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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE STATE OF CALIFORNIA; THE STATE OF CONNECTICUT; THE STATE OF DELAWARE; THE DISTRICT OF COLUMBIA; THE STATE OF HAWAII; THE STATE OF ILLINOIS; THE STATE OF MARYLAND; THE STATE OF MINNESOTA, BY AND THROUGH ITS DEPARTMENT OF HUMAN SERVICES; THE STATE OF NEW YORK; THE STATE OF NORTH CAROLINA; THE STATE OF RHODE ISLAND; THE STATE OF VERMONT; THE COMMONWEALTH OF VIRGINIA; THE STATE OF WASHINGTON,

Plaintiffs,

THE STATE OF OREGON,

Plaintiff-Intervenor,

THE STATE OF COLORADO; THE STATE OF MICHIGAN; THE STATE OF NEVADA,

Proposed-Plaintiffs-Intervenors,

v.

ALEX M. AZAR, II, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; R. ALEXANDER ACOSTA, IN HIS OFFICIAL

4:17-cv-05783-HSG

STATES' SUR-REPLY OPPOSING DEFENDANTS' AND INTERVENOR-DEFENDANTS' MOTIONS, SUPPORTING STATES' MOTION

Date: September 5, 2019
Time: 2:00 p.m.
Dept: 2, 4th Floor
Judge: The Honorable Haywood S. Gilliam, Jr.

Action Filed: October 6, 2017

CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF LABOR; STEVEN MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE TREASURY; DOES 1-100,

Defendants,

and,

THE LITTLE SISTERS OF THE POOR, JEANNE JUGAN RESIDENCE; MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

Defendant-Intervenors.

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ARGUMENT

I. THE RELIGIOUS AND MORAL EXEMPTION RULES ARE CONTRARY TO THE WOMEN'S HEALTH AMENDMENT

The Women's Health Amendment expressly states that women's preventive services "shall" be provided by "[a] group health plan and a health insurance issuer." 42 U.S.C. § 300gg-13(a); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 697 (2014). As Defendants concede, "'shall' denotes a requirement" and the statute confers a benefit. Defs. Reply at 1. Defendants' Exemption Rules strip this benefit from women. Defendants claim that they have the authority to limit the effectiveness of this "requirement" by restricting the "categories of regulated entities" to which it applies. This interpretation is contrary to the plain language of the statute.

Failing to overcome the statutory language, Defendants sidestep the question of their authority, instead shifting their analysis to the church exemption. This argument is a red herring. The States do not challenge the church exemption and, as the States have explained, whether the church exemption is valid is distinct from whether the Religious and Moral Exemption Rules are. States Opp'n at 13-14. Defendants fail to grapple with this distinction.

Defendants' interpretation would give them "total authority" "to exempt anyone they wish from the contraceptive mandate." *California v. Health & Human Servs.*, 351 F. Supp. 3d 1267, 1285 (N.D. Cal. 2019). This is unreasonable (*cf.* Defs. Reply at 2) and conflicts with the purpose of the Women's Health Amendment. Defendants claim that the statute's use of the phrases "as provided for" and "comprehensive" grants them the authority to promulgate the Religious and Moral Exemption Rules. As the Third Circuit recently explained, use of the phrase "as provided for" indicates that the guidelines "were not yet written" and use of the word "comprehensive" was meant to describe the guidelines, not provide "the power to exempt actors from the statute itself." *Pennsylvania v. President United States*, 2019 WL 3057657, at *14 (3d Cir. July 12, 2019).

Despite their protestations about the States' reliance on legislative history, Defendants now themselves contend that the "[Affordable Care Act's (ACA's)] legislative history" supports their position and overcomes the *expressio unius* canon. Defs. Reply at 3; *see, e.g.*, *id.* at 4. This is undoubtedly not the case where the full legislative history, including the passage of the ACA and

the subsequent amendments, confirm what the text of the Women's Health Amendment requires: Congress defined the entities subject to the mandate and delegated HRSA, the agency specializing in healthcare (not religious or moral exemptions), to prescribe the exact coverage. *See, e.g*, States Mot. at 4, 18 (collecting legislative history and explaining that Congress rejected an amendment that would have permitted broad moral and religious exemptions to the ACA's coverage requirements); *see also* States Opp'n at 10-12. Moreover, Defendants' reasoning is circular: They assert that where Congress "leaves" discretion to an agency, the canon is not applicable. Defs. Reply at 3, 4. But Congress did not expressly or implicitly "delegate[] authority" to Defendants to determine which entities are subject to the statutory mandate. Congress had already made that determination as evidenced by the unambiguous statutory language.[1]

