Nos. 19-15072, 19-15118, and 19-15150

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA *et al.*,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES *et al.*,

Defendants-Appellants,

and

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,

Intervenor-Defendant-Appellant,

and

MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

Intervenor-Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR THE FEDERAL APPELLANTS

JOSEPH H. HUNT
Assistant Attorney General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
DAVID L. ANDERSON
United States Attorney
SHARON SWINGLE
LOWELL V. STURGILL JR.
KAREN SCHOEN
Attorneys, Appellate Staff
Civil Division, Room 7241
U.S. Department of Justice
950 Pennsylvania Avenue N.W.
Washington, D.C. 20530
(202) 514-3427

Counsel for the Federal Government

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Regulatory Materials:

INTRODUCTION

California and several other States challenge final rules that expand the prior religious exemption from the so-called contraceptive-coverage mandate adopted pursuant to the Patient Protection and Affordable Care Act (ACA) and also provide for a moral exemption to the mandate. In a prior appeal in this case, the Court concluded that the administering agencies—the Departments of Health and Human Services (HHS), Labor, and the Treasury—improperly bypassed notice-and-comment procedures in issuing interim final rules. *See California v. Azar*, 911 F.3d 558, 575-80 (9th Cir. 2018). The Court upheld the plaintiff States' standing to challenge the interim rules as well as a preliminary injunction precluding the agencies from implementing those rules, but limited the scope of the injunction to the plaintiff States. *See id.* at 585.

The States amended their complaint to challenge newly issued final rules that superseded the interim rules, and the district court again issued a preliminary injunction. This time, the district court held that the States were likely to succeed on their claim that the agencies lacked substantive authority to issue the rules.

The district court's decision is erroneous. The same provision of the ACA that authorized the agencies to issue the prior exemption for churches equally authorizes the expanded exemptions. Moreover, the Religious Freedom Restoration Act (RFRA) independently authorized, and indeed required, issuance of the religious exemption as a means of eliminating the substantial burden on religious exercise that *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), held was imposed by the contraceptive-coverage mandate.

Both RFRA and the ACA authorize the government to satisfy its obligation under RFRA by using the straightforward exemption provided by the current administration rather than attempting to rely only on the novel accommodation created by the prior administration. That is especially true because the accommodation itself violates RFRA and is, at a minimum, subject to significant legal doubt: as the agencies concluded and some courts have held, the accommodation imposes a substantial burden on some employers by using the plans they sponsor to provide contraceptive coverage that they object to on religious grounds, which some employers sincerely believe makes them complicit in the provision of such coverage.

The district court also concluded that the agencies separately violated the Administrative Procedure Act (APA) by failing to provide a reasoned explanation for the final rules, but the court's cursory analysis of that issue does not withstand scrutiny. When an agency changes its policy, it need only show that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes the new policy to be better. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-16 (2009). The final rules easily satisfy those minimal requirements.

STATEMENT OF JURISDICTION

The plaintiff States' claims challenging the rules under the APA rested on the district court's jurisdiction under 28 U.S.C. § 1331. The district court entered a preliminary injunction barring implementation of the final rules on January 13, 2019. ER 45. The government filed a timely notice of appeal on January 23, 2019. ER 48. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the agencies had statutory authority under the ACA and RFRA to issue rules expanding the religious exemption and creating a moral exemption to the contraceptive-coverage mandate.

2. Whether the agencies provided a reasoned explanation for the new rules' expansion of conscience protections.

3. Whether the district court erred in holding that the States would suffer Article III injury and irreparable harm if the rules were enforced and that the balance of equities and the public interest support a preliminary injunction.

STATEMENT OF THE CASE

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

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

comprehensive guidelines supported by the Health Resources and Services Administration [HRSA]," a component of HHS. *Id.* § 300gg-13(a)(4).

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

At the same time, the agencies, invoking their authority under 42 U.S.C. § 300gg-13(a)(4), promulgated interim final rules authorizing HRSA to exempt churches and their integrated auxiliaries from the contraceptive-coverage mandate. *See* 76 Fed. Reg. at 46,623. The rules were finalized in February 2012. *See* 77 Fed. Reg. at 8725. Although various religious groups urged the agencies to expand the exemption to all organizations with religious or moral objections to providing contraceptive coverage, *see* 78 Fed. Reg. 8456, 8459-60 (Feb. 6, 2013), the agencies instead offered, in a later rulemaking, what they termed an "accommodation" limited to religious not-for-profit organizations

with religious objections to providing contraceptive coverage, *see* 78 Fed. Reg. 39,870, 39,874-82 (July 2, 2013). The accommodation allowed a group health plan established or maintained by an eligible objecting employer to opt out of any requirement to directly "contract, arrange, pay, or refer for contraceptive coverage." *Id.* at 39,874. Under the regulations, that opt-out then generally required the employer's health insurer or third-party administrator (in the case of self-insured plans) to provide or arrange contraceptive coverage for plan participants. *See id.* at 39,875-80.

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

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

B. Challenges to the Contraceptive-Coverage Mandate and Accommodation

Many employers objected to the contraceptive-coverage mandate. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court held that RFRA prohibited applying the mandate to closely held for-profit corporations with religious objections to providing contraceptive coverage. The Court held that the mandate "impose[d] a substantial burden on the exercise of religion" for such employers, *id.* at

2779, and that, even assuming a compelling governmental interest, application of the mandate was not the least restrictive means of furthering that interest, *id.* at 2780. The Court observed that the agencies had already established an accommodation for not-for-profit employers and that, at a minimum, this less restrictive alternative could be extended to closely held for-profit corporations with religious objections. *Id.* at 2782. But although the Court held that such an option was a less restrictive means under RFRA, the Court did not decide "whether an approach of this type complies with RFRA for purposes of *all* religious claims." *Id.* (emphasis added).

