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

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

REPLY BRIEF

The petition offers an opportunity for this Court to resolve the contraceptive mandate litigation once and for all. As this Court has recognized with several prior emergency orders and grants of certiorari, this litigation raises questions of national importance and already has received an extraordinary level of lower court attention.

The State Respondents do not contest the national importance of the issue presented, nor the need for it to be eventually settled by this Court; and they agree that the appeal is not moot. BIO 10-11. Their only argument for denying certiorari is that—even after seven years of litigation—still further development in the lower courts is warranted.

The States have it backwards. At this point, further percolation (a) is unnecessary, (b) is not actually happening (because courts are just deferring to the same cases upon which this Court's *Zubik* certiorari grant was based in 2015), and (c) is actually harmful to the development of the law, as this politically sensitive litigation upsets normal decision-making in other important areas of the law. The questions presented stopped percolating long ago and are festering instead. Further litigation is therefore both unnecessary and unhelpful. The petition presents a clean, narrow vehicle for addressing the heart of the contraceptive mandate litigation. Future petitions will not be so narrow.

1. The States downplay the RFRA question by suggesting that it might be avoided if this particular case is resolved on other grounds. BIO 13-14. But even a ruling in the States' favor on the alternate questions they propose will not avoid the RFRA question. The

States' requested remedy in this case is the restoration of the mandate and the regulatory mechanism for compliance (which the States call the "accommodation") as they existed before the Fourth IFR, *i.e.*, the regulatory system in place at the time of this Court's decision in *Zubik*. Excerpts of Record at 59, *California* v. *Azar*, Nos. 19-15072, 19-15118, and 19-15150 (9th Cir. Feb. 25, 2019), Dkt. 21-1. Judicial reinstatement of that system will only spawn further litigation over the legality of the old, pre-*Zubik* system—the very reason this Court granted certiorari in *Zubik*.

The RFRA issue is also a central part of the government's rationale both for forgoing notice and comment, 82 Fed. Reg. 47,792, 47,793 (Oct. 13, 2017), and for the substance of the Final Rule at issue, 83 Fed. Reg. 57,536, 57,542-51 (Nov. 15, 2018). Accordingly, even judicial determinations on APA grounds will need to reckon with the invalidity of the prior system under RFRA. The States' proposed alternate paths all lead back to RFRA.

Conversely, while the States' allegedly alternative grounds cannot foreclose a RFRA determination, a RFRA determination now would save courts the work of resolving those other grounds. First, a finding that the regulatory mechanism for compliance violated RFRA would resolve the States' alternate question of whether the agencies had good cause to postpone notice and comment. BIO 14. That is because violation of a federal civil rights law is surely a good reason to briefly delay what would have been the seventh comment period on this issue, and because—even if good cause was lacking—the agencies have conducted notice and comment before issuing a final rule.

Second, that such an ongoing violation of civil rights constituted good cause to postpone notice and comment would also resolve (or obviate the need for resolving) the States' alternate question of the agencies' substantive authority to issue the IFR in the first place. BIO 13. Federal agencies of course have authority to obey federal law. 42 U.S.C. § 2000bb-2 ("the term 'government' includes a branch, department, agency").

The same logic applies to the States' third proposed question of whether the IFR was arbitrary and capricious, BIO 13-14; if the agencies needed to cure an ongoing RFRA violation, that cure could not be arbitrary or capricious, and with good cause, there would be no procedural violations that could taint the Final Rule. If the agencies correctly identify a RFRA violation, the agencies' substantive authority to comply with federal law cannot possibly turn on how well they explain their change of view from that prior administration.[1] For the same reasons, a resolution of the RFRA question would also resolve any plausible argument against the Final Rule, thus likely resolving that litigation as well. See *Pennsylvania* v. *Trump*, 281 F. Supp. 3d 553, 578 (E.D. Pa. 2017) ("any exception to the ACA required by RFRA is permissible.").

2. The States fail to offer any reasons that further percolation in the lower courts would aid in a resolution of the RFRA question, particularly when the lower courts are now simply repeating the analysis of the "several courts of appeals" that addressed the question of RFRA's application to the regulatory

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[1] The agencies did, in any case, devote almost 8,000 words to that explanation. 82 Fed. Reg. at 47,799-807.

mechanism pre-*Zubik*. *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984); see Pet. 27 (citing App. 124a-125a); see also *Pennsylvania* v. *Trump*, 351 F. Supp. 3d 791, 825 (E.D. Pa. 2019) (noting that the Third Circuit has "reaffirmed and reapplied the reasoning" of its vacated decision in *Geneva Coll.* v. *Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 442 (3d Cir. 2015), vacated and remanded sub nom. *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016)). Additional cut-and-paste analysis will do nothing to sharpen the issues.

The States suggest that the agencies' concessions in *Zubik* warrant further consideration in the lower courts. BIO 13. But concessions made in this Court itself surely do not require development in the lower courts. This Court is perfectly capable of judging the import of arguments made in front of it and why, after those concessions, the federal government was required (or at the very least permitted) to stop asserting its affirmative defense of strict scrutiny. And many lower courts since *Zubik* have had an opportunity to consider those developments. See *e.g.*, App. 95a; Order granting permanent injunction, *Wheaton Coll.* v. *Azar*, No. 1:13-cv-08910 (N.D. Ill. Feb. 22, 2018), Dkt. No. 119 ("After considering the parties' briefs submitted on the motion for a permanent injunction, including Defendants' concessions on the merits of Wheaton's claims, the Court agrees that Wheaton is entitled to a permanent injunction.").

