No. 21-10302

In the United States Court of Appeals for the Fifth Circuit

VICTOR LEAL; PATRICK VON DOHLEN; KIM ARMSTRONG,

Plaintiffs-Appellants,

v.

XAVIER BECERRA, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; JANET YELLEN, SECRETARY, U.S. DEPARTMENT OF TREASURY; MARTIN WALSH, SECRETARY, U.S. DEPARTMENT OF LABOR; UNITED STATES OF AMERICA; KENT SULLIVAN; TEXAS DEPARTMENT OF INSURANCE,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas, Amarillo Division
Case No. 2:20-cv-00185-Z

OPENING BRIEF OF APPELLANTS VICTOR LEAL, ET AL.

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CERTIFICATE OF INTERESTED PERSONS

Counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

The plaintiffs-appellants respectfully request oral argument, as the issues in this appeal are sufficiently complex and important to warrant argument time.

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The Affordable Care Act requires private insurance to cover "preventive care and screenings" for women without any cost-sharing arrangements such as copayments or deductibles, and it empowers the Health Resources and Services Administration (HRSA) to unilaterally determine the "preventive care and screenings" for women that private insurers must cover. *See* 42 U.S.C. § 300gg-13(a)(4) (ROA.26). In 2011, the Health Resources and Services Administration issued an edict that compels private insurance to cover all forms of FDA-approved contraceptive methods, including contraceptive methods that operate as abortifacients. This makes it impossible for individuals to purchase health insurance unless they agree to subsidize other people's contraception, even though millions of Catholics throughout the United States regard the use of contraception—and actions that make one complicit in its distribution and use—as immoral and contrary to the teachings of their religious faith. It also prevents millions of Americans who do not want or need contraceptive coverage from purchasing health insurance that excludes this unnecessary coverage, even though most individual consumers of health insurance have no need for contraception and would rather have less expensive insurance that excludes this unwanted "benefit."

The plaintiffs in this case seek to enjoin the enforcement of the Contraceptive Mandate, and to have 42 U.S.C. § 300gg-13(a)(4) declared unconstitutional under the Appointments Clause and the nondelegation doctrine. The district court dismissed two of the plaintiffs' claims on res judicata grounds, and it dismissed the nondelegation challenge to section 300gg-

13(a)(4) on the merits. ROA.419-460. The plaintiffs respectfully appeal each of these rulings.

STATEMENT OF JURISDICTION

The district court's subject-matter jurisdiction rests on 28 U.S.C. § 1331 because this case arises under federal law.

This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment. ROA.514-515. The district court issued this judgment on March 26, 2021, and the plaintiffs filed a timely notice of appeal later that day. ROA.516. This appeal is from a final judgment that disposes of all parties' claims.

STATEMENT OF THE ISSUES

1. In *DeOtte v. Azar*, 393 F. Supp. 3d 490 (N.D. Tex. 2019), a federal district court certified a class of individual religious objectors to the Contraceptive Mandate, and it enjoined federal officials from enforcing the Mandate against any private insurer that is willing to offer contraceptive-free health insurance to members of the certified class. Two members of that certified class, Victor Leal and Patrick Von Dohlen, claim that the *DeOtte* injunction has proven inadequate to protect their religious freedom because few if any insurers have been willing to offer contraceptive-free health insurance to the small number of people who hold religious objections to contraception, and they have sued to enjoin the enforcement of the Contraceptive Mandate in its entirety so that private insurers can once again offer contraceptive-free health insurance to the general public. Leal and Von Dohlen are also chal-

lenging the constitutionality of 42 U.S.C. § 300gg-13(a)(4), which authorizes the Health Resources and Services Administration to unilaterally determine the "preventive care" for women that private insurers must cover. None of these claims were asserted in the *DeOtte* litigation, but the district court dismissed Leal and Von Dohlen's claims under the doctrine of res judicata. The issue presented is:

> Did the district court err by dismissing Mr. Leal and Mr. Von Dohlen's claims under the doctrine of res judicata?

2. 42 U.S.C. § 300gg-13(a)(4) empowers the Health Resources and Services Administration (HRSA) to unilaterally determine the "preventive care and screenings" for women that private insurers must cover without cost-sharing arrangements such as copays or deductibles. The statute, however, contains no language to guide HRSA's discretion in deciding which "preventive care" and which "screenings" private insurers should be compelled to cover. Plaintiff Kim Armstrong claims that section 300gg-13(a)(4) lacks an "intelligible principle" and should be declared unconstitutional under the nondelegation doctrine, but the district court rejected the claim. The issue presented is:

> Did the district court err by dismissing Ms. Armstrong's nondelegation challenge to 42 U.S.C. § 300gg-13(a)(4)?

STATEMENT OF THE CASE

The plaintiffs in this case are seeking to enjoin the enforcement of the federal Contraceptive Mandate. We will begin by describing the relevant

statutes and agency rules. Then we will discuss the claims that the plaintiffs are asserting.

I. The Federal Contraceptive Mandate

The Affordable Care Act requires private health insurance to cover "preventive care and screenings" for women without any cost-sharing arrangements such as copayments or deductibles. *See* 42 U.S.C. § 300gg-13(a)(4) (ROA.26). It also empowers the Health Resources and Services Administration (HRSA) to unilaterally determine the preventive care that insurers must cover. *See id.*

On August 1, 2011—more than one year after the Affordable Care Act was signed into law—the Health Resources and Services Administration issued an edict that compels private insurance to cover all forms of FDA-approved contraceptive methods, including contraceptive methods that operate as abortifacients, as "preventive care" under 42 U.S.C. § 300gg-13(a)(4). In response to HRSA's decree, the Secretary of Health and Human Services, the Secretary of the Treasury, and the Secretary of Labor issued notice-and-comments regulations to implement HRSA's decision to require contraceptive coverage. These rules are known as the "Contraceptive Mandate," and they are codified at 45 C.F.R. §§ 147.130–147.133 (ROA.29-38), 29 C.F.R. § 2590.715–2713(a)(1)(iv) (ROA.40), and 26 C.F.R. § 54.9815–2713(a)(1)(iv) (ROA.42).

The original version of the Contraceptive Mandate exempted church employers, as well as the "grandfathered" plans protected by section 1251 of

the Affordable Care Act. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,896 (July 2, 2013) (church employers); 29 C.F.R. § 2590.715–1251 (grandfathered plans).

The Contraceptive Mandate also offered an "accommodation"—not an exemption—to religious non-profits who objected to covering contraception for sincere religious reasons. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,896–97 (July 2, 2013) (describing provisions formerly codified at 45 C.F.R. § 147.131(c)). To use this "accommodation," an entity was required to certify that it is a religious non-profit that objects to covering some or all methods of contraception on religious grounds. *See id.* at 39,896 (describing provisions formerly codified at 45 CFR § 147.131(b)). Then the issuer of the group health insurance used by the religious non-profit must exclude contraceptive coverage from that employer's plan, but the issuer must pay for any contraception used by the non-profit's employees. *See id.* (describing provisions that were formerly codified at 45 C.F.R. § 147.131(c)). The issuer may not shift any of those costs on to the religious non-profit, its insurance plan, or its employee beneficiaries. *See id.* If a religious non-profit is self-insured, then its third-party administrator must pay for the employees' contraception, without shifting any costs on to the religious non-profit, its insurance plan, or its employee beneficiaries. *See id.* at 39,893 (describing provisions that were formerly codified at 26 C.F.R. § 54.9815–2713A(b)(2)).

