the second, the agencies were implementing this Court's narrow order in *Wheaton College*. 79 Fed. Reg. 51,095-96. Good cause is a fact-specific inquiry. See *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012). Neither circumstance is analogous to the argument made in support of the agencies' argument for good cause here.

B. The 2018 rules are procedurally invalid.

Alternatively, the agencies maintain that procedural flaws with the 2017 rules are irrelevant because the agencies received comments on those rules before promulgating the 2018 rules. But taking comments on unlawful rules before issuing new rules is inconsistent with the APA's text and runs counter to its purpose. The agencies have not shown why their flawed procedure nonetheless meets the APA's objectives.

1. The 2018 rules were not the outgrowth of processes initiated by "notice[s] of proposed rule making," 5 U.S.C. 553(b), but rather of processes initiated by the unlawful 2017 rules. As the D.C. Circuit recognized long ago, "553(b) speaks quite specifically about 'proposed' rules, and a 'final' rule simply cannot be a 'proposed' rule." *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 901-02 (D.C. Cir. 1978).

The distinction is not a formality. Instead, it enforces a foundational element of administrative law that represents Congress's best effort to give "affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes" and to ensure agencies "avoid errors and make a more informed decision." *Azar v. Allina Health Services*, 139 S. Ct. 1804, 1816 (2019) (citing 1 Kristin E. Hickman & Richard J. Pierce, *Administrative Law* § 4.8 (6th ed. 2019)); see also *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979).

Because a proposed rule is only a matter under consideration, comments directed at a proposed rule accomplish the APA's objective. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007). Agencies that already have issued binding rules, however, are less likely to be influenced by comments, thereby defeating their purpose. This "psychological and bureaucratic realit[y]" is why courts of appeals look skeptically on any argument that a post-promulgation comment period satisfies the APA's requirements. *New Jersey Dep't of Envtl. Prot. v. EPA*, 626 F.2d 1038, 1050 (D.C. Cir. 1980) (citing *U.S. Steel Corp. v. EPA*, 595 F.2d

207, 214-15 (5th Cir. 1979) and *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979)); see also *United States v. Dean*, 604 F.3d 1275, 1280-81 (11th Cir. 2010); *Dismas Charities v. DOJ*, 401 F.3d 666, 678 (6th Cir. 2005); *Levesque v. Block*, 723 F.2d 175, 187 (1st Cir. 1983).

This case illustrates the concern. In the 2017 moral rule, the agencies "determined that expanding the exemptions to include protections for moral convictions" was the best administrative response to the "important and highly controversial issue" of contraceptive coverage despite the issue "implicating many different views." 82 Fed. Reg. 47,849. The agencies explained that they had already "determined that the Government's interest in applying contraceptive coverage requirements" to moral objectors "does not outweigh the sincerely held moral objections of those entities and individuals"—despite having never proposed a moral exemption in prior rulemakings. *Ibid.* The agencies demonstrated the "defensive" stance that naturally comes with having already "made a 'final' determination." *Nat'l Tour Brokers Ass'n*, 591 F.2d at 902.

2. When other agencies have issued rules with similar procedural defects, some courts of appeals have permitted such rules to remain in effect if the agency demonstrates it nevertheless maintained an open mind during the rulemaking process. See, *e.g.*, *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994); *Levesque*, 723 F.2d at 188. Although the agencies regard this as

a "novel, heightened standard for notice-and-comment rulemaking," Br. 35, it is instead a well-established basis for allowing agencies to salvage procedurally improper rules through an affirmative showing that their unlawful procedure still satisfied the purpose of the APA's required comment period, *Advocates for Highway & Auto Safety*, 28 F.3d at 1292; see also 5 U.S.C. 706 ("[D]ue account shall be taken of the rule of prejudicial error."). This approach is not, as the Little Sisters believe, unworkable. LS-Br. 47-48. The D.C. Circuit has followed it for decades. See *Nat'l Tour Brokers Ass'n*, 591 F.2d at 902.

Here, the Third Circuit found nothing in the record signaling the agencies had maintained an open mind throughout the process. Pet.App. 30a. Even though the district court had enjoined the 2017 rules as procedurally and substantively invalid, the 2018 rules readopted the same analysis. *Ibid*. While an agency is under no obligation to make changes in promulgating a final rule, meaningful changes can be evidence of an agency's open mind despite failing to comply with the APA's requirements. See *Levesque*, 723 F.2d at 188. By the same token, a court is justified in considering a failure to make changes in assessing whether the agency has carried its burden of showing open-mindedness. See *New Jersey*, 626 F.2d at 1050.

Merely responding to comments received after the 2017 rules, Br. 35-36, is not enough to show open mindedness—agencies must do this for every rule, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). The standard for evaluating a properly issued rule

cannot be the same as salvaging an improperly issued one, or the distinction between pre- and post-promulgation comment would be meaningless.

