Nos. 17-3752, 18-1253, 19-1129, and 19-1189

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COMMONWEALTH OF PENNSYLVANIA and STATE OF NEW JERSEY,

Plaintiffs-Appellees,

v.

PRESIDENT, UNITED STATES OF AMERICA; SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY, U.S. DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE TREASURY; SECRETARY, U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF LABOR,

Defendants-Appellants,

and

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,

Intervenor-Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

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INTRODUCTION AND SUMMARY OF ARGUMENT

As the government's opening brief (Br.) demonstrated, the district court erred in several respects in preliminarily enjoining the final rules' religious and moral exemptions from the contraceptive-coverage mandate. The States' response brief (Resp. Br.) does not rehabilitate any of those errors.

At the threshold, the States fail to overcome the multiple layers of speculation underlying their claim of standing. They provide no basis to conclude that Pennsylvania or New Jersey employers will use the expanded exemption to deprive residents of contraceptive coverage, let alone that any such residents will seek and receive state assistance. Nor do they distinguish the precedent squarely foreclosing their assertion of *parens patriae* standing against the federal government.

On the merits, the States fail to refute our showing that the agencies had substantive authority to promulgate the final rules. Under the Affordable Care Act (ACA), preventive-services coverage for women is mandated only "as provided for" in guidelines "supported by" a component of the Department of Health and Human Services (HHS). 42 U.S.C. § 300gg-13(a)(4). Both the text and context of that provision

demonstrate that HHS can choose *not* to provide and support a mandate that employers with sincere conscience-based objections provide such coverage, and can instead choose to exempt those entities. Moreover, the Religious Freedom Restoration Act (RFRA) at a minimum authorizes, and indeed requires, the religious exemption to alleviate the substantial burden on some employers' religious exercise imposed by the contraceptive-coverage mandate (as well as the accommodation). There is no basis in law or logic for the States' argument that federal agencies may not modify the scope of their regulations proactively to comply with RFRA's requirements and instead must wait to be sued by religious objectors. Tellingly, the States' contrary view of the agencies' statutory authority would mean that the church exemption announced with the creation of the contraceptive-coverage mandate and the later-adopted accommodation are both invalid—an untenable conclusion that the States do not meaningfully dispute and simply ask this Court to ignore.

The States also fail to refute our showing that the final rules procedurally complied with the Administrative Procedure Act (APA) because the agencies requested and considered public comment before

issuing them. In contending that the alleged procedural defect in the interim rules tainted the final rules, the States mistakenly rely on a case addressing only the validity of an initial rule issued without prior notice and comment, not the subsequent final rule issued after notice and comment. In any event, the interim rules were procedurally valid.

Finally, the States unsuccessfully defend the propriety of the district court's injunction. The government's institutional interests and the need to protect employers' sincere conscience-based objections far outweigh the speculative harms alleged by the States. At a minimum, the States have not justified the injunction's scope. Any speculative harm they may suffer if the rules are not enjoined in other States is not remotely adequate to justify a nationwide injunction burdening employers with no connection to Pennsylvania or New Jersey.

ARGUMENT

I. The States Have Not Demonstrated Standing to Challenge the Rules

A. The States' contention that they will suffer economic harm because the rules will cause some women to seek state assistance is conjecture that falls far short of either certainly impending injury or a substantial risk of injury.

The States rely on declarations that "explained that women who lost contraceptive coverage as a result of the [rules] would seek it elsewhere, including from [s]tate-funded programs." Resp. Br. 36. But these declarations are themselves speculative, providing no basis to conclude that employers in Pennsylvania or New Jersey that currently provide contraceptive coverage (or use the accommodation) will use the expanded exemption. Nor do the States provide any other evidence that residents will lose employer-sponsored contraceptive coverage because of the rules.

Notably, the States no longer contend that any of the eight employers they previously identified are likely to use the expanded exemption. And the States are wrong in asserting that the interim rules "identified employers in Pennsylvania and New Jersey who were

expected to take advantage of the exemptions" because they had "already filed lawsuits seeking expanded exemptions." Resp. Br. 91 (citing litigating-entities spreadsheet). The agencies made no such determination; they had no reason to believe that any of those litigating entities would use the exemption rather than the accommodation, with the exception of not-for-profit entities that challenged the accommodation (many of which subsequently received permanent injunctions or use self-insured church plans and were thus excluded from the agencies' estimate). *See* Br. 25-27. Rather, for purposes of determining whether the rules could have an annual cost of more than $100 million and thereby require certain review procedures, *see* 83 Fed. Reg. 57,536, 57,573 (Nov. 15, 2018), the agencies conservatively assumed that all the litigating entities (except those already exempt, using self-insured church plans, or protected by injunctions) would use the expanded exemption, *see id.* at 57,575-76; 82 Fed. Reg. 47,792, 47,819 (Oct. 13, 2017).[1]

[1] Amici Massachusetts et al. (Mass. Br. 18) identify three additional Pennsylvania employers purportedly expected to use the exemption, but none supports the States' claimed injury. Seneca Hardwood Lumber received a permanent injunction precluding the

Continued on next page.

