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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA *et al.*,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

and

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,

Intervenor-Defendant-Appellant,

and

MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

Intervenor-Defendant-Appellant.

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

REPLY BRIEF FOR THE FEDERAL APPELLANTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

As the government's opening brief (Fed. 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.

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 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 suggest that this Court ignore.

The States argue that the expanded exemption violates the ACA's prohibition on unreasonable barriers to healthcare, as well as its prohibition on discrimination. The district court did not rely on these claims, and this Court should reject them. The exemption does not create a barrier to healthcare, as any financial constraints that may limit a woman's access to contraceptive services are not *caused* by the exemption. Before the contraceptive-coverage mandate, women had no entitlement to contraceptive coverage without cost-sharing, and the exemption leaves women with the same access to contraceptive services as they would have had if HHS had chosen not to include contraceptive

coverage in its guidelines at all. Nor does the exemption discriminate on the basis of sex. The contraceptive-coverage mandate is itself limited to women, and whether a particular woman is affected by the exemption depends not on her sex but on whether her employer has a sincere conscience objection to contraceptive coverage.

Further, the States fail to refute our showing that the agencies provided a reasoned explanation for the expanded exemption. The States may disagree with the agencies' policy judgments, but the States' contention that the agencies did not adequately explain their reasoning is patently groundless.

Finally, while we acknowledge that this Court's ruling in the prior appeals is controlling with respect to standing and the balance of equities, the States' arguments for standing remain fatally speculative, and the government's institutional interests and the need to protect employers' sincere conscience objections far outweigh the speculative harms alleged by the States.

ARGUMENT

I. 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. 57,536, 57,540-42 (Nov. 15, 2018); 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* Fed. Br. 18-21, and the States' contrary arguments lack merit.

1. Notably, the States do not meaningfully dispute that the church exemption would not be authorized under their interpretation of § 300gg-13(a)(4). Although the States, like the district court, suggest

(Resp. Br. 35) that this Court can simply ignore that implication because they are not challenging the church exemption, 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.

The States contend that the church exemption is "different" from the challenged exemptions because the church exemption is "narrowly crafted and tethered to the Internal Revenue Code." Resp. Br. 35. But the States are unable to explain how a statutory exception from the requirement to file annual returns with the IRS could authorize an exemption from the ACA's preventive-services requirement, which, according to the States (Resp. Br. 26-28), unambiguously forecloses exceptions. *See* Fed. Br. 23-24.

The States emphasize that the agencies, when they originally crafted the church exemption, asserted that "churches are more likely to hire co-religionists," Resp. Br. 35 (quoting 80 Fed. Reg. 41,318, 41,325

(July 14, 2015)), but that assertion, even if it were true, cannot itself authorize the church exemption unless the agencies have authority to grant exemptions under § 300gg-13(a)(4). After all, agencies cannot deny employees of certain employers a benefit to which they otherwise would be entitled under a regulation, merely because some (or even all) of the employees would not use the benefit.

Indeed, contrary to the States' suggestion, the agencies did not rely on their assertion that employees of churches were more likely to share their employers' religious beliefs as authority for the church exemption. Rather, the agencies relied on the authority conferred by § 300gg-13(a)(4), *see* 76 Fed. Reg. at 46,623, and referenced the comparative use of contraception by church employees only in the context of responding to an argument that the existence of the church exemption undermined the asserted compelling interest in requiring contraceptive coverage, 78 Fed. Reg. 39,870, 39,887 (July 2, 2013). And regardless, the agencies "no longer adhere to [their] previous assertion that houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same

objection." 83 Fed. Reg. at 57,561 (cleaned up). As the agencies explained, "[i]t is not clear" that "the percentage of women who work at churches that oppose contraception, but who support contraception, is lower than the percentage of women who work at nonprofit religious organizations that oppose contraception on religious grounds, but who support contraception." *Id.*; *see also* 82 Fed. Reg. 47,792, 47,802 n.19 (Oct. 13, 2017) (citing religious universities that only hire persons who sign the universities' statements of faith).

