Nos. 19-1038, 19-1040, 19-1053

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMBINED BRIEF IN OPPOSITION

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March 20, 2020

(*Additional captions on inside cover and counsel on signature pages*)

MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,

Respondents.

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,

Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,

Respondents.

QUESTIONS PRESENTED

1. Whether the federal government acted outside its authority when it issued rules broadly exempting employers with religious or moral objections from the Affordable Care Act's mandate to provide contraceptive coverage for women.

2. Whether the respondent States have Article III standing to challenge the agencies' religious and moral exemption rules based on record evidence demonstrating that the rules will cause women to lose coverage for contraceptive services and turn to state-supported programs to fill the gap.

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INTRODUCTION

The Affordable Care Act requires healthcare plans to cover cost-free preventive care services, including contraceptive services for women. In 2017 and 2018, the United States Departments of Health and Human Services, Labor, and the Treasury issued interim and then final rules broadly exempting employers with religious or moral objections from the statutory mandate to provide contraceptive coverage. The district court and the court of appeals held that the agencies likely acted outside of their authority in promulgating these sweeping new exemptions and enjoined the final rules within the respondent States.

That conclusion is correct; but under the circumstances present here, it would be appropriate for the Court to hold the three petitions filed by petitioners the United States Department of Health and Human Services and other federal agencies, Little Sisters of the Poor Jeanne Jugan Residence, and March for Life Education and Defense Fund. On January 17, 2020, this Court granted certiorari in *Trump v. Pennsylvania*, No. 19-454, and *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, No. 19-431. Those cases involve challenges to the same religious and moral exemption rules. Like the petitions here, they present the question whether the agencies had authority to broadly exempt employers from the ACA's contraceptive-coverage mandate.

Petitioner March for Life, but not the other two petitioners, also asks the Court to grant certiorari to consider the respondent States' Article III standing. That request should be denied. March for Life does not assert that the decision below conflicts with decisions of other circuits. And the court of appeals properly ap-

plied this Court's precedents in concluding that the respondent States have standing to pursue their claims in light of the substantial and concrete fiscal harms that will result from the final rules.

STATEMENT

1. Congress adopted the Patient Protection and Affordable Care Act in 2010. In a provision known as the Women's Health Amendment, Congress required healthcare plans to cover, at no cost to the patient, "such additional preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(4); Pet. App. 4a.[1]

In 2011, HRSA issued guidelines requiring coverage of all FDA-approved "contraceptive methods, sterilization procedures, and patient education and counseling" for women. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725-8726 (Feb. 15, 2012). HRSA based those guidelines on recommendations of the Institute of Medicine. *Id.* at 8726. The guidelines were subsequently updated in 2016 and continue to call for comprehensive coverage of contraceptive services. Pet. App. 158a n.3. The United States Departments of Health and Human

[1] This brief responds to the petitions filed by the federal defendants (No. 19-1038), intervenor March for Life Education and Defense Fund (No. 19-1040), and intervenor Little Sisters of the Poor Jeanne Jugan Residence (No. 19-1053). Citations to the petition and appendix filed by the federal government are to "Pet." and "Pet. App.," respectively. Citations to the petition filed by March for Life are to "March for Life Pet." Citations to the petition filed by Little Sisters are to "Little Sisters Pet."

Services, Labor, and the Treasury—which jointly administer the Affordable Care Act, *see* 42 U.S.C. § 300gg-92; 29 U.S.C. § 1191c; 26 U.S.C. § 9833—promulgated regulations consistent with these guidelines. *See* 77 Fed. Reg. at 8725-8726. The agencies explained that the requirement to provide coverage of contraceptives implements the ACA's objective of meeting the "unique health care needs and burdens" of women. *Id.* at 8727.

The agencies also separately adopted regulations to accommodate certain nonprofit religious employers with objections to covering contraceptives. First, the agencies adopted a limited exemption from the contraception-coverage requirement for houses of worship, using a definition consistent with a similar longstanding exemption in the Internal Revenue Code. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). In a subsequent rulemaking and in response to public feedback, the agencies adopted an accommodation for a defined category of nonprofit religiously-affiliated employers that would allow them to opt out of contracting, arranging, paying, or referring for contraceptive services. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,874-39,882 (July 2, 2013); *see also* 77 Fed. Reg. at 8726-8727.

