Eric C. Rassbach – No. 288041
Mark L. Rienzi – pro hac admission pending
Lori L. Windham – pro hac admission pending
The Becket Fund for Religious Liberty
1200 New Hampshire Ave. NW, Suite 700
Washington, DC 20036
Telephone: (202) 955-0095
Facsimile: (202) 955-0090
erassbach@becketlaw.org

John C. Peiffer, II
The Busch Firm
860 Napa Valley Corporate Way, Suite O
Napa, CA 94558
Telephone: (707) 400-6243
Facsimile: (707) 260-6151
jpeiffer@buschfirm.com

Counsel for Defendant-Intervenor

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE STATE OF CALIFORNIA; THE STATE OF DELAWARE; THE STATE OF MARYLAND; THE STATE OF NEW YORK; THE COMMONWEALTH OF VIRGINIA,

Plaintiffs,

v.

ERIC D. HARGAN, in his official capacity as Acting Secretary of the U.S. Department of Health and Human Services; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; R. ALEXANDER ACOSTA, in his official capacity as Secretary of 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,

Defendant-Intervenor.

Case No. 4:17-cv-05783-HSG

DEFENDANT-INTERVENOR'S PROPOSED OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Legislative Materials

Other Authorities

STATEMENT OF THE ISSUES

Whether the States have demonstrated that they have standing to challenge, and satisfy all the factors to obtain a preliminary injunction against, two interim final rules that were prompted by prior, ongoing litigation and are designed to protect religious and moral objectors from one portion of a federal preventive services regulation.

INTRODUCTION

This Court will not be writing on a blank slate. For the past six years, courts across the country have adjudicated—and are still adjudicating—the proper relationship between the federal contraceptive Mandate and religious liberty. The dispute has been public and prominent—repeatedly reaching the Supreme Court, and generating dozens of injunctions against application of the Mandate to religious objectors. During all of this, the Plaintiff States sat on the sidelines.

Instead, in this new case, the States ask this Court to interject itself into that ongoing dispute. The States want this Court to act both urgently ("by January 1") and authoritatively (with a "nationwide injunction"). Delay will supposedly harm huge swaths of the population and wreck the States' finances. *See* Dkt. 28, States' Mot. for Peliminary Inj., ("Mot.") 20 ("could impact over half of the U.S. population"); Mot. 32 ("Even a slight uptick in such costs will cause irreparable harm to the States."). Accordingly, the States ask for a rushed injunction against an interim final rule (IFR) allowing religious exemptions.

The Court should refuse the States' request for a last minute do-over. Existing federal court orders—including, in the Little Sisters' case, *two* orders from the Supreme Court—already forbid enforcement of the federal contraceptive Mandate against religious objectors. Every religious employer the States actually name (Dkt. 24, First Am. Compl. ¶¶ 110-11) is already protected from the Mandate because of prior lawsuits and injunctions. The States cannot identify even a single employer who is expected to change coverage based on the IFR. The States thus cannot plausibly

claim an injury (much less an irreparable one) that is fairly traceable to the IFR, rather than to the pre-existing injunctions. And longstanding precedent forecloses the States' effort to sue in *parens patriae* against the federal government.

Even if the States had standing, their claims are wrong on the merits. Congress commanded the agencies to provide religious exemptions under the Religious Freedom Restoration Act ("RFRA"); obeying that command does not violate the Administrative Procedure Act or the Affordable Care Act. Nor does it violate the Establishment Clause or the Equal Protection Clause to provide religious exemptions from a contraceptive mandate—indeed, the plaintiff States do precisely that in their own mandates (a fact they all conveniently omit from discussions of their own mandates). In fact, it is the States' requested relief, not the IFR, that creates an untenable situation putting contraceptive coverage at risk. Accordingly, for the reasons set forth below, and for those set forth in Defendants' Opposition (Dkt. 51, "Defs. Opp.") which are hereby incorporated herein, the Plaintiffs' Motion should be denied.

FACTS AND BACKGROUND

A. The Federal Mandate and Its Limits

Federal law requires some employers (namely, those with over 50 employees) to offer group benefits with "minimum essential coverage." 26 U.S.C. § 5000A(f)(2), 26 U.S.C. § 4980H(a), (c)(2). That "minimum essential coverage" must include, among other things, coverage for "preventive care and screenings" for women. 42 U.S.C. § 300gg-13(a)(4); 29 U.S.C. § 1185d. Congress did not require that "preventive care" include contraceptive coverage. Instead, Congress delegated to HHS the authority to determine what should be included as preventive care "for purposes of this paragraph." 42 U.S.C. § 300gg-13(a)(4). Via a series of interim final rules, HHS determined that preventive care should include all FDA-approved contraceptives, including those that can prevent implantation of a fertilized egg. *See* 76 Fed. Reg. 46,621 (Aug. 3, 2011); 77 Fed. Reg. 8,725 (Feb. 15, 2012); 45 C.F.R.

§ 147.130(a)(1)(iv); Food and Drug Administration, *Birth Control Guide*, http://bit.ly/2prP9QN.

Not all private employers are subject to the federal contraceptive Mandate. First, the vast majority of employers—namely, those with fewer than 50 employees—are not required to provide any coverage at all.[1] Second, approximately a quarter of large employers are exempt through the ACA's exception for "grandfathered health plans." *See* 26 U.S.C. § 4980H(c)(2); 42 U.S.C. § 18011; 75 Fed. Reg. 34,538, 34,542 (June 17, 2010); Kaiser Family Found., *Employer Health Benefits 2017 Annual Survey* 204 (2017). Third, even prior to the IFR at issue here, "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order," 26 U.S.C. § 6033(a)(3)(A)(i), (iii), were exempt from the contraceptive Mandate for religious reasons. 82 Fed. Reg. 47,792, 47,795-96 (Oct. 13, 2017).

