No. 18-1192

In the Supreme Court of the United States

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,
Petitioner,

v.

THE STATE OF CALIFORNIA, *et al.*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE STATE RESPONDENTS IN OPPOSITION

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
AIMEE FEINBERG*
Deputy Solicitor General
KATHLEEN BOERGERS
Supervising Deputy Attorney General
KARLI EISENBERG
Deputy Attorney General
KRISTIN A. LISKA
Associate Deputy Solicitor General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 210-6003
Aimee.Feinberg@doj.ca.gov
**Counsel of Record*

(*Additional counsel on signature page*)

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QUESTION PRESENTED

Whether the court of appeals properly upheld a narrowed preliminary injunction against a now-superseded interim final rule exempting employers with a religious objection from a requirement to provide contraceptive coverage to their employees, on the ground that the interim final rule was improperly issued without prior notice and comment.

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STATEMENT

1. Congress adopted the Patient Protection and Affordable Care Act in 2010. In a provision known as the Women's Health Amendment, Congress required healthcare plans to cover, at no cost to the patient, "preventive care and screening" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(4); Pet. App. 86a-87a.

In 2011, HRSA, based on recommendations of the Institute of Medicine, issued guidelines that require coverage of all FDA-approved "contraceptive methods, sterilization procedures, and patient education and counseling" for women. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services, 77 Fed. Reg. 8725, 8725-8726 (Feb. 15, 2012). These guidelines were subsequently updated in 2016 and continued to call for comprehensive coverage of contraceptive services. Pet. App. 89a n.3. The United States Departments of Health and Human Services, Labor, and the Treasury—which jointly administer the Affordable Care Act—promulgated regulations requiring health plans to cover contraception consistent with these guidelines. *See* 77 Fed. Reg. at 8726. The agencies explained that these regulations would implement the ACA's objective of meeting the "unique health care needs and burdens" of women. *Id.* at 8728.

The agencies also separately adopted regulations to accommodate religious objections to covering contraceptives. First, the agencies adopted a categorical exemption from the contraception-coverage requirement for houses of worship, using a definition consistent with a similar exemption in the Internal

Revenue Code. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). In a separate rulemaking, the agencies adopted an accommodation for certain other religious objectors that would allow them to opt out of contracting, arranging, paying, or referring for contraceptive services. Coverage of Certain Preventive Services, 78 Fed. Reg. 39,870, 39,874-39,882 (July 2, 2013).

Under the accommodation as originally devised, religious objectors submitted to their health insurance issuer or third party plan administrator a self-certification form attesting to their eligibility for the accommodation. 78 Fed. Reg. at 39,875-39,876. Upon receiving the form, the insurer or administrator would "assume sole responsibility" for providing the required contraceptive services without cost sharing, notify covered employees of their employer's use of the accommodation, and segregate coverage of contraceptives from the rest of the employer-sponsored health plan. *Id.* The accommodation process was amended in 2014, in response to objections from those eligible for the accommodation, to allow eligible employers to instead directly notify (without using any specific form) the Department of Health and Human Services, which would then notify the objector's insurer or plan administrator in the objector's place. *See* Coverage of Certain Preventive Services, 79 Fed. Reg. 51,092, 51,094-51,095 (Aug. 27, 2014).

Numerous lawsuits were filed challenging the federal requirement to cover cost-free contraceptives and the agencies' approach to accommodating religious objections. *See* Pet. App. 89a-97a. In *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam), this Court vacated

several decisions addressing challenges to the accommodation brought under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1. *Zubik*, 136 S. Ct. at 1561. The Court remanded the cases to allow the parties to seek an alternative accommodation that would meet the needs of all parties, including "ensuring that women covered by [objectors'] health plans 'receive full and equal health coverage, including contraceptive coverage.'" *Id.* at 1560-1561.

