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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA *et al.*,
Plaintiffs–Appellees,
v.
ALEX M. AZAR II, in his official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,
Defendants-Appellants,
and
THE LITTLE SISTERS OF THE POOR, JEANNE JUGAN RESIDENCE,
Intervenor-Defendant-Appellant.

STATE OF CALIFORNIA *et al.*,
Plaintiffs–Appellees
v.
ALEX M. AZAR II, in his official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,
Defendants-Appellants,

STATE OF CALIFORNIA *et al.*,
Plaintiffs–Appellees
v.
ALEX M. AZAR II, in his official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,
Defendants-Appellants,
and
MARCH FOR LIFE EDUCATION AND DEFENSE FUND,
Intervenor-Defendant–Appellant.

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

REPLY BRIEF FOR INTERVENOR-DEFENDANT-APPELLANT MARCH FOR LIFE

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REPLY BRIEF FOR INTERVENOR-DEFENDANT-APPELLANT MARCH FOR LIFE

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INTRODUCTION

As the briefing reveals, this case is about the Plaintiff States' attempt to accomplish through the court system what they were unable to achieve on Capitol Hill: to stop the Health Resources and Services Administration (HRSA) from exercising its considerable discretion to offer religious and moral exemptions to the Affordable Care Act's preventive care provision. It is undisputed that Congress delegated to HRSA broad authority to determine what "preventive care" should include. It is also undisputed that if it so chose, HRSA could elect not to require *any* contraceptive or abortifacient coverage at all. Yet the Plaintiff States argue that, having required such coverage, HRSA is barred from offering reasonable exemptions. That is an argument the Plaintiff States must take to Congress and HRSA, not the judiciary.

As explained in March for Life's opening brief, the Plaintiff States have failed to state a legally cognizable injury. The federal government is under no obligation to fund or to provide contraception coverage at all. So, a discretionary adjustment to the regime it created cannot constitute a harm for which the Plaintiff States can be granted relief.

Moreover, this Court's prior ruling that the Plaintiff States had standing to challenge the IFRs does not mean that the Plaintiff States have standing to challenge the Final Rules. The law of the case doctrine does not apply here, where the issues to be decided and the relevant facts and circumstances are different than they were in earlier proceedings. Nor does the doctrine apply when the plaintiff has filed an amended complaint, or when the contested issue involves this Court's subject matter jurisdiction to hear an appeal—e.g., with Article III standing.

On the merits, the "Congressional mandate" that the Plaintiff States tout is nothing of the kind. Specifically, the Plaintiff States say that by enacting the Women's Health Amendment, Congress *required* employers to provide women with contraceptive coverage at no cost. But the Amendment does not even mention contraceptives, much less guarantee no-cost access to them. Rather, the decision of *what* "preventive care and screenings" to cover was left entirely to HRSA. 42 U.S.C. § 300gg-13(a)(4).

Congress also delegated to HSRA the authority to determine *to whom* such "comprehensive guidelines" would apply. That is why from the very outset HRSA has exempted churches and has accommodated

religious nonprofits who object to providing contraceptive coverage on religious grounds. The Plaintiff States have never contested that delegated authority; quite the opposite, they have expressly stated—in this very litigation—that they have no objection to the church exemption. It is incongruous, to say the least, for the Plaintiff States to argue that HRSA has the authority to exempt churches but not organizations who share the same religious or moral beliefs as churches.

In sum, this Court should dismiss this case for lack of standing. Alternatively, the Court should uphold the religious and moral exemptions.[1] The exemptions are well within HRSA's broad, delegated authority to determine to whom the contraceptive mandate applies. And HRSA has the greater power to eliminate the contraceptive mandate entirely, so it must have the lesser power to exempt. In no event should this Court give the Plaintiffs States the political victory they were unable to achieve in Washington. The district court should be reversed.

[1] March for Life focuses principally on the moral exemption because it is a moral objector to the contraceptive coverage requirement. Having said that, March for Life agrees with and incorporates the arguments of the Federal Defendants and The Little Sisters of the Poor as to their defense of the religious exemption.