Finally, Defendants rely exclusively on the Women's Health Amendment as authority to promulgate the Moral Exemption Rule. Defs. Reply at 1-5. Because Defendants do not have authority under the Women's Health Amendment to craft a broad exemption to the statutory mandate, the Moral Exemption Rule must be set aside. March for Life asserts that the Moral Exemption Rule is required by the Fifth Amendment's Equal Protection principle. March Reply at 11-13. That is not a basis upon which the rule was promulgated and thus cannot be a basis for sustaining the rule here. *See* 83 Fed. Reg. 57592 (Nov. 15, 2018); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). Furthermore, there is no support for this assertion where it is clear that the government can treat religious objections differently from moral objections. *See, e.g.*, 42 U.S.C. § 2000bb-1 (RFRA).

II. THE RELIGIOUS EXEMPTION RULE IS NOT REQUIRED BY RFRA

Defendants and Sisters insist that any objective analysis of the way that the existing accommodation process works is tantamount to telling religious objectors "that their beliefs are

[1] Defendants cite an executive order to suggest that they have authority to adopt the Religious and Moral Exemption Rules. Defs. Reply at 4. Even if the Court were to consider this new argument, neither the Executive Order nor the provisions cited within it override Congress' express and narrow delegation of authority to HRSA. *See, e.g.*, *City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1231-32 (9th Cir. 2018) (explaining the limitations of executive orders).

flawed." Defs. Reply at 10; *see also* Sisters Reply at 13. But that conflates the factual question of whether a belief is sincerely held with the legal question of whether the operation of the accommodation substantially burdens the exercise of religion. *See Pennsylvania*, 2019 WL 3057657, at *15 n.28 (deferring to religious beliefs "'does not bar our objective evaluation of the nature of the claimed burden and the substantiality of that burden on [the objector's] religious exercise'"). Defendants and Sisters do not acknowledge—let alone distinguish—the textual arguments, legislative history, and vast body of case law maintaining this fundamental distinction. States Mot. at 21-34; States Opp'n at 16-23.

Defendants' and Sisters' focus on the alternative monetary fine fares no better. They claim that the fine—by itself—applies such pressure to conform to the contraceptive coverage requirement that it substantially burdens the exercise of religion. Defs. Reply at 10; Sisters Reply at 13. But the monetary penalty is an *alternative* to complying with the accommodation. "An objectively insubstantial burden does not become substantial simply because a RFRA plaintiff faces substantial burdens in the alternative." *Catholic Health Care System v. Burwell*, 796 F.3d 207, 221 (2d Cir. 2015). Defendants admit as much, Defs. Reply at 10 ("*if* the accommodation burdens religious practice, that burden is substantial because the same penalties would potentially apply"), and *Hobby Lobby* confirms it. States Opp'n at 19.

Defendants and Sisters maintain that a substantial burden exists because the separate contraceptive coverage offered by the insurer or TPA "comes from the employer's health plan." Sisters Reply at 14; *see also* Defs. Reply at 11.[2] Both the plain language of the regulation governing the accommodation process and the evidentiary record belie such a claim. 45 C.F.R. § 147.131(d)(2)(i); States Opp'n at 20-23; *Pennsylvania*, 2019 WL 3057657 at *16. While the separate contraceptive coverage is provided by the same insurance *company*, that does not make the contraceptive coverage part of the employer's group health *plan*. *See, e.g.*, Dkt. No. 385-40.

[2] Sisters also asserts that the accommodation gives the insurer "permission to alter that [group health plan] contract . . . ." Sisters Reply at 15. Not so. By law, after opting out, the employer does not "contract, arrange, pay or refer for contraceptive coverage." 45 C.F.R. § 147.131(e). The employer's group health plan "contract" is not altered in any way under the accommodation.