Consistent with this Court's remand, the agencies issued a request for information and solicited comments concerning the accommodation and seamless coverage for women. *See* Coverage for Contraceptive Services, 81 Fed. Reg. 47,741, 47,743-47,744 (July 22, 2016). Following the comment period, the agencies decided to maintain the existing accommodation, reiterating their conclusion that it was consistent with RFRA and explaining that "no feasible approach" had been identified by comments from either side that would "resolve the concerns of religious objectors, while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage." U.S. Dep't of Labor, Employee Benefits Security Administration, *FAQs About Affordable Care Act Implementation Part 36*, at 4-5 (Jan. 9, 2017).[1]

On October 6, 2017, the agencies changed course and issued two interim final rules significantly expanding the number of employers eligible for the exemption from the requirement to provide contraceptive coverage. One interim final rule extended the categorical religious exemption to "any

[1] *Available at* https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf (last visited May 12, 2019).

kind of non-governmental employer" with a religious objection to contraceptive coverage. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services, 82 Fed. Reg. 47,792, 47,809 (Oct. 13, 2017). A separate interim final rule created an entirely new exemption for certain employers with a sincerely held moral objection to covering contraceptives. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services, 82 Fed. Reg. 47,838, 47,849 (Oct. 13, 2017). The two interim final rules also made the accommodation procedure voluntary for religious and moral objectors. *See* 82 Fed. Reg. at 47,806, 47,854. Both interim final rules were issued without prior notice or an opportunity for public comment, and both took immediate effect. 82 Fed. Reg. at 47,813-47,815, 47,854-47,856.

2. Respondents the States of California, Delaware, Maryland, and New York and the Commonwealth of Virginia filed suit against the agencies to challenge the two interim final rules and moved for a preliminary injunction. Pet. App. 15a. The States alleged that the interim final rules were invalid under the Administrative Procedure Act because they were improperly issued without notice and comment, were arbitrary and capricious, were contrary to the Affordable Care Act, and violated the First and Fifth Amendments. *Id.*

The district court granted the States' motion for a preliminary injunction and enjoined enforcement of both interim final rules nationwide. Pet. App. 84a-127a. The court held that "at a minimum" the States were likely to succeed on their claim that the agencies violated the APA by issuing the interim final rules without prior notice and comment under the circumstances of the case. *Id.* at 109a. It declined to address

the States' other challenges to the rules for purposes of entering the preliminary injunction. *Id.* at 125a n.18. Petitioner the Little Sisters of the Poor Jeanne Jugan Residence and respondent March for Life Education and Defense Fund intervened as defendants. *Id.* at 16a.

3. The court of appeals affirmed in part. Pet. App. 1a-58a. It agreed that the States were likely to succeed on their procedural challenge to the issuance of the interim final rules without notice and comment, *id.* at 30a-43a; but it concluded that the district court should not have entered a nationwide injunction, *id.* at 46a-51a.

The court explained that the APA requires agencies to issue notice and provide an opportunity for public comment before promulgating a rule unless there is good cause for forgoing that procedure, a later statute excuses the agency from following it, or the failure to provide notice and comment is harmless. Pet. App. 30a-31a. Here, the court determined that "based on the totality of the circumstances, the agencies likely did not have good cause for bypassing notice and comment" before issuing the two interim final rules. *Id.* at 37a. The court explained that the good cause exception is "usually invoked in emergencies," such as where "the agency cannot both follow" the APA's notice-and-comment requirement "and execute its statutory duties" or where "delay would do real harm to life, property, or public safety." *Id.* at 31a-32a (internal quotation marks omitted). In contrast, an "agency's desire to eliminate more quickly legal and regulatory uncertainty is not by itself good cause." *Id.* at 33a; *see also id.* (if asserted need to provide immediate guidance were sufficient, "then an exception to the notice

requirement would … swallow the rule") (internal quotation marks omitted).

The court recognized that eliminating potential violations of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, "is an important consideration for the agencies," because "[a]ny delay in rectifying violations of statutory rights has the potential to do real harm." Pet. App. 34a. It declined, however, to "determine whether there [was] a RFRA violation" in this case, because "even if immediately remedying [a] RFRA violation constituted good cause, the agencies' reliance on this justification was not a reasoned decision based on findings in the record." *Id.* at 34a-35a. The court explained that in January 2017 the agencies had determined that RFRA did not require a change to the accommodation. *See id.* at 35a. The agencies "then let nine months go by and failed to specify what developments necessitated the agencies to change their position and determine … that RFRA violations existed." *Id.* The agencies' decision to make the new rules effective immediately, without notice and comment, could not be sustained based on that "unexplained about-face." *See id.* Nor did the agencies face any "urgent deadline to issue" the interim final rules. *Id.* at 36a.

