Nos. 19-15072, 19-15118, 19-15150

In the United States Court of Appeals for the Ninth Circuit

THE STATE OF CALIFORNIA, *et al.*,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II in his official capacity as Acting Secretary of the U.S. Department of Health and Human Services, *et al.*,

Defendants-Appellants,

and

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

Intervenors-Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

OPENING BRIEF OF INTERVENOR-DEFENDANT-APPELLANT THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 26.1, The Little Sisters represent that they do not have any parent entities and do not issue stock.

Dated: February 25, 2019

/s/ Mark Rienzi

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INTRODUCTION

This case concerns the validity of the federal government's latest effort to both provide contraceptive access and protect religious liberty. In 2017, after many years of unsuccessful litigation against religious objectors, the federal government finally admitted that it did not need to hijack the health plans of unwilling religious entities. Instead, the government found it has many less restrictive alternatives to provide contraceptive access.

How good are these alternatives? So good that to date none of the Plaintiff States can identify even a single woman among over 120 million residents who stands to lose contraceptive access as a result of the rules at issue here. Nor can the eight states engaged as amici or in the parallel litigation in Pennsylvania.

Accordingly, in issuing new religious exemption rules, the federal government did the only thing it could do: it stopped trying to force religious objectors to comply with the contraceptive mandate. And although the federal government was free (and remains free) to simply revoke the mandate entirely, it instead tailored its response to only the small class of employers with religious or moral objections. The federal

government also ensured that other programs providing free and low-cost contraceptives will remain in place. It has even expanded Title X to create additional access in case any employee of a religious or moral objector seeks coverage.

That should have been the end of the long and unseemly culture-war battle over whether the federal government is *permitted* to force nuns to participate in the distribution of contraception. But the Plaintiff States sued to advance a more radical claim: that the federal government is *required* to force nuns to participate in the distribution of contraception.

That position is so extreme it was never advanced in the five years of litigation over the contraceptive mandate from 2011-2016. To the contrary, the Obama Administration—like the Trump Administration—believed that the agencies had discretion to avoid burdening religious employers. *See* 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). And lest the regulators had any doubt about their obligation to avoid such burdens, federal judges have entered more than 50 injunctions forbidding applying the mandate against religious objectors. Those injunctions from Article III courts remain in place and continue to bind the agencies.

Despite all this, the district court issued an injunction that purports to require the federal government to apply the contraceptive mandate to religious objectors. That injunction cannot stand, because the agencies were obeying both Congress (which enacted RFRA) and the courts (dozens of which found that the mandate violated RFRA) in issuing religious exemptions. The agencies were given discretion about what to include in the preventive services mandate and what "guidelines" should apply to it, but they were not given discretion about whether to obey RFRA.

The district court's injunction thus orders the agencies to violate federal law. Worse still, the order re-imposes the prior version of the mandate-plus-exemptions, even though the court's reasoning would make that regime invalid too. Rather than analyze the legality of the regime it was imposing, however, the district court simply claimed that the legality of that version of the mandate "is not before the Court." ER 24.

But this Court cannot affirm an injunction that violates federal law, or that would render invalid the very relief the States seek. Either way,

the Little Sisters are entitled to protection, and the decisions below must be reversed.

JURISDICTIONAL STATEMENT

The States asserted jurisdiction in the district court under 28 U.S.C. § 1331. Nonetheless, that court was without jurisdiction because the States' claim for relief does not present an Article III "case" or "controversy." *See infra* Part I. The district court entered its preliminary injunction on January 13, 2019. ER 45. The Little Sisters appealed the same day. ER 51. This appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(B). Because this is an appeal from an interlocutory order granting a preliminary injunction, this Court's jurisdiction rests on 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

Standing. Was the district court correct that the States have standing? ECF No. 223 at 9; ER 16-21.

Success on the merits. Have the States demonstrated likely success on the merits of their claims that the Final Rule is contrary to law? ECF No. 223 at 12-25; ER 21-38.

Remedy. Can the Court reinstate the underlying mandate that predated the interim final rule and final rule if that underlying mandate violates the Constitution, the Administrative Procedure Act, the Affordable Care Act (ACA), and the Religious Freedom Restoration Act? ECF No. 223 at 9-12; ER 22-31.

Preliminary Injunction. Do the remaining injunction factors justify the district court's decision to enjoin the Final Rule? ECF No. 223 at 25; ER 39-42.

STATEMENT OF THE CASE

A. The federal mandate and its exceptions

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 the Department of Health and Human Services (HHS) the authority to

develop "guidelines" about what should be included as preventive care "for purposes of this paragraph." 42 U.S.C. § 300gg-13(a)(4).

The preventive services mandate was first implemented in an interim final rule on July 19, 2010, published by the departments of Health and Human Services, Labor, and Treasury (the agencies). 75 Fed. Reg. 41,726, 41,728 (July 19, 2010) (First IFR). The First IFR stated that the Health Resources and Services Administration (HRSA), a division of HHS, would produce comprehensive guidelines for women's preventive services. *Id.* HHS asked for recommendations from the Institute of Medicine (IOM), 77 Fed. Reg. 8,725, 8,726 (Feb. 15, 2012), which proposed including, *inter alia*, all FDA-approved contraceptives and sterilization methods.[1]

Following the comment period on the First IFR, and thirteen days after IOM issued its recommendations, HHS promulgated its second IFR. 76 Fed. Reg. 46,621 (Aug. 3, 2011) (Second IFR). That same day, HRSA issued guidelines on its website adopting the IOM recommendations in full, including all female contraceptive methods in the mandate. HRSA,

[1] Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps*, The National Academies Press 3 (2011), https://bit.ly/2QOysgH.

