No. 19-431

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA AND STATE OF NEW JERSEY,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner lacks standing to appeal from a district court injunction that expressly does not affect petitioner.

2. Whether an agency that improperly forgoes the notice-and-comment procedures of the Administrative Procedure Act before issuing an interim rule can cure its failure by simply accepting post-promulgation public comment.

3. Whether the agencies here had statutory authority under the Women's Health Amendment to the Affordable Care Act or under the Religious Freedom Restoration Act to issue the challenged regulations creating broad religious and moral exemptions from the contraceptive care guarantee.

4. Whether it was an abuse of discretion to find, based on the record, that a nationwide injunction is necessary to provide the States complete relief for their injuries, and whether petitioner forfeited any challenge to the scope of the injunction.

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STATEMENT

1. Under the Women's Health Amendment, enacted as part of the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. § 18001 *et seq*., health insurance providers must cover without cost-sharing "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA]." 42 U.S.C. § 300gg-13(a)(4). In August 2011, at the recommendation of a committee of specialists, HRSA published guidelines guaranteeing women access, free of cost-sharing, to "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counselling for all women with reproductive capacity," as prescribed by a doctor. C.A. App. 985. As of 2015, at least 56 million women have benefited from increased access to preventive medical care. 83 Fed. Reg. 57,578 (Nov. 15, 2018).[1]

Soon after adoption of the HRSA guidelines, the Departments of Health and Human Services, Labor, and Treasury (collectively, "the agencies") exempted certain religious employers from complying with the contraceptive coverage guarantee. 76 Fed. Reg. 46,623 (Aug. 3, 2011); 77 Fed. Reg. 8725 (Feb. 15, 2012); 78 Fed. Reg. 39,896 (July 2, 2013). The agencies also created an accommodation for nonprofit

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[1] Contrary to petitioner's characterization (at 4), the number of workers enrolled in grandfathered plans has been consistently decreasing over time. Kaiser Family Foundation, *Percentage of Covered Workers Enrolled in Plans Grandfathered Under the Affordable Care Act (ACA), by Firm Size, 2011–2019* (Sept. 25, 2019), https://www.kff.org/report-section/ehbs-2019-section-13-grandfathered-health-plans/attachment/figure-13-3-5/.

employers with religious objections to contraception that were not exempted as religious employers. 77 Fed. Reg. 16,501 (Mar. 21, 2012); 78 Fed. Reg. 8456 (Feb. 6, 2013); 78 Fed. Reg. 39,874 (July 2, 2013). The rule relieved an employer of the duty to "contract, arrange, pay, or refer for contraceptive coverage" once it self-certified its religious objections to its insurance company or third-party benefits administrator via a standardized form. Female employees would then receive access to contraceptive care directly from the insurer or third-party administrator. 78 Fed. Reg. at 39,875–81.

Petitioner, which provides insurance through the Christian Brothers Employee Benefit Trust, has no obligation to comply with the contraceptive guarantee or the accommodation because the agencies are permanently enjoined from enforcing either against any employer participating in the Christian Brothers trust. Order at 2–3, *Little Sisters of the Poor v. Azar*, No. 13-2611 (D. Colo. May 29, 2018).[2] That perma-

[2] The Colorado injunction provides as follows: "Defendants, their agents, officers, employees, and all successors in office are enjoined and restrained from any effort to apply or enforce the substantive requirements of 42 U.S.C. § 300gg-13(a)(4) and any implementing regulations as those requirements relate to the provision of sterilization or contraceptive drugs, devices, or procedures and related education and counseling to which Plaintiffs have sincerely-held religious objections, and are enjoined and restrained from pursuing, charging, or assessing penalties, fines, assessments, or other enforcement actions for noncompliance related thereto, including those in 26 U.S.C. §§ 4980D and 4980H, and 29 U.S.C. §§ 1132 and 1185d, and including, but not limited to, penalties for failure to offer or facilitate access to religiously-objectionable sterilization or contraceptive drugs, devices, or procedures, and related education and counseling, against Plaintiffs, *all current and future participating employers in the Christian Brothers Employee Benefit Trust Plan*, and

nent injunction was entered after the agencies stopped opposing a 2013 lawsuit brought by Little Sisters homes in Baltimore and Denver, as well as the Christian Brothers trust, which claimed that compelling the plaintiffs' compliance with either the contraceptive guarantee or the accommodation violated the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq*. See Order at 1, *Little Sisters of the Poor v. Azar*, No. 13-2611 (D. Colo. May 29, 2018).[3]

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any-third party administrators acting on behalf of these entities with respect to the Christian Brothers Employee Benefit Trust Plan, including Christian Brothers Services. Defendants remain free to enforce 26 U.S.C. § 4980H for any purpose other than to require Plaintiffs, other employers participating in the Christian Brother Employee Benefit Trust Plan, and third-party administrators acting on their behalf, to provide or facilitate the provision of sterilization or contraceptive drugs, devices, or procedures, and related education and counseling, or to punish them for failing to do so." Order at 2–3, *Little Sisters of the Poor v. Azar*, No. 13-2611 (D. Colo. May 29, 2018) (emphasis added).

