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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

ALEX M. AZAR II, in his official capacity as Secretary of the U.S. Department of Health and Human Services, et al.,

Defendants,

and,

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,

Intervenor-Defendant,

and,

MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

Intervenor-Defendant.

Case No. 4:17-cv-05783-HSG

INTERVENOR-DEFENDANT MARCH FOR LIFE'S COMBINED MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT WITH MEMORANDUM OF POINTS AND AUTHORITIES

Hearing Date: September 5, 2019
Time: 2:00 pm
Courtroom: 2, 4th Floor
Judge: Hon. Haywood S. Gilliam, Jr.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 5, 2019, at 2:00 p.m., in Courtroom 2 of the above-entitled court located at 1301 Clay Street, Oakland, California, Intervenor-Defendant March for Life Education and Defense Fund will move and hereby moves this Court to dismiss in their entirety the Plaintiff States' Second Amended Complaint and the State of Oregon's Complaint-in-Intervention. In the alternative, March for Life will move and hereby moves for summary judgment on each of the causes of action set forth in the Plaintiff States' Second Amended Complaint and in the State of Oregon's Complaint-in-Intervention.

March for Life asks the Court to dismiss these complaints in their entirety and with prejudice, first because the Plaintiff States lack standing and fail to state a claim upon which relief can be granted, and second because the challenged Interim Final Rules[1] and Final Rules[2] do not violate any applicable law. In the alternative, March for Life asks the Court to deny the Plaintiff States' Motion for Summary Judgment (Dkt. No 311), and grant March for Life's Motion for Summary Judgment on each of the causes of action set forth in the Plaintiff States' Second Amended Complaint and in the State of Oregon's Complaint-in-Intervention.

This motion is based on this notice, the accompanying memorandum of points and authorities, this Court's file, any matters properly before the Court, and to the extent required to resolve the matter, the administrative record.

[1] 82 Fed. Reg. 47,792 (Oct. 13, 2017) and 82 Fed. Reg. 47,838 (Oct. 13, 2017).
[2] 83 Fed. Reg. 57,536 (Nov. 15, 2018) and 83 Fed. Reg. 57,592 (Nov. 15, 2018).

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INTRODUCTION

The Plaintiff States have turned a political disagreement into litigation designed to subdue those who have different religious and moral views. As this Court well knows, the conflict between religious liberty and freedom of conscience on the one hand, and the Patient Care and Affordable Care Act's (ACA) contraceptive coverage requirement on the other, has occupied the federal courts for years. The Plaintiff States chose to sit idly by all that time, precisely because this was not their fight. Yet once the Departments of Health and Human Services, Labor, and the Treasury (collectively "the Departments") promulgated Interim Final Rules (IFRs) and then Final Rules creating moral and religious exemptions to the ACA's contraceptive coverage requirement, the Plaintiff States cried foul.

Unfortunately, the Plaintiff States' political machinations have the potential to do real harm to organizations like March for Life. Despite the fact that the ACA does not require contraceptive coverage and Congress and the Departments have created numerous exemptions to the contraceptive coverage requirement for myriad employers, no provision protected pro-life, non-religious entities like March for Life until the Departments promulgated the IFRs and the Final Rules. This gap existed even though March for Life's moral convictions mirror the religious beliefs of churches and religious entities opposing abortion. Mot. to Intervene, Mancini Decl. at ¶¶ 15, 17, Dkt. No. 87-1.

Indeed, March for Life exists to protect, defend, and respect human life at every stage of life. As a result, March for Life is staunchly opposed to abortion in all its forms. March for Life was founded in 1973, shortly after the United States Supreme Court decided *Roe v. Wade*. At that time a group of pro-life leaders decided not to allow the first anniversary of that decision to come and go without recognition. Consequently, the hallmark of March for Life is its annual march on the Supreme Court and the United States Capitol, held every year on or around January 22nd, *Roe*'s anniversary. *See* Dkt. No. 87-1 at ¶¶ 3-7.

March for Life and its employees hold firmly to the moral conviction—based on scientific and medical knowledge—that human life begins at conception and that every human embryo, small and fragile though he or she may be, is a human life worthy of our protection. March for Life therefore opposes the destruction of human life at any stage before birth, including by abortifacient methods that destroy life after it has been created. March for Life believes that the hormonal drugs and devices within HRSA's contraceptive coverage requirement are abortifacients because these drugs and treatments may prevent or dislodge the implantation of a human embryo after fertilization, thereby causing the embryo's death. Paying for coverage for these abortifacients (and for counseling in favor of the same) thus runs directly contrary to March for Life's very reason for being. March for Life cannot in good moral conscience comply with HRSA's contraceptive coverage requirement. *Id.* at ¶¶ 9-19; 82 Fed. Reg. 47,838, 47,847 (Oct. 13, 2017) (acknowledging this moral conviction).

Undeterred, the Plaintiff States would have this Court ignore the moral convictions of March for Life and other organizations like it in a headlong rush to cement the alien principle that the federal government is somehow legally bound to compel private parties to provide contraceptive coverage to their citizens. In so moving the Plaintiff States themselves ignore our Nation's preeminent concern for the "unalienable right" to conscience[3] and their very own laws, many of which provide protections for those who object to facilitating abortions and participating in other controversial procedures. In other words, the Plaintiff States curiously seek to deny through this litigation the very rights they grant to their citizens by virtue of state law. Thankfully, this Court need not place its imprimatur on the Plaintiff States' contradictory and destructive gambit. The law and the circumstances surrounding the implementation of the ACA and the preventive services requirement comfortably sustain the Final Rules.

[3] James Madison, *A Memorial and Remonstrance against Religious Assessments*, in Selected Writings of James Madison 21, 22 (Ralph Ketcham ed., Hackett Publishing Co., Inc. 2006).

At the threshold, the Plaintiff States have not alleged a legally cognizable injury. Congress delegated to HRSA broad authority to determine what "preventive care" should include. HRSA could elect not to require *any* contraceptive coverage if it saw fit. To the extent the Plaintiff States and some of their citizens may have enjoyed an indirect benefit for a time from federal regulatory largesse, they are not entitled to make that windfall permanent. The federal government owes them nothing, and its recent provision of moral and religious exemptions to a tiny subset of entities does not constitute an injury, much less one for which the Plaintiff States can recover anything. HRSA's decision to require contraceptive coverage did not create a guarantee or an entitlement. But even if the Plaintiff States could claim such an entitlement, they would still lack standing because they have failed to assert an actual, concrete injury. Instead, they have proffered nothing more than speculative chains of causation merely prophesying harm. Finally, even if the Plaintiff States had alleged concrete harms, they would be self-inflicted and therefore insufficient to confer Article III standing.

Meanwhile, the Departments' moral and religious exemptions solve real problems for real people. They ensure that no one will be forced to act against his or her beliefs. The religious exemption is actually required by the Religious Freedom Restoration Act (RFRA) and the First Amendment. And the moral exemption is strongly compelled by extant legal authority, including the Fifth Amendment's equal protection guarantee. The moral exemption is also entirely consistent with our foundational principles regarding conscience; our historical solicitude for ensuring conscientious objectors are protected; and myriad congressional enactments, federal regulations, and state laws protecting conscience in a variety of contexts. The fact that many of these conscience protections arose in the wake of *Roe v. Wade* makes protecting the right to conscience particularly compelling here, where much of the objection to the contraceptive coverage requirement centers on abortifacient drugs.

In sum, the Plaintiff States are not entitled to the declaratory and injunctive relief they seek. The Final Rules are consistent with the ACA, the APA, and the Constitution. For these reasons,

this Court should deny the Plaintiff States' Motion for Summary Judgment and grant March for Life's Motion to Dismiss, or in the alternative, grant March for Life's Motion for Summary Judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Affordable Care Act's "preventive care" requirement and the resulting agency-issued contraceptive coverage requirement

In March 2010, Congress passed the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010), collectively known as the Affordable Care Act. A provision of the ACA requires that any "group health plan" (including employers offering the plan) or "health insurance issuer offering group or individual health insurance coverage" must provide coverage, without any cost-sharing, for "preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" (HRSA). 42 U.S.C. § 300gg-13(a).

Congress did not specify in the ACA precisely what preventive services must be covered under this statutory provision. Rather, that task was left to HRSA, an agency within the Department of Health and Human Services (HHS). After Congress tasked HRSA with determining what preventive services must be covered under the ACA, HHS asked the Institute of Medicine (IOM) to "convene a diverse committee of experts in . . . women's health issues" and other related issues to "recommend services and screenings for HHS to consider." Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 1, 20-21 (2011), https://bit.ly/310tNNC; 77 Fed. Reg. 8,725, 8,726 (Feb. 15, 2012). The IOM eventually recommended that HHS define preventive services to include "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." Inst. of Med., *Clinical Preventive Services*, at 10.

On August 1, 2011, HRSA adopted the IOM's recommendations in full, defining preventive services for women to include "[a]ll Food and Drug Administration approved

contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA, *Women's Preventive Services Guidelines* (Aug. 1, 2011), https://bit.ly/2OHsmgH; *see* 77 Fed. Reg. at 8,725-26; 76 Fed. Reg. 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv). The Departments of Labor and Treasury did the same. 29 C.F.R. § 2590.715-2713(a)(1)(iv); 26 C.F.R. § 54.9815-2713(a)(1)(iv). The FDA's approved "contraceptive methods" include hormonal oral and implantable contraceptives, IUDs, and products categorized as "emergency contraception"—each of which March for Life believes can prevent the implantation of a newly conceived human embryo, thereby causing an abortion. Dkt. No. 87-1 at ¶ 14.

B. Exceptions to HRSA's contraceptive coverage requirement

On the same day HRSA issued its guidelines defining preventive services, the federal government promulgated another regulation exempting certain entities—mainly churches—that object to providing contraceptive coverage for their employees. 76 Fed. Reg. 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A)-(B). This new regulation granted HRSA "discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned." 76 Fed. Reg. at 46,623. By its terms, though, the regulation limits "religious employers" to churches and their integrated auxiliaries, conventions or associations of churches, and religious orders. *See id*. at 46,626; 45 C.F.R. § 147.131(a) (citing and incorporating 26 U.S.C. § 6033(a)(3)(A)(i), (iii)).

Separate and apart from this church exemption, the Departments also offered what they termed an "accommodation" for religious non-profits with religious objections to providing contraceptive coverage as part of their health care plans. *See* 78 Fed. Reg. 39,870, 39,874-82 (July 2, 2013). This accommodation required religious employers who were not covered by the exemption to execute a self-certification form and deliver it to their insurers or to third-party administrators (TPAs) (in the event they were self-insured), to avoid having to "contract, arrange, pay, or refer for contraceptive coverage." *Id*. at 39,874. This certification would then trigger

"payments for contraceptive services" from either the insurers or the TPAs. *See id*. at 39,876, 39,879. The Departments later amended this accommodation to allow covered employers to provide notice of their religious objection directly to HHS, rather than executing a self-certification form. *See* 80 Fed. Reg. 41,318, 41,322-23 (July 14, 2015). After *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), which held that RFRA prohibited the government from applying the contraceptive mandate to closely held, for-profit corporations with religious objections to providing contraceptive coverage, the Departments promulgated rules extending the accommodation to such entities. *See* 80 Fed. Reg. at 41,323-28.

In addition to the church exemption and the religious accommodation, the contraceptive mandate does not apply to a host of other employers and individuals. For instance, the ACA exempts grandfathered health plans from its preventive services requirement, meaning plans that have not made certain specified changes since the inception of the ACA do not have to provide coverage for preventive services. 42 U.S.C. § 18011. In 2018, some twenty percent of employers offered a grandfathered health plan. *See* Kaiser Family Found., *2018 Employer Health Benefits Survey* 209 (2018). The ACA also does not apply to employers with fewer than 50 employees, so these employers are not required to provide health insurance at all. 26 U.S.C. § 4980H(c)(2). This means that HRSA's contraceptive mandate already does not apply to tens of millions of individuals. *Hobby Lobby*, 573 U.S. at 700 (noting that "[o]ver one-third of the 149 million nonelderly people in America with employer-sponsored health plans were enrolled in grandfathered plans in 2013" and the "count for employees working for firms that do not have to provide insurance at all because they employ fewer than 50 employees is 34 million workers").