Women's Preventive Services Guidelines, U.S. Dep't of Health & Human Servs. (Aug. 2011), https://www.hrsa.gov/womens-guidelines/index.html (2011 Preventive Services Guidelines).

The Second IFR stated that it "contain[ed] amendments" to the First IFR. 76 Fed. Reg. at 46,621. It implemented HRSA's guidelines without notice and comment. *See id.* at 46,623. Not all private employers are subject to this mandate. First, the vast majority of employers—namely, those with fewer than 50 employees—are not required to provide any insurance coverage at all.[2] Second, approximately a fifth 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 2018 Annual Survey* 209 (2018), https://bit.ly/2T4qwbQ. For non-exempt employers, the penalty for offering a plan that excludes

[2] According to some estimates, more than 97% of employers have fewer than 50 employees, and therefore face no federal obligation to provide contraceptive coverage. *See, e.g.*, DMDatabases, *USA Business List*, http://bit.ly/10yw56o. The *Hobby Lobby* Court estimated that "34 million workers" are employed by firms with fewer than 50 employees. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 700 (2014) (citing The White House, Health Reform for Small Businesses: The Affordable Care Act Increases Choice and Saving Money for Small Businesses 1).

coverage for even one of the FDA-approved contraceptive methods is $100 per day for each affected individual. 26 U.S.C. § 4980D(a)-(b). If an employer with more than 50 employees fails to offer a plan at all, the employer owes $2,000 per year for each of its full-time employees. 26 U.S.C. § 4980H(a), (c)(1).

The Second IFR also granted HRSA "discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned." 76 Fed. Reg. at 46,623. It defined the term "religious employer" narrowly. *Id.* at 46,626. The Second IFR was effective immediately without prior notice or opportunity for public comment. The agencies received "over 200,000" comments on the Second IFR. 77 Fed. Reg. at 8,726. Many of the comments explained the need for a broader religious exemption than that implemented by the Second IFR. However, on February 15, 2012, HHS adopted a final rule that "finaliz[ed], without change," the Second IFR. *Id.* at 8,725.

The agencies then published an Advance Notice of Proposed Rulemaking (ANPRM), 77 Fed. Reg. 16,501 (Mar. 21, 2012), and a Notice of Proposed Rulemaking (NPRM), 78 Fed. Reg. 8,456 (Feb. 6, 2013), which were later adopted in a final rule making further changes to the

mandate, 78 Fed. Reg. 39,870 (July 2, 2013). The agencies eventually amended the definition of a religious employer by eliminating some of the criteria from the Second IFR, limiting the definition to organizations "referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code," thus exempting "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order," from the mandate. 78 Fed. Reg. at 39,874; *see* 26 U.S.C. § 6033(a)(3)(A)(i), (iii). The agencies also adopted an arrangement—termed an "accommodation"—by which religious employers not covered by the exemption could offer the objected-to contraceptives on their health plans by executing a self-certification and delivering it to the organization's insurer or the plan's third-party administrator (TPA).

The system initiated by the first two IFRs did not address the concerns of many religious organizations, and many filed lawsuits seeking relief. In July 2013, one of those organizations, Wheaton College, received an emergency injunction from the Supreme Court that protected it from the penalties in the mandate. *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014). Following that injunction, in August 2014, the agencies published

a third IFR "in light of the Supreme Court's interim order" in *Wheaton*, again without notice and comment. 79 Fed. Reg. 51,092 (Aug. 27, 2014) (Third IFR). This Third IFR amended the mandate to allow a religious objector to "notify HHS in writing of its religious objection" instead of notifying its insurer or third-party administrator. *Id.* at 51,094. The Third IFR received over 13,000 publicly posted comments. *See* EBSA, *Coverage of Certain Services Under the Affordable Care Act* (Aug. 27, 2014), https://www.regulations.gov/document?D=EBSA-2014-0013-0002. The Third IFR was ultimately finalized on July 14, 2015. 80 Fed. Reg. 41,318 (July 14, 2015). The Third IFR did not accommodate the religious beliefs of the Little Sisters and other religious objectors, and the Supreme Court revisited the issue in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (discussed below).

B. The challenges to the mandate and the resulting injunctions

Because the mandate required that many employers choose between violating their sincere religious beliefs and paying debilitating fines, religious objectors filed dozens of cases against it. Those lawsuits resulted in injunctions from federal courts across the country, and multiple such cases were consolidated at the Supreme Court. *See Zubik*,

136 S. Ct. 1557 (consolidating cases from the Third, Fifth, Tenth, and D.C. Circuits).[3] Once the cases reached the Supreme Court, the agencies made new concessions that changed the facts and arguments they had previously relied on to defend the mandate.