Likewise, the fact that "churches have 'special status under longstanding tradition in our society and under federal law,'" Resp. Br. 36 (quoting 80 Fed. Reg. at 41,325), cannot itself justify the church exemption. The States identify no source of legal authority besides § 300gg-13(a)(4) to justify that exemption from the ACA's preventive-services requirement. *See* Fed. Br. 24-25.

The States also ignore that their reading of § 300gg-13(a)(4) would mean that the agencies lacked authority to promulgate the accommodation. The States do not dispute our showing (Fed. Br. 35) that the accommodation deviates from the contraceptive-coverage mandate's express requirements under § 300gg-13(a)(4). The statute

requires that a "group health plan" or "health insurance issuer" *itself* "provide coverage for" the services specified in the Health Resources and Services Administration (HRSA) guidelines, not that it outsource that obligation to someone else. 42 U.S.C. § 300gg-13(a). Moreover, the accommodation effectively exempts from the contraceptive-coverage mandate altogether religious not-for-profit entities not eligible for the church exemption but using self-insured church plans, because the agencies lack authority to enforce the accommodation against such plans. *See* 83 Fed. Reg. at 57,547; Fed. Br. 6. And while the States contend that the accommodation is the least restrictive means of furthering a compelling governmental interest under RFRA (Resp. Br. 47-57), they also argue that RFRA does not authorize agencies to create exemptions to laws of general applicability (Resp. Br. 57-59), which means that on their view the agencies would have lacked authority to create the accommodation under RFRA as well.

2. The States' textual argument fares no better. The term "shall" in § 300gg-13(a) does not bear the weight the States place (Resp. Br. 26-27) on it. While "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 which preventive services must be covered *or* which categories of regulated entities must cover them. Nothing in the statute requires HRSA to mandate coverage of *contraceptive* services at all, let alone for all types of employers and plans.

On the contrary, 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). Congress did not specify the extent to which HRSA must "provide[] for" and "support[]" the application of the specified guidelines. Rather, Congress delegated to HRSA the authority to determine both the types of services that must be covered under § 300gg-13(a)(4) and the scope of that coverage—*i.e.*, the extent to which entities must provide coverage for those services.

That interpretation is bolstered by the use of the phrase "for purposes of this paragraph," which makes clear that HRSA should consider the statute's coverage mandate in shaping the guidelines. The States attempt to minimize the significance of the phrase "as provided for," contending that "as" is merely "used in anticipation of HRSA

issuing guidelines." Resp. Br. 33 (quoting *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 579 (E.D. Pa. 2017)). But the use of the word "as" reflects more than just the fact that the guidelines had not yet been developed when the ACA was enacted. Rather, it confirms that HRSA had discretion with respect to the scope of the guidelines.

This makes particular sense when those guidelines are compared with the guidelines referenced in other paragraphs of § 300gg-13(a) (*e.g.*, the children's guidelines in § 300gg-13(a)(3)), which predated the ACA and set forth *nonbinding* recommendations as to the "care that *providers should provide* to patients," 76 Fed. Reg. at 46,623 (emphasis added). The guidelines at issue here, in contrast, were to be developed "solely to bind non-grandfathered group health plans and health insurance issuers with respect to the extent of their coverage of certain preventive services for women." *Id.* And as the agencies have explained, "[g]uidelines developed as nonbinding recommendations for care implicate significantly different legal and policy concerns than guidelines developed for a mandatory coverage requirement." 82 Fed. Reg. at 47,794. The absence of terms like "evidence-based" or "evidence-informed" in § 300gg-13(a)(4), as compared with § 300gg-13(a)(1) and

(a)(3), reinforces the conclusion that Congress gave HRSA and the agencies discretion to take into account additional policy-based concerns in implementing § 300gg-13(a)(4).