Many religious employers deemed these agency-created exemptions and accommodations inadequate, and litigation quickly ensued. In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held that the Contraceptive Mandate violated the Religious Freedom Restoration Act because it failed to provide any exemptions or accommodations for closely held, for-profit corporations that oppose the coverage of contraception for sincere religious reasons. And in *Wheaton College v. Burwell*, 573 U.S. 958 (2014), the Supreme Court enjoined federal officials from requiring a religious non-profit to directly notify its health insurance issuers or third-party administrators about its religious objections to the Contraceptive Mandate.

In response to *Hobby Lobby* and *Wheaton College*, the Obama Administration amended the Contraceptive Mandate in two ways. First, it allowed closely held for-profit corporations to use the accommodation that was previously available only to religious non-profits. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,346 (July 14, 2015) (describing provisions formerly codified at 45 C.F.R. § 147.131(b)); *id.* at 41,345 (describing provisions formerly codified at 29 C.F.R. § 2590.715–2713A(a)); *id.* at 41,343 (describing provisions formerly codified at 26 C.F.R. § 54.9815–2713A(a)). Second, it allowed employers seeking this accommodation to choose whether to directly notify their health insurance issuers or third-party administrators—or whether to notify the Secretary of Health or Human Services, who would then inform the health insurance issuers or third-party administrators of the employer's religious objections and

of their need to pay for the contraception of the affected employees. *See id.* at 41,346 (describing provisions formerly codified at 45 C.F.R. § 147.131(b)(3)); *id.* at 41,345 (describing provisions formerly codified at 29 C.F.R. § 2590.715–2713A(a)(3)); *id.* at 41,344 (describing provisions formerly codified at 26 C.F.R. § 54.9815–2713A(b)(ii)). Under the previous version of the Contraceptive Mandate, objecting religious non-profits were compelled to directly notify their health insurance issuers or third-party administrators, and many such employers believed this process made them complicit in the provision of objectionable contraception. *See, e.g.*, *Wheaton College*, 573 U.S. at 958.

After President Trump took office, he issued an executive order instructing the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services to amend the Contraceptive Mandate to provide more robust protections for religious and conscience-based objectors. *See* Executive Order 13,798 (May 4, 2021). In response to this order, the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services issued a rule that exempts any employer from the Contraceptive Mandate if it opposes the coverage of contraception for sincere religious reasons. *See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 83 Fed. Reg. 57,536 (November 15, 2018) (ROA.44-98). The Departments also issued a separate rule that exempts employers who object to contraceptive coverage based on their sincerely held moral convictions—whether religious

or secular. *See Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 83 Fed. Reg. 57,592 (November 15, 2018).

Each of these rules also sought to accommodate individual purchasers of health insurance who object to contraceptive coverage for religious or moral reasons. *See Religious Exemptions*, 83 Fed. Reg. at 57,590 (ROA.98) (creating a new provision in 45 C.F.R. § 147.132(b)); *Moral Exemptions*, 83 Fed. Reg. at 57,631 (creating a new provision in 45 C.F.R. § 147.133(b)). Under the original Contraceptive Mandate, individuals were forced to choose between purchasing health insurance that covers contraception or forgoing health insurance entirely—unless they could obtain insurance through a grandfathered plan or a church employer that was exempt from the Contraceptive Mandate. The Trump Administration's rules gave individual objectors the option of purchasing health insurance that excludes contraception from any willing health insurance issuer.

The Trump Administration's rules were scheduled to take effect on January 14, 2019. On January 14, 2019, however, a federal district court in Pennsylvania issued a nationwide preliminary injunction against their enforcement. *See Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019); *see also* ROA.100-101; ROA.103-167. The Third Circuit affirmed this nationwide preliminary injunction on July 12, 2019. *See Pennsylvania v. President of the United States*, 930 F.3d 543 (3d Cir. 2019). The Supreme Court eventually granted certiorari and vacated the nationwide injunction in *Little Sisters of the Poor*

Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020), but the litigation over the Trump Administration's rules continues even though the rules are now in effect.[1]

In response to the nationwide injunction issued in *Pennsylvania v. Trump*, a class-action lawsuit was filed in the Northern District of Texas to enjoin federal officials from enforcing the Obama-era Contraceptive Mandate against any of the objectors protected by the Trump Administration's religious-exemption rule. *See DeOtte v. Azar*, 393 F. Supp. 3d 490 (N.D. Tex. 2019). The plaintiffs in *DeOtte* argued that the protections conferred by the religious-exemption rule were compelled by the Religious Freedom Restoration Act of 1993, and they sought and obtained certification of two plaintiff classes. The first class, which we will refer to as the "Employer Class," was defined to include:

> Every current and future employer in the United States that objects, based on its sincerely held religious beliefs, to establishing, maintaining, providing, offering, or arranging for: (i) coverage or payments for some or all contraceptive services; or (ii) a plan,

1. On September 29, 2020, the states of Pennsylvania and New Jersey moved for summary judgment and asked the district court to set aside the Trump Administration's rules in their entirety. *See Pennsylvania v. Trump*, 2:17-cv-04540-WB (ECF No. 252). On April 30, 2021, the Biden Administration moved for a stay of proceedings until July 30, 2021, "to permit new leadership to continue to evaluate the issues presented by this case," and the district court granted the motion. *See Pennsylvania v. Trump*, 2:17-cv-04540-WB (ECF Nos. 274 & 275).

> issuer, or third-party administrator that provides or arranges for such coverage or payments.

DeOtte v. Azar, 332 F.R.D. 188, 201 (N.D. Tex. 2019). The second class, which we call the "Individual Class," was defined to include:

> All current and future individuals in the United States who: (1) object to coverage or payments for some or all contraceptive services based on sincerely held religious beliefs; and (2) would be willing to purchase or obtain health insurance that excludes coverage or payments for some or all contraceptive services from a health insurance issuer, or from a plan sponsor of a group plan, who is willing to offer a separate benefit package option, or a separate policy, certificate, or contract of insurance that excludes coverage or payments for some or all contraceptive services.

Id.

After certifying these classes, the district court in *DeOtte* held that the protections conferred in the Trump Administration's religious-exemption rule were compelled by the Religious Freedom Restoration Act, and it permanently enjoined federal officials from enforcing the Contraceptive Mandate in a manner that contravenes the protections described in the Trump Administration's religious-exemption rule. *See DeOtte v. Azar*, 393 F. Supp. 3d 490 (N.D. Tex. 2019); *see also* ROA.169-172 (final judgment in *DeOtte*). As a result of *DeOtte*, the protections conferred by the Trump Administration's religious-exemption rule are in full force and effect because they have been incorporated into the *DeOtte* injunction, even though the rule itself was enjoined from enforcement at the time of the *DeOtte* ruling, and even though

the Trump Administration's rules remain subject to litigation and potential repeal by the Biden Administration.[2]

II. The Plaintiffs' Claims

Plaintiffs Victor Leal and Patrick Von Dohlen are devout Roman Catholics who oppose all forms of birth control, and they want to purchase health insurance that excludes coverage of contraception to avoid subsidizing other people's contraception and becoming complicit in its use.[3] ROA.16. Plaintiff Kim Armstrong, by contrast, has no religious or moral objections to any of the FDA-approved contraceptive methods. Ms. Armstrong, however, does not need or want contraceptive coverage in her health insurance because she had a hysterectomy at age 21 and is incapable of becoming pregnant. ROA.16-17. Ms. Armstrong is also 50 years old, and would be past her childbearing years even apart from her hysterectomy. ROA.17.

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2. The *DeOtte* injunction is currently on appeal, and the Fifth Circuit heard oral arguments on April 29, 2021. *See DeOtte v. Nevada*, No. 19-10754 (5th Cir.). The Court has not yet ruled on the appeal.