The astonishing reach of the two rules heightened the need for genuine open-mindedness. Despite this Court's admonition that no order was to affect "the ability of the Government to ensure that women covered by petitioners' health plans 'obtain, without cost, the full range of FDA approved contraceptives,'" *Zubik*, 136 S. Ct. at 1560-61 (quoting *Wheaton College*, 134 S. Ct. at 2807), the agencies failed to ensure that women working for religiously objecting employers would receive access to guaranteed coverage. And for the first time the agencies created a moral exemption, which the district court found "would allow an employer with a sincerely held moral conviction that women do not have a place in the workplace to simply stop providing contraceptive coverage." Pet.App. 84a. Agencies must be willing to consider whether novel decisions of such significance are well-informed.

3. To move forward, the agencies need only comply with the APA. A similar situation preceded this Court's decision in *Bowen v. American Hospital Association*, 476 U.S. 610 (1986). HHS had issued an "interim final rule" without prior notice and comment and "invite[d] comments on all aspects" of it. *Bowen*, 476 U.S. at 618; see also 48 Fed. Reg. 9630 (Mar. 7, 1983). But after a district court found the "interim final rule" violated the APA, HHS initiated a new rulemaking process with a notice of proposed rulemaking and abandoned the prior rule. *Bowen*, 476 U.S. at 618-19; see also 48

Fed. Reg. 30,846 (July 5, 1983). So contrary to the agencies' contention, Br. 36, they are not stuck.

To be clear, an agency that has properly skipped notice and comment often will be well served by taking comments and further modifying its rule. But if the process utilized here may substitute for what the APA demands, "it is hard to see why an agency would ever go to the trouble of undertaking prepromulgation notice and comment." Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 Cornell L. Rev. 261, 293 (2016). After all, an agency that unlawfully bypassed notice and comment could rest assured that, as long as it took comment after the fact and issued a new final rule, it would never be worse off than if it had followed the process set forth in the APA in the first place. For this reason, the claim that the agencies' approach here is consistent with the APA "effectively reads § 553's prepromulgation notice and comment requirements out of the statute." *Ibid.*

II. The ACA does not authorize the rules.

The Women's Health Amendment to the ACA does not authorize categorical exemptions from its requirements. The text and structure make plain that Congress delegated HRSA authority to oversee guidelines defining *what* preventive services for women must be covered, not *who* must cover them.

1. The ACA's preventive-services section requires that "[a] group health plan and a health insurance issuer * * * shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for" four categories of preventive services. 42 U.S.C. 300gg-13(a). Congress's use of "shall" creates an obligation: every governed "group health plan" and "health insurance issuer" must provide the required services. See *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016).

The first two categories of required services reference preexisting recommendations from medical experts. 42 U.S.C. 300gg-13(a)(1)-(2). The third, targeted toward children, requires coverage of "evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by [HRSA]." 42 U.S.C. 300gg-13(a)(3). This category refers to guidelines issued by the American Academy of Pediatrics, which had been supported by HRSA since 1990. See *Bright Futures: Guidelines for Health Supervision of Infants, Children, and Adolescents* (3d ed. J. Hagan, et al. eds., 2008).

The fourth category largely mirrors the third. It requires coverage of "with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by [HRSA] for purposes of this paragraph." 42 U.S.C. 300gg-13(a)(4).

Together, the four categories set minimum requirements for coverage of preventive healthcare. Senators for and against the Women's Health Amendment praised and lamented, respectively, the preventive-services section because they understood that all governed plans must cover in all instances all identified services. See, *e.g.*, 155 Cong. Rec. 28,876 (2009) (Sen. Cardin); *id.* at 29,078 (Sen. Brown); *id.* at 29,080 (Sen. Coburn); *id.* at 29,087 (Sen. Murkowski); *id.* at 29,300 (Sen. Harkin); *id.* at 29,306 (Sen. Hutchison); *id.* at 29,310 (Sen. Mikulski); *id.* at 29,311 (Sen. Nelson).

Because the women's guidelines (unlike the first three categories) did not exist when the ACA was passed, Congress delegated to HRSA authority to support comprehensive guidelines that identify *what* preventive services for women must be covered without cost sharing. See *Hobby Lobby*, 573 U.S. at 697. Once that determination was made, the statute dictates that covered entities "shall * * * provide coverage for" those services. 42 U.S.C. 300gg-13(a).

2.a. To justify the rules, the agencies contort the meaning of the Women's Health Amendment to suggest that it operates differently from the three preceding paragraphs and grants HRSA authority to create exemptions from this obligation.

First, the agencies stretch HRSA's authority to "support[ ]" preventive-services guidelines into power to decide which entities must comply with the Women's Health Amendment. Br. 16-17. But Congress

already made that determination. HRSA's role is to "support[ ]" the comprehensive guidelines themselves, just as it has for the children's guidelines. See *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) (noting that identical words in the same statute are normally given identical meaning). For the children's guidelines, HRSA support meant funding independent organizations through cooperative agreements. See *Bright Futures*, *supra*, at ix, xix. HRSA did the same for the women's guidelines. See 83 Fed. Reg. 57,543.

Second, the agencies read too much into the minor differences between the paragraph describing the children's guidelines—which is missing the words "as" and "for purposes of this paragraph"—and the paragraph describing the women's guidelines. Br. 16, 18-19. As explained, the children's guidelines existed when Congress wrote the ACA; the women's guidelines did not. The straightforward meaning of these words is to order HRSA to help develop the latter.