[3] Petitioner references 15 additional injunctions prohibiting enforcement of the contraceptive guarantee or the accommodation against religious objectors. Pet. 14–15 n.6, 22, 22 n.10. One of those injunctions has been entered with respect to classes defined as "[e]very current and future employer in the United States" with a sincere religious objection to facilitating access to some or all contraceptive services and as "[a]ll current and future individuals in the United States" with a sincere religious objection to contraceptive services and who would willingly obtain health insurance that excludes the objected-to contraceptive service. *DeOtte v. Azar*, 393 F. Supp. 3d 490, 499, 514–15 (N.D. Tex. 2019) appeal docketed, 19-10754 (5th Cir. July 5, 2019). As with the injunction entered in Colorado, each of these 15 injunctions was entered only after the agencies stopped opposing the challenges on the merits.

2. a. After a group of employers challenged the contraceptive guarantee under RFRA, this Court held that the accommodation offered a less burdensome means of enforcing the contraceptive care guarantee for closely held for-profit employers with sincere religious objections to contraception. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). A different group of employers brought RFRA challenges to the accommodation itself. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). Rather than resolving the issue, this Court vacated all relevant lower court judgments and permitted the parties to negotiate a solution that accommodated religious exercise while also "ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage." *Id.* at 1560 (internal quotations marks omitted). In doing so, the Court noted that nothing in its opinion was to "affect the ability of the Government to ensure that women covered by petitioners' health plans obtain, without cost, the full range of FDA approved contraceptives." *Id.* at 1560–61 (internal quotation marks omitted).

Following *Zubik*, the agencies published a request for information. After reviewing the comments received, the agencies concluded that any alternative to the accommodation short of an exemption would "not be acceptable to those with religious objections to the contraceptive-coverage requirement." Dep't of Labor, *FAQs About Affordable Care Act Implementation Part 36* ("2017 FAQs") at 4, 5–11 (Jan. 9, 2017).[4] And any alternative to the accommodation would also create "administrative and operational challenges"

[4] https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf.

that would "undermine women's access to full and equal coverage." *Id.* at 4. The Labor Department determined that the accommodation would remain because it is "the least restrictive means of furthering the government's compelling interest in ensuring that women receive full and equal health coverage, including contraceptive coverage." *Id.* at 5.

b. The agencies reversed course in October 2017, releasing—without prior notice or opportunity for public comment—two interim final rules the upended the ACA's contraceptive guarantee. See 82 Fed. Reg. 47,792 (Oct. 13, 2017) (religious exemption); 82 Fed. Reg. 47,838 (Oct. 13, 2017) (moral exemption). Among the changes, the religious exemption permitted private employers of every sort to opt out of the contraceptive guarantee, without specific notice, if the employer holds a sincere religious objection to contraception. 82 Fed. Reg. at 47,808–11. The accommodation, which enabled women to continue accessing contraceptive care, became optional. *Id.* at 47,812–13. Similarly, the moral exemption allowed any privately held entity to avoid complying with the contraceptive guarantee, without specific notice, because of a moral conviction. 82 Fed. Reg. at 47,850–51. Each rule was immediately effective and gave the public 60 days to comment. 82 Fed. Reg. at 47,792; 82 Fed. Reg. at 47,838.

Pennsylvania sued to block enforcement of the interim final rules for violating the Administrative Procedure Act (APA) and the ACA, among other claims. Pennsylvania then moved for a preliminary injunction of the two interim final rules.

Soon after, petitioner moved to intervene as a defendant, but the district court denied that motion.

Mem. Op. (E.D. Pa. Dec. 8, 2017). Petitioner immediately appealed that order.

Meanwhile, the district court granted Pennsylvania's motion for a preliminary injunction. After rejecting a challenge to the Commonwealth's standing, the court concluded that Pennsylvania is likely correct that the agencies had neither independent statutory authority nor good cause under the APA to escape their notice-and-comment obligations. App. 162a–73a. Independently, the interim final rules likely exceed the agencies' authority under the ACA and RFRA. App. 173a–83a. Finally, Pennsylvania would suffer irreparable harm under the interim finals rules and both the balance of equities and public interest favored a nationwide injunction. App. 183a–92a.[5] Petitioner immediately filed a protective appeal

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[5] A suit by separate states resulted in a similar injunction. See *California v. Dep't of Health & Human Servs.*, 281 F. Supp. 3d 806 (N.D. Cal. 2017). As below, the district court there concluded that the agencies lacked statutory authority or good cause to promulgate the interim final rules without first subjecting them to public notice and comment, that the plaintiffs would suffer irreparable harm absent an injunction, and that both the equities and public interest favored an injunction. *Id.* at 825–32. The district court enjoined the interim final rules nationally. *Id.* at 832–33.

After entering the preliminary injunction, the district court permitted the Little Sisters of the Poor Jeanne Jugan Residence to intervene as a defendant. Order, *California v. Dep't of Health & Human Servs.*, No. 17-5783 (N.D. Cal. Dec. 29, 2017).

The Ninth Circuit affirmed the preliminary injunction, but limited its reach to the plaintiff states because "[o]n the present record, an injunction that applies only to the plaintiff states would provide complete relief to them." *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018).

of that order. C.A. App. 4. Weeks later, the agencies appealed as well. C.A. App. 1.