The federal government is also bound—in all of its actions, by any of its parts, under any statute—to obey federal religious freedom laws. *See, e.g.*, 42 U.S.C. § 2000bb *et seq.* (Religious Freedom Restoration Act or "RFRA"). RFRA prohibits federal agencies from imposing substantial burdens on religion unless the agency demonstrates that the burden is required by a compelling government interest and is the least restrictive means of achieving that interest. *Id.*

B. The Existing Injunctions

This lawsuit, and the States' preliminary injunction motion, are latecomers. Litigation concerning the proper relationship between the Mandate and religious groups has been ongoing since 2011. *See, e.g.*, *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25, 29 (D.D.C. 2012). Dozens of cases have been filed since then on behalf of religious objectors. The States have not intervened in any of them.

These ongoing lawsuits have resulted in dozens of injunctions from federal courts across the

[1] According to some estimates, more than 97% of employers have fewer than 50 employees, and therefore face no federal obligation to provide coverage at all. *See, e.g.*, DMDatabases, *USA Business List*, http://bit.ly/10yw56o (last accessed Dec. 6, 2017).

country, including from the Supreme Court. *See, e.g.*, *Little Sisters of the Poor v. Sebelius*, 134 S.Ct. 1022 (2014) ("the respondents are enjoined from enforcing against applicants the challenged [statute and regulations]"); *Zubik v. Burwell*, 136 S. Ct. 1557, 1561 (2016) ("the Government may not impose taxes or penalties on petitioners"). These injunctions forbid the federal government from enforcing the Mandate against all known religious objectors.[2] Several injunctions have been entered in open-ended class or associational standing cases that allow new members to join. *See, e.g.*, *Reaching Souls, Int'l, Inc. v. Sebelius*, No. CIV-13-1092-D, 2013 WL 6804259, at *8 (W.D. Okla. Dec. 20, 2013); Order, *Catholic Benefits Ass'n v. Burwell*, No. 5:14-cv-00240-R (W.D. Okla. May 28, 2015), ECF No. 107 (setting procedure for periodic updates to expand injunction to protect new members).

C. Allegations Concerning the Impact of the IFR

After years of unsuccessful attempts to justify the Mandate in court, and in compliance with injunctions forbidding enforcement against religious and moral objectors, the federal Defendants issued two interim final rules providing that the Mandate will not be enforced against employers with religious or moral objections. 82 Fed. Reg. at 47,792; 82 Fed. Reg. 47,838 (Oct. 13, 2017) (the "IFRs").[3] The IFRs otherwise leave the Mandate in place as to all employers previously covered. The IFRs also leave in place the "accommodation" by which objecting employers can request that insurers and plan administrators provide coverage instead. 45 C.F.R 147.131.

The States claim they will suffer harm from the IFRs because they will "vastly expand" the number of religious objectors, thereby "frustrat[ing] the State's public health interests" and causing the States

[2] Notre Dame, which was previously the lone exception to this pattern due to an early loss, has since indicated that it does not object to participation in the "accommodation." Tami Luhby, *Notre Dame Reverses Decision to End Birth Control Coverage*, CNN Money, Nov. 8, 2017, http://cnnmon.ie/2zI10TU. The "accommodation" is described in Defendant-Intervenor's Mot. to Intervene at 7-8.

[3] Many of the arguments presented here are relevant to both rules. Because the religious exemptions rule most directly pertains to the Little Sisters, the singular references to "IFR" are to that rule.

to "incur increased costs" to provide contraception and assist with unintended pregnancies. Am. Compl. ¶¶ 101, 14-15. But the States do not identify *even one* employer whom they expect to drop contraceptive coverage *because of the IFR*. To be sure, they each claim to have a number of (mostly unnamed) employers they say will "likely seek an exemption *or accommodation*." Am. Compl. ¶¶107-08, 113 (emphasis added). But the States make no allegation that these employers will be seeking exemption because of the IFR; in fact, the few employers actually named by the States all sued over the Mandate and, therefore, are already protected. Am. Compl. ¶ 110 (Hobby Lobby); ¶111 (Christian and Missionary Alliance and Biola University). And the States offer no facts to suggest that the religious employers will not take advantage of the accommodation, which the States themselves describe as an "automatic seamless mechanism for women to continue to receive contraceptive coverage." Am. Compl. ¶2.

The States also make no claim to know whether any other hypothetical objecting employer would even be subject to the federal Mandate at all; would employ women who do not share the employer's beliefs; would fall outside of the overlapping state mandates (Am. Compl. ¶¶ 44, 54, 64, 75); or would already be protected by an existing injunction. The States offer no facts to suggest that such employees would turn to the States for coverage, rather than to a family member's plan or the Exchanges. The States also offer no facts to suggest that the full-time employees of such employers would qualify for State aid (*e.g.*, Am. Compl. ¶49 (California state aid available only to those below 200% of federal poverty level)), and no reason to believe the employees—who by supposition are fully employed with health insurance—would somehow turn to the State to fund their alleged unintended pregnancies.

In short, out of 75 million citizens, across five States, the Complaint identifies no one whose coverage is actually expected to change because of the IFR. Zero.

ARGUMENT

I. The States lack standing.

To have standing under Article III, the States must demonstrate injury, causation, and redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). The injury must be to a "legally protected interest," *id.*, and it "must affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (citation omitted); *Lujan*, 504 U.S at 560 ("not conjectural or hypothetical" (citations and internal quotations marks omitted)). The injury must be "fairly traceable to the challenged conduct of defendant," and must be redressable by a favorable judicial decision. *Spokeo*, 136 S. Ct. at 1547. And the plaintiff must "'clearly . . . allege facts demonstrating' each element." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). The States do not come close to carrying these burdens, either in their own right or as *parens patriae*.

A. The States lack standing in their own right.

1. The States categorically lack standing to bring First Amendment or Fifth Amendment claims.

The States cite no authority for the idea that States can sue the federal government for an alleged violation of the First Amendment, and there is none we are aware of. This Court would therefore be the first court anywhere to rule that States have standing to bring Religion Clause claims against the federal government. It would be passing strange to give *State governments* the right to the free exercise of religion and church-state separation. What religion would these States exercise? And how can they have "offended observer" or taxpayer standing under the Establishment Clause, particularly to challenge an exemption rather than an expenditure? To ask these questions is to answer them.