Under the original accommodation, objecting employers submitted a self-certification form to their health insurance issuer or third-party plan administrator attesting to their eligibility for the accommodation. 78 Fed. Reg. at 39,875-39,876. Upon receiving the form, the insurer or administrator would "assume

sole responsibility" for providing the required contraceptive services without cost-sharing, notify covered employees of their employer's use of the accommodation, and segregate coverage of contraceptives so that it was completely separate from the rest of the employer-sponsored health plan. *Id.* In response to objections from those eligible for the accommodation and this Court's order in *Wheaton College v. Burwell*, 573 U.S. 958 (2014), the accommodation process was amended in 2014 to allow eligible employers to instead directly notify (without using any specific form) the Department of Health and Human Services, which would then notify the objecting employer's insurer or plan administrator in the employer's place. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,094-51,095 (Aug. 27, 2014).

Numerous lawsuits were filed challenging the requirement to cover cost-free contraceptives and the agencies' approach to accommodating religious objections. *See* Pet. App. 162a-163a. In *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam), this Court considered certain nonprofit employers' claims that the act of opting out through the accommodation process violated the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1. *Zubik*, 136 S. Ct. at 1561. The Court did not address the merits of the challengers' claims but remanded the cases to allow the parties to seek an alternative accommodation that would meet the needs of all parties, including "ensuring that women covered by [objectors'] health plans 'receive full and equal health coverage, including contraceptive coverage.'" *Id.* at 1560.

Consistent with this Court's remand, the agencies issued a request for information and solicited comments concerning whether and how the regulations could be changed to resolve objectors' concerns while still ensuring their employees received full and equal health coverage. *See* Coverage for Contraceptive Services, 81 Fed. Reg. 47,741, 47,743-47,744 (July 22, 2016). Following the comment period, the agencies decided to maintain the existing accommodation, reiterated their conclusion that it was consistent with RFRA, and explained that "no feasible approach" had been identified by comments from either side that would "resolve the concerns of religious objectors, while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage." U.S. Dep't of Labor, Employee Benefits Security Administration, *FAQs About Affordable Care Act Implementation Part 36*, at 4 (Jan. 9, 2017).[2]

2. a. On October 6, 2017, the agencies changed course and issued two interim final rules significantly expanding the number of employers eligible for the exemption from the requirement to provide coverage for contraceptive services for their employees and their dependents. One interim final rule extended the categorical religious exemption to "any kind of non-governmental employer" with a religious objection to contraceptive coverage. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,809 (Oct. 13, 2017). A separate interim final rule created an entirely new exemption for certain

[2] *Available at* https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf) (last visited March 19, 2020).

employers with a moral objection to covering contraceptives. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,848-47,849 (Oct. 13, 2017). The interim final rules also made the accommodation procedure voluntary for both religious and moral objectors. *See id.* at 47,806, 47,854. Both were issued without prior notice or an opportunity for public comment, and both took immediate effect. *See id.* at 47,813-47,815, 47,854-47,856.

b. Respondents the States of California, Delaware, Maryland, and New York and the Commonwealth of Virginia filed suit challenging the interim religious and moral exemption rules and moved for a preliminary injunction. Pet. App. 8a. The States alleged that the interim final rules were invalid under the Administrative Procedure Act because they were improperly issued without notice and comment, were arbitrary and capricious, were contrary to the Affordable Care Act, were issued without statutory authority, and violated the First and Fifth Amendments. *Id.*

Little Sisters moved to intervene to defend the agencies' expanded religious exemption, and March for Life moved to intervene to defend the new moral exemption. *See* Little Sisters Pet. 5; March for Life Pet. 18. The States opposed both motions, noting in particular that March for Life had already obtained a permanent injunction in a separate suit that prevented the federal government from applying the contraceptive-coverage requirement to it. *See* D.Ct. Dkt. 107 at 3-4.

