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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA *et al.*,
Plaintiffs–Appellees,
v.

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

and

THE LITTLE SISTERS OF THE POOR, JEANNE JUGAN RESIDENCE,

Intervenor-Defendant-Appellant.

STATE OF CALIFORNIA *et al.*,
Plaintiffs–Appellees
v.

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

STATE OF CALIFORNIA *et al.*,
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v.

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

and

MARCH FOR LIFE EDUCATION AND DEFENSE FUND,
Intervenor-Defendant–Appellant.

On Remand from the United States Supreme Court

SUPPLEMENTAL BRIEF OF INTERVENOR-DEFENDANT-APPELLANT
MARCH FOR LIFE

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INTRODUCTION

On July 8, 2020, the Supreme Court issued its opinion in *Little Sisters of the Poor v. Pennsylvania*, a case that is virtually identical to this one. 140 S. Ct. 2367 (2020). The next day the Supreme Court granted the petitions for certiorari filed by the federal defendants and intervenors in this case and reversed and remanded to this Court "for further consideration in light of" its *Little Sisters* opinion. *Dep't of H&HS v. California*, No. 19-1038, 2020 WL 3865243 (U.S. July 9, 2020); *March for Life Educ. v. California*, No. 19-1040, 2020 WL 3865244 (U.S. July 9, 2020), *Little Sisters of the Poor v. California*, No. 19-1053, 2020 WL 3865245 (U.S. July 9, 2020). This Court then ordered the parties to file supplemental briefing "addressing the impact of the Supreme Court's opinion on this case." Order at 2, ECF No. 193. This brief responds to that request.

The Supreme Court's *Little Sisters* opinion flatly rejected the core basis upon which the district court granted Plaintiffs a preliminary injunction and this Court affirmed—that the federal agencies tasked with administering the ACA lacked the authority to issue the religious and moral exemptions to the contraceptive requirement that the Health

Resources and Services Administration created. In fact, the Supreme Court held that quite the opposite is true—"the plain language of the [ACA] clearly allows the Departments to create the preventive care standards as well as the religious and moral exemptions." *Little Sisters*, 140 S. Ct. at 2382.

Little Sisters also rejected the arguments that (1) the Final Rules were procedurally defective, and (2) the Departments were not allowed to consider RFRA in deciding whether to exempt religious objectors. *Id.* at 2382-86. Under these circumstances, the appropriate course is to remand this case to the district court so it can apply the Supreme Court's opinion in the first instance, to the extent the district court determines any issues remain to be resolved in light of *Little Sisters*.[1]

[1] Should this Court instead opt to reach the merits based on issues that *Little Sisters* did not resolve, March for Life requests an opportunity to brief anew any issues that still remain, and for oral argument.

ARGUMENT

I. The Supreme Court's *Little Sisters* opinion means that Plaintiffs' statutory authority and procedural infirmity arguments are no longer viable.

In its opinion granting Plaintiffs a preliminary injunction as to the Final Rules, the district court held that the same agency that created the contraceptive requirement from whole cloth—and granted exemptions and crafted accommodations to that requirement from the beginning—somehow lacked authority to exempt religious and moral objectors from the mandate's reach by issuing the final rules. The court concluded instead that the "'[c]ontraceptive [m]andate' . . . is in fact a statutory mandate," and that the religious and moral exemptions were "inconsistent with the ACA's mandate that women's contraceptive coverage 'shall' be provided by covered plans and issuers without cost sharing." *California v. Health & Human Servs.*, 351 F. Supp. 3d 1267, 1285–86 (N.D. Cal. 2019).

On appeal this Court agreed, holding that "nothing in the [ACA] permits the agencies to determine exemptions from the [preventative care] requirement," and that "[t]o interpret the [ACA]'s limited delegation more broadly would contradict the plain language of the

statute." *California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 425 (9th Cir. 2019).