After entry of the preliminary injunction, the Third Circuit reversed the district court's denial of petitioner's motion to intervene and ordered that petitioner be permitted to intervene only "for the purpose of defending the portions of the religious exemption [interim final rule] that apply to religious nonprofit entities." *Pennsylvania v. President*, 888 F.3d 52, 62 (3d Cir. 2018).

b. Following the Third Circuit's intervention decision, and while appeals of the preliminary injunction were pending, two consequential events happened. First, as already described, the Colorado injunction permanently relieved petitioner of its duty to comply with the contraceptive guarantee or the accommodation. Order at 2–3, *Little Sisters of the Poor v. Azar*, No. 13-2611 (D. Colo. May 29, 2018). Second, rather than withdraw the interim final rules, the agencies replaced the interim final rules with nearly identical final rules. See 83 Fed. Reg. 57,536 (Nov. 15, 2018) (religious exemption); 83 Fed. Reg. 57,592 (Nov. 15, 2018) (moral exemption).

Like the interim versions, the final rules authorized all private entities to opt out of the contraceptive guarantee for religious reasons; allowed all but publicly traded corporations to do so for moral reasons; reiterated that compliance with the accommodation was voluntary; and affirmed that the rules do not impose any notice requirement on employers that

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The Little Sisters petitioned for a writ of certiorari from the Ninth Circuit's decision, which was denied. *Little Sisters of the Poor Jeanne Jugan Residence v. California*, 139 S. Ct. 2716 (2019).

opt out. 83 Fed. Reg. at 57,558–65; 83 Fed. Reg. at 57,614, 57,617–18.

Following publication of the final rules, Pennsylvania, joined by New Jersey (collectively, "the States"), filed an amended complaint and again moved for a preliminary injunction, which the district court granted. The court concluded that the States are likely right that the final rules fail to comply with the APA's procedural requirements. App. 89a–98a. Separately, the court resolved, the final rules exceed the agencies' statutory authority under the ACA and RFRA does not furnish an independent basis for the religious exemption. App. 98a–121a. Irreparable harm to the States, the balance of equities, and the public interest all counseled for an injunction, the court decided. App. 121a–26a. This injunction, the district court specified, operates nationally to protect the States from costs that would be incurred if, for example, a State resident's out-of-state employer dropped contraceptive coverage or if a student attending an in-State school lost contraceptive coverage through her out-of-state plan. App. 126a–37a. Nothing in the injunction, the district court explicitly stated, disturbed the Colorado injunction. App. 126a n.27.

c. Petitioner and the agencies both appealed from the district court's order, C.A. App. 53a, 56a, and the Third Circuit consolidated the two appeals with the still-pending appeals of the first preliminary injunction.

The Third Circuit unanimously affirmed the second injunction. Before discussing the merits, however, it held that petitioner lacked appellate standing. App. 15a n.6. Because petitioner is protected by the

permanent injunction entered in Colorado, the court reasoned, petitioner is "no longer aggrieved by the district court's ruling." App. 15a n.6.

As for the merits, first, the court of appeals rejected the agencies' assertion that they had specific statutory authorization or good cause to forgo notice-and-comment rulemaking. App. 29a–35a.

Second, although the agencies received comments between the interim final rules and the final rules, the court concluded that the final rules are procedurally improper as the agencies did not review the comments with an open mind. App. 35a–37a. Indeed, by the agencies' account, the two sets of rules are materially indistinguishable and each relied on the same rationale. App. 35a–37a. Beyond closed-mindedness, the agencies' process impermissibly moved the goalposts. App. 37a–38a. Rather than commenting on possible implementation of new rules, the public was invited to comment on whether the agencies should abandon existing rules. App. 37a–38a.

Third, the court found that the final rules exceed the agencies' authority under the ACA, which assigns HRSA authority only to identify covered services, not authority to decide who must provide them. App. 38a–43a. Likewise, RFRA is not a basis for the religious exemption. The Third Circuit assumed without deciding that RFRA might supply all agencies with affirmative rulemaking authority. App. 43a–44a. But even if so, the accommodation does not place a burden on religious exercise and therefore the religious exemption was not required by RFRA. App. 44a–48a.

After confirming that the district court had not abused its discretion as to the remaining preliminary injunction considerations, the Third Circuit affirmed the injunction. App. 48a–49a. The court of appeals also found that the district court acted within its discretion entering the injunction nationwide. The court reasoned that a nationwide preliminary injunction is a fitting remedy because the likely final remedy for an APA violation is vacatur of the challenged rules. App. 49a–51a. Additionally, the record established that without a nationwide injunction the States would not be completely protected from costs associated with providing contraceptive coverage to employees and students living in state, but covered by an exempted out-of-state plan. App. 51a–52a.[6]

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[6] Like the interim rules, the final rules are subject to a second injunction. In the parallel California litigation, the district court determined that the final rules likely are not permitted by the ACA and that RFRA does not supply an alternative substantive basis for the final religious exemption. *California v. Dep't of Health & Human Servs.*, 351 F. Supp. 3d 1267, 1284–97 (N.D. Cal. 2019). "On the present record," the district court ruled, the plaintiffs had not shown a nationwide injunction was needed for complete relief from the final rules, so the injunction applied in only the plaintiff states. *Id.* at 1300–01.