At a minimum, and contrary to the States' contention (Resp. Br. 34 n.20), the statute is ambiguous when read as a whole, and the agencies' interpretation is thus entitled to *Chevron* deference. The States are also wrong to suggest that the agencies' interpretation conflicts with their prior interpretation of the statute. The agencies have consistently interpreted § 300gg-13(a)(4) as conferring on HRSA discretion to exempt entities from otherwise-applicable guidelines it adopts. *See* 76 Fed. Reg. at 46,623 (interpreting statute this way in promulgating original church exemption). And the States are wrong insofar as they suggest that Congress did not grant "broad rulemaking authority" to the agencies here. Resp. Br. 32. Congress gave the agencies broad authority to "promulgate such regulations as may be necessary or appropriate to carry out the provisions of this subchapter," including § 300gg-13(a)(4). 42 U.S.C. § 300gg-92; *see also* 26 U.S.C. § 9833; 29 U.S.C. § 1191c.

As our opening brief explained (at 25-26), we do not suggest that HRSA and the agencies have "limitless" authority. Resp. Br. 33. The agencies' authority to create exemptions is subject to "arbitrary and capricious" review under the Administrative Procedure Act (APA), which ensures that any exemption does not "defeat the statute itself." Resp. Br. 34. And the States fail to establish that expanding the prior exemption from the contraceptive-coverage mandate to encompass an additional class of employers with sincere conscience objections to contraceptive coverage is unreasonable.

Although the States assert (Resp. Br. 30-31) that the exemption is inconsistent with § 300gg-13(a)(4)'s purpose, that assertion would again invalidate the church exemption and the accommodation's effective exemption of religious not-for-profit entities using self-insured church plans. This underscores that the States have overlooked that "no law pursues its purpose at all costs," and "the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Kucana v. Holder*, 558 U.S. 233, 252 (2010). Here, the statute limits its scope by delegating to HRSA the authority to determine the scope of the preventive-services mandate, including

through reasonable exemptions. Indeed, the statute itself *does not require* coverage of contraceptive services *at all*. Certain legislators' anticipation that the ACA would cover contraceptive services (Mass. Amicus Br. 11-13) 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.").

3. The States invoke the *expressio unius* canon (Resp. Br. 28-29), inferring from certain other statutory exemptions Congress's intent to preclude the agencies from creating exemptions to the preventive-services requirement. But that canon applies "only when circumstances support a sensible inference that the term left out must have been meant to be excluded." *SW Gen.*, 137 S. Ct. at 940 (cleaned up). No such inference is appropriate here.

The States point first to the exemption for grandfathered plans. But that exemption was "designed to ease the transition of the healthcare industry into the reforms established by the [ACA] by allowing for gradual implementation of reforms." 75 Fed. Reg. 34,538, 34,541 (June 17, 2010). And it applies not just to § 300gg-13(a)'s

preventive-services requirement, but also to numerous other provisions of the ACA. *See* 42 U.S.C. § 18011(a)(2)-(4). It in no way suggests that Congress intended to foreclose the agencies from exercising discretion to adopt an exemption limited to the preventive-services requirement to accommodate conscience objections to contraceptive coverage (like the church exemption), particularly given that contraceptive coverage did not need to be included in HRSA's guidelines at all.

Nor can the States draw any support from 42 U.S.C. § 18113(a), which prohibits discrimination against a "health care entity" on the basis that "the entity does not provide any health care item or service furnished for the purpose of causing, or for the purpose of assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing." Like the grandfathering exemption, this provision serves a very different purpose than the agencies' conscience exemption. It does not support an inference that Congress meant to prohibit a conscience exemption to an agency-created contraceptive-coverage mandate.

Nor does Congress's rejection of a conscience amendment suggest that the agencies lack authority to create an exemption to the

contraceptive-coverage mandate. *See* Fed. Br. 26. That amendment would have provided an exemption from *any* preventive-service requirement objected to on religious or moral grounds regardless of whether the government first found—as the agencies did here in their rulemaking—that requiring coverage of that service by objecting entities was not the least restrictive means of furthering a compelling interest. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 n.30 (2014); 158 Cong. Rec. S538-39 (daily ed. Feb. 9, 2012) (text of amendment). As a general matter, Congress's failure to adopt a proposal is a "particularly dangerous ground on which to rest an interpretation" of a statute. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). That is particularly so here, where the agencies' exemption is significantly narrower than the amendment rejected by Congress and where Congress did not itself require a contraceptive-coverage mandate.