To support their strained interpretation, the agencies distort the statute, claiming that it requires health plans to "offer coverage 'as provided for' " in HRSA's guidelines. Br. 19. But the statute actually requires plans to cover "*such additional preventive care and screenings not described in paragraph (1)* as provided for" in the HRSA guidelines. 42 U.S.C. 300gg-13(a)(4) (emphasis added). The italicized language makes clear *what* is to be "provided for" is "such additional preventive care and screenings" that HRSA-developed guidelines deem necessary for women.

Third, the agencies attribute undue significance to the fact that the phrase "preventive care and screenings" in the Women's Health Amendment lacks the qualifiers "evidence-based" and "evidence-informed." Br. 16-17. But the absence of these phrases has no bearing on the scope of HRSA's delegation, which is to identify only *what* services are to be covered, not *who* would provide those services.

Skepticism of the agencies' interpretation is further warranted because they provide no limiting principle. Under their reading, HRSA would have authority to exempt insurers for any reason, including a belief that the prohibition on cost sharing is too onerous. And any suggestion that Congress intended to grant HRSA the authority to create conscience-based exemptions cannot be reconciled with the fact that Congress later considered and rejected adding such an exemption to the statute itself. 158 Cong. Rec. 2621-34 (2012).

As a final salvo, the agencies half-heartedly invoke *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Br. 18. Because the ACA is unambiguous, the agencies are owed no deference under *Chevron*. 467 U.S. at 842-43.

b. The agencies' reading also flouts fundamental principles of statutory construction.

For one, Congress does not implicitly delegate authority to resolve politically significant questions, such as the scope of conscience-based exemptions from generally applicable laws. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); see also *Gundy*

v. United States, 139 S. Ct. 2116, 2141-42 (2019) (Gorsuch, J., dissenting). And Congress certainly would not have delegated authority to decide such weighty questions to HRSA, a subdivision of HHS with expertise in health. See HRSA, *About HRSA* (Oct. 2019).[7] If Congress had made this counterintuitive decision, "it surely would have done so expressly." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); see also *Gonzalez v. Oregon*, 546 U.S. 243, 266-67 (2006).

Second, the agencies ignore the established principle that when "Congress provides exceptions in a statute," other exceptions should not be assumed See *United States v. Johnson*, 529 U.S. 53, 58 (2000). Congress exempted grandfathered plans from the preventive-services requirement, 42 U.S.C. 18011(a), and so did not authorize HRSA to create other exemptions.

3. Petitioners warn that if the ACA does not authorize the exemptions, then the earlier, narrower church exemption would be invalid. Br. 19-20; LS-Br. 43. But the church exemption rests on authority other than the ACA

Houses of worship have a unique status in communal religious exercise. The First Amendment protects "matters of church government as well as those of faith and doctrine" from state interference. *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952); see also *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-504

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[7] https://www.hrsa.gov/about/index.html.

(1979); *Serbian E. Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U.S. 696, 698 (1976). Thus, when a house of worship maintains that its internal affairs—from employment relationships to property ownership—are religiously informed, the First Amendment dictates that the civil legal system is not to interfere.

The earlier exemption for houses of worship respects this autonomy, affording those entities freedom to craft religiously informed arrangements with their employees. 78 Fed. Reg. 39,874; 76 Fed. Reg. 46,623. In originally exempting houses of worship from the contraceptive care guarantee, the agencies stressed that they sought to "respect[] the unique relationship between certain religious employers and their employees in certain religious positions." 76 Fed. Reg. 46,623; see also 80 Fed. Reg. 41,325 (the exemption respects the "particular sphere of autonomy for houses of worship"). Indeed, as the agencies explained, the relationship between a house of worship and its employees is one likely defined by common faith. 78 Fed. Reg. 39,874.

The agencies contend that the prior church exemption is overbroad and "not tailored" to these concerns. Br. 20. Even if so, it cannot justify the creation of two much broader exemptions that no one contends are authorized by the church autonomy doctrine.

III. RFRA does not justify the religious rule.

No party claims that RFRA authorizes the moral rule. Nor does RFRA require the agencies to create the religious rule, because the preexisting accommodation allowed objecting employers to opt out of providing contraceptive coverage. And RFRA does not grant federal agencies broad rulemaking authority to create exemptions from mandatory laws absent a violation. Petitioners' arguments to the contrary must be rejected.

A. RFRA does not require the religious rule.

Before *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court had interpreted the Free Exercise Clause to prohibit incidental burdens on religious exercise caused by application of an otherwise neutral law, unless applying the law served a compelling government interest. *E.g.*, *Sherbert v. Verner*, 374 U.S. 398, 403-06 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). *Smith* departed from the individualized approach, holding instead that the Free Exercise Clause permitted incidental burdens on religious exercise caused by neutral, generally applicable, and otherwise valid laws. 494 U.S. at 878-80.

Congress enacted RFRA to "adopt[] a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). Under RFRA, the government "may substantially burden a

person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. 2000bb-1(b). The statute allows a person whose religious beliefs have been impermissibly burdened to assert "a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. 2000bb-1(c).