First, the government admitted for the first time that contraceptive coverage, rather than being provided as a "separate" plan under the accommodation, must be "part of the same plan as the coverage provided by the employer," Br. for the Resp'ts at 38, *Zubik*, 136 S. Ct. 1557 (2016) (internal quotation marks and citation omitted), https://bit.ly/2DiCj32; Tr. of Oral Arg. at 60-61, *Zubik*, 136 S. Ct. 1557 (2016) https://bit.ly/2VklhFx (Chief Justice Roberts: "You want the coverage for contraceptive services to be provided, I think as you . . . said, seamlessly. You want it to be in one insurance package. . . . Is that a fair understanding of the case?"; Solicitor General Verrilli: "I think it is one fair understanding of the case."). The government thus removed any basis for lower courts' prior holding that the mandate did not impose a substantial burden on the religious exercise of objecting employers

[3] The various cases challenging the mandate are collected at Becket, *HHS Mandate Information Central*, https://www.becketlaw.org/research-central/hhs-info-central/hhs-case-database/ (last accessed Feb. 25, 2019).

because the provision of contraceptives was separate from their plans. *Cf.* Tr. of Oral Arg. at 61, *Zubik*, 136 S. Ct. 1557 (2016) https://bit.ly/2VklhFx (Solicitor General Verrilli "would be content" if Court would "assume a substantial burden" and rule only on the government's strict scrutiny defense).

Next, the agencies admitted to the Supreme Court that women who do not receive contraceptive coverage from their employer can "ordinarily" get it from "a family member's employer," "an Exchange," or "another government program." Br. for the Resp'ts at 65, *Zubik*, 136 S. Ct. 1557 (2016), https://bit.ly/2DiCj32. The government also acknowledged that the mandate "could be modified" to be more protective of religious liberty, Suppl. Br. for the Resp'ts at 14-15, *Zubik*, 136 S. Ct. 1557 (2016), https://bit.ly/2VjFsVb, thus admitting the mandate was not the least restrictive means of achieving the government's interests.

The Supreme Court unanimously vacated the decisions of the Courts of Appeals of the Third, Fifth, Tenth, and D.C. Circuits, which had ruled in favor of the agencies. *Zubik*, 136 S. Ct. at 1561. It ordered the government not to impose taxes or penalties on petitioners for failure to comply with the mandate and remanded the cases so that the parties

could be "afforded an opportunity to arrive at an approach going forward" that would resolve the dispute. *Id.* at 1560.

Other injunctions forbid the federal government from enforcing the mandate against all known religious objectors. Some of these were issued prior to the rules at issue in this case.[4] Some, however, were issued after

[4] *See, e.g.*, Injunction, *Am. Pulverizer Co. v. HHS*, No. 6:12-cv-03459 (W.D. Mo. Oct. 30, 2014), ECF No. 56; Injunction, *Annex Medical, Inc., v. Solis*, No. 0:12-cv-02804 (D. Minn. Aug. 19, 2015), ECF No. 76; Amended Final Judgment, *Armstrong v. Sebelius*, No. 1:13-cv-00563 (D. Colo. Oct. 7, 2014), ECF No. 82; Injunction, *Autocam Corp. v. Sebelius*, No. 1:12-cv-01096 (W.D. Mich. Jan. 5, 2015), ECF No. 76; Injunction, *Barron Indus., Inc. v. Sebelius*, No. 1:13-cv-01330 (D.D.C. Oct. 27, 2014), ECF No. 10; Consent Injunction, *Bick Holdings, Inc. v. HHS*, No. 4:13-cv-00462 (E.D. Mo. Nov. 18, 2014), ECF. No. 24; Order, *Brandt, Bishop of the Roman Catholic Diocese of Greensburg v. Sebelius*, No. 2:14-cv-00681 (W.D. Pa. Aug. 20, 2014), ECF No. 43; Injunction, *Briscoe v. Sebelius*, No. 1:13-cv-00285 (D. Colo. Jan. 27, 2015), ECF No. 70; *Catholic Diocese of Beaumont v. Sebelius*, 10 F. Supp. 3d 725 (E.D. Tex. 2014) (No. 1:13-cv-00709); Permanent Injunction, *C.W. Zumbiel Co. v. HHS*, No. 1:13-cv-01611 (D.D.C. Nov. 3, 2014), ECF No. 19; Order, *Conestoga Wood Specialties Corp. v. Sebelius*, No. 5:12-cv-06744 (E.D. Pa. Oct. 2, 2014), ECF No. 82; Order, *Medford v. Sebelius*, No. 0:13-cv-01726 (D. Minn. Nov. 20, 2014), ECF No. 20; Order, *Doboszenski & Sons, Inc. v. Sebelius*, No. 0:13-cv-03148 (D. Minn. Nov. 18, 2014), ECF No. 15; Injunction, *Domino's Farms Corp. v. Sebelius*, No. 2:12-cv-15488 (E.D. Mich. Dec. 3, 2014), ECF No. 54; Injunction, *Eden Foods, Inc. v. Sebelius*, No. 2:13-cv-11229 (E.D. Mich. Feb. 12, 2015), ECF No. 39; Order, *Feltl & Co. v. Sebelius*, No. 0:13-cv-02635 (D. Minn. Nov. 26, 2014), ECF No. 15; Order, *Gilardi v. HHS*, No. 1:13-cv-00104 (D.D.C. Oct. 20, 2014), ECF No. 49; Injunction and Judgment, *Grote Indus., LLC v. Sebelius*, No. 4:12-cv-00134 (S.D. Ind. Apr. 30, 2015), ECF No. 66; Order, *Hall v. Sebelius*, No.