B. RFRA Both Authorizes and Requires the Religious Exemption

As we explained (Fed. Br. 27-31), 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, *Hobby Lobby*, 134 S. Ct. at 2779. 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. Whereas the States devote a substantial portion of their brief (pp. 36-57) to arguing that RFRA does not *require* the religious exemption, their only response to our argument (Fed. Br. 27-30) that RFRA at least *authorizes* the religious exemption is to contend that RFRA does not give agencies authority to "create broad exemptions to generally applicable statutory law." Resp. Br. 57-58. As we explained in our opening brief (at 33-36), however, that contention 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, the agency itself promulgated the offending provision.

Contrary to the States' suggestion (Resp. Br. 58-59), RFRA's authorization of judicial relief in individual cases, 42 U.S.C. § 2000bb-1(c), does not mean that agencies lack an independent obligation to comply with RFRA, 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 applies only to the category of persons who have a valid RFRA claim against the contraceptive-coverage mandate—*i.e.*, those employers with a sincere religious objection to the mandate. *See* 83 Fed. Reg. at 57,590; *Hobby Lobby*, 134 S. Ct. at 2779.

Moreover, as we explained (Fed. Br. 34-36), the States' argument would mean that the agencies lacked authority under RFRA to

promulgate either the original church exemption or the accommodation. Again, the States tacitly concede the logical consequence of their position yet urge this Court to ignore it. Resp. Br. 59 n.36.

Apart from their flawed threshold argument that agencies lack authority to create exemptions under RFRA, the States have no response to the fundamental point that, while 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.

Insofar as the ACA did not authorize religious-conscience exemptions from any preventive-services mandate supported by HRSA, the agencies reasonably determined that the considerable legal doubt that the accommodation itself satisfied RFRA left them faced with potentially conflicting duties under the ACA and RFRA. 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, 585 (2009), which recognized that an entity faced with potentially conflicting legal obligations should be afforded some leeway in resolving that conflict.

The States contend (Resp. Br. 58-59) that *Ricci* is limited to Title VII and that any conflict between the ACA and RFRA must be resolved by adopting the narrowest relief necessary, but they ignore this Court's invocation of *Ricci* in the context of RFRA's sister statute, the Religious Land Use and Institutionalized Persons Act. *See* Fed. Br. 32-33 (citing *Walker v. Beard*, 789 F.3d 1125, 1136-37 (9th Cir. 2015)). And applying *Ricci* in this context makes perfect sense: rather than having to navigate perfectly between Scylla and Charybdis by going no further than the precise relief from a legal mandate that is required by RFRA, agencies should have the latitude to adopt a broader exemption than may be strictly necessary in light of reasonable concerns about the adequacy of a narrower accommodation.

Finally, the States are wrong to suggest that the exemption "run[s] afoul of congressional intent." Resp. Br. 59. As discussed, nothing in § 300gg-13(a)(4) requires that contraceptive services even be included in any preventive-services mandate. And the exemption does

not allow "*any* employer to unilaterally disregard the contraceptive mandate," Resp. Br. 59 (emphasis added); the exemption is limited to employers with sincere religious objections to the contraceptive-coverage mandate.

2. In any event, RFRA requires the exemption because the accommodation is inadequate for some employers. *See* Fed. Br. 30-31, 36-37. As a threshold matter, the States err in arguing that the accommodation does not substantially burden objecting employers' religious exercise because the accommodation "meticulously separates the employer's health plan from any involvement in the provision of contraceptive coverage." Resp. Br. 44. The States' view about whether the accommodation sufficiently separates the employer's health plan from the provision of contraceptive coverage invites precisely what RFRA does not allow and what the Supreme Court has prohibited: "it is not for [a court] to say that [an objector's] religious beliefs are mistaken." *Hobby Lobby*, 134 S. Ct. at 2779. "The question here is not whether [religious objectors] have correctly interpreted the law, but whether they have a sincere religious belief that their participation in the accommodation process makes them morally and spiritually

complicit in providing [contraceptive coverage to which they religiously object]." *Sharpe Holdings, Inc. v. HHS*, 801 F.3d 927, 942 (8th Cir. 2015), *vacated and remanded sub nom.*, *HHS v. CNS Int'l Ministries*, 136 S. Ct. 2006 (2016) (mem.); *see also Priests for Life v. HHS*, 808 F.3d 1, 16-21 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc).