Since the petition was filed, the Ninth Circuit affirmed that injunction. See *California v. Dep't of Health & Human Servs.*, 941 F.3d 410 (9th Cir. 2019). The court of appeals agreed the final rules exceed the agencies' authority under the ACA. *Id.* at 424–26. And like the Third Circuit, the Ninth Circuit assumed, but did not resolve, that RFRA delegates rulemaking authority to agencies. *Id.* at 427. Even under that broad understanding of RFRA, it concluded that the statute does not support the final rules, for three reasons: First, the final rules undermine women's access to preventive care, contrary to the Women's Health Amendment. *Id.* Second, the final rules do not depend on an individualized determination of the government's interests at

REASONS FOR DENYING THE PETITION

The Third Circuit correctly held that petitioner lacked appellate standing because it is not affected by the preliminary injunction entered below. After being permitted to intervene in this case, petitioner obtained a permanent injunction in a separate proceeding that prevents the agencies from enforcing the contraceptive guarantee against it. The Third Circuit rightly concluded that petitioner suffered no injury as a result of the district court's injunction of the religious exemption, and therefore lacked standing to appeal.

That decision reflects nothing more than the application of a well-settled rule, recently articulated in *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) ("[S]tanding 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'") (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (2013)). Petitioner does not claim that the decision conflicts with that of any other court of appeals, nor does petitioner identify any particular reason why the issue warrants this Court's attention. And despite characterizing the court of appeals' analysis as both "egregiously wrong," Pet. 18, and "flatly wrong,"

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stake or the burden on religious exercise, an inquiry RFRA demands. *Id.* at 427–28. Third, the accommodation does not substantially burden religion. *Id.* at 428–30.

The First Circuit, for its part, recently reversed a district court decision dismissing on jurisdictional grounds a third challenge to the final rules. See *Massachusetts v. Dep't of Health & Human Servs.*, 923 F.3d 209 (1st Cir. 2019). That challenge to the final rules remains pending. *Massachusetts v. Dep't of Health & Human Servs.*, No. 17-11930 (D. Mass.).

Pet. 19, petitioner offers only a halfhearted response resting on an argument never made in briefing below and which lacks any support in the record.

Even if petitioner did have appellate standing, this case is not the appropriate vehicle to address any of the other issues raised. Petitioner was permitted to intervene in this matter to defend only one of the two rules at issue, and only as that rule pertains to a single class of employers. While petitioner lumps the multiple merits issues in this case into a single question presented, the decision below rested on two independently sufficient bases for enjoining the religious exemption, neither of which is subject to a circuit split nor otherwise deserving of this Court's attention. Petitioner tries to link the various issues by suggesting that the court of appeals' analysis of the Religious Freedom Restoration Act (RFRA) somehow "infected" its other conclusions, but the opinion itself supports no such conclusion. And petitioner for the first time challenges the geographic scope of the injunction entered below, despite the district court's fact-bound and correct determination.

The petition should be denied.

I. The court of appeals' decision that petitioner lacks appellate standing is correct and does not warrant review.

The Third Circuit's ruling that petitioner lacked standing to appeal from the district court's preliminary injunction order satisfies none of the ordinary criteria for granting certiorari. Petitioner identifies no conflict with any decision from any other court of appeals. Nor does petitioner ask this Court to exercise its supervisory power to correct a gross departure from the accepted and usual course of judicial

proceedings. Instead, petitioner asserts only that the Third Circuit's ruling was "both unnecessary and wrong." Pet. 18. But petitioner is mistaken on both points. And, in any event, the Third Circuit's application of settled law on appellate standing to the particular facts of this appeal does not warrant this Court's discretionary review.

1. The Third Circuit correctly concluded that petitioner "lack[s] appellate standing" because petitioner is "no longer aggrieved by the District Court's ruling." App. 15a n.6. Petitioner does not contend that the Third Circuit applied the wrong rule of law in reaching its conclusion—and for good reason. See Pet. 19. The rule applied by the Third Circuit is well established. See, *e.g.*, *Hollingsworth*, 570 U.S. at 705 (noting that "standing must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance") (internal quotation marks omitted); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 376 (1987) ("An intervenor may appeal from 'all interlocutory and final orders *that affect him*.'") (emphasis added) (quoting 7C C. Wright, A. Miller, & M. Kane, Federal Practice and Procedures Procedure § 1923, p. 517 (2d ed. 1986)).

The Third Circuit also properly applied this legal standard. The court recognized that petitioner is protected from agency enforcement of the contraceptive guarantee by a permanent injunction entered just weeks after petitioner was permitted to intervene in this litigation. App. 15a n.6 (citing Order at 2–3, *Little Sisters of the Poor v. Azar*, No. 13-2611 (D. Colo. May 29, 2018)). The Third Circuit further recognized that the district court had expressly left the Colorado injunction undisturbed. App. 126a n.27. As a result,

the court of appeals correctly concluded that petitioner was not aggrieved by the district court's order.