The court further held that the agencies likely lacked statutory authority to bypass notice and comment and that the agencies' failure to follow notice-and-comment procedures likely was not harmless. Pet. App. 37a-43a. Although the agencies are authorized to issue interim final rules, the relevant provisions "do not provide that notice and comment is supplanted or that good cause is no longer required." *Id.* at 38a. The agencies' decision to forgo normal rulemaking procedures likewise deprived the public of the

opportunity to comment on major regulatory changes, "thus denying it the safeguards of the notice and comment procedure." *Id.* at 42a.

Although the court upheld the issuance of a preliminary injunction, it limited the scope of the relief ordered by the district court. Pet. App. 46a-51a. It concluded that, on the record before it, an injunction tailored to cover only the plaintiff States was sufficient to provide interim relief. *Id.* at 50a.

Judge Kleinfeld dissented on the ground that the plaintiff States had not established standing. Pet. App. 52a-58a.

4. While the district court proceedings were underway, the agencies received public comments that were solicited at the same time the interim final rules were promulgated. In November 2018, the agencies issued two new final rules to take effect on January 14, 2019, superseding the interim final rules. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services, 83 Fed. Reg. 57,536 (Nov. 15, 2018); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services, 83 Fed. Reg. 57,592 (Nov. 15, 2018). Like the interim final rules, the final rules provide broad exemptions from the ACA's contraception-coverage requirement for any non-governmental religious objector and for nearly any non-governmental moral objector, while maintaining a now-optional accommodation process. 83 Fed. Reg. at 57,537-57,538, 57,593.

The respondent States here, joined by eight others and the District of Columbia, amended their complaint to challenge both final rules and moved for a

new preliminary injunction. D.Ct. Dkt. 170, 174.[2] The district court enjoined enforcement of the two final rules in the plaintiff States, upon concluding that the States were likely to prevail on, or at least had raised serious questions concerning, their claim that the final rules are inconsistent with the requirements of the Affordable Care Act and are not required or authorized by the Religious Freedom Restoration Act. D.Ct. Dkt. 234 at 21-38.

Petitioner, the federal defendants, and intervening defendant March for Life have appealed the entry of the new preliminary injunction. Briefing in the court of appeals is complete, and the case is scheduled for argument on June 6, 2019. 19-15072 C.A. Dkt. 111.

ARGUMENT

Petitioner asks this Court to review an interlocutory judgment based on the likely procedural invalidity of an interim final rule that has now been superseded by a final rule. That final rule is now being challenged in new proceedings below. There is no reason for this Court to consider whether the lower courts properly granted preliminary relief with respect to the superseded interim final rule.

1. Petitioner does not challenge the court of appeals' ruling enjoining the interim final rule that created a new exemption for moral objectors. Pet. 12 n.3. Petitioner seeks review of the preliminary injunction of the agencies' interim final rule concerning religious

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[2] The new plaintiffs are Connecticut, Hawaii, Illinois, Minnesota, North Carolina, Rhode Island, Vermont, Washington, and the District of Columbia. D.Ct. Dkt. 170 at 9-12. They were not parties to the proceedings leading to the injunction challenged by the present petition and are not respondents in this Court. *See* Sup. Ct. R. 12.6.

objectors, based on its contention that review at this time could resolve a legal question that might affect ongoing litigation over the final religious exemption rule: whether the Religious Freedom Restoration Act requires the federal government to categorically exempt employers with sincere religious objections from the Affordable Care Act's contraceptive-coverage requirement. *See id.* at i. But neither the district court nor the court of appeals passed on that question in reaching the judgment of which petitioner seeks review. Both courts' decisions rested solely on their conclusion that the States were likely to prevail on their claim that the agencies had improperly issued the interim religious exemption rule without notice and comment. *See* Pet. App. 34a-35a, 125a n.18.

Petitioner argues that the agencies were necessarily permitted to dispense with notice and comment in issuing the interim religious exemption rule if RFRA requires a categorical exemption like the one provided by the rule. Pet. 26-27. Previously, however, the agencies had formally concluded that RFRA imposed no such requirement. To justify making a sweeping new exemption effective right away, the agencies would at least have needed to explain what had changed and why the exemption must now be put in place at once. *See* Pet. App. 34a-35a. In any event, any review of whether RFRA authorizes or compels an exemption would be more appropriate in a case in which the lower courts addressed that question.