3. *See, e.g.*, *March for Life v. Burwell*, 128 F. Supp. 3d 116, 128–29 (D.D.C. 2015) (holding that the Contraceptive Mandate "substantially burdens" the religious freedom of individuals who wish to purchase contraceptive-free health insurance, because the Mandate "makes it impossible for employee plaintiffs to purchase a health insurance plan that does not include coverage of contraceptives to which they object."); *Wieland v. United States Dep't of Health & Human Services*, 196 F. Supp. 3d 1010, 1017 (E.D. Mo. 2016) (holding that the Contraceptive Mandate substantially burdens the religious freedom of individual consumers of health insurance because they "must either maintain a health insurance plan that includes contraceptive coverage, in violation of their sincerely-held religious beliefs, or they can forgo healthcare altogether").

The federal defendants' enforcement of the Contraceptive Mandate, however, makes it impossible for the plaintiffs to purchase health insurance that excludes this unwanted and unneeded coverage for contraception. Although the *DeOtte* injunction permits issuers of health insurance to issue group or individual health-insurance coverage that excludes contraception to religious objectors, few if any insurers are offering policies of this sort because only a small number of individuals object to all forms of contraception on religious grounds and would be eligible to purchase such policy under the *DeOtte* injunction. ROA.17. And even if a health insurer were willing to create and offer a policy that excludes contraceptive coverage solely for religious objectors, the Contraceptive Mandate drastically restricts the available options on the market to consumers who hold religious objections to contraceptive coverage. The Mandate requires any policy that covers *anyone* who lacks a sincere religious objection to contraception to cover all forms of FDA-approved contraceptive methods, without any deductibles or co-pays. Without the federal Contraceptive Mandate, insurers will have the freedom to offer policies that exclude contraceptive coverage to the general public, just as they did before the Contraceptive Mandate, which will expand the health-insurance options available to consumers who oppose contraceptive coverage for sincere religious reasons.

And the *DeOtte* injunction does nothing for non-religious objectors such as Ms. Armstrong, who are forced to pay for health insurance that covers contraceptive services that they do not want or need. Millions of Americans

have no need for contraceptive coverage in their health insurance for reasons that have nothing to do with religious or moral beliefs. This includes unmarried men, women who are past their childbearing years, women who have been sterilized, men who are married to women who are incapable of becoming pregnant, women who are celibate or practicing abstinence until marriage, and most members of the LGBTQ community. Yet none of these individuals have the option of acquiring health insurance that excludes contraceptive coverage, because they are unprotected by the *DeOtte* injunction and the Trump Administration's rules that exempt religious and moral objectors from the Contraceptive Mandate.

On August 1, 2020, plaintiffs Leal, Von Dohlen, and Armstrong filed suit to enjoin the enforcement of the Contraceptive Mandate. ROA.9-24. The plaintiffs raised three claims. First, they alleged that 42 U.S.C. § 300gg-13(a)(4) violates the Appointments Clause by conferring "significant authority pursuant to the laws of the United States" on members of the Health Resources and Services Administration, who have not been appointed in conformity with the Constitution's Appointments Clause. ROA.18-20.

Second, the plaintiffs alleged that 42 U.S.C. § 300gg-13(a)(4) unconstitutionally delegates legislative power to the Health Resources and Services Administration by empowering it to unilaterally determine the "preventive care" that private insurance must cover, as well as the scope of any exceptions that HRSA might create to its preventive-care coverage mandates. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct.

2367, 2380–82 (2020) (implying that the "sweeping authority" granted to HRSA might present constitutional delegation problems).

Third, plaintiffs Leal and Von Dohlen alleged that the Contraceptive Mandate violates the Religious Freedom Restoration Act by making it difficult or impossible for them purchase health insurance that excludes contraceptive coverage. ROA.21; *see also March for Life*, 128 F. Supp. 3d at 128–29 (D.D.C. 2015); *Wieland*, 196 F. Supp. 3d at 1017.[4]

The government moved to dismiss, and the district court granted its motion in part and denied it in part. ROA.419-460. The district court held that each of the three plaintiffs had properly alleged Article III standing, ROA.425-429, and it rejected the government's sovereign-immunity and statute-of-limitations defenses, ROA.429-432. But the district court held that Leal and Von Dohlen's claims were barred by res judicata, because each of them was a member of the "Individual Class" of religious objectors certified in *DeOtte*, and their claims (according to the district court) arise out of the "nucleus of operative facts" that undergirds the *DeOtte* litigation. ROA.432 ("The final judgment in [*DeOtte*] bars all of Plaintiffs Leal and Von Dohlen's claims in this case because the claims in both cases are 'based on the same

4. The plaintiffs also sought to enjoin the continued enforcement of the Texas contraceptive-equity law. ROA.21-23. The district court dismissed those claims on jurisdictional grounds, ROA.448-460, and the plaintiffs are not pursuing those claims on appeal.

nucleus of operative facts, and could have been brought in the first lawsuit.'").[5]

Ms. Armstrong, by contrast, was not a member of the certified classes in *DeOtte* so neither of her constitutional challenges to 42 U.S.C. § 300gg-13(a)(4) encountered a res judicata obstacle. ROA.441. The district court refused to dismiss Ms. Armstrong's Appointments Clause claim and allowed that claim to proceed. ROA.441-445. But the district court dismissed Ms. Armstrong's nondelegation challenge to 42 U.S.C. § 300gg-13(a)(4), concluding that "the delegation falls within the outer boundaries of the intelligible principle doctrine drawn by the Supreme Court." ROA.446.[6]

After the district court's ruling, Ms. Armstrong voluntarily dismissed her Appointments Clause claim and asked the district court to enter a final judgment. ROA.510-513. The district court entered judgment for the federal defendants on March 26, 2021, which the plaintiffs have appealed. ROA.514-516.

SUMMARY OF ARGUMENT

The district court erred by dismissing Leal and Von Dohlen's claims on res judicata grounds, and its res judicata analysis is mistaken for two separate

5. Absent class members are bound by the doctrine of res judicata. *See Richardson v. Wells Fargo Bank, N.A.*, 839 F.3d 442, 449 (5th Cir. 2016); *Johnson v. General Motors Corp.*, 598 F.2d 432, 438 (5th Cir. 1979).

6. Ms. Armstrong (unlike Leal and Von Dohlen) is not asserting a RFRA claim because her objections to the Contraceptive Mandate are not rooted in religious belief. ROA.16.

and independent reasons. First, the district court's stance contradicts the Supreme Court's holding in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). *Hellerstedt* allows Leal and Von Dohlen to bring a *facial* RFRA challenge to the Contraceptive Mandate because it is a different claim from the *as-applied* RFRA challenge that was litigated on their behalf in *DeOtte*, and the plaintiffs' facial challenge is based on new material facts that post-date the *DeOtte* litigation. *See id.* at 2305. *Hellerstedt* also allows Leal and Von Dohlen to challenge the constitutionality of 42 U.S.C. § 300gg-13(a)(4) because it is a "separate, distinct provision" from the agency rules that were challenged in *DeOtte*. *See id.* at 2308. When a case involves "important human values"—such as religious freedom—a court must apply the approach to res judicata used in *Hellerstedt* rather than the "same transaction" test that courts apply in other contexts.