0:13-cv-00295 (D. Minn. Nov. 26, 2014), ECF No. 13; Injunction, *Hartenbower v. HHS*, No. 1:13-cv-02253 (N.D. Ill. Nov. 3, 2014), ECF No. 34; Order, *Hastings Chrysler Ctr., Inc. v. Sebelius*, No. 0:14-cv-00265 (D. Minn. Dec. 11, 2014), ECF No. 38; Order, *Hobby Lobby Stores, Inc. v. Sebelius*, No. 5:12-cv-01000, 2014 WL 6603399 (W.D. Okla. Nov. 19, 2014) (ECF No. 98); Injunction, *Holland v. HHS*, No. 2:13-cv-15487 (S.D. W. Va. May 29, 2015), ECF No. 52; *Johnson Welded Products, Inc. v. Sebelius*, No. 1:13-cv-00609, 2014 WL 5395775, (D.D.C. Oct. 24, 2014) (ECF No. 11); Order of Injunction, *Korte v. HHS*, No. 3:12-cv-1072 (S.D. Ill. Nov. 7, 2014), ECF No. 89; Injunction, *Lindsay v. HHS*, No. 1:13-cv-01210 (N.D. Ill. Dec. 3, 2014), ECF No. 50; Injunction, *M&N Plastics, Inc. v. Sebelius*, No. 5:13-cv-14754 (E.D. Mich. Nov. 17, 2015), ECF No. 10; Order, *March for Life v. Azar*, No. 1:14-cv-01149 (D.D.C. Aug. 31, 2015), ECF No. 31; Injunction and Judgment, *Mersino Dewatering Inc. v. Sebelius*, No. 2:13-cv-15079 (E.D. Mich. Feb. 27, 2015), ECF No. 9; Injunction, *Mersino Mgmt. Co. v. Sebelius*, No. 2:13-cv-11296 (E.D. Mich. Feb. 4, 2015), ECF No. 37; Order, *Midwest Fastener Corp. v. Sebelius*, No. 1:13-cv-01337 (D.D.C. Oct. 24, 2014), ECF No. 21; Stipulated Order, *MK Chambers Co. v. HHS*, No. 2:13-cv-11379 (E.D. Mich. Nov. 21, 2014), ECF No. 54; Permanent Injunction, *Newland v. Sebelius*, No. 1:12-cv-01123 (D. Colo. Mar. 16, 2015), ECF No. 70; Injunction, *O'Brien v. HHS*, No. 4:12-cv-00476 (E.D. Mo. Nov. 12, 2014), ECF No. 64; Order, *Randy Reed Auto., Inc. v. Sebelius*, No. 5:13-cv-06117 (W.D. Mo. Nov. 12, 2014), ECF No. 29; Injunction, *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 1:12-cv-02542 (E.D.N.Y. Dec. 16, 2013), ECF No. 117; Order, *Sioux Chief MFG. Co. v. Sebelius*, No. 4:13-cv-00036 (W.D. Mo. Nov. 12, 2014), ECF No. 19; Injunction, *SMA, LLC v. Sebelius*, No. 0:13-cv-01375 (D. Minn. Nov. 20, 2014), ECF No. 16; Order, *Stewart v. Sebelius*, No. 1:13-cv-01879 (D.D.C. Feb. 2, 2015), ECF No. 9; Order for Injunction, *Stinson Electric, Inc. v. Sebelius*, No. 0:14-cv-00830 (D. Minn. Nov. 18, 2014), ECF No. 18; Order, *Tonn & Blank Constr. LLC v. Sebelius*, No. 1:12-cv-00325 (N.D. Ind. Nov. 6, 2014), ECF No. 56; Order, *Tyndale House Publishers, Inc. v. Sebelius*, No. 1:12-cv-01635 (D.D.C. Jul. 15, 2015), ECF No. 53; Injunction, *Weingartz Supply Co. v. Sebelius*, No. 2:12-cv-12061 (E.D. Mich. Dec. 31, 2014), ECF No. 98; Order, *Wieland v. HHS*, No. 4:13-cv-01577 (E.D. Mo. Jul 21, 2016), ECF No. 87; Order, *Williams v. Sebelius*,

the district court enjoined the IFRs.[5] Indeed, several injunctions have been entered in open-ended class or associational standing cases that allow new members to join.[6] These injunctions continue to bind the agency defendants to this day.

No. 1:13-cv-01699 (D.D.C. Nov. 5, 2014), ECF No. 11; Amended Order, *Willis & Willis PLC v. Sebelius*, No. 1:13-cv-01124 (D.D.C. Oct. 31, 2014), ECF No. 17; Order, *Zubik v. Sebelius*, No. 2:13-cv-01459 (W.D. Pa. Dec. 20, 2013), ECF No. 81.

