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

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR INTERVENOR-DEFENDANT-APPELLANT MARCH FOR LIFE

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CORPORATE DISCLOSURE STATEMENT

The March for Life Education & Defense Fund makes this disclosure statement pursuant to Federal Rule of Civil Procedure 26.1. The March for Life Education & Defense Fund does not have any parent entities and does not issue stock.

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National Federation of Independent Business v. Sebelius,
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Health Care and Education Reconciliation Act,
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42 C.F.R. § 438.102(a)(2) 54

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45 C.F.R. § 147.131(a) 7

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79 Fed. Reg. 51,118 (Aug. 27, 2014) 62

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82 Fed. Reg. 47,792 (Oct. 13, 2017) 13, 14, 15

83 Fed. Reg. 57,536 (Nov. 15, 2018) ..... passim

83 Fed. Reg. 57,592 (Nov. 15, 2018) ..... passim

Other Authorities:

Conscientious Objection and Alternative Service, Selective Service System, https://bit.ly/2T0ZW7o 47

Cynthia Eller, *Conscientious Objectors and The Second World War: Moral and Religious Arguments in Support of Pacifism* (1991) ... 47

Francis J. Manion, *Protecting Conscience Through Litigation: Lessons Learned in the Land of Blagojevich*, 24 Regent U. L. Rev. (2012) 58

George Washington, *From George Washington to the Society of Quakers, 13 October 1789*, National Archives-Founders Online, https://bit.ly/2tEzjGq 45

Guttmacher Inst., *Refusing to Provide Health Services* (February 1, 2019), https://bit.ly/1lsohM6 59

HRSA, *Women's Preventive Services Guidelines* (Aug. 1, 2011), https://bit.ly/2OHsmgH 6

Institute for Healthcare Improvement, https://bit.ly/2SoMFAv 6

Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* (2011), https://bit.ly/2rT7RDR..... 6

James Madison, *A Memorial and Remonstrance against Religious Assessments*, in Selected Writings of James Madison (Ralph Ketcham ed., Hackett Publishing Co., Inc. 2006)..... 44

James Madison, *Property*, in Selected Writings of James Madison, (Ralph Ketcham ed., Hackett Publishing Co., Inc. 2006)..... 45

James S. Kabala, *Church-State Relations in the Early American Republic, 1787-1846* (2013)..... 46-47

John Rawls, *A Theory of Justice* (1971) 48

Kaiser Family Foundation, 2018 Employer Health Benefits Survey (2018) 9

Kevin H. Theriot & Ken Connelly, *Free to Do No Harm: Conscience Protections for Healthcare Professionals*, 49 Ariz. St. L.J. (2017) 59

Kristina Tocce, M.D., M.P.H., & Britt Severson, M.P.H., *Funding for Abortion Training in Ob/Gyn Residency*, AMA Journal of Ethics, (Feb. 2012), https://bit.ly/2TeCTW9 50

Lynn D. Wardle, *Conscience Exemptions*, 14 Engage: J. Federalist Society Practice Groups (2013) .. 45,46, 48

Lynn D. Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 Ave Maria L. Rev. (2010) 56-57

M. Casey Mattox & Matthew S. Bowman, *Your Conscience, Your Right: A History of Efforts to Violate Pro-Life Medical Conscience, and the Laws That Stand in the Way*, The Linacre Quarterly 77(2) (May 2010) 57

Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. (2012) 46

Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (2008) 47-48

The New Conscientious Objection: From Sacred to Secular Resistance (Charles C. Moskos & John Whiteclay Chambers eds., 1993) 46

Thomas Jefferson, *Notes On the State Of Virginia* (1782) 45

Thomas Jefferson, *To The Society of the Methodist Episcopal Church at New London, Connecticut (Feb. 4, 1809)*, in 8 The Works of Thomas Jefferson (H.A. Washington ed., 1884) 45

INTRODUCTION

The Plaintiff States have turned a political disagreement into litigation designed to subdue those who have different religious and moral views. The conflict between religious liberty/freedom of conscience on the one hand, and the Affordable Care Act's contraceptive coverage requirement on the other, has occupied the federal courts for years. The Plaintiff States chose to sit idly by, because this was not their fight. Yet, once the Departments promulgated rules creating moral and religious exemptions to the contraceptive-coverage requirement, the Plaintiff States cried foul.

But the Plaintiff States have suffered no legally cognizable harm. To the extent the Plaintiff States may have enjoyed an indirect benefit for a time from federal regulatory largesse, they are not entitled to make that windfall permanent. The federal government owes them nothing, and adjusting the regulatory apparatus of the ACA—which did not by its statutory terms ever require contraceptives to be a part of preventive care guidelines—is not a harm for which they can recover. Although their declarations speculate that harm surely is to come, they

have failed to show an actual, concrete legal injury. And any alleged harm is self-inflicted and therefore insufficient to confer standing.

Meanwhile, the Departments' moral and religious exemptions solve real problems for real organizations and individuals. They ensure that no one will be compelled to act against his or her beliefs. And neither exemption runs afoul of the ACA, the Administrative Procedure Act, or the Constitution. The religious exemption is actually required by the Religious Freedom Restoration Act and the First Amendment. And the moral exemption is strongly compelled by extant legal authority, including the Fifth Amendment's equal protection provisions.

The moral exemption is also entirely consistent with our foundational principles regarding conscience; our historical solicitude for ensuring conscientious objectors are protected; and myriad congressional enactments, federal regulations, and state laws protecting conscience in a variety of contexts. The fact that many of these conscience protections arose in the wake of *Roe v. Wade*, in which the Supreme Court announced a constitutional right to elective abortion, testifies to the primacy of the right to conscience.

The district court erred when it enjoined the Final Rules. First, the Plaintiff States lack standing. Second, the contraceptive coverage is not an ACA statutory mandate, but rather a discretionary regulatory decision, no different than the Departments' decision to craft the unchallenged exemptions and accommodations to that "mandate." Third, the moral and religious exemptions contained in the Final Rules are natural and permissible extensions of that discretion, and in no way violate the law. And finally, the Plaintiff States fail to satisfy the factors necessary to secure a preliminary injunction. For all these reasons, this Court should reverse.

STATEMENT OF JURISDICTION

The district court exercised jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction over this timely appeal under 28 U.S.C. § 1292(a)(1) (permitting interlocutory appeals of preliminary injunction orders). *See* ER 1 (order granting motion for preliminary injunction dated January 13, 2019); ER 46 (notice of appeal dated January 28, 2019).

STATEMENT OF THE ISSUES

This appeal presents four issues:

1. Whether the Plaintiff States have Article III standing to bring this suit.

2. Whether the religious exemption contained in the Final Rules promulgated by the Departments is in accord with the Affordable Care Act, and therefore compliant with the Administrative Procedure Act.

3. Whether the moral exemption contained in the Final Rules promulgated by the Departments is in accord with the Affordable Care Act, and therefore compliant with the Administrative Procedure Act.

4. Whether the Plaintiff States have shown that they satisfy the requirements to merit a preliminary injunction as to the Final Rules promulgated by the Departments.

STATEMENT OF THE CASE

A. The Affordable Care Act and its contraceptive coverage requirement

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

Congress did not specify in the ACA precisely what preventive services must be covered under this statutory provision. Rather, that task was left to HRSA, an agency within the Department of Health and Human Services. As part of this process, HHS requested that the Institute of Medicine, which is "affiliated with the National Academies of Science and serves as a nonprofit organization devoted to providing

leadership on health care,"[1] to "convene a diverse committee of experts in," among other things, "women's health issues" to "recommend services and screenings for HHS to consider." Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 1, 20-21 (2011), https://bit.ly/2rT7RDR; 77 Fed. Reg. 8,725, 8,726 (Feb. 15, 2012). IOM eventually recommended that HHS define preventive services to include "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." Inst. of Med., *Clinical Preventive Services*, at 10.