Similarly, the States are not "person[s]" under the Fifth Amendment capable of asserting an equal protection claim. *Premo v. Martin*, 119 F.3d 764, 771 (9th Cir. 1997) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966)); *Bd. of Nat. Res. of State of Wash. v. Brown*, 992 F.2d 937,

942 (9th Cir. 1993) ("States as states clearly are not persons for Fifth Amendment purposes."); *United States v. Thoms*, 684 F.3d 893, 899 n.4 (9th Cir. 2012) (same); *State of Pa. v. Riley*, 84 F.3d 125, 130 n.2 (3d Cir. 1996) (same); *S. Dakota v. U.S. Dep't of Interior*, 665 F.3d 986, 990 (8th Cir. 2012) (same).

Finally, the States also lack prudential standing, because they are not themselves regulated by the Mandate, and they cannot plausibly claim to be within its "zone of interests." *City of Los Angeles v. Cty. of Kern*, 581 F.3d 841, 846 (9th Cir. 2009).

2. The States' claims are too speculative to support standing on any of their claims.

Lack of injury. With respect to their other claims, the States are reduced to arguing that the IFR will spark a "chain of events" Mot. 29, via which they will supposedly, someday, be injured. To hear the States tell it, there will be many employers suddenly dropping coverage, with dramatic impacts on public health, and a severe drain on the public fisc. Mot. 20 ("could impact over half of the U.S. population"); Mot. 32 ("Even a slight uptick in such costs will cause irreparable harm to the States.").

But such overheated rhetoric cannot mask the cold reality about the States' speculation. The gaping hole in the States' logic is that they fail to account for the fact that all known religious objectors are already protected by the existing injunctions. The States simply cannot show that even a single employer has dropped or will drop contraceptive coverage *because of the IFR*. The States try to obscure this failure by citing unsupported numbers of unnamed religious organizations in each State "who will likely seek an exemption *or accommodation*." *E.g.*, Am. Compl. ¶ 107 (emphasis added). But the careful inclusion of "or accommodation" makes this claim meaningless. Employers seeking the "accommodation"—which may well be everyone the States' allegation actually includes—do not threaten the States' interests at all. Am. Compl. ¶ 2 ("seamless"). And the States do not allege that any such entities are actually expected to change their coverage (on January 1 or otherwise) because of the IFR or that such entities are not already protected by individual or class-wide injunctions. Indeed, the few employers specifically mentioned in the complaint have previously sued and therefore are already

protected. Am. Compl. ¶¶ 110-11. The States thus offer no proof that an actual person—as opposed to a hypothetical person—will change coverage based on the IFR. They thus assert no injury at all, and certainly none fairly traceable to the IFR or redressable by an order against it.

The States' guesswork conveniently elides the fact that many employers in these states are already subject to state contraceptive mandates, so removing a duplicative federal mandate would cause the State no injury at all. Am. Compl. ¶¶ 44, 54, 64, 75. Many more are already not subject to the federal Mandate in the first place, either because they have fewer than 50 employees (and thus are not required to provide insurance at all) or because they have grandfathered plans. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2763-64 (2014). These employers are not obligated to provide contraceptive coverage, regardless of the IFRs, and their decisions therefore cannot cause injury via the IFRs. *Id.*

If the States could locate even one such employer who is expected to drop coverage because of the IFR, they next must speculate about the religious beliefs and choices of employees. For example, women working for religious employers may often share common religious beliefs with the ministry. *See* 82 Fed. Reg. at 47,802. They might prefer a contraceptive method still covered by their employer, since many objectors object to only 4 out of 20 FDA-approved methods. *See Hobby Lobby,* 134 S. Ct. at 2762-63. Women who do not may choose to get on a family member's plan, or get a plan from an exchange, or purchase contraception on their own. The States have no reason to believe these employed and insured women would need to rely upon state programs. And the States would only bear the cost of the feared unintended pregnancies, if, for some reason, these women with health insurance did not obtain contraceptives in some other way and did not use their health insurance for their medical expenses related to pregnancy, but instead turned to the State. The States offer no reason to think that even a single state resident will thread this particularly narrow needle; they have certainly failed to "clearly allege facts demonstrating" that these alleged future injuries are real and not speculative.

The absence of an injury is exacerbated by the fact that the States have no "legally protected interest" at stake. The States are not subject to the IFR at all. Nor are they third-party beneficiaries of private insurance contracts. Nothing in the ACA, the Mandate, or the IFR, indicates any "special solicitude" Congress (or the Executive Branch) might have shown for the States with respect to these issues. *Massachusetts. v. EPA*, 549 U.S. 497, 520 (2007). Where the States can regulate insurance contracts, they can (and often do) impose their own direct mandates (Am. Compl. ¶¶ 44, 54, 64, 75); they cannot possibly be injured by the absence of a duplicative federal mandate. To the extent those contracts *cannot* be regulated by the States—that is, because the States are constitutionally preempted from regulating (Am. Compl. ¶¶ 46, 56, 65, 78)—then the States have no "legally protected interest" in their contents at all.

Traceability and redressability. Finally, the States' injury claims fail because the alleged injuries are not "fairly traceable" to the IFR, or redressable by order of this Court. Religious objectors have held judicial exemptions from the Mandate for many years. The States offer no evidence that these exemptions have caused an iota of harm, much less the severe harms they predict. But if they do, that alleged harm was not caused by the IFR, but by pre-existing court order; and, since the States did not sue the offending courts, that alleged harm cannot be redressed by an order of this Court concerning the IFR. Accordingly, the States' motion should be denied.