I. The Plaintiff States have failed to assert a legally cognizable injury.

The Plaintiff States' declarations cannot change a basic reality: the federal government is under no obligation to fund contraception or to compel third parties to provide coverage for it. Any decision by the federal government to modify that voluntary regime does not constitute a legally cognizable injury for which this Court (or any other) can grant relief. *See Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the ACA,* 83 Fed. Reg. 57,592, 57,606 (Nov. 15, 2018) (noting that Congress never required contraceptive coverage, and further noting that "the fact that the government at one time exercised its administrative discretion to require private parties to provide coverage to which they morally object, to benefit other private parties, does not prevent the government from relieving some or all of the burden of that Mandate"); *Cf. Harris v. McRae*, 448 U.S. 297 (1980) (the constitutional right to abortion does not entail a constitutional right to have the government pay for abortions).

If that were not the case, "any governmental coverage requirement would be a one-way ratchet," and the Plaintiff States have cited no authority to support the proposition that the federal government can

be conscripted to provide goods and services in perpetuity. 83 Fed. Reg. at 57,606. In sum, then, neither the moral nor the religious exemption constitute a cognizable legal injury entitling the Plaintiff States to relief, even if they could provide anything more than speculative chains of causation culminating in their alleged harms.[2]

II. This Court's prior ruling that the Plaintiff States had Article III standing to challenge the Interim Final Rules is not the law of the case in this appeal.

"The law of the case doctrine provides that one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case." *United States v. Renteria*, 557 F.3d 1003, 1006 (9th Cir. 2009) (cleaned up). But a panel's prior decision governs only "the *same issues* in subsequent stages in the same case." *United States v. Marguet-Pillado*, 648 F.3d

[2] Relatedly, this Court should look upon the doomsday economic scenarios painted by the Plaintiff States with a jaundiced eye. None of the Plaintiff States—either individually or collectively—ever challenged the church exemption or the religious accommodations created by HRSA, or the statutory exemptions provided by Congress, even though those carve outs collectively impacted tens of millions of women. When taken together with the failure of the Plaintiff States to point to any employer who will use these exemptions or any employee who will be harmed by them, their asseverations of fiscal harm merit great suspicion in the standing analysis this Court should conduct.

1001, 1007 n.1 (9th Cir. 2011) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)) (emphasis added).

Moreover, a court has the "discretion to depart from the law of the case where: 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). Here, the Plaintiff States appear to argue that this Court's prior ruling that they had standing constitutes the law of the case. Opp. Br. at 20-21. That argument fails for three reasons.

First, determining whether the States have standing to challenge the Final Rules does not raise "the same issues" as determining whether the States had standing to challenge the Interim Final Rules. *See Marguet-Pillado*, 648 F.3d at 1007. Importantly, both the district court and this Court previously held that the States had standing to challenge the Interim Final Rules under the theory that the States had "established a procedural injury," namely that they had been "denied notice and opportunity to comment on the IFRs prior to their effective date." *California v. Azar*, 911 F.3d 558, 571, 573 (9th Cir. 2018).

Under that theory, to establish standing, the States merely needed to show a "*reasonable probability*, that the IFRs [would] first lead to women losing employer-sponsored contraceptive coverage, which [would] then result in economic harm to the states." *Id.* at 571 (emphasis added). Similarly, the "causation and redressability requirements are relaxed once a plaintiff has established a procedural injury." *Id.* at 573 (cleaned up).[3]

But the Plaintiff States have not proffered even a plausible case that any such procedural injury resulted from the issuance of the Final Rules. Nor can they, given that the Plaintiff States were given notice and opportunity to comment on the Final Rules, and in fact a majority of them did so. *See* https://www.regulations.gov./document?D=CMS-2014-0115-58168 (last visited May 6, 2018). Indeed, the Departments "solicited public comments on these issues" and "[a]fter consideration of the comments and feedback received from stakeholders," finalized the rules "with changes based on comments as indicated." 83 Fed. Reg. at 57,596 (revealing that "[d]uring the 60-day comment period for the

[3] *See also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992) (stating that "procedural rights" are "special" and do not require "meeting all the normal standards for redressability and immediacy").

Moral IFC . . . the Departments received over 54,000 public comment submissions"); *see also Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the ACA,* 83 Fed. Reg. 57,536, 57,539-40 (Nov. 15, 2018) (revealing that during the "60-day public comment period for the Religious IFC," the "Departments received over 56,000 public comment submissions"). As a result, because no procedural injury obtains, the lower "reasonable probability" standard and the "relaxed" "causation and redressability requirements" do not apply. *Azar,* 911 F.3d at 571, 573.[4]

Accordingly, determining whether the States have standing to challenge the Final Rules does not involve the "same issues" as determining whether the States had standing to challenge the Interim Final Rules. *Marguet-Pillado*, 648 F.3d at 1007 n.1. "[T]he evidence . . . is substantially different," and "other changed circumstances exist."