The States mischaracterize the Supreme Court's statements in *Hobby Lobby* as "dicta" and wrongly suggest that the "context" for the Court's statements makes them inapplicable here. Resp. Br. 40. The Supreme Court has long made clear that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others" to merit protection, *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981), and that "courts must not presume to determine . . . the plausibility of a religious claim," *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 887 (1990). Nothing in *Hobby Lobby* is to the contrary: the States overlook (Resp. Br. 40-41) that the plaintiffs there did not challenge the accommodation or otherwise claim that it burdened their religious beliefs. *See* 134 S. Ct. at 2782.

In addition, the States' criticisms of employers' religious objections are particularly inappropriate because the States misunderstand both the objection and the accommodation. Even under the accommodation, while employers may not be paying for contraceptive coverage themselves, they remain inextricably intertwined with the provision of contraceptive coverage to their employees—if an employer eliminated its health plan or terminated an employee, that employee would no longer receive contraceptive coverage through the employer's insurer or third-party administrator. That connection is inescapable, and thus employers' complicity objection is entirely reasonable. This is especially so for self-insured employers, given that, as the States themselves concede (Resp. Br. 46-47), the government has no power to require a third-party administrator to provide contraceptive coverage other than through the employer's ERISA plan.

The States also fundamentally err in arguing that deferring to objectors' determinations that they have a sincere religious objection "collapse[s] the distinction between beliefs and substantial burden." Resp. Br. 39-40. As *Hobby Lobby* illustrates, even where a court has held that the plaintiff has identified sincerely held religious beliefs, the

court must still determine whether the claimed burden is *substantial*—an independent inquiry that turns on the severity of the pressure the government's action imposes on the objector's religious exercise. *See* 134 S. Ct. at 2775-76; *see also Sharpe*, 801 F.3d at 938.

In the case of the accommodation, as we explained (Fed. Br. 36), the substantial burden results from the significant financial penalty imposed for failure to comply with the mandate or accommodation. That is the same penalty the plaintiffs faced in *Hobby Lobby*, where the Court had "little trouble" concluding that the mandate imposed a substantial burden. 134 S. Ct. at 2775; *see also Priests for Life*, 808 F.3d at 16 (Kavanaugh, J., dissenting from denial of rehearing en banc).

The States fear that focusing solely on whether the government has placed significant pressure on a person to engage in conduct to which it has sincere religious objections will require the government to "defend innumerable actions demanding strict scrutiny analysis." Resp. Br. 41 (quoting *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 218 (2d Cir. 2015), *vacated and remanded*, 136 S. Ct. 2450 (2016)). But that is the unambiguous policy choice Congress made in enacting RFRA, and the contrary choice would place courts in the untenable position of

second-guessing the reasonableness of religious objections. Moreover, the States' concern about Congress's policy choice is overblown. For example, the States raise the hypothetical of "a religious conscientious objector to the military draft" further objecting to "notifying the government of his religious opposition," Resp. Br. 41-42, but that hypothetical is doubly inapposite: the military's drafting of a replacement would not substantially burden the objector, because it would neither depend on the form of the objector's notification nor involve the objector's own contracts, and the government's need to conscript citizens to fight a war, unlike its purported need to conscript employers to subsidize their employees' contraception, would undoubtedly satisfy strict scrutiny, *see, e.g.*, *Eternal Word Television Network, Inc. v. Secretary of HHS*, 818 F.3d 1122, 1188 n.32 (11th Cir. 2016) (Tjoflat, J., dissenting) (rejecting the draft hypothetical), *vacated*, No. 14-12696, 2016 WL 11503064 (11th Cir. May 31, 2016).

