NOS. 19-431, 19-454

IN THE

Supreme Court of the United States

THE LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.,

Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* MARCH FOR LIFE EDUCATION AND DEFENSE FUND IN SUPPORT OF PETITIONERS

David A. Cortman
Rory T. Gray
Kevin H. Theriot
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals
Lawrenceville, GA 30043
(770) 339-0774

Kristen K. Waggoner
John J. Bursch
Counsel of Record
ALLIANCE DEFENDING FREEDOM
440 First Street NW, #600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTEREST OF AMICUS CURIAE[1]

March for Life is one of the oldest and best-known pro-life organizations in the country. It is a non-religious, charitable organization that protects, defends, and respects human life at every stage and promotes the worth and dignity of all unborn children. Opposition to abortion is the reason the group exists.

One of March for Life's basic moral convictions is that human life begins at conception/fertilization and that a human embryo is a human life that should be protected. Because hormonal oral and implantable contraceptives, IUDs, and so-called "emergency contraception" may prevent a human embryo from implanting in the uterus, causing an abortion, March for Life cannot include them in its health plan. Nor would its employees—who share those beliefs—use them.

March for Life is a proponent and beneficiary of the religious and moral exemptions at issue here. Indeed, March for Life filed its own petition in support of the exemptions in *March for Life Education and Defense Fund* v. *California*, No. 19-1040. Accordingly, March for Life asks the Court to hold that (1) the Little Sisters of the Poor have standing, (2) the lack of any individual plaintiffs proves there is no compelling reason to compel conscience violations, and (3) the religious and moral exemptions are a lawful, non-arbitrary exercise of agency authority.

---

[1] Pursuant to Supreme Court Rule 37(6), March for Life states that no party other than the amicus and its counsel authored this brief in whole or part nor contributed money that was intended to fund preparing or submitting this brief. Both parties have consented in writing to the filing of this brief in blanket consents on file with the Court

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Little Sisters of the Poor have standing. The injunction that currently protects the Little Sisters is limited and applies only to the specific health plan the Little Sisters currently have. If the Little Sisters change their plan, the injunction's protection will vanish. Because the religious and moral exemptions provide broader protection and give the Little Sisters greater flexibility in providing health insurance, the Little Sisters have standing to defend the exemption. Moreover, the Little Sisters as intervenors have standing derivatively, as a "piggyback" to the unquestioned standing of the federal government in this proceeding.

Conversely, the plaintiff States lack standing. The States have no right to a federal subsidization of abortifacients and contraceptives. And the fact that these States were unable to find a single individual plaintiff who is allegedly harmed by the religious and moral exemptions shows that contraceptives are widely available and that the federal government lacks a compelling reason to violate the religious and moral convictions of organizations who oppose abortifacients and artificial contraception.

Finally, the federal agencies who promulgated the contraceptive mandate had authority to create the religious and moral exemptions. In enacting the Affordable Care Act, Congress said nothing about requiring employers to provide abortifacients and artificial contraception. Just as the legislation left agencies with discretion to include such a requirement, the agencies had concomitant discretion to fashion religious and moral exemptions.

The final exemptions are balanced and address concerns on all sides. They are not arbitrary or capricious. Accordingly, if this Court reaches the merits, it should reverse the Third Circuit and uphold the religious and moral exemption.

STATEMENT OF THE CASE

A. The ACA's "preventive care and screenings" requirement for women.

The Affordable Care Act, or ACA, regulates our Nation's health-insurance industry in unprecedented ways. It requires employers not just to offer health insurance but plans that cover certain (1) items or services, (2) immunizations, (3) child preventive care and screenings, and (4) preventive care and screenings for women, without cost sharing. 42 U.S.C. 300gg-13. Exempt from these requirements are employers with fewer than 50 employees, who are not required to offer health coverage, and employers with grandfathered health plans that predated the ACA and have not undergone certain changes. *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 699 (2014).