Little Sisters rejected these conclusions. In upholding the Departments' statutory authority to issue the religious and moral exemptions, the Supreme Court concluded that "HRSA has virtually unbridled discretion to decide what counts as preventive care and screenings," and further concluded that "the same capacious grant of authority that empowers HRSA to make these determinations leaves its discretion equally unchecked in other areas, including the ability to identify and create exemptions from its own Guidelines." *Little Sisters*, 140 S. Ct. at 2380. It is now beyond cavil that "[u]nder a plain reading" of the ACA, HRSA has and had "broad discretion" to not only "define preventative care and screenings" but also to "create the religious and moral exemptions." *Id.* at 2381. Accordingly, Plaintiffs are foreclosed from arguing that the Departments lacked statutory authority to create the religious and moral exemptions.

Rejected too are Plaintiffs' arguments sounding in any asserted procedural infirmity in the Departments' promulgation of the Final Rules. *Little Sisters* resolved this issue by concluding that the Final

Rules are procedurally valid. More specifically, the Court held that the "rules contained all of the elements of a notice of proposed rulemaking as required by the APA," were "free from procedural defects," and gave the Plaintiffs precisely what the APA requires, "fair notice." *Id.* at 2384-86 (internal quotation marks and citation omitted). Any failing "to publish a document entitled 'notice of proposed rulemaking' when the agency move[d] from an IFR to a final rule," was "harmless error." *Id.* at 2385 (cleaned up). The religious and moral exemptions' procedural validity are now also beyond dispute.[2]

II. The reasoning behind the Supreme Court's determination in *Little Sisters* that the Departments could consult RFRA in deciding whether to grant a religious exemption strongly supports the reasonableness of the moral exemption as well.

The Supreme Court also rejected the argument that the Departments "could not even consider RFRA as they formulated the

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[2] *Little Sisters* also invalidated the nationwide injunction entered against the Final Rules by the district court in *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 830 (E.D. Pa. 2019). *See* 140 S. Ct. at 2373 (remanding "with instructions to dissolve the nationwide preliminary injunction"). *Little Sisters* thus resolves any concern that this case is moot. *See California*, 941 F.3d at 431-33 (Kleinfeld, J., dissenting) (stating that because of the nationwide injunction issued by the district court, which was subsequently affirmed by the Third Circuit, this case was moot).

religious exemption," pointing out that "RFRA specifies that it 'applies to all Federal law, and the implementation of that law, whether statutory or otherwise.'" *Little Sisters,* 140 S. Ct. at 2382–83 (quoting § 2000bb-3(a)). The Court held not only that the Departments *could* consider RFRA in deciding whether to create the religious exemption, but suggested that failing to do so would open them up to a charge that they had acted in an arbitrary and capricious fashion by "failing to consider an important aspect of the problem." *Id.* at 2384. The Supreme Court stated that with respect to the contraceptive mandate, its "decisions all but instructed the Departments to consider RFRA going forward," and that it "left it to the Federal Government to develop and implement a solution" consistent with RFRA. *Id.* at 2383. The Court concluded that "[i]t is hard to see how the Departments could promulgate [the Final Rules] consistent with [its] decisions if they did not overtly consider these entities' rights under RFRA." *Id.*

This logic applies with equal force to the Departments' considera-tion of equal-protection principles and other factors in promulgating the moral exemption. In the Final Rules, the Departments expressly noted that moral objectors like March for Life had filed cases challenging the

mandate on equal protection and other grounds, 83 Fed. Reg. 57,592, 57,595 (Nov. 15, 2018), and that March for Life had secured a preliminary injunction based in part on its equal-protection claim, *March for Life v. Burwell*, 128 F. Supp. 3d 116, 128 (D.D.C. 2015). The Departments further recognized that such legal challenges "led to conflicting opinions among the federal courts." 83 Fed. Reg. at 57,596. Prompted by this "extensive litigation over the contraceptive Mandate," along with other factors, including "Congress's history of providing protections for moral convictions regarding certain health services," the Departments "concluded that it was appropriate that HRSA take into account the moral convictions of certain employers." *Id.*

Viewed in light of *Little Sisters*, this decision was eminently reasonable. In fact, had the Departments not considered the dictates of equal protection, traditional Congressional solicitude for protecting conscience rights, a federal court's permanent injunction in *March for Life*, and the continuing litigation threat posed by the contraceptive mandate, they would have "fail[ed] to consider an important aspect of the problem." 140 S. Ct. at 2384.