C. Prior litigation involving March for Life

To vindicate its right to operate in a manner consistent with its moral convictions, March for Life sued the federal government on July 7, 2014, eventually securing a permanent injunction barring the federal government from enforcing the contraceptive coverage requirement against it. The federal government then appealed. *March for Life v. Burwell*, 128 F. Supp. 3d 116 (D.D.C.

2015), appeal docketed, No. 15-5301 (D.C. Cir. Oct. 30, 2015). But in the wake of the IFRs at issue here, the federal government dismissed its appeal on September 5, 2018. Mtn. for Voluntary Dismissal, *March for Life v. Azar*, No. 15-5301 (D.C. Cir. Sept. 5, 2018), Doc. No. 1749057.

D. The Interim Final Rules providing for religious and moral exemptions

On May 4, 2017, the President issued his "Executive Order Promoting Free Speech and Religious Liberty." Exec. Order No. 13798, 82 Fed. Reg. 21,675 (May 4, 2017). This Order was concerned in part with "Conscience Protections with Respect to [the] Preventive-Care Mandate," and provided that "[t]he Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services shall consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate promulgated under section 300gg-13(a)(4) of title 42, United States Code." *Id*. Based on the guidance provided in the President's Order, and mindful that "multiple rounds of rulemaking" and years of protracted litigation had done little to resolve the religion- and conscience-based challenges to the contraceptive coverage requirement, the Departments issued two new IFRs in an effort to provide greater protections for moral and religious objectors. 82 Fed. Reg. 47,792, 47,799 (Oct. 13, 2017).

By creating exemptions for both moral and religious actors, the new IFRs sought to balance the rights of conscience and religious liberty with the contraceptive coverage requirement created by HRSA. *Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the ACA*, 82 Fed. Reg. 47,838 (Oct. 13, 2017); *Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the ACA*, 82 Fed. Reg. 47,792 (Oct. 13, 2017). The moral IFR created an exemption for entities like March for Life who "object to coverage of some or all contraceptives based on sincerely held moral convictions but not religious beliefs," and further made these "exempt entities eligible for [the] accommodation[]" as well. 82 Fed. Reg. at 47,844. Similarly, the religious IFR expanded the religious exemption to include all "non-governmental plan sponsors that object based on sincerely held religious beliefs, and institutions

of higher education in their arrangement of student health plans." 82 Fed. Reg. at 47,806. It also retained the "accommodation . . . as an optional process for exempt employers." *Id.*

The Departments explained that they created the moral exemption to bring HRSA's contraceptive coverage requirement "into conformity with Congress's long history of providing or supporting conscience protections in the regulation of sensitive health-care issues." 82 Fed. Reg. at 47,844. They also noted that our founding principles and the Supreme Court have expressed great solicitude for the right to conscience, and that myriad federal statutes, regulations, and state laws already provide such protections and have done so for decades. *Id*. at 47,845-48.

Consistent with their statutory authority to issue interim final rules, the Departments issued both IFRs without notice and comment. *Id*. at 47,840 (invoking 26 U.S.C. § 9833, 29 U.S.C. § 1191c, and 42 U.S.C. § 300gg-92). The Departments also relied on the good-cause exception to 5 U.S.C. § 553(d), concluding that "it would be impracticable and contrary to the public interest to engage in full notice and comment rulemaking before putting the[ ] interim final rules into effect, and that it [was] in the public interest to promulgate interim final rules." *Id*. at 47,856; *accord* 82 Fed. Reg. at 47,815 (same). In promulgating the IFRs the Departments provided notice and an opportunity for comment over a sixty-day period going forward. 82 Fed. Reg. at 47,792; 82 Fed. Reg. at 47,838.

E. Litigation over the Interim Final Rules

In response to these newly created and expanded exemptions, the State of California sued the Departments, alleging that they had violated the APA's public notice requirement in 5 U.S.C. § 553, the APA's prohibition on "abuse of discretion" in 5 U.S.C. § 706, the First Amendment's Establishment Clause, and the Fifth Amendment's equal protection principle. Dkt. No. 1. In a first amended complaint, New York, Maryland, Delaware, and Virginia joined as plaintiffs. Dkt. No. 24. The Plaintiff States then filed a motion for preliminary injunction asking this Court to bar the federal government from implementing the IFRs. Dkt. No. 28.

This Court subsequently granted the Plaintiff States a nationwide injunction as to the IFRs. Dkt. No. 105. Specifically, this Court held that venue was proper in the district, that the Plaintiff States had Article III standing, and that the Plaintiff States were likely to succeed on their procedural APA claim because the "highly-consequential IFRs were implemented without any prior notice or opportunity to comment." *Id*. at 2.

The federal government, Little Sisters of the Poor, and March for Life all appealed to the Ninth Circuit Court of Appeals.[4] Dkt. Nos. 135, 137, 142. That Court affirmed in part and reversed in part. *See California v. Azar*, 911 F.3d 558 (9th Cir. 2018). In its opinion explaining its decision, the Ninth Circuit held that venue was proper, the Plaintiff States had "standing to sue on their procedural APA claim," and the Departments "likely did not have good cause" or "statutory authority for bypassing notice and comment." *Id. at* 571, 578, 580. But the Ninth Circuit also held that the injunction's scope was too broad because "an injunction that applies only to the plaintiff states would provide complete relief to them." *Id*. at 584. Despite affirming as to venue, standing, and the procedural APA injury that the Plaintiff States had alleged, the Ninth Circuit reiterated that the "free exercise of religion and conscience is . . . fundamentally important," and that "[p]rotecting religious liberty and conscience is obviously in the public interest." *Id*. at 582.

F. Litigation over the Final Rules

After soliciting public comments, considering those comments, and making changes to the proposed rules based upon those comments, the Departments promulgated the Final Rules while the appeal over the Interim Final Rules was still pending. *See* 83 Fed. Reg. 57,592, 57,596 (Nov. 15, 2018) (moral exemptions); 83 Fed. Reg. 57,536, 57,539-40 (Nov. 15, 2018) (religious exemptions). Like the IFRs, the Final Rules provide moral and religious exemptions to HRSA's contraceptive coverage requirement. *See id*.

[4] Two weeks before the Court granted the injunction, March for Life filed a motion to intervene in this case, which the Court granted. Dkt. Nos. 87, 134. This Court also granted a motion to intervene filed by Little Sisters of the Poor. Dkt. Nos. 38, 115.

Before the Final Rules could take effect, the Plaintiff States filed a Second Amended Complaint—adding nine states as plaintiffs—seeking declaratory and injunctive relief as to the Final Rules.[5] A day after they filed that amended complaint, the Plaintiff States filed a motion for preliminary injunction seeking to bar implementation of the Final Rules. Dkt. No. 174. This Court granted that motion, but limited the scope of its injunction to the Plaintiff States. Dkt. No. 234 at 42-44. The Court concluded that the Plaintiff States were likely to succeed on their claim that the religious exemption is "not in accordance with" the ACA and therefore violates the APA because the contraceptive coverage requirement is "a statutory mandate" and because the "Religious Exemption likely is not required by RFRA." *Id*. at 21-31. The Court further held that the Plaintiff States were likely to succeed on their claim that the moral exemption is "not in accordance with" the ACA and therefore violates the APA because "Congress mandated the coverage that is the subject matter of this dispute" and because the moral exemption "is inconsistent with the language and purpose of the statute it purports to interpret." *Id*. at 38-39.

The federal government, Little Sisters of the Poor, and March for Life all appealed this Court's decision to the Ninth Circuit Court of Appeals. Dkt. Nos. 235, 255, 263. The parties have filed their briefs, and oral argument has been scheduled for June 6, 2019. Order, *California v. Azar*, No. 19-15072 (9th Cir. Apr. 23, 2019).

LEGAL STANDARD

March for Life moves to dismiss the Plaintiff States' and the State of Oregon's complaints under Federal Rule of Civil Procedure 12(b)(1) because the Plaintiff States lack Article III standing. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) (holding that "lack of *Article III* standing requires dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)"). March for Life also moves to dismiss both complaints under Rule

[5] Plaintiff-Intervenor Oregon successfully moved to intervene weeks after the Second Amended Complaint had been filed. Dkt. Nos. 210, 274. In the interest of brevity, March for Life refers to the Plaintiff States and Plaintiff-Intervenor Oregon collectively as the "Plaintiff States."

12(b)(6) because the Plaintiff States have failed to state a claim upon which relief can be granted. Under Rule 12(b)(6), "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

If this Court determines that it must consider the administrative record to resolve this matter, March for Life moves in the alternative for summary judgment under Federal Rule of Civil Procedure 56. A party is entitled to summary judgment where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ARGUMENT

I. The Plaintiff States lack standing.

The Supreme Court's Article III standing doctrine has three requirements:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (cleaned up).[6] A plaintiff must support "[e]ach element of standing . . . 'with the manner and degree of evidence required at the successive stages of the litigation.'" *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (*quoting Defs. of Wildlife*, 504 U.S. at 561).

Both this Court and the Ninth Circuit previously held that the Plaintiff States had standing to challenge the IFRs under the theory that the Plaintiff States had "established a procedural

[6] This brief uses "(cleaned up)" to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *E.g.*, *United States v. Reyes*, 866 F.3d 316, 321 (5th Cir. 2017).

injury," namely that they had been "denied notice and opportunity to comment on the IFRs prior to their effective date." *Azar*, 911 F.3d at 571, 573. Under that theory, the States could establish standing merely by showing 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).

Importantly, the "causation and redressability requirements are relaxed once a plaintiff has established a procedural injury." *Id*. at 573 (cleaned up); *see also Defs. of Wildlife*, 504 U.S. at 572 n.7 (stating that "procedural rights" are "special" and do not require "meeting all the normal standards for redressability and immediacy"). But because the Plaintiff States cannot state a plausible claim that they suffered any procedural injury under the Final Rules,[7] the lower "reasonable probability" standard and the "relaxed" "causation and redressability requirements" do not apply here. *Azar*, 911 F.3d at 571, 573. This Court must therefore determine anew whether the Plaintiff States have standing to challenge the Final Rules. *See City of Los Angeles v. Cty. of Kern*, 581 F.3d 841, 845 (9th Cir. 2009) (holding that "a court can, and indeed must, resolve any doubts about this constitutional issue sua sponte," and noting that standing "cannot be waived by any party").

The Plaintiff States allege and argue that the Final Rules and the process by which the Departments adopted them inflict injuries to their state fiscs and to their citizens as well. *See, e.g.*, Dkt. No. 170 at 5-9, 60-61; Dkt. No. 311 at 13-14, 35-36, 43, 50-51. But the Plaintiff States have not suffered any legally cognizable injury. Moreover, they have proffered nothing more than

[7] 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 Moral IFC . . . the Departments received over 54,000 public comment submissions"); *see also* 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").

speculative, attenuated harms insufficient to confer Article III standing. Even if those harms were more concrete, they would be self-inflicted. Finally, the Plaintiff States lack standing to bring claims sounding in the Establishment Clause or Equal Protection. Accordingly, the Plaintiff States lack standing to challenge the Final Rules, and this Court should dismiss.

A. Under the ACA, the Departments had the discretion to decide whether to require employers to provide contraceptive coverage, and the Plaintiff States have failed to assert a legally cognizable injury stemming from the Departments' further exercise of that discretion to provide moral and religious exemptions.

The federal government is not obligated to require contraceptive coverage under the plain text of the ACA. So even assuming without conceding that the Departments' decision to exempt certain employers from providing such coverage somehow impacts the Plaintiff States' respective fiscs, any such impact is not a legally cognizable injury. The Plaintiff States can cite to no authority for the proposition that the Departments are required to insulate the Plaintiff States from any and all economic impact resulting from the Departments' discretionary decisions in the absence of some legal right that has been infringed.