Conscientious objectors like March for Life have no quarrel with the ACA's mandatory-coverage provisions. They object not to the health insurance or preventive-care-and-screening requirement but to the initial agency gap filling that followed.

In the ACA itself, Congress provided that health plans offer "with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration," a division of HHS. 42 U.S.C. 300gg-13(a)(4). This discretionary

grant of authority is buttressed by provisions giving federal agencies the power to "promulgate such regulations as may be necessary or appropriate to carry out" Congress' broad decree. 42 U.S.C. 300gg-92; 29 U.S.C. 1191c; 26 U.S.C. 9833.

In turn, HHS delegated the job of fleshing out the women's preventive-care-and-screenings requirement to the Institute of Medicine, "a nonprofit group of volunteer advisers." *Hobby Lobby*, 573 U.S. at 697. These consultants urged HHS to mandate free coverage of all FDA "approved contraceptive methods, sterilization procedures, and patient education and counseling." 77 Fed. Reg. 8,725, 8,725 (Feb. 15, 2012). HHS generally followed this recommendation and required many private employers to cover contraceptive methods that "may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus." *Hobby Lobby*, 573 U.S. at 697–98.

Simultaneously, HHS and the Departments of Labor and the Treasury granted the Health Resources and Services Administration "discretion to establish an exemption for group health plans established or maintained by certain religious employers," *i.e.*, churches and their integrated auxiliaries. 77 Fed. Reg. at 8,726.

The agencies' rationale was that churches' employees "would be less likely to use contraceptives even if contraceptives were covered under their health plans." *Id.* at 8,728. Though the same is true of the employees of many other religious and non-religious non-profits opposed to abortion—including March for Life—the agencies initially made no exception for them.

No state ever challenged the agencies' church exemption, which does not require qualifying entities to do anything to obtain an exception. *Hobby Lobby* 573 U.S. at 698. In fact, many states provide similar or broader religious exemptions to their own contraceptive mandates. 77 Fed. Reg. at 8,726.

Originally, employers like March for Life who offered health insurance but refused to cover abortifacients in their health plans faced public or private lawsuits under ERISA and fines up to $100 per plan participant per day. 29 U.S.C. 1132; 26 U.S.C. 4980D. While employers who dropped health coverage altogether faced potential penalties of $2,000 per employee each year. 26 U.S.C. 4980H.

B. The widespread litigation sparked by the agencies' choice and the modifications the agencies made pre-*Zubik*.

The agencies' decision to exempt only churches and their integrated auxiliaries from the contraception mandate sparked intense backlash. Dozens of non-profit organizations and closely held, for-profit businesses sued, primarily under RFRA, the Religious Freedom Restoration Act of 1993. 42 U.S.C. 2000bb *et seq*. Because the agencies' extreme position was legally indefensible, they quickly began making regulatory changes. They staunchly refused to exempt religious non-profits opposed to abortion from the contraception mandate—as they did churches. But they agreed to provide a regulatory "accommodation" or alternative means of compliance by which religious non-profits' health insurance issuers or third-party administrators could provide abortifacients and contraceptives in their stead.

To access the accommodation, religious non-profits had to submit a form to their health insurance issuer or third-party administrator. This form was more than just notice of a religious objection. It was an instrument under which objectors' health plans were operated. 29 C.F.R. 2510.3-16(b)&(c). And for self-insured plans, it served as a special designation of the third-party administrator as plan and claims administrator for making payments for contraceptive services. 78 Fed. Reg. 39,870, 39,880 (July 2, 2013).

Under this iteration of the regulatory scheme, (1) churches and their integrated auxiliaries were exempt from the contraception mandate, (2) religious non-profits with objections to abortion could authorize others to provide abortifacients via the non-profits' own health plans, (3) non-religious non-profits with objections to abortion—like March for Life—had to cover abortifacients directly, and (4) for-profit businesses also had to cover abortifacients directly no matter if their owners objected to abortion and their companies were closely held.