The accommodation does not fall afoul of RFRA. It respects religious liberty by allowing objecting non-profit and closely held corporate employers to opt out of providing contraceptive coverage, while also respecting the rights and autonomy of female students, employees, and beneficiaries by providing them access to that coverage.

1. To implicate RFRA, a law must first "substantially burden a person's exercise of religion." 42 U.S.C. 2000bb-1(a). Because the burden must be "substantial," RFRA "does not require the Government to justify every action that has some effect on religious exercise." 139 Cong. Rec. 26,180 (1993) (Sen. Hatch). As nine courts of appeals have now recognized, *supra* note 3, the contraceptive care guarantee, as modified by the accommodation, does not impose such a burden.

While courts may not inquire into the reasonableness of a sincere religious belief, *Hobby Lobby*, 573 U.S. at 725, the question of whether a law imposes a

substantial burden is one courts must answer. *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *Bowen v. Roy*, 476 U.S. 693, 699-701 & n.6, 703 (1986); *Tony & Susan Alamo v. Labor*, 471 U.S. 290, 303-05 (1985); *Gillette v. United States*, 401 U.S. 437, 462 (1971); cf. *Zubik*, 136 S. Ct. at 1560 (expressing "no view on * * * whether petitioners' religious exercise has been substantially burdened").

This legal inquiry examines what the law requires as well as the cost of noncompliance. *E. Texas Baptist Univ. v. Burwell* ("*ETBU*"), 793 F.3d 449, 456 (5th Cir. 2015), *vacated on other grounds Zubik*, 136 S. Ct. 1557. If the law imposes a considerable demand and compels compliance through a meaningful penalty, then the law imposes a substantial burden. But if the activity required by the law does not itself create a substantial burden, then the consequences for failure to comply are beside the point. See *Bowen*, 476 U.S. at 703.

Here, the accommodation does not compel any action that facilitates the provision of contraception by an objecting employer, and therefore does not substantially burden religious exercise. By default, the ACA's preventive-services provision requires that non-grandfathered group health plans cover women's preventive services without cost sharing. 42 U.S.C. 300gg-13(a)(4). The accommodation allows non-profit and closely held for-profit employers with a religious objection to avoid the financial penalty for removing this coverage from their plans. 78 Fed. Reg. 39,870; 80 Fed. Reg. 41,318.

For an employer to take advantage of the existing accommodation, it need only provide notice of the scope of its objection to: (a) the insurer or TPA, which then knows to exclude the default contraceptive coverage from the employer's plan; or (b) HHS, with information sufficient for the government to make the insurer or TPA aware that it must exclude the default coverage. 45 C.F.R. 147.131(c)(1) (2015); 29 C.F.R. 2590.715-2713A(b)(1), (c)(1) (2015). No petitioner asserts that noting one's objection is a substantial burden, and for good reason: it is precisely what RFRA encourages. 42 U.S.C. 2000bb-1(c).

Once an employer removes contraception from its own plan, the government exercises its independent authority to require (or encourage) insurers or TPAs to provide coverage to women directly.[8] Insurers and TPAs may not impose any costs on the employer, may not use the employer's plan infrastructure, and must inform the employee separately of the employer's non-involvement. 45 C.F.R. 147.131(c)(2), (d) (2015); 29 C.F.R. 2590.715-2713A(b)(2)-(4), (c)(2), (d) (2015). For fully-insured plans, the insurer itself pays for the

[8] Government authority to regulate insurers comes from the statute. 42 U.S.C. 300gg-13(a). Authority to regulate TPAs for most self-insured plans comes from ERISA. 29 C.F.R. 2510.3-16(b), (c); 29 C.F.R. 2590.715-2713A(b); see also 78 Fed. Reg. 39,879-80; 80 Fed. Reg. 41,323. The government does not have authority to regulate TPAs for self-insured "church plans," which are exempt from ERISA. 29 U.S.C. 1003(b)(2); see also 29 U.S.C. 1002(33)(A), (C)(ii)(II) (defining "church plan"). Instead, the government encourages these TPAs to voluntarily comply by offering compensation. 80 Fed. Reg. 41,323 n.22.

employee's contraceptive services because the provision of contraception typically results in savings for insurers. 45 C.F.R. 147.131(c)(2)(i)(B) (2015); 29 C.F.R. 2590.715-2713A(c)(2)(i)(B), (d) (2015); see 78 Fed. Reg. 39,877. For self-insured plans, the TPA obtains reimbursement from the government for the costs. 29 C.F.R. 2590.715-2713A(b)(2)-(3) (2015).

As a result, the accommodation "effectively exempt[s]" an employer, *Hobby Lobby*, 573 U.S. at 698, from the obligation it would otherwise have to "contract, arrange, pay, or refer for contraceptive coverage," 45 C.F.R. 147.131 (2015); 29 C.F.R. 2590.715-2713A (2015). And because the accommodation permits an employer to remove itself from the provision of contraception, it does not substantially burden those whose religious teaching forbids providing contraception. *ETBU*, 793 F.3d at 459-63.