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

A split developed in the circuits, *see* 82 Fed. Reg. at 47,798, and the Supreme Court granted certiorari in several of the cases. The Court vacated the judgments and remanded the cases to the respective courts of appeals. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam). The Court "d[id] not decide whether [the plaintiffs'] religious exercise ha[d] been substantially burdened, whether the Government ha[d] a compelling interest, or whether the current regulations [we]re the least restrictive means of serving that interest." *Id.* at 1560. Instead, the Court directed that, on remand, the parties be given an opportunity to resolve the dispute. *See id.* In the meantime, the Court precluded the government from "impos[ing] taxes or penalties on [the plaintiffs] for failure to provide the [notice required under the accommodation]." *Id.* at 1561. Similar orders were entered in other pending cases.

In response to *Zubik*, the agencies sought public comment to determine whether further modifications to the accommodation could resolve the religious objections asserted by various organizations while providing a mechanism for contraceptive coverage for their employees. *See* 81 Fed. Reg. 47,741 (July 22, 2016). The agencies received over 54,000 comments, but could not find a way to amend the

accommodation to both satisfy objecting organizations and provide seamless coverage to their employees. *See* FAQs About Affordable Care Act Implementation Part 36, at 4 (Jan. 9, 2017).[1] The pending litigation—more than three dozen cases brought by more than 100 separate plaintiffs—thus remained unresolved.

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

C. The Interim Final Rules

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

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

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

D. The States' Challenge to the Interim Rules

The States of California, Maryland, Delaware, and New York, and the Commonwealth of Virginia, sued in the U.S. District Court for the Northern District of California, challenging the interim rules. The States claimed that the rules (1) failed to comply with the APA's notice-and-comment requirements; (2) are arbitrary and capricious, an abuse of discretion, or otherwise contrary to law; (3) violate the Establishment Clause; and (4) violate the Equal Protection Clause.

The district court granted the States' motion for preliminary injunctive relief on the first claim, issuing a "nationwide" preliminary injunction invalidating the interim rules. *California v. HHS*, 281 F. Supp. 3d 806, 832 (N.D. Cal. 2017).

The government, as well as intervenors Little Sisters of the Poor and March for Life, appealed, and on December 13, 2018, this Court affirmed the district court's holding that the interim rules failed to comply with the APA's notice-and-comment requirements. *See*

California v. Azar, 911 F.3d 558, 575-80 (9th Cir. 2018). The Court rejected the government's arguments that the plaintiff States lacked standing, *id.* at 571-73, and that the States had sued in the wrong venue, *id.* at 569-70. And the Court concluded that the district court had not abused its discretion in finding that the equities warranted a preliminary injunction. *Id.* at 581-82. The Court narrowed the injunction, however, to apply only to the plaintiff States. *Id.* at 582-84.

E. The Final Rules

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

Like the interim rules, the final rules expanded the religious exemption to nongovernmental plan sponsors, as well as institutions of higher education in their arrangement of student health plans, to the extent that those entities have sincere religious objections to providing contraceptive coverage. *See* 83 Fed. Reg. at 57,558-65. The agencies also

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

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

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

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

F. The States' Challenge to the Final Rules

Following issuance of the final rules, California and the original plaintiffs, joined by the States of Connecticut, Hawaii, Illinois, Minnesota, North Carolina, Rhode Island, Vermont, and Washington, and the District of Columbia, filed a second amended complaint. The plaintiff States challenged the final rules on largely the same basis that

the original plaintiffs challenged the interim rules, and once again sought a preliminary injunction. *See* ER 14.

The district court issued a preliminary injunction barring implementation of the final rules in the plaintiff States. ER 44. The court held that the States have standing and sued in a proper venue, and that they are likely to succeed on, or at a minimum have raised serious questions regarding, their APA claim that the final rules are not in accordance with the ACA and are neither authorized nor required by RFRA. ER 15-39. In passing, the court also concluded that the States are likely to prevail on their claim that the agencies failed to provide a reasoned explanation for their change in policy. ER 37. And the court held that the balance of harms favors injunctive relief. ER 39-42.

SUMMARY OF ARGUMENT

The district court erred in granting a preliminary injunction. The agencies had substantive authority to issue the challenged rules and provided a reasoned explanation for their expansion of the prior conscience exemption to the contraceptive-coverage mandate. Furthermore, the balance of harms weighs against preliminary injunctive relief.

1. The ACA authorizes HRSA to decide what "additional preventive care and screenings" for women should be required, 42 U.S.C. § 300gg-13(a)(4), and since the agencies' first rulemaking on that subject in 2011—when they created both the contraceptive-coverage mandate and the church exemption—the agencies have reasonably interpreted that provision to authorize exemptions to the mandate for sincerely held conscience-based objections.