Defendants claim that the agencies reviewed the evidence in the administrative record and properly concluded that no compelling interest was present. Defs. Reply at 14. But Congress determines where the compelling governmental interests lie. *See, e.g.*, *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 107 n.1 (2001) (asking whether "Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination"); *W. States Paving Co. v. Washington State Dep't of Transp.*, 407 F.3d 983, 1002 (9th Cir. 2005) (holding that "Congress identified a compelling remedial interest" when it enacted a statute requiring that a portion of federal highway construction funds be paid to small businesses owned and controlled by racial minorities and women). Here, the legislative history describes the historical barriers to women's preventive care that Congress sought to eradicate when it passed the Women's Health Amendment. *See* States Mot. at 4-5. Additionally, the administrative record, including the science, medical opinion, and HRSA guidelines themselves, demonstrates that there is a compelling government interest in ensuring that women have full and equal healthcare benefits. *See infra* at 9-11. And the Supreme Court has repeatedly underscored the importance of ensuring that women "receive full and equal health coverage, including contraceptive coverage." *Zubik v. Burwell*, 136 S. Ct. 1557, 1560-61 (2016) (per curiam); *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014).

Defendants and Sisters seize upon the word "seamlessness," claiming that there can be no compelling governmental interest in such a particular requirement. Sisters Reply at 18-19; Defs. Reply at 12. "Seamlessness" is not itself the compelling interest, but a description of why the current accommodation process furthers the compelling interest in full and equal access to contraceptives. Neither Defendants nor Sisters have attempted to demonstrate a reasonable alternative method of providing contraceptives that furthers the interests at stake "equally well." *Hobby Lobby*, 573 U.S. at 731; *Eternal World Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1158-60 (11th Cir. 2016).

Finally, Defendants aver that "alleged third party harm is not a reason to neglect RFRA's requirements." Defs. Reply at 13. On the contrary, the Supreme Court has held that consideration of third-party harm is *part of* RFRA's requirements. *Hobby Lobby*, 573 U.S. at 730

n.37 ("in applying RFRA courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"). Defendants dismiss this as "referring to the Establishment Clause analysis as explained in *Cutter v. Wilkinson*, not any requirement of RFRA." Defs' Reply at 13. But the Court invoked this language when "applying RFRA." *Hobby Lobby*, 573 U.S. at 730 n.37.

III. THE RELIGIOUS EXEMPTION RULE IS NOT PERMITTED BY RFRA

Defendants argue that RFRA empowers them to "cure their own imposition of [a] substantial burden." Defs. Reply at 7. But Defendants' argument assumes that: (1) there is a "substantial burden" necessitating a "cure;" (2) if Defendants make such a legal determination, they can craft a "cure" that alters statutory mandates imposed by Congress without any effort to harmonize purportedly conflicting statutes; and (3) in crafting their "cure," Defendants wield unlimited discretion, including the discretion to impose harm to innocent third parties. There is nothing in the text of RFRA nor any case to support these assumptions.

Realizing the reach of their argument, Defendants try to allay concerns by conceding that this Court can evaluate their actions under RFRA—but only using an "arbitrary and capricious" standard. Defs. Reply at 7. Their argument would limit this Court's review of Defendants' RFRA-based actions—including their legal determinations that a "substantial burden" exists, their determinations about conflicts with other statutes, their authority to harmonize statutes, their determinations about third-party harm, and their "cure,"—and require judicial ratification unless they are arbitrary and capricious. They cite *no* authority for this sweeping proposition.[3]

Defendants' interpretation of their regulatory authority suffers from several flaws. First, the Supreme Court and the Ninth Circuit have concluded that whether there is a "substantial burden" is a legal determination for the courts. *See infra* at 2-3. Second, agencies must harmonize

[3] Contrary to Defendants' suggestion otherwise, their interpretation would result in a religious class system. Religious "winners" would be granted exemptions and courts would review the agencies' determinations under the arbitrary and capricious framework. Religious "losers" must file a lawsuit and demonstrate that they have sincere religious beliefs and those beliefs are being "substantially burdened" under an entirely different framework—one without deference. *Cf.* Defs. Reply at 7-8. Nothing suggests that Congress intended RFRA to create such a system.

statutes, and courts "must read the statutes to give effect to each if [they] can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *see also* States Opp'n at 37; *Citizens to Save Spencer Cnty. v. U.S. EPA*, 600 F.2d 844, 871 (D.C. Cir. 1979). Third, Defendants' interpretation that they have the power to craft a "cure," regardless of third-party harms (unless a Court later determines Defendants acted arbitrarily), runs afoul of RFRA. *See* 42 U.S.C. § 2000bb-4; States Opp'n at 27-29, 38; *see also infra* at 4-5.