On August 1, 2011, HRSA adopted the IOM's recommendations in full, defining preventive services for women to include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA, *Women's Preventive Services Guidelines* (Aug. 1, 2011), https://bit.ly/2OHsmgH; s*ee* 77 Fed. Reg. at 8,725-26; 76 Fed. Reg. 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv). The Departments of Labor and Treasury did the same. 29 C.F.R. § 2590.715-

[1] Inst. for Healthcare Improvement, https://bit.ly/2SoMFAv.

2713(a)(1)(iv); 26 C.F.R. § 54.9815-2713(a)(1)(iv). Among the items included under such approved contraceptives are hormonal oral and implantable contraceptives, IUDs, and products categorized as emergency contraception, all of which March for Life believes can prevent the implantation of a newly conceived human embryo, causing an abortion. Mot. to Intervene, Mancini Decl. at ¶ 14, *California v. Azar*, No. 17-05783 (N.D. Cal. Dec. 8, 2017), ECF No. 87-1.

B. Exceptions to the contraceptive coverage requirement

On the same day that HRSA issued these guidelines, the federal government promulgated another regulation which exempted some entities that objected to providing contraceptive coverage. 76 Fed. Reg. 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A)-(B). This regulation granted HRSA "discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned." 76 Fed. Reg. at 46,623. The term "religious employer" referred, in general, to churches, religious orders, and their integrated auxiliaries. *See id.* at 46,626; 45 C.F.R. § 147.131(a).

Separate and apart from this narrow church exemption, the Departments also offered what they termed an "accommodation" for

religious non-profits with religious objections to providing contraceptive coverage as part of their health care plans. *See* 78 Fed. Reg. 39,870, 39,874-82 (July 2, 2013). This accommodation required religious employers who were not covered by the exemption to execute a self-certification form and deliver it to their insurers or third-party administrators (in the event they were self-insured), to avoid having to "contract, arrange, pay, or refer for contraceptive coverage." *Id.* at 39,874. This certification would then trigger "payments for contraceptive services" from either the insurers or the TPAs. *See id.* at 39,876, 39,879. The Departments later amended this accommodation to allow covered employers to provide notice of their religious objection directly to HHS, rather than executing a self-certification form. *See* 80 Fed. Reg. 41,318, 41,322-23 (July 14, 2015). After *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), which held that RFRA prohibited the government from applying the contraceptive mandate to closely held, for-profit corporations with religious objections to providing contraceptive coverage, the Departments promulgated rules extending the accommodation to such entities. *See* 80 Fed. Reg. at 41,323-28.

In addition to the exemption and the accommodation, the contraceptive mandate does not apply to a host of other employers and individuals. For instance, the ACA exempts from the preventive services requirement grandfathered health plans, defined as those plans which have not made certain specified changes since the inception of the ACA. 42 U.S.C. § 18011. In 2018, some 20% of employers offered a grandfathered health plan. *See* Kaiser Family Found., *2018 Employer Health Benefits Survey* 209 (2018). The ACA also does not apply to employers with fewer than 50 employees, who are not required to provide health insurance at all. 26 U.S.C. § 4980H(c)(2). This means that the contraceptive mandate does not apply to tens of millions of individuals. *Hobby Lobby*, 573 U.S. at 700 (noting that "[o]ver one-third of the 149 million nonelderly people in America with employer-sponsored health plans were enrolled in grandfathered plans in 2013," and that the "count for employees working for firms that do not have to provide insurance at all because they employ fewer than 50 employees is 34 million workers").

C. Litigation involving March for Life

Despite numerous exemptions for myriad employers, no provision protected pro-life, non-religious entities like March for Life. This is so even though March for Life's moral convictions mirror the religious beliefs of those churches and religious entities opposing abortion. Mot. to Intervene, Mancini Decl. at ¶¶ 15, 17, *California v. Azar*, No. 17-05783 (N.D. Cal. Dec. 8, 2017), ECF No. 87-1.

Indeed, March for Life exists to protect, defend, and respect human life at every stage, and is staunchly opposed to abortion in all its forms. March for Life is one of the oldest pro-life organizations in the nation. March for Life was founded in 1973, shortly after the Supreme Court decided *Roe v. Wade*. At that time a group of pro-life leaders decided that the first anniversary of that decision should not come and go without recognition. The hallmark of March for Life, then, is its annual march on the Supreme Court and United States Capitol, held every year on or around January 22, the anniversary of *Roe v. Wade*. *See* Mot. to Intervene, Mancini Decl. at ¶¶ 3-7, *California v. Azar*, No. 17-05783 (N.D. Cal. Dec. 8, 2017), ECF No. 87-1.

March for Life, and its employees, based on scientific and medical knowledge, hold the basic moral conviction that human life begins at conception/fertilization—a human embryo, small and fragile though it may be, is a human life that must and should be protected. March for Life therefore opposes the destruction of human life at any stage before birth, including by abortifacient methods that may act after the union of a sperm and ovum. March for Life believes that the hormonal drugs and devices within the ACA's contraceptive mandate are abortifacients, because such drugs and treatments may prevent or dislodge the implantation of a human embryo after fertilization, thereby causing its death. The provision of these abortifacients (and counseling in favor of the same) thus runs directly contrary to March for Life's very reason for being. March for Life cannot in good moral conscience comply with the ACA's contraceptive mandate. *Id.* at ¶¶ 9-19; 82 Fed. Reg. 47,838, 47,847 (Oct. 13, 2017) (acknowledging this moral conviction).

Accordingly, to vindicate its right to operate in a manner that is consistent with its moral convictions, March for Life sued the federal government on July 7, 2014, and eventually secured a permanent injunction, which the federal government appealed. *March for Life v.*

Burwell, 128 F. Supp. 3d 116 (D.D.C. 2015), *appeal docketed*, No. 15-5301 (D.C. Cir. Oct. 30, 2015). In the wake of the IFRs, which provided both religious and moral exemptions to the contraceptive mandate, the federal government dismissed its appeal on September 5, 2018. Mtn. for Voluntary Dismissal, *March for Life v. Azar*, No. 15-5301 (D.C. Cir. Sept. 5, 2018), Doc. No. 1749057.

D. The Interim Final Rules providing for Religious and Moral Exemptions

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

challenges to the contraceptive mandate, the Departments issued two new IFRs. 82 Fed. Reg. 47,792, 47,799 (Oct. 13, 2017).

The IFRs, by providing exemptions for both religious and moral actors, balanced the rights of religious liberty and conscience with the contraceptive mandate's provision for contraceptive coverage. *Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the ACA*, 82 Fed. Reg. 47,792 (Oct. 13, 2017); *Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the ACA*, 82 Fed. Reg. 47,838 (Oct. 13, 2017). The first IFR expanded the religious exemption to all "non-governmental plan sponsors that object based on sincerely held religious beliefs, and institutions of higher education in their arrangement of student health plans." 82 Fed. Reg. at 47,806. It also retained the "accommodation . . . as an optional process for exempt employers." *Id.* The second IFR created an exemption for entities like March for Life, who "object to coverage of some or all contraceptives based on sincerely held moral convictions but not religious beliefs," and as with the newly expanded religious exemption, made these "exempt entities eligible for [the] accommodation[]" as well. 82 Fed. Reg. at 47,844.