Second, Leal and Von Dohlen's Appointments Clause and nondelegation claims can proceed even under the traditional test for res judicata, which asks whether a claim arises from the "same nucleus of operative facts" as a previously litigated claim. Each of these claims is directed solely at 42 U.S.C. § 300gg-13(a)(4)—and they allege that *Congress* violated the Constitution by *enacting* this statute.[7] The claims in *DeOtte*, by contrast, were directed at the conduct of *executive-branch officials* who were implementing and enforcing

7. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1214 (2010) ("[E]very constitutional holding should start by saying *who* has violated the Constitution.").

the Contraceptive Mandate, and they alleged that the Mandate—and the executive officers who authored and enforced it—were failing to sufficiently accommodate the rights of religious objectors. The factual issues in *DeOtte* have *nothing* to do with whether 42 U.S.C. § 300gg-13(a)(4) comports with the Appointments Clause or the nondelegation doctrine, and there is no overlap between the "nucleus of operative facts" in *DeOtte* and the "nucleus of operative facts" that undergirds the plaintiffs' constitutional challenges to 42 U.S.C. § 300gg-13(a)(4). The district court dismissed this contention by observing that the *DeOtte* plaintiffs "could have raised" the claims presented in this lawsuit,[8] but that is not the test for res judicata. *See* Fed. R. Civ. P. 18(a) (allowing a litigant to join "as many claims as it has against an opposing party," regardless of whether those claims arise of the same nucleus of operative fact); 6A Charles Alan Wright, et al., *Federal Practice and Procedure* § 1582 (3d ed.) ("[T]he failure to join a claim does not necessarily bar its assertion in a subsequent action.").

The district court was also mistaken to dismiss Ms. Armstrong's nondelegation challenge to 42 U.S.C. § 300gg-13(a)(4). There is nothing in the text of section 300gg-13(a)(4) that purports to establish a "principle" of any sort—let alone an "intelligible" principle—to guide HRSA's discretion in deciding which "preventive care" and which "screenings" should be covered by private insurance. The district court correctly observed that the statute

8. ROA.434.

establishes boundaries on HRSA's power by allowing it to compel coverage only of "preventive care" and "screenings" for "women." ROA.447. But there is nothing in the statute that purports to guide or control the agency's discretion within those boundaries, and the nondelegation doctrine requires an intelligible principle to guide discretionary decisions of agencies. No such principle can be found in section 300gg-13(a)(4).

ARGUMENT

I. Mr. Leal and Mr. Von Dohlen's Claims Are Not Barred By Res Judicata

The district court's dismissal of Leal and Von Dohlen's claims is incompatible with *Hellerstedt*, and its dismissal of Leal and Von Dohlen's constitutional challenges to 42 U.S.C. § 300gg-13(a)(4) is incompatible with the "same nucleus of operative fact" test that has traditionally governed res judicata inquiries. We will discuss each of these points in turn.

A. The District Court's Res Judicata Dismissal Contradicts The Supreme Court's Holding In *Whole Woman's Health v. Hellerstedt*

The district court's res judicata dismissal violates the holding of *Hellerstedt* in two separate and distinct ways. First, *Hellerstedt* holds that a facial and as-applied challenge to the same law will be different "claims" for res judicata purposes if the later case rests on "factual developments" that postdate the previous lawsuit. *See Hellerstedt*, 136 S. Ct. at 2305–07 (2016). That is precisely the situation here: The *DeOtte* litigants brought an as-applied RFRA challenge to the Contraceptive Mandate that sought only a carve-out

for religious objectors, while Leal and Von Dohlen have brought a subsequent facial RFRA challenge that seeks to enjoin the enforcement of the Contraceptive Mandate across the board. And Leal and Von Dohlen's facial RFRA challenge is based on "new material facts" that post-date the *DeOtte* litigation. The complaint specifically alleges that private insurers have failed to offer contraceptive-free health insurance in the wake of the *DeOtte* injunction, which "substantially burdens" the religious freedom of individuals who wish to purchase health insurance but do not want to become complicit in the provision of contraception that violates their religious beliefs. ROA.17.

Second, *Hellerstedt* holds that Leal and Von Dohlen's constitutional challenges to 42 U.S.C. § 300gg-13(a)(4) are different "claims" from the challenges that the *DeOtte* litigants brought against the Contraceptive Mandate, because section 300gg-13(a)(4) is a "separate, distinct provision" from the agency rules that were challenged in *DeOtte*. *See Hellerstedt*, 136 S. Ct. at 2308 (allowing the plaintiffs in that case to bring a second lawsuit challenging a "separate, distinct provision" of a state abortion statute, even while acknowledging that the previously challenged provision was part of the same "overarching government regulatory scheme." (cleaned up)).

1. *Hellerstedt* Establishes That Leal And Von Dohlen's Facial RFRA Challenge To The Contraceptive Mandate Is A Different "Claim" From The As-Applied RFRA Challenge Brought By The *DeOtte* Litigants

Hellerstedt holds that res judicata applies *only* when the same parties seek to relitigate "the very same claim." *See Hellerstedt*, 136 S. Ct. at 2305 ("'The doctrine of claim preclusion . . . prohibits 'successive litigation of the very same claim' by the same parties. Petitioners' postenforcement as-applied challenge is not 'the very same claim' as their preenforcement facial challenge." (quoting *New Hampshire v. Maine,* 532 U.S. 742, 748 (2001)); *id.* at 2307 ("The challenge brought in this case and the one in *Abbott* are not the 'very same claim,' and the doctrine of claim preclusion consequently does not bar a new challenge to the constitutionality of the admitting-privileges requirement." (citation omitted)). *Hellerstedt* also holds that a facial and as-applied challenge to the same statutory or regulatory provision will *not* be "the very same claim" if the later challenge rests on later "factual developments" that postdate the earlier lawsuit. *Id.* at 2306; *see also id.* ("Changed circumstances of this kind are why the claim presented in *Abbott* is not the same claim as petitioners' claim here."); *id.* at 2305 ("'[R]es judicata does not bar claims that are predicated on events that postdate the filing of the initial complaint'" (quoting *Morgan v. Covington*, 648 F.3d 172, 178 (3rd Cir. 2011)). Indeed, *Hellerstedt* goes so far as to hold that plaintiffs may bring subsequent *facial* challenges to the same statute that they had previously challenged on its face, so long as the renewed facial challenge is based on

"changed circumstances" or "later, concrete factual developments." *Hellerstedt*, 136 S. Ct. at 2306; *id.* at 2335 (Alito, J., dissenting) (sharply criticizing this aspect of the Court's holding).[9]

Leal and Von Dohlen are asserting a *facial* RFRA challenge to the Contraceptive Mandate. ROA.23 (asking the courts to "enjoin the federal defendants from enforcing the federal Contraceptive Mandate" against anyone). The *DeOtte* lawsuit challenged the Mandate only *as applied* to religious objectors, and it sought classwide relief that would allow insurers to offer contraceptive-free health insurance to individuals who hold religious objections to some or all contraceptive methods. *See DeOtte v. Azar*, 393 F. Supp. 3d 490, 513–15 (N.D. Tex. 2019).[10] The facial RFRA challenge brought by

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9. The majority opinion in *Hellerstedt* appears to limit this aspect of its holding to cases in which "important human values" are involved. *See Hellerstedt*, 136 S. Ct. at 2305 ("[W]here 'important human values—such as the lawfulness of continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.'" (quoting Restatement (Second) of Judgments § 24, Comment *f* (1980)); *id.* at 2306 ("Changed circumstances of this kind are why the claim presented in *Abbott* is not the same claim as petitioners' claim here. The claims in both *Abbott* and the present case involve 'important human values.'"). As we will explain, the right of religious freedom is assuredly an "important human value"—at least as important (if not more so) than the right to abort an unborn child.

10. The requested relief in *DeOtte* tracked the protections conferred in the Trump Administration's *Religious Exemptions* rule, which had been subjected to a nationwide injunction until the Supreme Court allowed the rule to take effect last June. *See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*,

Leal and Von Dohlen is not "the very same claim" as the as-applied challenge in *DeOtte* because it rests on factual developments that emerged after *DeOtte*. After the *DeOtte* litigants obtained relief, plaintiffs Leal and Von Dohlen sought to purchase contraceptive-free health insurance but found that it was "impossible" to obtain, despite the relief provided by the *DeOtte* injunction. ROA.17. These post-*DeOtte* discoveries of their continued inability to obtain contraceptive-free health insurance provides "new material facts," which suffices to overcome a res judicata defense under *Hellerstedt*. *See Hellerstedt*, 136 S. Ct. at 2305 ("[The] development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim." (citing Restatement (Second) of Judgments § 24, cmt. *f* (1980)). And these post-*DeOtte* factual developments revealed that Leal and Von Dohlen could not adequately protect their religious freedom unless they sued to enjoin section 300gg-13(a)(4) and the Contraceptive Mandate across the board, and not merely as applied to religious objectors.