[5] *See, e.g.*, Order, *Ass'n of Christian Sch. v. Azar*, No. 1:14-cv-02966 (D. Colo. Dec. 10, 2018), ECF No. 49; Order, *Ave Maria Sch. of Law v. Sebelius*, No. 2:13-cv-00795 (M.D. Fla. Jul. 11, 2018), ECF No. 68; Order, *Ave Maria Univ. v. Sebelius*, No. 2:13-cv-00630 (M.D. Fla. Jul. 11, 2018), ECF No. 72; Order, *Catholic Benefits Ass'n LCA v. Hargan*, No. 5:14-cv-00240 (W.D. Okla. Mar. 7, 2018), ECF No. 184; Order, *Colo. Christian Univ. v. HHS*, No. 1:13-cv-02105 (D. Colo. Jul. 11, 2018), ECF No. 84; Order, *Dordt Coll. v. Sebelius*, No. 5:13-cv-04100 (N.D. Iowa June 12, 2018), ECF No. 85; Permanent Injunction, *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207 (W.D. Pa. Jul. 5, 2018), ECF No. 153; Permanent Injunction, *Grace Sch. v. Sebelius*, No. 3:12-cv-00459 (N.D. Ind. June 1, 2018), ECF No. 114; Order, *Little Sisters of the Poor v. Hargan*, No. 1:13-cv-02611 (D. Colo. May 29, 2018), ECF No. 82; Permanent Injunction, *Reaching Souls Int'l Inc. v. Azar*, No. 5:13-cv-01092 (W.D. Okla. Mar. 15, 2018), ECF No. 95; Permanent Injunction, *Sharpe Holdings, Inc. v. HHS*, No. 2:12-cv-00092 (E.D. Mo. Mar. 28, 2018), ECF No. 161; Order, *S. Nazarene Univ. v. Hargan*, No. 5:13-cv-01015 (W.D. Okla. May 15, 2018), ECF No. 109; Permanent Injunction, *Wheaton Coll. v. Azar*, No. 1:13-cv-08910 (N.D. Ill. Feb. 22, 2018), ECF No. 119.

[6] *See, e.g.*, *Reaching Souls Int'l, Inc. v. Azar*, No. CIV-13-1092-D, 2018 WL 1352186, at *2 (W.D. Okla. Mar. 15, 2018); Order, *Catholic Benefits Ass'n LCA v. Hargan*, No. 5:14-cv-00240-R (W.D. Okla. Mar. 7, 2018), ECF No.

C. Challenges to the IFRs

After years of unsuccessful attempts to justify the mandate in court, in compliance with Congress's mandate that government "shall not" impose a substantial burden on religion, 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. 47,792 (Oct. 13, 2017) (Fourth IFR); 82 Fed. Reg. 47,838 (Oct. 13, 2017) (Fifth IFR).[7] The IFRs otherwise left the mandate in place as to all employers previously covered. The IFRs also left in place the accommodation. 45 C.F.R § 147.131. The IFRs were immediately challenged in the present lawsuit and in others around the country.[8]

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184 (granting permanent injunction of mandate to current and future nonprofit members of Catholic Benefits Association).

[7] Many of the arguments presented here are relevant to both the religious and moral exemption, but the Little Sisters address only the religious exemption. Singular references to "Final Rule" are to that rule.

[8] *ACLU v. Azar*, No. 4:17-cv-05772 (N.D. Cal.), *dismissed without prejudice* Nov. 2, 2018; *Campbell v. Trump*, No. 1:17-cv-02455 (D. Colo.), *dismissed* Sept. 11, 2018; *Massachusetts v. HHS*, No. 1:17-cv-11930 (D. Mass.), *summary judgment granted in favor of defendants* Mar. 12, 2018, (on appeal 1st Cir. No. 18-1514); *Medical Students for Choice v. Azar*, No. 1:17-cv-02096 (D.D.C.), *dismissed without prejudice* Feb. 2, 2018;

In response to a motion for a preliminary injunction filed by California, Delaware, Maryland, New York, and Virginia, the district court entered a nationwide injunction preventing the implementation of the IFRs on December 21, 2017 due to a lack of prior notice and comment. ECF No. 105. That injunction was appealed to this Court, which held that the plaintiff States met the "relaxed" requirements for standing to bring the procedural claim on appeal. *California v. Azar*, 911 F.3d 558, 571 (9th Cir. Dec. 13, 2018). This Court also ruled in favor of the States on their procedural claims, holding that the IFRs likely violated the notice and comment provisions of the APA. *Id.* at 575-78. This court's prior opinion also held that a nationwide injunction was inappropriate and limited the injunction to the plaintiff States. *Id.* at 582-84.

D. The Final Rule and proceedings below

The agencies received comments on the IFRs and reviewed them over a period of several months. They then finalized the religious exemption

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Pennsylvania v. Trump, No. 2:17-cv-4540 (E.D. Pa. Jan. 13, 2019), *preliminary injunction granted* Dec. 15, 2017, *preliminary injunction granted* Jan. 13, 2019, *on appeal* No. 17-3752 (3d Cir.); *Shiraef v. Azar*, No. 3:17-cv-00817 (N.D. Ind.), *dismissed without prejudice* Feb. 7, 2018; *Washington v. Trump*, No. 2:17-cv-01510 (W.D. Wash.), *dismissed without prejudice* Dec. 19, 2018.

in a final rule that took effect on January 14, 2019. 83 Fed. Reg. 57,536 (Nov. 15, 2018) (Final Rule). Following the publication of the Final Rule, the States submitted an amended complaint joining more plaintiff States, including the State of Washington, which dropped its own lawsuit and joined this one. The other states to join were Connecticut, the District of Columbia, Hawaii, Illinois, Minnesota, North Carolina, Rhode Island, and Vermont. ER 129.[9] The States brought a second motion for a preliminary injunction, arguing that the Final Rule violates substantive provisions of the APA, and that the Final Rule is tainted by the lack of comment on the IFRs. ECF No. 174. The States submitted no evidence of any employer who will drop coverage as a result of the Final Rule and identified no women who stand to lose coverage as a result of the Final Rule.