RFRA also independently authorized—and indeed, required—the religious exemption. The Supreme Court held in *Hobby Lobby* that the contraceptive-coverage mandate, standing alone, substantially burdens the exercise of religion by employers that sincerely object to providing such coverage. Nothing in RFRA or the ACA prevents the agencies from eliminating that burden through a straightforward exemption rather than the novel accommodation the agencies previously attempted to use. On the contrary, RFRA gives the agencies discretion to determine how best to alleviate the burden flowing from the ACA's regulatory regime. The agencies' decision to expand the preexisting religious exemption was particularly reasonable given the sincere religious

objections to the accommodation itself, which violates RFRA as applied to some entities and at a minimum is subject to significant legal doubt.

2. The agencies also provided a reasoned explanation for expanding conscience protections. The agencies, based on a thorough review of the record and comments received from the public, concluded that the existing accommodation imposed a substantial burden on some entities' religious or moral beliefs. And the agencies explained that the administrative record was insufficient to establish a compelling governmental interest in ensuring that women covered by plans of objecting organizations receive cost-free contraceptive coverage through those plans, given the multiple other programs that provide free or subsidized contraception and the complex and uncertain relationship between contraceptive access, contraceptive use, and unintended pregnancy. Those determinations are entitled to deference, and easily satisfy the minimal requirements necessary to justify a change in policy under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

3. The district court also erred in holding that the States have standing, that they would suffer irreparable harm if the rules were allowed to go into effect, and that the balance of equities favors

preliminary injunctive relief. The agencies recognize that the panel's prior ruling on these issues is controlling for purposes of this appeal, but we preserve our arguments for further review.

STANDARD OF REVIEW

This Court reviews the grant of a preliminary injunction for abuse of discretion. *See American Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). "A district court necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Id.* (cleaned up).

ARGUMENT

I. The Agencies Had Statutory Authority to Issue the Final Rules

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

1. The ACA grants HRSA, and in turn the agencies, significant discretion to shape the content, scope, and enforcement of any preventive-services guidelines adopted pursuant to 42 U.S.C. § 300gg-13(a)(4). The ACA does not specify the types of preventive services that must be included in such guidelines. Instead, as relevant

here, it provides only that, "with respect to women," coverage must include "such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by [HRSA]." 42 U.S.C. § 300gg-13(a)(4). Several textual features of § 300gg-13(a) demonstrate that this provision grants HRSA broad discretionary authority.

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

Second, nothing in the statute mandated that the guidelines include contraception, let alone for all types of employers with covered plans. The statute provides only for coverage of preventive services "as

provided for in comprehensive guidelines supported by [HRSA] for purposes of this paragraph." 42 U.S.C. § 300gg-13(a)(4). The use of the phrase "for purposes of this paragraph" makes clear that HRSA should consider the statutory mandate in shaping the guidelines, and the use of the phrase "as provided for"—absent in parallel provisions, *see* 42 U.S.C. § 300gg-13(a)(1), (2), (3)—suggests that HRSA may define not only the services to be covered but also the manner or reach of that coverage. That suggestion is reinforced by the absence of words like "evidence-based" or "evidence-informed" in this paragraph, as compared with § 300gg-13(a)(1) and (a)(3)—an omission demonstrating that Congress authorized HRSA to consider factors beyond the scientific evidence in deciding whether to support a coverage mandate for particular preventive services.

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

Reg. 38,409 (Aug. 31, 1982). The text of § 300gg-13(a)(4) thus plainly authorized HRSA to recognize an exemption from otherwise-applicable guidelines that it adopts, and nothing in the ACA prevents HHS from directing that HRSA recognize such an exemption. Since their first rulemaking on this subject in 2011, the agencies have consistently interpreted the broad delegation in § 300gg-13(a)(4) to include the power to reconcile the ACA's preventive-services requirement with sincerely held views of conscience on contraceptive coverage—namely, by exempting churches and their integrated auxiliaries from the contraceptive-coverage mandate. *See* 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). At that time, no one filed a lawsuit challenging this basic authority of HRSA.

The agencies expressly invoked this statutory and regulatory backdrop in exercising their authority to expand the exemption. *See* 83 Fed. Reg. 57,536, 57,540-42 (Nov. 15, 2018). At the very least, this is a reasonable construction of the statute and thus entitled to deference. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

2. Seizing on § 300gg-13(a)'s use of the term "shall," the district court held (ER 23) that the agencies were precluded from creating exemptions to the preventive-services requirement. The district court treated the government's argument that HRSA was authorized to define both the preventive services to be covered and the manner or reach of that coverage as tantamount to a "den[ial] that the statutory mandate is a mandate." ER 22.

But while the term "shall" imposes a mandatory obligation *on covered plans* to cover the preventive services that Congress authorized HRSA to specify, it does not limit *HRSA's* authority (which ultimately belongs to HHS and, through enforcement, the other agencies) to decide both what preventive services must be covered and by what categories of regulated entities.

Any contrary conclusion would mean that the agencies likewise lacked (and continue to lack) the statutory authority to create the exemption for churches. The district court sought to avoid this problem on the ground that "the legality of that exemption is not before the Court," ER 24, but the issue is not so readily put aside. The States have never contended that the agencies lack statutory authority to create an

exemption for churches, and the court cannot simply ignore the wide-ranging legal consequences of its interpretation of the statute.

In attempting to sidestep the problem of how to square the church exemption with its reading of § 300gg-13(a), the court "note[d]" that the church exemption "was rooted" in Internal Revenue Code provisions that apply to churches, their integrated auxiliaries, and conventions of churches, as well as to the exclusively religious activities of any religious order. ER 24 (citing 78 Fed. Reg. 39,870, 39,874 (July 2, 2013)). The court provided no explanation, however, why those Code provisions would authorize a religious exemption from the preventive-services requirement in the ACA as long as the exemption is limited to churches and their integrated auxiliaries. In both instances, the statutory authority to create the exemption is found in § 300gg-13(a), *not* the Internal Revenue Code.