Nor can the States rely on the agencies' estimate that at least 70,500 women nationwide could lose employer-sponsored contraceptive coverage to demonstrate that employers in Pennsylvania or New Jersey will use the expanded exemption to deprive residents of coverage. Indeed, the States' failure to address the specific employers in Pennsylvania and New Jersey upon which the estimates were based underscores the flaw in relying on the agencies' general nationwide estimates to infer the effects in the plaintiff States. *See* Br. 31-33. The States have identified the three litigating entities in the estimate that operate in Pennsylvania or New Jersey, as well as five Pennsylvania and New Jersey employers currently using the accommodation, but provide no basis to conclude that the rules will have any effect on their employees. And while there could be other employers in the two States using the accommodation (since the spreadsheet they rely on includes only employers that notified HHS rather than, for example, their

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government from enforcing the mandate against it. *See* JA 387. Likewise, Alliance Home of Carlisle and Westminster Theological Seminary entered into settlements with the government resolving their challenges to the mandate. *See* Mot. for Voluntary Dismissal, *Christian & Missionary All. Found. v. Secretary, HHS*, No. 15-11437 (11th Cir. Oct. 30, 2017); Unopposed Joint Mot. of Pls., *East Texas Baptist Univ. v. Azar*, No. 4:12-cv-3009 (S.D. Tex. Jan. 10, 2019).

insurer), the States have presented no facts that such an entity exists—let alone that it would switch to the exemption.

The States (Resp. Br. 41) fault the agencies for their lack of specific data, blaming it on the initial failure to conduct notice-and-comment rulemaking. But it is the States' burden to demonstrate Article III injury, and the agencies had no obligation to help them do so. *Cf. Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009). Furthermore, the agencies *did* solicit comments before issuing the final rules yet found that those comments did not "substantially assist [them] in estimating how many women would be affected by these expanded exemptions." 83 Fed. Reg. at 57,574-75. Contrary to the States' suggestion (Resp. Br. 41-42), the agencies' (limited) ability to estimate the number of individuals covered by accommodated plans is meaningless absent knowledge about which plans will switch to the exemption.

Moreover, even assuming the States had identified an employer that will use the expanded exemption, they offered mere speculation that employees will not share that employer's religious or moral objections and that the employer will cease covering employees' chosen

contraceptive methods. *See* Br. 29-30. Some litigating entities, including Hobby Lobby, are willing to cover most FDA-approved contraceptive methods. The States argue that "the four methods Hobby Lobby objected to 'are among the most effective forms of pregnancy prevention.'" Resp. Br. 40. But that does not mean that any particular woman will lose coverage for contraception she would have chosen, let alone that she will not be willing or able to use a method that is covered. *Cf.* 83 Fed. Reg. at 57,575 n.79 ("Among women using the[] 18 [FDA-approved] female contraceptive methods, 85 percent use the 14 methods that Hobby Lobby and entities with similar beliefs were willing to cover . . . ."). It bears mention that Hobby Lobby *was* willing to cover a long-acting reversible contraceptive. *See id.*; JA 244 ¶ 25, 1036.

Further, the States can only speculate that any woman who loses coverage of her chosen contraceptive method will seek and qualify for state assistance. *See* Br. 30-31. The States offer no basis for concluding (Resp. Br. 37-38) that such women will meet the income-eligibility thresholds for state programs. Nor do the States address the possibility

that such women will have access to coverage through a spouse's (or parent's) plan.

The States flip the burden of proof in asserting that the government "chose not to present any evidence to counter [their] assertions." Resp. Br. 38. "[I]t is [plaintiffs'] burden to prove their standing by pointing to specific facts, not the Government's burden to disprove standing." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412 n.4 (2013) (citation omitted). The States are also wrong in contending that the agencies' own assertions "confirm that the States will suffer injury." Resp. Br. 38. While the agencies noted, in discussing whether there is a compelling governmental interest in the mandate, that state programs "provide free or subsidized contraceptives for low-income women," 82 Fed. Reg. at 47,803, they did not concede that any women who lost employer-sponsored coverage because of the expanded exemption would qualify for, or use, such programs.

Contrary to the States' contention, the problem is not that the States do not know "precisely how many women will lose coverage" or "how many [of them] will impose additional costs on the States." Resp. Br. 42. Rather, the States have not demonstrated a sufficient likelihood

that *any* of their residents will seek and qualify for state assistance because their employers invoked the exemption. The States thus have not demonstrated a "substantial risk" of injury, *id.*, or a "real, immediate" injury, Resp. Br. 43. In contrast, in *Massachusetts v. EPA*, there was no dispute that Massachusetts was *already* being injured—"rising seas ha[d] already begun to swallow Massachusetts' coastal land." 549 U.S. 497, 522 (2007).

B. The States' assertion of *parens patriae* standing to protect the well-being of their residents fares no better. Even setting aside that the States have not shown any injury to their residents traceable to the rules, "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982); *see* Br. 36-37.