E. The decision below

In granting the second preliminary injunction brought by the augmented group of states, the district court held again that the States have Article III standing because they were able to show "a reasonably

[9] The State of Oregon filed a motion to intervene as a plaintiff, which the district court granted on February 1. ECF No. 274.

probable threat to their economic interests." ER 20. The district court also held that the States are likely to succeed on their claim that the Final Rule violates the APA because it is not in accordance with the law, finding that the agencies did not have authority to exempt religious organizations under the Affordable Care Act. ER 22-24. In so holding, the district court expressly declined to explain how the agencies had authority to issue the religious employer exemption and not the religious exemption in the Final Rule, because "the legality of [the religious employer] exemption is not before this Court." ER 24. Nor did the court explain how the agencies had authority to issue the "accommodation" upon which the court expressly relied in its RFRA holding. ER 27-31. Because of that "accommodation," the court held that the Final Rule is not required by the Religious Freedom Restoration Act, ER 24-31. The court noted that it would need "substantially greater detail" to "sufficiently address the merits of" the claim that RFRA allows the agencies to create the religious exemption. ER 38.

STANDARD OF REVIEW

"Standing is a question of law reviewed de novo." *Carroll v. Nakatani*, 342 F.3d 934, 940 (9th Cir. 2003) (citation omitted).

A preliminary injunction—particularly one that directs the federal government to impose restrictions on nonparties—is an "extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "A preliminary injunction is reviewed for abuse of discretion." *California*, 911 F.3d at 568. In reviewing a preliminary injunction, the Court reviews *de novo* "whether the trial court identified the correct legal rule to apply to the relief requested." *Id.* at 568. It then determines whether "the district court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* "[A] reviewing court may set aside only agency actions that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010). The Court "may not substitute [its] judgment for that of the agency." *Id.*

SUMMARY OF ARGUMENT

The States lack standing. Since this Court's previous decision, the States' theory of standing has only become more conclusory. Despite the addition of more plaintiff states, one abandoning its own lawsuit, there

is still no evidence that the Final Rule will cost any woman contraceptive coverage which she currently has.

Even assuming standing, the States are not likely to succeed on the merits. The district court held that the agencies do not have the authority to create religious exemptions but did not explain how it could reimplement a scheme that has assumed that same authority in prior iterations going back to 2011. Moreover, the agencies have statutory authority—indeed, a statutory *obligation*—to comply with RFRA in offering a religious exemption.

At bottom, the district court abused its discretion by reimplementing regulations that violate RFRA and are themselves illegal under the district court's own reasoning.

ARGUMENT

I. The Plaintiffs lack standing.

Rather than submitting additional evidence in the district court that they will be harmed by the Final Rules following their implementation, the States relied on this Court's ruling that they are likely to suffer harm as a result of the IFRs. ER 140-41 ¶¶ 27-30, 186-88 ¶¶ 223-232. They thus fail to identify any employers who are not protected by current court injunctions and who plan to change their behavior based on the Final

Rules. Even with the addition of several new States—one of which abandoned its own separate case to litigate here—the States have still failed to identify anyone who will actually be harmed by the Final Rules.

In its prior ruling, this Court held that the States need not "identify a specific woman likely to lose coverage" in order to show that the rule would "lead to women losing employer-sponsored contraceptive coverage, which will then result in economic harm to the states," *California*, 911 F.3d 558 at 571. While the Little Sisters respectfully disagree with this conclusion, further review is warranted here due to subsequent developments. Since the prior preliminary injunction, eight more states and the District of Columbia have joined this case, and the original states have had additional time to shore up their claims. They have failed to do so. If, after a full year and the addition of nine jurisdictions, the States are still unable to identify a single employer who will drop coverage, or a single woman who will turn to the states to fund her coverage, this proves what the Little Sisters said all along: the States' alleged injury is too speculative to satisfy Article III standing.

Adding to the problems with the States' alleged injury, an order enjoining the Final Rule would also not redress the claimed harm.

Religious objectors can bring their own RFRA lawsuits and obtain injunctions, given that the government has admitted that it has no compelling interest in enforcing the underlying mandate. Or they can join existing classes that already have injunctions against the mandate. *See supra* note 6. Or, since many religious employers have fewer than fifty employees, they can simply drop health insurance altogether. 26 U.S.C. § 4980H(c)(2). The district court addressed none of these eventualities. *See* ER 16-20.

Furthermore, before the Fourth IFR and the Final Rule were issued, the regulations contained variations from the mandate in the form of an exemption for churches and integrated auxiliaries and a separate "accommodation" for other religious employers. That accommodation is central to the district court's RFRA holding. Yet—according to the district court and the States' reasoning—the earlier exemption and accommodation violate the APA.

The district court held that the agencies exceeded their authority in promulgating the Final Rule because the ACA authorized the agencies to determine only "*what* 'additional preventive care and screenings'" must be covered, not who must provide the coverage. ER 23 (emphasis in

original). The States likewise argued that the agencies do not have statutory authority to create exemptions to the preventive services mandate. ECF No. 174 at 11. But the States also request that the Court replace the Final Rule with the mandate *as it existed before the IFRs*. *Id.* at 25.