B. The States lack *parens patriae* standing.

The States are also barred from asserting the rights of their citizens in *parens patriae* against the federal government. *See Massachusetts v. Mellon*, 262 U.S. 447 (1923). "[I]t is the United States, and not the state, which represents them as *parens patriae*, when such representation becomes appropriate." *Id.* at 485-86. The States seek to protect citizens from the application of RFRA, arguing that a RFRA exemption violates other laws. Mot. 13, 21-28. But, as the Supreme Court recently confirmed, such a suit is precisely "what *Mellon* prohibits," namely a suit by a State "to protect her

citizens from the operation of federal statutes." *EPA*, 549 U.S. at 520, n.166.

Also, as California recently demonstrated, "*parens patriae* standing is inappropriate where an aggrieved party could seek private relief." *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 652 (9th Cir.), *cert. denied sub nom. Missouri ex rel. Hawley v. Becerra*, 137 S. Ct. 2188 (2017); *id.* at 653 (rejecting claims as "necessarily speculative"). Aggrieved state residents—if any exist—can challenge the IFR and/or their employers' use of the exemption, without States to sue for them.

II. The States' claims are not ripe.

The States' motion must be denied for a separate constitutional and prudential reason: their claims are unripe. The "basic rationale" of ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977). "Where a dispute hangs on 'future contingencies that may or may not occur' it may be too 'impermissibly speculative' to present a justiciable controversy." *In re Coleman*, 560 F.3d 1000, 1004–05 (9th Cir. 2009) (quoting *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996) and *Portland Police Ass'n v. City of Portland*, 658 F.2d 1272, 1273 (9th Cir. 1981)).

Here, the States' claims are "impermissibly speculative." Notice-and-comment is ongoing. The States are not aware of any actual employer who will drop coverage, any actual employee who will lose coverage, and have no idea whether any such employee even wants coverage or would qualify for and seek it from the State. Their claims are thus wholly speculative and may never come to pass. Their claims are not ripe.

III. The States are not likely to succeed on their APA claims.

A. The States ignore existing injunctions.

The IFR was both directly authorized by statute and supported by good cause. Defs. Opp. at 14-19; 42 U.S.C. § 300gg-92 ("The Secretary may promulgate any interim final rules as the Secretary determines are appropriate . . ."). But the IFR cannot be fully understood apart from the litigation that spawned it, or from the federal government's long and unsuccessful record of trying to enforce the Mandate against religious objectors.

The IFR was motivated by the legal challenges to the various versions of the Mandate. *See* 82 Fed. Reg. at 47,799. [4] The government had unsuccessfully asked the Supreme Court on *five separate occasions* to allow it to force compliance by religious objectors.[5] But instead, the Supreme Court had repeatedly entered injunctions protecting objectors, and had unanimously ordered the government to find a different approach. *Zubik*, 136 S. Ct 1557. In other words, the IFR was required to ensure compliance with multiple injunctions across the country.

B. The ACA did not mandate contraceptive coverage at all, and the States' overbroad arguments would invalidate all exemptions or delays.

1. Section 2713 does not require contraceptive coverage.

The ACA did not mandate contraceptive coverage. Instead, Congress delegated to HRSA discretion to determine the contours of the preventive services guidelines. 42 U.S.C. § 300gg-13(a)(4). The States claim that the preventive care provision was included in the ACA for "the express purpose" of including contraception. Mot. 12. But they rely upon a statement in the Congressional Record from 2012, two years after passage of the ACA and months after the initial IFR establishing the Mandate.

---

[4] Cases are collected at at Becket, *HHS Mandate Information Central*, http://www.becketlaw.org/ research-central/hhs-info-central/ (last accessed December 12, 2017).

[5] *See Little Sisters of the Poor Home for the Aged, Denver v. Sebelius*, 134 S. Ct. 1022 (2014); *Hobby Lobby*, 134 S. Ct. 2751; *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014); *Zubik v. Burwell*, 135 S. Ct. 2924 (2015); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

See id. (citing 158 Cong. Rec. S375). In fact, the legislative history of the preventive services mandate has scant discussion of family planning and instead focuses primarily on mammograms and other screening tests.[6] The States therefore cannot escape the fact that it would have been perfectly consistent with the statute for HRSA to leave contraceptives off the list entirely. And Congress left the entire preventive services mandate out of its list of "particularly significant protections" that required across-the-board compliance. 75 Fed. Reg. at 34,540; *Hobby Lobby*, 134 S. Ct. at 2780.

Against this backdrop, it makes no sense to assume, as the States do, that Congress intended to foreclose exemptions, forcing HRSA to make a binary all-or-nothing choice. The better reading of the statute is the one the Obama Administration adopted in 2011 with the original church exemption, and in 2012 with the slightly expanded church exemption, and again in 2013 with the "accommodation," and again in 2014 with the modified "accommodation," which is that the delegation of authority to HRSA included the authority to balance competing interests over coverage. Defs. Opp. at 19-21. Indeed, the grant of authority specifies "comprehensive guidelines supported by the Health Resources and Services Administration," rather than merely a list of services. This shows that the authority delegated to HRSA was not merely the authority to create a list of services, but to produce "guidelines" that are "comprehensive" in scope, meaning that HRSA should provide context for the recommendations and take multiple factors into account. 42 U.S.C. § 300gg-13.