In response, petitioner first asserts (at 19) that the Colorado injunction protects petitioner only insofar as petitioner continues to participate in its current benefit plan, while the religious exemption would protect petitioner even if petitioner were to change plans in the future. But petitioner did not raise this argument until oral argument, and did not offer any supporting evidence, see Reply C.A. Br. 35–36, so it has been forfeited, see *Adams v. Robertson*, 520 U.S. 83, 90 (1997) (refusing to reach question that party had not properly presented below); see also *Montrose Med. Grp Participating Savs. Plan v. Butler*, 243 F.3d 773, 783 (3d Cir. 2001) (treating argument as waived because it was not raised until oral argument).

Even if not forfeited, the Colorado injunction currently shields petitioner from any infringement of its asserted rights, and petitioner has offered no evidence of its intent to change plans. *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1737 (2016) (noting that "the party invoking federal jurisdiction bears the burden of establishing that he has suffered an injury by submitting affidavit[s] or other evidence") (internal quotation marks omitted). In fact, in their Colorado class action complaint, the Little Sisters' affiliate represented that they have worked with the Christian Brothers trust for decades. See Compl. ¶ 8, *Little Sisters of the Poor v. Azar*, No. 13-2611 (D. Colo. Sept. 24, 2013). The mere suggestion—however remote and unsubstantiated—that petitioner could switch plans in the future, and thereby strip itself of the protection of the Colorado injunction, is too "conjectural" and "hypothetical" to establish petitioner's

appellate standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

Petitioner also attempts to construct appellate standing from the apparent legal disagreement between the Third Circuit and the Colorado district court. Pet. 20. But an abstract interest in furthering a particular legal theory, as opposed to relieving an actual injury, is not a sufficient basis for constitutional standing. See *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 471–72 (1982). Moreover, the Colorado injunction was based on an unopposed motion for relief, not an actual case or controversy. See Unopposed Mot. to Reopen & Entry of Permanent Inj., *Little Sisters of the Poor v. Azar*, No. 13-2611 (D. Colo. May 16, 2018); Resp., *Little Sisters of the Poor v. Azar*, No. 13-2611 (D. Colo. May 18, 2018).

2. Petitioner also contends (at 18–19) that it was "unnecessary" for the court of appeals even to consider petitioner's appellate standing because the federal government also appealed from the same district court order. Petitioner is incorrect, and its argument would not support granting the petition in any event.

Petitioner and the federal government filed separate appeals from the district court's preliminary injunction order, just as they now have filed separate petitions for certiorari. Petitioner invoked the Third Circuit's jurisdiction by filing its notice of appeal the day the district court entered its preliminary injunction. C.A. App. 56. The federal government appealed several days later, and its appeal was docketed separately by the Third Circuit. C.A. App. 53. Petitioner and the federal government similarly appealed separately from the district court's order preliminarily

enjoining the interim final rule. Petitioner also filed a notice of appeal the day the injunction was entered, while the government filed its appeal nearly eight weeks later. These appeals were likewise docketed separately. C.A. App. 1, 4.

The Third Circuit subsequently consolidated the four appeals and issued a single opinion explaining its disposition of all four. Such treatment does not "completely merg[e] the constituent" cases into one, but rather "enabl[es] more efficient case management while preserving the distinct identities of the cases and the rights of the separate parties in them." *Hall v. Hall*, 138 S. Ct. 1118, 1125 (2018). The mere fact that both parties seek review of the same court of appeals judgment does not erase the "distinct identities" of the separate appeals." *Id.* Nor does it affect the "distinct . . . rights of the parties" in the separate appeals. *Id.* Just as a party's right to invoke a district court's jurisdiction depends on its capacity to demonstrate standing, so too must the parties demonstrate standing when they separately appeal a district court's order.

None of the authorities cited by petitioner supports the conclusion that the Third Circuit was free to ignore petitioner's lack of appellate standing. *Arizonans for Official English* confirms that "[a]n intervenor cannot step into the shoes of the original party unless the intervenor independently fulfills the requirements of Article III." 520 U.S. at 65. That case did not hold, as petitioner claims (at 19), that "defendant-intervenors do not need to show standing unless they are going it alone." Rather, the Court determined it need not address the question of standing because the case could be decided on mootness grounds, and both issues "go[] to the Article III juris-

diction of this Court and the courts below, not to the merits of the case." *Id.* at 66–67.

Nor does *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), aid petitioner's argument. As petitioner concedes, *Virginia House of Delegates* held that a party must demonstrate appellate standing if it seeks to "invoke[e] a court's jurisdiction." 139 S. Ct. at 1951. Despite its protestations, petitioner *did* seek to invoke the court of appeals' jurisdiction: it appealed on its own from the preliminary injunction, and did so well before the federal government had filed an appeal. It cannot have it both ways by now claiming that it was "merely appear[ing] . . . in support of another party." Pet. 18 (internal quotation marks omitted).

In sum, the Third Circuit correctly held that petitioner lacks standing to appeal from a district court order entering a preliminary injunction that does not affect petitioner and petitioner's rights are protected by a separate permanent injunction entered by another court. Petitioner's complaints about the Third Circuit's analysis turn on the particular facts of this case and do not warrant review by this Court.