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

The Departments issued both IFRs without notice and comment under their statutory authority to issue interim final rules. *Id.* at 47,840 (invoking 26 U.S.C. § 9833, 29 U.S.C. § 1191c, and 42 U.S.C. § 300gg-92). The Departments also relied on the good-cause exception to 5 U.S.C. § 553(d), concluding that "it would be impracticable and contrary to the public interest to engage in full notice and comment rulemaking before putting the[ ] interim final rules into effect, and that it [was] in the public interest to promulgate interim final rules." *Id*. at 47,856; *accord* 82 Fed. Reg. at 47,815 (same). The Departments did provide notice and an opportunity for post-promulgation notice for 60

days, until December 5, 2017. 82 Fed. Reg. at 47,792; 82 Fed. Reg. at 47,838.

E. The IFR litigation

In response to the federal government recognizing the religious and conscience rights of employers, the State of California filed suit against the Departments, alleging violations of the APA's public notice requirement in 5 U.S.C. § 553, the APA's prohibition on "abuse of discretion" in 5 U.S.C. § 706, the First Amendment's Establishment Clause, and the Fifth Amendment's equal protection provisions. Compl., *California v. Azar*, No. 17-05783 (N.D. Cal. Oct. 6, 2017), ECF No. 1. In a first amended complaint New York, Maryland, Delaware, and Virginia joined as plaintiffs. The Plaintiff States filed a motion for preliminary injunction asking the district court to bar the federal government from implementing the IFRs. Mot. for a Prelim. Inj., *California v. Azar*, No. 17-05783 (N.D. Cal. Nov. 9, 2017), ECF No. 28.

On December 21, 2017 the district court granted the Plaintiff States a nationwide injunction as to the IFRs. Order Granting Pls.' Mot. for a Prelim. Inj., *California v. Azar*, No. 17-05783 (N.D. Cal. Dec. 21, 2017), ECF No. 105. The court held that venue was proper in the

district, that the Plaintiff States had Article III standing, and that the Plaintiff States were likely to succeed on their procedural APA claim, because the "highly-consequential IFRs were implemented without any prior notice or opportunity to comment." *Id.* at 2.[2] The Little Sisters of the Poor filed their notice of appeal on January 26, 2018, Notice of Appeal, *California v. Azar*, No. 17-05783 (N.D. Cal. Jan. 26, 2018), ECF No. 135; March for Life filed its notice of appeal on January 31, 2018, Notice of Appeal, *California v. Azar*, No. 17-05783 (N.D. Cal. Jan. 31, 2018), ECF No. 137; and the federal government filed its notice of appeal on February 16, 2018, Notice of Appeal, *California v. Azar*, No. 17-05783 (N.D. Cal. Feb. 16, 2018), ECF No. 142.

In its opinion filed on December 13, 2018 this Court affirmed in part and reversed in part. It held that venue was proper, that the Plaintiff States had "standing to sue on their procedural APA claim," and that the Departments "likely did not have good cause" or "statutory authority for bypassing notice and comment." *California v. Azar*, 911

[2] On December 8, 2017, Intervenor-Defendant March for Life filed a motion to intervene in this action. *California v. Azar*, No. 17-05783 (N.D. Cal. Dec. 8, 2017), ECF No. 87. The district court granted that motion on January 26, 2018. *California v. Azar*, No. 17-05783 (N.D. Cal. Jan. 26, 2018), ECF No. 134.

F.3d 558, 571, 578, 580 (9th Cir. 2018). But this Court held that the injunction's scope was too broad, because "an injunction that applies only to the plaintiff states would provide complete relief to them." *Id.* at 584. Despite affirming as to venue, standing, and the procedural APA injury alleged by the Plaintiff States, this Court reiterated that the "free exercise of religion and conscience is . . . fundamentally important," and that "[p]rotecting religious liberty and conscience is obviously in the public interest." *Id.* at 582.

F. The Final Rules litigation and the district court's second preliminary injunction

While the IFR appeal was pending, the Departments—after soliciting public comments, considering those comments, and making changes to the rules based upon those comments—promulgated the Final Rules on November 15, 2018. *See* 83 Fed. Reg. 57,592, 57,596 (Nov. 15, 2018) (moral exemptions); 83 Fed. Reg. 57,536, 57,539-40 (Nov. 15, 2018) (religious exemptions). Like the IFRs, the Final Rules provide both religious and moral exemptions to the Mandate. *See id.* The Final Rules were scheduled to take effect on January 14, 2019. *See* 83 Fed. Reg. at 57,536; 83 Fed. Reg. at 57,592.

On December 18, 2018, the Plaintiff States filed a Second Amended Complaint, adding nine states as plaintiffs.[3] On December 19, 2018 the Plaintiff States filed a motion for preliminary injunction seeking to bar implementation of the Final Rules. Mem. in Supp. of Pl.'s Mot. for a Prelim. Inj. 9-20, *California v. Azar*, No. 17-05783 (N.D. Cal. Dec. 19, 2018), ECF No. 174.

On January 13, 2019, the district court granted a preliminary injunction as to the Final Rules, limited to the Plaintiff States. ER at 42-44. In so doing the district court held that venue was proper and that the Plaintiff States had Article III standing. Moreover, the district court concluded that the Plaintiff States are likely to succeed on their claim that the religious exemption is "not in accordance with" the ACA and therefore violates the APA, because the contraceptive mandate is "a statutory mandate" and because the "religious exemption likely is not required by RFRA." *Id.* at 21-31. The district court further held that the Plaintiff States are likely to succeed on their claim that the moral exemption is "not in accordance with" the ACA and therefore violates

[3] Including the District of Columbia as a state for purposes of this count.

the APA, because "Congress mandated the coverage that is the subject matter of this dispute," and because the moral exemption "is inconsistent with the language and purpose of the statute it purports to interpret." *Id.* at 38-39.

The Little Sisters of the Poor filed their notice of appeal on January 13, 2019, ER at 50-51; the federal government filed its notice of appeal on January 23, 2019, ER at 48-49; and March for Life filed its notice of appeal on January 28, 2019, ER at 46-47.

SUMMARY OF THE ARGUMENT

The district court's preliminary injunction barring implementation of the Final Rules should be reversed.

1. The Plaintiff States have no cognizable legal injury. The federal government is not obligated to provide contraceptive coverage at all, so any impact posed by the religious and moral exemptions on the Plaintiff States' fiscs is not a legal harm. The Plaintiff States cannot show the actual, concrete injury necessary to obtain Article III standing, just like states cannot complain when Congress eliminates any other discretionary program. What's more, the Plaintiff States cannot bring a *parens patriae* claim against the federal government on

behalf of their citizens. And any injury they allege would be self-inflicted.[4]

2. The ACA's statutory text does not require contraceptive coverage. Because Congress did not require that contraceptives be covered, exemptions are proper under the Departments' and HRSA's discretion.

3. The moral exemption is also a permissible exercise of agency discretion to regulate the ACA. This discretion was used to determine not only *what* should be included in the preventive services guidelines, but *who* should be subject to them. The moral exemption is also consistent with our foundational and historical respect for conscience; myriad congressional enactments and federal regulations; judicial precedents; and state laws protecting conscience. Furthermore, it is required by the Fifth Amendment's equal protection provisions.

[4] This lack of harm also indicates Plaintiff States cannot show irreparable harm. March for Life agrees with the Departments' and Little Sisters' analyses of this and the two other preliminary injunction factors—balance of equity and public interest—all of which weigh against granting the injunction.

4. Finally, the religious exemption is required by RFRA. The contraceptive mandate represents a substantial burden on religion, for which no compelling interest exists.

STANDARD OF REVIEW

Article III standing is reviewed *de novo*. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969 (9th Cir. 2003) (internal citations omitted). So is the district court's construction of federal statutes. *Am. Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). Grant of a preliminary injunction is reviewed for abuse of discretion. *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980).