That an employer utilizing the accommodation is deemed by the government to be "in compliance" with the contraceptive care guarantee makes no difference. LS-Br. 22, 41. RFRA does not "require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen*, 476 U.S. at 699-701 & n.6; see also *Priests for Life*, 808 F.3d at 26 (Kavanaugh, J., dissenting from denial of rehearing en banc); S. Rep. 103-111 at 9 & n.19 (1993). In fact, if the Little Sisters used the accommodation, their employees would still not receive contraceptive coverage. The Little Sisters participate in an ERISA-exempt church plan that refuses to provide such coverage and the government cannot require

it to do so. Compl. ¶¶ 21-25, Little Sisters of the Poor v. Azar, No. 13-2611 (D. Colo. Sept. 24, 2013). That the government would nonetheless deem them "in compliance" cannot constitute a substantial burden on their religious exercise.

Similarly, how ERISA treats contraceptive coverage cannot substantially burden religious exercise. The Little Sisters incorrectly claim that any contraceptive coverage provided by their TPA through the accommodation would be part of the "same 'plan'" as their other health coverage. LS-Br. 37 (quoting Br. for Resp'ts 38, Zubik, 136 S. Ct. 1557). But the cited source expressly notes that "if the employer has a self-insured church plan * * * any contraceptive coverage voluntarily provided by the TPA is not part of the employer's ERISA-exempt plan." Br. for Resp'ts 38 n.15, Zubik, 136 S. Ct. 1557. And the Little Sisters cannot allege that *their* religious exercise is burdened by the operation of the accommodation with respect to *other* employers.[9]

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[9] An ERISA "plan" is simply a "set of rules that define the rights of a beneficiary and provide for their enforcement." *Pegram v. Herdrich*, 530 U.S. 211, 223 (2000). If a self-insured employer uses the accommodation, the government, utilizing its authority under section 3(16)(A) of ERISA, then designates the TPA as the plan administrator for purposes of providing contraceptive coverage. 29 C.F.R. 2510.3-16(b). An objection to the manner in which this contraceptive coverage is classified under ERISA—*i.e.*, whether it is technically part of the same "plan" as the employer's health coverage—it the type of concern the Court rejected in *Bowen*. 476 U.S. at 699.

In sum, the ACA—not an employer's notification of its own decision—provides women with segregated access to contraceptive coverage. Therefore, the contraceptive care guarantee, as implemented, does not impose a substantial burden in violation of RFRA.

2. Even if the contraceptive care guarantee substantially burdens religious exercise, the guarantee does not violate RFRA because the government has a compelling interest in facilitating women's full and equal access to preventive services and the agencies have failed to identify any less burdensome method of achieving this interest.

a.i. The medical benefits of access to contraception are widely acknowledged. See *supra* at 4-5; C.A.App. 251. An independent panel of medical experts concluded—and continues to conclude—that contraceptive services and counseling are a necessary part of preventive health care because they prevent unintended pregnancy and its concomitant physical and mental costs. See *supra* at 4-5.

Contraceptive access also allows women to participate more fully in the workforce and improves their economic and social status, 77 Fed. Reg. 8728—helping remedy the historical inequity that led Congress to enact the Women's Health Amendment. Contraception "promotes * * * continued educational and professional advancement, contributing to the enhanced economic stability of women and their families." C.A.App. 255. As a result, studies have shown a link between "women's ability to obtain and use oral contraceptives

and their education, labor force participation, [and] average earnings." C.A.App. 255-56.

Seamless access to preventive services, including contraception, is especially important because barriers impede effective use. See *supra* at 4-5; 78 Fed. Reg. 39,888. Requiring women to, for example, "take steps to learn about, and to sign up for, a new health benefit" or to obtain services from a different doctor would create deterrents in the form of time, cost, and logistics. See *Hobby Lobby*, 573 U.S. at 732 (citation and internal quotation marks omitted). The accommodation fulfills Congress's intent by allowing a woman to obtain contraceptive services and counseling from her regular medical doctor as part of her regular medical visit.

ii. The agencies dispute none of these facts. Instead, they claim they were "compel[ed]" to find that the contraceptive care guarantee does not serve a compelling government interest because it exempted churches and houses of worship and "provided an effective exemption" for church plans. Br. 25-26.

No Justice in *Hobby Lobby* raised this concern. In fact, no Justice questioned that the contraceptive care guarantee serves a compelling government interest. The opinion of the Court "assume[d]" that it did, while five justices in concurrence and dissent found as much. 573 U.S. at 691-92; *id.* at 737 (Kennedy, J., concurring); *id.* at 761 (Ginsburg, J., dissenting); see also *Priests for Life*, 808 F.3d at 22 (Kavanaugh, J., dissenting from denial of rehearing en banc) (characterizing Justice Kennedy's concurrence as "controlling" on this point).