II. The court of appeals' decision that the religious exemption is likely unlawful is correct and does not warrant this Court's review.

The court of appeals concluded that the States were likely to succeed in establishing that the religious exemption is unlawful for two independent reasons: First, it found that the agencies had improperly failed to follow the notice-and-comment procedures set forth in the Administrative Procedure Act (APA). Second, it found that the agencies lack

statutory authority to issue the rule, either under the Affordable Care Act (ACA) or under RFRA. Neither of the independent conclusions warrants review.

A. The court of appeals' decision that the agencies likely violated the APA when promulgating the religious exemption is correct and does not warrant this Court's review.

The court of appeals enjoined enforcement of the interim religious exemption because the agencies acted unlawfully in dispensing with the APA's notice-and-comment requirement before issuing the interim final rule, and the perfunctory post-promulgation comment period did not cure the violation. Petitioner insists that the Third Circuit erred because the agencies properly invoked the APA's good-cause standard to do away with notice and comment before issuing the interim final religious exemption, and, even if the interim religious exemption was improper, the comment period that followed the interim rule cured the defect. Pet. 29–30. Although petitioner considers the Third Circuit to have erred in each conclusion, petitioner does not allege that either conflicts with that of any other court or departs from the usual course of judicial proceedings. For those reasons alone, the petition, should be denied. In any event, the Third Circuit's conclusions are sound.

1. Petitioner maintains (at 29–30) that the interim religious exemption was properly issued without public notice or opportunity to comment because, in the agencies' view, the rule needed to end ongoing violations of RFRA. Eliminating those perceived legal violations, petitioner says, qualifies as good cause

under 5 U.S.C. § 553(b)(3)(B) to forgo notice and comment. But petitioner offers no authority for that sweeping proposition, and the Third Circuit rightly rejected it. As that court explained, all regulations remedy some perceived harm and endorsing petitioner's view of the good cause standard would mean the end of notice and comment as a public check on agency rulemaking. App. 33a–34a, 33a n.23. And contrary to petitioner's assertion (at 29), whether the religious rule actually remedied RFRA violations did not feature anywhere in the court's analysis of good cause. App. 32a–35a.

2. Next, petitioner claims (at 30) that the Third Circuit was wrong to rule "that notice and comment on a final rule can never cure the failure to provide notice and comment on an interim rule." According to petitioner, the lower court should have applied a harmless error standard that accounts for case-specific factors. Pet. 30–31. But petitioner is fighting a strawman. Contrary to petitioner's characterization, the decision below rested on a fact-specific analysis of whether the agencies kept an open mind about their own rule during the post-promulgation comment period such that the APA-required comment period was meaningful. App. 36a–37a. The record shows they had not. App. 36a–37a.

B. The court of appeals' decision that the agencies likely lacked statutory authority for the religious exemption is correct and does not warrant this Court's review.

The second basis for the court of appeals' ruling that the states were likely to succeed on the merits of their claim—that the agencies lacked statutory au-

thority for the religious exemption—likewise does not warrant this Court's review.

The court of appeals rejected the argument that the agencies have authority under the ACA to issue the religious exemption. App. 32a–36a. In addition, the court of appeals, after assuming that RFRA grants agencies rulemaking authority—a question that has been subject to little analysis in the lower courts—correctly concluded that RFRA does not require the religious rule because the accommodation does not substantially burden religious exercise. These conclusions do not warrant review.

1. There is no basis for reviewing the Third Circuit's decision that the Women's Health Amendment does not authorize the religious exemption.

The court of appeals properly concluded that the agencies lacked statutory authority under the Women's Health Amendment to promulgate the religious exemption.[7] Review is not warranted; petitioner presents no conflict among the lower courts nor any reasons to overturn the Third Circuit's straightforward textual analysis.

1. Petitioner has not identified a division among the lower courts as to whether the Women's Health Amendment grants agencies the authority they claim, and there is none. The only two courts of appeals to examine the issue both reached the same conclusion: The Women's Health Amendment authorized HRSA to determine *which* preventive ser-

[7] For the moral exemption, the Women's Health Amendment is the sole source of authority. App. 43a n.27. But petitioner defends only the religious exemption. Pet. 11 n.4.

vices must be covered, but it did not give the agency discretion to determine *who* is required to cover those services. App. 38a–43a; *California v. Dep't of Health & Human Servs.*, 941 F.3d 410, 424–46 (9th Cir. 2019) ("*California IV*"). Congress already made clear *who* was to cover these services: "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage." 42 U.S.C. § 300gg-13(a).

2. The common resolution is unsurprising as the court of appeals' reading of the statute is the only reasonable reading. The ACA imposes a mandatory obligation:

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

42 U.S.C. § 300gg-13(a)(4) (emphasis added). The Third Circuit rightly concluded that nothing in the plain language "gives HRSA the discretion to wholly exempt actors of its choosing from providing the guidelines services." App. 33a.