ARGUMENT

I. The States are not injured by the Final Rule.

The federal government has no obligation to fund contraception. The Departments' decision to grant religious and moral exemptions to the contraceptive coverage requirement—which itself arose from a discretionary decision by HRSA—is consistent with the ACA. So, any effect on the Plaintiff States' fiscs does not constitute a cognizable injury, just like when the federal government stops funding any state program. Additionally, Plaintiffs' alleged harms are too conjectural to

satisfy Article III standing requirements. This Court should reverse the district court's order, vacate the preliminary injunction, and remand the case with instructions to dismiss.[5]

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

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (cleaned up).[6]

To establish standing, a plaintiff may not merely rest on a complaint's allegations. It must *prove* standing.

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[5] Although this Court initially held that the Plaintiff States had standing to challenge the IFRs, March For life maintains that the Plaintiff States lack standing to challenge the IFRs *or* the Final Rules. *See City of Los Angeles v. Cty. of Kern*, 581 F.3d 841, 845 (9th Cir. 2009) ("a court can, and indeed must, resolve any doubts about this constitutional issue sua sponte," and noting that standing "cannot be waived by any party").

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

The States argue that the Final Rules and the process by which the Departments adopted them inflict three types of injury. First, an economic injury: they speculate that the Final Rules, through a chain of events, will eventually impose financial costs on them. ER at 133-34. Second, a procedural injury: the States say that, as a matter of law, the Departments violated the APA by failing to comply with notice and comment requirements. *Id.* at 189-91. Third, an injury to their quasi-sovereign interests: the States contend that the Final Rules will adversely impact some of their residents, and that they have standing to vindicate their citizens' interests. *Id.* at 188-89. The Plaintiff States are wrong on all three theories. And, to the extent they are able to show harm, it is self-inflicted.

A. The States' alleged injury is based on a discretionary mandate, and speculative.

1. The Departments' decision to extend discretionary exemptions to the contraceptive mandate—itself created pursuant to discretion—does not harm the Plaintiff States.

The federal government is not obligated to provide contraceptive coverage through the ACA, so any speculative impact on the respective fiscs of the Plaintiff States is not a legal harm. Neither the Plaintiff States nor the district court cited any authority for the proposition that

the Departments are somehow required to insulate the States from any and all economic impact in the absence of some legal infirmity.

The Plaintiff States allege that the ACA "requires that employers provide no-cost contraceptive coverage to their employees," ER at 142-43. That is false. Congress did not require contraceptive coverage as part of the ACA—it merely delegated to HRSA the discretion to decide what would constitute the full measure of "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4); *accord* 83 Fed. Reg. at 57,606 (pointing out that the contraceptive mandate "is not an explicit statutory requirement").

That distinction is crucial—for if the Departments were free not to provide for contraceptive coverage at all,[7] Plaintiff States can hardly complain that the Departments' provision of expanded exemptions to the voluntary regime the Departments created constitutes an injury requiring a judicial remedy, immediate or otherwise. *Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 579 (2012).[8] As the Departments

[7] *Cf. Harris v. McRae*, 448 U.S. 297 (1980) (the constitutional right to abortion does not entail a constitutional obligation for the government to pay for abortions).

[8] ("Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds.

correctly note in the Final Rules' preamble, "[u]ntil 2012, there was *no* federal mandate of contraceptive coverage across health insurance and health plans nationwide. The ACA did *not* require a contraceptive Mandate, and its discretionary creation by means of HRSA's Guidelines does *not* translate to a benefit that the federal government owes to state or local governments." 83 Fed. Reg. at 57,607 (emphasis added). There is no legal injury to the Plaintiff States whenever the federal government ends a program that saves them from spending their own money. *See* § I(C) below. This means the Plaintiff States lack standing.

Moreover, any alleged harm to the Plaintiff States is belied by their acquiescence—for years—to HRSA's discretionary exemption for churches and their integrated auxiliaries, along with the exemption for myriad grandfathered plans. These longstanding exemptions impact millions of women, far more than the Departments have estimated may be impacted by the new religious and moral exemptions. 83 Fed. Reg. at 57,562 ("The ACA did not apply the preventive services mandate to the

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In the typical case we look to the States to defend their prerogatives by adopting the simple expedient of not yielding to federal blandishments when they do not want to embrace the federal policies as their own. The States are separate and independent sovereigns. Sometimes they have to act like it.") (cleaned up).

many grandfathered health plans among closely held as well as publicly traded for-profit entities, encompassing tens of millions of women. . . . we are not aware of evidence showing that the expanded exemptions finalized here will impact such a large number of women."). Yet the Plaintiff States did not challenge those exemptions—and in fact provided religious exemptions to their own contraceptive mandates—presumably for reasons similar to those advanced by the Departments.[9] The Plaintiff States have no legally cognizable harm.

2. The Plaintiff States advance nothing more than speculative harm.

The Plaintiff States contend that the Final Rules may eventually, someday, impose new costs upon them. This is their chain of speculation: large numbers of previously exemption-ineligible plan sponsors will invoke the newly available exemptions; the beneficiaries of these plans will still clamor for government-paid-for contraceptives and abortifacients; the Final Rules will force large numbers of plan beneficiaries to turn to state governments for this freebie; the Plaintiff

[9] *See, e.g.*, Cal. Health and Safety Code § 1367.25(c) (allowing "a health care service plan contract without coverage for FDA-approved contraceptive methods that are contrary to the religious employer's religious tenets."); N.Y. Ins. Law § 3221(l)(16)(A) (same).

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

This theory is the definition of a "conjectural or hypothetical" chain of events with an appended predicted injury. *Lujan,* 504 U.S. at 560. The district court admitted as much in its preliminary-injunction order. *See* ER at 18 (the evidence of harm submitted by the Plaintiff States documents how "their female residents are *predicted* to lose access to contraceptive coverage because of the Final Rules") (emphasis added). But it is axiomatic that such conclusory and conjectural claims of economic harm are insufficient to establishing standing. *Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1233–34 (10th Cir. 2012) ("Record facts consisting of conclusory statements and speculative economic data" do not show an injury in fact.).

Tellingly, the Plaintiff States have not identified a single employer in their states who plans to invoke the religious or moral exemption

who is not already protected by extant exemptions or court injunctions, and they have not shown any individuals who stand to lose coverage pursuant to any plan sponsor's decision. This failure persists even though the Plaintiff States had an opportunity to submit a comment substantiating their alleged harms from the IFRs, and despite the fact that the ranks of the Plaintiff States have now swelled to 14.[10] Under these circumstances the Plaintiff States do not have standing. *E.g.*, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 301 F. Supp. 3d 248, 263 (D. Mass. 2018) (cleaned up) (in an analogous case challenging the IFRs, the plaintiff commonwealth lacked standing because it did "not identify any employers that are likely to avail themselves of the expanded exemptions, much less identify employees who will cause [it] the alleged significant financial harm").

[10] The Plaintiff States did submit a comment on the religious and moral exemptions on December 5, 2017. *See* https://bit.ly/2xICBu2 (last visited Apr. 9, 2018). But they failed to respond to the Departments' invitation to provide input on the estimated impact of the IFRs.

B. The States' interest in the health and wellbeing of its residents cannot form the basis for standing in a suit against the federal government.

State governments have no standing to bring *parens patrie* suits against the federal government. *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923); *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990) (recognizing Supreme Court rule).

States can have standing under the *parens patriae* doctrine to sue to vindicate their citizens' interests, commonly "in situations involving the abatement of public nuisances, such as global warming, flooding, or noxious gases." *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 970, 974 (9th Cir. 2009) (denying Oregon standing because its injury claims were merely "generalized grievances" that failed to show an "independent quasi-sovereign interest[.]"). But here, the Plaintiff States say they are suing to protect sovereign, quasi-sovereign, and proprietary interests. ER at 16-17, 140. And Plaintiffs cannot sue the *federal* government to protect quasi-sovereign interests in their citizens' health or wellbeing, so no standing is supported on this score.