The States cannot rely on *Massachusetts*, 549 U.S. 497; as the States acknowledge, the Court there did not rely on an injury to the Commonwealth's residents, but rather to its *own* "ownership of coastal property." Resp. Br. 45 n.19. Further, the States are wrong in arguing (Resp. Br. 46) that *Massachusetts v. Mellon*, 262 U.S. 447 (1923), bars only those suits by States seeking to protect their citizens from the

federal government's enforcement of an unconstitutional federal statute, not from the federal government's failure to comply with a federal statute. This Court squarely held that the denial of *parens patriae* standing in a suit alleging that the federal government had failed to comply with a statutory obligation represented "an application of [the] settled rule" that "a state may not attempt as parens patriae to enforce rights of its citizens 'in respect of their relations with the Federal Government.'" *Pennsylvania v. Porter*, 659 F.2d 306, 317 (3d Cir. 1981) (en banc).

Nor can the States invoke (Resp. Br. 45-46) the special solicitude referred to in *Massachusetts*, 549 U.S. at 520. That special solicitude does not alleviate a State's burden to demonstrate concrete injury, *see* Br. 37-38, and in any event, the States' allegations of injury flowing from the inability to conscript employers into paying for employees' contraceptive coverage does not involve the type of sovereign interest that warrants special solicitude, *see* Br. 38-39.

II. The Agencies Validly Exercised Statutory Authority to Promulgate the Religious and Moral Exemptions

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

Since their first rulemaking on this subject in 2011, the agencies have consistently interpreted the broad delegation of authority provided by 42 U.S.C. § 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. The agencies originally exercised that authority by crafting an exemption limited to churches and their integrated auxiliaries, *see* 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011), and have now invoked the same authority to expand that exemption, *see* 83 Fed. Reg. at 57,540-42; 83 Fed. Reg. 57,592, 57,596-98 (Nov. 15, 2018). The agencies' reading of the statute is supported by its text and context, *see* Br. 39-42, and the States' contrary arguments lack merit.

1. Most notably, the States do not dispute that the church exemption would not be authorized under their interpretation of § 300gg-13(a)(4). Although the States argue (Resp. Br. 67-68) that the Court should simply ignore that implication, the wide-ranging and radical consequences of their position are certainly relevant to the

plausibility of their interpretation. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998) (rejecting statutory interpretation that would have "far reaching and seemingly perverse" implications for federal habeas-corpus practice). And the States have identified no separate source of authority for the church exemption.

Pointing to a statement in the 2011 rule that the agencies were acting to "provide" the Health Resources and Services Administration (HRSA) with authority to exempt churches, the States argue (Resp. Br. 68) that § 300gg-13(a)(4) did not already supply that authority. But the agencies identified no other source of authority for the church exemption, and other language in that rule makes clear that the agencies were relying on § 300gg-13(a)(4) as such authority. *See* 76 Fed. Reg. at 46,623 (noting that because § 300gg-13(a)(4) "gives HRSA the authority to develop comprehensive guidelines for additional preventive care and screenings," it is "appropriate that HRSA . . . takes into account the effect on the religious beliefs of certain religious employers if coverage of contraceptive services were required"). In context, the use

of "provide" is best understood as confirming that HRSA is subject to HHS's authority in this respect.[2]

The States hypothesize that the Internal Revenue Code "could have provided external authority for the church exemption." Resp. Br. 69. But they fail to explain how a statutory exception from requirements to make annual reports to the IRS could authorize a religious exemption from the ACA's preventive-services requirement. Nor do the tax-code provisions establish an outer benchmark for 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—a point confirmed by Supreme Court and Circuit precedent, *see Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017) (holding that an ERISA-exempt "church plan" includes a plan maintained by a

[2] The States also question (Resp. Br. 69 n.27) whether HRSA is subject to direction by HHS. But as our opening brief notes (at 41), HHS created HRSA and exercises general supervision over it; Congress's decision to vest direct authority over the scope of the preventive-services requirement in HRSA cannot plausibly be read as precluding HHS from exercising its supervisory authority over HRSA.

"principal-purpose organization," regardless of whether a church originally established the plan); *Leboon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217 (3d Cir. 2007) (holding that a Jewish community center was a "religious organization" exempt from Title VII's prohibition on religious discrimination in employment).

The States are also wrong to suggest (Resp. Br. 69-70) that the church exemption might be required by the First Amendment's "ministerial exception." The States ignore our showing (Br. 44) that the church exemption is not tailored to any plausible First Amendment concerns given that it exempts all churches from the contraceptive-coverage mandate regardless of whether they object to such coverage (and regardless of whether coverage is for ministers or mere employees).

Finally, the States ignore that their reading of § 300gg-13(a)(4) would mean the agencies lacked authority to promulgate the accommodation itself. The States do not dispute our showing (Br. 55) that the accommodation deviates from the contraceptive-coverage mandate's express requirements under § 300gg-13(a)(4). And the States

deny that the agencies either could or did promulgate the accommodation pursuant to RFRA. *See* Resp. Br. 73-74, 82.