The situation in this case is indistinguishable from *Hellerstedt*. The plaintiffs in *Hellerstedt* (like the plaintiffs in *DeOtte*) brought their initial lawsuit against the Texas admitting-privileges law before they could know for certain what effects the law would have. *See Hellerstedt*, 136 S. Ct. at 2306 ("The *Abbott* plaintiffs brought their facial challenge to the admitting-privileges requirement *prior to its enforcement*—before many abortion clinics had closed

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83 Fed. Reg. 57,536, 57,586–90 (November 15, 2018); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

and while it was still unclear how many clinics would be affected. . . . The postenforcement consequences of H.B. 2 were unknowable before it went into effect."). The plaintiffs in *DeOtte* likewise brought their initial lawsuit against the Contraceptive Mandate before they could know for certain whether the as-applied relief that they sought would ensure the availability of contraceptive-free health insurance to each member of the class—and they certainly could not have proven in that initial lawsuit that a total, across-the-board invalidation of the Contraceptive Mandate was necessary to attain that result. The second lawsuit in *Hellerstedt* was filed after the admitting-privileges law took effect, and after its effects became known for sure. *See id.* ("Here, petitioners bring an as-applied challenge to the requirement *after its enforcement*—and after a large number of clinics have in fact closed." (emphasis in original)). And in this case, the second lawsuit against the Contraceptive Mandate was filed after the *DeOtte* injunction had taken effect, and after it became known that the as-applied relief in *DeOtte* was insufficient to fully protect the religious freedom of individual consumers of health insurance. This second lawsuit—like the second lawsuit in *Hellerstedt*—rests on "new material facts,"[11] "later, concrete factual developments,"[12] and "events the postdate the filing of the initial complaint,"[13] which is all that is needed to

11. *Hellerstedt*, 136 S. Ct. at 2305.
12. *Hellerstedt*, 136 S. Ct. at 2306.
13. *Hellerstedt*, 136 S. Ct. at 2305 (citation and internal quotation marks omitted).

show that Leal and Von Dohlen are *not* asserting "the very same claim" as the *DeOtte* litigants. *See id.* at 2307.

Finally, both this case and *DeOtte* involve "important human values," which appears to be a necessary condition for triggering *Hellerstedt*'s lenient approach to res judicata. *See Hellerstedt*, 136 S. Ct. at 2306 ("'The claims in both *Abbott* and the present case involve 'important human values.'").[14] It is hard to imagine a "human value" more important than the right of religious freedom, and the political branches have recognized the importance of this right by enshrining the Religious Freedom Restoration Act into law. It is also hard to imagine how any court can deny that the right of religious freedom qualifies as an "important human value" while simultaneously conferring that status on the right to abortion, which is unmentioned in the Constitution and is (to put it mildly) a controversial practice among large segments of American society. The special res judicata rules that apply when "important human values" are at stake are fully applicable to the claims presented in this lawsuit.

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14. *See The Supreme Court, 2015 Term—Leading Cases*, 130 Harv. L. Rev. 397, 406 (2016) ("The [*Hellerstedt*] majority first rejected the Fifth Circuit's res judicata holding, noting that material facts had developed since the first round of litigation and that 'important human values' were at stake." (footnotes omitted)); Lee Kovarsky, *Preclusion and Criminal Judgment*, 92 Notre Dame L. Rev. 637, 646 (2016) ("Just last term, the Supreme Court indicated that res judicata rules operated differently in challenges to anti-abortion laws because of their impact on 'important human values.'").

2. *Hellerstedt* Establishes That Leal And Von Dohlen's Constitutional Challenges To 42 U.S.C. § 300gg-13(a)(4) Are Not Barred By Res Judicata Because Section 300gg-13(a)(4) Is A "Separate, Distinct Provision" From The Agency Rules That Were Challenged In *DeOtte*

Hellerstedt also allows Leal and Von Dohlen to challenge the constitutionality of 42 U.S.C. § 300gg-13(a)(4) because this statute is a "separate, distinct provision" from the agency rules that were challenged in the *DeOtte* litigation.

Hellerstedt makes clear that litigants may bring separate challenges to discrete provisions of the same statute—even when those separate provisions govern the same subject matter and are "part of one overarching government regulatory scheme." *Hellerstedt*, 136 S. Ct. at 2308. The statute in *Hellerstedt* required abortions to be performed by doctors with hospital admitting privileges, and it also required abortions to be performed in ambulatory surgical centers. Yet the Court allowed abortion providers to challenge the admitting-privileges provision and the surgical-center provision in separate lawsuits—even though the provisions appeared in the same statute, and even though the claims arose out of the same nucleus of operative facts. The Court explained:

> The surgical-center provision and the admitting-privileges provision are separate, distinct provisions of H.B. 2. They set forth two different, independent requirements with different enforcement dates. This Court has never suggested that challenges to two different statutory provisions that serve two different functions must be brought in a single suit. And lower courts

> normally treat challenges to distinct regulatory requirements as "separate claims," even when they are part of one overarching "[g]overnment regulatory scheme."
>
> That approach makes sense. The opposite approach adopted by the Court of Appeals would require treating every statutory enactment as a single transaction which a given party would only be able to challenge one time, in one lawsuit, in order to avoid the effects of claim preclusion. Such a rule would encourage a kitchen-sink approach to any litigation challenging the validity of statutes. That outcome is less than optimal—not only for litigants, but for courts.

Hellerstedt, 136 S. Ct. at 2308. All of this applies with equal or greater force to the constitutional claims brought against 42 U.S.C. § 300gg-13(a)(4) and the RFRA claims brought by the *DeOtte* litigants against the agency rules that codify the Contraceptive Mandate.

First, section 300gg-13(a)(4) and the agency rules challenged in *DeOtte* are far more "separate" and "distinct" from each other than the abortion-related statutory provisions in *Hellerstedt*. Section 300gg-13(a)(4) is a statutory provision enacted in 2010 as part of the Affordable Care Act. The Contraceptive Mandate, by contrast, is a series of agency rules that long post-date the enactment of section 300gg-13(a)(4). Second, the statute and the agency rules set forth "different, independent requirements." *Hellerstedt*, 136 S. Ct. at 2308. Section 300gg-13(a)(4) merely delegates authority to the Health Resources and Services Administration to impose preventive-care mandates on private insurers, while the Contraceptive Mandate specifically compels private insurers to cover FDA-approved contraceptive methods. Third, section

300gg-13(a)(4) and the Contraceptive Mandate have different effective dates. *See Hellerstedt*, 136 S. Ct. at 2308 (relying on the fact that the admitting-privileges and ambulatory-surgical-center provisions in HB2 had "different enforcement dates."). Section 300gg-13(a)(4) took effect immediately upon the ACA's enactment, while the Contraceptive Mandate's requirements did not take effect until 2013. When all of this is combined with *Hellerstedt*'s explicit encouragement of separate lawsuits for separate provisions, it becomes impossible for a res judicata defense to be sustained against Leal and Von Dohlen's constitutional challenges to section 300gg-13(a)(4).