Defendants contend that "if it was acceptable for the Agencies to use their authority under RFRA to create the exception for churches," its use of the "same authority to implement the Religious Exemption Rule" must also be warranted. Defs. Reply at 5. First, Defendants have not shown that they relied on any independent authority under RFRA when they promulgated the church exemption. *See* 76 Fed. Reg. 46621, 46625 (Aug. 3, 2011). Second, that Defendants promulgated a narrow exemption for churches does not mean that they have the authority to enact this sweeping Rule. Third, the third-party harm from the Religious Exemption Rule goes far beyond any harm caused by the limited church exemption. *See* States Opp'n at 38. Lastly, the ACA's mandates constrain any authority that Defendants purport to have under RFRA. *Id*. at 30, 36-37.

Defendants' argument that the nondelegation doctrine has not invalidated a statute in decades is inapposite. Defs. Reply at 8. The States do not assert that RFRA itself violates the nondelegation doctrine, but rather that Defendants' interpretation of RFRA—that RFRA grants agencies authority to determine what constitutes a substantial burden and devise a "cure" without any judicial oversight aside from arbitrary and capricious review—would contravene separation of powers principles. When resolving competing interpretations of a statute, the nondelegation doctrine has been invoked many times to give "narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1988); *see, e.g., Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645-46 (1980) (plurality opinion) (rejecting agency interpretation that would give the Secretary of Labor "unprecedented power over American industry" and noting "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored").

IV. THE RELIGIOUS AND MORAL EXEMPTION RULES VIOLATE SECTION 1554

For the first time, Defendants focus their argument on the word "create," asserting that the Religious and Moral Exemption Rules do not "create" barriers because there is no "affirmative act." Defs. Reply at 21-22 (citing 42 U.S.C. § 18114(1)); *id*. at 22 (Rules do not "'create' the costs of contraceptives" and thus "impose no barriers"). Even if this Court considers this new argument, Defendants' interpretation of "create" is entirely illogical. "Create" is not synonymous with "affirmative act;" instead, "create" means "to produce or bring about by a course of action or behavior" or "to cause, occasion." Webster's New International Dictionary (3d ed. 1986). Here, Defendants are "caus[ing]" women to face "unreasonable barriers" to necessary healthcare. 83 Fed. Reg. 57536, 57551 n.26, 57581 (Nov. 15, 2018); *id*. at 57627 (thousands of women will lose employer-sponsored healthcare coverage); *id*. at 57538 ($68.9 million in "transfer costs" for "women previously receiving contraceptive coverage"); *id*. at 57585 n.123 (predicting "increased expenditures on pregnancy-related services"). It is disingenuous for Defendants to claim that they are not "creat[ing]" barriers when women will lose coverage as a direct result of Defendants' Religious and Moral Exemption Rules. Notably, Defendants do not dispute that the Rules "impede timely access to healthcare." 42 U.S.C. § 18114(2); *see* States Mot. at 35-36; States Opp'n at 39-41. Further, under Defendants' theory, they could create exemptions to any ACA mandate that benefits individuals and evade Section 1554 by merely asserting that they are not "affirmatively impeding" access to those benefits. Such an argument cannot be correct, inasmuch as it distorts the plain language of the section and would render it ineffective. *United States v. Thomsen*, 830 F.3d 1049, 1057 (9th Cir. 2016) (court is to make "every effort" not to interpret a statute in a manner rendering it "meaningless").

Defendants' additional arguments fail. First, the statutory language offers no support for Defendants' claim that Section 1554 is inapplicable because the Rules purportedly apply to "only a small subset of employers." Defs. Reply at 22. There is no threshold numerical requirement in Section 1554. More importantly, for those thousands of women who will lose coverage, there are irreparable consequences. Second, Defendants argue that the barriers are not "'unreasonable' in light of the substantial burden on religious exercise," but as explained *supra* at 2-3, there is no

substantial burden. Nor does Section 1554 contain a balancing test, and no court has ever suggested it does. Lastly, Defendants rely on a non-citable Ninth Circuit decision in litigation pertaining to the Title X program. Defs. Reply at 22-23 (citing *California v. Azar*, 927 F.3d 1068, 1078 (9th Cir. 2019)). Their reliance is misplaced because this decision is not precedential, as Defendants admit, and it did not conclude that Section 1554 is unenforceable. Rather, the Court relied on the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991), which concerns a federal funding issue that is not directly implicated here. *California*, 927 F.3d at 1078.