That relief—the revival of the prior mandate regime, complete with the "accommodation" and religious employer exemption—cannot be entered consistent with the court's order. If HRSA has no authority to decide who must provide the coverage, then it surely has no authority to exempt some employers, "accommodate" others, and impose new obligations on insurers and TPAs to comply in their place. Yet that is precisely the regime the district court reimposed.

For these reasons, the States lack standing, and the case should be dismissed.

II. The States cannot succeed on the merits.

Beyond the problems with their theory of standing, the States have failed to establish likelihood of success on the merits.

A. The States are unlikely to succeed on their claim that the Final Rule is contrary to law.

1. The agencies may make exemptions from a contraceptive mandate that they were never obligated to create.

The district court enjoined the Final Rule as contrary to law, reasoning that the agencies lacked authority to create the religious exemption from the contraceptive mandate. But the ACA did not require any contraceptive mandate in the first place, which makes the States' anti-exemption argument absurd. The relevant statutory section says nothing about contraception. The ACA merely requires certain employers to offer "a group health plan" that provides coverage for women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4); 26 U.S.C. § 9815; 29 U.S.C. § 1185d.[10] Congress did not specify what "preventive care" means, but instead delegated that task to HRSA. HRSA, in turn, had discretion

[10] Although it has not been raised in this case, the Little Sisters note that one court has held that the individual mandate, as amended by the Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017), is unconstitutional. *See Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018). Because the mandate is part of the "minimum essential coverage" required to satisfy the insurance mandate, there is strong reason to believe that the women's preventive services provisions are not severable from the individual mandate. *See id.* at 605-19 (striking the remainder of the law as non-severable).

to articulate "guidelines" the agency wished to "support[]" for this purpose. *See* 2011 Preventive Services Guidelines.

Thus, HRSA was under no obligation to include contraceptives in the preventive services regulations at all, much less all FDA-approved contraceptives. HRSA could have limited the guidelines to other preventive services such as domestic violence screening and well-woman visits, made no mention of contraceptives, and have still faithfully implemented the "preventive care" requirement. *See* 42 U.S.C. § 300gg-13(a)(4); 2011 Preventive Services Guidelines.

The district court held that the statutory delegation of authority did not include authority to create exemptions from the preventive care mandate. ER 22-24. In making this determination, the court ignored the most relevant statutory term, "guidelines." 42 U.S.C. § 300gg-13(4). The dictionary definition of guideline is an "indication of policy or procedure by which to determine a course of action."[11] Had Congress meant for HRSA to simply create a list of covered items from which there could be no deviation, it could have said so. It did just this for subsections (1) and (2) of § 300gg-13:

[11] *The American Heritage Dictionary* (3d ed. 1992).

> (1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force;
>
> (2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved;

42 U.S.C. § 300gg-13. These provisions require coverage of all "items or services" on a particular list, or all immunizations, if recommended "with respect to the individual involved." *Id.* The language used in (4) is markedly different: "such additional preventive care and screenings . . . (1) as provided for in comprehensive guidelines" from HRSA. 42 U.S.C. § 300gg-13(4). Since it is "presume[d] that the ordinary meaning of the words chosen by Congress accurately express its legislative intent," the distinction between these provisions indicates a broader grant of discretion to HRSA in crafting the regulations. *Santiago Salgado v. Garcia*, 384 F.3d 769, 771 (9th Cir. 2004) (internal quotation marks and citation omitted).

The district court stated that "[t]he Federal Defendants never appear to have denied that the statutory mandate is a mandate until the issuance of the IFRs (and the ensuing litigation . . .)." ER 22. But HHS has used its discretion to delimit the guidelines since the earliest

implementation of the preventive services mandate, and not just on contraceptives. For all preventive services, HRSA has exercised discretion to "specify the frequency, method, treatment, or setting for the provision of that service," and has directed that if such information is not specified, "the plan or issuer can use reasonable medical management techniques to determine any coverage limitations." Centers for Consumer Information & Insurance Oversight, *Affordable Care Act Implementation FAQs – Set 12*, Centers for Medicare & Medicaid Services, https://go.cms.gov/2I54sZV (last visited Feb. 25, 2019). HRSA has also created age limits in its recommendations. For example, in average-risk women, HPV screenings are only covered for those age 30 and older, and mammograms are only covered for those age 40 and older. HRSA, *Women's Preventive Services Guidelines*, U.S. Dep't of Health & Human Servs. (Oct. 2017), https://bit.ly/2irrzlT. HRSA has been exercising its statutory discretion to delimit coverage requirements for years, and the States have not claimed that it is contrary to law to limit preventive services by age (a limitation not found in § 300gg-13(a)(4)), nor that it is improper to utilize "reasonable medical management techniques" to determine exclusions from coverage.

The upshot is that HRSA could have required coverage of some contraceptives and not others, permitted employers to exclude coverage of some contraceptives due to cost considerations (which it in fact does),[12] or determined that a contraception mandate was unnecessary due to widespread coverage pre-dating the ACA. Indeed, since the listing of contraceptives itself is not in the Code of Federal Regulations and has never been subject to formal rulemaking, HRSA could edit its website tomorrow to eliminate some or all contraceptives from the list, and the States would have no recourse. To claim that the agencies have no authority to create exemptions from the mandate in these circumstances is weaving new administrative law from whole cloth.

