No. 19-454

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The decision below freezes in place a policy that has caused pervasive uncertainty and that three federal agencies jointly determined substantially burdens religious liberty. That decision amply warrants review. Indeed, this Court granted certiorari in *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (per curiam), to decide the lawfulness of that policy. But it ultimately left that question unanswered, instead directing the parties to pursue a compromise. Those efforts were unsuccessful, and so the agencies sought to resolve the controversy by adopting the exemptions through duly promulgated regulations. But the nationwide injunction below, affirmed by the Third Circuit, has now locked in place the very policy the agencies found inadequate.

The States do not meaningfully contest the case's importance. They do not dispute the final rules' significance for objecting employers across the country, or

the practical effect of the decision below of paralyzing further agency efforts to address the problem. The States suggest that the Ninth Circuit's agreement with the Third should assuage any concerns. But the absence of a square circuit conflict is immaterial in light of the nationwide injunction upheld below: further litigation elsewhere is effectively futile because the injunction applies everywhere.

The States instead spend the bulk of their submission defending the decision below on the merits. But the States identify no reason why a court of appeals should have the final word on questions of such significance. In any event, as explained below, the States' merits arguments fail on their own terms. Their view that the agencies lack statutory authority to adopt the exemptions cannot be reconciled with the relevant statutory text or the uncontested exemption for churches that has existed since 2011. The States' contention that putative procedural flaws in the now-superseded interim rules taint the final rules has no grounding in the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.*, or common sense. And their assertion that nationwide injunctive relief is appropriate to redress speculative cross-border harms to two States contradicts bedrock principles of equity. The petition should be granted.

I. THE FINAL RULES ARE LAWFUL

A. The Agencies Had Statutory Authority To Adopt The Expanded Exemptions

1. The religious and moral exemptions are authorized by the plain language of 42 U.S.C. 300gg-13(a)(4), which requires covered plans to provide coverage for "such additional preventive care and screenings * * * as provided for in comprehensive guidelines supported by the

Health Resources and Services Administration [HRSA] for purposes of this paragraph." *Ibid.* The States do not dispute that the text grants HRSA broad discretion in deciding what services to "provide[] for" in guidelines it chooses to "support[]." *Ibid.* And they acknowledge (Br. in Opp. 21-22) that HRSA's guidelines did not yet exist when the provision was enacted, confirming that Congress empowered HRSA to make that determination going forward.

Like the court of appeals, the States assert (Br. in Opp. 20-21) that Section 300gg-13(a)(4) requires HRSA to exercise its discretion on a binary, all-or-nothing basis by requiring a particular service to be provided by all covered plans or none. But they identify nothing in the text requiring that approach. The States note that "as provided for" modifies "such additional preventive care and screenings" in paragraph (a)(4), not the "'shall * * * provide'" command in subsection (a)'s opening clause. *Ibid.* (citation and emphasis omitted). That is beside the point. The opening clause's command requires plans to furnish coverage for a service under paragraph (a)(4) only "as provided for" in HRSA's guidelines. 42 U.S.C. 300gg-13(a)(4). Nothing in the statute precludes HRSA from "provid[ing] for" (*ibid.*) a particular service to be furnished in some circumstances or by some plans and not others.

The States also fail to grapple with the unavoidable consequence of their all-or-nothing interpretation: that the church exemption in force since 2011 is and has always been ultra vires. Like the Third Circuit, Pet. App. 33a n.26, the States allude (Br. in Opp. 18 n.7) to ministerial exceptions courts have inferred based on the First Amendment. But the States do not suggest that the church exemption—which applies to all churches

regardless of whether they object to providing contraceptive coverage—is tailored to any First Amendment concern. And they cite no other law authorizing that exception. That the States have not expressly challenged the church exemption here (*ibid.*) is irrelevant because the court of appeals' decision necessarily leads to the implausible conclusion that that exemption is invalid.*

2. a. In addition to Section 300gg-13(a)(4), the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, independently authorizes—indeed, for some employers, requires—the religious exemption. See Pet. 20-26. The States contend (Br. in Opp. 22-24) that RFRA grants the agencies no authority whatsoever to provide regulatory exemptions to the agencies' own rules. That cannot be correct. RFRA commands agencies to avoid placing substantial burdens on religion, stating that the "Government shall not substantially burden a person's exercise of religion * * * except as provided in" RFRA. 42 U.S.C. 2000bb-1(a). RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. 2000bb-3(a). That command necessarily confers authority on agencies to prevent their own actions from substantially burdening religious exercise. It is a hornbook canon of construction that a "[c]ommand includes permission." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 193 (2012)

* The States' contention (Br. in Opp. 21 n.9) that the government has "abandoned" reliance on "deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984)," is incorrect. As they acknowledge (*ibid.*), the government preserved that argument below. And the weight due to the agencies' interpretation is fairly included in the first question presented.