C. Plaintiff States' alleged harm is self-inflicted and therefore insufficient to confer standing on them.

Plaintiff States' speculation that they will incur additional costs because of the Final Rules is also insufficient for standing because any such injuries would be entirely self-inflicted. The Plaintiff States voluntarily chose to allocate state resources to the family planning programs they claim will be pressed by the Final Rule. The States' alleged economic harms are based on assumptions about an increase in the use of programs whose eligibility requirements the States set, and where the funding is determined by state budgets and taxes. Mem. in Supp. of Pl.'s Mot. for a Prelim. Inj. 30, *California v. Azar*, No. 17-05783 (N.D. Cal. Dec. 19, 2018), ECF No. 174 (arguing that "if the Rules are not enjoined, the States are likely to face increased costs of providing contraception to their residents"). Such self-inflicted injuries do not confer standing. *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam) (holding that self-inflicted injuries could not establish standing where plaintiff state governments' own legislative decisions caused the fiscal harm at issue); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (determining that plaintiffs' costs undertaken to avoid surveillance under challenged statute were self-inflicted harms, and

concluding that "respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending").

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

The Plaintiff States chose to enact programs that may suffer an impact in some way as a result of the Final Rules. That choice does not

create an injury sufficient to confer Article III standing. As the Plaintiff States noted in their amicus brief in *Texas*, parties should not get to petition federal courts for their failures in the political arena. They can only do so if they can show actual, concrete injuries, caused by the Departments, which they failed to do. Of course, the Plaintiff States are free to narrow their own programs to decrease costs, or to expand them to cover anyone who does not already qualify for the program, if they deem that worthy (in which case they can also increase state revenue by raising taxes). But the amount the States choose to spend on contraceptives is discretionary. And they cannot use the courts to interfere with the Departments' considered decision to no longer "require private parties to provide coverage to which they morally object." 83 Fed. Reg. at 57,606. Having no injury, the States have no ground to complain that they no will longer "receiv[e] [the] indirect benefits" which flowed from the previous arrangement before the arrival of the religious and moral exemptions. *Id*. at 57,607.

II. The Plaintiff States are not likely to succeed on the merits of their APA claims.

A. The ACA did not require contraceptive coverage as a statutory matter.

The district court wrongly concluded that the "'Contraceptive Mandate' in the Women's Health Amendment is in fact a statutory mandate," ER at 22. This mistake led the district court to reject the argument that Congress granted HRSA discretion to determine both *what* and *who* should be covered under the preventive-services guidelines. In actuality, nowhere does the ACA itself require contraceptive coverage. That oversight allowed the district court to draw an arbitrary and insupportable demarcation between the ostensibly acceptable exemptions of the past, and the religious and moral exemptions created by the IFRs and the Final Rules under review here. But the district court's line ignores the discretionary practice of granting exemptions and accommodations to the contraceptive mandate, which has marked the administration of the ACA since its inception. The district court's ruling constitutes reversible error.

1. The text of the ACA confirms that Congress did *not* require contraceptive coverage.

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

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

42 U.S.C. § 300gg-13(a)(4). Congress granted HRSA the authority and discretion to create "comprehensive guidelines." HRSA ultimately decided—in the exercise of that discretion—to include contraceptives as part of "preventive care." But the ACA itself would not have been

offended—and still would not be offended—if HRSA had opted not to include any contraceptives on that list.

Against this backdrop, the district court mistakenly concluded that the discretion exercised by the Departments in creating the religious and moral exemptions in the Final Rules "is inconsistent with the ACA's mandate that women's contraceptive coverage 'shall' be provided by covered plans and issuers without cost sharing." ER at 23. But that's not what the ACA's text says. Congress could have said "contraceptive coverage shall be provided," but it didn't. Notably, Congress *did* specify in other sections of the ACA precisely what was to be included as part of preventive services in other, unrelated contexts. *E.g.*, 42 U.S.C. § 300gg-13(a)(1) (requiring preventive-services coverage based upon "current recommendations of the United States Preventive Services Task Force"); 42 U.S.C. § 300gg-13(a)(2) (requiring coverage for "immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved").

The crucial distinction between the way Congress provided guidance—in the same statute—as to these categories, on the one hand, and as to women's preventive care (in § 300gg-13(a)(4)), on the other, shows that the "contraceptive mandate" is not a statutory mandate. *E.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

The district court's reference to the judicial presumption that "the ACA requires specified categories of health insurance plans and issuers to provide contraceptive coverage at no cost to women," ER at 22, does nothing to alter this conclusion. The Supreme Court has already confirmed that contraceptive coverage is required as a result of *regulations* promulgated by the Departments. *Zubik v. Burwell*, 136 S. Ct. 1557, 1559, (2016) (per curiam) ("Federal *regulations* require petitioners to cover certain contraceptives as part of their health plans …") (emphasis added); *Hobby Lobby*, 573 U.S. at 697 ("Congress itself …. did not specify what types of preventive care must be covered" under

the "preventive care and screenings" requirement, but rather "authorized the Health Resources and Services Administration (HRSA), a component of HHS, to make that important and sensitive decision"). *Accord, e.g.*, *California v. Azar*, 911 F.3d 558, 566 (9th Cir. 2018) ("HRSA established guidelines for women's preventive services that include any FDA approved contraceptive methods, sterilization procedures, and patient education and counseling," and further noting that the "three agencies responsible for implementing the ACA—the Department of Health and Human Services, the Department of Labor, and the Department of the Treasury . . . issued regulations requiring coverage of all preventive services contained in HRSA's guidelines").

2. Longstanding exemptions and accommodations confirm that the ACA is not an unalloyed mandate with no exceptions.

The ACA itself provides for exemptions to the otherwise operative preventive services requirements. For instance, employers providing "grandfathered health plans," plans which have not made certain specified changes since the inception of the ACA, are not subject to the contraceptive mandate. *See* 42 U.S.C. § 18011. And employers with fewer than 50 employees are not required to provide health insurance at

all. *See* 26 U.S.C. § 4980H(c)(2). This means that the contraceptive mandate does not apply to tens of millions of individuals. *Hobby Lobby*, 573 U.S. at 700.

Congress also granted HRSA "discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned." 76 Fed. Reg. at 46,623. The exercise of this discretion resulted in the "church exemption." *Id.* at 46,626. This exemption was then slightly modified and expanded. 77 Fed. Reg. 8,725 (Feb. 15, 2012) (final rules).

For those not covered by this narrowly defined church exemption, the Departments offered an accommodation for religious non-profits with religious objections to providing contraceptive coverage as part of their health care plans. 78 Fed. Reg. at 39,874-82. The Departments later modified this accommodation to allow covered employers to provide notice of their religious objection directly to HHS, rather than executing a self-certification form. 80 Fed. Reg. at 41,322-23. Further adjustments were made to the accommodation after *Hobby Lobby*. 80 Fed. Reg. at 41,323-28.

The history of these practical and continuing adjustments as to *who* was to be covered by the contraceptive mandate—coupled with the textual command of Congress to HRSA to develop "comprehensive guidelines" as to the *what* of the preventive services requirement—proves that Congress entrusted HRSA to consider any number of issues and concerns the ACA implicated. This conclusion is ineluctable. For if it is not—if HRSA's discretion is as easily subject to judicial negation as the district court's order makes it out to be—then it is difficult to see how the agency's decision to cover contraceptives in the first instance, its decision to exempt churches, or its decision to accommodate religious objectors can survive either.

The district court rejected reliance on the church exemption to support the religious and moral exemptions, noting that "the legality of that exemption is not before the Court." ER at 24. True enough. But the error in the district court's treatment of the religious and moral exemptions—as essentially void *ab initio* because the Departments lacked the discretion to create them—is demonstrated by the existence of the other longstanding exemptions, not to mention the statutory exemptions Congress itself created.