The district court granted the States' motion for a preliminary injunction and enjoined enforcement of the interim moral and religious exemption rules nationwide. Pet. App. 194a-195a. It held that the States

had standing to bring their procedural challenge because they had demonstrated that they would "incur economic obligations" because of the interim final rules. *Id.* at 173a. The interim final rules would lead to women losing coverage for contraceptives, which in turn would lead to increased costs to the States from "cover[ing] contraceptive services necessary to fill in the gaps" or from "expenses associated with unintended pregnancies." *Id.* On the merits, the court concluded that, "at a minimum," the States were likely to succeed on their claim that the agencies violated the APA by issuing the interim final rules without prior notice and comment and that the other requirements for injunctive relief were met. *Id.* at 178a. After issuing the injunction, the district court granted Little Sisters' and March for Life's motions to intervene as permissive intervenors. *Id.* at 8a.

c. The court of appeals affirmed in part and reversed in part the district court's issuance of preliminary relief. Pet. App. 105a-153a. The court of appeals first agreed with the district court that the States had standing to bring their claims. *Id.* at 118a-125a. It explained that the States had demonstrated that the interim religious and moral exemption rules would "first lead to women losing employer-sponsored contraceptive coverage, which [would] then result in economic harm to the states" when women turned to state-funded programs to provide needed services. *Id.* at 118a.

The court reasoned that this conclusion followed from the federal government's own regulatory impact analysis. Pet. App. 119a-120a. That analysis "estimate[d] that between 31,700 and 120,000 women nationwide [would] lose some coverage" under the interim final rules, *id.* at 119a; identified the "names

of specific employers . . . likely to use the expanded exemptions," including those doing business in the plaintiff States, *id.* at 119a-120a; and forecast "the direct cost of filling the coverage loss as $18.5 or $63.8 million per year," *id.* at 120a. It also specifically recognized that "state and local programs 'provide free or subsidized contraceptives for low-income women'" and concluded that this "'existing intergovernmental structure for obtaining contraceptives significantly diminishes' the impact of" the new categorical exemptions. *Id.* (quoting 82 Fed. Reg. at 47,803). The court explained that the regulatory analysis "itself thus assumed that state and local governments will bear additional economic costs" as a result of the new rules. *Id.*; *see also id.* (discussing States' declarations further demonstrating that women losing employer-provided coverage will turn to state-supported programs for care).

The court further concluded that the States' injuries were traceable to the challenged interim final rules. Pet. App. 122a. It rejected the argument, advanced for the first time by the dissent, that the States' injuries were "self-inflicted" by the States' own voluntary decisions to fund programs providing contraceptive care to low-income women. *Id.* at 122a-123a. "Courts regularly entertain actions brought by states and municipalities that face economic injury," as the States here did, "even though those governmental entities theoretically could avoid the injury by enacting new legislation." *Id.* at 123a (citing *South Dakota v. Dole*, 483 U.S. 203 (1987), and *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979)).

On the merits, the court agreed that the States were likely to succeed on their claim that the interim final rules were improperly issued without notice and

comment and that injunctive relief was proper, Pet. App. 125a-140a, but limited the scope of the injunction to the five plaintiff States, *id.* at 141a-146a.

Judge Kleinfeld dissented. Pet. App. 147a-153a. He would have concluded that the States' injuries were self-imposed and could be avoided by declining to fund state programs providing contraceptive care for low-income women. *Id.* at 153a.

d. This Court denied Little Sisters' petition for a writ of certiorari. *Little Sisters of the Poor Jeanne Jugan Residence v. California*, 139 S. Ct. 2716 (2019) (No. 18-1192) (mem.).

3. a. In November 2018, the agencies issued two new final rules—a final religious exemption rule and a final moral exemption rule—that were to supersede the interim final rules and take effect on January 14, 2019. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018). The final rules are "materially identical" to the interim final rules, Pet. App. 9a, and continue to provide broad exemptions from the ACA's contraception-coverage requirement for any non-governmental religious objector and for nearly any non-governmental moral objector, while maintaining the now-optional accommodation process, 83 Fed. Reg. at 57,537-57,538, 57,593.

There were, however, three relevant changes to the agencies' analysis of the impact of the rules. First, the agencies increased the estimated number of women who would lose coverage by several thousand, from

120,000 to 126,400. Pet. App. 59a (citing 83 Fed. Reg. at 57,551). Second, the agencies increased the estimated cost of the rules from $63.8 million to $67.3 million a year. *See id.* (citing 83 Fed. Reg. at 57,581). Third, the rules placed "increased emphasis on the availability of contraceptives at Title X family-planning clinics as an alternative to contraceptives provided by women's health insurance" and as a means to fill the gap in coverage created by the rules. *Id.* (citing 83 Fed. Reg. at 57,551, 57,608).

b. Respondents here—the original five plaintiff States joined by the States of Connecticut, Hawaii, Illinois, Minnesota, North Carolina, Rhode Island, Vermont, and Washington and the District of Columbia—amended their complaint to challenge the final religious and moral exemption rules and moved for a preliminary injunction. Pet. App. 9a.[3]