3. The District Court's Efforts To Avoid *Hellerstedt* Are Unavailing

The district court correctly observed that *Hellerstedt* had "altered the test for res judicata in cases that involve 'important human values'"[15]—as the claims in *Hellerstedt* indisputably arose from the "same nucleus of operative fact" as the claims asserted in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 734 F.3d 406 (2013), and the *Hellerstedt* majority opinion never acknowledged or purported to apply the same-nucleus-of-operative-fact test when conducting its res judicata analysis. *See Hellerstedt*, 136 S. Ct. at 2333 (Alito, J., dissenting) (criticizing the majority for its refusal to apply the same-nucleus-of-operative-fact test); Riley T. Keenan, *Identity Crisis: Claim Preclusion in Constitutional Challenges to Statutes*, 20 U. Pa. J.

15. ROA.435 ("*Hellerstedt* altered the test for *res judicata* in cases that involve 'important human values'").

Const. L. 371, 385–86 (2017) ("[T]he Court conspicuously avoided using the word 'transaction' throughout its opinion—the word appears outside of quotation marks only once, in a passage that criticizes the Fifth Circuit's own application of the transactional approach. Given that both the Fifth Circuit and the dissent explicitly applied the transactional approach to the plaintiffs' claims, the Court's care to avoid endorsing that approach cannot be dismissed as an oversight.").[16] But at the same time, the district court expressed

16. *See also* Lee Kovarsky, *Preclusion and Criminal Judgment*, 92 Notre Dame L. Rev. 637, 646 (2016) ("Just last term, the Supreme Court indicated that res judicata rules operated differently in challenges to anti-abortion laws because of their impact on 'important human values.'"); Keenan, *supra* at 399 ("*Hellerstedt* sets forth a special rule for constitutional challenges to statutes that is significantly narrower than the rule prescribed by the transactional approach for ordinary civil litigation."); *id.* at 402 "*Hellerstedt* requires a rejection of the transactional approach to claim preclusion for challenges to statutes"); Elizabeth Price Foley, *Whole Woman's Health and the Supreme Court's Kaleidoscopic Review of Constitutional Rights*, 2016 Cato Sup. Ct. Rev. 153, 171 ("[*Hellerstedt*] engaged in remarkable contortions of procedural law, including distortion of the principle of *res judicata*. Specifically, the majority concluded that the second lawsuit was not the same claim as the first lawsuit, invoking an obscure and controversial comment found in the Restatement (Second) of Judgments that suggested that cases involving 'important human values' should generally not be dismissed if a 'slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.' But as Justice Samuel Alito's dissent points out, this conclusion is 'plainly wrong' because both the first and second lawsuits arose out of the same transaction or occurrence—namely, the passage of H.B. 2." (footnotes omitted)); *id.* ("Contrary to the majority's claim, the Restatement comment relied on by the majority was designed only to illustrate the unremarkable proposition that a new legal claim based on *postjudgment acts* should generally be permitted in cases such as

reluctance to extend *Hellerstedt*'s approach beyond the abortion context—even as it acknowledged that the issues in this case "certainly involve[] 'important human values.'" ROA.438; *see also* ROA.437-438 ("'This Court . . . will not apply the *adulterated* version of *res judicata* enthroned by *Hellerstedt* unless it applies squarely to the instant case before the Court." (emphasis in original)). Instead, the district court declared that *Hellerstedt* had used "important human values" as a "euphemism for abortion," and it characterized *Hellerstedt*'s res judicata analysis as an example of the Supreme Court's willingness to depart from established rules and doctrines in abortion cases. ROA.437 ("[T]he Supreme Court treats abortion differently. It always has. And it continues to do so." (citations omitted)); *see also Hellerstedt*, 136 S. Ct. at 2333 (Thomas, J., dissenting) ("[T]oday's decision creates an abortion exception to ordinary rules of res judicata.").

But a regime that gives abortion litigants special dispensations from the same-nucleus-of-operative-fact test and the ordinary rules of res judicata is incompatible with the judicial oath, which compels judicial officers to administer justice "without respect to persons,"[17] and a lower court should not at-

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child custody or similar status adjudications, not cases seeking to relitigate the *same transaction* challenged in the prior lawsuit with 'better evidence.'" (footnote omitted)).

17. 28 U.S.C. § 453 ("Each justice or judge of the United States shall take the following oath or affirmation be- fore performing the duties of this office: 'I, _____ _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and per-

tribute these intentions to the Supreme Court until the Court explicitly states that *Hellerstedt*'s res judicata analysis applies only to abortion cases. The *Hellerstedt* opinion did not claim to limit its res judicata holding or rationale to lawsuits challenging abortion restrictions. Instead, it attempted to justify its departure from the same-nucleus-of-operative-fact test by observing that the claims in *Hellerstedt* involved "important human values." *Hellerstedt*, 136 S. Ct. at 2305–06. A lower court should remain faithful to what the Supreme Court has said and apply the approach in *Hellerstedt*—rather than the same-nucleus-of-operative-fact test—when considering a res judicata defense in any case where "important human values" are at stake.

The district court acknowledged that this case involves "important human values." ROA.438 ("'This case certainly involves 'important human values.'"). Yet it *still* held that Leal and Von Dohlen's claims were barred by res judicata, despite the fact that their RFRA claim indisputably rests upon "changed circumstances" and "later, concrete factual developments." *Hellerstedt*, 136 S. Ct. at 2306. Leal and Von Dohlen specifically pleaded that the relief obtained in *DeOtte* has proven insufficient to protect the religious freedom of individuals who wish to purchase insurance that excludes contraceptive coverage, because "few if any insurance companies" are offering contraceptive-free health insurance in response to *DeOtte*. ROA.17. There is no way that this fact could have been known before the *DeOtte* injunction (or the

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form all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.'").

Trump Administration's *Religious Exemptions* rule) had taken effect, and any attempt to "prove" that this would happen would have been "too remote or speculative to afford relief" in the *DeOtte* litigation. *See Hellerstedt*, 136 S. Ct. at 2305 ("Factual developments may show that constitutional harm, which seemed too remote or speculative to afford relief at the time of an earlier suit, was in fact indisputable. In our view, such changed circumstances will give rise to a new constitutional claim. . . . Justice Alito's dissenting opinion is simply wrong that changed circumstances showing that a challenged law has an unconstitutional effect cannot give rise to a new claim.").

The district court did not deny any of this, yet it refused to apply the holding of *Hellerstedt* to this case for two reasons. First, the district court observed that the Appointments Clause and nondelegation claims do not rest on "factual developments" that post-date *DeOtte*. ROA.439. True enough, but Leal and Von Dohlen are asserting *three* claims against the federal defendants: (1) An Appointments Clause challenge to the constitutionality of 42 U.S.C. § 300gg-13(a)(4);[18] (2) A nondelegation challenge to the constitutionality of 42 U.S.C. § 300gg-13(a)(4);[19] and (3) A facial challenge to the Contraceptive Mandate under the Religious Freedom Restoration Act.[20] The district court's observation that the first two claims have nothing to do with "newly acquired evidence" does nothing to explain why the third of these

18. ROA.18-20; ROA.23 (¶ 58(a)).
19. ROA.20-21; ROA.23 (¶ 58(b)).
20. ROA.21; ROA.23 (¶ 58(c)–(d)).

claims should not proceed under *Hellerstedt*,[21] especially when Leal and Von Dohlen's facial RFRA challenge indisputably depends on evidence that post-dates *DeOtte* and that could not have been discovered during the *DeOtte* litigation.