The Plaintiff States argue that the "ACA requires coverage of . . . contraceptives." Dkt. No. 311 at 3. Not so. Congress did not require contraceptive coverage as part of the ACA—it merely delegated to HRSA the discretion to decide what would constitute the full measure of "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4); *accord* 83 Fed. Reg. at 57,606 (pointing out that the contraceptive mandate "is not an explicit statutory requirement"). That distinction is crucial—given that the Departments were free to decide not to require contraceptive coverage at all, the Plaintiff States can hardly complain that the Departments' provision of expanded exemptions to the voluntary regime the Departments created constitutes an injury requiring a judicial remedy. *Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 579 (2012) (cleaned up) ("Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds. In the typical case we look to the States to defend their prerogatives by adopting the simple expedient of not yielding to federal blandishments when they

do not want to embrace the federal policies as their own. The States are separate and independent sovereigns. Sometimes they have to act like it."). As the Departments correctly note in the Final Rules' preamble, "[u]ntil 2012, there was no federal mandate of contraceptive coverage across health insurance and health plans nationwide." 83 Fed. Reg. at 57,607. "The ACA did not require a contraceptive Mandate, and its discretionary creation by means of HRSA's Guidelines does not translate to a benefit that the federal government owes to state or local governments." *Id.* There is no legal injury to the Plaintiff States when the federal government ends a program that has the indirect benefit of saving them from spending their own money. *See* § I(D) below. This means the Plaintiff States lack standing.[8]

B. The Plaintiff States allege only speculative harm, and speculative harm is never enough to establish an injury in fact.

The Plaintiff States speculate that the Final Rules will ultimately cost them money once an attenuated chain of causation reaches its terminus. That chain goes something like this: large numbers of previously exemption-ineligible plan sponsors will invoke the newly available exemptions; the beneficiaries of these plans will still clamor for government-paid-for contraceptives and abortifacients; the Final Rules will force large numbers of plan beneficiaries to turn to state governments for this freebie; the Plaintiff States will therefore face increased demand

[8] Moreover, the Plaintiff States' asseverations of harm are belied by their acquiescence—for years—to the Departments' discretionary exemption for churches and their integrated auxiliaries, along with the congressional carve-out for myriad grandfathered plans. These longstanding exemptions impact tens of millions of women—far more than the Departments have estimated may be impacted by the new moral and religious exemptions. 83 Fed. Reg. at 57,562 ("The ACA did not apply the preventive services mandate to the many grandfathered health plans among closely held as well as publicly traded for-profit entities, encompassing tens of millions of women. . . . [W]e are not aware of evidence showing that the expanded exemptions finalized here will impact such a large number of women."). Yet the Plaintiff States did not challenge those exemptions—and in fact many provided religious exemptions to their own contraceptive mandates where they existed—presumably for reasons similar to those advanced by the Departments. This Court should thus look with a jaundiced eye upon the harms predicted by the Plaintiff States as arising from the Final Rules.

and will have to react by spending money; additionally, some women will use less effective forms of contraception or forego them entirely, which will increase unintended pregnancies; the unintended nature of these pregnancies will cause adverse health effects; and the Plaintiff States will have to respond to additional citizens' demands for health services by spending even more money than they currently spend.

On its face, this hypothetical chain of causation is plainly inadequate to establish Article III standing. Indeed, it is the very definition of a "conjectural or hypothetical" injury consistently found wanting by the Supreme Court. *Lujan*, 504 U.S. at 560; *see also Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1233–34 (10th Cir. 2012) (holding that "[r]ecord facts consisting of conclusory statements and speculative economic data [were] insufficient" to show an injury in fact). Tellingly, the Plaintiff States have not identified a single employer who intends to invoke the religious or moral exemption and is not already protected by extant exemptions or court injunctions. Nor have they found any individuals who stand to lose coverage under any plan sponsor's decision to take advantage of the new exemptions. This failure persists even though the Plaintiff States had an opportunity to submit a comment to the Departments substantiating their alleged harms, *see supra* n. 7, and despite the fact that the ranks of the Plaintiff States have now swelled to 15 over the last year and a half of this litigation.[9] The Plaintiff States have alleged no actual injury that is imminent, and therefore they do not have standing.

C. The Plaintiff States' conjectural harms would be self-inflicted, and self-inflicted harms do not confer standing either.

The Plaintiff States' speculation that they will incur additional costs because of the Final Rules is also insufficient to establish standing because any such alleged injuries—even if they were to materialize—would be entirely self-inflicted. The Plaintiff States chose to allocate state resources to the family planning programs that they claim they will have to tap into to a greater

[9] This tally includes Intervenor-Plaintiff Oregon and counts the District of Columbia as a state.

extent as a result of the Final Rules. These alleged economic harms are based on assumptions about an increase in the use of programs whose eligibility requirements the Plaintiff States set, and where the funding is determined by state budgets and taxes. *See* Dkt. No. 170 at ¶ 29 (alleging that "[t]he States will suffer concrete and substantial harm because they will incur increased costs of providing contraceptive coverage to many of the women who stand to lose coverage through the Exemption Rules, as well as increased costs associated with resulting unintended pregnancies and the related attendant harms"); Dkt. No. 174 at 22-23 (detailing predicted increased costs to Plaintiff States through impact on state programs).

But such self-inflicted injuries do not confer standing. *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam) (holding that self-inflicted injuries could not establish standing where plaintiff state governments' own legislative decisions caused the fiscal harm at issue); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (determining that plaintiffs' costs undertaken to avoid surveillance under challenged statute were self-inflicted harms, and concluding that "respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending").

Tellingly, a majority of the Plaintiff States agreed that self-inflicted harm does not confer standing when they were amici in another case, arguing that such harm could not form the basis for a preliminary injunction, and could "not justify using the federal courts to achieve a political victory that Plaintiffs could not achieve through the political process." Amicus Br. of the States of Washington, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maryland, Massachusetts, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and the District Of Columbia in Support of Petitioners 8-9, *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), as revised (Nov. 25, 2015) (No. 15-674), 2015 WL 8138323 (arguing states are not harmed by federal action regarding aliens that may result in increased costs for voluntary subsidies the state provides). The same limitation that the state vociferously contended for there applies here.

The Plaintiff States chose to enact programs that may be impacted in some way as a result of the Final Rules. Those choices do not create injuries sufficient to confer Article III standing. As the Plaintiff States noted in their amicus brief in Texas, parties should not get to petition federal courts for their failures in the political arena. They can only do so if they can show actual, concrete injuries, which they have failed to do.

Of course, the Plaintiff States are free to narrow their own programs to decrease costs, or to expand them to cover anyone who does not already qualify for the program, if they deem that a worthy expenditure (in which case they can also conceivably increase state revenue by raising taxes or reducing expenditures elsewhere). But the amount the Plaintiff States choose to spend on contraceptives is discretionary. And they cannot use the courts to interfere with the Departments' considered decision to no longer "require private parties to provide coverage to which they morally object." 83 Fed. Reg. at 57,606. Having no injury, the States have no ground to complain that they will no longer "receiv[e] [the] indirect benefits" which flowed from the previous arrangement before the arrival of the moral and religious exemptions. *Id*. at 57,607.

D. The Plaintiff States' interest in the health and well-being of their citizens cannot form the basis for standing in a suit against the federal government.

The Plaintiff States cannot remedy their failure to posit an actual injury by falling back on their interests in the health and well-being of their citizens. "A State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 610 n.16 (1982). *See also Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923) ("It cannot be conceded that a state, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof."); *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990) (recognizing Supreme Court rule). This is because "the citizens of [the Plaintiff States] are also citizens of the United States." *Mellon*, 262 U.S. at 485. As a result, the Plaintiff States have no "duty or power to enforce their [citizens'] rights in respect of their relations with the federal government." *Id.* at 486. Instead, "[i]n

that field it is the United States, and not the [Plaintiff States], which represents them as parens patriae, when such representation becomes appropriate." *Id.* Accordingly, the Plaintiff States' citizens must look to the federal government, and not to the Plaintiff States, "for such protective measures as flow from [the federal government's] status" as *parens patriae*.[10] And the Plaintiff States cannot establish Article III standing on these grounds.

E. The Plaintiff States cannot bring Establishment Clause or Equal Protection claims.

The Plaintiff States cite no authority in support of the proposition that a state can sue the federal government for an alleged Establishment Clause violation. That is not surprising, as the states cannot suffer "spiritual or psychological harm," be "stigmatized" because of their religion, or be the subject of a "government message of disapproval." *See Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1050-53 (9th Cir. 2010). Nor can the Plaintiff States bring an Equal Protection challenge to the Final Rules. They are not "person[s]" under the Due Process Clause of the Fifth Amendment. *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966) ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union . . . ."); *see also United States v. Thoms*, 684 F.3d 893, 899 n.4 (9th Cir. 2012) (same).

Accordingly, because the Plaintiff States lack Article III standing, this Court should dismiss their complaints in their entirety for lack of subject matter jurisdiction.

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[10] The Supreme Court appears to have recognized a limited exception to this rule in cases "involving the abatement of public nuisances," such as the Environmental Protection Agency's failure to regulate "the emission of greenhouse gasses" at issue in *Massachusetts v. E.P.A.*, 549 U.S. 497, 520 (2007). *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 970, 974 (9th Cir. 2009). This case does not involve any such alleged public nuisance. So the normal rule prohibiting state *parens patriae* actions against the federal government applies.

II. The Final Rules are valid under the APA because they are in accord with the law and do not exceed statutory authority.

The Plaintiff States urge this Court to hold that the Final Rules are unlawful and must be set aside under 5 U.S.C. § 706(2)(A) "because they are 'not in accordance with the law' and are 'in excess of statutory jurisdiction.'" Dkt. No. 311 at 15. More specifically, the Plaintiff States contend that the Final Rules run afoul of the Women's Health Amendment and the ACA more broadly. The Plaintiff States are mistaken. The ACA does not require employers to provide contraceptive coverage for their employees. And the Departments possess the discretionary authority to issue exemptions to the preventive services requirement.

A. The ACA does not require contraceptive coverage, nor does it foreclose the creation of certain exemptions to the discretionary requirement created by HRSA.

The Plaintiff States contend that the contraceptive coverage requirement created by HRSA is actually a statutory mandate instituted by Congress which renders nugatory the moral and religious exemptions created by the Departments. *See* Dkt. No. 311 at 16. But the text of the ACA and the history of its implementation prove that the opposite is true.

1. The ACA's text confirms that Congress did not require contraceptive coverage through the Women's Health Amendment.

Congress did not mandate contraceptive coverage when it passed the ACA and required coverage for preventive services without cost-sharing. It expressly left the specifics of determining how to advance that directive to the Departments. *See, e.g.*, 83 Fed. Reg. at 57,606. ("The ACA did not impose a contraceptive coverage requirement. Agency discretion was exercised to include contraceptives in the Guidelines issued under section 2713(a)(4)."); *id*. (stating that the "Mandate is not an explicit statutory requirement"). To that end, Congress provided the following:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not

> impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings not described in paragraph (1) 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). Congress granted HRSA the authority and discretion to create "comprehensive guidelines." *Id.* HRSA ultimately decided—in the exercise of that discretion—to include contraceptives as part of "preventive care." *Id.* But neither the Women's Health Amendment nor the ACA itself would have been offended—and still would not be offended—if HRSA opted not to include any contraceptives on that list.

Against this backdrop, the Plaintiff States mistakenly insist that the Women's Health Amendment constitutes a statutory imperative. But that's not what the statutory text says. Congress could have said "contraceptive coverage shall be provided," but it didn't. Congress did, however, specify in other sections of the ACA precisely what was to be included as part of preventive services in other, unrelated contexts. *See, e.g.*, 42 U.S.C. § 300gg-13(a)(1) (requiring preventive-services coverage based upon "current recommendations of the United States Preventive Services Task Force"); 42 U.S.C. § 300gg-13(a)(2) (requiring coverage for "immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved").