It twists strict scrutiny beyond recognition to argue that the creation of an exemption for houses of worship, grounded in our nation's longstanding respect for church autonomy, justifies a rule that would sweep in all employers and universities that employ and enroll as students tens of thousands of women. Unlike the church exemption, the agencies present no evidence that all employees, students, and female beneficiaries share their employer's faith or religious views on contraception. 78 Fed. Reg. 39,874. Nor do the agencies present any authority suggesting that a compelling interest is undermined by providing financial incentives to TPAs serving employers with ERISA-exempt self-insured church plans. 80 Fed. Reg. 41,323 n.22. To the contrary, TPAs are willing to voluntarily provide separate coverage. Br. for Resp'ts 60-61, Zubik, 136 S. Ct. 1557.

Regulatory schemes that serve a compelling interest while allowing for certain exceptions are common. No one disputes the government's compelling interest in raising revenue, raising an army, or preventing employment discrimination even though those have exemptions. *E.g.*, 50 U.S.C. 3802 (exempting women from the draft); 42 U.S.C. 2000e(b) (exempting small employers from Title VII); *United States v. Lee*, 455 U.S. 252, 260 (1982) (recognizing government interest in imposing Social Security taxes, notwithstanding certain exceptions).

O Centro is perfectly consistent. There, the government claimed a compelling interest in the "*uniform* application of the Controlled Substances Act." 546 U.S.

at 423 (emphasis in original). The longstanding exemption for use of peyote by Native Americans was fatal to a purported interest in uniformity. *Id.* at 534-45. By contrast, the compelling interest served by the contraceptive care guarantee rests on the benefits it provides to scores of women. The States do not challenge the exemption because it might lead down a "slippery-slope," 546 U.S. at 435-36, but rather because it will harm women who lose coverage as a result.

iii. That a woman denied contraceptive coverage could get it through a spouse or other family member, or enroll separately in a government-funded program for low-income women, has the compelling interest exactly backwards. Br. 26-27. The goal of the Women's Health Amendment was to eliminate such hurdles to women's access to necessary health care. See 77 Fed. Reg. 8728; 78 Fed. Reg. 39,872-73; C.A.App. 1017-19. Relegating contraception to second-class status as the agencies suggest would write the Women's Health Amendment out of the law.

b. Once the government's compelling interest is established, RFRA could require the religious exemption only if it was the least restrictive means of furthering that interest. It is not.

The agencies did not deny that the accommodation was the least restrictive means of achieving the government's interest in ensuring seamless access to contraceptive coverage. Nor do they do so expressly before this Court. And they have identified "no alternative forms of regulation" that would satisfy the goals of the

Women's Health Amendment while placing a lesser burden on objecting employers. See *Sherbert*, 374 U.S. at 407. As a result, the accommodation complies with RFRA. And even if the accommodation could be further modified—a possibility the agencies ignored here—RFRA would not require the creation of an exemption, which undermines rather than furthers the compelling interest embodied in the Women's Health Amendment of providing seamless, cost-free contraceptive care to women.

Following *Zubik*, the agencies solicited public comment to determine if any less-burdensome means existed. 81 Fed. Reg. 47,741. But for some objecting employers the only acceptable alternative would have been an exemption—an option that would deprive women of the full and equal health care guaranteed by Congress. 2017 FAQs at 4, 5-11; see also 83 Fed. Reg. 57,578-80 (estimating tens of thousands of women would lose coverage under religious rule). And anything besides the accommodation would create "administrative and operational challenges" that would "undermine women's access to full and equal coverage." 2017 FAQs at 4, 5-11; see *Sherbert*, 374 U.S. at 408-09. Therefore, the accommodation was the "least restrictive means" of satisfying the law. 2017 FAQs at 5. The agencies' failure to directly challenge this conclusion reflects their inability to identify any other means of achieving the goals of the Women's Health Amendment.

RFRA also requires courts to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Hobby Lobby*, 573 U.S. at

730 n.37 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)). The agencies' exemption not only deprives women of access to the preventive services the law guarantees, but also re-imposes the very harms the law set out to ameliorate.

In the rules, the agencies brushed aside these concerns. 83 Fed. Reg. 57,549. They suggested that any third-party harm "rests on an incorrect presumption"—namely, "that the government has an obligation to force private parties to benefit * * * third parties and that the third parties have a right to those benefits." *Ibid.* But it is the law, not the government, that provides women with a right to cost-free preventive care. For the same reason, *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) does not aid their argument. Br. 31. There, the law did not guarantee the employee employment for a religious organization; here, the law guarantees women access to health care.

That the rule undermines the compelling interest at stake is no surprise. The exemption was granted in response to the objections from some employers to the provision of "seamless" coverage for contraception. See Br. 23; LS-Br. 34, 36-37. But where an objector opposes the government's compelling interest, RFRA does not require the government interest to give way. 42 U.S.C. 2000bb-1(b). Here, RFRA does not require denying women access to seamless contraceptive coverage because some employers object to it. See *Priests for Life*, 808 F.3d at 26 n.12 (Kavanaugh, J., dissenting from denial of rehearing en banc).

B. RFRA does not authorize the religious rule.

The agencies claim that "even if RFRA does not compel" the religious exemption rule, it "authorizes" it. 83 Fed. Reg. 57,544; Br. 27-31. But RFRA is not an open-ended delegation of rulemaking authority to federal agencies. RFRA prohibits certain specified conduct and provides a judicial remedy to injured individuals or entities. RFRA is a limitation on government power, not a grant of it. Nothing in the statute supports the agencies' assertion that they have authority to create exemptions from other statutes when no RFRA violation exists.