Because the agencies imposed a third-party administrator's duty to provide contraceptives under ERISA, and ERISA does not apply to church plans, 29 U.S.C. 1003(b)(2), the agencies sort of exempted certain church-affiliated non-profits from the contraceptive mandate, including some hospitals and universities. The agencies lacked any basis for compelling these entities' third-party administrators to deliver contraceptives. 79 Fed. Reg. 51,092, 51,095 n.8 (Aug. 27, 2014). But this did not eliminate the requirement to execute forms and give the government information so the government could make voluntary offers to those administrators.

Because some objectors' consciences were not assuaged, this Court was forced to intervene. It first enjoined the agencies from enforcing the contraceptive mandate or the accommodation against a religious order pending appeal to the Tenth Circuit. Expressing no view on the merits, this Court allowed Little Sisters of the Poor to obtain an exemption by informing the Secretary of HHS, in writing, that it holds itself out as religious and has religious objections to covering contraceptives. *Little Sisters of the Poor Home for the Aged, Colo.* v. *Sebelius*, 571 U.S. 1171 (2014).

Several months later, this Court ruled on the merits that it violated RFRA for the agencies to impose the contraceptive mandate on closely-held, for-profit businesses whose owners objected to abortion on religious grounds. *Hobby Lobby*, 573 U.S. at 736. Whether or not the accommodation satisfied "RFRA for purposes of all religious claims," it proved that the agencies had less restrictive means of obtaining their goals. *Id.* at 730–31.

This Court's ruling in *Hobby Lobby* made two things clear. First, the agencies could not impose the mandate directly on religious objectors, either for-profit or non-profit. And second, the accommodation suffices for those with no objection to it.

Not long after, this Court granted an injunction pending appeal barring the agencies from enforcing either the contraceptive mandate or the accommodation against a religious college. Wheaton College could obtain an exemption by informing the Secretary of HHS, in writing, that it is a non-profit that holds itself out as religious and has religious objections to covering contraceptives. *Wheaton Coll.* v. *Burwell*,

573 U.S. 958 (2014). Though this Court expressed no view on the merits, *ibid.*, this trend of granting interim relief to objectors suggested the existing accommodation could not pass muster.

The agencies went back to the drawing board. Still refusing to exempt religious non-profits from the mandate, they revised the accommodation. Religious non-profits could comply with the mandate either by submitting the official form to their health insurance issuer/third-party administer or sending a "notice" to HHS. The notice had to contain: (1) the entities' name and the reason it qualifies for the accommodation, (b) a description of its religious objection to covering contraceptives, (c) the name and type of its health plan, and (d) the name and contact information of its health insurance issuer or third-party administrator. 79 Fed. Reg. 51,092, 51,094–95 (Aug. 27, 2014). Then HHS would notify a religious non-profit's insurer or third-party administrator, on the non-profit's behalf, of its new obligation to provide contraceptive coverage to employees. *Id.* at 51,095; 29 C.F.R. 2510.3-16(b).

The agencies also made closely-held, for-profits whose owners objected to covering abortifacients eligible for the new accommodation. 80 Fed. Reg. 41,318, 41,324 (July 14, 2015). But they still offered no exemption or accommodation to non-religious, non-profits with moral objections to abortion. As a result, the agencies gave March for Life *less* conscience protection than Hobby Lobby.

C. *Zubik* and its aftermath

Not all objectors' consciences were assuaged by the revised accommodation because it still required them to authorize use of their own health plans to provide abortifacient drugs. Dozens of lawsuits continued, and this Court granted emergency relief to a group of Catholic dioceses and related entities pending the filing and disposition of their cert. petition. *Zubik* v. *Burwell*, 135 S. Ct. 2924 (2015). Ultimately, this Court took and consolidated seven cases brought chiefly by religious non-profits.