The district court enjoined enforcement of the final rules within the plaintiff States. Pet. App. 104a. It first held that the States had established standing in light of the "voluminous and detailed evidence documenting how their female residents are predicted to lose access to contraceptive coverage because of the Final Rules—and how those women likely will turn to state programs to obtain no-cost contraceptives, at significant cost to the States." *Id.* at 65a. The court further concluded that the States had "shown that the Final Rules are likely to result in a decrease in the use of effective contraception," since "the most effective

[3] The State of Oregon is also a plaintiff in the district court but is not a respondent in these proceedings. *See* Sup. Ct. R. 12.6. Oregon intervened as a plaintiff and obtained a separate preliminary injunction after the district court issued the preliminary injunction at issue here. *See* D.Ct. Dkts. 210, 274, 297, 387.

contraceptive methods are also among the most expensive," and that in turn will "lead[] to unintended pregnancies" and "impose significant costs on the States." *Id.* at 66a.

On the merits, the district court held that the States were likely to prevail on, or at least had raised serious questions concerning, their claims that the final rules are inconsistent with the ACA, Pet. App. 71a-74a; are not required or authorized by the Religious Freedom Restoration Act, *id.* at 74a-92a; and are arbitrary and capricious due to the agencies' failure to provide a reasoned explanation for disregarding facts supporting their prior policy, particularly in light of the "serious reliance interests of women who would lose coverage to which they are statutorily entitled," *id.* at 94a. The court did not address the States' additional claim that the final rules were procedurally invalid because the agencies failed to properly follow notice and comment requirements in issuing the rules.[4]

c. All three petitioners appealed, and the court of appeals again affirmed. It first held that the States had standing to bring their challenges to the final religious and moral exemption rules. Pet. App. 10a-11a. The court explained that no new factual or legal developments supported reconsideration of its prior ruling. *Id.* To the contrary, intervening authority from this Court, *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), confirmed its prior conclusion. *See*

[4] March for Life is incorrect in asserting (at 26) that the States did not challenge the final rules as procedurally invalid under the APA. Although the district court declined to reach that claim in light of its other holdings, the States pleaded such a claim and moved for a preliminary injunction on that ground. *See, e.g.*, D.Ct. Dkt. 174 at 15-16.

Pet. App. 11a. In *Department of Commerce*, this Court held that the plaintiff States had standing to challenge the federal government's decision to add a citizenship question to the census, "even though their claims of harm depended on unlawful conduct of third parties," because their injuries "'relie[d] on the predictable effect of Government action on the decisions of third parties.'" *Id.* (quoting *Dep't of Commerce*, 139 S. Ct. at 2566) (ellipses omitted). Here, the States' "theory of causation depends on wholly lawful conduct and on the federal government's *own* prediction about the decisions of third parties." *Id.* (emphasis in original).

Turning to the merits, the court held that the agencies likely lacked statutory authority to issue the final rules. Pet. App. 17a-30a. The court first concluded that the Affordable Care Act did not authorize the agencies to promulgate either the religious or moral exemption. *Id.* at 17a-22a. Examining the "plain language" of the statute, the court explained that Congress used the word "'shall'" when prescribing the obligations of insurers to provide cost-free coverage for preventive services for women. *Id.* at 18a (quoting 42 U.S.C. § 300gg-13(a)(4)). That means that "group health plans and insurance issuers must cover preventative care without cost sharing." *Id.* And while the statute grants HRSA the limited authority to determine the types of preventive care to be covered, "nothing in the statute permits the agencies to determine exemptions from the requirement" to provide such coverage. *Id.* at 18a-19a; *see also id.* at 19a (ACA delegates "the discretion to determine *which types of preventative care* are covered," not "the discretion to exempt *who must meet the obligation*") (emphasis in original).

The court next concluded that RFRA neither required nor authorized the moral and religious exemption rules. Pet. App. 22a-30a. The court explained that "RFRA plainly does not authorize the moral exemption" rule because RFRA "pertains only to the exercise of religion; it does not concern moral convictions." *Id.* at 22a n.2.