Second, the district court held that Leal and Von Dohlen should have re-opened the *DeOtte* litigation and asked for a remedy that enjoins the enforcement of the Contraceptive Mandate across the board, rather than launching a "facial" challenge to the Contraceptive Mandate in a separate lawsuit. ROA.440 ("Plaintiffs should seek to modify the *DeOtte* injunction."). But this overlooks the fact that Leal and Von Dohlen's RFRA claim rests on "factual developments" that post-date the *DeOtte* litigation, and *Hellerstedt* explicitly allows a new lawsuit to be filed when the cause of action rests on evidence that did not exist at the time of the previous litigation (at least when "important human values" are at stake). *See Hellerstedt*, 136 S. Ct. at 2305–06; *id.* at 2305 (2016) ("[R]es judicata does not bar claims that are predicated on events that postdate the filing of the initial complaint" (citation and internal quotation marks omitted)); *id.* ("[W]here important human values . . . are at stake, even a slight change of circumstances may afford a

21. Leal and Von Dohlen's Appointments Clause and nondelegation challenges to the constitutionality of 42 U.S.C. § 300gg-13(a)(4) can still proceed on the ground that section 300gg-13(a)(4) is a "separate and distinct provision" from the agency rules that established the Contraceptive Mandate. *See* Part I.A.2, *supra*. They can also proceed under the traditional "same nucleus of operative fact" test. *See* Part I.B, *infra*.

sufficient basis for concluding that a second action may be brought." (citation and internal quotation marks omitted)). It is undisputed that this case involves "important human values,"[22] and it is equally undisputed that the federal RFRA claim rests on evidence that was unavailable and unknowable at the time of *DeOtte*. Nothing more is needed to overcome a res judicata defense under *Hellerstedt*.

The district court also refused to allow Leal and Von Dohlen's constitutional challenges to 42 U.S.C. § 300gg-13(a)(4) to proceed under *Hellerstedt*, and it rejected their claim that section 300gg-13(a)(4) represents a "separate and distinct provision" from the agency rules that were challenged in *DeOtte*. ROA.440-441. The district court tried to distinguish *Hellerstedt* by observing that:

> *Hellerstedt* involved two statutes passed in the same bill. Here, Plaintiffs are challenging a statute and a regulation passed pursuant to that same statute. This forms a nexus that cannot possibly fall into the "separate and distinct" category from *Hellerstedt*.

ROA.440. The district court's analysis is untenable. The question to resolve under *Hellerstedt* is whether the statute that delegates authority to HRSA is "separate" and "distinct" from the agency rules that impose the Contracep-

22. ROA.438 ("This case certainly involves 'important human values.'"). The federal defendants have never denied that the right of religious freedom is as at least as "important" a "human value" as the right to abortion. ROA.297-328; ROA.407-416.

tive Mandate, and it undoubtedly is. Consider once again the analysis from *Hellerstedt*:

> The surgical-center provision and the admitting-privileges provision are separate, distinct provisions of H.B. 2. They set forth two different, independent requirements with different enforcement dates. This Court has never suggested that challenges to two different statutory provisions that serve two different functions must be brought in a single suit. And lower courts normally treat challenges to distinct regulatory requirements as "separate claims," even when they are part of one overarching "[g]overnment regulatory scheme."

Hellerstedt, 136 S. Ct. at 2308. The statute and the agency rules set forth "different, independent requirements," that "serve two different functions." Section 300gg-13(a)(4) authorizes HRSA to decide the preventive care for women that private insurers must cover. The Contraceptive Mandate, on the other hand, dictates that private health insurance must cover all FDA-approved contraceptive methods as "preventive care," with some exceptions for church employers, grandfathered plans, and religious objectors. The statute and the agency rules also have "different enforcement dates," as section 300gg-13(a)(4) took effect when the Affordable Care Act was signed in 2010, while the Contraceptive Mandate took effect years later. And while the district court correctly observed that the agency rules were issued pursuant to section 300gg-13(a)(4),[23] that observation does nothing to distinguish *Hellerstedt*, which insists that challenges to distinct regulatory requirements qualify

23. ROA.440 ("Plaintiffs are challenging a statute and a regulation passed pursuant to that same statute.").

as "separate claims,"—"even when they are part of one overarching '[g]overnment regulatory scheme.'" *Hellerstedt*, 136 S. Ct. at 2308.

B. Leal And Von Dohlen Can Challenge The Constitutionality Of 42 U.S.C. § 300gg-13(a)(4) Under The "Same Nucleus Of Operative Facts" Test

In all events, Leal and Von Dohlen do not even need to rely on *Hellerstedt* to challenge 42 U.S.C. § 300gg-13(a)(4) under the Appointments Clause and nondelegation doctrine. Even if one applies the traditional "same nucleus of operative fact" test for res judicata (which *Hellerstedt* eschewed), the constitutional challenges to section 300gg-13(a)(4) are a different "claim" from the challenges to the Contraceptive Mandate presented in *DeOtte*.

The constitutional challenges to section 300gg-13(a)(4) allege that Congress violated the Constitution by enacting this statute.[24] They are challenges to the *legislature's* action in enacting a law that confers authority on individuals who are not appointed in conformity with Article II, and that fails to provide an intelligible principle to guide the discretion of the Health Resources Services Administration. The "nucleus" of relevant facts concerns the text of this statute and the meaning of the Constitution—nothing more. The alleged constitutional violation occurred at the moment of the statute's enactment,[25] and the "nucleus" of relevant facts is centered around that event and

24. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1214 (2010) ("[E]very constitutional holding should start by saying *who* has violated the Constitution.").

25. *See* Rosenkranz, *supra* at 1224 ("Every constitutional violation must be located in time." (emphasis removed)).

nothing else. There is no concern with how HRSA decides to use its powers under the statute; that is irrelevant to the Appointments Clause and nondelegation challenges alleged in the complaint. ROA.18-21.

The claims in *DeOtte*, by contrast, were challenging *only* the behavior of *executive-branch officials* who were enforcing the Contraceptive Mandate in a manner that violated the Religious Freedom Restoration Act. The relevant facts in *DeOtte* concerned the meaning of RFRA and the content of the Contraceptive Mandate, which have nothing to do with *any* of the facts surrounding the plaintiffs' constitutional challenges to section 300gg-13(a)(4). There is no overlap at all between these factual nuclei.

The district court rejected this argument because it observed that the Contraceptive Mandate was issued "pursuant" to 42 U.S.C. § 300gg-13(a)(4), and it held that the statute and the mandate were therefore "related" and "inextricably intertwined." ROA.434; *see also id.* ("The mandate could not exist without the statute."). But the question to resolve under res judicata is whether the *claims* arise from the same "nucleus" of operative facts; whether the statute and mandate are "related" does not answer that question. The district court also observed that the *DeOtte* plaintiffs "could have raised"[26] the constitutional challenges to section 300gg-13(a)(4) that Leal and Von Dohlen are asserting, but that is not the test for res judicata. A

26. ROA.434; *see also id.* ("To the extent Plaintiffs did not challenge the statutory basis for the Contraceptive Mandate in *DeOtte*, they unquestionably 'could have raised' those claims there.").

plaintiff can always join *any* claim that he might have against a defendant, regardless of whether that claim arises from the "same nucleus of operate fact." *See* Fed. R. Civ. P. 18(a). A litigant's failure to join a claim that could have been brought in a previous lawsuit does not demonstrate that the claim arises from the "same nucleus of operate fact" as the claims that were previously litigated—and it does not show that the claim is barred by res judicata. *See* 6A Charles Alan Wright, et al., *Federal Practice and Procedure* § 1582 (3d ed.) ("[T]he failure to join a claim does not necessarily bar its assertion in a subsequent action."); Jill E. Fisch, Jonah B. Gelbach, and Jonathan Klick, *The Logic and Limits of Event Studies in Securities Fraud Litigation*, 96 Tex. L. Rev. 553, 600–01 (2018) ("Rule 18(a) . . . allows, but does not require, a plaintiff to bring all possible claims in a single lawsuit.").[27]

The district court was correct to observe that litigants cannot "challenge" the mere existence of a statute. ROA.435. Instead, they must wait until the executive branch implements or threatens to enforce the allegedly unconstitutional statute in a manner that inflicts Article III injury, and assert their constitutional claims against the statute at that time. *See id.*; *see also California v. Texas*, No. 19-840 (U.S. June 17, 2021); *Okpalobi v. Foster*, 244

27. The district court's stance is also incompatible with *Hellerstedt*, because there is no question that the abortion providers' facial and as-applied challenges to Texas's admitting-privileges law, as well as their facial challenge to Texas's ambulatory-surgical-center requirement, *could* have been asserted in the previous lawsuit that brought only a facial challenge against the state's admitting-privileges law.