2. The States' textual defense of their position fares no better. As the States note (Resp. Br. 62), § 300gg-13(a) provides that group health plans and insurance issuers "shall" provide coverage for preventive services without cost-sharing. But while the term "shall" requires *covered plans* to cover preventive services "as provided for" and "supported by" HRSA, 42 U.S.C. § 300gg-13(a)(4), it does not limit *HRSA*'s authority to decide what preventive services must be covered *and* by what categories of regulated entities. Nothing in the statute required HRSA to mandate coverage of *contraceptive* services at all, let alone for all types of employers and plans.

The statute requires 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). "[A]s provided for" and "supported by" grant HRSA authority to define not only the services to be covered but also the manner and reach of that coverage, and "for purposes of this paragraph" makes clear that HRSA should consider the statutory mandate in shaping the guidelines. For the same reason, the

States are wrong (Resp. Br. 63) that the agencies' interpretation of § 300gg-13(a)(4) is not entitled to *Chevron* deference because the agencies supposedly lack authority to prescribe "who" must provide coverage.

The States argue (Resp. Br. 62) that "as" reflects only that HRSA had not yet issued "comprehensive guidelines" concerning women's preventive services—unlike the already-existing HRSA guidelines concerning children referenced in § 300gg-13(a)(3). But § 300gg-13(a)(4) already accounts for that difference by using the term "for purposes of this paragraph" and by omitting the word "the" that precedes § 300gg-13(a)(3)'s reference to the children's guidelines, *see* Br. 47—a point the States fail to address.

As our opening brief explained (at 41), the absence of "evidence-based" or "evidence-informed" in § 300gg-13(a)(4), as compared with § 300gg-13(a)(1) and (a)(3), further supports the agencies' reading of the statute. The States' alternative construction of § 300gg-13(a)(4)—that by referencing "preventive care and screenings not described in paragraph (1)," Congress "was telling HRSA to include evidence-based items or services that do not have in effect a rating of 'A' or 'B' in the

current recommendations of the United States Preventive Services Task Force," Resp. Br. 64—is atextual and would have nonsensical results. Under that interpretation, HRSA could include only those preventive services that are poorly rated by the United States Preventive Services Task Force. Furthermore, the Task Force's list of services does not appear to contain *any* contraceptive methods, at any rating.[3]

The States (Resp. Br. 64-65) invoke *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994), but fail to establish that expanding the prior exemption from the contraceptive-coverage mandate to cover a small additional class of employers with sincere conscience objections to contraceptive coverage works the sort of "radical" or "fundamental change" in the statutory scheme that *MCI* rejected. *See* Br. 46-47.

The States also contend that, because "Congress created only a single exception" from § 300gg-13(a)(4) "for grandfathered plans," Congress intended to preclude the agencies from recognizing other exemptions. Resp. Br. 65. But the grandfathering exemption applies not just to the preventive-services requirement, but also to numerous other

[3] *See* U.S. Preventive Services Task Force, Published Recommendations, https://www.uspreventiveservicestaskforce.org/BrowseRec/Index (last visited Apr. 6, 2019).

provisions of the ACA. *See* 42 U.S.C. § 18011(a)(2)-(4). The grandfathering exemption was designed to accomplish very different ends than the agencies' conscience-based exemption, and does not support an inference that Congress meant to prohibit a conscience exemption to an agency-created contraceptive-coverage mandate. *See* Br. 48.

The States contend (Resp. Br. 66) that the expanded exemption is inconsistent with § 300gg-13(a)(4)'s purpose, but the statute *does not require* coverage of contraceptive services. Certain legislators' anticipation that the ACA would cover "family planning" services, Resp. Br. 66, is simply not rooted in the ACA's text. *Cf. NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history.").

B. RFRA Both Authorizes and Requires the Religious Exemption

As our opening brief explained (at 49-54), the agencies also reasonably decided to adopt the religious exemption to satisfy their RFRA obligation to eliminate the substantial burden that the

contraceptive-coverage mandate imposes on objecting employers, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014). The agencies previously attempted to eliminate that burden through the accommodation, but nothing in RFRA prevents the agencies from employing the more straightforward choice of an exemption. Indeed, the accommodation itself violates RFRA for those employers with sincere religious objections to it.

1. The States' contention (Resp. Br. 72-76) that agencies can never create exemptions under RFRA lacks merit. RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion" unless applying that burden to the person is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb-1(a), (b). That language is a command to the government (which includes an "agency," *id.* § 2000bb-2(1)), and imposes a duty that agencies must follow. That is especially true where, as here, an agency has promulgated the offending provision in the first place.

This argument is consistent with the proposition that "courts—not agencies—provide the final word on RFRA violations." Resp. Br. 73.

