NO. 19-1040

IN THE

Supreme Court of the United States

MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

Petitioner,

v.

CALIFORNIA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

KEVIN H. THERIOT
KENNETH J. CONNELLY
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

BRIAN R. CHAVEZ-OCHOA
CHAVEZ-OCHOA LAW OFFICES, INC.
4 Jean Street, Suite 4
Valley Springs, CA 95252
(209) 772-3013

KRISTEN K. WAGGONER
JOHN J. BURSCH
Counsel of Record
DAVID A. CORTMAN
RORY T. GRAY
ALLIANCE DEFENDING FREEDOM
440 First Street, N.W.
Suite 600
Washington, D.C. 20001
(616) 450-4235
jbursch@ADFlegal.org

Counsel for Petitioner

CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Petition for a Writ of Certiorari remains unchanged.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

INTRODUCTION

The States' standing and merits arguments fail for the same reason: the Affordable Care Act does not require health plans to cover all FDA-approved contraceptives cost-free. On the merits, the States tacitly concede that the ACA's preventive-care-and-screening mandate has no content, and that federal agencies exercised their discretion to require contraceptive coverage—including abortifacients—in the first instance. Combined Br. in Opp'n ("Opp.") 2–3. The States also acknowledge that the federal agencies could exercise that discretion to exempt churches and their integrated auxiliaries from this executive-branch mandate. *Id.* at 20 n7. Given all that, the agencies necessarily had discretion to exempt religious objectors and moral objectors as well. At a minimum, this Court should so hold in *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, No. 19-431, and *Trump* v. *Pennsylvania*, No. 19-454, and GVR this case so the Ninth Circuit can apply that holding here.

The same reasoning controls the standing issue, too. Because the mandate is discretionary, the States have no right to any hypothetical financial windfall the mandate may have created by offsetting the States' own voluntary spending on contraceptives. If the federal agencies eliminated the mandate, the States would have no basis to sue. In holding that the States have standing here, the Ninth Circuit weaponized federalism-based political disagreements, so that states may sue *whenever* the federal government does something that may tangentially cost states money. That outcome is a disaster.

Accordingly, either here or in the *Little Sisters*/*Trump* pair of cases, this Court should also hold that when states lack any legally protected interest sufficient to open the courthouse doors, they are merely concerned bystanders and lack Article III standing. Pro-abortion states that seek to squelch any organization that has a religious or moral objection to abortion cannot "invoke the authority of a federal court to forbid what they dislike for no more reason than they dislike it." *Am. Legion* v. *Am. Humanist Ass'n*, 139 S. Ct. 2067, 2099 (2019) (Gorsuch, J., concurring in the judgment).

I. The States cannot satisfy their burden of proving Article III standing.

The States bear the burden of proving that they have Article III standing. *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 493 (2009). They have failed to carry that burden here.

First, the States suggest they are entitled to the lowered standing bar applicable to procedural claims because the States "pleaded [a procedural Administrative Procedure Act violation in the district court] and moved for a preliminary injunction on that ground." Opp.11 n.4. But "the district court declined to reach that [procedural] claim." *Ibid.* And no APA procedural claim was before the Ninth Circuit either, because the States did not file a cross-appeal. Such a step was required to preserve the issue; adding a procedural breach to the substantive APA violations on which the district court actually ruled would "enlarge" the States' rights in the judgment. *Jennings* v. *Stephens*, 574 U.S. 271, 276 (2015).

No plaintiff can use an abandoned claim to prove standing at later litigation stages. If the States had filed a cross-appeal to preserve their procedural APA claim, the States would have born the burden of proving their standing on appeal, *Va. House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019), "for each type of relief sought," *Summers*, 555 U.S. at 493. The same would be true for any cross-petition the States chose to file to keep their procedural claim alive in this Court. After all, the States cannot presume they would win a procedural challenge that lower courts never addressed.

Second, the States do not contest—and thus admit—that the ACA imposes no rights or duties on them. They argue only that "there is . . . no requirement that a plaintiff have been accorded a legal right or duty in order to challenge a federal regulation." Opp.17 (cleaned up). But this Court's precedent after *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992), makes clear that standing requires "a legally protected interest." E.g., *Gill* v. *Whitford*, 138 S. Ct. 1916, 1929 (2018); *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1548 (2016); *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997). And the States do not claim such an interest.