Before this Court, the agencies admitted several key facts about the accommodation. First, contraceptive services provided by a religious non-profit's health insurance issuer or third-party administrator are "part of the same [health] plan as the coverage provided by the employer." Br. for Resp'ts at 38, *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418). They are not "separate," as the agencies had long claimed.

Second, the agencies claimed that they could not ensure the delivery of abortifacients without religious non-profits turning over the name and contact information of their health insurance issuer or third-party administrator. *Id.* at 87–88. But providing this data imposed a burden on religious exercise because it was a "but for" cause of abortifacients' delivery.

Third, the agencies confessed the need for religious non-profits to submit a written document legally authorizing others to provide abortifacients through their own private health plans. *Id.* at 16 n.4. Either the official form or notice to HHS served as religious non-profits' designation of someone else to provide abortifacients in their stead. *Ibid.*

Fourth, in a supplemental brief ordered by this Court, the agencies admitted that the regulatory scheme "could be modified" to better accommodate objectors' concerns. Suppl. Br. for Resp'ts at 3, 14, *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418). The accommodation was not the least restrictive means of accomplishing their goals.

Given this, and religious non-profits' assurance they did not object to their health insurers providing contraceptives without them, this Court vacated the judgments below and remanded the cases. *Zubik* v. *Burwell*, 136 S. Ct. 1557, 1560 (2016) (per curiam). It gave the agencies "an opportunity" to better accommodate religious non-profits' objections. *Ibid.*

The agencies solicited public comments on options to revise the accommodation yet again. 81 Fed. Reg. 47,741, 47,741 (July 22, 2016). But no regulatory changes resulted. Shortly after the 2016 presidential election, the agencies stated that it was impossible to modify the accommodation to resolve objectors' concerns. U.S. Dep't of Labor, FAQs About Affordable Care Act Implementation Part 36 (Jan. 9, 2017), https://bit.ly/2Sv6Q3z. Dozens of lawsuits remained pending, including one March for Life filed in 2014.

D. After additional litigation, the agencies reconsider and create broader conscience exemptions.

After prevailing in an election where the contraceptive mandate was a major matter, President Trump issued an executive order directing the agencies to consider regulatory changes "to address conscience-based objections." Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017).

The agencies later revisited the matter and issued final rules concluding: (1) Congress has protected moral and religious objectors in the healthcare context for decades, (2) the agencies had exempted many employers from the contraceptive mandate from its inception, (3) the mandate and revised accommodation violated RFRA in many instances, (4) creating an exemption for employers with moral objections and enlarging the existing religious exemption was justified, and (5) these carve outs were preferable to eliminating the contraceptive mandate altogether. 83 Fed. Reg. 57,536 (Nov. 15, 2018); 83 Fed. Reg. 57,592 (Nov. 15, 2018).

The final rules, issued after notice and comment, establish moral and religious exemptions from the contraceptive mandate for which March for Life and others had long advocated in court and the public square. The agencies agreed to no longer force entities such as churches, non-profits, for-profits that are not publicly traded, and private colleges to establish, maintain, provide, offer, or arrange for abortifacient drugs. But the mandate otherwise remains in place and qualifying employers must provide any FDA-approved contraceptive or sterilization items, procedures, services, and counseling to which they have no moral or religious objection. 45 C.F.R. 147.132; 45 C.F.R. 147.133.

The agencies kept the religious accommodation, as a voluntary option, and made it available to moral objectors. 83 Fed. Reg. at 57,561; 83 Fed. Reg. at 57,623–24. HHS also ensured that any low-income woman who might lose access to contraceptives due to her employer's objection could receive them under Title X. 84 Fed. Reg. 7,714 (Mar. 4, 2019).