The crucial distinction between the way Congress provided guidance—in the same statute—as to these categories, on the one hand, and as to women's preventive care (in § 300gg-13(a)(4)), on the other, shows that the "contraceptive mandate" is not the statutory command that the Plaintiff States claim it to be. *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) (stating that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"). To the contrary, and as confirmed by the Supreme Court, the contraceptive coverage requirement is a result of *regulations* promulgated by the Departments. *Zubik v. Burwell*, 136 S. Ct. 1557, 1559, (2016) (per curiam) ("Federal regulations require

petitioners to cover certain contraceptives as part of their health plans . . ."); *Hobby Lobby*, 573 U.S. at 697 ("Congress itself . . . did not specify what types of preventive care must be covered" under the "preventive care and screenings" requirement, but rather "authorized the Health Resources and Services Administration (HRSA), a component of HHS, to make that important and sensitive decision."); *see also California v. Azar*, 911 F.3d 558, 566 (9th Cir. 2018) (noting that "HRSA established guidelines for women's preventive services" and further noting that the "three agencies responsible for implementing the ACA—the Department of Health and Human Services, the Department of Labor, and the Department of the Treasury . . . issued regulations requiring coverage of all preventive services contained in HRSA's guidelines"). Those regulations permit the Departments and by extension HRSA to determine not only *what* preventive care must be covered, but also *who* is required to provide such coverage.

2. Longstanding exemptions and accommodations confirm that the ACA permits regulatory exceptions.

The ACA itself provides for exemptions to the otherwise operative preventive services requirements. For instance, employers providing "grandfathered health plans"—plans which have not made certain specified changes since the inception of the ACA—are not subject to the contraceptive coverage requirement. *See* 42 U.S.C. § 18011. And employers with fewer than 50 employees are not required to provide health insurance at all. *See* 26 U.S.C. § 4980H(c)(2). This means that the preventive services requirement does not apply to tens of millions of individuals. *Hobby Lobby*, 573 U.S. at 700.

In addition, the Departments granted HRSA "discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned." 76 Fed. Reg. at 46,623. The exercise of this discretion resulted in the "church exemption." *Id.* at 46,626. This exemption was then slightly modified and expanded. 77 Fed. Reg. 8,725 (Feb. 15, 2012) (final rules). For those not covered by the narrowly defined church exemption, the Departments offered an accommodation for religious non-profits with religious objections to paying for contraceptive

coverage. 78 Fed. Reg. at 39,874-82. The Departments later modified this accommodation to allow covered employers to provide notice of their religious objection directly to HHS, rather than executing a self-certification form. 80 Fed. Reg. at 41,322-23. Further adjustments were made to the accommodation after the Supreme Court's decision in *Hobby Lobby*. 80 Fed. Reg. at 41,323-28.

Taken together with the ACA's text, the history of these practical and continuing adjustments as to *who* was to be covered by the contraceptive mandate demonstrates that the contraceptive coverage requirement has always admitted of exceptions.[11] The Plaintiff States thus 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 to accommodate religious non-profits back then, and it equally has the discretion to exempt moral and religious objectors now.[12] Any other conclusion flies in the face of the ACA's text and its historical implementation. Put simply, the Final Rules represent a predictable development of what came before in terms of the exemptions and accommodations instituted by the Departments to balance the equities regarding contraceptive coverage and religious freedom. As such they are in accord with the ACA and therefore do not violate the APA.

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[11] If this were not true, it is difficult to see how the agency's decision to cover contraceptives in the first instance, its decision to exempt churches, or its decision to accommodate religious objectors can survive.

[12] Moreover, the potential numerical impact of the Final Rules is miniscule compared to the exemptions passed by Congress itself. *See supra* at 6; *compare* 83 Fed. Reg. at 57,625-28 (estimating that the moral exemption will be used by "nine nonprofit entities," no "institutions of higher education," and "nine for-profit entities," for a total economic impact as to the last category of $8,760 nationwide); 83 Fed. Reg. at 57,550 (estimating that the religious exemption "will affect no more than 126,400 women of childbearing age who use contraceptives covered by the Guidelines," which "constitutes less than 0.1% of all women in the United States"), with *Hobby Lobby*, 573 U.S. at 700 ("All told, the contraceptive mandate presently does not apply to tens of millions of people.") (cleaned up).

B. The Moral Exemption constitutes a lawful exercise of the Departments' discretion to create exceptions to the discretionary contraceptive coverage requirement created by HRSA.[13]

The Plaintiff States contend that the moral exemption must be set aside because "Defendants do not point to a specific congressional enactment authorizing it" and because Congress opted not to include "a conscience amendment to the Women's Health Amendment." Dkt. No. 311 at 35. Neither of these arguments is availing.

1. The Moral Exemption accords with the ACA's text, the Departments' administration of the ACA, and the directives of successive executive administrations.

As already established, from the ACA's very inception HRSA has determined *what* the "comprehensive guidelines" would comprise and *who* would be bound by them, administering and managing an ongoing exemption and accommodation regime. *See supra* at 5-6. The same discretion that allowed HRSA to place contraceptive coverage in the preventive services basket—and to carve out certain exceptions to that discretionary choice—authorizes the Departments to create the moral exemption that the Plaintiff States challenge here.

Not only is the moral exemption permitted by the text of the ACA, it also is consistent with presidential executive orders, both past and present, directing the Departments regarding the ACA's implementation. Executive Order 13535, signed by President Obama in 2010, provides support for the right to conscience and provides that under the ACA, "longstanding Federal laws to protect conscience (such as the Church Amendment, 42 U.S.C. 300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8) remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions." *Ensuring Enforcement and*

[13] March for Life does not address the RFRA issue because it is not a religious organization. March for Life does, however, concur with the RFRA analysis of the Departments and The Little Sisters of the Poor and hereby incorporates their arguments in defense of the religious exemption more broadly as its own.

Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act, 75 Fed. Reg. 15,599, 15,599 (Mar. 24, 2010).

Similarly, Executive Order 13798, signed by President Trump in 2017, expressly orders the Departments to "consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate promulgated under section 300gg-13(a)(4) of title 42, United States Code." *Promoting Free Speech and Religious Liberty*, 82 Fed. Reg. 21,675, 21,675 (May 4, 2017). These orders constitute the exercise of the Presidents' authority to establish and direct executive policy. As such, the Departments were required to take heed of them, and they ultimately did so in creating the moral exemption. *See Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012) (holding that an agency "under the direction of the executive branch" "may not simply disregard an Executive Order" but rather "must implement the President's policy directives to the extent permitted by law").

2. The Moral Exemption is supported by our founding principles, congressional enactments, federal regulations, court precedents, and state laws and regulations.

a. Founding principles and practices

The right to conscience was central to the founding of the Republic. James Madison deemed it "the most sacred of all property."[14] Thomas Jefferson concurred, stating that conscience "could not [be] submit[ted]" to governmental oversight or authority,[15] and that no law "ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority."[16] George Washington wrote that "the Conscientious scruples of all men should be treated with great delicacy and tenderness."[17]

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[14] Madison, *Property*, in Selected Writings of James Madison, 222-23 (Ralph Ketcham ed., Hackett Publishing Co., Inc. 2006).
[15] Thomas Jefferson, *Notes On the State Of Virginia* 169 (1782).
[16] Thomas Jefferson, *To The Society of the Methodist Episcopal Church at New London, Connecticut (Feb. 4, 1809)*, in 8 The Works of Thomas Jefferson 147 (H.A. Washington ed., 1884).
[17] George Washington, *From George Washington to the Society of Quakers, 13 October 1789*, National Archives-Founders Online, https://bit.ly/2tEzjGq.

Protecting the right to "conscience was one of the essential purposes for the founding of the United States of America," "one of the great motivations for the drafting of the Bill of Rights," and an "indispensable part of the core of our constitution" Lynn D. Wardle, *Conscience Exemptions*, 14 Engage: J. Federalist Soc'y Prac. Groups 77, 78 (2013). In fact, the effort to protect the right to conscience "was indispensable to the success of the great American experiment in popular self-government." *Id*. at 79.

This concern for keeping the right to conscience inviolate has persisted for centuries. Consider conscientious objection to war.[18] As Justice Harlan stated in his *Welsh v. United States* concurrence, the "policy of exempting religious conscientious objectors is one of longstanding tradition in this country and accords recognition to what is, in a diverse and open society, the important value of reconciling individuality of belief with practical exigencies whenever possible." 398 U.S. 333, 365–66 (1970). That policy "dates back to colonial times." *Id*. at 366. Indeed, save for Georgia, every one of the original 13 colonies enacted exemptions for such objectors. *The New Conscientious Objection: From Sacred to Secular Resistance* 26 (Charles C. Moskos & John Whiteclay Chambers eds., 1993). President Madison in 1816 pardoned seven Maryland Quakers whom a local sheriff imprisoned for failing to pay fines related to military commutation. James S. Kabala, *Church-State Relations in the Early American Republic, 1787-1846* (2013). And in World War II, some 25,000 objectors were granted noncombat military service, while some 12,000 objectors entered the Civil Public Service, as their beliefs did not permit them to serve in a military capacity. Cynthia Eller, *Conscientious Objectors and The Second World War: Moral and Religious Arguments in Support of Pacifism* 66, 69 (1991).

Our national policy continues to support the balancing of national need with the right to conscience. *E.g.*, *Conscientious Objection and Alternative Service*, Selective Service System,

[18] *See generally* Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121, 130-36 (2012) (outlining the history of military conscription and our historical approach to conscientious objection).

https://bit.ly/2T0ZW7o (last visited May 30, 2019) (providing that "[b]eliefs which qualify a registrant for CO status may be religious, . . . moral or ethical [in nature]," and that the "person who is opposed to any form of military service will be assigned to alternative service," while the "person whose beliefs allow him to serve in the military but in a noncombatant capacity will serve in the Armed Forces but will not be assigned training or duties that include using weapons").

We are a nation that still "respects people's committed search for a way of life according to their consciences." Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* 2 (2008). And that respect entails an understanding "that liberty of conscience is worth nothing if it is not equal liberty." *Id.* The 20th-century American moral and political philosopher John Rawls deemed the "question of equal liberty of conscience" a "settled" matter and conceived of this equality as "one of the fixed points of our considered judgments of justice." John Rawls, *A Theory of Justice* 206 (1971).

Given the historical pedigree of the right to conscience and its continuing vitality today, the Final Rules' moral exemption represents merely one more example of our national commitment to self-determination and equality of thought and belief. Indeed, the moral exemption acknowledges that the right to conscience is a "fundamental purpose[]" and an "essential requirement[]" of our republican form of government. Wardle, *Conscience Exemptions* at 78.

b. Congressional enactments

Congress has considered and enacted myriad measures to protect the right to conscience over the years. These congressional protections bolster the conclusion that the Departments acted lawfully in promulgating the moral exemption.

For instance, Congress addressed the issue of conscience just weeks after the Supreme Court announced a right to elective abortion in *Roe v. Wade*, 410 U.S. 113 (1973). The Church Amendment to the Public Health Service Act (named after its sponsor, Senator Frank Church (D-Idaho)) provides a wide range of protections to healthcare professionals—including doctors, nurses, midwives, and other personnel, plus hospitals. 42 U.S.C. § 300a-7. These protections apply

to entities that receive certain federal health-related funds, and they prohibit those entities from discriminating against healthcare personnel because they refuse—for religious *or* moral reasons—to assist in the performance of abortions or sterilizations. The protections are framed broadly as non-discrimination provisions, which Congress has labeled as protecting "individual rights." Pub. L. No. 93-348, § 214, 88 Stat. 342 (1974). Notably, the rights of all individuals when it comes to abortion are protected—whether a medical practitioner chooses to perform them or not.

In 1995, when the Accreditation Council for Graduate Medical Education mandated abortion training in all obstetrics and gynecology residency programs,[19] Congress passed what is known as the Coats-Snowe Amendment. 42 U.S.C. § 238n. This amendment broadly protects any health care entity or individual physician from being forced to perform, refer for, or even make arrangements to refer for an abortion. It applies to any government entity—federal, state, or local—that receives any federal financial assistance. The law is notable for the particular protections it adds for medical schools, residency programs, and medical residents, in that it prevents medical schools from having to provide training for abortion and prevents medical students from having to participate in such training. *See id*.