Nor do the Internal Revenue Code provisions cited by the district court limit the authority of the agencies to create religious exemptions from the preventive-services requirement in the ACA, or establish some outer benchmark for appropriate accommodation of religious freedom. As the agencies recognized in expanding the religious exemption,

"religious exercise in this country has long been understood to encompass actions outside of houses of worship and their integrated auxiliaries." 83 Fed. Reg. at 57,561. Other religious exemptions go beyond simply protecting churches and their integrated auxiliaries. *See, e.g.*, *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017) (holding that an ERISA-exempt "church plan" includes a plan maintained by a "principal-purpose organization," regardless of whether a church originally established the plan); *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011) (per curiam) (holding that the accommodation for "religious organizations" in 42 U.S.C. § 2000e-1(a), concerning employment discrimination, lawfully extends beyond houses of worship); *Kong v. Scully*, 341 F.3d 1132 (9th Cir. 2003) (upholding constitutionality of an accommodation that allows Medicare reimbursement of healthcare expenses provided in religious nonmedical healthcare institutions).

The district court reasoned that, even if the "church exemption is uniquely required by law given the special legal status afforded to churches and their integrated auxiliaries, the existence of that exemption simply does not mean that the agencies have boundless

authority to implement any other exemptions they choose." ER 24. The church exemption, however, which applies to all churches whether or not they have asserted a religious objection to contraception, *see* 45 C.F.R. § 147.131(a) (2016), is not tailored to any plausible Free Exercise Clause concerns. In addition, the district court provided no explanation as to how RFRA could require the church exemption but not the expanded religious exemption in the challenged rules, given that the accommodation is no less an available alternative for the former than the latter.

Moreover, we do not suggest that the agencies had boundless authority to create invidious or irrational exemptions. The agencies' exercise of their authority to shape the content and scope of any preventive-services guidelines is subject to "arbitrary and capricious" review under the APA. The point here is that the challenged exemption is eminently reasonable, given the tortured litigation history preceding it, its powerful justification for affected employers, and its minimal impact on women. Indeed, the agencies reasonably anticipate that the rules will at most only moderately expand the number of employers that use the exemption. Even before the ACA, "the vast majority of

entities already covered contraception." 82 Fed. Reg. 47,792, 47,819 (Oct. 13, 2017). And employers have "no significant financial incentive" not to comply with the contraceptive-coverage mandate, since compliance is "cost-neutral," and noncompliance with the mandate in the past had led to "serious public criticism and in some cases organized boycotts." *Id.*

Nor, contrary to the district court's suggestion (ER 23), does Congress's rejection in 2012 of a conscience amendment show that the agencies lack authority to create an exemption. Congress's failure to adopt a proposal is a "particularly dangerous ground on which to rest an interpretation" of a statute. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). That is particularly so here, where the amendment was *broader* than the exemption here, and Congress may have determined simply *not to require* an exemption. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 n.30 (2014).

B. RFRA Both Authorizes and Requires the Religious Exemption

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

In *Hobby Lobby*, the Supreme Court held that the contraceptive-coverage mandate, standing alone, "imposes a substantial burden" on objecting employers. 134 S. Ct. at 2779. And the Court further held that application of the mandate to objecting employers was not the least restrictive means of furthering any compelling governmental interest, because, at a minimum, the accommodation was a less restrictive alternative that could be extended to the objecting employers in that case. *See id.* at 2780-83. But the Court did not decide whether the accommodation would satisfy RFRA for all religious claimants; nor did

it suggest that the accommodation is the only permissible way for the government to comply with RFRA and the ACA, even assuming the existence of a compelling governmental interest. *See id.* at 2782. Moreover, as the agencies noted, other lawsuits have shown that "many religious entities have objections to complying with the accommodation based on their sincerely held religious beliefs." 82 Fed. Reg. at 47,806.

The agencies reasonably decided to adopt the religious exemption to satisfy their RFRA obligation to eliminate the substantial burden imposed by the mandate. *See* 83 Fed. Reg. at 57,544-48. Although RFRA prohibits the government from substantially burdening a person's religious exercise where doing so is not the least restrictive means of furthering a compelling interest—as is the case with the contraceptive-coverage mandate, per *Hobby Lobby*—RFRA does not prescribe the remedy by which the government must eliminate that burden. The prior administration chose to attempt to do so through the complex accommodation it created, but nothing in RFRA compelled that novel choice or prohibits the current administration from employing the more straightforward choice of an exemption—much like the existing and unchallenged exemption for churches. Indeed, if the agencies had

simply adopted an exemption from the outset—as they did for churches—no one could reasonably have argued that doing so was improper because the agencies should have invented the accommodation instead. Neither RFRA nor the ACA compels a different result here based merely on path dependence.