Petitioner offers no competing analysis of the Women's Health Amendment's text. See Pet. 27–29. Instead, petitioner contends only that the agencies have previously relied on the Women's Health Amendment as authority to modify who must comply with the contraceptive guarantee, and under what circumstances. But courts still must independently review the claimed statutory authority for the agencies' action. The Third Circuit performed that independent review, and petitioner suggests no reason that court was wrong.[8]

2. It is premature to address whether RFRA grants agencies regulatory authority.

Petitioner next claims (at 20–24) that the accommodation violates RFRA and so it provides independent authority for the religious exemption rule. Yet before considering whether the accommodation violates RFRA, the Court would have to accept that RFRA delegates rulemaking power to executive branch agencies. Like all rules, the religious exemption, "must be promulgated pursuant to authority Congress has delegated to the official." *Gonzales v. Oregon*, 546 U.S. 243, 258–59 (2006); see *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986)

[8] Petitioner takes issue (at 28–29) with the court of appeals' suggestion that the preexisting exemption for churches and house of worship—which is not at issue in this case—could be grounded in the ministerial exception. App. 33a–34a n.26; see 76 Fed. Reg. 46,623 (recognizing need for exemption to "respect[] the unique relationship between a house of worship and its employees in ministerial positions"). But whether the church exemption precisely "map[s] on" to the ministerial exemption, Pet. 28, has no bearing on the validity of petitioner's expansive reading of agency authority under the Women's Health Amendment.

("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

Contrary to petitioner's assertion (Pet. 24–25), this threshold question has been acknowledged, but not decided, by the courts of appeals. App. 43a–48a (assuming that "RFRA provides statutory authority for the Agencies to issue regulations"); *California IV*, 941 F.3d at 427 (questioning "whether RFRA delegates to any government agency the authority to determine violations and to issue rules addressing alleged violations," but declining to resolve the question and instead assuming that "agencies are authorized to provide a mechanism for resolving perceived RFRA violations").

Petitioner points to no provision of RFRA providing executive branch agencies with independent rulemaking authority. That RFRA "applies to all Federal law," Pet. 25 (citing 42 U.S.C. § 2000bb-3(a)), is unremarkable in a statute allowing a person to challenge any "rule of general applicability" for burdening her religious exercise. 42 U.S.C. § 2000bb-1(c). Petitioner is also wrong to equate (Pet. 26) a statement that exemptions permitted under the Establishment Clause do not violate RFRA with rulemaking authority. *Id.* § 2000bb-4; see S. Rep. No. 103-111, at 12–13 (1993); *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001). And neither of petitioner's examples of prior rules purportedly authorized by RFRA (Pet. 26 n.11) rely on that statute as a source of rulemaking authority, much less the sole source of authority the agencies need it to be here.[9]

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[9] In promulgating 42 C.F.R. 54.5, HHS simply acknowledged the existence of RFRA. 68 Fed. Reg. 56,435 (Sept. 30, 2003) ("[W]here a religious entity establishes that its exercise of

Thus, to conclude that the final rule alleviates a RFRA violation, the Court first must accept that RFRA delegates rulemaking authority absent an explicit statement from Congress. That judgment would be rendered without the benefit of any meaningful lower court analysis, much less a circuit split. The Court should decline petitioner's invitation to address this matter of first impression.

3. The Third Circuit's decision is correct.

As petitioner correctly summarizes, RFRA creates an individualized private right of action empowering courts to resolve "whether government action in fact substantially burdens religious exercise and passes strict scrutiny." Pet. 27. A federal law violates RFRA only if it fails a three-part test: it (a) "substantially burdens a person's exercise of religion," and is (b) not "in furtherance of a compelling government interest" or (c) not "the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb-1(a)–(b).[10] The Third Circuit correctly enjoined the religious exemption rule because the ac-

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religion would be substantially burdened by the religious nondiscrimination provisions cited above, RFRA supersedes those statutory requirements, thus exempting the religious entity therefrom, unless the Department has a compelling interest in enforcing them."). Petitioner's other example involves regulations protecting eagles under the Bald and Golden Eagle Protection Act; the agency mentioned RFRA in passing when responding to a public comment about a permit issued to the Hopi Tribe. 81 Fed. Reg. 91,537 (Dec. 16, 2016).

[10] Petitioner incorrectly claims RFRA cannot tolerate "an 'accommodation' of religious exercise that itself substantially burdens religion." Pet. 21. RFRA requires this result only if the government does not employ the least restrictive means of furthering a compelling government interest.

commodation does not run afoul of the first part: "the status quo prior to the new Rule, with the accommodation, did not infringe on the religious exercise of covered employers, nor is there a basis to conclude the accommodation process infringes on the religious exercise of any employer."[11] App. 48a. Petitioner's argument to the contrary (Pet. 20–24) has no merit.

First, the Third Circuit properly understood that while courts must "defer to the reasonableness of an objector's religious beliefs," they must also engage in an "objective evaluation of the nature of the claimed burden and the substantiality of that burden on the objector's religious exercise." App. 44a n.28 (citations omitted). Petitioner does not challenge this approach, and rightly so. *Hobby Lobby* affirmed that courts must determine whether a given law "imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs." 573 U.S. at 724.