The States claim there is a need for percolation about "the applicability of RFRA in [the] context" of the Final Rule. BIO 13. But the RFRA question is not how RFRA applies to the Final Rule, but whether the

pre-*Zubik* regime violated RFRA and thus required the federal government to change the rules.[2]

Indeed, rather than allowing further percolation of the law following *Zubik*, the result of the injunctions in this and related lawsuits is to stymie the federal government's attempt to follow the Court's *Zubik* order. BIO 4. The States have argued successfully in the district court below, as have the plaintiff states in the parallel Third Circuit case, that the agencies have no authority at all to implement a regulatory response to *Zubik*. See *California* v. *Health & Human Servs.*, 351 F. Supp. 3d 1267, 1285 (N.D. Cal. 2019); *Pennsylvania* v. *Trump*, 351 F. Supp. 3d at 827 ("Because neither the ACA nor RFRA confer authority on the Agencies to promulgate the Religious Exemption, the rule is invalid."); see also Oral Argument at 52:00-53:00, *Commonwealth of Pennsylvania* v. *Trump*, No. 17-3752 (3d Cir. May 21, 2019), available at https://bit.ly/2JGf19H ("[T]he ACA as is written does not authorize the agencies to promulgate exemptions to the mandate * * * . Perhaps what they should have done was gone to Congress * * * ."). As the States see it, neither the ACA nor RFRA give the agencies authority to respond to this Court's *Zubik* order with anything other than obstinate refusal to adopt a new approach. The States thus question the fundamental premise of the *Zubik* order, which was that a deal ought to be possible.

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[2] Percolation may have one other virtue from the States' point of view: it allows them to play for time. But that is not an interest the Court should honor.

To support this claim, the States have been forced to advance severely constrained views of the Affordable Care Act, RFRA, and the APA. First, the States argue that the Affordable Care Act required only a strict contraceptive mandate, because the agencies can only determine "the *types* of preventive services that shall be included—not *who* must" provide them. States' Br. at 18, *California* v. *Azar*, Nos. 19-15072, 19-15118, and 19-15150 (9th Cir. Apr. 15, 2019), Dkt. 72 (first emphasis added). That interpretation is irreconcilable with the task this Court set the agencies in *Zubik*, and conflicts with the interpretations of both administrations to implement the ACA. The Obama Administration's interpretation of the statue was that it was allowed to ease the burden of the mandate on what it deemed "religious employers," 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011), and to "accommodat[e]" other religious objectors by purporting to adjust "who" would cover the contraceptives, 80 Fed. Reg. 41,318, 41,344 (July 14, 2015).

Second, the States also argue that RFRA does not allow an agency to withdraw a burden it has imposed except as ordered by a court with regard to specific religious objectors. See States' Br. at 59, *California* v. *Azar*, Nos. 19-15072, 19-15118, and 19-15150 (9th Cir. Apr. 15, 2019), Dkt. 72 ("There is no statutory basis for the notion that RFRA permits agencies to impose broad, categorical exemptions to federal statutes."). They thus reject the notion that federal agencies can fulfill their RFRA obligations unless and until the agencies lose a lawsuit. And the States now argue that if an agency erroneously proceeds by IFR, that error invalidates *both* the IFR *and* also any subsequent final rule issued after notice and comment. See Mot. for

Summ. J. at 56-58, *California* v. *Azar*, No. 17-5783 (N.D. Cal. Apr. 30, 2019), Dkt. 311; see also *Pennsylvania* v. *Trump*, 351 F. Supp. 3d at 816 ("the procedural defect that characterized the IFRs fatally tainted the issuance of the Final Rules").

If successful, these arguments will prevent the agencies from following this Court's order in *Zubik* and will circumscribe the agencies' flexibility in other areas of the law. For example, much of the federal government operates on the presumption that agencies are obligated (and, of course, authorized) to lift burdens that would be illegal under RFRA. See Army Command Policy, Accommodating religious practices, Army Reg. 600-20 ch. 5-6 (Nov. 6, 2014) (prescribing religious accommodations under RFRA); 81 Fed. Reg. 91,494, 91,537 (Dec. 16, 2016) (citing RFRA to accommodate Native American eagle taking).

Likewise, adopting the States' rule that a procedurally invalid IFR taints all subsequent rulemaking would remove any incentive for agencies to request post-promulgation comment for even valid IFRs. See U.S. Gov't Accountability Office, GAO-13-21, *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments* 3 n.6, 8, 24 (Dec. 2012), http://www.gao.gov/assets/660/651052.pdf (noting agencies commonly request comments on major rules issued without notice and comment post-publication). Furthermore, the States have requested a nationwide injunction against the Final Rules, further stunting

the agencies and preventing religious objectors from obtaining long-awaited regulatory relief.[3]

The longer this case and parallel cases wind through the lower courts, the more the States and others will continue to make results-oriented arguments (in this case and in parallel cases) that could both prevent agency action and warp the development of the law.

Continued percolation of these strained views of the ACA, APA, and RFRA will hurt, not help, the development of the law. Prompt resolution of the central RFRA question would therefore be beneficial even beyond the parties to this dispute.

This petition offers a narrow, clean vehicle in which to resolve the long-pending dispute over whether RFRA requires religious exemptions from the contraceptive mandate. Neither the parties nor the courts will benefit from continued lower-court litigation.

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[3] In the appeal of the preliminary injunction of the Final Rules in this case, the Ninth Circuit has requested briefing on whether the case is moot due to the nationwide preliminary injunction in the parallel case in the Eastern District of Pennsylvania, currently on appeal in the Third Circuit. Order, *California* v. *Azar*, Nos. 19-15072, 19-15118, and 19-15150 (9th Cir. Apr. 29, 2019), Dkt. 131. A mootness determination in the Ninth Circuit could significantly curtail further percolation of this issue.

CONCLUSION

This Court should grant the petition.

Respectfully submitted.

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