The most recent federal conscience protection, the Weldon Amendment, has been part of every appropriations act that Congress has passed since 2004. It prohibits 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. *E.g.*, *Consolidated and Further Continuing Appropriations Act, 2015*, Pub. L. No. 113-235, § 507(d), 128 Stat. 2130, 2515 (2014). The Amendment is subject to annual renewal and has survived multiple legal challenges.

[19] *See* Kristina Tocce, M.D., M.P.H., & Britt Severson, M.P.H., *Funding for Abortion Training in Ob/Gyn Residency*, AMA Journal of Ethics, (Feb. 2012), https://bit.ly/2TeCTW9 (last visited May 30, 2019).

A number of other federal statutory conscience protections bear mentioning. The Danforth Amendment, enacted in 1988, ensures that Title IX of the Education Amendments Act of 1972 cannot be construed to "require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion." 20 U.S.C. § 1688. The Federal Employees Health Benefits Acquisition Regulation ensures that "[p]roviders, health care workers, or health plan sponsoring organizations are not required to discuss treatment options that they would not ordinarily discuss in their customary course of practice because such options are inconsistent with their professional judgment or ethical, moral or religious beliefs." 48 C.F.R. § 1609.7001(c)(7). The Legal Services Corporation Act provides that funds for legal services may not be used "with respect to any proceeding or litigation which seeks to procure a nontherapeutic abortion or to compel any individual or institution to perform an abortion, or assist in the performance of an abortion, or provide facilities for the performance of an abortion, contrary to the religious beliefs or moral convictions of such individual or institution." 42 U.S.C. § 2996f(b)(8). And the Federal Death Penalty Act of 1994 protects the "moral or religious convictions" of persons who object to participating in capital prosecutions or federal executions. 18 U.S.C. § 3597(b).

The ACA itself provides conscience protections, prohibiting the recipient of federal funds under the act from discriminating "on the basis that [a health care] 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." 42 U.S.C. § 18113.

Congress has also acted to provide specific conscience protections in the provision of contraceptives. For example, Congress prohibited health plans participating in the federal employees' benefits program from discriminating against individuals who refuse to prescribe contraceptives. *Consolidated Appropriations Resolution, 2003*, Pub. L. No. 108-7, §635(c), 117 Stat. 11, 472 (2003). And

> Congress expressed its intent on the matter of Government-mandated contraceptive coverage when it declared, with respect to the possibility that the District of Columbia would require contraceptive coverage, that "it is the intent of Congress that any legislation enacted on such issue should include a 'conscience clause' which provides exceptions for religious beliefs and moral convictions." Consolidated Appropriations Act, 2018, Div. E, section 808, Public Law 115-141, 132 Stat. 348, 603 (Mar. 23, 2018); see also Consolidated Appropriations Act, 2017, Div. C, section 808, Public Law 115-31 (May 5, 2017).

83 Fed. Reg. at 57,598-99. Thus "Congress's most recent statements on the prospect of Government-mandated contraceptive coverage specifically intend that a conscience clause be included to protect moral convictions." *Id*. at 57,599.

In sum, these laws and enactments highlight Congress's commitment to protecting individuals and employers from having to cede their right to conscience to other obligations claimed as somehow more imperative, especially in the context of abortion and contraception. These considered measures also demonstrate that the Final Rules' moral exemption is not some radical departure from the norm, but rather a consistent development of our longstanding national practice of respecting and protecting the right to conscience.

c. Federal regulations

Federal agencies and departments have acted to protect conscience as well. *See generally* 83 Fed. Reg. at 57,601. For instance, the general Medicare Advantage rule "does not require the MA plan to cover, furnish, or pay for a particular counseling or referral service if the MA organization that offers the plan . . . [o]bjects to the provision of that service on moral or religious grounds." 42 C.F.R. § 422.206(b)(1). Otherwise applicable information-furnishing requirements do not apply "if the [organization or plan] objects to the service on moral or religious grounds." 42 C.F.R. § 438.102(a)(2). "[H]ealth plan sponsoring organizations are not required to discuss treatment options that they would not ordinarily discuss in their customary course of practice because such options are inconsistent with their professional judgment or ethical, moral or religious beliefs." 48 C.F.R. § 1609.7001(c)(7). And 48 C.F.R. § 352.270-9 contains a "Non-Discrimination for Conscience" clause for organizations receiving HIV or malaria relief funds.

"Other federal regulations have also applied the principle of respecting moral convictions alongside religious beliefs in particular circumstances." 83 Fed. Reg. at 57,601. For instance, when the question arises whether a practice or belief is religious, the Equal Employment Opportunity Commission "define[s] religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views," consistent with the "standard . . . developed in *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970)." 29 C.F.R. § 1605.1. Likewise, the Department of Justice provides that "[n]o officer or employee [of the department] shall be required to be in attendance at or to participate in any execution if such attendance or participation is contrary to the moral or religious convictions of the officer or employee . . . ." 28 C.F.R. § 26.5.

These regulatory protections for conscience are consistent with the statutory protections passed by Congress. As the Final Rules demonstrate, the Departments have long been cognizant of the distinction between congressional lawmaking and agency regulation, and they decided that the discretion Congress granted them, along with the congressional and regulatory practice of protecting conscience over time, support the moral exemption. 83 Fed. Reg. at 57,601-02. The distinction drawn by the Plaintiff States between congressional statutes and agency regulations is thus immaterial.

d. Judicial precedents

Roe v. Wade, which for the first time announced a right to elective abortion, was nonetheless "decided in the context of and with the explicit judicial acknowledgement of strong existing official professional protection for rights of conscience of health-care providers." Lynn D. Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 Ave Maria L. Rev. 1, 22 (2010). Indeed, "[t]he actual holdings of *Roe* . . . far from authorizing a woman to co-opt a physician into aborting her baby, focuses on the physician's freedom of self-determination." M. Casey Mattox & Matthew S. Bowman, *Your Conscience, Your*

Right: A History of Efforts to Violate Pro-Life Medical Conscience, and the Laws That Stand in the Way 189-90, The Linacre Quarterly 77(2) (May 2010).

The *Roe* Court saw fit to cite the AMA's resolution to the effect that "[n]either physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles." 410 U.S. at 143 n.38. In *Doe v. Bolton*, 410 U.S. 179 (1973), *Roe*'s companion case, "the constitutionality of statutory protection for rights of conscience of health-care providers was challenged, noted, and explicitly upheld." Wardle, *Present, Past, and Future*, 9 Ave Maria L. Rev. at 16. The *Doe* Court unanimously affirmed the portion of the Georgia abortion law under review that ensured that "a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure," a provision the Court characterized as "afford[ing] appropriate protection" for individuals and institutions alike. 410 U.S. at 197–98.

So, "at the same time the Court was legalizing abortion, the Court itself recognized the potential clash between its decision and the consciences of those to whom abortion was repugnant, and expressly recognized . . . the constitutionality of statutory measures designed to protect the right of conscience." Francis J. Manion, *Protecting Conscience Through Litigation: Lessons Learned in the Land of Blagojevich*, 24 Regent U. L. Rev. 369, 370 (2012). These precedents provide sturdy support for the moral exemption, as do many others. *E.g.*, *United States v. Seeger*, 380 U.S. 163, 178-79 (1965) (holding that conscientious objector status included moral as well as religious objections); *Welsh v. United States*, 398 U.S. 333, 343 (1970) (same); *Gillette v. United States*, 401 U.S. 437, 445 (1971) (same). These cases—drawn from the abortion context most pertinent to the challenged Final Rules and from the national security context—illustrate that conscience can be protected even where controversy reigns, and even where the government interest is at its apogee.

e. State laws and regulations

State laws and regulations concerning conscience also buttress the Departments' decision to create the moral exemption. According to the Guttmacher Institute, some forty-six states protect healthcare practitioners who refuse to perform abortions; eighteen states protect healthcare practitioners who refuse to provide sterilization services; and twelve states protect healthcare practitioners who refuse to provide contraceptive services. Guttmacher Inst., *Refusing to Provide Health Services* (May 30, 2019), https://bit.ly/1lsohM6.

The majority of these laws provide protections for not only religious beliefs, but for moral or ethical beliefs as well. And many were, like the Church Amendments, passed in the wake of *Roe v. Wade*. *See* Kevin H. Theriot & Ken Connelly, *Free to Do No Harm: Conscience Protections for Healthcare Professionals*, 49 Ariz. St. L.J. 549, 550 n.7, 575, 587-601 (2017). In fact, all of the Plaintiff States have laws protecting conscience.[20] This means that the Plaintiff States—by

[20] Cal. Health & Safety Code §123420(a) (protection for those medical professionals who refuse to "directly participate in the induction or performance of an abortion"); Cal. Health & Safety Code §123420(b) (same protection for medical students and physicians); Cal. Health & Safety Code §§443.14(b), (e), 443.15 (medical practitioners may refuse to participate in assisted suicide "for reasons of conscience, morality, or ethics"); Conn. Agencies Regs. § 19-13-D54(f) (2016) (protecting those who object to participation in "any phase of an abortion" based upon the person's "judgment, philosophical, moral or religious beliefs"); Del. Code tit. 24, § 1791(a) (2016) ("No person shall be required to perform or participate in medical procedures which result in the termination of pregnancy . . ."); D.C. Mun. Regs. tit. 22-B, § 9006 ("Department heads shall not discipline or in any way penalize an employee for refusing to participate in certain aspects of direct patient care that are in conflict with their religious, or ethical beliefs."); Haw. Rev. Stat. § 327E-7(e) ("A health-care provider may decline to comply with an individual instruction or health-care decision for reasons of conscience."); 745 Ill. Comp. Stat. 70/6 (stating that a "physician shall be under no duty to perform, assist, counsel, suggest, recommend, refer or participate in any way in any form of medical practice or health care service that is contrary to his or her conscience"); Md. Code § 20-214(a)(1) ("A person may not be required to perform or participate in, or refer to any source for, any medical procedure that results in artificial insemination, sterilization, or termination of pregnancy."); Minn. Stat. § 145.414(a) ("No person and no hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion for any reason."); N.Y. Civ. Rights Law § 79-i ("When the performing of an abortion on a human being or assisting thereat is contrary to the conscience or religious beliefs of any person, he may refuse to perform or assist in such abortion by filing a prior written refusal . . . ."); N.C. Gen. Stat. §14-45.1(e) ("No physician, nurse, or any

pursuing this litigation—seek to deny to moral entities many of the same protections for conscience that they grant to citizens in their own states as a part of their own statutory regimes. That cognitive dissonance speaks volumes about the Plaintiff States' insistence that the moral exemption is somehow impermissible and unwarranted.

3. The Moral Exemption is required by Equal Protection.

Under the Fifth Amendment's Equal Protection doctrine, the federal government cannot make a distinction that "bears no rational relationship to a legitimate governmental interest." *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973). The government must demonstrate a rational relationship between the disparate treatment and some legitimate governmental purpose. This means that the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

The stated purpose behind the contraceptive coverage requirement is to offer contraceptive coverage to women who "want it," to prevent "unintended" pregnancies, 77 Fed. Reg. at 8,727, and thus to advance "women's health and equality" when women voluntarily use the items, 79 Fed. Reg. 51,118, 51,123 (Aug. 27, 2014). But there is no rational purpose to impose contraceptive

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other health care provider who shall state an objection to abortion on moral, ethical, or religious grounds shall be required to perform or participate in medical procedures which result in an abortion."); Or. Rev. Stat. § 435.225 ("Any employee of the Oregon Health Authority may refuse to accept the duty of offering family planning and birth control services to the extent that such duty is contrary to the personal or religious beliefs of the employee."); R.I. Gen. Laws § 23-17-11 (providing that medical professionals and personnel "shall not be required to participate in . . . medical procedures which result in . . . abortion or sterilization" if they state in writing an objection on "moral or religious grounds"); Vt. Stat. tit. 18, § 5285(a) ("A physician, nurse, pharmacist, or other person shall not be under any duty, by law or contract, to participate in the provision of a lethal dose of medication to a patient."); Va. Code § 18.2-75 ("[A]ny person who [objects] to any abortion or all abortions on personal, ethical, moral or religious grounds shall not be required to participate in procedures which will result in such abortion . . . ."); Wash. Rev. Code § 48.43.065 ("No individual health care provider, religiously sponsored health carrier, or health care facility may be required . . . to participate in the provision of or payment for a specific service if they object to so doing for reason of conscience or religion.").

coverarge requirements on organizations like March for Life that only employ individuals who do not want abortifacients and who will not use them. *See* Dkt. No. 87-1 at ¶¶ 8, 15, 17. The moral exemption thus ensures that the government does not arbitrarily treat March for Life or other morally objecting entities less favorably than similarly situated organizations that also object to the contraception coverage requirement, but do so for religious reasons. *March for Life v. Burwell*, 128 F. Supp. 3d. at 128 ("If the purpose of the religious employer exemption is, as HHS states, to respect the anti-abortifacient tenets of an employment relationship, then it makes no rational sense—indeed, no sense whatsoever—to deny March [for] Life that same respect.").