[4] The district court's application of the lower "reasonable probability" standard below, despite the absence of any plausible procedural violation, ER at 17, 20, bolsters the conclusion that it abused its discretion in holding that the Plaintiff States had standing to challenge the Final Rules. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (holding that "the Second Circuit's 'objectively reasonable likelihood' standard [was] inconsistent with [the Court's] requirement that threatened injury must be certainly impending to constitute injury in fact") (cleaned up).

Alexander, 106 F.3d at 876. In this procedural context, the law of the case doctrine does not apply.

Second, this case comes before the Court as a result of the district court's ruling pursuant to the States' Second Amended Complaint and their motion for preliminary injunction as to the Final Rules. Manifestly, "the filing of an amended complaint does not ask the court to reconsider its analysis of the initial complaint." *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1043 (9th Cir. 2018). It follows that "an amended complaint requires a new determination," and the law of the case doctrine does not apply. *Id.* (holding that "the district court [had] erred in dismissing plaintiffs' amended complaint as barred by the law of the case doctrine").

Third, "the doctrine of 'law of the case' is inapplicable to the question of [this Court's] jurisdiction to consider an appeal." *United States v. Houser*, 804 F.2d 565, 569 (9th Cir. 1986). Determining whether the Court has jurisdiction requires the Court to determine whether the plaintiffs have standing. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) (a "suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal

court therefore lacks subject matter jurisdiction over the suit"). For this additional reason, the law of the case doctrine does not apply here. *Pub. Interest Research Grp. of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 117 (3d Cir. 1997) (plaintiff could not "hide behind the law of the case" to shield itself from the fact that it did not have standing).[5]

This Court must therefore determine anew whether the Plaintiff States have standing. For all the reasons stated in March for Life's opening brief, it should conclude that the district court erred in holding that the Plaintiff States had standing to challenge the Final Rules. MFL Br. at 21-32.

III. The text of the Women's Health Amendment and the history of its enforcement confirm that HRSA has the authority to issue the moral and religious exemptions.

A. The text confirms that Congress delegated both the authority to decide what preventive services to cover and who would be required to provide that coverage.

The Plaintiff States argue that the Final Rules "cannot be reconciled with the Women's Health Amendment" because that

[5] *See also Cascadia Wildlands v. Scott Timber Co.*, No. 6:16-CV-01710-AA, 2018 WL 3614202, at *5 n.5 (D. Or. July 27, 2018) (refusing to apply the law of the case doctrine because "standing is a jurisdictional requirement," and the "law of the case doctrine, by contrast, . . . is a discretionary doctrine rooted in concerns about judicial efficiency").

provision requires coverage for "preventive care and screenings." Opp. Br. at 26 (quoting 42 U.S.C. § 300gg-13(a)(4)). They place great reliance on the idea that statutory interpretation must begin with the statute's text, but then conspicuously ignore the totality of that text. Indeed, the Plaintiff States mostly ignore Congress's decision to only require coverage for "preventive care and screenings . . . as provided for in *comprehensive guidelines supported by the Health Resources and Services Administration* for purposes of this paragraph." 42 U.S.C. § 300gg-13(a)(4) (emphasis added).

When read in context, Congress's broad grant of authority to HRSA is clear. Nowhere else in the statute is HRSA granted the authority to create from whole cloth new content in the form of "comprehensive guidelines" that did not already exist. For instance, 42 U.S.C. § 300gg-13(a)(1) requires coverage based on the "current recommendations of the United States Preventive Services Task Force." And 42 U.S.C. § 300gg-13(a)(2) provides that "recommendation[s] from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved" should be the guide. But 42 U.S.C. § 300gg-13(a)(4) contains no such

limitations or guideposts. Instead, HRSA is left to determine what "comprehensive guidelines . . . for purposes of this paragraph" are to entail, a considerably broader grant of authority than those contained elsewhere in the same statute. This authority was certainly broad enough to include determining not only *what* preventive care must be covered, but also *who* is required to provide such coverage, especially when the history of the ACA's rollout is considered.