E. The plaintiff States sue, and the Third Circuit affirms an injunction against the final rules.

This truce should have brought lasting peace, but it was not to be. Before the agencies could even publish the revised rules, Pennsylvania sued, seeking a nationwide injunction on the ground that the religious and moral exemptions violated the ACA and the Administrative Procedures Act. J.A. 194–95. The district court held that Pennsylvania had standing, Little Sisters Pet.App. 147a–58a, then granted the nationwide preliminary injunction, even though only a single state had filed suit, *id.* at 160a–73a, 193a–95a.

During the appeal—and after considering more than 56,000 comments, see 83 Fed. Reg. 57,536, 57,540 (Nov. 15, 2018)—the agencies issued their final rule, concluding "an expanded exemption . . . is the most appropriate administrative response to the substantial burden identified by [this] Court in Hobby Lobby." *Id.* at 57,545. Indeed, for some objecting entities, RFRA "required" the expanded exemption. *Id.* at 57,540–541.

All this spurred Pennsylvania, joined by New Jersey, to file an amended complaint. The district court again held that the states had standing, Little Sisters Pet.App. 73a–81a, and it again entered a nationwide injunction. *Id.* at 97a–100a. In other words, the agencies had the authority to create the contraceptive mandate, but they apparently lacked power to carve out any exemptions. This "all or nothing" view of the agencies' authority has no tether to the ACA's text.

The Third Circuit affirmed. Little Sisters Pet.App. 8a. It began by recognizing that the plaintiff States' hypothetical increase in voluntary funding gave them standing, even though they could not identify a single "specific woman who will be affected by the Final Rules." Little Sisters Pet.App.25.

Conversely, and in conflict with its earlier ruling on intervention, the court of appeals said the Little Sisters lacked standing to defend the rule because they had already obtained a limited injunction from a Colorado district court that was based on the specific benefit plans the Little Sisters had in place. Little Sisters Pet.App.15a n.6. The opinion did not address the fact that under the final rules, the Little Sisters would have much more flexibility, including the ability to adopt different health plans without running afoul of the mandate.

On the merits, the Third Circuit agreed that the ACA granted limited discretion to the agencies to create a mandate that exempted churches but withheld discretion to exempt anyone else, Little Sisters Pet.App. 40a, and it held that RFRA was not in play because the mandate "did not infringe on the religious exercise of covered employers," Little Sisters Pet.App. 48a, notwithstanding the contrary suggestions in *Hobby Lobby* and *Zubik*.

ARGUMENT

I. The Little Sisters of the Poor have standing.

A. The Little Sisters have appellate standing.

The Third Circuit's about-face on the Little Sisters' standing is remarkable. To demonstrate standing on appeal, a litigant must show that it is seeking "relief for an injury that affects him in a 'personal and individual way'" and possesses "a 'direct stake in the outcome' of the case." *Hollingsworth* v. *Perry*, 570 U.S. 693, 705 (2013). The Little Sisters easily satisfy that standard here.

For years, the Little Sisters have sought the very protection the agencies' final rules provide. Absent that protection, the Little Sisters would be forced to violate the tenets of their Catholic faith. The Third Circuit did not disagree in theory. But it concluded the Little Sisters no longer needed that protection in fact because of the injunction they obtained in *Little Sisters of the Poor* v. *Azar*, No. 1:13-cv-02611 (D. Colo). But that order enjoined the government's enforcement of the contraceptive mandate only if the Little Sisters stay in their current plan. If the Little Sisters leave that plan for any reason, whether due to cost, scope of coverage, or another state's requirements, the federal government is again "free to enforce" the mandate. *Id.*, ECF No. 82 at 2–3. That is a far cry from the final rules, which provide a categorical exemption regardless of the plan provider or the specifics of any plan provisions. That difference easily satisfies the direct-stake and personalized injury requirements that Article III requires.