4. Congress's decision not to enact a conscience exemption does not undermine HRSA's discretionary authority to create the moral exemption.

The Plaintiff States make much of the fact that Congress opted not to adopt a conscience amendment that would have included protections for moral objectors. Dkt. No 311 at 18-19, 35. That decision cannot and should not be deemed dispositive or even influential to deciding the question of whether the moral exemption violates the ACA. Indeed, relying on congressional inaction to infer intent—or here discretionary authority—is of dubious validity at best. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law.") (cleaned up); *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)); *United States v. Price*, 361 U.S. 304, 310-311 (1960) ("[N]on-action by Congress affords the most dubious foundation for drawing positive inferences."); *United States v. Meek*, 366 F.3d 705, 720 (9th Cir. 2004) ("Sorting through the dustbin of discarded legislative proposals is a notoriously dubious proposition."); *Chisholm v. FCC*, 538 F.2d 349, 361 (D.C. Cir. 1976) ("[A]ttributing legal significance to Congressional inaction is a dangerous business.").

Such unjustified reliance is particularly dangerous here, where the rejected exemption was considerably broader in scope than the narrowly circumscribed moral and religious exemptions promulgated by the Departments. *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 was of the "blanket" variety which would have allowed "any employer to deny any health service to any American for virtually any reason"). This crucial difference definitively negates the inference pressed by the Plaintiff States that the Departments and HRSA lacked the authority to create the moral exemption.[21]

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

The Plaintiff States also contend that the moral and religious exemptions violate Sections 1554 and 1557 of the ACA. Dkt. No. 311 at 35-37. But the Plaintiff States are mistaken.

Section 1554 provides that the Secretary of Health and Human Services shall not promulgate 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. 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 4-6. The moral and religious exemptions cannot constitute "unreasonable barriers," nor can they be seen as "imped[ing] timely access to health care services" when Congress itself provided for carve-outs that dwarf those two exemptions.[22] Nor should the arguments of the Plaintiff States be granted credence here when they

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[21] Moreover, if congressional inaction were enough to infer its intent with respect to the moral exemption, the contraceptive coverage requirement itself—and the church exemption and the religious accommodations—would also be imperiled. Congress never indicated that contraceptives were a necessary part of the ACA or the Women's Health Amendment, and it did not expressly authorize those discretionary carve outs either. The whole regulatory edifice would collapse of itself if this Court were to bless the idea that congressional inaction prevents the Departments from exercising their considerable discretion.

[22] It should also be noted that the Departments expressly considered and rejected the idea that the moral exemption would cause the "vast majority of entities that covered contraceptives before . . . [to] terminate such coverage because of [this exemption . . ." 83 Fed. Reg. at 57,627. Indeed, based on comments submitted the Departments concluded

acquiesced to that regime for years without even a hint that they considered such expansive exceptions problematic in any way.

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 service . . . which women (and only women) use." Dkt. No. 311 at 37. 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. *See* 83 Fed. Reg. at 57,607 (noting that the "women's preventive service mandate under section 2713(a)(4) . . . and the Guidelines issued under that section treat women's preventive services in general, and female contraceptives specifically, more favorably than they treat male preventive services or contraceptives"). It is thus both predictable and unremarkable that 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.[23] Any other conclusion would bless the theory that "anytime the government exercises its discretion to provide a benefit that is specific to women (or specific to men), it would constitute sex discrimination for the government to reconsider that benefit." *Id*. The

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that the effect on insurance coverage would be "small," especially because "[b]oth of th[e nonprofit] entities [known to the Departments] have fewer than five employees enrolled in health coverage, and both require all of their employees to agree with their opposition to the nature of certain contraceptives subject to coverage under the Mandate." *Id*. at 57,626. The Departments estimated the same to be true with respect to the religious exemption. *See* 83 Fed. Reg. at 57,556 ("[W]e conclude that the Religious IFC and these final rules—which merely withdraw the Mandate's requirement from what appears to be a small group of newly exempt entities and plans—are not likely to have negative effects on the health or equality of women nationwide.").

[23] For example, where the primary insured is a male whose plan covers his wife, both husband and wife would be affected by the exemptions.

Plaintiff States have cited no legal authority to support such a proposition. This Court should therefore reject their attempt to manufacture a statutory equal protection violation where none exists.

III. The Final Rules are neither arbitrary nor capricious.

The Plaintiff States argue that the Final Rules must be set aside because they are arbitrary and capricious. Dkt. No. 311 at 37-51. But the Plaintiff States' substantive disagreement with the Departments' promulgation of the Final Rules does not equate to a regulatory failure. In fact, both the law and the facts show that the Departments' actions fully accord with the APA.

A. The Departments gave a reasoned explanation for the Final Rules.

As to the law, deference is the controlling principle that this Court is to be guided by. If an agency action "is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute," it is not arbitrary or capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). Indeed, the validity and regularity of agency action is to be presumed in an inquiry like this. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Ruckelshaus*, 719 F.2d 1159, 1164 (D.C. Cir. 1983). Such deference, in practice, means that a court "is not empowered to substitute its judgment for that of the agency." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Indeed, even "a decision of less than ideal clarity [will be upheld] if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). Moreover, even when an agency changes its policy it need only show "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," not that "the reasons for the new policy" are necessarily "*better* than the reasons for the old one." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Under these guidelines, the Departments comfortably withstand the Plaintiff States' assertion that the Final Rules are arbitrary and capricious.

As to the facts, the Plaintiff States argue that the Departments failed to "provide the requisite reasoned explanation" for the Final Rules. Dkt. No. 311 at 37-51. But the record reveals otherwise. The Departments proffered myriad—and valid—justifications for issuing the Final Rules, both as to the moral exemption and the religious exemption. And they did so after accounting for a host of important factors and considerations.

Among other things, the Departments considered "Congress's history of providing protections for religious beliefs regarding certain health services (including contraception, sterilization, and items or services believed to involve abortion); the text, context, and intent of section 2713(a)(4) and the ACA; protection of the free exercise of religion in the First Amendment and, by Congress, in RFRA; Executive Order 13798, 'Promoting Free Speech and Religious Liberty' (May 4, 2017); previously submitted public comments; and the extensive litigation over the contraceptive Mandate." 83 Fed. Reg. at 57,539-40; *see also* 83 Fed. Reg. at 57,596 (considering similar factors with respect to the moral exemption). After taking account of these multifarious considerations, the Departments expressly concluded the following in promulgating the Final Rules:

> [R]eexamination of the record and review of the public comments has reinforced the Departments' conclusion that significantly more uncertainty and ambiguity exists on these issues than the Departments previously acknowledged when we declined to extend the exemption to certain objecting organizations and individuals. The uncertainty surrounding these weighty and important issues makes it appropriate to maintain the expanded exemptions and accommodation if and for as long as HRSA continues to include contraceptives in the Guidelines. The federal government has a long history, particularly in certain sensitive and multi-faceted health issues, of providing religious exemptions from governmental mandates. These final rules are consistent with that history and with the discretion Congress vested in the Departments for implementing the ACA.

83 Fed. Reg. at 57,555. This detailed explanation was the result of the Departments' extensive review of all pertinent factors implicating HRSA's contraceptive coverage requirement and the advisability of the moral and religious exemptions, and it more than illustrates that the Departments acted rationally after accounting for all manner of relevant factors. That the Plaintiff States do not

share the Departments' ultimate conclusion "that the best way to balance the various policy interests at stake . . . is to provide the expanded exemptions set forth herein," 83 Fed. Reg. at 57,556; 83 Fed. Reg. at 57,613, is of no moment under controlling jurisprudence, the hallmark of which is deference to the Departments. Because the Departments' decision was rational and duly considered, this Court must defer to that decision and uphold it.

B. The Departments advanced plausible justifications and comprehensively responded to comments consistent with APA requirements.

The Plaintiff States' "implausib[ility]" and "fail[ure] to meaningfully respond to comments" arguments fare no better than their "failure to provide a reasonable justification" argument. *See* Dkt. No. 311 at 44-51.

As to implausibility, the Departments provided a detailed discussion in the Final Rules' preamble as to why they decided to issue the moral exemption. Taken together, these reasons ultimately show a tight fit between the problem: "the burdens imposed on . . . moral beliefs" by HRSA's contraceptive coverage requirement, and the policy solution finally adopted by the Departments: the moral exemption. 83 Fed. Reg. at 57,592, 598-604. The Plaintiff States attempt to obfuscate the matter by equating the Departments' discussion of various factors informing their rebalancing of government interests with the actual purpose of the moral exemption. *See* Dkt. No. 311 at 44 (e.g., the safety of contraceptives, contraceptives and the prevalence of teen pregnancy, etc.). But the multitude of considerations informing the final decision and its ultimate justification are not the same thing, so no "lack of alignment" exists. *Id*. at 45. The moral exemption is designed "to relieve burdens that some entities and individuals experience from being forced to choose between" their conscience and the contraceptive coverage requirement, and it does just that. 83 Fed. Reg. at 57,593.

As to the Departments' alleged "failure to meaningfully respond to comments," the Final Rules' preamble—on page after page—flatly contradicts this assertion by the Plaintiff States. The Departments painstakingly, for nearly every conceivable issue or objection, outlined the competing

positions and then expressly stated why and how they came to their ultimate conclusions as to how to proceed. *See, e.g.*, 83 Fed. Reg. at 57,603-605 (detailing comment submission on propriety and scope of moral exemption in general); 83 Fed. Reg. at 57,605 (detailing comments and disagreements regarding the Departments "rebalancing of government interests"); 83 Fed. Reg. at 57,605-09 (detailing comments and disagreements regarding "burdens on third parties"); 83 Fed. Reg. at 57,609-613 (detailing comments and disagreements regarding the "health effects of contraception and pregnancy" and the "health and equality effects of contraceptive coverage mandates"). The Departments thus fulfilled their APA obligations by "articulat[ing a] rational connection between the facts found and the choice made." *Bowman*, 419 U.S. at 285 (cleaned up).[24]

That the Departments did not specifically respond by name to the Plaintiff States' preferred roster of commenters does not mean that they failed to meaningfully respond. *See Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 812 (E.D. Pa. 2019) (finding in an essentially identical case that the plaintiffs were "unlikely to succeed on the merits of their argument that, in promulgating the Final Rules, the Agencies' actions failed to meet the requirements of notice-and-comment rulemaking" based on an alleged failure to adequately respond to comments because "a review of the Final Rules demonstrates that the Agencies acknowledged the comments and provided an explanation as to why the Agencies did (or did not) amend the Final Rules based on the comment"). And it was neither arbitrary nor capricious for the Departments to arrive at a conclusion and a course of action at odds with those favored by the Plaintiff States.

[24] *See also Covad Commc'ns Co. v. F.C.C.*, 450 F.3d 528, 550 (D.C. Cir. 2006) (explaining that all the APA requires is that an agency explanation demonstrate that it "considered and rejected petitioners' arguments") (cleaned up); *Pub. Citizen, Inc. v. F.A.A.*, 988 F.2d 186, 197 (D.C. Cir. 1993) (holding that the APA requirements that "the agency adequately explain its result . . . and respond to 'relevant' and 'significant' public comments" are not "particularly demanding").

IV. The Final Rules comply with the procedural requirements of the APA because they were issued after a period of notice and comment.