The Plaintiff States cannot help but concede that Congress never mandated contraceptive coverage. Opp. Br. at 27 ("To be clear, Congress did not provide a fixed list of covered preventive services.").[6] This inconvenient truth dooms the Plaintiff States' argument that the moral and religious exemptions are categorically prohibited. Congress did not even mention contraceptives when it passed the ACA[7]—that requirement is

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[6] This admission runs directly contrary to the Plaintiff States' unsupported assertion that "guaranteeing contraceptive coverage was . . . a Congressional directive that federal agencies are duty-bound to implement." Opp. Br. at 50. That argument is also flatly contradicted by the ACA's text and HRSA's implementation of the preventive services provision, along with other statements in the Plaintiff States' own brief. *See* Opp. Br. at 5 ("Rather than set forth a comprehensive definition of women's preventive services that must be covered, Congress opted to rely on the expertise of HRSA.").

[7] *See* 83 Fed. Reg. at 57,607 ("The ACA did not require a contraceptive Mandate"); 83 Fed. Reg. at 57,606 ("Congress did not create a right to

instead a result of HRSA's regulatory discretion.[8] That same discretion authorizes HRSA to create, as necessary, modifications like the moral and religious exemptions.

B. The history of the ACA's enforcement demonstrates that HRSA has the discretion to issue exemptions.

Since the ACA's inception, not all employers have been subject to its requirements, even as to the contraceptive coverage provision introduced by HRSA. As a statutory matter, Congress itself provided significant carve-outs, even before HRSA began implementing the statute, for grandfathered plans and employers with fewer than 50 employees. Then HRSA provided for the church exemption and the various incarnations of the religious accommodations. Thus HRSA has been regulating both the *what* and the *who* of preventive care coverage for some time.

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receive contraceptive coverage from other private citizens through section 2713 of the PHS Act, other portions of the ACA, or any other statutes it has enacted.").

[8] *See Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016) (per curiam) (pointing out that "[f]ederal regulations require . . . cover[age of] certain contraceptives") (emphasis added); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 697 (2014) (noting that Congress authorized HRSA to decide what "preventive care and screenings" includes).

Tellingly, the Plaintiff States recently confirmed that they "have no objection" to that exemption. States' Reply in Supp. of Mot. for Prelim. Inj. at 9 n.14 (Jan. 8, 2019), ECF No. 218 ("The States have no objection to this narrowly crafted exemption and do not seek to sweep it away . . ."") (cleaned up). The Plaintiff States attempt to justify their approval of this longstanding exemption—and by extension HRSA's discretion in creating it—by noting that it takes its scope from definitions contained in the Internal Revenue Code and is thus "narrow." *Id.*; Opp. Br. at 35 (stating that the church exemption "is narrowly crafted and tethered to the Internal Revenue Code"). But the scope of the exemption has nothing to do with whether HRSA has discretion to decide "who" is to be bound. Moreover, that justification ignores the fact that HRSA gets its grant of discretionary authority from 42 U.S.C. § 300gg-13(a), not the Internal Revenue Code.

The Plaintiff States' official position vis-à-vis the church exemption fatally undermines their argument that HRSA's discretion is strictly limited to determining *what* should be covered as far as preventive services are concerned. The fact that the Plaintiff States saw fit to acquiesce to a regime of congressional carve-outs, religious

accommodations, and the church exemption—for years—suggests that their asseverations of harm now are litigation contrivances rather than economic realities of great immediacy and concern.[9]

The Plaintiff States have no principled basis to accept HRSA's regulation of the *who* in some contexts, but to reject it in others. HRSA had the discretion to exempt churches and accommodate religious non-profits back then, and it has the discretion to exempt moral and religious objectors now. Any other conclusion flies in the face of the ACA's statutory realities and its historical implementation.

IV. The moral exemption is a permissible exercise of HRSA's discretion and accords with our nation's historical solicitude for protecting the right to conscience.

The district court held that the moral exemption is contrary to the "language and purpose of the" ACA. ER at 38. But it could so do only by erroneously concluding that "Congress mandated" contraceptive coverage. *Id*. If the Court had properly applied the text and history of the ACA and its implementation, it would have been compelled to

[9] Taken together, those statutory and regulatory arrangements dwarf in numerical terms the moral and religious exemptions contained in the Final Rules. *See* MFL Br. at 40-41; *Hobby Lobby*, 573 U.S. at 700 ("All told, the contraceptive mandate presently does not apply to tens of millions of people.") (cleaned up); 83 Fed. Reg. at 57,562 (same).

conclude that the moral exemption is of a piece with HRSA's continuing grant of authority to manage the ACA's preventive care mandate, and is therefore valid.