V. THE RELIGIOUS AND MORAL EXEMPTION RULES VIOLATE SECTION 1557

Defendants do not meaningfully respond to the States' Section 1557 claim. Defs. Reply at 23; States Opp'n at 41-43. Instead, Defendants assert that if the States' Equal Protection claim fails, so too does the Section 1557 claim. Defs. Reply at 27. Nothing in Section 1557 suggests that Congress intended its protections be limited to a constitutional equal protection analysis. *See Rumble v. Fairview Health Servs.*, 2015 WL 1197415, at *11 (D. Minn. Mar. 16, 2015) (Section 1557 "create[d] a new, health-specific, anti-discrimination cause of action"). And it would be "'inappropriate to adopt a textually dubious construction that threatens to render the entire provision a nullity.'" *Chubb Custom Ins. Co. v. Space Sys.*, 710 F.3d 946, 966 (9th Cir. 2013).

On the merits, Defendants do not dispute that the Religious and Moral Exemption Rules deny women full and equal participation in, and the benefits of, employer-sponsored healthcare. 42 U.S.C. § 18116. Rather, Defendants argue that they are not singling out women's healthcare because they are merely responding to the "dozens of objectors" and "protracted litigation." Defs. Reply at 24. Nothing in Section 1557 permits agencies to carve out exceptions to the statute simply to avoid litigation. And it is incontestable that, on their face, the Religious and Moral Exemptions Rules create sex-based distinctions by ensuring that women will not receive full and equal healthcare comparable to that of their male colleagues in violation of Section 1557.

VI. THE RELIGIOUS AND MORAL EXEMPTION RULES ARE ARBITRARY AND CAPRICIOUS

Defendants claim that they have not ignored the "benefits" of contraceptives, but instead have concluded that "the net benefits are less certain than previously acknowledged." Defs.

Reply at 13-15. The problem with this conclusion is that it "runs counter to the evidence before the agency," including Defendants' own statements. States Opp'n at 44; States Mot. at 40-41, 46-48. Defendants do not respond to *any* of the evidence cited by the States. Defs. Reply at 13.

Without citing any authority, Defendants assert that they are merely "balanc[ing] conscience objections." Defs. Reply at 14. "Balancing," however, does not allow Defendants to issue Rules based on conclusions contrary to medical, science-based evidence in the record. This is particularly true where there are reliance interests at stake. *See* States Mot. at 39.

Defendants further claim that they are entitled to deference because portions of the Rule are based on their "scientific judgments." Defs. Reply at 14. But courts "need not" defer to agency analysis "when the agency's decision is without substantial basis in fact." *Earth Island Institute v. Hogarth*, 494 F.3d 757, 766 (9th Cir. 2007). Here, the agency charged by Congress with defining "preventive services"—HRSA—has always included contraceptives within that definition, and Defendants have repeatedly cited the overwhelming benefits of contraceptives. *See* States Mot. at 38. Defendants' Rules are "not supportable" given their erroneous factual conclusions that run counter to the evidence. *Id*.; *see* States Opp'n at 44; States Mot. at 40-41, 46-48.

Defendants for the first time assert that they are entitled to deference on the *entirety of the Rules* because they "canvass[ed] [] the literature." Defs. Reply at 15. This ignores the substance of that literature; agencies are not entitled to deference where the studies relied upon do not support their conclusions. *Tucson Herpetological Soc. v. Salazar*, 566 F.3d 870, 879 (9th Cir. 2009). Here, every study cited by Defendants to support their request for deference (83 Fed. Reg. at 57552-53 nn. 28-34), was published before HRSA issued its most recent science-driven guidelines for women's preventive care, calling for coverage for all FDA-approved contraceptives. Yet Defendants did not dispute HRSA's guidelines or expertise. *See* Ex. 25, Ex. 8-9. Nor did Defendants identify any deficiency in HRSA's review process or explain how these experts collectively failed to properly assess the current medical literature at the time they enacted guidelines finding contraceptives necessary to support women's optimal health and well-being.

Defendants attempt to rely on *Organized Vill. of Kake v. Dep't of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015) (en banc), but that decision supports the States' position. Defs. Reply at 15; States

Opp'n at 45, 47 (citing *Kake*). In *Kake*, the Court concluded that the agency did not provide substantial justification for its policy change because the agency's conclusion was a "contradiction of the Department's" prior rulemaking "under precisely the same" facts. 795 F.3d at 968. Like *Kake*, Defendants rest their rulemaking on their conclusion that the "net benefits" of contraceptives are less certain such that it justifies the exemptions for religious employers. But Defendants have not "provide[d] a 'reasoned explanation for disregarding' the 'facts and circumstances that underlay its previous decision.'" *Id*. *Kake* further explained that an agency's desire to end litigation was not enough to save unsupported rulemaking. *Id*. at 970.