The APA does not lift that burden. Contra Opp.17 (citing the APA challenge in *Dep't of Commerce* v. *New York*, 139 S. Ct. 2551, 2565 (2019)). A plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue." *Spokeo*, 136 S. Ct. at 1549. "'Article III standing requires a concrete injury even in the context of a statutory violation.'" *Frank* v. *Gaos*, 139 S. Ct. 1041, 1045 (2019) (per curiam) (quoting *Spokeo*, 136 S. Ct.

at 1549). Under the APA, this Court fulfills Article III's legally-protected-interest requirement by requiring a plaintiff to show "that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the" substantive law at issue. *Lujan* v. *Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990).

As explained above, the States concede they fall outside the zone of interests the ACA was meant to protect. The States are like the hypothetical transcription company the *National Wildlife Federation* Court said could not sue under the APA based on an agency's failure to hold statutorily mandated hearings. Even though the company had a contract with the agency and lost revenue, the hearing "provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters." *Id.* at 883. Congress enacted the ACA's preventive-care-and-screening mandate to protect women, not the States' discretionary spending.

Third, the States admit they must "establish a substantial risk that the challenged agency action will harm" them. Opp.17. But they lack convincing supporting evidence. The States rely almost exclusively on agency findings that the final rules may cause up to 126,400 women to lose contraceptive coverage—roughly .038% of the U.S. population. Opp.12, 16. It is unknown where these women reside, whether their employers are already protected by injunctions, what contraceptives (if any) they want and whether their employers object, what other coverage or contraceptive coverage or access they possess, whether they will turn to State healthcare programs, and whether they will satisfy the States' eligibility criteria.

The States make no effort to connect the dots, effectively admitting they face no substantial risk of harm. It is certainly not enough to point to costs associated with "unintended pregnancies" writ large. Opp.16, 18. Unintended pregnancies are ubiquitous, accounting for nearly half the pregnancies in the U.S. each year. Center for Disease Control, Unintended Pregnancy, https://bit.ly/3bJfuBL. The States cannot (and make no effort to) show causation between unintended pregnancies and the final rules. Nobody knows who the impacted women are, if they even exist, or the effect losing contraceptive coverage would have on the unintended-pregnancy rate of women working for employers that oppose abortion.

Consider the few concrete examples the States highlight: Hobby Lobby, Nyack College, and The Charles Feinberg Center for Messianic Jewish Studies (based on a relationship with Biola University). Opp.16–17 (citing D.Ct. Dkt. 174-36). The accommodation "does not impinge on [Hobby Lobby's owners'] religious belief." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 731 (2014). Hobby Lobby uses the accommodation without objection. Nyack College chose *not* to challenge the mandate in court. Br. for Intervenor-Def.-Appellant March for Life 25, Nos. 18-15144, 18-15166, 18-15255 (9th Cir. Apr. 9, 2018). And the Charles Feinberg Center is not operated by Biola University, which is already protected by an injunction in any event. *Id.* at 25–27. None of these examples shows an impact on the States' fiscs.

Fourth, the States' cited legal authority is just as inapposite. Nothing about contraceptive access or use is as "predictable" as the effect of including a citizenship question on the census. Opp.12 (quoting *Dep't of Commerce*, 139 S. Ct. at 2566). *South Dakota* v. *Dole*, 483 U.S. 203 (1987), does not even mention standing. Opp.8. And *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), Opp.8, required the plaintiffs to prove "genuine injury . . . on the basis of discrete facts," *id.* at 114, along with "the necessary causal connection between the alleged conduct and the asserted injury," *id.* at 114 n.29. The States have shown neither.

In sum, the States are pursuing an ideological agenda without proof of a protected legal interest or concrete injury. This Court should hold that the States lack standing.

II. The States' merits arguments have no basis in the ACA's text while ignoring the inequity of accommodating religious but not moral objectors.

Nothing in the ACA requires employers to cover all FDA-approved contraceptives in their health plans. To the contrary, the ACA's text leaves the preventive-care-and-screening mandate's content to a federal agency. 42 U.S.C. 300gg-13(a)(4). A component of the U.S. Department of Health and Human Services had discretion to include all or some FDA-approved contraceptives in the mandate, or none at all.