A. Congress's decision not to enact a conscience exemption does not undermine HRSA's discretionary authority to create exemptions.

The Plaintiff States and the district court make much of the fact that Congress chose not to adopt a conscience exemption to the Women's Health Amendment. But congressional inaction is a poor indicator of not only intent but also the proper interpretation of a statute like the ACA. *See, e.g.*, *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (stating that "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress," particularly "when it concerns, as it does here, a proposal that does not become law") (cleaned up).[10]

Such extrapolation is particularly dangerous here, where the rejected exemption was considerably more fulsome than the moral and

[10] *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) ("'It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law.'") (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)).

religious exemptions. *See Hobby Lobby*, 573 U.S. at 719 n.30 (rejecting the attempt to attach significance to the fact that the "Senate voted down [a] so-called conscience amendment," and noting that the proposed amendment would have allowed "any employer to deny any health service to any American for virtually any reason"). This difference negates the inference pressed by the Plaintiff States and undercuts their argument that the Departments and HRSA lacked the authority to create the exemptions.[11]

[11] The Plaintiff States cite to *United States v. Johnson*, 529 U.S. 53, 58 (2000), to support their conclusion that the moral and religious exemptions are invalid because Congress did not expressly provide for them while providing for other exemptions. But *Johnson* is inapposite to the facts here. In *Johnson* the Court held that "[w]hen Congress provides exceptions in a statute, it does not follow that *courts* have authority to create others." *Id.* (emphasis added). That Congress provided for certain exemptions initially does not mean that HRSA was somehow forbidden from executing its statutory mandate to create "comprehensive guidelines" going forward, which it did by instituting the contraceptive coverage requirement, the church exemption, and the religious accommodations. The Final Rules are no less valid because Congress did not predict HRSA's creation of the contraceptive coverage requirement and expressly enact statutory exemptions before that requirement came into being.

B. The moral exemption is consistent with our nation's history of protecting conscience, especially with respect to issues implicated by the contraceptive coverage requirement.

March for Life has already detailed why the moral exemption is not the radical departure that the Plaintiff States claim it is, either in general or as to the ACA itself. *See* MFL Br. at 44-61. In fact, protecting the right to conscience is strongly compelled by our founding principles and practices, congressional enactments, federal regulations, judicial precedents, and state laws and regulations. *Id*.

This solicitude for conscience has particular salience where abortion is concerned, making the moral exemption to the contraceptive coverage requirement a natural and predictable outgrowth of a process that began in the wake of the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973).[12]

[12] *See* HHS.gov, *Conscience and Religious Freedom*, available at https://www.hhs.gov/conscience/conscience-protections/index.html#federal (last visited April 25, 2019) (stating that the Church amendments "were enacted in the 1970s to protect the conscience rights of individuals and entities that object to performing or assisting in the performance of abortion or sterilization procedures if doing so would be contrary to the provider's religious beliefs or moral convictions").

The moral exemption aligns with our national understanding that although the right to an elective abortion may have been declared constitutional by the Supreme Court, that right does not compel another to facilitate abortion or to pay for it if doing so is against his or her conscience. *See Roe*, 410 U.S. at 143 & n.38 (quoting AMA resolutions confirming that "no party to the [abortion] should be required to violate personally held moral principles"); *Doe v. Bolton*, 410 U.S. 179, 197-98 (1973) (noting that under the challenged law "a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure").

Many employers have objected to the contraceptive coverage requirement principally because it would compel them to provide abortifacient drugs to their employees, which they consider akin to abortion. *See Hobby Lobby*, 573 U.S. at 701 ("The Hahns have accordingly excluded from the group-health-insurance plan they offer to their employees certain contraceptive methods that they consider to be abortifacients."); 83 Fed. Reg. at 57,610 (noting that "[c]ommenters and litigants have positively stated that some of them view certain contraceptives as abortifacients" because such drugs may prevent the