Defendants also contend that this Court has no authority to review their "policy determination" that "expanding exemptions" will not have a "significant effect on contraceptive use." Defs. Reply at 16; Defs. Opp'n at 34 (citing 83 Fed. Reg. at 57556). There is no evidence to support the substance of Defendants' determination, nor any legal basis for their assertion that such determinations are immune from judicial review. The evidence in the record establishes that the mandate has provided millions of women with access to contraceptives, which women use, and that such access and use has reduced unintended pregnancies. States Opp'n at 44; States Mot. at 1-3, 6-8, 38-39, 41-43. Defendants' conclusion to the contrary is without support.

The law requires that agencies consider "'critical facts,'" including "'costs.'" States Opp'n at 46-49; States Mot. at 43. Defendants' admission that they failed to account for costs related to unintended pregnancies, while simultaneously asserting that the contraceptive coverage mandate has curbed unintended pregnancies, demonstrates that Defendants acted without regard to "an important aspect" of this rulemaking. *Id*. (citing 83 Fed. Reg. at 57574, 57626); Ex. 9 (D4 000402-03), Ex. 24 (D9 668963). Not only did they disregard their own evidence demonstrating that there would be increased costs, but they disregarded comments that outlined the costs of the religious and moral interim final rules (IFRs). States Mot. at 3, 43.

Defendants also disregarded congressional intent when they ignored HRSA's guidelines. *See* States Mot. at 43-44, 4-8. HRSA is not just a "commenter" that the States' "favor." Defs. Reply at 19. HRSA is the entity designated by Congress to render a determination on "preventive

services," which HRSA did, *twice*, after exhaustive evidence-based research with medical experts in the field. States Opp'n at 48; States Mot. at 43-44, 4-8.

Defendants assert that the scope of the Rules is not arbitrary because they are tailored to Defendants' desire to end "years of litigation" (which is not alone a rational basis for rulemaking) and their interest in "respecting objections of conscience." Defs. Reply at 20. However, Defendants fail to demonstrate the need for such sweeping, "blanket" Religious and Moral Exemption Rules, without evidentiary support. States Opp'n at 49 (collecting cases); *State v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1066-67 (N.D. Cal. 2018); *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 17-18 (D.C. Cir. 2015) (*DNREC*). This is further underscored by the fact that under the Rules, entities can opt out of providing mandated contraceptive coverage without notification to the government or its employees. As a result, not only is there no evidence to support the scope of the Rules but, once implemented, no one will know the extent to which they are harming women across the country.

Rather than defend the scope of their Rules with evidentiary support, Defendants argue that the States will not be harmed if the Rules create exemptions that are not used. Defs. Reply at 20. Yet, it is *Defendants*' obligation to justify the Rules based upon the record. *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014). Because there is "no evidence" to support the scope of the Rules, they must be set aside. *Id.*[4]

Defendants assert that they properly responded to comments regarding burdens on women because Defendants "spen[t] more than a page responding to these comments," and determined that "any potential negative effects would be the product of private action" and the "Rules relieve a burden on conscience." Defs. Reply at 21 (citing 83 Fed. Reg. at 57548-57550). Defendants' 1-page response (out of a 55-page rule) to the many comments outlining the numerous negative

[4] Defendants assert that the States are imposing a new standard that requires rules to be narrowly tailored. Not so. The APA already requires that agency action be "supported by the record" and not based on "speculation." *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1244 (9th Cir. 2001). The scope of the Religious and Moral Exemption Rules is based on mere speculation. *See* States Opp'n at 49-50 (explaining, for example, that Defendants speculate that publicly-traded companies have religious objections to contraceptive coverage).

consequences to women does not fulfil their "obligations under the APA to respond to 'relevant and significant comments.'" *DNREC*, 785 F.3d at 15. This is particularly true where Defendants admit that they do not actually engage in responding to the comments, but rather resort to their conclusion that the Rules relieve a burden on conscience. Such a response does not address the myriad of harms commenters raised. *See* States Mot. at 46-51; States Opp'n at 50.