Petitioner notes that this Court has sometimes reviewed rules or statutes that were revised during the course of litigation. Pet. 28-29. But in two of the cases petitioner cites, the Court granted certiorari after courts of appeals had addressed substantive chal-

lenges to an agency rule, and the petitioner sought review of those rulings. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 703-704 (2014) (discussing lower courts' holdings). In this case, the court of appeals resolved only a procedural challenge specific to the now-superseded interim final rules; it did not pass on the question framed in the present petition.

The other two cases cited by petitioner (Pet. 28-29) held that a challenge was not moot. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-289 (1982) (voluntary cessation of challenged conduct); *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514 (1911) (capable of repetition yet evading review). Here the question is not mootness, but whether discretionary review by this Court is warranted at the present stage of proceedings

The question of the interim final rule's procedural validity remains potentially live in this case, as the subject of ongoing litigation below. In proceedings before the court of appeals, the States previously indicated their expectation that the appeals of the preliminary injunction barring enforcement of the two interim final rules would become moot when the two final rules took effect. 18-15144 C.A. Dkt. 127 at 2-4; *see also Massachusetts v. U.S. Dep't of Health & Human Servs.*, 2019 WL 1950427, at *7-*8 (1st Cir. May 2, 2019) (procedural challenge to interim final rules moot after issuance of final rules, while substantive challenge not moot). The district court, however, has indicated that if the final rules are invalid (as it has held they likely are), then the interim final rules, if valid, could again become operative. *See* Pet. App. 126a-127a (judicial invalidation of agency rule reinstates rule previously in force). Accordingly, in the district court, the States have continued to pursue all

of their challenges to the interim final rules, including their procedural challenge based on the agencies' failure to comply with notice and comment requirements. D.Ct. Dkt. No. 311 at 58-59 (motion for summary judgment).

Because the procedural validity of the interim religious exemption rule is still potentially a live issue, there is no basis for vacating the judgment below on grounds of mootness. *See* Pet. 28 n.8. In the two cases cited by petitioner on that point, the Court recognized that a lower court's judgment may be vacated and a matter dismissed as moot when review by this Court has been prevented because there is no longer a live case or controversy. *Id.* (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), and *Trump v. Hawaii*, 138 S. Ct. 377 (2017) (Mem.)). As just explained, that is not the situation here. There is likewise no need to vacate the judgment below to "clear[] the path for future relitigation of" the issue presented in the petition. *See Munsingwear*, 340 U.S. at 40. Litigation on the validity of both the interim final rule and final rule continues; and as noted, the decision below did not address the merits of the question petitioner seeks to present here. Petitioner faces no barrier to having its arguments fairly considered in the courts below, or to seeking this Court's review of any adverse ruling in due course.

2. The court of appeals correctly resolved the issue it did pass upon, by concluding that the interim final rule at issue here is likely procedurally invalid. The Administrative Procedure Act requires that agency rules be promulgated only after notice and comment unless the agency has "good cause," 5 U.S.C. § 553(b)(B), or a later statute "expressly" exempts the agency from that requirement, *id.* § 559. A court must

set aside agency rules issued "without observance of procedure required by law" unless the procedural error is harmless. *Id.* § 706(2)(D). Exemptions from the APA's requirements "are not lightly to be presumed." *Marcello v. Bonds*, 349 U.S. 302, 310 (1955).

The court below correctly held that the agencies here likely lacked "good cause" for acting without notice and comment because "an agency's desire to eliminate more quickly legal and regulatory uncertainty is not by itself good cause." Pet. App. 33a. And although the agencies have statutory authority to "promulgate any interim final rules" that they "determine[] are appropriate to carry out" the provisions of the Affordable Care Act, 26 U.S.C. § 9833; 29 U.S.C. § 1191c; 42 U.S.C. § 300gg-92, that authorization does not relieve the agencies of the obligation to follow the requirements of the APA. Pet. App. 37a-40a.

Petitioner's sole objection to this conclusion is that the need to avoid putative RFRA violations constituted good cause. Pet. 26-27. But even if RFRA compelled the religious exemption sought by petitioner, the agencies failed to adequately explain what intervening events led to their reversal from their prior view that the accommodation was valid under RFRA, or to justify making the rule effective immediately after taking nine months to consider the issue. *See* Pet. App. 34a-35a. The lower courts' conclusion that the States were likely to prevail on their procedural challenge does not warrant this Court's review.