The court further determined that RFRA did not authorize or require the religious exemption rule. Pet. App. 22a-30a. The court explained that, even assuming that RFRA delegated authority to the agencies to issue blanket rules to address perceived RFRA violations, the accommodation process established before the rule's issuance does not substantially burden the exercise of religion. *Id.* at 25a. The court observed that under the accommodation process, a religious objector need only notify its insurance issuer, its third-party administrator, or the U.S. Department of Health and Human Services of its eligibility for the accommodation and intent to opt out of providing contraceptive services. *Id.* at 28a. The objector is then "relieved of any role whatsoever in providing objectionable care." *Id.* "[A]ll actions taken to pay for or provide the [objector's] employees with contraceptive care [are] carried out by a third party;" the objector has no "obligation to contract, arrange, pay, or refer for access to contraception." *Id.* Rejecting the argument that religious objectors "are forced to be complicit in the provision of contraceptive care," the court held that an "objecting organization's only act—and the only act required by the government—is opting out by form or notice." *Id.* at 29a. The accommodation thus does not

substantially burden any employer's religious exercise. *Id.* at 30a.[5]

Judge Kleinfeld dissented. Pet. App. 33a-39a. He would have held that a nationwide injunction issued by a federal court in Pennsylvania after the injunction ordered here mooted petitioners' appeals. *Id.* He also noted his disagreement with the majority on standing and on the merits. *Id.* at 38a.

4. On January 17, 2020, this Court granted two petitions for certiorari arising from a parallel challenge to the interim and final rules brought by the Commonwealth of Pennsylvania and the State of New Jersey: *Trump v. Pennsylvania*, No. 19-454, and *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, No. 19-431. In *Trump*, the questions presented are: (1) whether the agencies had authority to promulgate the final rules; (2) whether the agencies' decision to forgo notice and comment when issuing the interim final rules renders the final rules invalid under the APA; and (3) whether it was appropriate to enter a nationwide injunction to remedy the harm caused by the rules. *Little Sisters* presents the additional question whether a litigant has standing to appeal a decision invalidating an administrative rule when an injunction issued by another court protects the litigant from the harm alleged.

[5] The court declined to reach the district court's further conclusion that the final rules were likely arbitrary and capricious as a result of the agencies' failure to adequately explain why they disregarded the facts underlying their pre-2017 rules. Pet. App. 30a-31a.

ARGUMENT

1. The federal petitioners and Little Sisters ask that the Court hold their petitions pending the resolution of *Trump v. Pennsylvania* and *Little Sisters of the Poor v. Pennsylvania* (hereafter *Pennsylvania*). Pet. 14-15; Little Sisters Pet. 1, 11-12. The arguments and the record in this case differ in certain respects from those in *Pennsylvania*; and the decision below correctly applied this Court's precedents in holding that the final religious and moral exemption rules are likely invalid, *see infra* at 19-21. Nevertheless, it would be appropriate to hold all three petitions until the Court decides *Pennsylvania*. As the federal petitioners note, both this case and *Pennsylvania* involve challenges to the same agency rules and present the question whether the agencies had authority to broadly exempt employers from the ACA's contraceptive-coverage requirement. Pet. 14-15; *see also* Little Sisters Pet. 11-12. In addition, whether intervenors Little Sisters and March for Life may press their appeals in this case is likely to be affected by the Court's resolution of Little Sisters' appellate standing in *Pennsylvania*, since both intervenors have obtained permanent injunctions providing them with the relief they seek. *See* Little Sisters Pet. 8; March for Life Pet. 16-17, 35. Respondents thus agree that these petitions should be held pending the Court's decision in *Pennsylvania*.

2. Petitioner March for Life asks the Court either to hold its petition until *Pennsylvania* is decided or to grant certiorari now, including to consider the question whether the State respondents have Article III standing to challenge the final rules. March for Life Pet. i, 34-36. March for Life does not allege any conflict in the lower courts regarding the States' standing;

and its disagreement with the court of appeals' application of this Court's settled precedent to the specific facts present here does not warrant review.

To demonstrate standing, a plaintiff must show an injury in fact that is fairly traceable to the challenged conduct and that is likely to be redressed by a favorable decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Here, the States satisfied this standard by pointing to the agencies' own regulatory analysis, which estimated that the final rules would cause up to 126,400 women to lose coverage for contraceptive services, that the loss in coverage would cost millions of dollars, and that Title X family planning clinics would fill the void. *See* 83 Fed. Reg. at 57,551, 57,575, 57,581, 57,605; Pet. App. 65a ("any increase in enrollment [in Title X programs] will likely increase costs to the state").