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

To be sure, if providing an exemption for an objecting religious employer would prevent the contraceptive-coverage mandate from achieving a compelling governmental interest as to that employer, then RFRA would not authorize that exemption. *See Hobby Lobby*, 134 S. Ct.

at 2779-80. But the agencies expressly found that application of the mandate to objecting entities neither serves a compelling governmental interest nor is narrowly tailored to any such interest. That is so for multiple reasons, including that:

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

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

Of course, that is especially true because the accommodation *does* violate RFRA for at least some employers, by using plans that they themselves sponsor to provide contraceptive coverage that they object to

on religious grounds, which they sincerely believe makes them complicit in providing such coverage. *See* 82 Fed. Reg. at 47,798, 47,800. In light of that sincere religious belief, forcing objecting employers to use the accommodation plainly imposes a substantial burden under *Hobby Lobby*. *See Sharpe Holdings, Inc. v. HHS*, 801 F.3d 927, 939-43 (8th Cir. 2015), *vacated and remanded sub nom.*, *HHS v. CNS Int'l Ministries*, 136 S. Ct. 2006 (2016) (mem.); *Priests for Life v. HHS*, 808 F.3d 1, 16-21 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc). Indeed, after extensive study, the previous administration determined that it could identify no means short of an exemption that would resolve all religious objections; and on further examination the agencies determined that denying the exemption was not narrowly tailored to achieving any compelling interest. *See supra* pp. 9-10, 30. It thus was not just reasonable, but required, for the agencies to satisfy their RFRA obligations concerning the contraceptive-coverage mandate by providing an exemption rather than just the accommodation.

2. The district court nevertheless held (ER 31-37) that the States raised serious questions about whether RFRA authorizes the exemptions. But the court's analysis was flawed in multiple respects.

a. As an initial matter, the district court had an unduly cramped view of the government's authority under RFRA. The district court held (ER 32-33) that the government's authority to offer an exemption under RFRA is limited to circumstances in which no other possible accommodation would be consistent with RFRA, rejecting the federal defendants' contrary argument based on the Supreme Court's decision in *Ricci*, 557 U.S. 557. But again, while RFRA provides that the government cannot substantially burden religious exercise unless doing so is narrowly tailored to a compelling interest, RFRA does not provide that the government must adopt the most narrowly tailored means of eliminating the substantial burden. *See* 42 U.S.C. § 2000bb-1(a). Moreover, in *Ricci*, the Supreme Court held that an employer need only have a strong basis for believing that an employment practice has an impermissible race-based impact under Title VII in order to be able to take race-based remedial measures that otherwise would themselves be impermissible under Title VII. *See* 557 U.S. at 585. *Ricci* establishes that an entity faced with potentially conflicting legal obligations—here, in the district court's view, compliance with both the ACA and RFRA—should be afforded some leeway in resolving that conflict. Indeed, this

Court has applied that principle, albeit in the converse scenario, in the context of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, which employs the same "substantial-burden / compelling-interest" test as RFRA. *See Walker v. Beard*, 789 F.3d 1125, 1136-37 (9th Cir. 2015) (denying a religious exemption from prison rules requiring racially integrated cells given "an objectively strong legal basis" for believing that doing so would violate the Equal Protection Clause).

Similarly, the Establishment Clause permits the government to accommodate religious practices, and "[t]he limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 673. Indeed, even the district court here recognized that there is "some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause." ER 34 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005)).

In nevertheless questioning whether the agencies have some leeway to create exemptions to the contraceptive-coverage mandate in the face of potentially conflicting legal obligations, the district court

reasoned that "the courts, not the agencies, are the arbiters of what the law and the Constitution require." ER 33. That rationale, however, suggests that agencies can provide exemptions only to the extent that they are *required* under RFRA based on an adverse judicial ruling—a position that not even the district court embraced. It is also flatly at odds with the plain language of RFRA, which applies to "the implementation of" "all Federal law," 42 U.S.C. § 2000bb-3(a), and provides that "Government shall not substantially burden a person's exercise of religion" unless strict scrutiny is satisfied, *id.* § 2000bb-1(a), (b). The statute's plain text thus prohibits a federal agency from promulgating a regulation that would impose such an unjustified burden, and requires the agency to eliminate the burden in some way, not simply wait for the inevitable lawsuit and judicial order to comply with RFRA.

The district court's contrary suggestion could lead to perverse results: Here, for example, given the absence at the time of any court order compelling the accommodation, the agencies would not have been able to create the accommodation under RFRA and provide it even to employers that objected to the mandate but *not* to the accommodation.

And then, when those employers instead inevitably invoked RFRA as "a claim or defense" against enforcement of the mandate, 42 U.S.C. § 2000bb-1(c), courts likely would have provided them a full exemption (an ordinary RFRA remedy) rather than ordering the agencies to manufacture the novel accommodation (an unusual RFRA remedy).

Indeed, if the agencies were not authorized to provide an exemption to a law of general applicability based on their view of RFRA's requirements, it is not apparent why the accommodation itself would have been statutorily authorized: 42 U.S.C. § 300gg-13(a) requires that any "group health plan" or "health insurance issuer offering group or individual health insurance coverage" *itself* "provide coverage for" contraceptives, not that it outsource that obligation to someone else. Unless compelled to do so by RFRA, then, the agencies had no authority under § 300gg-13(a)(4) to deviate from the contraceptive-coverage mandate's requirements by creating the accommodation. Yet nothing in RFRA *requires* the accommodation per se; it is hardly the only possible means of eliminating the substantial burden imposed by the contraceptive-coverage mandate. Conversely, under the district court's reasoning, the purported validity of the

accommodation would imply that the church exemption would not be authorized by RFRA, because it too would not be "required."

b. The district court also erred in concluding (ER 24-31) that the religious exemption likely is not required by RFRA.