The State's all-or-nothing reading of the discretion delegated in § 2713 would foreclose any true

[6] *See, e.g.*, 155 Cong. Rec. S11987 (Nov. 30, 2009) (statement of Sen. Mikulski) ("overwhelming hurdles for women to access screening programs"); 155 Cong. Rec. S12019 (Dec. 1, 2009) (statement of Sen. Reid) ("They are skipping screenings for cervical cancer, they are skipping screenings for breast cancer, they are skipping screenings for pregnancy.") Sen. Mikulski also stated that "There are no abortion services included in the Mikulski amendment." Sen. Mikluski Floor Statement On Women's Healthcare Amendment, C-SPAN (Dec. 1, 2009). Thus including contraceptives that the FDA says may terminate an embryo was particularly suspect.

exemption for religious organizations. That approach would not result in more contraceptive coverage but less as HHS, still subject to RFRA, would have only one legally permissible choice: deleting contraceptive coverage entirely from required preventive care under the ACA, for *all* employers. The States' claimed interests are better protected by a contraceptive mandate with exemptions than with the only legal alternative: no contraceptive mandate at all.[7]

2. Section 1557 does not require contraceptive coverage.

The States next argue that the IFR violates Section 1557 of the ACA, which prohibits discrimination "on the ground prohibited under . . . title IX of the Education Amendments of 1972." 42 U.S.C. § 18116. But Title IX does not apply to organizations "controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681. Therefore an exemption which protects religious organizations cannot be inconsistent with Section 1557, since Section 1557 itself incorporates the broad exemption scheme of Title IX. *See Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 690 (N.D. Tex. 2016) (noting both religious and abortion exemptions).[8]

In 2016, HHS issued a rule interpreting Section 1557. A portion of that rule has been enjoined as contrary to law. *Franciscan All.*, 227 F. Supp. 3d at 691. But even that overbroad rule did not claim to incorporate the contraceptive Mandate into Section 1557. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376-401 (May 18, 2016) (no mention of "contraception"). Thus, to strike down this IFR under Section 1557, the Court would have to reach significantly beyond any prior judicial construction of Section 1557; beyond the previous HHS interpretation of Section 1557 (which

[7] Which, presumably, is why the States themselves have also provided religious exemptions in their own contraceptive mandates. *See infra* at 22-23.

[8] Notably, the Title IX abortion provision applies specifically to non-religious entities, since religious institutions are already exempt from Title IX.

was itself deemed contrary to law); and beyond the plain language of Section 1557, which incorporates religious and abortion exemptions. The States have no likelihood of success on such a claim.

3. Section 1554 does not require contraceptive coverage.

Nor does Section 1554 prohibit the IFR. As set forth above, Congress itself (a) chose not to mandate contraceptive coverage at all but instead to leave the matter entirely to HRSA's discretion, and (b) chose not to require grandfathered plans covering tens of millions of people to cover preventive services. In light of these choices, it makes no sense to suggest that the ACA treats failure to extend a mandate to each and every potential employer as "creat[ing] an[] unreasonable barrier[]" or "imped[ing] timely access to health care." 42 U.S.C. § 18114. The ACA itself flunks that test far worse than the comparatively tiny IFRs ever could. Furthermore, in light of (a) the existing injunctions, (b) the wide availability of contraceptives generally, and (c) the many State programs available to provide contraceptives to those who cannot afford them, the IFR cannot be said to create an unreasonable barrier or impede timely access.

C. RFRA permits and in fact requires HHS to create religious exemptions.

1. The IFR was mandated by RFRA.

As the Little Sisters have long maintained, and HHS now admits, a broad religious exemption is mandated by RFRA. RFRA's requirements are stringent. It applies "to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a)-(b). RFRA thus applies to the ACA, regulations promulgated under it, and the implementation of those regulations. *Hobby Lobby*, 134 S. Ct. at 2761-62.

Under RFRA, a regulation which imposes a substantial burden on religious exercise must pass strict scrutiny. As the Supreme Court has held, "Because the contraceptive mandate forces them to pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs." *Hobby*

Lobby, 134 S. Ct. at 2779. The Little Sisters cannot, in good conscience, provide these services on their health benefits plan or authorize others to do so for them. Dkt. 38-3, Decl. of Sr. McCarthy ¶¶ 35-51. Therefore the Mandate must pass strict scrutiny if it is to be applied to the Little Sisters—something that the government admits it cannot do. 82 Fed. Reg. at 47,800-06. Even prior to that admission, the government's myriad exemptions from the Mandate, its ever-shifting enforcement schemes, and the vast range of alternative sources of contraception confirmed that its interest in enforcing the Mandate against religious objectors was not compelling, and that less restrictive alternatives were available. *See infra*. Therefore HHS was not just acting within its discretion, but statutorily required to broaden the Mandate's exemptions.

2. Even if the IFR were not mandated, RFRA grants HHS authority to lift government-created burdens on religious exercise.

Congress made RFRA applicable to all federal statutes, regulations, and their implementation. 42 U.S.C. § 2000bb-3(a)-(b). As the Ninth Circuit has recognized, "Congress derives its ability to protect the free exercise of religion from its plenary authority found in Article I of the Constitution; it can carve out a religious exemption from otherwise neutral, generally applicable laws based on its power to enact the underlying statute in the first place." *Guam v. Guerrero*, 290 F.3d 1210, 1220 (9th Cir. 2002). In other words, Congress has discretion to carve out religious exemptions broader than those required under the Free Exercise Clause. Through RFRA, Congress has adopted a broad policy of lifting burdens on religious exercise, and in doing so it has delegated authority to the agencies to create exemptions to protect religious exercise.

In so doing, Congress emphasized that RFRA should not be read "to authorize any government to burden any religious belief." 42 U.S.C. § 2000bb-3. In other words, RFRA's test for when government-imposed burdens are prohibited should not be read as an authorization—much less a requirement—to impose burdens that might be permissible. This reading is confirmed by RFRA's

provision treating the Establishment Clause as the outer limit on exemptions: "Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter." 42 U.S.C. § 2000bb-4.

RFRA thus contemplates that the government may choose to grant discretionary benefits or exemptions to religious groups over and above those which are strictly required by RFRA. It authorizes the government to carve out exemptions up to the limits imposed by the Establishment Clause, and to do so in regulations and the "implementation" of the law. 42 U.S.C. § 2000bb-3(a)-(b). RFRA thus operates as a floor on religious accommodation, not a ceiling. HHS was well within its rights to use the discretion granted under RFRA to create exemptions, even if those exemptions had not been required by RFRA's substantial burden provision.