The Departments issued the Final Rules after requesting, receiving, and considering over 110,000 submitted comments. *See* 83 Fed. Reg. at 57,596 (noting that the "Departments . . . solicited public comments on these issues" and further noting that as to the moral exemption the Departments "received over 54,000 public comment submissions" during the 60-day comment period); 83 Fed. Reg. at 57,540, 57,552 (noting that the Departments received "over 56,000 public comment submissions" for the religious exemption, which comments were "thoroughly consider[ed]" before the issuance of the Final Rules). The majority of the Plaintiff States themselves submitted their own comments on December 5, 2017, some eleven months before the Departments issued the Final Rules on November 15, 2018. *See* https://www.regulations.gov./document ?D=CMS-2014-0115-58168 (last visited May 13, 2019). Yet despite the public's opportunity to participate in the process and the Plaintiff States' actual participation in that process, the Plaintiff States now contend that the Final Rules are procedurally defective under the APA because "notice and an opportunity to be heard" occurred after the IFRs had already been promulgated. *See* Dkt. No. 311 at 56. The Plaintiff States are wrong.

"The purpose of the notice and comment requirement is to provide for meaningful public participation in the rule-making process." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995). As even a cursory review of the administrative record and the Final Rules' preamble reveals, such meaningful public participation *and* agency consideration happened here. *See* 83 Fed. Reg. at 57,596-57,625 (detailing the considerations of the Departments in issuing the moral exemptions); 83 Fed. Reg. at 57,540-57,556 (detailing the considerations of the Departments in issuing the religious exemptions). And none of the cases relied upon by the Plaintiff States rescue the unsupported and unworkable notion that a lack of notice and comment prior to the issuance of interim final rules somehow fatally and irrevocably infects final rules promulgated after actual notice and comment. In fact, where as here the Final Rules were

promulgated after a full public airing of issues and positions, the case law and prudential considerations support precisely the opposite result.

In *Paulsen v. Daniels*, 413 F.3d 999 (9th Cir. 2005), for instance, the Bureau of Prisons failed to provide notice and comment before an interim final rule became effective. The court there concluded that the interim final rule was defective as a result. But it did not hold that the final rule was thereby tainted. In fact, because the "rule previously in force" was itself found to be erroneous, the court determined that the final rule was the "applicable" rule to enforce. *Id*. at 1008. Notably, those final rules had been promulgated after the Bureau of Prisons received and considered comments after publishing the interim regulations, just as happened here. *Paulsen* thus debunks any notion that a notice and comment failure as to an interim final rule categorically infects the validity of a final rule. On the contrary, *Paulsen* supports the conclusion that the Final Rules should be permitted to go into effect without delay.

In *Sharon Steel Corp. v. EPA*, 597 F.2d 377 (3d Cir. 1979), the EPA administrator adopted a rule without providing an opportunity for notice and comment. The court found that the agency lacked good cause to do so, but only as to the rule that had been issued without notice and comment. As to any further rulemaking, the court remanded to the EPA administrator and ordered him to "forbear" from imposing the strictures of the invalid rule on plaintiffs and to "conduct[] a limited legislative hearing [to] give[] [plaintiffs] the required statutory notice and opportunity for participation and comment as provided by the APA, 5 U.S.C. § 553." *Id*. at 381-82. Thus *Sharon Steel* does not stand for the proposition that the lack of notice and comment as to the IFRs dooms the Final Rules here. Quite the opposite—the court in *Sharon Steel* ordered as a remedy the very type of notice and comment opportunity which was actually provided by the Departments for the Final Rules.

Levesque v. Block, 723 F.2d 175 (1st Cir. 1983), is similarly unavailing. In *Levesque* the court found invalid an interim final rule issued without public comment. But it upheld a final rule for which notice and an opportunity for public comment had been provided. In doing so the court

conspicuously noted—contrary to the *Levesque* district court's order—that "further rulemaking is not necessary." *Id*. at 177. The *Levesque* court found that the agency was "able to present evidence of a level of public participation and a degree of agency receptivity that demonstrate that a real 'public reconsideration of the issued rule' has taken place." *Id*. at 188. That "public participation" consisted of "130 letters regarding the interim rules," and the "agency receptivity" consisted of "a number of changes" to the rules and "reasonable responses when rules were not changed." *Id*. While the court noted that the "public response was not overwhelming," it nonetheless concluded that such participation satisfied "the requirements and purposes of section 553" of the APA. *Id*. at 189.

Levesque thus provides strong support for the validity of the Final Rules. In contrast to the relatively scant participation in *Levesque*, the Departments received and considered over 110,000 comments, indicating that the public "participate[d] vigorously." *Id*. at 188. Moreover, as in *Levesque*, the Departments made a number of changes in response to those comments, and the Final Rules' preamble is replete with detailed explanations as to why the Departments ultimately decided to take the particular courses of action they chose. *See supra* at 39-40 & n.24; 83 Fed. Reg. at 57,593 (outlining changes to moral exemption "in response to public comments"); 83 Fed. Reg. at 57,537 (outlining changes to religious exemption "in response to public comments"). Thus the concerns voiced in *Levesque* for "self-governance" and the ability of "interested persons to make their views known," *Levesque*, 723 F.2d at 187-88, have been fully vindicated.

The guidance of these cases thus definitively rebuts the position advanced by the Plaintiff States.[25] It also comports with prudential judicial and administrative considerations, given the

[25] *See also Salman Ranch, Ltd. v. Comm'r*, 647 F.3d 929, 940 (10th Cir. 2011) ("While the . . . temporary regulations were issued without notice and comment, [n]ow that the regulations have issued in final form [after postpromulgation notice and comment], these arguments are moot." (first alteration in original) (internal quotation marks omitted)); *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368, 1380 (Fed. Cir. 2011) ("Grapevine also argues that the temporary Treasury regulations should not receive *Chevron* deference because of purported procedural shortcomings

practical realities surrounding federal rulemaking and judicial review of that process. For if courts were to adopt the mistaken view advanced by the Plaintiff States and punish regulatory agencies each time they were ultimately found to be mistaken in claiming a good cause exception to notice and comment[26]—even when notice and comment fully informed the final rules—the result would not be more public participation or transparency, but rather great expense and unnecessary redundancy. Form over function would be incentivized and rewarded. In fact, it is difficult to conceive what new comments or regulatory decisions would materialize under such a regime. That is especially true in a case such as this, where the comment period produced over 110,000 submissions, and the Departments had months to consider them. Compelled do-overs such as those contemplated by the Plaintiff States would not constitute "meaningful public participation," but rather a cynical short-circuiting of a regulatory process that had been conducted consistent with the purpose of section 553.[27]

In sum, in light of the notice and comment period provided by the Departments, and in light of the fact that the administrative record and the Final Rules' preamble shows that they hewed closely to their statutory task to duly consider the comments they received, this Court should reject the Plaintiff States' argument that the Final Rules are procedurally defective.

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in their issuance. Now that the regulations have issued in final form [after postpromulgation notice and comment], these arguments are moot."); *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994) (finding post-promulgation notice and comment was sufficient where the agency showed it gave careful thought to comments in opposition, even though the agency did not change or revise its regulations in response to those comments).

[26] Which is precisely what happened here. *See Azar*, 2018 WL 6566752, at *9-12 (9th Cir. Dec. 13, 2018) (finding that the Departments likely did not have good cause to issue the IFRs without first permitting notice and comment).

[27] Adopting this approach would also threaten to extinguish myriad regulations passed in much the same way by a host of federal agencies. *See, e.g.*, U.S. Gov't Accountability Office, GAO-13-21, *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments*, 8 (December 2012) available at https://www.gao.gov/assets/660/651052.pdf (last visited May 14, 2019) (estimating that "[a]gencies [i]ssued about 35 percent of [m]ajor [r]ules . . . without an NPRM from 2003 to 2010").

V. The Final Rules do not violate the Establishment Clause.

The Plaintiff States allege that the Final Rules violate the Establishment Clause by "privilege[ing] religious beliefs over secular beliefs as a basis for obtaining exemptions under the ACA." *See* Dkt. No. 170 at ¶¶ 248-54; *see also* Dkt. No. 311 at 51-54. In addition to the fact that the Plaintiff States do not have standing to bring this claim, it would fail regardless because the Plaintiff States are mistaken as to both the facts and the law.

As to the facts, the regulations protect both religious (e.g., The Little Sisters of the Poor) and non-religious (e.g., March for Life) actors, thereby dispelling any argument that the federal government intended to advance religious interests. Moreover, neither on their face nor in their application do the Final Rules promote religion in general or any particular religious sect or message. Rather, the regulations merely make it possible for both religious and non-religious entities alike to act in accord with either their religious beliefs or moral convictions without penalizing them for deciding not to comply with an otherwise applicable government requirement.

As to the law, the Plaintiff States' challenge fails because under extant and controlling Establishment Clause jurisprudence the Final Rules are a permissible accommodation of religion. As a general matter, religious accommodations do not violate the Establishment Clause. The Supreme Court has "long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-145 (1987).[28] In fact, far from being problematic, such accommodation "follows the best of our traditions." *Zorach*

[28] *See also Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (holding that the Religious Land Use and Institutionalized Persons Act (RLUIPA) "qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause"); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339-40 (1987) (holding that an exemption for religious organizations from Title VII's prohibition against religious discrimination in employment does not violate the Establishment Clause); *id*. at 338 ("[T]here is ample room for accommodation of religion under the Establishment Clause."); *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 680 (1970) (holding that property tax exemptions for religious organizations do not violate the Establishment Clause).

v. Clauson, 343 U.S. 306, 314 (1952) (upholding against constitutional challenge a government policy that permitted students to leave public school during the school day to visit religious centers for spiritual instruction or devotional exercises).

More specifically, Supreme Court jurisprudence identifies several factors that determine whether an accommodation of religious exercise is permissible under the First Amendment. A review of these factors confirms that the Final Rules do not violate the Establishment Clause.

First, the Final Rules do not establish religion because they do not prefer any particular religious faith or sect over another. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244, 255 (1982) (holding that a state statute imposing registration and reporting requirements on some religious organizations violated the Establishment Clause by "burden[ing] or favor[ing] selected religious denominations"). The Final Rules comply with this principle by providing exemptions to both religious and nonreligious moral actors, while expressing or instituting no preference whatsoever for any particular religious faith or moral belief. The religious exemption exempts any religious nonprofit and for-profit which has religious objections to covering any drugs, devices, or services required by the contraceptive mandate. 45 C.F.R. § 147.132. And the moral exemption does the same for any nonreligious entity that similarly objects, based upon its "sincerely held moral convictions." 45 C.F.R. § 147.133(a)(2). Accordingly, the religious accommodation represented by the Final Rules is constitutional. *See Cutter*, 544 U.S. at 723 (explaining that RLUIPA does not run afoul of the Establishment Clause because it "does not differentiate among bona fide faiths").

Second, the Final Rules do not contravene the Establishment Clause because they lift a burden on religious exercise that the government itself created through its original imposition of the contraceptive coverage requirement. "[G]overnment does not benefit religion by first imposing a burden through regulation and then lifting that burden through exemption." Douglas Laycock, *The Religious Exemption Debate,* 11 Rutgers J. L. & Religion 139, 153-54 (2009); *Cutter*, 544

U.S. at 720 (finding "RLUIPA's institutionalized-persons provision compatible with the Establishment Clause because it alleviate[d] exceptional government-created burdens on private religious exercise"). The Final Rules merely ensure that religious and moral actors are not driven from the field because of their beliefs or convictions, without in any way privileging certain religious objectors over others. The Constitution permits "this kind of benevolent neutrality." *Walz*, 397 U.S. at 676.

Third, the IFRs comport with the Establishment Clause because they do not encourage citizens to engage in (or discourage them from engaging in) religious exercise. *See id.* at 672 (considering whether a challenged accommodation "advance[s]" or "inhibit[s]" religion). It is generally the case that laws that alleviate government-imposed burdens on religion "do not encourage anyone to engage in a religious practice." Laycock, *supra*, at 153-54. That is certainly true here, where it is implausible to suggest that the Final Rules either encourage or discourage religion. Instead, the rules recognize that certain religious and moral entities cannot in good conscience comply with HRSA's contraceptive coverage requirement and make allowance for that. This is permissible under the Establishment Clause.