When HHS first chose to include all FDA-approved contraceptives in the mandate, it exempted churches and their integrated auxiliaries because their employees are "less likely to use contraceptives even if contraceptives were covered under their health plans." 77 Fed. Reg. 8,725, 8,728 (Feb. 15, 2012). The States concede this exemption is lawful. Opp.20 n.7. But they maintain that HHS lacks authority to exempt anyone else. Opp.19. This argument is self-refuting.

If HHS has the power to exempt houses of worship because their employees are *unlikely* to use contraceptives, it also has the power to exempt moral objectors like March for Life whose employees *definitely* will not use them. Churches do not have exclusive rights to make conscientious objections. *March for Life* v. *Burwell*, 128 F. Supp. 3d 116, 127–28 (D.D.C. 2015). Under the States' logic, the government could demand that even houses of worship cover all FDA-contraceptives in their health plans one way or another. (That shouldn't be surprising, since states like California are already trying to do exactly that using state law and agency enforcement. *E.g.*, *Skyline Wesleyan Church* v. *California Dep't of Managed Health Care*, 9th Cir. No. 18-55451; *Foothill Church* v. *Rouillard*, 9th Cir. No. 19-15658.) And if the States are saying that federal agencies must accommodate religious objections by for-profits and non-profits but not non-profits whose sole purpose is *opposing abortion*, see Opp.20, the States ignore the basic equal-protection rule that government must treat "all persons similarly situated . . . alike." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

In short, the States seek to compel secular, pro-life non-profits to pay for abortifacient coverage and violate their deepest beliefs for no good reason other than pure ideological animus. After all, "March for Life only hires individuals who oppose all forms of abortion, including contraceptives that the organization believes are abortifacients." *March for Life*, 128 F. Supp. 3d at 123. The States ignore the mandate's purpose: to ensure that contraceptives are readily available to women who *want* and will *use* them, not to women who *oppose* and *reject* them.

III. The States concede that this petition should at least be held. Their additional reasons for rejecting review are baseless.

At a minimum, the States acknowledge that the Court should hold the petition pending disposition of *Little Sisters* and *Trump*. The States are correct. But the States then go further and urge this Court not to consider the important standing question because (1) there is no circuit conflict on the standing issue, Opp.1, 15, and (2) March for Life may lack appellate standing, Opp.15, 18. The States are wrong.

To begin, this Court previously granted review to decide a standing question that is indistinguishable from the first question presented here. *United States* v. *Texas*, 136 S. Ct. 906 (2016). The United States raised and fully briefed that issue. But this Court could not resolve it because the Court was "equally divided." *United States* v. *Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam). It would be appropriate to hear the standing issue in this case or, alternatively, add it as a question presented in the *Little Sisters* and *Trump* cases.

Interestingly, many of the plaintiff States here took the exact opposite view in *United States* v. *Texas*. *E.g.*, Amicus Br. of the States of Washington, et al. 1–7, No. 15-674 (S. Ct. Mar. 8, 2016) (arguing that Texas was not required to do anything, its injury was speculative, and that it failed to present sufficient evidence). The States' contradictory litigation positions highlight the need for this Court's immediate review of the issue.

In addition, March for Life has appellate standing. As explained in the petition, because HHS and other federal agencies filed their own cert petition, March for Life—as an intervenor—may "'piggyback' on [their] undoubted standing" and is "entitled to seek review." Pet. 35 (quoting *Diamond* v. *Charles*, 476 U.S. 54, 64 (1986)).

So either here or in the *Little Sisters*/*Trump* pair of cases, this Court should say definitively whether the plaintiff States have Article III standing. Allowing the Ninth Circuit's published decision to remain in place will invite more state-initiated litigation in response to federal government decision-making in politically charged areas of the law.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for a writ of certiorari, the petition should either be granted or held.

Respectfully submitted,

KRISTEN K. WAGGONER
JOHN J. BURSCH
Counsel of Record
DAVID A. CORTMAN
RORY T. GRAY
ALLIANCE DEFENDING FREEDOM
440 First Street, N.W.
Suite 600
Washington, D.C. 20001
(616) 450-4235
jbursch@ADFlegal.org

KEVIN H. THERIOT
KENNETH J. CONNELLY
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

BRIAN R. CHAVEZ-OCHOA
CHAVEZ-OCHOA LAW OFFICES, INC.
4 Jean Street, Suite 4
Valley Springs, CA 95252
(209) 772-3013

Counsel for Petitioner

APRIL 2020