To begin, the court wrongly concluded (ER 25-31) that the accommodation does not impose a substantial burden on religious exercise. Some employers "have a sincere religious belief that their participation in the accommodation process makes them morally and spiritually complicit" in providing contraceptive coverage, because their "self-certification" triggers "the provision of objectionable coverage through their group health plans." *Sharpe*, 801 F.3d at 942. The accommodation substantially burdens that belief because those employers' only other choice is to pay the devastating financial penalty the ACA sets out for employers that do not comply with the contraceptive-coverage mandate. That is the same penalty *Hobby Lobby* held constituted a substantial burden with respect to the closely held corporations that were the plaintiffs there. *See* 134 S. Ct. at 2775-76.

The district court reasoned that the accommodation cannot impose a substantial burden on the free exercise of religion because "the only

action required of the eligible organization is opting out [of the contraceptive-coverage mandate]." ER 27 (quoting *Eternal Word Television Network, Inc. v. Secretary of HHS*, 818 F.3d 1122, 1149 (11th Cir. 2016), *vacated*, No. 14-12696, 2016 WL 11503064 (11th Cir. May 31, 2016)). By this reasoning, however, the court mischaracterized the nature of the religious objection to the accommodation to which the agencies responded. As explained (*supra* pp. 30-31, 36), some employers have a sincere belief that the manner in which the accommodation operates renders them "complicit" in the provision of contraceptive coverage. Those objections are not merely to "opting out," but to the impact that using the accommodation as it is structured would have on their religion. For those employers, following their religion (by not invoking the accommodation) would leave them subject to the same financial penalty as *Hobby Lobby* held constitutes a substantial burden under RFRA. *See Sharpe*, 801 F.3d at 937-38; *see also Priests for Life*, 808 F.3d at 20 (Kavanaugh, J., dissenting from denial of rehearing en banc).

The district court rejected the idea that the accommodation could render objecting employers complicit in the provision of contraceptive

coverage, asserting that "women are entitled to contraceptive coverage regardless of their employer's action (or lack of action) with respect to seeking an accommodation." ER 27 (quoting *Eternal Word*, 818 F.3d at 1149). This conclusion, however, "dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)." *Hobby Lobby*, 134 S. Ct. at 2778.

Hobby Lobby establishes that a court's "narrow function in this context is to determine whether the line drawn reflects an honest conviction," as opposed to "in effect tell[ing] the plaintiffs that their beliefs are flawed." 134 S. Ct. at 2778, 2779 (cleaned up); *see also Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981) (holding that it was "not for [the Court] to say" whether the line a Jehovah's Witness employee drew between helping to manufacture steel that was used in making weapons, which he found to be consistent with his religious beliefs, and helping to make the weapons themselves, which he found

morally objectionable, was reasonable). The district court's conclusion that the mandate cannot impose a substantial burden because of how the accommodation functions violates that principle by disregarding the sincere religious beliefs of many employers on the ground that those beliefs are flawed. As the Eighth Circuit correctly put it in *Sharpe*, under *Hobby Lobby*, the question is not whether religious objectors "have correctly interpreted the law, but whether they have a sincere religious belief that their participation in the accommodation process makes them morally and spiritually complicit in providing [contraceptive coverage to which they religiously object]." 801 F.3d at 942; *see also Priests for Life*, 808 F.3d at 17-20 (Kavanaugh, J., dissenting from denial of rehearing en banc).

The district court rejected this understanding of RFRA on the ground that a court "must assess the nature of a claimed burden on religious exercise to determine whether, as an objective legal matter, that burden is substantial under RFRA." ER 26 (quoting *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 217 (2d Cir. 2015), *vacated and remanded*, 136 S. Ct. 2450 (2016)). That reasoning, however, is the same as that set forth in Justice Sotomayor's dissent in *Wheaton*

College v. Burwell, 134 S. Ct. 2806, 2812 (2014) ("Wheaton is mistaken—not as a matter of religious faith, in which it is undoubtedly sincere, but as a matter of law . . . . Any provision of contraceptive coverage by Wheaton's third-party administrator would not result from any action by Wheaton; rather, in every meaningful sense, it would result from the relevant law and regulations."). A majority of the Supreme Court disagreed with Justice Sotomayor's dissent, however, at least for purposes of the injunction, which the Court could have granted "only if it concluded that the required form 'indisputably' would impose a substantial burden on Wheaton College's exercise of religion." *Priests for Life*, 808 F.3d at 20 n.6 (Kavanaugh, J., dissenting from denial of rehearing en banc).

That some courts have described RFRA's substantial-burden inquiry as an objective test, *see* ER 26, also does not provide a license for courts to second-guess the sincerity of religious beliefs—as the district court did here by essentially rejecting as flawed many organizations' sincere belief that using the accommodation would violate their religion by making them complicit in contraceptive coverage. *See Hobby Lobby*, 134 S. Ct. at 2779 (concluding that the

mandate imposed a substantial burden on plaintiffs' religious exercise by forcing them to pay an "enormous sum of money"); *Sharpe,* 801 F.3d at 938 (explaining that once a court determines that a religious belief is burdened, "substantiality is measured by the severity of the penalties for noncompliance" (quoting *University of Notre Dame v. Burwell*, 786 F.3d 606, 628 n.1 (7th Cir. 2015) (Flaum, J., dissenting))); *Priests for Life*, 808 F.3d at 16-21 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