3. There is likewise no reason for the Court to grant review at this time to address the broader question petitioner seeks to present. Petitioner states that it, along with many other religious objectors, has obtained an injunction prohibiting the federal government from enforcing any requirement to provide

contraceptive coverage or to use the accommodation process. Pet. 17. And although the petition contends that the federal government is currently subject to an untenable patchwork of injunctions (*id.* at 20), the federal defendants themselves have not sought review in this case at this time.

Any review by this Court of the issue framed in the petition would benefit from prior consideration by the courts of appeals. The petition correctly notes that those courts have previously addressed whether the pre-2017 accommodation complied with RFRA. *See* Pet. 27. Since then, however, the agencies have promulgated new regulations adopting a broad categorical religious exemption and making the accommodation process voluntary. Petitioner identifies no court of appeals that has addressed the applicability of RFRA in that context. While petitioner claims (*id.* at 27-28) that further percolation is unnecessary, the petition itself argues (*id.* at 23-25) that developments post-dating prior appellate consideration of the issue should materially affect the analysis.

Petitioner is also incorrect in claiming that this Court will inevitably need to resolve whether RFRA requires a categorical exemption for all religious objectors. *See* Pet. 2. The validity of the agencies' decision to adopt their current rules implicates legal questions not presented by the prior suits, including (among others): (1) whether the agencies have statutory authority to establish broad exemptions whether or not required by RFRA (as the agencies have argued, *see* D.Ct. Dkt. 234 at 22-24); (2) whether the agencies' rules are arbitrary and capricious because the agencies have offered no sufficient explanation for their change in position and have failed to respond to comments (as the States have argued, *see* D.Ct. Dkt. 311

at 37-51); and (3) whether the final rules are invalid for failure to comply with the APA's procedural requirements (as the States have also argued, *see* D.Ct. Dkt. 311 at 56-58). Depending on how these other legal issues are resolved, the validity of the agencies' current rules may be determined without regard to RFRA, as petitioner acknowledges. *See* Pet. 2 ("the lower courts might decide the case on other grounds").

Litigation addressing these issues is proceeding in the lower courts. The appeal of the preliminary injunction against enforcement of both final rules entered in this case has been fully briefed in the court of appeals, and argument has been scheduled for June 6. The district court is moving forward with consideration of the merits, with summary judgment briefing and argument scheduled to conclude in September 2019. D.Ct. Dkt. 275. In a parallel case arising from the Eastern District of Pennsylvania, the Third Circuit is set to hear argument in May on an appeal of another preliminary injunction against enforcement of both final rules. *See Pennsylvania v. Trump*, No. 19-1189 (3d Cir.). And the First Circuit has just remanded a similar case brought by Massachusetts for adjudication on the merits of certain challenges to both the final and interim final rules. *See Massachusetts*, 2019 WL 1950427, at *14. Particularly in light of these ongoing proceedings, there is no reason for this Court to grant review now to address a question neither passed upon by the court below nor properly presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
AIMEE FEINBERG
Deputy Solicitor General
KATHLEEN BOERGERS
Supervising Deputy Attorney General
KARLI EISENBERG
Deputy Attorney General
KRISTIN A. LISKA
Associate Deputy Solicitor General

May 13, 2019

(*Counsel listing continues on next page*)

KATHLEEN JENNINGS
Attorney General of Delaware
ILONA KIRSHON
Deputy State Solicitor
JESSICA M. WILLEY
DAVID J. LYONS
Deputy Attorneys General
820 N. French St., 6th Fl.
Wilmington, DE 19801
(302) 577-8400
Counsel for the State of Delaware

BRIAN E. FROSH
Attorney General of Maryland
STEVEN M. SULLIVAN
Solicitor General
KIMBERLY S. CAMMARATA
Senior Assistant Attorney General
200 St. Paul Place
Baltimore, MD 21202
(410) 576-7038
Counsel for the State of Maryland

LETITIA JAMES
Attorney General of New York
BARBARA D. UNDERWOOD
Solicitor General
LISA LANDAU
Bureau Chief, Health Care Bureau
STEVEN C. WU
Deputy Solicitor General
ESTER MURDUKHAYEVA
Assistant Solicitor General
28 Liberty Street
New York, NY 10005
(212) 416-8000
Counsel for the State of New York

MARK. R. HERRING
Attorney General of Virginia
TOBY J. HEYTENS
Solicitor General
SAMUEL T. TOWELL
Deputy Attorney General
Barbara Johns Building
202 N. Ninth Street
Richmond, VA 23212
(804) 786-6731
Counsel for the Commonwealth of Virginia