Indeed, the district court failed to explain why HRSA had discretion to exempt churches and accommodate religious objectors in the beginning, but is now powerless to take heed of moral objectors with similar objections to the contraceptive mandate. *E.g.*, *March for Life v. Burwell*, 128 F. Supp. 3d 116, 127 (D.D.C. 2015) (holding that the refusal to grant an exemption from the contraceptive mandate to March for Life constituted a violation of equal protection, because "March for Life and exempted religious organizations are not just 'similarly situated,' they are identically situated" in terms of their opposition to abortion and refusal to provide abortifacient medication).

The district court also erred by mischaracterizing the Final Rules' religious and moral exemptions as the Departments' attempt to use "unbridled discretion . . . to exempt anyone they see fit from providing coverage." ER at 23. The Final Rules are an exercise of mere ordinary discretion, and the religious and moral exemptions contained in them are of a substantive piece with the earlier solicitude shown by HRSA for religious entities and objectors. Moreover, their numerical impact is miniscule compared to the Congressional exemptions. *See* above at 9; *compare* 83 Fed. Reg. at 57,625-28 (estimating that the moral

exemption will be used by "nine nonprofit entities," no "institutions of higher education," and "nine for-profit entities," for a total economic impact as to the last category of $8,760 nationwide); 83 Fed. Reg. at 57,550 (estimating that the religious exemption "will affect no more than 126,400 women of childbearing age who use contraceptives covered by the Guidelines," which "constitutes less than 0.1% of all women in the United States"), *with Hobby Lobby*, 573 U.S. at 700 (cleaned up) ("All told, the contraceptive mandate presently does not apply to tens of millions of people."). The Final Rules represent a mere evolution of what came before in terms of exemptions and the Departments' attempt to balance the equities regarding contraceptive coverage and religious freedom.

In sum, the district court erred in saying that the contraceptive coverage requirement "is in fact a statutory mandate." ER at 22. The ACA's text (including its statutory exemptions), along with the regulatory exemptions created to protect churches and religious objectors, show that the contraceptive mandate has always admitted of exceptions. The Plaintiff States are not likely to succeed on their claim that the Final Rules violate the APA, because the Final Rules are a

permissible exercise of discretion, and because they protect the right to conscience and religious freedom, which this Court deems "fundamentally important." *Azar*, 911 F.3d at 582.

B. The Moral Exemption accords with the law and is not in excess of statutory authority.

1. The Moral Exemption is a permissible exercise of HRSA's discretion.

In holding that the Plaintiff States were "likely to succeed in showing that the [m]oral [e]xemption is 'not in accordance with' the ACA, and thus violates the APA," the district court said that "Congress mandated the coverage that is the subject matter of this dispute." ER at 38. As just discussed, this is wrong—Congress did not include contraceptive coverage and "did not intend to require entirely uniform coverage of preventive services." 83 Fed. Reg. at 57,597.

Rather, Congress granted HRSA the discretion to craft "comprehensive guidelines" as to preventive care and screenings, and in discharging that duty, HRSA determined that contraceptives would be covered. But HRSA simultaneously created exemptions. From the beginning, then, HRSA has determined *what* the guidelines would comprise, and *who* would be bound by them, in the form of administering and managing an ongoing exemption and accommodation regime.

See above at 6-9. The same discretion that allowed HRSA to place contraceptive coverage in the preventive services basket, and to carve out exemptions to that discretionary choice, authorizes the Final Rules' creation of the moral exemption.[11]

The moral exemption is not only a product of HRSA's continuing discretion, it is also consistent with executive orders, both past and present, implicating the ACA. Executive Order 13535, signed by President Obama on March 24, 2010, expresses solicitude for conscience and provides that under the ACA "longstanding Federal laws to protect conscience (such as the Church Amendment, 42 U.S.C. 300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8) remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to

[11] 83 Fed. Reg. at 57,597 ("The moral objections at issue here, like the religious objections prompting exemptions dating back to the inception of the Mandate in 2011, may . . . permissibly inform what HHS, through HRSA, decides to provide for and support in the Guidelines. Since the first rulemaking on this subject in 2011, the Departments have consistently interpreted the broad discretion granted to HRSA in section 2713(a)(4) as including the power to reconcile the ACA's preventive-services requirement with sincerely held views of conscience on the sensitive subject of contraceptive coverage—namely, by exempting churches and their integrated auxiliaries from the contraceptive-coverage Mandate.").

provide, pay for, provide coverage of, or refer for abortions." *Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act*, 75 Fed. Reg. 15,599, 15,599 (Mar. 24, 2010). And Executive Order 13798, signed by President Trump on May 4, 2017, ordered the Departments to "consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate promulgated under section 300gg-13(a)(4) of title 42, United States Code." *Promoting Free Speech and Religious Liberty*, 82 Fed. Reg. 21,675, 21,675 (May 4, 2017).

The moral exemption thus accords with the Act's text, HRSA's administration of the ACA, and the guidance of successive executive administrations.

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

a. Founding Principles and Practices

The right to conscience was central to the founding of the Republic. James Madison deemed conscience an "unalienable right,"[12]

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

"the most sacred of all property."[13] Thomas Jefferson concurred, stating that conscience "could not [be] submit[ted]" to governmental oversight or authority,[14] and that no law "ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority."[15] George Washington wrote that "the Conscientious scruples of all men should be treated with great delicacy and tenderness."[16]

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

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[13] Madison, *Property*, in Selected Writings of James Madison, supra note 12 at 222-23.
[14] Thomas Jefferson, *Notes On the State Of Virginia* 169 (1782).
[15] Thomas Jefferson, *To The Society of the Methodist Episcopal Church at New London, Connecticut (Feb. 4, 1809)*, in 8 The Works of Thomas Jefferson 147 (H.A. Washington ed., 1884).
[16] George Washington, *From George Washington to the Society of Quakers, 13 October 1789*, National Archives-Founders Online, https://bit.ly/2tEzjGq.

indispensable to the success of the great American experiment in popular self-government." *Id.* at 79.

The concern for keeping the right to conscience inviolate has persisted for centuries. Consider conscientious objection to war.[17] As Justice Harlan stated in his *Welsh v. United States* concurrence, the "policy of exempting religious conscientious objectors is one of longstanding tradition in this country and accords recognition to what is, in a diverse and open society, the important value of reconciling individuality of belief with practical exigencies whenever possible." 398 U.S. 333, 365–66 (1970). That policy "dates back to colonial times." *Id.* at 366. Indeed, save for Georgia, every one of the original 13 colonies enacted exemptions for such objectors. *The New Conscientious Objection: From Sacred to Secular Resistance* 26 (Charles C. Moskos & John Whiteclay Chambers eds., 1993). President Madison in 1816 pardoned seven Maryland Quakers who a local sheriff imprisoned for failing to pay fines related to military commutation. James S. Kabala, *Church-State Relations in the Early American Republic, 1787-1846*

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

(2013). And in World War II, some 25,000 objectors were granted noncombat military service, while some 12,000 objectors entered the Civil Public Service, as their beliefs did not permit them to serve in a military capacity. Cynthia Eller, *Conscientious Objectors and The Second World War: Moral and Religious Arguments in Support of Pacifism* 66, 69 (1991).

Our national policy continues to support the balancing of national need with the right to conscience. *E.g.*, *Conscientious Objection and Alternative Service*, Selective Service System, https://bit.ly/2T0ZW7o (last visited February 15, 2019) (providing that "[b]eliefs which qualify a registrant for CO status may be religious . . . moral or ethical [in nature]," and that the "person who is opposed to any form of military service will be assigned to alternative service," while the "person whose beliefs allow him to serve in the military but in a noncombatant capacity will serve in the Armed Forces but will not be assigned training or duties that include using weapons").