This approach is consistent with longstanding Free Exercise and Establishment Clause precedent. The Supreme Court has long permitted the government to act to lift burdens on religious exercise, even when such accommodations are not constitutionally required. In *Corporation of the Presiding Bishop v. Amos*, the Supreme Court unanimously upheld Title VII's exclusion of religious organizations from the prohibition on religious discrimination. 483 U.S. 327 (1987). It did so regardless of the fact that the First Amendment does not require religious organizations to be exempt in all cases. *Id.* at 334-35. As described below, the IFR easily passes Establishment Clause muster. So it is well within the discretion committed to HHS under the ACA and RFRA.

IV. The IFR does not violate the Establishment Clause.

A. The States misapply the Establishment Clause in contradiction of Supreme Court and Ninth Circuit precedent.

The States' Establishment Clause argument misapplies, or outright ignores, binding precedent. Their overbroad reading of the Establishment Clause would invalidate a host of laws protecting religious minorities, as well as the States' own religious protections in their contraceptive mandates.

1. The States wrongly rely upon *Lemon*, rather than *Town of Greece*.

The States and Defendants both wrongly assume that the *Lemon* test controls Establishment Clause analysis. But the Supreme Court has moved away from *Lemon* and required courts to focus on the historical purposes of the Clause, as outlined in *Town of Greece*. That decision is binding on this Court.

The *Lemon* test has been one of the most harshly criticized tests in all of constitutional law. At least ten recent Supreme Court Justices have criticized it, including five *current* Justices.[9] One of its most forceful critics has been Justice Kennedy, who has argued for many years that the *Lemon* test is "flawed in its fundamentals and unworkable in practice"—and that Establishment Clause cases should instead "be determined by reference to historical practices and understandings." *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 669-70 (1989).

After years of criticism, the Supreme Court has finally moved away from *Lemon*. In the last 16 years, it has applied *Lemon* only once—over 12 years ago—in a case involving a Ten Commandments display. *McCreary Cty. v. ACLU*, 545 U.S. 844, 864-866 (2005). Over the same 16-year time period, the Court has decided *six* Establishment Clause cases that either ignored the *Lemon* test or expressly declined to apply it.[10] Then, in *Town of Greece*, which involved a challenge to a town's practice of

---

[9] *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346-349 (1987) (O'Connor, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 107-113 (1985) (Rehnquist, J., dissenting); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 400 (1985) (White, J., dissenting); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting); *see also Utah Highway Patrol Ass'n v. American Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial of certiorari) (collecting criticism by Chief Justice Roberts and Justices Kennedy, Alito, Thomas, and Scalia); *Green v. Haskell Cty. Bd. of Comm'rs*, 574 F.3d 1235, 1245 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing en banc) (noting that *Lemon* "leave[s] the state of the law 'in Establishment Clause purgatory.'") (citation omitted).

[10] See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (not applying *Lemon*); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (same); *Cutter v. Wilkinson*, 544 U.S. 709, 726 n.1 (2005) (Thomas, J., concurring) ("The Court properly declines to assess [the statute] under the discredited test of *Lemon*."); *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality) (not applying *Lemon*); *id.* at 698-99 (Breyer, J., concurring) (same); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (same); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (same).

legislative prayer, a majority of the Court made a clean break with *Lemon*. In an opinion by Justice Kennedy, the Court said that "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers." 134 S. Ct. at 1819. Citing his own famous criticism of the *Lemon* test, Justice Kennedy held that "the Establishment Clause *must* be interpreted 'by reference to historical practices and understandings.'" *Id.* at 1819 (quoting *County of Allegheny*, 492 U.S. at 670). The question in *Town of Greece*, as here, is "whether the [IFR] fits within the tradition long followed" in our nation's history. *Id.* at 1819.

2. The IFR passes both Establishment Clause tests.

Over six years of hard-fought litigation, neither the Obama Administration, nor the lower federal courts, nor any Supreme Court Justice took the view that granting relief to religious organizations would violate the Establishment Clause. And with good reason: the IFR easily passes Establishment Clause muster under any test, and the States' argument has been rightly rejected time and again.

First, there is no historical evidence supporting the notion that a narrow exemption to the contraceptive Mandate would be an establishment of religion. To the contrary, history supports religious exemptions, even when they are broader than necessary to comport with the Free Exercise Clause. *See supra* at 15-16. Religious accommodations "fit[] within the tradition long followed" in our nation's history.[11] Indeed, the historical understanding of "establishments" in some cases *requires* broad exemptions for religious employers. In *Hosanna-Tabor*, a unanimous Supreme Court held that historical anti-establishment interests required that churches be exempt from employment discrimination laws with regard to their ministers. 565 U.S. 171. That exemption is required because "the Establishment Clause . . . prohibits government involvement in such ecclesiastical decisions." *Id.*

[11] *See, e.g.*, Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J., 121 (2012) (collecting historical examples); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

at 189. The IFR falls within this tradition of avoiding government interference with religious decision-making and the internal determinations of religious groups like the Little Sisters.

Even under *Lemon*, the Supreme Court has long recognized that accommodation of religion is a permissible secular purpose, which does not advance or endorse religion, and which avoids, rather than creates, entanglement with religion. The leading case is *Amos*. There, a federal employment law prohibited discrimination on the basis of religion. But it also included a religious exemption, which permitted religious organizations to hire and fire on the basis of religion. 483 U.S. at 329 n.1. That exemption was challenged as a violation of the Establishment Clause, allegedly because it advanced religion by "singl[ing] out religious entities for a benefit." *Id.* at 338. But the Supreme Court *unanimously* upheld the religious exemption, concluding that the "government acts with [a] proper purpose" when it "lift[s] a regulation that burdens the exercise of religion." *Id.*

The same is true here. HHS is not "advanc[ing] religion through its own activities and influence." *Id.* at 337. It would merely be lifting a severe governmental burden on private religious exercise. Such religious accommodations are not just permissible under the Establishment Clause, they "follow[] the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). The Supreme Court reaffirmed this principle with regard to RFRA's companion statute, RLUIPA, in *Cutter v. Wilkinson*, 544 U.S. 709 (2005). There, Justice Ginsburg, writing for a unanimous Court, stated that "that 'there is room for play in the joints between' the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause." *Id.* at 713 (quoting *Locke v. Davey*, 540 U.S. 712, 718 (2004)).