RFRA's authorization of judicial relief, 42 U.S.C. § 2000bb-1(c), ensures that courts can have the "final word on RFRA violations," and does not mean that agencies lack an independent obligation to comply with RFRA in the first place, or that they must await the inevitable lawsuit and judicial order to do so. RFRA applies to "the implementation" of "all Federal law," *id.* § 2000bb-3(a), which necessarily includes agency regulations and guidance. And the religious exemption is not the kind of "blanket exemption[]," Resp. Br. 78, *Hobby Lobby* questioned. As our opening brief explained (at 58-59), the conscience amendment *Hobby Lobby* discussed, unlike the religious exemption, did not incorporate the elements of a RFRA claim.

The States also argue that agencies lack discretion to adopt general exemptions under RFRA because "[o]nly the individual has the necessarily personal knowledge about whether a rule of general applicability compels her to" violate her religious beliefs. Resp. Br. 76. But the religious exemption here accounts for the employer's personal knowledge, as it applies only where a particular employer sincerely objects to contraceptive coverage, and the agency of course had general

knowledge that such employers exist in light of the prior litigation and the rulemaking process.

The States' suggestion (Resp. Br. 76 n.32) that allowing agencies to implement RFRA by rule would raise Establishment Clause problems is no stronger. As our opening brief noted (at 52), there is "room for play in the joints" between what the Free Exercise Clause requires and the Establishment Clause forbids, *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970), and nothing in the religious exemption crosses that line. *See infra* subsection C.

Moreover, as we explained (Br. 56-57), the States' argument would mean that the agencies lacked authority under RFRA to promulgate either the original church exemption or the accommodation.

2. Although RFRA prohibits substantial burdens on religious exercise that are not narrowly tailored to further a compelling governmental interest, RFRA does not mandate a particular remedy to eliminate such burdens or require the narrowest possible remedy. Even assuming the accommodation would have been adequate to eliminate the burden imposed by the contraceptive-coverage mandate, that does not mean the exemption is impermissible.

The agencies' discretion to create a regulatory exemption that may be broader than strictly necessary to eliminate a substantial burden under RFRA is supported by *Ricci v. DeStefano*, 557 U.S. 557 (2009), which recognized that an entity faced with potentially conflicting statutory obligations should be afforded some leeway in resolving that conflict. *See* Br. 51-52. The States are wrong that the agencies did not face that kind of "binary" choice here. Resp. Br. 74 n.31. The agencies reasonably ascertained that, insofar as the ACA itself did not authorize religious-conscience exemptions from any preventive-services mandate supported by HRSA, the considerable legal doubt that the accommodation satisfied RFRA left them faced with potentially conflicting duties under the ACA and RFRA. The States also argue that *Ricci* has never been held to apply to RFRA, but they identify no reason why it should not, and *Ricci* has been held applicable to the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, which employs the same substantive standard 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).

In any event, RFRA requires the exemption because the accommodation imposes a substantial burden on some employers. Citing *Geneva College v. Secretary, HHS*, 778 F.3d 422, 435-42 (3d Cir. 2015), the States contend that the accommodation cannot substantially burden an employer's religious exercise because it "causes the eligible organization to play 'no role whatsoever' in the provision of federally mandated contraception services." Resp. Br. 79. As this Court has recognized, however, "*Geneva* is no longer controlling," *Real Alternatives, Inc. v. Secretary, HHS*, 867 F.3d 338, 356 n.18 (3d Cir. 2017), having been vacated in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam). Moreover, *Hobby Lobby* held that a court should not reject a RFRA claim on the ground that "the connection between what the objecting parties must do" and "the end that they find to be morally wrong" is "too attenuated." 134 S. Ct. at 2777. Some employers have a sincere religious belief that the accommodation makes them complicit in providing contraceptive coverage because the coverage is provided in connection with their health plans. *See* Br. 57. A court may not reject

that claim on the ground that such beliefs "are flawed." *Hobby Lobby*, 134 S. Ct. at 2778; *accord 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.).

Finally, although the States object (Resp. Br. 81) to the religious exemption's inclusion of publicly traded corporations, they ignore our explanation (Br. 59-60) for such coverage. The mere fact that publicly traded corporations are unlikely to be able to assert a sincere religious objection to the contraceptive-coverage mandate is no reason to categorically exclude such corporations given *Hobby Lobby*'s broad interpretation of the term "person" used in RFRA, 134 S. Ct. at 2768-69.

C. The Religious Exemption Does Not Violate the Establishment Clause

Amici Church-State Scholars and Americans United for Separation of Church and State et al. argue that the religious exemption violates the Establishment Clause by imposing undue burdens on women. *See also California v. HHS,* 351 F. Supp. 3d 1267, 1294-95 (N.D. Cal. 2019) (questioning whether RFRA authorizes the religious exemption in light of concerns regarding "harm to third

parties”). Such third-party-burden arguments are meritless in this context.

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* Br. 52-53. That conclusion precludes any finding that the religious exemption exceeds the agencies’ RFRA authority by unduly burdening the interests of third parties. *Cf. Benning v. Georgia*, 391 F.3d 1299, 1312-13 (11th Cir. 2004) (holding that RLUIPA’s religious exemption does not facially burden third-party interests unduly, because RLUIPA allows States to satisfy compelling interests). Furthermore, as the agencies reasonably concluded, the burden the mandate imposes on objecting employers is greater than previously thought, and outweighs the burden on women who might lose contraceptive coverage. *See* 83 Fed. Reg. at 57,545-48.