B. The Little Sisters also have derivative standing as intervenors.

Alternatively, the Little Sisters have derivative standing based on the federal agencies' participation in this case. While some lower courts have required intervenors to show independent Article III standing even when the party they support appeals, *e.g.*, *Pennsylvania* v. *President United States*, 930 F.3d 543, 559 n.6 (3d Cir. 2019), this Court has rejected that position. Because the agencies are petitioners in this Court, the Little Sisters may "'piggyback' on [their] undoubted standing" and are "entitled to seek review." *Diamond* v. *Charles*, 476 U.S. 54, 64 (1986).

Moreover, intervening in support of the agencies does not entail invoking this Court's jurisdiction or require the Little Sisters to show standing themselves. *Va. House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019); see also *Wittman* v. *Personhuballah*, 136 S. Ct. 1732, 1736 (2016) (only parties "invoking a federal court's jurisdiction" must "demonstrate standing").

So even if the Little Sisters were protected by a much broader injunction than the one that actually exists, i.e., one that is truly coextensive with the protection the religious and moral exemptions provide, the Little Sisters' standing piggybacks on the agencies' standing. The Third Circuit erred in holding that only the federal government as regulator has an interest in upholding the final rules, not a regulated party who spurred on the rules and sought for years the relief the final rules provide.

II. Conversely, the plaintiff States lack standing. And their inability to identity a single individual plaintiff who is harmed by the exemptions shows there is no compelling reason to force employers to violate their consciences.

Under RFRA, the federal government and its agencies may not enforce the contraceptive mandate to substantially burden the Little Sisters' exercise of religion unless doing so is the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(a), (b). *Hobby Lobby* establishes that the mandate imposes a substantial burden on religious exercise. 573 U.S. at 719. And the plaintiff States cannot show that the mandate without the religious and moral exemptions is the least restrictive means of furthering the government's interest in ensuring that women have abortifacients and artificial contraception. We know this, because the plaintiff States have been unable to produce even a single person who is likely to lose contraceptive coverage as a result of the religious and moral exemptions' implementation.

As explained more fulsomely in March for Life's petition in Case No. 19-1040, the plaintiff States lack standing to demand a federal contraceptive mandate with no exemptions. The mandate operates against private employers to benefit employees. Nothing gives the States a legal right to force the agencies to redirect contraceptive payments they voluntarily assumed to conscientious objectors. All the States claim is self-imposed financial harm based on the hypothetical actions of employers and employees that is speculative and remote.

1. To articulate the States' novel theory of standing is to refute it. It goes as follows: (1) the States voluntarily instituted programs that provide contraceptives to low-income women, (2) the religious and moral exemptions will cause some employed women to lose access to contraceptives, and (3) those women will turn back to the States' voluntary contraceptive programs, costing the States money.

This logic shows no injury in fact. The States have no "personal right under the Constitution or any statute to be free of action by [federal agencies] that may have some incidental adverse effect" on them. *Warth* v. *Seldin*, 422 U.S. 490, 509 (1975). Any indirect fiscal benefit the contraceptive mandate provided to States was purely serendipitous, not a matter of right.

Virtually every federal policy increases or reduces the States' costs. That does not give them standing to freeze any beneficial administrative act. Federal agencies owe the States nothing under the ACA. The agencies' contraceptive mandate and moral and religious exemptions leave the States free to do what they like. *New Jersey* v. *Sargent*, 269 U.S. 328, 334 (1926). The States may leave their voluntary contraceptive programs as is, modify their eligibility criteria, or cancel them altogether without federal punishment.

So what the States seek is "not to enforce specific legal obligations whose violation works a direct harm" against them. *Allen* v. *Wright*, 468 U.S. 737, 761 (1984). The States want nothing less than to "restructur[e] . . . the apparatus established by the Executive Branch to fulfill its legal duties" under the ACA. *Ibid.*

2. "No State can be heard to complain about damage inflicted by its own hand." *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976). Yet that is precisely the complaint the States make here. Any possible injury to the State's fiscs results "from decisions by their respective state legislatures" to pay for women's contraception. *Ibid*. That decision is unrelated to the federal agencies' contraceptive mandate.