The States further argue (Resp. Br. 47-57) that even if the accommodation imposes a substantial burden, it is the least restrictive means of furthering a compelling governmental interest. But as we explained (Fed. Br. 30), the agencies have concluded that application of

the mandate (and accommodation) to objecting entities neither serves a compelling interest nor is narrowly tailored to any such interest.

The States mischaracterize our opening brief. We did not suggest that the mandate does not serve a compelling interest merely because women affected by the exemption "are no worse off than before the agencies chose to act in the first place." Resp. Br. 49 (quoting Fed. Br. 43). The text that the States quote from our brief was addressing the district court's separate concern that the exemption impermissibly burdened third parties in violation of the Establishment Clause and thus was not authorized by RFRA. *See* Fed. Br. 41-45; ER 34-36.

As to the question whether application of the mandate and accommodation to objecting entities serves a compelling governmental interest, we explained that the agencies had concluded it did not for several reasons, including that:

- Congress did not mandate coverage of contraception at all;
- the preventive-services requirement was not made applicable to grandfathered plans;
- the prior rules exempted churches and their related auxiliaries, and also effectively exempted entities that participated in self-insured church plans because the agencies lack authority to enforce the accommodation against such plans (*see* Fed. Br. 6);

- multiple federal, state, and local programs provide free or subsidized contraceptives for low-income women; and
- entities bringing legal challenges to the mandate have been willing to cover some, though not all, contraceptives.

See 83 Fed. Reg. 57,546-48.

The States nevertheless double down by arguing that the government's interest is not just in an employee's receipt of contraceptive coverage, but in receipt "seamlessly with other health services" without "additional logistical or administrative hurdles." Resp. Br. 53. But the agencies have concluded otherwise and, in any event, that interest is hardly compelling enough to override religious objections. The States also contend (Resp. Br. 51-52) that the existence of the prior exemptions from the mandate does not mean that the government lacks a compelling interest. But, although the existence of exceptions is by no means dispositive, "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (cleaned up). In any event, the States ignore the fact that the ACA does not mandate coverage of contraception at all. And the States

point to no case in which a court has found a policy to advance a compelling interest where the government itself does not claim one.

The States mistakenly rely on *United States v. Lee*, 455 U.S. 252 (1982), in emphasizing the effect of the exemption on third parties. There, Congress had granted a religious exemption from participation in the social-security system to self-employed Amish and others. *Id.* at 260. The Supreme Court denied an Amish employer a broader exemption from paying social-security taxes, not because the requested exemption burdened third parties, but because "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief" and "Congress ha[d] [already] accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system." *Id.*

The States likewise can draw no support from *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). The problem with the statute at issue there was not that it imposed a burden on other employees, but that it intruded on private relationships to favor religious individuals

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, far from taking sides in an otherwise-private dispute between religious employees and their employers, the government has simply lifted a burden on religious employers that it itself imposed, *see Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987), and, moreover, has done so only after determining that the burden is not narrowly tailored to achieve any compelling interest.

Likewise, Amici Church-State Scholars and Religious and Civil-Rights Organizations argue that the expanded exemption unduly burdens third-party interests, but fail to rebut our argument (Fed. Br. 43-45) that any women who might be adversely affected by the exemption would be no worse off than before the agencies decided to promulgate the contraceptive-coverage mandate in the first place. Amici try to limit the reasoning of *Amos* to leadership- and membership-control concerns, but *Amos* spoke more broadly of the government's authority to alleviate governmental interference with the ability of 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 for employers with sincere religious objections to contraceptive coverage.