(citation omitted). "If you must do something, then you are necessarily allowed to do it." *Id.* at 194.

That principle applies with particular force here. The "substantial burden" on religion caused by the mandate, recognized in *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014), stems from the agencies' own action. Pet. 5-6. RFRA forbade the agencies from adopting rules that impose such a burden unless they satisfied RFRA's strict-scrutiny exception, and it required the agencies to eliminate the substantial burden this Court identified. RFRA necessarily empowered the agencies to create exemptions to their own rules to fulfill that duty. The States' contrary view would put agencies in an impossible position: upon recognizing a substantial burden on religion caused by its own rule, an agency would be powerless to modify the rule to alleviate the burden; instead, it would have to sit idly and wait to be sued, or rescind the rule in its entirety.

The States also fail to refute our showing (Pet. 20-24) that, even if RFRA does not require the religious exemption, RFRA at least permits it. They assert (Br. in Opp. 25) that RFRA does not empower agencies to grant exemptions if they can "enforce the law through less restrictive means." But nothing in RFRA confines agencies to accommodating religious beliefs in the least restrictive manner possible. RFRA requires that action *burdening* religious exercise—not action *safeguarding* religious exercise—be "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(b)(2). As the agencies explained, had they adopted the religious exemption at the outset, "no one could reasonably have argued that * * * they should have invented the accommodation instead." 83 Fed. Reg. 57,536, 57,545 (Nov. 15, 2018).

b. Moreover, the States fall short of showing that the accommodation satisfies RFRA. The accommodation imposes a substantial burden by forcing objecting employers to choose between complying with a requirement that is inconsistent with their sincere religious beliefs and facing significant financial penalties. See Pet. 24-25. The States do not dispute that objecting employers sincerely believe the accommodation violates their beliefs or that the penalties objectors face for refusing to comply with the accommodation are substantial. That should end the analysis.

The States nevertheless contend that courts should go further and conduct their own "'objective evaluation'" of the effect of a challenged requirement on a plaintiff's religious exercise. Br. in Opp. 27 (citation omitted). The States insist (*ibid.*) that RFRA requires more than "pro forma" review or "judicial abdication" to a plaintiff's asserted beliefs. To the extent the States are suggesting (*id.* at 27-28) that courts should independently assess whether complying with a particular requirement is truly incompatible with a plaintiff's faith, that position contradicts *Hobby Lobby*, 573 U.S. at 723-725; see Pet. 24-25. Courts have no warrant to second-guess a plaintiff's own understanding of his or her professed faith, or to downplay particular tenets as ancillary to or inconsistent with what courts perceive as the plaintiff's core beliefs. See *Thomas* v. *Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981) (explaining, in sustaining free-exercise claim, that religious objector "drew a line, and it is not for us to say that the line he drew was an unreasonable one").

The States also err in contending (Br. in Opp. 24-25) that, to hold that the accommodation violates RFRA, the

Court would have to decide whether it furthers a compelling governmental interest. As in *Hobby Lobby*, the Court can "assume" that it does, because the accommodation still falls short of RFRA's "exceptionally demanding" "least-restrictive-means standard." 573 U.S. at 728. Applying the mandate to objecting entities is not narrowly tailored to a putative interest in providing seamless contraceptive coverage—as evidenced by the gaps in coverage resulting from the church exemption, and from the effective exemption for self-insured church plans that was adopted with the accommodation itself. Pet. 22-23; see *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) ("[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." (citation and internal quotation marks omitted)).

B. The Final Rules Do Not Violate The APA

The States offer no persuasive defense of the court of appeals' conclusion that the final rules are invalid because the *interim* rules were adopted without prior notice and comment. The agencies undisputedly adopted the final rules only after soliciting, reviewing, and responding to public comments the interim rules invited. Pet. 9. Like the Third Circuit, the States do not attempt to show that the agencies failed to respond adequately to significant comments. The final rules were thus validly promulgated.

1. The States argue (Br. in Opp. 15-16 & n.6) that the adequacy of the agencies' responses to comments is wholly separate from whether the agencies afforded a meaningful opportunity to comment. But those are two sides of the same coin. Lower courts have held that "the opportunity to comment is meaningless unless the

agency responds to significant points raised by the public." *Sherley* v. *Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012), cert. denied, 568 U.S. 1087 (2013) (citation omitted). Conversely, if an agency has responded adequately to all significant comments after providing public notice and sufficient time to comment, it has necessarily provided a meaningful opportunity to comment.