If the States are concerned about the costs of their discretionary programs, "nothing prevents" them from altering or eliminating them. *Ibid.* (Just as the federal government is free to alter or eliminate its own program.) But self-inflicted injury in the form of voluntary spending does not open the door to federal court. The agencies "neither require nor forbid any action on" the States' part. *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 493 (2009). What the States are "really complaining about [is] their own statute[s]." *Pennsylvania*, 426 U.S. at 667 (Blackmun, J., concurring).

3. So Article III's requirements apply in full force: the States' "threatened injury must be certainly impending to constitute injury in fact." *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990) (cleaned up). The problem is that the States' alleged fiscal harm is "pure speculation and fantasy." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 567 (1992).

The final regulations' economic impact is not known. 83 Fed. Reg. at 57,607–08, 57,618; 83 Fed. Reg. at 57,550, 57,572–81. Critically, the States cannot identify a single employer in their borders that will drop contraceptive coverage based on the new moral or expanded religious exemptions, much less an

employee of such an employer who desires abortifacient coverage. That is because many objectors were satisfied with the accommodation and others—like March for Life—are covered by injunctions. And that is just the start of the "highly attenuated chain of possibilities," *all* of which must align perfectly before the States could realize a financial hit. *Clapper* v. *Amnesty Intern. USA*, 568 U.S. 398, 410 (2013).

Even if a relevant employer exists within the States' bounds, the States do not know what specific contraceptives it objects to and what contraceptives its health plan beneficiaries want. Assuming a real conflict, the States still cannot prove that it is likely: (1) plan beneficiaries have no other coverage or way to access their contraceptive of choice, (2) plan beneficiaries will turn to State healthcare programs, (3) plan beneficiaries will satisfy the States' programs' eligibility requirements, and (4) the States will leave their programs the same and spend more money on contraceptives or unintended pregnancies.

4. The plaintiff States' inability to produce any evidence that a particular employer is likely to claim the exemption that will result in the States paying additional money after implementation of the religious and moral exemptions is fatal on the merits. If the mandate both with and without the exemptions results in the same scope of coverage, the mandate with the exemptions is necessarily the least restrictive means of advancing the government's interests, however compelling. This is a separate and independent reason to reverse the Third Circuit and uphold the final rules.

III. The agencies had statutory authority to issue the moral and religious exemptions, which are legally permissible (if not required) and not arbitrary or capricious.

Congress left the preventive-care mandate a blank slate and invested federal agencies with ample discretion to fashion not only its content, but limited exemptions based on the Constitution, the Religious Freedom Restoration Act, and this Court's decisions. Moreover, the final rules are balanced, address all relevant considerations, and attempt to restore societal peace. Just because the Third Circuit disagrees with objectors' views does not make accommodating them arbitrary or capricious.

A. The final regulations are within the agencies' gap-filling authority.

Any argument that the ACA does not allow the agencies much, if any, discretion is based on cherry-picked legislative history and value judgments—not the statute's text. Congress said that a component of HHS will enact "comprehensive guidelines" fleshing out what the ACA's preventive-care requirement means, 42 U.S.C. 300gg-13(a)(4), and that the agencies could "promulgate such regulations as may be necessary or appropriate to" accomplish that task, 42 U.S.C. 300gg-92; 29 U.S.C. 1191c; 26 U.S.C. 9833.

The agencies have done precisely what Congress asked: they enacted comprehensive guidelines that generally require employers to include all FDA-approved contraceptives in their health plans. But the agencies also issued regulations exempting moral or religious objectors that were necessary or appropriate based on constitutional or statutory concerns.

"The power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the marking of rules to fill any gap left, implicitly or explicitly, by Congress." *Mayo Found. for Med. Educ. & Research* v. *United States*, 562 U.S. 44, 55–56 (2011) (cleaned up). The ACA's preventive-care gap is explicit, and the discretion Congress granted the agencies to fill it is broad. Congress expressly delegated authority to the agencies to craft regulations interpreting the preventive-care provision. *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001).