Moreover, amici’s characterization of the loss of compelled contraceptive coverage as a governmental 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.* Before the contraceptive-coverage mandate, women had no entitlement to 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 conclusion 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), which held that Title VII's religious exemption to the prohibition against religious discrimination in employment was consistent with the Establishment Clause even though the result was to affirm the employer's right to terminate the plaintiff's employment. While the plaintiff was "[u]ndoubtedly" adversely affected, the Court noted, "it was the Church[,] . . . not the Government, who put him to the choice of changing his religious practices or losing his job." *Id.* at 337

n.15. Rather than burdening the Church's employees, the exemption simply left them where 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 results from a decision of private employers, not the government; and the burden is much less than the loss of job, as it is merely the loss of subsidized contraceptive coverage by an unwilling employer. Once more, the contrary reasoning would invalidate the church exemption.

Amici contend that *Amos* is inapposite because it concerned the institutional autonomy of religious congregations and religious not-for-profits to control their own leadership and membership. That cramped view of the permissibility of accommodating religious beliefs finds no support in *Amos*, which spoke broadly of the government's authority to alleviate governmental interference with the ability of religious organizations to "define and carry out their religious missions." 483 U.S. at 335. That is precisely what the religious exemption here seeks to accomplish.

Amici also wrongly argue that the religious exemption constitutes the kind of "absolute and unqualified" exception the Supreme Court held unconstitutional in *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985). The statute at issue in *Caldor* did not lift any governmental burden on religion, but instead intruded on private relationships by imposing on employers an "absolute duty" to allow employees to be excused from work on "the Sabbath [day] the employee unilaterally designate[d]." *Id.* at 709. Here, by contrast, the government has simply lifted a burden that it itself imposed, *see Amos*, 483 U.S. at 338, and, moreover, has done so only after determining that the burden is not narrowly tailored to achieve any compelling interest.

D. The Agencies Provided a Reasoned Explanation for the Rules

The States assert that that the agencies "violated the law by failing to explain their change in position on the applicability of RFRA." Resp. Br. 83. That contention, which the district court did not address, is unfounded.

An agency acts within its statutory discretion if a rational basis for its 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 the government's action reflects a change in policy. *See FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 514-15 (2009). An agency 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.

The States contend that the agencies provided "no rationale" for concluding that the accommodation imposes a substantial burden on religious exercise, Resp. Br. 84, but that is plainly incorrect. The agencies discussed RFRA at length. *See* 83 Fed. Reg. at 57,544-48. As they explained, the mandate and accommodation substantially burdened the religious exercise of certain non-exempt religious entities by forcing them to "choose between complying with the [m]andate, complying with the accommodation, or facing significant penalties." 83 Fed. Reg. at 57,546; s*ee also* Br. 57. The States disagree with that legal judgment, but it was clearly set out in the final rule.

The States similarly err in arguing (Resp. Br. 85) that the agencies did not explain why imposing the contraceptive-coverage mandate on objecting employers is not narrowly tailored to achieve a compelling interest. The agencies explained their reasoning in detail, noting, *e.g.*, that the mandate is both over- and under-inclusive, because it does not cover grandfathered plans, exempts churches and their integrated auxiliaries, effectively exempts entities using self-insured church plans, and applies to religious organizations that primarily hire persons who agree with their faith; that multiple federal, state, and local programs provide free or subsidized contraceptives for low-income women; and that significantly more uncertainty exists regarding the health effects of contraception and the contraceptive-coverage mandate than the agencies had previously understood. *See* 83 Fed. Reg. at 57,546-56. For these reasons and others, the agencies concluded that the religious-liberty concerns at stake outweigh any competing interests. *See id.* While the States' disagree with these judgments, their contention that the agencies did not adequately explain their reasoning is patently groundless.

The agencies also addressed potential reliance interests, concluding that "it is not clear" that expanding the exemption "will have a significant effect on contraceptive use," given the "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 amply satisfy the APA's deferential review standard.

III. The Rules Are Procedurally Valid

A. The Final Rules Complied with the APA

As our opening brief explained (at 60-65), regardless of whether the *interim* rules violated the APA's notice-and-comment requirements, the *final* rules complied with the APA because the agencies solicited and considered public comment before issuing them. *See Levesque v. Block*, 723 F.2d 175 (1st Cir. 1983) (upholding final rule in similar circumstances after voiding interim rule for lack of notice and comment).

The States misunderstand *Natural Resources Defense Council, Inc. (NRDC) v. EPA*, 683 F.2d 752 (3d Cir. 1982), in arguing that the final rules must nonetheless be enjoined. As we explained (Br. 62-65), the petitioner in *NRDC* did not even challenge the *final* rule there, and the court's discussion centered on the remedy for the procedural defect in the *initial* rule. *See* 683 F.2d at 767-68. *NRDC* said nothing about the procedural validity of the final rule, the only issue here.