Beyond the federal agencies' own analysis, the States submitted "voluminous and detailed evidence" confirming that the final rules will cause women to lose coverage and that the States will incur costs either from filling that gap or from unintended pregnancies. Pet. App. 65a. For example, the director of California's Medicaid program explained that the final rules would lead to more women seeking contraceptives at state-funded providers, increasing the costs to the State. D.Ct. Dkt. 174-4. A New York state official identified employers likely to use the expanded exemption and estimated the number of employees who would be impacted by that decision. D.Ct. Dkt. 174-

36.[6] This record evidence makes clear that the final rules will cause the States to suffer concrete harms.

March for Life's contrary arguments misunderstand Article III standards. The States need not, as March for Life contends (at 26, 30), identify a specific woman who will lose coverage or a specific employer that will choose to use the expanded exemption. Rather, the States need only show a "substantial risk that the harm will occur." *Dep't of Commerce*, 139 S. Ct. at 2565 (internal quotation marks omitted). There is likewise no requirement that a plaintiff have been "accord[ed]" a legal "right[] or dut[y]" in order to challenge a federal regulation. March for Life Pet. 24. To demonstrate standing, a plaintiff need only establish a substantial risk that the challenged agency action will harm it, as the States have done here. *See, e.g.*, *Dep't of Commerce*, 139 S. Ct. at 2565-2566.

March for Life also errs in contending that the States' injuries are "self-inflicted." March for Life Pet. 25. The States' programs providing healthcare services to low-income women are longstanding and not tethered to decisions by the federal government regarding employers' coverage obligations. This case is therefore not like *Pennsylvania v. New Jersey*, 426

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[6] *See also* D.Ct. Dkt. 174-5 (declaration of Randie C. Chance) (estimating number of affected women and number of employers eligible for the expanded exemption in each State); D.Ct. Dkt. 174-7 (declaration of Nicole Alexander-Scott) (rules will lead to increased costs for Rhode Island from covering contraceptive services or costs of unintended pregnancies); D.Ct. Dkts. 174-6, 174-9, 174-11, 174-13, 174-14, 174-17, 174-19, 174-20, 174-21, 174-22, 174-23, 174-24, 174-25, 174-26, 174-27, 174-28, 174-29, 174-30, 174-33, 174-34, 174-35, 174-38 (additional declarations detailing how the States will be harmed by the rules).

U.S. 660 (1976) (per curiam), in which this Court denied Pennsylvania's request to initiate an original jurisdiction action to challenge a New Jersey law taxing the New Jersey-derived income of nonresidents. The claimed injuries to Pennsylvania's fisc were "self-inflicted" because its own law expressly provided a credit for taxes paid to other States. *Id.* at 663-664; *see also Maryland v. Louisiana*, 451 U.S. 725, 745 n.18 (1981) (discussing *New Jersey*). There is no analogous tie here.

March for Life's reliance (at 26, 29) on *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), is also misplaced. There, the Court reasoned that costs incurred by plaintiffs to avoid government surveillance were self-inflicted, and thus insufficient to establish standing, because it was entirely speculative whether plaintiffs would ever be subject to surveillance themselves. *Id.* at 416. Here, it is far from speculative that women in the respondent States will lose employer-sponsored coverage and will turn to state-supported programs to meet their healthcare needs. Furthermore, even if the States did not spend public funds to provide contraceptive care, the final rules will cause the States to incur costs addressing unintended pregnancies resulting from the reduced availability of contraceptives. Pet. App. 66a-68a. In no sense can that harm be regarded as "self-inflicted."

The Court should decline to take up March for Life's petition for the additional reason that this Court's resolution of Little Sisters' appellate standing in *Pennsylvania* is likely to affect whether March for Life can press this appeal. Like Little Sisters in *Pennsylvania*, March for Life has already obtained a separate permanent injunction in a different case providing it with the relief it seeks. *Compare* March

for Life Pet. 16-17, *with Pennsylvania v. President of the United States*, 930 F.3d 543, 559 n.6 (3d Cir. 2019), *cert. granted*, Nos. 19-431, 19-454.