Amici Religious and Civil-Rights Organizations complain that the exemption does not permit the government to "assess whether any particular objector's religious exercise is substantially burdened before the objector avails itself of the exemption." Br. 25. But, as explained (*supra* p. 23), the financial penalty the ACA imposes for failure to comply with the mandate or accommodation constitutes a substantial burden on the religious exercise of employers with sincerely held conscience objections to contraceptive coverage. Insofar as amici are concerned that the rules lack any mechanism to distinguish between sincere objections and "after-the-fact or sham" invocations of the exemption, Br. 25, the agencies explained that "[e]ntities that insincerely or otherwise improperly operate as if they are exempt would do so at the risk of enforcement under [mechanisms in the Public Health Service Act, the Internal Revenue Code, and ERISA]," 83 Fed. Reg. at 57,558.

C. The Expanded Exemption Is Not Foreclosed By Any Other ACA Provision

The States argue (Resp. Br. 61-63) that the expanded exemption violates the ACA's prohibition on unreasonable barriers to healthcare, 42 U.S.C. § 18114, as well as its prohibition on discrimination, *id.* § 18116(a). These claims, which the district court did not address, lack merit.

As relevant here, § 18114 prohibits HHS from "promulgat[ing] any regulation" that "creates any 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(1), (2). The expanded exemption, which merely exempts certain objecting employers from providing contraceptive coverage, does neither. Any financial constraints that may limit a woman's access to contraceptive services are not *caused* by the exemption. Before the contraceptive-coverage mandate, women had no entitlement to contraceptive coverage without cost-sharing, and the exemption leaves women with the same access to contraceptive services as they would have had if HRSA had chosen not to include contraceptive coverage in its guidelines at all. *Cf. Harris v. McRae*, 448 U.S. 297, 316 (1980) ("[A]lthough government may not

place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation.").

Nor does the exemption contravene the ACA's requirement that "an individual shall not" be "excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity" on the basis of sex. 42 U.S.C. § 18116(a). The exemption is not based on sex: whether a woman is affected by the exemption depends only on the extent to which her employer has a sincere conscience objection to contraceptive coverage, and the States do not and could not claim that employers' religious or moral objection to contraception reflects sex discrimination. Indeed, § 300gg-13(a)(4) itself governs only women's preventive services, and the contraceptive-coverage mandate itself applies only to female contraceptives. Accordingly, it is particularly irrelevant that, as the States emphasize (Resp. Br. 62), the exemption "permit[s] employers to exempt themselves from providing only one type of preventive service[]—[female] contraceptives." *See Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1353 (2015) (explaining that, until Congress amended

Title VII in the Pregnancy Discrimination Act, discrimination on the basis of pregnancy did not constitute discrimination on the basis of sex).

II. The Agencies Provided a Reasoned Explanation for the Expanded Exemption

The States also assert that, even if the agencies had statutory authority to promulgate the expanded exemption, they "failed to offer a reasoned explanation" for it. Resp. Br. 23. But the States fail to rebut our demonstration of why the district court erred in so ruling. 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." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The religious and moral exemptions easily satisfy those standards.

In promulgating the religious exemption, the agencies concluded that the mandate and accommodation substantially burden the religious exercise of certain non-exempt objecting 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; *see also* 83 Fed. Reg. at 57,605 (noting that the moral exemption protects convictions that "occupy a place parallel to that filled by sincerely held religious beliefs"). The agencies acknowledged that this was a change from their prior legal view of those interests, *see* 83 Fed. Reg. at 57,546, and the States do not assert that the agencies failed to address that issue.

The agencies also explained the basis for their conclusion that imposing the contraceptive-coverage mandate on objecting employers is not narrowly tailored to achieve a compelling interest. *See supra* pp. 25-26. The States argue that the agencies' conclusion does not reflect a "reasoned explanation," given the "lack of any material change in the underlying factual and legal circumstances that supported their prior position." Resp. Br. 23. But this Court recently held in *Organized Village of Kake v. U.S. Department of Agriculture* that an agency was entitled to "give more weight to socioeconomic concerns than it [previously] had [two years earlier], even on precisely the same record." 795 F.3d 956, 968 (9th Cir. 2015) (en banc). Here, the agencies likewise decided to give more weight to conscience interests than they previously had, and as *Kake* shows, nothing in the APA precludes agencies from

changing positions on the basis of a different evaluation of law and policy.[1]