The States contend (Resp. Br. 58-59) that if the procedural defect in the initial rule had no bearing on the validity of the final rule, the *NRDC* court would have affirmed the effective dates in the final rule rather than invalidated the final rule and made the amendments effective as of March 30, 1981. But in order to place NRDC in the position it would have been in absent the initial rule, the court had to make the amendments effective as of March 30, 1981, because absent the initial rule, they would have taken effect then. *See NRDC*, 683 F.2d at 767. And because the final rule further postponed the effective date of the amendments, the court could not uphold it and still provide the required remedy for the defect in the initial rule. The court did not suggest that the final rule itself was procedurally invalid. Invalidating

that rule was merely a necessary part of restoring NRDC to the position it would have been in absent the initial rule.[4]

Contrary to the States' contention, that is not "a distinction without a difference." Resp. Br. 59. This case makes clear why the distinction is critical: because here the final rules went through notice and comment, they may be set aside due to any procedural defect in the interim rules if and only if doing so is necessary and appropriate to redress any injury from the interim rules themselves. That was the case in *NRDC*, but it is not the case here, because the interim rules were preliminarily enjoined and have now been superseded and thus do not injure the States at all.

In *NRDC*, the agency argued that NRDC was not entitled to *any* remedy because "NRDC was able to make all of the arguments in

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[4] The final rule further postponed the effective date of four amendments; it made other amendments effective as of January 31, 1982. *See NRDC*, 683 F.2d at 757. The States are mistaken to draw any significance from the fact that the court made *all* the amendments effective as of March 30, 1981. As the court explained, the case was likely moot as to those other amendments, but "[s]eparating out the four amendments and dismissing th[e] case as moot in part would be pointless." *Id.* at 759 n.15. And the court invalidated the final rule only as to the four amendments that were further postponed. *See id.* at 767, 768.

connection with the further postponement that NRDC would have made in connection with the initial postponement." 683 F.2d at 768. The court rejected that argument, explaining that the final rule's notice-and-comment process could not replace the notice and comment required before issuance of the initial rule and thus allow the *initial* rule to be upheld and the amendments postponed. The court also noted that the question posed in the later rulemaking (whether the amendments should be further postponed) was different from the question that would have been posed in the initial rulemaking (whether the amendments, "which had been in effect for some time" and had started imposing compliance obligations, "should be suspended"). *Id.*

Here, however, the issue is not whether the solicitation and consideration of comments "cured" any defect in the interim rules, *NRDC*, 683 F.2d at 767, but whether it satisfies the procedural requirements for the final rules. And unlike in *NRDC*, here there is no practical difference between the question posed for public comment when the agencies issued the interim rules and the question that would be posed in any new notice of proposed rulemaking.

United States v. Reynolds, 710 F.3d 498 (3d Cir. 2013), also cited by the States (Resp. Br. 56), similarly involved a challenge to an interim rule, which was the basis for the defendant's conviction. And *Sharon Steel Corp. v. EPA*, 597 F.2d 377 (3d Cir. 1979), addressed the validity of a rule issued without prior notice and comment. While the court noted that the agency invited comments after issuing the rule and "promised to modify the rule if the comments should show any modification to be necessary," *id.* at 379, the court did not say whether any subsequent rule was issued, let alone whether it was procedurally valid.

B. In Any Event, the Interim Rules Were Procedurally Valid

Although the Court need not reach the issue, the interim rules were procedurally valid. *See* Br. 65-75. The States argue (Resp. Br. 50) that the agencies lacked express statutory authority to depart from the APA's notice-and-comment requirements for the reasons the Ninth Circuit gave in *California v. Azar*, 911 F.3d 558, 579-80 (9th Cir. 2018). But they offer no response to our explanation (Br. 69-71) of why the Ninth Circuit erred. The States also contend (Resp. Br. 55) that the

need to protect religious liberty did not constitute good cause to bypass notice-and-comment requirements, arguing that entities not already protected by injunctions either did not seek an injunction or did so and lost. Entities that sought injunctions but lost were in need of relief, however, and entities that did not seek injunctions may have declined to do so for reasons unrelated to their need for relief, such as the cost and burdens of litigation.

IV. The States Do Not Satisfy the Equitable Factors for Preliminary Injunctive Relief

As our opening brief demonstrated (at 75-78), the government's institutional interests and the need to protect the religious and moral consciences of objecting employers outweigh the speculative harms alleged by the States.

The States contend (Resp. Br. 92-93) that *Maryland v. King*, 133 S. Ct. 1 (2012) (Roberts, C.J., in chambers), is distinguishable because it concerned the implementation of a criminal statute and because the Chief Justice had found that the statute was likely constitutional. Neither point holds up. To begin, *Maryland* reaffirmed that a government suffers irreparable harm "*[a]ny* time a State is

enjoined by a court from effectuating statutes enacted by representatives of its people." 133 S. Ct. at 3 (emphasis added). And the States ignore the cases cited in our opening brief (at 76) holding that the allegation of a RFRA violation satisfies the irreparable-harm requirement. *See Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). Moreover, *Maryland*'s analysis of irreparable injury was separate from its analysis of the merits, not dependent on it. *See* 133 S. Ct. at 2-3.