The district court was also mistaken in asserting that *Hobby Lobby* "suggested (without deciding) that the accommodation likely was not precluded by RFRA." ER 28. While *Hobby Lobby* noted that the accommodation satisfied the religious beliefs of the plaintiffs *in that case*, *see* 134 S. Ct. at 2782, the Court did not suggest that the accommodation would satisfy the religious beliefs of *other* employers. On the contrary, the Court specifically noted that it did not "decide today whether an approach of this type complies with RFRA for purposes of all religious claims." *Id.*

c. The district court noted that "a court evaluating a RFRA claim must 'take adequate account of the burdens a requested accommodation

may impose on nonbeneficiaries.'" ER 35 (quoting *Hobby Lobby*, 134 S. Ct. at 2781 n.37). The court concluded that serious questions exist regarding whether RFRA authorizes the religious exemption, because it "has the effect of depriving female employees, students and other beneficiaries connected to exempted religious objectors of their statutory right under the ACA to seamlessly-provided contraceptive coverage at no cost." ER 34. This argument fails for two reasons.

First, as already noted, the agencies reasonably concluded that application of the mandate to objecting entities neither serves a compelling interest nor is narrowly tailored to any such interest. *See supra* p. 30. That conclusion precludes any finding that the religious exemption exceeds the agencies' authority under RFRA on the ground that it allegedly unduly burdens the interests of third parties. *Cf. Benning v. Georgia*, 391 F.3d 1299, 1312-13 (11th Cir. 2004) (holding that the religious exemption in RLUIPA does not facially burden third-party interests unduly, because RLUIPA allows States to satisfy compelling interests). Furthermore, as the agencies also reasonably concluded, the burden the mandate places on some employers with religious objections is greater than previously thought, and outweighs

the burden on women who might lose contraceptive coverage. *See* 83 Fed. Reg. at 57,546-48.

Second, as the agencies explained, calling the loss of compelled contraceptive coverage a government burden rests on the "incorrect presumption" that "the government has an obligation to force private parties to benefit those third parties and that the third parties have a right to those benefits." 83 Fed. Reg. at 57,549. "If some third parties do not receive contraceptive coverage from private parties who the government chose not to coerce [into providing such coverage], that result exists in the absence of governmental action—it is not a result the government has imposed." *Id.* In other words, before the contraceptive-coverage mandate, women had no entitlement to have their health plans provide contraceptive coverage without cost sharing. If the same agencies that created and enforce the mandate also create a limited exemption to accommodate sincere religious objections, the women affected are not "burdened" in any meaningful sense, because they are no worse off than before the agencies chose to act in the first place.

That reasoning is supported by *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987). There, the Court held that Title VII's religious exemption to the prohibition against religious discrimination in employment was consistent with the Establishment Clause, facially and as applied, even though the result was to affirm the employer's right to terminate the plaintiff's employment. *See id.* at 330-38. While the plaintiff was "[u]ndoubtedly" adversely affected, the Court noted, "it was the Church . . . , and not the Government, who put him to the choice of changing his religious practices or losing his job," *id.* at 337 n.15; again, rather than burdening the Church's employees, the exemption simply left them in the same place they were before Title VII's general prohibition and exemption were enacted, *see id.* (noting that the plaintiff employee "was not legally obligated" to take the steps necessary to save his job, and that his discharge "was not required by statute"). The same reasoning applies here *a fortiori*: any adverse effect on women who may lose employer-sponsored contraceptive coverage equally results from a decision of private employers, not the government; and the burden is much less than the loss of job, but

merely the loss of subsidized contraceptive coverage by an unwilling employer. And again, the contrary conclusion would mean that the church exemption is not authorized by RFRA, because a church's employees are no less burdened than the employees of any other employer with sincere religious objections.

II. The Agencies Provided a Reasoned Explanation for the Religious and Moral Exemptions

In evaluating the plaintiff States' likelihood of success, the district court stated that plaintiffs "are also likely to prevail on their claim that the agencies failed to provide 'a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.'" ER 37 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)). The court reasoned that the rules "provide no new facts and no meaningful discussion that would discredit [the agencies'] prior factual findings establishing the beneficial and essential nature of contraceptive healthcare for women," and that on this point, the rules instead "rest, at bottom, on new *legal* assertions by the agencies." *Id.* Both the court's conclusion and its abbreviated discussion of *Fox* are erroneous.

An agency acts properly within its statutory discretion if a rational basis for the agency's decision "may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). The same standard applies where, as here, the government's action reflects a change in policy. *See Fox*, 556 U.S. at 514-15. Thus, an agency that changes policy need not demonstrate "that the reasons for the new policy are *better* than the reasons for the old one," but only that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *Id.* at 515.

The agencies fully satisfied those obligations in issuing the final rules. After reviewing a litany of competing comments and scientific studies regarding the efficacy and health benefits of contraceptives, *see* 83 Fed. Reg. at 57,552-55, the agencies explained that a "reexamination of the record and review of the public comments has reinforced the Departments' conclusion that significantly more uncertainty and ambiguity exists on these issues than the Departments previously acknowledged when we declined to extend the exemption to certain objecting organizations and individuals," *id.* at 57,555. The agencies' view of the medical evidence is accorded deference because it falls

within HHS's expertise, *see San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994, 996 (9th Cir. 2014), and cannot be deemed arbitrary and capricious, given the highly deferential character of that standard, *see id.* at 996.