We are a nation that still "respects people's committed search for a way of life according to their consciences." Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious*

Equality 2 (2008). And that respect entails an understanding "that liberty of conscience is worth nothing if it is not equal liberty." *Id.* The 20th-century American moral and political philosopher John Rawls deemed the "question of equal liberty of conscience" a "settled" matter, and conceived of this equality as "one of the fixed points of our considered judgments of justice." John Rawls, *A Theory of Justice* 206 (1971).

Given the historical pedigree of the right and its continuing vitality today, the Final Rules' moral exemption reflects our collective national solicitude for self-determination and equality of thought and belief. The moral exemption acknowledges that the right to conscience is a "fundamental purpose[]" and "essential requirement[]" of our republican form of government. Wardle, *Conscience Exemptions* at 78.

b. Congressional Enactments

Congressional solicitude for the right to conscience also supports the moral exemption. Congress has considered and enacted myriad measures evincing the federal government's commitment to protecting conscience.

For instance, Congress addressed the issue of conscience just weeks after the Supreme Court announced a right to elective abortion in *Roe v. Wade*, 410 U.S. 113 (1973). The Church Amendment to the Public Health Service Act (named after its sponsor, Senator Frank Church (D-Idaho)) provides a wide range of protections to healthcare professionals, including doctors, nurses, midwives, and other personnel, plus hospitals. 42 U.S.C. § 300a-7. It applies to entities that receive certain federal health-related funds, and it prohibits those entities from discriminating against healthcare personnel because they refuse—for religious *or* moral reasons—to assist in the performance of abortions or sterilizations. The Church Amendment is framed broadly as a non-discrimination provision, which Congress has labeled as protecting "individual rights." Pub. L. No. 93-348, § 214, 88 Stat. 342 (1974). It protects all individuals' rights when it comes to abortion—whether a medical practitioner chooses to perform abortions or not.

In 1995, when the Accreditation Council for Graduate Medical Education mandated abortion training in all obstetrics and gynecology

residency programs,[18] Congress passed what is known as the Coats-Snowe Amendment. 42 U.S.C. § 238n. This amendment broadly protects any health care entity or individual physician from being forced to perform, refer for, or even make arrangements to refer for an abortion. It applies to any government entity—federal, state, or local—that receives any federal financial assistance. The law is notable for the particular protections it adds for medical schools, residency programs, and medical residents, in that it prevents medical schools from having to provide training for abortion, and prevents medical students from having to participate in such training. *See id*.

The most recent federal conscience protection, the Weldon Amendment, has been part of every appropriations act that Congress has passed since 2004. It prohibits federal agencies and programs, and state and local governments receiving certain federal funding, from discriminating against any healthcare entity, professional, or insurance plan, because of their decision not to provide, pay for, provide coverage for, or refer for abortions. *E.g.*, *Consolidated and Further Continuing*

[18] *See* Kristina Tocce, M.D., M.P.H., & Britt Severson, M.P.H., *Funding for Abortion Training in Ob/Gyn Residency*, AMA Journal of Ethics, (Feb. 2012), https://bit.ly/2TeCTW9 (last visited Feb. 15, 2019).

Appropriations Act, 2015, Pub. L. No. 113-235, § 507(d), 128 Stat. 2130, 2515 (2014). The Amendment is subject to annual renewal and has survived multiple legal challenges.

A number of other federal statutory conscience protections bear mentioning. The Danforth Amendment, enacted in 1988, ensures that Title IX of the Education Amendments Act of 1972 cannot be construed to "require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion." 20 U.S.C. § 1688. The Federal Employees Health Benefits Acquisition Regulation ensures that "[p]roviders, health care workers, or health plan sponsoring organizations are not required to discuss treatment options that they would not ordinarily discuss in their customary course of practice because such options are inconsistent with their professional judgment or ethical, moral or religious beliefs." 48 C.F.R. § 1609.7001(c)(7).

The Legal Services Corporation Act provides that funds for legal services may not be used "with respect to any proceeding or litigation which seeks to procure a nontherapeutic abortion or to compel any individual or institution to perform an abortion, or assist in the

performance of an abortion, or provide facilities for the performance of an abortion, contrary to the religious beliefs or moral convictions of such individual or institution." 42 U.S.C. § 2996f(b)(8).

The Federal Death Penalty Act of 1994 protects the "moral or religious convictions" of persons who object to participating in federal executions or prosecutions. 18 U.S.C. § 3597.

And the ACA itself provides conscience protections, prohibiting the recipient of federal funds under the act from discriminating "on the basis that [a health care] entity does not provide any health care item or service furnished for the purpose of causing, or for the purpose of assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing." 42 U.S.C. § 18113.

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

protecting religious beliefs and moral convictions in any contraceptive mandate. *Id.* at 126-27.

These laws highlight Congress's commitment to protect individuals and employers from having to cede their right to conscience to other obligations claimed as somehow imperative. These laws also demonstrate that the Final Rules' moral exemption is not some radical departure from the norm, but rather a consistent development of our longstanding national practice of respecting and protecting the right to conscience.[19]

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[19] The district court made much of the fact that Congress rejected a conscience amendment that would have provided protection similar to the moral exemption. ER at 3, 38. But treating that rejection as essentially dispositive to the question of whether the moral exemption violates the ACA constitutes error, because relying on congressional inaction to infer intent—or here discretionary authority—is improper. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law.") (cleaned up); *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) ("'It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law.'") (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)); *United States v. Price*, 361 U.S. 304, 310-311 (1960) ("non-action by Congress affords the most dubious foundation for drawing positive inferences."); *Chisholm v. FCC*, 538 F.2d 349, 361 (D.C. Cir. 1976) ("attributing legal significance to Congressional inaction is a dangerous business."). Moreover, if congressional inaction were enough

c. Federal Regulations

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

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to infer its intent with respect to the moral exemption, the contraceptive coverage requirement itself—and the church exemption and the accommodation—would be imperiled, because Congress never indicated that form of care or service was a necessary part of the ACA, and it did not expressly authorize those discretionary carve outs. The whole regulatory edifice would collapse on itself if this Court blesses the district court's reliance on congressional inaction.

48 C.F.R. § 352.270-9 contains a "Non-Discrimination for Conscience" clause for organizations receiving HIV or malaria relief funds.

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

These regulatory protections for conscience are consistent with the statutory protections passed by Congress. As the Final Rules demonstrate, the Departments have long been cognizant of the distinction between congressional lawmaking and agency regulation, and they decided that the discretion Congress granted them, along with the congressional and regulatory practice of protecting conscience over time, support the moral exemption. 83 Fed. Reg. at 57,601-02. The district court erred, ER at 38, when it concluded that the moral exemption must fail because it was the Departments and not Congress that created it. The federal government's consistent and laudatory practice in this field, and the ACA itself, belie the district court's conclusion.

d. Judicial Precedents

Roe v. Wade, which for the first time announced a right to elective abortion, was nonetheless "decided in the context of and with the explicit judicial acknowledgement of strong existing official professional protection for rights of conscience of health-care providers." Lynn D. Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 Ave Maria L. Rev. 1, 22

(2010). Indeed, "[t]he actual holdings of *Roe* . . . far from authorizing a woman to co-opt a physician into aborting her baby, focuses on the physician's freedom of self-determination." M. Casey Mattox & Matthew S. Bowman, *Your Conscience, Your Right: A History of Efforts to Violate Pro-Life Medical Conscience, and the Laws That Stand in the Way* 189-90, The Linacre Quarterly 77(2) (May 2010).