F.3d 405, 426 n.34 (5th Cir. 2001) (en banc) ("An injunction enjoins a defendant, not a statute."); *Pool v. City of Houston*, 978 F.3d 307, 309 (5th Cir. 2020) ("Courts hold laws unenforceable; they do not erase them."); *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2220 (2020) (Thomas, J., concurring in part and dissenting in part) ("The Federal Judiciary does not have the power to excise, erase, alter, or otherwise strike down a statute.").

But it remains the case that the relevant "nucleus of fact" surrounds Congress's decision to enact 42 U.S.C. § 300gg-13(a)(4)—and whether this *statute* comports with the Appointments Clause and the nondelegation doctrine. There is no overlap between this "nucleus of fact" and the facts that undergird the *DeOtte* litigants' challenge to the Contraceptive Mandate, which was concerned only with the content of agency rules and the meaning of the Religious Freedom Restoration Act. It is true that the plaintiffs would not have acquired *standing* to launch their constitutional challenges to section 300gg-13(a)(4) until HRSA acted in a manner that inflicted Article III injury, but there is still no factual overlap between the plaintiffs' constitutional attacks on section 300gg-13(a)(4) and the RFRA-based challenges to the subsequent agency rules—and there is certainly not a "common nucleus" of operative fact that would trigger res judicata. The congressional *enactment* of section 300gg-13(a)(4) is a separate and distinct transaction from the agency de-

cisions to impose and enforce the Contraceptive Mandate,[28] and the *DeOtte* litigation never challenged the constitutionality of section 300gg-13(a)(4). So Leal and Von Dohlen's constitutional challenge to the *statute* is fair game for litigation under the "same transaction" test.

II. Section 300gg-13(a)(4) Fails To Provide An "Intelligible Principle" To Guide HRSA's Discretion

Statutes that delegate authority to administrative agencies must supply an "intelligible principle" to guide the agency's discretion. *See Whitman v. American Trucking Associations*, 531 U.S. 457, 472 (2001). Yet there is *nothing* in the text of 42 U.S.C. § 300gg-13(a)(4) that purports to guide HRSA's discretion when choosing the "preventive care" and "screenings" for women that private insurance must cover. The statute does not even require HRSA to make these decisions based on the "public interest" or the "public health," and it does not provide *any* factors or considerations that might influence the agency's decisionmaking. Even the statutes that fall along the outermost boundary of constitutionally permissible delegations have at least *something* to guide the agency; this statute has nothing at all. Consider once again what the statute says:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for — . . .

28. *See* Rosenkranz, *supra* at 1214, 1224; *see also* notes 24–25 and accompanying test.

> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

42 U.S.C. § 300gg-13(a)(4). When it comes to deciding the "preventive care" and "screenings" for women that all private insurance will be forced to cover, HRSA can do whatever it wants.

The district court held that section 300gg-13(a)(4) provides an "intelligible principle" by allowing HRSA to compel coverage only of "preventive care and screenings," and then only of preventive care and screenings "for women." ROA.447. But this argument conflates a statutory boundary on an agency's authority with the "intelligible principle" needed to guide the agency's discretion within those boundaries. Limiting the scope of HRSA's powers to "preventive care and screenings" does nothing provide to provide guidance when HRSA is deciding *which* "preventive care" and *which* "screenings" will be covered. That is where the absence of an intelligible principle is felt, and neither the government nor the district court can point to anything in the statute that alleviates this problem.

Finally, the Supreme Court's recent opinion in *Little Sisters* indicates that the justices have at least some discomfort with the delegation of authority in section 300gg-13(a)(4). Consider this passage, which seems to go out of its way to call out the statute as a unique (and uniquely troublesome) delegation:

> On its face, then, [section 300gg-13(a)(4)] grants sweeping authority to HRSA to craft a set of standards defining the preven-

> tive care that applicable health plans must cover. But the statute is completely silent as to *what* those "comprehensive guidelines" must contain, or how HRSA must go about creating them. The statute does not, as Congress has done in other statutes, provide an exhaustive or illustrative list of the preventive care and screenings that must be included. See, *e.g.*, 18 U.S.C. § 1961(1); 28 U.S.C. § 1603(a). It does not, as Congress did elsewhere in the same section of the ACA, set forth any criteria or standards to guide HRSA's selections. See, *e.g.*, 42 U.S.C. § 300gg–13(a)(3) (requiring "*evidence-informed* preventive care and screenings" (emphasis added)); § 300gg–13(a)(1) ("evidence-based items or services"). It does not, as Congress has done in other contexts, require that HRSA consult with or refrain from consulting with any party in the formulation of the Guidelines. See, *e.g.*, 16 U.S.C. § 1536(a)(1); 23 U.S.C. § 138. This means that HRSA has virtually unbridled discretion to decide what counts as preventive care and screenings. But 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.
>
> Congress could have limited HRSA's discretion in any number of ways, but it chose not to do so. Instead, it enacted "'expansive language offer[ing] no indication whatever'" that the statute limits what HRSA can designate as preventive care and screenings or who must provide that coverage.

Little Sisters, 140 S. Ct. at 2380 (some citations omitted). Of course, the Supreme Court did not go so far as to say that section 300gg-13(a)(4) actually violates the Constitution or the nondelegation doctrine. But the justices *did* make clear that the nondelegation doctrine continues to exist—and that the federal judiciary is to continue policing the boundary between permissible and impermissible delegations of lawmaking power by insisting on an "intel-

ligible principle" that can be found in the statute. *See Gundy v. United States*, 139 S. Ct. 2116 (2019). If a statute such as section 300gg-13(a)(4) is held to pass muster under the "intelligible principle" standard, then one must wonder how any statute could possibly fail this test.

The district court observed that the Supreme Court has not declared a federal statute unconstitutional under the nondelegation doctrine for more than 80 years,[29] and this may have informed its reluctance to act against the standardless delegation of power that appears in 42 U.S.C. § 300gg-13(a)(4). But the lower courts have an important role to play in enforcing constitutional boundaries—even when the Supreme Court appears to have largely abandoned the task. The resurrection of judicially enforced limitations on the commerce power was brought about by rulings from the federal courts of appeals that boldly declared congressional enactments beyond the enumerated powers described in Article I and brought these issues on to the Supreme Court's docket. *See, e.g.*, *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd* 514 U.S. 549 (1995); *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 825 (4th Cir. 1999), *aff'd sub nom. United States v. Morrison*, 529 U.S. 598 (2000); *Florida ex rel. Attorney General v. U.S. Department of Health and Human Services*, 648 F.3d 1235, 1240 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom. National Federation of Independent*

29. ROA.447. Professor Sunstein has said that the nondelegation doctrine has had "one good year" and more than 200 bad ones. *See* Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 330 (1999).

Business v. Sebelius, 567 U.S. 519 (2012). The Supreme Court's 86-year unwillingness to enforce the intelligible-principle requirement should not deter this Court from doing so here.

CONCLUSION

The judgment of the district court should be reversed to the extent it dismissed the claims brought against the federal defendants, and the case should be remanded for further proceedings.

Respectfully submitted.

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