The agencies also addressed any reliance interests that may have arisen, concluding, after reviewing applicable studies and comments, that "it is not clear that merely expanding exemptions as done in these rules will have a significant effect on contraceptive use," given that "[t]here is conflicting evidence regarding whether the [m]andate alone, as distinct from birth control access more generally, has caused increased contraceptive use, reduced unintended pregnancies, or eliminated workplace disparities, where all other women's preventive services were covered without cost sharing." 83 Fed. Reg. at 57,556. Those findings also are entitled to deference. *See San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 994, 996.

Moreover, the agencies explained at length why the religious and moral objections to complying with the contraceptive-coverage mandate—and to choosing the accommodation as a means to avoid compliance with the mandate—are more substantial than previously

acknowledged. *See* 83 Fed. Reg. at 57,542-48 (religious rule); 83 Fed. Reg. 57,592, 57,596-602 (Nov. 15, 2018) (moral rule). And the fact that the agencies decided not to eliminate the contraceptive-coverage mandate altogether, but to expand the exemptions to additional entities—the likely number of which are dwarfed by those that will still be subject to the mandate—further demonstrates that the agencies did not ignore factors they had considered in the past.

Accordingly, the agencies thoroughly and rationally explained their views on the facts related to the efficacy and health effects of contraceptives and any reliance interests engendered by the mandate, demonstrating why, in their judgment, the policy interests in favor of expanding the exemptions outweigh the interests in leaving the contraceptive-coverage mandate unchanged. That amply satisfied their obligation to provide a reasoned explanation for the change in policy, and the district court erred in concluding that the States were likely to prevail on this claim.

III. The District Court Erred in Ruling That the States Have Standing and That the Balance of Harms Supports Preliminary Injunctive Relief

The federal appellants recognize that this Court's decision in the prior appeals, which held that the plaintiff States had standing to bring this action and that the balance of equities and the public interest favor a preliminary injunction, *see California v. Azar*, 911 F.3d 558 (9th Cir. 2018), is controlling on those issues here. We thus address those issues only briefly, to preserve the agencies' arguments for further review.

The States' arguments for standing remain fatally speculative. The States have failed to provide any specific facts demonstrating a likelihood of injury. Indeed, the States have yet to identify a single resident who will lose contraceptive coverage because of the challenged rules, much less a resident who will then be eligible for and seek benefits from a state-funded program. And the States cannot rely on the agencies' estimate of the number of women who could be affected by the rules nationwide. The agencies' analysis does not address the likelihood that an *employer* in any of these specific States will use the exemption. Nor does that analysis show that it is likely rather than speculative that there is even a single woman who resides in the plaintiff States

who would wish to use the particular contraceptive method to which her employer objects and would qualify for and request state assistance. The new declarations the States filed in support of their motion for a preliminary injunction pertaining to the final rules are not materially different from the declarations the States previously relied upon in challenging the interim rules, and similarly fail to show non-speculative harm.

Nor does the balance of equities support the preliminary injunction. In addition to the irreparable injury the government suffers when its laws and regulations are set aside by a court, *see Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers), there is a substantial governmental and public interest in protecting religious liberty and conscience, *see Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (allegation of RFRA violation satisfies irreparable-harm requirement); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (same). The preliminary injunction here requires the agencies to maintain rules that they believe, and that some courts have held, substantially burden employers with sincere, conscience-based objections to contraceptive coverage. These institutional injuries to the government and conscience

injuries to employers far outweigh the speculative economic injuries to the States and their residents that may flow from the inability to conscript employers into paying for employees' contraceptive coverage.

The district court erroneously held that *Maryland v. King* is inapposite, rejecting the argument that the government suffers irreparable institutional injury whenever its laws and regulations are set aside by a court. *Maryland v. King*, the district court reasoned, "held that 'any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury,'" and here, "the 'representatives of the people'—the United States Congress—passed the ACA." ER 41.

But agencies are established by Congress to implement the statutes they administer, and injunctions barring agencies from implementing rules have the same adverse impact on the government even where, as here, the plaintiffs allege that the agencies have wrongly understood their statutory authority. Moreover, the district court also failed to give due weight to the federal government's separate interest in protecting religious freedom.

The district court also erred in finding it "significant that after the Court enjoined the [interim rules] in December 2017, the Federal Defendants and Intervenors stipulated to a stay of this case pending resolution of their appeals, which kept the existing structure, including the accommodation, in place for a year and delayed resolution of the merits of the claims." ER 42. The stay of district court proceedings did not undermine the irreparable injury the government suffered as a result of the preliminary injunction against the interim rules. The agencies took an expedited appeal of that injunction, and if they had prevailed on appeal, that injury would have been eliminated regardless of whether the ultimate resolution of the case was delayed by the stay of district court proceedings.

CONCLUSION

Accordingly, the district court's preliminary injunction should be vacated.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

DAVID L. ANDERSON
United States Attorney

SHARON SWINGLE

/s/ Lowell V. Sturgill Jr.
LOWELL V. STURGILL JR.
KAREN SCHOEN
Attorneys, Appellate Staff
Civil Division, Room 7241
U.S. Department of Justice
950 Pennsylvania Avenue N.W.
Washington, D.C. 20530
(202) 514-3427

Counsel for the Federal Government

FEBRUARY 2019

STATEMENT OF RELATED CASES

This case (no. 19-15118) has been consolidated with case nos. 19-15072 and 19-15150. The government certifies that it knows of no other related cases pending in this Court.

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

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,602 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

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

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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