"Regulation, like legislation, often requires drawing lines." *Mayo Found.*, 562 U.S. at 59. The only question is whether Congress would have expected courts to treat the final regulations as within the agencies' gap-filling authority. *Id.* at 58. Congress must have so expected because: (1) Congress is well-versed in the Constitution's limits, (2) Congress broadened those limits by enacting RFRA, and (3) this Court has long afforded conscience protections to those—like March for Life—whose moral convictions are held with the strength of traditional religious beliefs based on constitutional concerns, *Gillette* v. *United* States, 401 U.S. 437, 445 (1971); *Welsh* v. *United States*, 398 U.S. 333, 340 (1970) (plurality); *id.* at 344 (Harlan, J., concurring).

As the Little Sisters explain, RFRA provides an independent ground justifying the religious exemption. And it is irrational and violates equal protection for the government to refuse to give an exemption to non-religious nonprofits whose employees share the same pro-life beliefs as the Little Sisters. So, it makes sense to pair religious and moral exemptions.

Federal agencies do this all the time. 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). Information requirements do not apply "if the MCO, PIHP, or PAHP 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 has a "Non-Discrimination for Conscience" clause for receipt of HIV or malaria funds.

Other federal regulations similarly respect moral convictions alongside religious beliefs. 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 And 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, or if the employee is a medical professional who considers such participation or attendance contrary to medical ethics." 28 C.F.R. 26.5.

As these and other federal regulations demonstrate, federal agencies have long been cognizant of the distinction between congressional lawmaking and agency regulation. And agencies regularly exercise their rule-making discretion to protect non-religious and religious consciences alike. That practice supports the federal agencies' creation of both a religious and a moral exemption here. See 83 Fed. Reg. at 57,601–02.

In sum, if Congress gave the agencies discretion to require some employers to provide abortifacients and artificial contraceptives, it also gave those agencies discretion to craft both the religious and moral exemptions. Accordingly, the agencies had authority to enact the final rules.

B. The agencies' conscience exemptions are not arbitrary or capricious.

The agencies' moral and religious exemptions are the culmination of historic litigation, negotiation, and many rounds of rulemaking. Pennsylvania and New Jersey may dislike the result. But self-evidently, the final rules are the agencies' good-faith effort to bring peace to a fractured society. All the APA demands is "good reasons for the new policy" and the agencies' belief it is better than the old one. *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Here, the Third Circuit held that the final rules were likely arbitrary and capricious by ignoring this history and substituting the States' policy "judgment for that of the agenc[ies]." *Motor Vehicle Mfrs. Assoc. of the United States* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). But the agencies "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *Fox Television*, 556 U.S. at 515. They must simply "examine the relevant data and articulate a satisfactory explanation" for their actions. *Motor Vehicle*, 463 U.S. at 43.

Nothing lacks in the agencies' inquiry or reasoning here. The final rules are a balanced attempt to provide FDA-approved contraceptives to as many women as possible through employer-based health plans, while respecting the freedom of conscience on which our Nation was founded. Even a cursory review of the final rules shows that the agencies paid close heed to: (1) the ACA's text and structure, (2) Congress' and our Nation's history of protecting freedom of conscience, (3) judicial decisions, and (4) the likely benefits and burdens associated with their chosen path. 83 Fed. Reg. at 57,594–57,613; 83 Fed. Reg. at 57,538–57,582.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted,

David A. Cortman
Rory T. Gray
Kevin H. Theriot
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals
Lawrenceville, GA 30043
(770) 339-0774

Kristen K. Waggoner
John J. Bursch
Counsel of Record
ALLIANCE DEFENDING FREEDOM
440 First Street SW #600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

MARCH 2020