Following *Amos*, the Ninth Circuit has repeatedly upheld religious accommodations—including those not mandated by the Free Exercise Clause. In a precursor to *Cutter*, the Ninth Circuit upheld RLUIPA, explaining that, "[w]hile [the Establishment] clause forbids Congress from advancing

religion, the Supreme Court has interpreted it to allow, and sometimes to require, the accommodation of religious practices . . . ." *Mayweathers v. Newland*, 314 F.3d 1062, 1068 (2002). Thus, it is no accident that the Ninth Circuit has repeatedly rejected Establishment Clause challenges to governmental accommodations of religion. *See, e.g.*, *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 975 (9th Cir. 2004) (government policy protecting Native American religious sites does not violate Establishment Clause because "[c]arrying out government programs to avoid interference with a group's religious practices is a legitimate, secular purpose."); *Cammack v. Waihee*, 932 F.2d 765, 776 & n.15 (9th Cir. 1991) (upholding Good Friday holiday and noting that "'accommodation' is not a principle limited to 'burdens on the free exercise of religion,'" but may extend even further).

B. Striking down the IFR under the Establishment Clause would endanger a broad swath of state and federal laws, including the laws of the Plaintiff States.

The States claim that the IFR violates the Establishment Clause because it "places an undue burden on third parties." Mot. 23 (citing *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985)). Their overbroad reading of *Thornton* cannot be squared with their own actions, with hundreds of other state and federal religious exemptions, or with binding Supreme Court precedent.

First, the States' reading would invalidate their own exemptions for houses of worship and other religious employers from their own contraceptive coverage laws. *See infra* at 22. Yet the States hold their own laws up as models, not as illegal or discriminatory. *See, e.g.*, Am. Compl. ¶¶ 44-45.

Second, the requested injunction against the IFR would do nothing to remedy the religious exemption for houses of worship in the prior version of the Mandate, which the States praise and do not challenge here. Mot. 6 ("properly tailored"). But the States' view of the Establishment Clause would mean that the exemption for houses of worship is unconstitutional too—along with hundreds of other state and federal provisions that provide religious exemptions. As Justice Ginsburg explained for a unanimous Court when rejecting the same argument in *Cutter*, "all manner of religious

accommodations would fall" if the Court accepted the claim that providing religious exemptions impermissibly advances religion. 544 U.S. at 724.

That is why the Supreme Court has repeatedly and unanimously recognized a sharp distinction between laws that authorize "the *government itself* [to] advance[] religion through its own activities and influence" and laws that merely "alleviat[e] significant governmental interference with" private religious exercise. *Amos*, 483 U.S. at 337, 339; *see also Hosanna-Tabor*, 565 U.S. at 188-89 ("the First Amendment itself . . . gives special solicitude to the rights of religious organizations"). It is beyond cavil that the exemptions in *Amos* and *Hosanna-Tabor* impose a burden upon employees. In fact, that burden—the loss of a job—is heavier than any burden created by the exclusion of a narrow subset of coverage from a health plan. Yet those exemptions were not only permissible, but in some cases, required by the Establishment Clause. The Little Sisters are a religious organization that qualifies for the Title VII exemption upheld in *Amos*. The States' argument, if accepted, would create a situation in which government may authorize the Little Sisters to hire and fire people on religious grounds, but may not authorize the Little Sisters to exclude a narrow subset of services from their health care plan on religious grounds. The two cannot be squared.

The idea that any religious accommodation which creates a burden is impermissible carries an ugly pedigree. This is particularly true in the case of religious minorities, whose practices are often poorly understood and challenged by speculative claims of burdens on the community. Religious ceremonies have been banned by cities who masked religious discrimination under the guise of public health. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 544-45 (1993). The construction of mosques has been challenged on the ground that they pose "elevated risks to the public safety." *See, e.g.*, *United States v. Rutherford Cty. Tenn.*, No. 3:12-0737, 2012 WL 3775980, at *2 (M.D. Tenn. Aug. 29, 2012). Gurdwaras have been excluded because they create traffic burdens in

populated areas, and conversely because they create development burdens in rural ones. *Guru Nanak Sikh Soc. of Yuba City v. Cty. of Sutter*, 456 F.3d 978, 990 (9th Cir. 2006). Thus the States' overbroad reading of the Establishment Clause, in addition to being incorrect on the law, would create easy cover for religious bigotry masked with the neutral language of "burden."

V. The IFRs do not violate equal protection.

The States argue that the IFRs violate the equal protection component of the Fifth Amendment because they target women for worse treatment "simply because they are women." Mot. 25 (quoting *Virginia v. United States*, 518 U.S. 515, 532 (1996). This argument fails for four reasons.

First, as set forth above, States are not persons under the Fifth Amendment and cannot assert Fifth Amendment claims at all. *See Premo v. Martin*, 119 F.3d 764, 771 (9th Cir. 1997).

Second, the IFRs make no sex classification. It is the underlying Mandate, which the States are here to *enforce*, that creates differential rights based on sex. The Little Sisters and other religious groups oppose (for example) the sterilization of men and of women. They only need a religious exemption from the latter because that is all the Plaintiff States are seeking to force them to provide.

Third, the States ask this Court to embrace a theory of equal protection that would mean the Supreme Court violated equal protection when it granted exemptions to the same Mandate in *Little Sisters of the Poor v. Sebelius*, and *Zubik*. Those orders—each issued without dissent—provided exemptions only as to women's preventive services, just like the IFR. No Justice in either case—or even in *Hobby Lobby*—so much as mentioned an equal protection violation, nor did the Obama Administration ever even argue that the requested relief would create one.