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

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

So too here. These cases, drawn from the abortion context most pertinent to the challenged Final Rules, and from the national security context, illustrate that conscience can be protected even when controversy is rife, and even in the most pressing of circumstances, when the government interest is at its apogee.

e. State Laws and Regulations

State laws and regulations concerning conscience also buttress the Departments' decision to create the moral exemption. According to the Guttmacher Institute, some 46 states protect healthcare practitioners who refuse to perform abortions; 18 states protect healthcare practitioners who refuse to provide sterilization services; and 12 states protect healthcare practitioners who refuse to provide contraceptive services. Guttmacher Inst., *Refusing to Provide Health Services* (February 1, 2019), https://bit.ly/1lsohM6.

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

[20] Cal. Health & Safety Code §123420(a) (protection for those medical professionals who refuse to "directly participate in the induction or performance of an abortion"); Cal. Health & Safety Code §123420(b) (same protection for medical students and physicians); Cal. Health & Safety Code §§443.14(b), (e), 443.15 (medical practitioners may refuse to

participate in assisted suicide "for reasons of conscience, morality, or ethics"); Conn. Agencies Regs. § 19-13-D54(f) (2016) (protecting those who object to participation in "any phase of an abortion" based upon the person's "judgment, philosophical, moral or religious beliefs"); Del. Code tit. 24, § 1791(a) (2016) ("[n]o person shall be required to perform or participate in medical procedures which result in the termination of pregnancy"); D.C. Mun. Regs. tit. 22-B, § 9006 ("[d]epartment heads shall not discipline or in any way penalize an employee for refusing to participate in certain aspects of direct patient care that are in conflict with their religious, or ethical beliefs"); Haw. Rev. Stat. § 327E-7(e) ("[a] health-care provider may decline to comply with an individual instruction or health-care decision for reasons of conscience"); 745 Ill. Comp. Stat. 70/6 ("physician shall be under no duty to perform, assist, counsel, suggest, recommend, refer or participate in any way in any form of medical practice or health care service that is contrary to his or her conscience"); Md. Code § 20-214(a) ("[a] person may not be required to perform or participate in, or refer to any source for, any medical procedure that results in artificial insemination, sterilization, or termination of pregnancy"); Minn. Stat. § 145.414(a) ("[n]o person and no hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion for any reason"); N.Y. Civ. Rights Law § 79-i (when "the performing of an abortion on a human being or assisting thereat is contrary to the conscience or religious beliefs of any person, he may refuse to perform or assist in such abortion by filing a prior written refusal"); N.C. Gen. Stat. §14-45.1(e) ("[n]o physician, nurse, or any other health care provider who shall state an objection to abortion on moral, ethical, or religious grounds shall be required to perform or participate in medical procedures which result in an abortion"); Or. Rev. Stat. §435.225 ("[a]ny employee of the Oregon Health Authority may refuse to accept the duty of offering family planning and birth control services to the extent that such duty is contrary to the personal or religious beliefs of the employee"); R.I. Gen. Laws § 23-17-11 (individuals "shall not be required to participate in . . . medical procedures which result in . . . abortion or sterilization" if they state in writing an objection on "moral or religious grounds"); Vt. Stat. tit. 18, § 5285(a) ("[a] physician, nurse, pharmacist, or other person shall not be

entities many of the same protections for conscience they grant as part of their own statutory regimes. That cognitive dissonance speaks volumes about the Plaintiff States' position that the moral exemption is impermissible.

3. The Moral Exemption is required by Equal Protection.

Under the Fifth Amendment's Equal Protection doctrine, the federal government cannot make a distinction that "bears no rational relationship to a legitimate governmental interest." *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973). The government must demonstrate a rational relationship between the disparate treatment and some legitimate governmental purpose. This means the government "may not rely on a classification whose relationship to an

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under any duty, by law or contract, to participate in the provision of a lethal dose of medication to a patient"); Va. Code §18.2-75 ("any person who [objects] to any abortion or all abortions on personal, ethical, moral or religious grounds shall not be required to participate in procedures which will result in such abortion"); Wash. Rev. Code § 48.43.065 ("[n]o individual health care provider, religiously sponsored health carrier, or health care facility may be required . . . to participate in the provision of or payment for a specific service if they object to so doing for reason of conscience or religion").

asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

The stated purpose behind the contraceptive mandate is to offer contraceptive coverage to women who "want it," to prevent "unintended" pregnancies, 77 Fed. Reg. at 8,727, and thus to advance "women's health and equality" when women voluntarily use the items, 79 Fed. Reg. 51,118, 51,123 (Aug. 27, 2014). There is no rational purpose to impose the Mandate on organizations like March for Life that only employ individuals who do *not* want abortifacients and will *not* use them. Mot. to Intervene, Mancini Decl. at ¶¶ 8, 15, 17, *California v. Azar*, No. 17-05783 (N.D. Cal. Dec. 8, 2017), ECF No. 87-1.

The moral exemption ensures that the government does not arbitrarily treat March for Life less favorably than similarly situated organizations that also object to the contraception mandate, but do so for religious reasons. *March for Life v. Burwell*, 128 F. Supp. 3d. at 128 ("If the purpose of the religious employer exemption is, as HHS states, to respect the anti-abortifacient tenets of an employment relationship, then it makes no rational sense—indeed, no sense whatsoever—to deny March [for] Life that same respect.").

C. The District Court's RFRA substantial burden analysis conflicts with *Hobby Lobby*.

The Departments promulgated the Final Rules to avoid violating RFRA by coercing groups like the Little Sisters to be complicit in an act that violates their religious convictions—destruction of a human life.[21] The Supreme Court held that "[t]his belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Hobby Lobby*, 573 U.S. at 724. It then held that whether one is complicit in this manner is a question courts cannot answer. *Id.*

The district court flaunted this *Hobby Lobby* holding and wrongly determined that "an objector's 'complicity' argument does not establish a substantial burden, because it is the ACA and the guidelines that entitle plan participants and beneficiaries to contraceptive coverage, not

[21] March for Life does not address the RFRA issue in depth because it is not a religious organization. It concurs with the RFRA analysis of the Departments and the Little Sisters and writes separately only to emphasize the comprehensiveness of the district court's errors.

any action taken by an objector." ER at 27. It further concluded that any burden was "de minimis." *Id.* at 28.

But the test is not whether complicity is substantial or de minimis. It is whether the government is applying substantial pressure to coerce organizations to act contrary to that belief. Once again, *Hobby Lobby* provides the answer: "Because the contraceptive mandate forces them to pay an enormous sum of money… if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs." 573 U.S. at 726.

CONCLUSION

The Plaintiff States lack standing because it is impossible for them to claim damages when the federal government limits or even eliminates a federal program. They also lack standing because their harm is speculative and self-inflicted. On the merits, the States cannot prevail for several reasons, but primarily because the ACA does not require federal agencies to compel employers to violate their conscience.

For all the foregoing reasons, March for Life respectfully requests that this Court reverse the district court's decision, vacate the

preliminary injunction, and remand the case with instructions to dismiss for lack of jurisdiction.

Dated: February 25, 2019

Respectfully submitted,

/s/ Kevin H. Theriot

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STATEMENT OF RELATED CASES

Pursuant to 9th Cir. Rule 28-2.6, March for Life advises the Court that currently pending before it are *State of California v. Azar*, No. 19-15118 (9th Cir. filed Jan. 23, 2019), and *State of California v. Little Sisters of the Poor*, No. 19-15072 (9th Cir. filed Jan. 13, 2019). These appeals stem from the same underlying challenge to the Final Rules, and the Court consolidated them with March for Life's appeal.

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 type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,537 words, excluding the parts of the brief exempted under Rule32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/Kevin H. Theriot
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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2019, 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.

s/ Kevin H. Theriot
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