"implantation" of a "post-fertilization embryo"). The Departments' decision to provide exemptions to moral and religious objectors, then, is really nothing more than a recognition that the contraceptive coverage requirement would otherwise compel employers to essentially facilitate abortions in many cases—a burden the federal government has endeavored to avoid imposing since it first passed the Church Amendments. *See* 42 U.S.C. § 300a-7 (prohibiting entities that receive certain federal health-related funds from discriminating against healthcare personnel because they refuse—for religious or moral reasons—to assist in the performance of abortions or sterilizations).[13] In light of this history, HRSA did not exceed its authority in providing a moral exemption to the contraception requirement that it had earlier created. That exemption is justified by the ACA and HRSA's

[13] *See also* Coats-Snowe Amendment. 42 U.S.C. § 238n (protecting individual physicians from being forced to perform, refer for, or even make arrangements to refer for an abortion); Weldon Amendment, Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 507(d), 128 Stat. 2130, 2515 (2014) (prohibiting federal agencies and programs, and state and local governments receiving certain federal funding, from discriminating against any healthcare entity, professional, or insurance plan, because of their decision not to provide, pay for, provide coverage for, or refer for abortions).

discretionary authority to administer it, as well as our nation's history in protecting the right to conscience, a right that this Court just months ago confirmed as "fundamentally important." *Azar*, 911 F.3d at 582.[14] These justifications are more than sufficient to sustain the moral exemption.

V. The Final Rules are not contrary to any other provisions of the ACA.

The Plaintiff States further argue that the moral and religious exemptions violate Sections 1554 and 1557 of the ACA. Opp. Br. at 61-63. Not so.

Section 1554 provides that the Secretary of Health and Human Services shall not promulgate any regulation that "creates any

[14] The Plaintiff States object to March for Life's argument that the moral exemption is also required by Equal Protection, claiming that this was not a basis for the Departments' decision to issue the moral exemption and so cannot be considered. The Plaintiff States are mistaken. The Departments discussed the Equal Protection arguments made by March for Life and another non-profit in their challenges to the contraceptive coverage requirement in the federal courts, *see* 83 Fed. Reg. at 57,596-97, and then expressly stated that they took "into consideration the litigation surrounding the Mandate in exercising their discretion to adopt the [moral] exemption in these final rules," *id.* at 57,602.

unreasonable barriers to the ability of individuals to obtain appropriate medical care" or "impedes timely access to health care services." 42 U.S.C. § 18114. But Congress itself chose not to require contraceptive coverage and chose to exempt tens of millions of people from the preventive care mandate. *See supra* at 5 n.2 & 15 n.9. The moral and religious exemptions cannot constitute "unreasonable barriers," nor can they be seen as "imped[ing] timely access," when Congress itself provided for carve-outs that dwarf those two exemptions.

The Plaintiff States also cannot obtain relief on the basis of Section 1557. That provision prohibits discrimination "on the ground prohibited under . . . title IX of the Education Amendments of 1972." 42 U.S.C. § 18116. The Plaintiff States claim that the Final Rules must fall because they "permit employers to exempt themselves from providing only one type of preventive services . . . which women (and only women) use." Opp. Br. at 62.

But neither the moral nor the religious exemption discriminates against women. Any argument to the contrary rests not on anything specific in the language of the rules themselves but on the fact that the contraceptive coverage requirement itself confers a benefit only upon

women. Thus, any modification to that regime, including the moral and religious exemptions, necessarily affects women.

But that does not mean that the Final Rules discriminate against women, or even that their effect falls only upon women. For example, where the primary insured is a male whose plan covers his wife, both husband and wife would be affected by the exemptions. This Court should reject the Plaintiff States' attempt to manufacture a statutory equal protection violation where none exists.

CONCLUSION

The Plaintiff States have no right to a contraceptive and abortifacient mandate. As a result, they have no standing to sue the federal government for allowing religious and moral exemptions after HRSA decided to require contraceptive and abortifacient coverage.

What's more, the exemptions are entirely proper. HRSA has the authority to decide *what* preventive care to require, and *who* must provide it. Having conceded the validity of the church exemption, the Plaintiff States' objections to the moral and religious exemptions necessarily fail.

Accordingly, for the foregoing reasons, and the additional reasons stated in March for Life's opening brief, the decision below should be reversed and the case dismissed.

Dated: May 6, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook font, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,829 words, excluding the parts of the brief exempted under Rule32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/Kevin H. Theriot
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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Kevin H. Theriot
Kevin H. Theriot