It is unclear precisely what more the States believe the APA requires. They seem (Br. in Opp. 14) to embrace the court of appeals' view that, to demonstrate open-mindedness, an agency must adopt some (unspecified) portion of commenters' suggestions to modify the agency's proposed rule. As explained in the petition (at 29-30), such a requirement cannot be reconciled with the APA, which requires agencies to consider commenters' submissions. But if an agency, after considering a commenter's suggested change, disagrees with the proposed revision, the agency should reject it—not make a change the agency views as unwarranted. In any event, in the final rules the agencies did adopt some changes proposed by commenters. Pet. 30. The States fail to carry their burden of showing that even more changes were required.

2. Unable to show that the final rules were adopted without adequate notice and comment, the States retreat (Br. in Opp. 14-16) to the court of appeals' position that the absence of notice and comment before promulgation of the interim rules taints the final rules as well. They mistakenly frame the question (*id.* at 16) as whether the final rules "cure[d]" the purported procedural "defect" in the interim rules. The procedural validity and enforceability of the interim rules are not at issue. The States are seeking (and obtained below) prospective

relief against the final rules. The final rules are procedurally valid because the agencies requested, received, and considered public comments on the relevant issues before adopting them. Whether the interim rules could have been implemented before the final rules were promulgated is irrelevant.

The States err in contending (Br. in Opp. 15) that upholding the final rules here would diminish agencies' incentive to comply with the APA's notice-and-comment protocol. Unless an agency believes that it has good cause or statutory authorization to issue interim final rules without prior notice and comment, it will have no reason to pursue that path. Adopting a procedurally invalid interim rule invites legal challenges to the interim rule itself—which the agency may be precluded from implementing—and to a later-issued final rule, on the ground that the agency has prejudged particular issues. Upholding the final rules here thus will not encourage circumvention of the APA. With respect to the final rules, the process that the agencies followed here—inviting and responding to comments—is not evasion of notice and comment. It *is* notice and comment.

The States acknowledge (Br. in Opp. 16-17) that agencies commonly adopt rules without prior notice and comment. They dismiss that fact, observing (*id.* at 17) that agencies may have good cause or statutory authorization to do so. But the commonality of the practice highlights the importance and recurring nature of the legal question here, which is what should happen when an agency determines that it may issue an interim rule without notice and comment, but a reviewing court disagrees with that determination. On the States' view, the reviewing court's conclusion that an interim rule is procedurally invalid not only dooms the interim rule, but

also taints subsequently issued final rules even though the final rules are preceded by notice and comment.

That view would leave an agency hamstrung, unable to proceed without starting over from scratch by issuing a new notice of proposed rulemaking. The States endorse that outcome, arguing (Br. in Opp. 16) that "[a]n agency found to have improperly issued an interim final rule can withdraw the rule, issue a new notice of proposed rulemaking, seek comment, and then issue a final rule." But they identify no reason to undertake that needlessly duplicative procedure. So long as the agency provides sufficient notice and time to comment and responds to significant comments received, the opportunity to comment is meaningful regardless of whether the final rule is styled as adopting a proposed rule or as finalizing an interim rule.

The States suggest (Br. in Opp. 14) that agencies will be less receptive to comments on the substance of interim rules that have already taken effect than on proposed rules not yet in force. That speculation is inapposite here. In inviting comments on the interim rules, the agencies did not ask simply whether those rules should be retained or replaced. They solicited input on the rules generally, see 82 Fed. Reg. 47,792, 47,792 (Oct. 13, 2017); 82 Fed. Reg. 47,838, 47,838 (Oct. 13, 2017), and nothing in those solicitations stated or implied that some aspects of the interim rules were off-limits. The agencies' lengthy, detailed responses to comments in the final rule confirm that the agencies did not take retention of the interim rules as a foregone conclusion. See 83 Fed. Reg. at 57,540-57,573; 83 Fed. Reg. 57,592, 57,596-57,625 (Nov. 15, 2018). In any event, the district court here enjoined the interim rules only two months after they took effect—nearly a year before final rules

were promulgated. The interim rules here thus were functionally indistinguishable from proposed rules.

II. THE NATIONWIDE INJUNCTION IS IMPROPER

The States contend (Br. in Opp. 30) that the court of appeals properly affirmed the injunction's nationwide scope based on "defer[ence] to the district court's analysis of the[ ] facts." See *id.* at 29-30. But like the courts below, the States identify no fact that justifies enjoining the final rules across the country. They point (*ibid.*) to the possibility that individuals covered by exempted out-of-state plans might turn to the States for assistance and that "an injunction without nationwide reach risked depriving the States of complete relief." But the States' burden was to prove that such sweeping relief is actually necessary, not merely to posit scenarios where more targeted relief could leave the States vulnerable to potential harm. Even assuming that nationwide relief would avert some actual or imminent injury to the States, they fail to explain how, in the balance of equities, those comparatively insignificant injuries could outweigh the harm to the government and the public interest in implementation of rules the agencies adopted to safeguard religious liberty and moral conscience.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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Solicitor General

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