VII. THE RELIGIOUS AND MORAL EXEMPTION RULES VIOLATE THE ESTABLISHMENT CLAUSE

Defendants claim that the Religious Exemption Rule is permissible under the First Amendment because it merely involves "the lifting of a government-imposed burden on religious exercise." Defs. Reply at 26. *United States v. Lee*, 455 U.S. 252, 257 (1982), involved a similar government-imposed burden—the requirement to pay social security taxes—that harmed religious groups opposed to that requirement. Nonetheless, the Court declined to exempt employees of Amish employers because that would "impose the employer's religious faith on the employees." *Id*. at 261. The same is true here. *See* States Opp'n at 52, 53.[5]

Sisters suggest that the Religious Exemption Rule is merely the government stepping aside and allowing private parties to make religious choices that may harm others. Sisters Reply at 27. But in *Lee*, the employees could have chosen to work for non-Amish employers. Yet the Court refused to deprive "wage earners employed by others" of their social security benefits. 455 U.S. at 261.

VIII. THE RELIGIOUS AND MORAL EXEMPTION RULES VIOLATE THE EQUAL PROTECTION CLAUSE

Defendants argue that the Religious and Moral Exemption Rules are consistent with the principles of equal protection because they "do not treat men more favorably then women." Defs.

[5] Defendants' reliance on *Amos* is misplaced because in *Amos*: (1) the government already alleviated any burden on religious exercise when it created the accommodation; (2) Congress (not a federal agency) created the religious exemption to Title VII's non-discrimination provisions; and (3) there were no deeply entrenched reliance interests because the religious exemption had been a long established part of the statutory scheme. Defs. Reply at 24, 26; *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330-37 (1987); *see also* States Opp'n at 54. The Religious Exemption Rule, with its extensive harm to third parties and complete disregard of longstanding reliance interests, crosses the Rubicon into "'an unlawful fostering of religion.'" *Amos*, 483 U.S. at 334-35.

Reply at 27. The Women's Health Amendment was enacted to help end "gender discrimination" in healthcare. *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 263 (D.C. Cir. 2014) (citing 155 Cong. Rec. 28,842 (Dec. 1, 2009) (Sen. Mikulski)); *see also* 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012). The Rules upend the Women's Health Amendment, by allowing for the precise gender discrimination that Congress sought to remedy.

Defendants seek to minimize the Women's Health Amendment by referring to it as merely "subsidization" of contraceptives. Defs. Reply at 27. However, the Women's Health Amendment "addressed the need to provide preventive care to women to rectify past gender discrimination in health insurance." *Eternal World*, 818 F.3d at 1152 (citing 78 Fed. Reg. 39870, 39873 (July 2, 2013)). The Supreme Court, too, has recognized that access to contraception is a necessary component of equality because it allows women to control their health, education and livelihoods. *See Hobby Lobby*, 573 U.S. at 737 (Kennedy, J., concurring); *Int'l Union v. Johnson Controls*, 499 U.S. 187, 211 (1991); *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984).[6]

Defendants argue that the States' Equal Protection claim is based upon disparate impact because the Rules are allegedly facially neutral. This is inaccurate. The Rules directly target a statute enacted to minimize gender discrimination. The Rules would only serve to increase the disparities among men and women.

IX. THE RELIGIOUS AND MORAL EXEMPTION RULES ARE PROCEDURALLY DEFICIENT

As the Third Circuit recently explained, Defendants' procedural errors in promulgating the IFRs tainted the Religious and Moral Exemption Rules, and thus the Exemption Rules must be set aside. *Pennsylvania*, 2019 WL 3057657, at *12 (explaining that "[t]ogether, [Defendants'] justifications for avoiding notice and comment to the IFRs, and the fact that the IFRs and the Final Rules are virtually identical, suggest that the opportunity for comment was not a 'meaningful' one in the way the APA requires"). Defendants argue that the changes between the

[6] Defendants also cite no evidence to support their claim of "subsidization." *See* 78 Fed. Reg. 8456, 8463 (Feb. 6, 2013) ("[a]ctuaries, economists, and insurers estimate that providing contraceptive coverage is at least cost neutral"); 78 Fed. Reg. at 39871 (for employees utilizing the accommodation, employers do not "contract, arrange, pay or refer for coverage").