1. An agency is powerless to act "unless and until Congress confers power upon it." *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986). "Both their power to act and how they are to act is authoritatively prescribed by Congress[.]" *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013). The "first step in assessing whether a statute delegates legislative power is to determine what authority the statute confers." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 465 (2001).

RFRA does not contain an independent grant of rulemaking authority. Instead, the agencies rely on the fact that RFRA applies to "all Federal law, and the implementation of that law." 42 U.S.C. 2000bb-3(a). But this provision simply indicates that "[a]ny law is subject to challenge at any time by any individual." *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997). It does not

authorize agencies to use RFRA as a sword to create exemptions from other laws where no violation of RFRA exists in the first place.

The agencies' claim of authority is particularly incongruent because they do not administer RFRA. They have not asserted any particular expertise in applying strict scrutiny to claims of religious burden. See *O Centro*, 546 U.S. at 434. Yet they seek to use RFRA to create overly broad exemptions from laws they *do* administer and are expressly charged with "carry[ing] out." See 42 U.S.C. 300gg-92. If RFRA "does not compel" the religious exemption, Br. 29, then it does not authorize the agencies to disregard their obligation to enforce the ACA's preventive services guarantee.

Broad implicit authority to go beyond what RFRA requires would contravene basic principles of separation of powers. This Court has never found that "Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer," *Epic Systems v. Lewis*, 138 S. Ct. 1612, 1629 (2018), much less the authority to go beyond what another statute requires in creating exemptions from a statute it does administer, see *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990) (rejecting directive that agencies must account for statutes besides those they administer). Instead, "reconciliation of distinct statutory regimes is a matter for the courts, not agencies." *Epic Systems*, 138 S. Ct. at 1629 (internal quotation marks and citation omitted).

Recognizing such a broad grant of rulemaking authority in RFRA would undermine the central role courts play in interpreting and enforcing the statute. *O Centro*¸ 546 U.S. at 434. The agencies may modify existing regulations in response to judicial decisions interpreting RFRA, as they did following *Hobby Lobby* and *Wheaton College*. But the religious rule goes well beyond what RFRA requires and cannot be squared with the individualized analysis required by the statute.

2. By exempting anyone with a private assertion of a religious objection to contraception, the agencies have gone well beyond RFRA's requirements at the expense of the ACA's compelling interest in full and equal contraceptive coverage. For instance, the rule exempts employers who have no objection to the accommodation, 83 Fed. Reg. 57,590, excusing individuals whose rights are not violated at the expense of their female employees, whose rights will be. The rule also exempts fully-insured plans, despite no finding that the accommodation burdens religious exercise in such contexts. The rule exempts publicly traded corporations, despite this Court's skepticism, *Hobby Lobby*, 573 U.S. at 717, and despite the agencies' concession that they know of none with an objection, 83 Fed. Reg. 57,562. And the rule wholly deprives women of the full and equal health care guaranteed by Congress, even though the Court has never suggested RFRA would allow such a remedy. See *Hobby Lobby*, 573 U.S. at 731 (holding that self-certification under the accommodation offered a less burdensome means of

providing women with contraceptive coverage); *Wheaton College*, 134 S. Ct. at 2807 (holding that the notification option offered an even less burdensome means of applying the accommodation); *Zubik*, 136 S. Ct. at 1560 (ordering solution that ensured women "receive full and equal health coverage, including contraceptive coverage").

3. The agencies' reliance, Br. 29, on *Ricci v. DeStefano*, 557 U.S. 557, 587 (2009), undermines their case. Putting aside that *Ricci* involved a municipality—and so did not address the delegated powers of federal agencies—the case shows why the religious rule is impermissible. In *Ricci*, a city had cancelled racially disparate results from a firefighter promotion exam because it feared liability under Title VII for disparate-impact discrimination. The Court agreed with the city that the results presented a prima facie case of disparate-*impact* discrimination. *Id.* at 587. But the Court concluded that the city had instead committed disparate-*treatment* discrimination because a prima facie case is not a "strong basis in evidence" of actual liability. *Ibid.* The city "could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt." *Ibid.*

Here, the agencies claim the power to do what the Court found impermissible in *Ricci*. Based on a prima facie case (*i.e.*, the substantial burden placed on some employers by the contraceptive care guarantee alone),

the agencies have swept aside the ACA's preventive-services requirement without considering the other factors necessary to find a RFRA violation *for every other employer*. In fact, the agencies have gone further than the city in *Ricci*. There, no one disputed the existence of a prima facie case of disparate-impact discrimination; here, the agencies have exempted employers whose religious exercise has not been substantially burdened by the accommodation.

Ultimately, the agencies' claim of authority rests on the belief that RFRA authorizes them to exempt employers whose rights under that statute are not being violated at the expense of their female employees whose rights under the ACA will be violated. That is not what the law allows.