Finally, the States themselves do not actually believe their equal protection argument. They boast of their own "contraceptive equity" laws, Am. Compl. ¶¶ 44, 54, 64, 75, but these laws—just like the IFRs—include religious exemptions from special benefits for women. *See, e.g.*, Cal. Health & Safety Code § 1367.25(c) (religious exemption); N.Y. Ins. Law § 3221(l)(16) (religious exemption). Many

other state and federal laws provide similar protections related to abortion.[12] As the States well know, these exemptions exist because abortion is a deeply important issue concerning the creation and protection of human life. These exemptions were not sought or provided because the Little Sisters, HHS, lower federal courts, nine Supreme Court Justices, or the Plaintiff States dislike women.

VI. The requested relief would violate judicial orders, the Constitution, and federal law.

The States seek a "nationwide injunction" on the grounds that the religious exemptions set forth in the IFRs violate the Establishment Clause, Equal Protection Clause, and APA. Mot. 2, 10. The States seek this relief, they say, in order to prevent the harm caused by religious objectors. But this Court cannot enter such relief, and cannot force the federal government to apply the Mandate to religious objectors, without running afoul of existing injunctions from a range of federal courts, including the Supreme Court. Simply put, many other courts have already ordered HHS *not* to enforce the very Mandate the States seek to make it enforce here. *See supra* at 3-4**.**

In any case, the relief requested by the States would violate the First Amendment. If the States prevail, the federal government would revert to a system in which some religious organizations get exemptions (primarily churches and their "integrated auxiliaries"), and some do not. This type of discrimination among religious organizations is impermissible under the Free Exercise and Establishment Clauses, which prohibit the government from making such "explicit and deliberate distinctions between different religious organizations." *Larson v. Valente*, 456 U.S. 228, 246 n.23

[12] *See, e.g.*, Cal. Health & Safety Code § 123420 (allowing "moral, ethical, or religious" exemption from abortion); 42 U.S.C. § 300a-7 (exemption from sterilization and abortion for "religious beliefs or moral convictions"); *Doe v. Bolton*, 410 U.S. 179, 197-98 (1973) (right to refrain from abortion for "moral or religious reasons" is "appropriate protection"). Virtually every state in the country has a religious or conscience-based exemption from being required to provide abortions. *See, e.g.*, Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121, 148-49 (2012) (also detailing exemptions related to military service, capital punishment, and assisted suicide). The States seek a ruling from this Court that would treat all of these laws as unconstitutional violations of equal protection and/or the Establishment Clause.

(1982) (striking down laws that created differential treatment between "well-established churches" and "churches which are new and lacking in a constituency"). By preferring certain church-run organizations to other types of religious organizations, the Mandate inappropriately "interfer[es] with an internal . . . decision that affects the faith and mission" of a religious organization, *Hosanna-Tabor*, 565 U.S. at 190. Doing so also requires illegal "discrimination . . . [among religious institutions] expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations[.]" *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (applying *Larson* to invalidate distinction between "sectarian" and "pervasively sectarian" organizations).

The States' effort to thwart a small religious exemption, while never objecting to much larger and far-reaching secular exemptions, also violates the Free Exercise and Equal Protection Clauses. Simply put, governments may not single out religious conduct for special disabilities where they have taken no action to address comparable secular conduct that produces an even greater threat to the States' claimed interests. *See, e.g.*, *Lukumi*, 508 U.S. at 532 ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."); *Stormans Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015) ("the law is not generally applicable" if it "pursues the government's interest 'only against conduct motivated by religious belief' but fails to include in its prohibitions substantial, comparable secular conduct that would similarly threaten the government's interest") (quoting *Lukumi*, 508 U.S. at 545).

Finally, the requested relief violates RFRA. The Supreme Court has already found that forced compliance with the Mandate constitutes a substantial burden on religion. *Hobby Lobby*, 134 S. Ct. 2775-79. The federal defendants have not carried, and cannot carry, their statutory burden of

demonstrating that forced compliance is the least restrictive means of advancing a compelling government interest. *See* 82 Fed. Reg. at 47,800-06. Indeed, as the States' briefs make abundantly clear, governments have many different ways to provide contraceptives to those who want them without involving nuns or other religious objectors. *See* Am. Compl. ¶¶ 48-52, 57-62, 66-70, 80-83, 88-94 (detailing multiple state programs). If the States have so many tools available to provide contraceptives, there is no cause to force the Little Sisters to do it for them.

VII. The remaining injunction factors are not satisfied.

For the reasons set forth above, the States have failed to demonstrate a likelihood of success on the merits. They have also failed to carry their burden as to the other injunction factors. In light of the existing injunctions, the States have failed to show irreparable harm, given that they cannot identify even a single employer expected to change (or employee expected to lose) coverage (by January 1 or any other date). The States have not shown that damages would be insufficient to compensate for any financial harm they suffer from alleged increased use of their programs.

The balance of the equities also requires denial of the States' motion. While the States cannot find a single actual person who will be harmed by the IFR, there are actual, real, known religious groups like the Little Sisters for whom the IFR brings the real benefit of codifying their judicially-obtained exemptions. It would be far from equitable to allow the States, which sat on the sidelines for years while the Little Sisters won protection in other courts, to collaterally attack that relief here. The public interest—both in the enforcement of federal civil rights laws and the orderly functioning of the federal judiciary—thus forecloses the injunction.

CONCLUSION

For the foregoing reasons, the States' motion should be denied.

Dated: December 6, 2017

Respectfully submitted,

/s/ Eric C. Rassbach
Eric C. Rassbach – No. 288041
Mark L. Rienzi – pro hac admission pending
Lori L. Windham – pro hac admission pending
The Becket Fund for Religious Liberty
1200 New Hampshire Ave. NW, Suite 700
Washington, DC 20036
Telephone: (202) 955-0095
Facsimile: (202) 955-0090
erassbach@becketlaw.org

John C. Peiffer, II
The Busch Firm
860 Napa Valley Corporate Way, Suite O
Napa, CA 94558
Telephone: (707) 400-6243
Facsimile: (707) 260-6151
jpeiffer@buschfirm.com

Counsel for Proposed Defendant-Intervenor