Likewise, the States repeat the district court's holding that Congress "already struck its desired balance" in § 300gg-13(a)(4). Resp. Br. 93. But as our opening brief explained (at 77-78), that reasoning erroneously skews the balance of equities for a *preliminary* injunction by improperly treating the merits of the agencies' authority to issue these rules as *definitively* resolved rather than the subject of ongoing litigation.

Finally, the States argue that our motion for a stay of the district-court proceedings "undercut[s]" any "complaint about a preliminary injunction" here. Resp. Br. 101. But the request for a stay (which the district court denied) does not undermine the irreparable injury the

government suffers as a result of the preliminary injunction against the rules. The government has taken an expedited appeal of the injunction, and if we prevail, that injury will be eliminated regardless of whether the ultimate resolution of this case is delayed by a stay of district-court proceedings.

V. The District Court Abused Its Discretion in Entering a Nationwide Injunction

1. The States do not dispute the fundamental principles (*see* Br. 78-81) that a plaintiff lacks "standing to seek an injunction" beyond what is necessary to "provide [it] full relief," *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 888 (3d Cir. 1986), and that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

Although amici Public Interest Law Center (PILC Br. 26) and Massachusetts (Mass. Br. 27) acknowledge that a plaintiff must demonstrate standing for "each form of relief" sought, *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017), they claim that Article III imposes no further restraint on the *scope* of relief. But the

Supreme Court made clear in *Gill v. Whitford* that "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." 138 S. Ct. 1916, 1934 (2018).

The Public Interest Law Center cites *Yamasaki* for the proposition that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." 442 U.S. at 702. But *Yamasaki* merely rejected the argument that certifying a nationwide class action was improper; it did not suggest that relief to *nonparties* was proper. *Id. Yamasaki*'s "primary concern" was that "the relief granted is not 'more burdensome than necessary to redress the complaining parties.'" *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987).

To be sure, relief may in some instances benefit nonparties. "The very nature of the rights [plaintiffs] seek to vindicate" in a desegregation case, for example, "requires that the decree run to the benefit not only of [plaintiffs] but also for all persons similarly situated." *Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963). But that is fully consistent with the principle that relief should be no more burdensome than necessary to provide complete relief to the parties.

The States repeat (Resp. Br. 98-99) the district court's cited justifications for the "potential over-inclusiveness" of the injunction, including that "when agency regulations are unlawful, the ordinary result is that the rules are vacated." JA 122 (cleaned up). But the States offer no response to our showing (Br. 85-86) that the D.C. Circuit's practice the district court was referring to represents an inapposite (and improper) exception to the ordinary rule that relief should be limited to the parties.

2. The States seek to defend the district court's conclusion that an injunction limited to the plaintiff States would not afford them complete relief. But they fail to refute our showing that it is speculative whether such cross-border injury will occur at all, and at a minimum, that any such harm would be far too marginal to justify a nationwide injunction that applies to employers that have nothing whatsoever to do with Pennsylvania or New Jersey. For example, the nationwide injunction applies to employers in Massachusetts, even though Massachusetts's challenge to the rules was dismissed for lack of Article III standing.

Regarding the speculative nature of the asserted harm, the States have no response to the fact that, of their residents who travel across state lines to work, a significant portion work in Pennsylvania or New Jersey. *See* Br. 82. Nor do the States address the fact that the number of "cross-border employees" may include many employees whose employers are not eligible for or likely to use the expanded exemption as well as employers that are already exempt or otherwise do not provide contraceptive coverage. *See* Br. 83-84. In response to our showing (Br. 82-83) that many cross-border employees work in States with their own contraceptive-coverage laws, the States note (Resp. Br. 97 n.37) that these laws do not apply to self-insured plans and that some state laws do not cover all FDA-approved contraceptive methods. But that does not diminish the fundamental point: the number of cross-border employees who could potentially be affected is relatively small, and the likelihood that any of them will not only lose coverage of their chosen contraceptive method but also qualify for and seek state assistance as a result, is too remote to support an injunction extending beyond the plaintiff States.[5]

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[5] A similar analysis applies to the States' emphasis (Resp. Br. 98)

Continued on next page.

Finally, the States do not contest that the scope of the injunction is unquestionably overbroad insofar as it applies to the "individual exemption." The States did not and could not show any injury from exempting objecting individuals who would not use or procure contraception even if it were provided. *See* Br. 86.

CONCLUSION

The preliminary injunction should be vacated.

Respectfully submitted,

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COMBINED CERTIFICATIONS

1. Government counsel are not required to be members of the bar of this Court.

2. This brief complies with the type-volume limitation of 8,000 words set forth in this Court's order of April 3, 2019, because the brief contains 7,974 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Rule 32(a)(5)-(6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

3. The text of the electronic version of this document is identical to the text of the paper copies that will be provided.

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/s/ Lowell V. Sturgill Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third 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.

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