IV. The scope of the injunction was not an abuse of discretion.

The preliminary injunction was well within the district court's authority, and no broader than necessary to redress the States' likely injuries.

1. The APA authorizes both preliminary and final relief in suits challenging agency action. For the former, it provides that courts may "to the extent necessary to prevent irreparable injury * * * issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. 705. For the latter, it directs courts to

"hold unlawful and set aside agency action" found not to be in accordance with the law. 5 U.S.C. 706(2).

Where, as here, the relevant "agency action" is the issuance of a rule, a court may enter preliminary or final relief with respect to the challenged rule in its entirety. Indeed, this Court has granted or affirmed such relief on multiple occasions. See *West Virginia v. EPA*, 136 S. Ct. 1000 (2016); *Brown & Williamson*, 529 U.S. at 120; *Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986); see also *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (affirming nationwide injunction of agency action).

The contrary claim that courts lack authority to invalidate rules except as applied to the parties, Br. 49, finds no support in the APA's text or the decisions of this Court. Such a regime would bring about a regulatory patchwork and invite repetitive lawsuits. Encouraging greater use of the class action mechanism would only make matters worse, as courts would face the additional burden of having to address class certification within the expedited timeframe often required for APA actions. See Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1089 (2018). And allowing rules to go into effect with respect to all but a few plaintiffs risks entrenching unlawful policies that will become substantially more difficult or costly to replace. Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 418, 476-77 (2017). This cannot be what Congress had in mind when it enacted the APA.

2. Independent of the authority granted by the APA, a court may enter injunctive relief that is "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation and internal quotation marks omitted). Application of that rule is fact-specific, calling on district court judges to exercise "discretion and judgment." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). At the preliminary injunction stage, a plaintiff need only demonstrate that the harms to be remedied are likely. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Because district courts possess "[t]he judicial power of the United States," U.S. CONST. art. III, § 1, an injunction may extend outside a district's boundaries if needed to provide complete relief.

The district court reviewed the record under these standards. As it found, "[h]undreds of thousands of the States' citizens travel across state lines—to New York, Ohio, Delaware, Maryland, West Virginia and even further afield—to work for out-of-state entities," and there is an annual influx of "tens of thousands of out-of-state students" into each of the States. Pet.App. 180a-81a. Likewise, young working adults who move to the States often will be covered by their parents' out-of-state health plans. And teleworking capabilities allow countless others to work in the States despite having out-of-state employers. Without nationwide relief, the States would bear the cost of contraceptive care for persons covered under exempted out-of-state health

plans. Pet.App. 181a-82a. These realities explain why petitioners have never been able to articulate how to limit the injunction while completely remedying the States' likely injuries.

Because the injunction was crafted with only the parties in mind, it does not raise the constitutional or equitable concerns some Justices have recently expressed. See, *e.g.*, *DHS v. New York*, 140 S. Ct. 599 (2020) (Gorsuch, J., concurring in grant of stay); *Trump v. Hawaii*, 138 S. Ct. 2392, 2424-29 (2018) (Thomas, J., concurring). For the same reason, any lesser relief would expose the States to continuing injuries despite their likelihood of success on the merits.

V. The Little Sisters lack appellate standing.

Article III "demands that an actual controversy persist throughout all stages of litigation." *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019) (citations and internal quotation marks omitted). This jurisdictional requirement applies to intervenors, who may appeal only those orders that affect them and "only to the extent of the interest that made it possible for intervention." 7C Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc.* § 1923 (3d ed. Aug. 2019 update). The Little Sisters are unaffected by the district court's order and therefore lacked standing to appeal it.

Due to the separate injunction entered in Colorado, the Little Sisters have no obligation to comply with the contraceptive guarantee and no need to claim

the religious exemption. Order, Little Sisters of the Poor v. Azar, No. 13-2611 (D. Colo. May 29, 2018). The district court here explicitly excluded Little Sisters from the injunction now on appeal. Pet.App. 173a-74a n.27. Contrary to their assertions, LS-Br. 26-27, they will remain shielded no matter how the Court resolves this case. That they care deeply about the issue does not establish standing. If "the federal courts [were] merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of 'standing' would be quite unnecessary." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982).

The Little Sisters' argument, LS-Br. 26, that they could change health plans in the future was not timely raised below, see LS-Reply C.A. Br. 35-36, and is forfeited, see *United States v. Jones*, 565 U.S. 400, 413 (2012). Regardless, the Little Sisters have worked with the Christian Brothers trust for decades, Compl. ¶ 8, Little Sisters of the Poor v. Azar, No. 13-2611 (D. Colo. Sept. 24, 2013), and present no evidence that such self-inflicted harm is "certainly impending," *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013).

The Little Sisters did not "merely support[]" the agencies' appeal below. LS-Br. 25-26. They separately invoked the Third Circuit's jurisdiction by filing their own appeal before the agencies themselves had done so. C.A.App. 53, 56. That court's consolidation of the appeals does not change this fact, as consolidated cases retain their separate identities. See *Hall v. Hall*, 138

S. Ct. 1118, 1125-28 (2018); see also *Butler v. Dexter*, 425 U.S. 262, 267 n.12 (1976).

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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April 2020

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