III. The Supreme Court's *Little Sisters* opinion renders unsustainable the district court's tentative conclusion that the Departments failed to give a "reasoned explanation" for the Final Rules.

In its order preliminarily enjoining the Final Rules, the district court concluded that the Plaintiffs were "likely to prevail on their claim that the agencies failed to provide a reasoned explanation" for the religious and moral exemptions, because "the Rules provide no new facts and no meaningful discussion that would discredit [the Departments'] prior factual findings." *California v. Health & Human Servs.*, 351 F. Supp. 3d at 1296 (internal quotations and citation omitted).[3] At the same time, however, the district court recognized that its conclusion was necessarily tentative, given that the case was in a stage of relative infancy. It cautioned that "the parties' positions on the [reasonable explanation] issue[ ] . . . will need to be laid out in substantially greater detail for the Court to sufficiently address the merits of this claim on a full record in the next stages of the case." *Id.*

[3] This Court declined to reach this issue because it had already held "that no statute likely authorized the agencies to issue the final rules and that the rules were thus impermissible." *California*, 941 F.3d at 431.

Little Sisters, however, has rendered this admittedly preliminary conclusion untenable.

First, *Little Sisters* held that the Departments not only had "unbridled discretion to decide what counts as preventive care and screenings," but "equally unchecked" discretion "to identify and create exemptions from its own Guidelines." 140 S. Ct. at 2380. The religious and moral exemptions' substance represent a legitimate exercise of the Departments' broad discretion.

Second, *Little Sisters* concluded that the "Departments issued an IFR that explained its position in fulsome detail," and further noted that, as to the Final Rules, the Departments gave a concise statement of their basis and purpose," "explain[ed] that the rules were necessary to protect sincerely held moral and religious objections," and "summariz[ed] the legal analysis supporting the exemptions." *Id*. at 2385–86 (internal quotations and citation omitted).

Third, *Little Sisters* took no issue with the fact that the Departments "reached a different conclusion," than they had before, *id*. at 2384 n.12, and further explained that the Departments had provided a robust explanation for their actions. The Court pointed out that with

respect to the religious exemption, the Departments provided "a lengthy analysis of the Departments' changed position" to justify why "an expanded exemption[,] rather than the existing accommodation[,] [was] the most appropriate administrative response to the substantial burden identified by the Supreme Court in *Hobby Lobby*." *Id*. at 2378. And with respect to the moral exemption, the Court pointed out that the Departments grounded it on "congressional enactments, precedents from [the Supreme Court], agency practice, and state laws that provided for conscience protections." *Id*. at 2378.

Little Sisters thus supports the conclusion that the Departments did proffer a reasoned explanation for the Final Rules, and thus did comply with their substantive obligations under the APA. This is especially true when one remembers that the "arbitrary and capricious" inquiry "is a narrow one," and a "court is not empowered to substitute its judgment for that of the agency." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974). If a rational basis for the agency's decision "may reasonably be discerned," it should be sustained. *Id*. at 286. *Little Sisters*, with no further litigation required, dictates how courts should resolve the reasoned-explanation issue.

IV. This Court should remand to the district court for further proceedings in light of *Little Sisters*.

Where the Supreme Court has swept aside the central predicate of the district court's decision to issue a preliminary injunction as to the Final Rules, the proper course is for this Court to remand to the district court for further proceedings, to the extent any are necessary.

CONCLUSION

As a result of *Little Sisters*, Plaintiffs' claims have been actually or effectively resolved in favor of Federal Defendants and Defendant-Intervenors. With respect to any claims that are unresolved, this Court should remand to the district court so that the parties can brief them in light of *Little Sisters*.

Dated: August 28, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook font, a proportionally spaced font. I further certify that this brief complies with the 15-page limit prescribed by the Court in its August 13, 2020 Order calling for supplemental briefing. This brief is 11 pages, excluding those portions exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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