The States offer no response to our argument (Fed. Br. 47) that it is unclear whether the expanded exemption will have a significant effect on contraceptive use in light of 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. The States do, however, criticize (Resp. Br. 24) the agencies' statement that "significantly more uncertainty and ambiguity exists [regarding the efficacy and health benefits of contraceptives] than the [agencies'] previously acknowledged." 83 Fed. Reg. at 57,555. But that statement accurately reflects the comments the agencies received on the interim rules, and while the uncertainty bolsters the agencies' conclusion, as discussed, the agencies had

[1] The agency decision challenged in *Kake* was struck down because the agency relied on a factual finding that the agency failed to reasonably support and that conflicted with an earlier finding. *See* 795 F.3d at 968. Here, by contrast, the agencies fully explained the reasons they chose to expand the original exemption.

sufficient independent reasons for concluding that application of the mandate and accommodation to objecting entities does not serve a compelling governmental interest. *See supra* pp. 25-26; 83 Fed. Reg. at 57,605 (same reasoning for moral exemption).

The States argue that "if the health benefits of contraceptives really had been called into question over the past two years, defendants would have addressed whether HRSA should include contraceptives in the [g]uidelines at all." Resp. Br. 24. The agencies properly focused here on the need for religious and moral exemptions, however, and as our opening brief explained (at 48), the agencies' decision not to eliminate the contraceptive-coverage mandate altogether further demonstrates that the agencies did not ignore factors they had considered in the past. It was entirely reasonable to conclude that contraceptive coverage is sufficiently worthwhile to include in the preventive-services mandate but not so compelling as to override employers' sincere conscience objections.

Finally, the States wrongly accuse us of "[m]ere disagreement" with the district court, Resp. Br. 25, which is not sufficient to vacate a preliminary injunction, *see National Wildlife Fed'n v. National Marine*

Fisheries Serv., 422 F.3d 782, 793 (9th Cir. 2005). The flaws in the district court's analysis that we have identified represent legal errors, or at least an abuse of discretion, either of which warrants vacatur of the preliminary injunction. *See id.*

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

While we acknowledge that this Court's ruling in the prior appeals is controlling with respect to standing and the balance of equities, *see* Fed. Br. 49, the States lack standing here because their assertions of Article III harm are speculative, and for the same reasons, the States cannot show that a preliminary injunction is necessary to prevent irreparable harm, *see* Fed. Br. 49-50. Indeed, the States attempt to undermine the harm the injunction poses to the government and the public by emphasizing that no one has "identified" a "single employer" that would invoke the final rules, Resp. Br. 65, but that just underscores the lack of harm to the States: by definition, if no employers would invoke the exemption, then no employees and no States would be harmed by it; conversely though, there are myriad

ways in which employers could invoke the exemption without any injury flowing to the States.

Accordingly, the government's institutional interests in its regulations and its specific interest in protecting religious liberty and conscience outweigh the speculative harms the States assert. *See* Fed. Br. 50-51. Contrary to the States' suggestion (Resp. Br. 66), the irreparable injury the government suffers whenever its laws and regulations are set aside by a court does have case-law support, *see Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers), and recognition of that injury would not preclude nearly all injunctions against the government, as irreparable injury to the government is only one aspect of balancing the equities.

The fact that the accommodation remains available to religious employers under the prior rules does not, contrary to the States' suggestion (Resp. Br. 65), mitigate the irreparable harm an injunction would cause employers and the government, since many employers have sincere religious objections to the accommodation as well as the mandate. And while the basic function of a preliminary injunction is undeniably to preserve the status quo, *see Chalk v. U.S. Dist. Ct.*,

840 F.2d 701, 704 (9th Cir. 1988), a court may grant a preliminary injunction only when the moving party satisfies the relevant factors, *see id.*, which for reasons explained the States have failed to do here.

CONCLUSION

The preliminary injunction should be vacated.

Respectfully submitted,

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

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

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,973 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

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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.

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