Second, the Third Circuit rightly concluded that the accommodation does not impose such a burden: it "does not trigger or facilitate the provision of contraceptive coverage because coverage is mandated to be otherwise provided by federal law." App. 45a (internal quotation marks omitted). Unlike the contraceptive guarantee itself, which requires employers to pay for health insurance, the accommodation allows employers to opt out of providing coverage while still enabling "women to receive statutorily mandated health care." App. 45a. That women may still receive insurance coverage to which some employers object

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[11] The Third Circuit certainly did not "insist that the government [] employ the least religiously accommodating means possible." Pet. 27.

does not transform the accommodation into a RFRA violation. App. 46a. Petitioner's only counterargument rests on a mischaracterization of the briefing and oral argument in *Zubik*.[12]

Finally, the Third Circuit correctly held that the Rule "would impose an undue burden on nonbeneficiaries—the female employees who will lose coverage for contraceptive care." App. 47a. Petitioner again does not dispute this conclusion, and for good reason. In *Hobby Lobby*, this Court reaffirmed the importance of courts "tak[ing] adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." 573 U.S. at 729 n.37 (internal quotation marks omitted). Here, the agency's proposed RFRA remedy excludes women from access to the contraceptive coverage mandated by Congress and

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[12] Petitioner falsely asserts that "concessions" by the government about the operation of the accommodation led this Court to vacate the court of appeals' decisions in *Zubik*. Pet. 9–10, 22–23. There is no truth to this claim. See States' Opp. to Mots. for Summ. J. & Reply Mem. in Supp. of Mot. for Summ J. at 7–8, 7 n.5 (E.D. Pa. June 28, 2019). Following argument in *Zubik*, the Court requested supplemental briefing on "whether and how contraceptive coverage may be obtained by petitioners' employees through petitioners' insurance companies, but in a way that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees." *Zubik v. Burwell*, 194 L. Ed. 2d 599 (Mar. 29, 2016). Based on the responses to this order, the Court vacated the courts of appeals' decisions and remanded the cases to provide the parties with "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage." *Zubik*, 136 S. Ct. at 1560 (internal quotation marks omitted).

this Court. *Zubik*, 136 S. Ct. at 1560 (requiring agencies to "ensur[e] that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage"). This is the antithesis of enforcing the contraceptive coverage guarantee via less restrictive means. See *Priests for Life v. Dep't of Health & Human Servs.*, 808 F.3d 1, 23–26, 26 n.12 (2015) (Kavanaugh, J., dissenting from denial of rehearing en banc) ("A means that is not a reasonably feasible way of furthering the Government's interest cannot be deemed a less restrictive means of furthering that interest.").

III. The scope of the preliminary injunction does not warrant this Court's review.

Finally, this Court should not review the fact-bound and correct determination that the religious exemption must be preliminarily enjoined nationwide to provide the States complete relief. As an initial matter, petitioner did not challenge the scope of the injunction below, so this claim has been forfeited, see *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1009 (2017). Even if not forfeit, petitioner's contentions that the injunction has subjected the agencies to conflicting obligations and has stalled further consideration of the relevant legal questions are both wrong.

1. This Court resolved long ago that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamaski*, 442 U.S. 682, 702 (1979); see also *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Application of that rule is fact-specific, calling on district court judges to exer-

cise "discretion and judgment." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

The courts below entered and affirmed, respectively, the contested injunction because the record demonstrates that nationwide relief is the least burdensome way to completely relieve the States of their injuries. App. 43a–44a, 175a–76a. As the district court found, "[h]undreds of thousands of the States' citizens travel across state lines—to New York, Ohio, Delaware, Maryland, West Virginia and even further afield—to work for out-of-state entities," and there is an annual influx of "tens of thousands of out-of-state students" into each of the States. App. 180a–81a. Without nationwide relief, the States would bear the cost of contraceptive care for citizens covered under an out-of-state employer's exempted plan and for any student attending school in one of the States but covered under an exempted out-of-state plan. App. 181a. The Third Circuit affirmed the injunction based on these same facts. App. 44a–46a. These fact-bound decisions do not meet this Court's standards for review.

2. Contrary to petitioner's assertion (at 32), nothing about the injunction entered below puts the agencies to an unsolvable conflict. Tellingly, the agencies themselves claim no such burden. See Pet. at 32–35, *Trump v. Pennsylvania*, No. 19-454. Under the injunction, the agencies may not enforce the religious exemption rule. App. 54a. That some courts, after the government stopped defending lawsuits challenging the contraceptive guarantee and accommodation, have enjoined the agencies from enforcing either against specific plaintiffs creates no conflict. Indeed, the district court here was explicit that the injunction entered below does not disturb the Colo-

rado injunction that protects petitioner's interests. App. 126 n.27.

Nor has petitioner's prediction (at 32–33) that the injunction below would end parallel proceedings borne out. Since the petition was filed, the Ninth Circuit affirmed a second injunction of the religious exemption. *California IV*, 941 F.3d 410. In doing so, the Ninth Circuit rejected the argument that the nationwide preliminary injunction entered in Pennsylvania moots the parallel proceeding in California. *Id.* at 421–23. And a third challenge to the religious exemption is still ongoing. See *Massachusetts v. Dep't of Health & Human Servs.*, 923 F.3d 209 (1st Cir. 2019) (overturning decision dismissing challenge to the final rules).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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