Fourth, the Final Rules are free from any Establishment Clause infirmities because they do not "result in extensive state involvement with religion." *Walz*, 397 U.S. at 689-90. Notably, the Final Rules make no provision for the government to inquire into the centrality of any organization's or individual's religious beliefs or moral convictions for the exemptions to apply. This lack of state involvement in matters of religion is another reason the Establishment Clause is not offended.

The Supreme Court has considered the above-discussed factors when analyzing Establishment Clause challenges to laws that accommodate religion in other analogous contexts. Evaluating these factors—rather than applying the three-prong *Lemon* test—is the appropriate method of analysis here. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (asking whether a challenged statute (1) has a "secular legislative purpose," (2) has a "primary effect . . . that neither

advances nor inhibits religion," and (3) does not "foster an excessive government entanglement with religion") (quotation marks and citation omitted). But even if this Court were to apply the *Lemon* test, all three of its factors are satisfied here.

First, the Final Rules further legitimate "secular legislative purpose[s]." *Lemon*, 403 U.S. at 612. One "proper purpose" under *Lemon* is "lifting a regulation that burdens the exercise of religion." *Amos*, 483 U.S. at 338; *see also id*. at 339 (reiterating that "a permissible purpose" is "limiting governmental interference with the exercise of religion"); *Walz*, 397 U.S. at 672-73 (upholding a law whose purpose was to "spar[e] the exercise of religion from [a government-imposed] burden"). The Final Rules' purpose of relieving the government-imposed burden on religious exercise represented by HRSA's contraceptive coverage requirement is a permissible purpose that satisfies the first *Lemon* factor. The fact that the IFRs also include protections for secular, nonreligious actors with moral objections to the mandate bolsters the conclusion that a secular purpose animates the regulations.

The two remaining *Lemon* factors mirror considerations already discussed above, and thus they are satisfied, too. The Final Rules do not encourage anyone to engage in (or discourage anyone from engaging in) religious exercise. *See supra* at 47. Thus, the "effect" prong of *Lemon*'s analysis is satisfied. And so is its last factor. As previously shown, the IFRs do not result in extensive state involvement with religion. *See supra* at 47. In sum, the Plaintiff States' Establishment Clause claim is legally deficient and cannot provide a basis for relief.[29]

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[29] The Plaintiff States frame their Establishment Clause claim in terms of third-party harms, asserting that the religious exemption "strips third parties . . . of health insurance to which they are entitled by law, imposing substantial costs and burdens on them." Dkt. No. 311 at 51. That is not true. The Final Rules relieve burdens, they do not impose them. *See* 83 Fed. Reg. at 57,549 ("If some third parties do not receive contraceptive coverage from private parties who the government chose not to coerce, that result exists in the absence of governmental action—it is not a result the government has imposed."). Moreover, and even more important, no one is entitled to federally guaranteed contraceptive coverage. The "entitlement" mantra repeated by the Plaintiff States is a litigation canard. *See supra* at 13-14; 83 Fed. Reg. at 57,606 ("Congress did not create a right to receive contraceptive coverage from other private citizens through PHS Act section 2713, other portions of the ACA, or any other statutes it has enacted."). The fact that the Final Rules may

VI. The Final Rules do not violate Equal Protection.

The Plaintiff States argue that the Final Rules violate Equal Protection because they "single out women's healthcare." *See* Dkt. No. 311 at 54. Not so. First, the Plaintiff States have no standing to bring this claim. *See supra* at 18. Second, the Final Rules do not violate Fifth Amendment equal protection principles because they neither create sex-based classifications nor invidiously discriminate against women. *See Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979) ("When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination."). Moreover, the Final Rules would survive heightened scrutiny regardless because they protect freedom of conscience.

A. The Final Rules do not create a sex-based classification.

The Final Rules are facially gender-neutral and do not create a sex-based classification. The Plaintiff States' theory to the contrary rests not on anything specific in the language in the Final Rules but on the fact that the contraceptive coverage requirement itself confers a unique benefit only upon women. Thus, any modifications to that mandate, including exemptions, necessarily affect women. The sex-based classification is in the contraceptive coverage requirement itself, which the Plaintiff States have not challenged.[30]

In contrast to the explicit sex-based classifications in the cases the Plaintiff States cite, the Final Rules do not classify based on sex. *See Orr v. Orr*, 440 U.S. 268 (1979) (finding that a rule requiring only husbands, not wives, to pay alimony after a divorce violated the Equal Protection

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produce an incidental effect on third parties, who have not established that they will be harmed and who have no right to contraceptive coverage anyway, does nothing to change the conclusion that the Final Rules comport with the Establishment Clause.

[30] Indeed, far from challenging it, they are attempting to enforce through litigation that requirement, even though success in that endeavor would compel groups like March for Life and The Little Sisters of the Poor to violate their moral and religious convictions.

Clause); *United States v. Virginia*, 518 U.S. 515, 519 (1996) (finding that a public all-male military college violated the Equal Protection Clause by not admitting women); *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017) (finding that a residency requirement for citizenship transfer treating unwed mothers and fathers differently violated the Equal Protection Clause).

B. The Final Rules reveal no discriminatory intent.

"Purposeful discrimination is the 'condition that offends the Constitution.'" *Feeney*, 442 U.S. at 274. No such ailment plagues the Final Rules.

For example, the purpose of the Final Rules, while keeping in place HRSA's contraceptive coverage requirement generally, is to "protect sincerely held moral objections of certain entities and individuals" and "minimize the burdens imposed on their moral beliefs." 83 Fed. Reg. at 57,592; *see also id*. at 57,594-596 (discussing the background of the contraceptive coverage requirement, the protracted litigation challenging it, and the Departments' considerations in issuing moral and religious exemptions). The record confirms this permissible purpose, and the Plaintiff States proffer no evidence to support their bald assertions that the Final Rules "target contraceptive coverage." Dkt. No. 311 at 54. The Departments have not targeted anything by merely relieving a government-imposed burden on moral convictions and religious beliefs. [31]

Nor do the Final Rules result in a disparate impact. Any difference in coverage among or between women depends not on sex but rather upon whether particular employers object to facilitating contraceptive coverage based on their moral convictions or religious beliefs.[32] And any effect on women as opposed to men is not a function of the exemptions but rather a function of

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[31] *Cf. Feeney*, 442 U.S. at 279 (noting that "nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service").

[32] The Plaintiff States also ignore the fact that many if not all women who work for morally convicted entities like March for Life are themselves opposed to abortifacients and other forms of birth control. *See, e.g.*, Dkt. No. 87-1 at ¶ 8. These women cannot reasonably be said to suffer an adverse impact from the Final Rules because they would not use the devices or services in question regardless of whether their employers covered them.

how the contraceptive coverage requirement itself defines "preventive services." Indeed, HRSA's "[g]uidelines . . . treat women's preventive services in general, and female contraceptives specifically, more favorably than they treat male preventive services or contraceptives." 83 Fed. Reg. at 57,607. And even with the moral and religious exemptions in place, the guidelines would continue to privilege women over men. So the Plaintiff States' sex-discrimination argument—that granting limited exemptions to a requirement that has always benefited only women somehow constitutes sex discrimination against women—falls apart. To state the argument is to refute it.

C. Though the Final Rules do not create a sex-based classification, they would satisfy heightened scrutiny regardless.

Sex-based classifications are subject to intermediate scrutiny, and if the Final Rules are deemed to create a sex-based classification, they would satisfy that heightened scrutiny because they are "substantially related" to achieving "an important governmental objective," namely, protecting conscience rights of both religious and nonreligious people and organizations. *See Orr*, 440 U.S. at 278–79 ("To withstand scrutiny under the Equal Protection Clause, classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.") (internal citations omitted); *see also Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 873 (1992) (noting that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right" and acknowledging that state governments have a valid interest in restricting abortions, even where private parties' consciences are not involved).

In this case, the Final Rules are "substantially related" to the "important governmental objective" of protecting freedom of conscience rights for moral and religious actors with objections to abortion or abortifacients. The exemptions give persons and entities with moral and religious convictions about abortifacients and contraceptives the right to not cover those products in their insurance plans. Not only are the Final Rules "substantially related" to the government's objectives

as to freedom of conscience, they are entirely related: the whole reason for the Final Rules' existence is to protect conscience rights.

The Plaintiff States assert that the moral exemption does not serve an important government interest because "[a]ccomodating requests from . . . three lone [moral entities] does not . . . supersede[] the rights of millions of women to access statutorily guaranteed healthcare." *See* Dkt. No. 311 at 55. That argument fails for at least three reasons. First, as established above, there is no statutory "guarantee" of contraceptive coverage to compete with the important government interest in vindicating the right to conscience. *See supra* at 13-14. Second, the estimated impact of the moral exemption is miniscule—nowhere near the "millions" cited by the Plaintiff States. *See* 83 Fed. Reg. at 57,625-628 (noting that each of the moral nonprofits which had filed suit employed fewer than five employees, all of whom shared the moral convictions of the organization; projecting that "approximately 15 women may incur contraceptive costs due to for-profit entities using the . . . moral exemption; and estimating that "the anticipated effects attributable to the cost of contraception from for-profit entities using the expanded moral exemption in these final rules is approximately $8,760").[33] And third, the government interest in protecting the right to conscience is not contingent upon a census revealing an acceptable numerical threshold thereby permitting moral entities to finally partake of conscience exemptions.[34] In other words, the right to conscience is not justified by sheer numbers or popular vote, but rather by the value inherent in the right itself.

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[33] Contrary to the Plaintiff States' contention, Dkt. No. 311 at 55 n.49, the right to conscience expounded upon in "historical letters penned by the Founding Fathers" is in no way diminished in importance by the Supreme Court's observation that "our nation has had a long and unfortunate history of sex discrimination," *Virginia*, 518 U.S. at 531. As stated above, the Final Rules do not discriminate against women—they protect moral and religious objectors. Moreover, in the highly pertinent context of abortion, the Supreme Court and Congress have consistently vindicated the right to conscience, even as the Court found a right to elective abortion in certain circumstances. Thus there need be no conflict between the two, and the Plaintiff States' efforts to posit a zero-sum game should be rejected. *See supra* at 26-29.

[34] Given the protracted litigation surrounding the contraceptive coverage requirement to date, it is obvious that opposition to abortifacient drugs will continue into the future. Such objectors should

Therefore, because the Final Rules are motivated by and deeply intertwined with the government's goal of protecting conscience rights, they would satisfy heightened scrutiny even if it could be said that they somehow create a sex-based classification.

For all these reasons, the Final Rules do not violate the equal protection principles of the Fifth Amendment, and they should therefore be upheld.

CONCLUSION

Because the Plaintiff States lack Article III standing, and have failed to state a claim for which relief can be granted, this Court should grant March for Life's motion to dismiss. In the alternative, because the Final Rules accord with the law in all respects, this Court should deny the Plaintiff States' Motion for Summary Judgment, grant March for Life's Motion for Summary Judgment, and dismiss the case in its entirety with prejudice.

Respectfully submitted this 31st day of May, 2019.

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not have to engage in piecemeal litigation to protect their rights, as the Plaintiff States' seem to want to require them to do. That conclusion is only bolstered by the Nation's historical protections for conscience. For instance, the legislative history surrounding the Church Amendments does not reveal that members waited to see whether a certain number of pro-life objectors to abortion would materialize before passing those protections into law. *See supra* at 26-27. Likewise, neither the *Roe* nor *Doe* courts indicated that the validity of the right to conscience depends upon how many verified individuals or organizations are eager to exercise it. *See Roe*, 410 U.S. at 143 n.38; *Doe*, 410 U.S. 179, 198 (1973). And conscientious objection to war is protected based upon the individual's sincerity of conviction, no matter how many make use of the protections *See United States v. Seeger*, 380 U.S. 163, 184-187 (1965); *Welsh v. United States*, 398 U.S. 333, 346-33 (1970).

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** *Pro hac vice granted*