IFRs and Exemption Rules are evidence that they maintained an "open mind" in reviewing public comments. Defs. Reply at 58. But, as the Third Circuit explained and Defendants readily admit, the IFRs and the Exemption Rules are virtually identical. *Pennsylvania*, 2019 WL 3057657, at *12. In fact, at the same time Defendants were purportedly remaining "open-minded" about modifying the IFRs, they were vigorously arguing in this Court and before the Ninth Circuit that the IFRs were lawful and necessary. This undercuts Defendants' claim and instead shows Defendants were "resist[ant] to change." *Id*. This factual background also highlights the consequence of Defendants' actions: "citizens will recognize that the agency is less likely to pay attention to their views after a rule is in place, and therefore the public is less likely to participate vigorously in comment." *Leveque v. Block*, 723 F.2d 175, 188 (1st Cir. 1983).

The States are not arguing, as Defendants suggest (Defs. Reply at 29), that anytime Defendants promulgate a final rule similar to an IFR, they are failing to be "open minded." Rather, as the Third Circuit explained, Defendants improperly changed the question presented *in this case* from whether an existing rule should be changed—the proper "starting point"—to a question of whether Defendants' already-enacted rule should be altered. *Pennsylvania*, 2019 WL 3057657, *13; *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979).

X. THE STATES HAVE STANDING

Intervenors' assertion that the States' harm is "speculative" is undercut by the extensive evidence attesting to the harm that will occur if these Rules take effect. *See* States Opp'n at 4-6 (citing 43 declarations); March Reply at 2-4. Intervenors do not respond to this evidence; instead, they merely assert that the States "failed to allege a legally cognizable injury" and the "federal government always has the power to voluntarily cease a program." March Reply at 3. Whether the government may cease a program is irrelevant here, as the contraceptive coverage mandate is not a "program" and an agency has no authority to contravene a Congressional mandate.[7]

[7] Sisters make several vague objections to the States' declarations. *See* Sisters Reply at 3 ("all of Plaintiffs' declarations that attempt . . . to predict behavior are likewise inadmissible"), 4 (none of the declarations are "admissible"). Such objections, without citation to authority or specific paragraphs within the declarations, should be disregarded as unsupported. As to Sisters' objections to the Werberg and Chance declarations, there is nothing "speculative" about these (continued…)

Ultimately, Intervenors cannot escape the fact that the Rules "assumed that state and local governments will bear additional economic costs." *California v. Azar*, 911 F.3d 558, 572 (9th Cir. 2018); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 923 F.3d 209, 223-225 (1st Cir. 2019); *Pennsylvania*, 2019 WL 3057657, at *6.[8]

Sisters' additional arguments also lack merit. Sisters Reply at 4-6. First, the States demonstrated redressability because they established that the Rules will damage the States' fiscs in three ways. *See* States Opp'n at 4-6; *California*, 351 F. Supp. 3d at 1281; *California*, 911 F.3d at 571. To redress that injury, the States request, among other things, that the Court set aside the Religious and Moral Exemption Rules. States Mot. at 60; States Opp'n at 59-60. Setting aside the Rules will prohibit their implementation; this undoubtedly meets the redressability requirement for Article III standing. *California*, 911 F.3d at 570, 573. Second, whether individual employers *could* bring future RFRA lawsuits or *could* join a separate lawsuit does not undermine the States' standing to challenge these Rules.[9] Third, Sisters' assertion that this Court "lacks the power to issue" the relief requested by the States, Sisters Reply at 5-6, ignores the "'presumption'" of vacatur as that is the "'usual' remedy for violation of the APA." States Mot. at 60; States Opp'n at 59-60.

CONCLUSION

The Court should deny Defendants' and Intervenors' motions to dismiss and motions for summary judgment, and grant the States' motion for summary judgment.

(…continued)
declarations, and Sisters do not point to a single paragraph in either declaration that is objectionable. To the contrary, both declarants explain their background and provide explicit detail as to their analysis. *See e.g.*, Chance at ¶¶ 1-6 (providing background), 9-13 (explaining Defendants' Rules), 14-19 (providing analysis of Defendants' estimates), 20-23 (utilizing documents from Defendants' Administrative Record to provide a list of employers that Defendants estimate will use the Exemption Rules).

[8] Sisters fail to provide any authority for the notion that questions asked at oral argument are binding authority and supersede Ninth Circuit precedent. Sisters Reply at 4.

[9] Sisters' reliance on *DeOtte v. Azar* is unavailing. As Sisters concede, at least one party has already filed an appeal challenging the district court's judgment. Sisters Reply at 5; *DeOtte v. Azar*, No. 4:18-cv-825 (N.D. Tex.), Dkt. No. 83 (appeal by proposed intervenor); *id*. at Dkt. No. 99 at 1 (federal government explaining that it may appeal the court's July 29, 2019 judgment).

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