3. Finally, there is no merit to the intervenor petitioners' arguments challenging the court of appeals' conclusion that the final religious and moral exemption rules are likely invalid. *See* Little Sisters Pet. 11-12; March for Life Pet. 30-33. To begin with, March for Life devotes significant attention to arguing that the court below erred in enjoining the religious exemption rule. March for Life Pet. 30-33. But March for Life may not challenge that conclusion because it does not have religious-based objections to providing contraceptive coverage. *See* March for Life Pet. i (objections to comprehensive contraceptive coverage based on a "nonreligious, moral conviction"); *see also id.* at 15 (March for Life is a "nonreligious, charitable organization").

In any event, the court of appeals correctly held that both the religious and the moral exemption rules likely exceed the agencies' statutory authority. The Affordable Care Act provides that health plans and issuers "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 . . . as provided for in comprehensive guidelines" issued by HRSA. 42 U.S.C. § 300gg-13(a)(4). This language authoritatively determines who must cover preventive services like contraceptives and delegates only the power to determine which services should be covered. *See* Pet. App. 18a-19a. March for Life is incorrect in arguing that the agencies' general rulemaking authority supports the exemptions. *See* March for Life Pet. 31 (citing 42 U.S.C. § 300gg-92, 29 U.S.C. § 1191c, and 26 U.S.C. § 9833).

That reading cannot be squared with the language of the Women's Health Amendment, which denies the agencies the authority to promulgate the exemptions. *See Bloate v. United States*, 559 U.S. 196, 207 (2010) (specific provision of statute controls over general).[7]

RFRA likewise does not authorize or compel the agencies' decision to broadly exempt employers with either moral or religious objections from the ACA's mandate. *See* Pet. App. 22a-30a. RFRA furnishes no authority to promulgate the moral exemption rule, because the statute addresses only religious beliefs, not nonreligious moral convictions. 42 U.S.C. § 2000bb-1. Petitioners do not appear to contend otherwise. *See* Pet. App. 22a n.2; D.Ct. Dkt. 51 at 25.

RFRA also does not authorize the religious exemption rule. To begin with, nothing in RFRA delegates to federal agencies the authority to issue blanket rules exempting entities from statutory obligations to address claimed RFRA violations. *See* Pet. App. 22a-24a. In addition, the accommodation does not substantially burden any objector's religious exercise. Under the accommodation, an objector is relieved of any "obligation to contract, arrange, pay, or refer for access to contra-

[7] March for Life's reliance on the pre-existing exemption for houses of worship also does not support its challenge to the decision below. *See* March for Life Pet. 32. The States did not challenge that exemption; and the validity of the agencies' narrow exception for houses of worship raises distinct legal issues not present here. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,325 (July 14, 2015).

ception." *Id.* at 28a. The only act required of an objecting employer is to opt out.[8] March for Life contends that, by opting out, an objecting employer "authorize[s]" others to provide contraceptive care. *E.g.*, March for Life Pet. 10. But it is the ACA, and not any employer's objection, that requires contraceptive coverage to be provided. *See* 42 U.S.C. § 300gg-13(a)(4). Moreover, RFRA does not confer on an objecting employer a right to control whether insurers cover contraceptive services or whether women choose to obtain such services. Pet. App. 29a.[9]

Finally, there is no basis at all for March for Life's argument that the court of appeals erred in "h[olding] that the final rules were likely arbitrary and capricious." March for Life Pet. 33. The court of appeals never addressed whether the final rules were arbitrary and capricious, because it had "already concluded that no statute likely authorized the agencies to issue the final rules." Pet. App. 31a. In any event, the rules are arbitrary and capricious because the agencies failed to provide any reasoned explanation for disregarding the facts underlying their prior policy. *See id.* at 93a-94a. March for Life's arguments to

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[8] *See also* D.Ct. Dkt. 385-3 (declaration of Phyllis C. Borzi) (explaining how the accommodation does not use the objector's plan and fully separates the objector from any coverage of contraceptive services); D.Ct. Dkt. 358-40 (declaration of JoAnn Volk) (example of notification and information provided when an employer objects).

[9] The court of appeals did not, as Little Sisters contends, "t[ake] it upon itself to tell the Little Sisters" that the accommodation "does not, in fact, violate their sincerely held religious beliefs." Little Sisters Pet. 12. The court addressed the separate, legal question whether the accommodation imposes a substantial, as opposed to de minimis, burden on the exercise of religion within the meaning of RFRA. *See* Pet. App. 28a-29a.

the contrary provide no reason for the Court to grant plenary review.

CONCLUSION

The petitions for writs of certiorari should be held pending resolution of *Pennsylvania*.

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