2. The States' reasoning, if accepted, would also invalidate the preexisting religious employer exemption and accommodation.

The States' APA argument also proves too much. If, as the district court held, the agencies had authority only to determine "*what* 'additional preventive care and screenings'" must be covered, the

[12] Employers may exclude more expensive contraceptives if they cover a cheaper contraceptive in the same category. *See* Centers for Consumer Information & Insurance Oversight, *Affordable Care Act Implementation FAQs – Set 12*, Centers for Medicare & Medicaid Services, https://go.cms.gov/2I54sZV (last visited Feb. 25, 2019).

agencies lacked the authority to issue the 2011 religious employer exemption, or to create a complex "accommodation" system, upon which the district court relied for its RFRA analysis. ER 23 (emphasis in original); 76 Fed. Reg. at 46,626. If HHS had no power to exempt some employers from the mandate, then it has no choice but to impose the mandate on houses of worship.

The district court declined to reconcile its holding with the previous version of the religious employer exemption because "the legality of that exemption is not before the Court." ER 24. It did suggest, though, that "the church exemption was rooted in provisions of the Internal Revenue Code." *Id.* But that is a red herring. Nothing in the ACA incorporates the Internal Revenue church exemption into the preventive services mandate. Nor is there anything special about the Internal Revenue Code: federal law has different ways to identify religious organizations. *See, e.g.*, 42 U.S.C. § 290kk ("a nonprofit religious organization"); 10 C.F.R. § 5.205 (educational institutions can self-identify as religious organizations). And federal law contains a variety of religious exemptions, any of which HHS could have selected to rely upon here, such

as Title VII's religious employer exemption or Title IX's exemption for religious educational institutions.[13]

The States offer no reason why the agencies would have authority to create a religious employer exemption based on a snippet of unrelated tax code (which by no means purports to define religious organizations), *see* 26 U.S.C. § 6033(a)(3)(C) (referring in the same section to "religious organization" as a different category), but lack the authority to adopt the exemption in the Final Rule. Neither the religious employer exemption nor the subsequent "accommodation" clears the district court's hurdle that "the statutory mandate is a mandate." ER 22.

As a result, in enjoining one regulation, the district court required the government to enforce an underlying regulation that, by the court's reasoning, is unlawful.

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[13] *See, e.g.*, 42 U.S.C. § 2000e-1 ("This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."); 20 U.S.C. § 1681 ("this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization"); 42 U.S.C. § 290kk ("The term 'religious organization' means a nonprofit religious organization.").

3. The agencies are permitted to issue the Final Rule to comply with RFRA.

A religious exemption required by a federal civil rights statute cannot be "arbitrary [and] capricious" or "not in accordance with law." 5 U.S.C. § 706(2)(A).

The lower court misunderstood both RFRA and federal precedent, relying on vacated decisions and failed legislative proposals to enjoin the Final Rule. That led the district court to reimpose a version of the mandate that is currently forbidden by RFRA-based injunctions from dozens of federal courts.

Properly understood, RFRA makes it illegal for the agencies to impose the contraceptive mandate without a religious exemption. Accordingly, the district court's order must be reversed.

a. RFRA applies broadly to federal laws and federal agencies.

RFRA requires that the federal government "shall not substantially burden a person's exercise of religion" unless doing so is the "least restrictive means" of advancing a "compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b). RFRA is not just a judicial remedy. Instead, it constrains every "agency," "all Federal law, and the implementation of that law, whether statutory or otherwise," including the agencies' actions

under the ACA. 42 U.S.C. §§ 2000bb-2, 2000bb-3. Simply put, whenever the federal government acts, it must obey RFRA.

The district court discounted RFRA, relying heavily on the fact that Congress later chose not to include a "conscience amendment" with a "blanket exemption for religious or moral objectors" in 2012. ER 23, 31, 33 n.14. But Congress also considered and declined to pass legislation declaring that RFRA did *not* apply to portions of the mandate.[14] Thus, "'[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.'" *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (citation omitted); *see also United States v. Meek*, 366 F.3d 705, 720 (9th Cir. 2004) ("Sorting through the dustbin of discarded legislative proposals is a notoriously dubious proposition."). It is equally plausible Congress decided not to pass the

[14] *See* Protect Women's Health From Corporate Interference Act of 2014, S. 2578, 113th Cong. (2014), https://www.congress.gov/bill/113th-congress/senate-bill/2578/actions; Protect Women's Health From Corporate Interference Act of 2014, H.R. 5051, 113th Cong. (2014) https://www.congress.gov/bill/113th-congress/house-bill/5051/actions.

conscience amendment because it thought that RFRA already constrained the agencies' actions.

b. The mandate as it existed before the Fourth IFR violates RFRA and the Constitution.

In enacting RFRA, Congress also made clear that "religious exercise" is a broad term, encompassing "any exercise of religion." 42 U.S.C. § 2000cc-5. Religious exercise includes "'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" *Hobby Lobby*, 573 U.S. at 710 (quoting *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990)).

The Little Sisters and other religious groups exercise religion by providing health insurance that complies with their religious beliefs. *See* ER 299 ¶¶33-34. It is undisputed that these groups have a sincere religious objection to complying with the "accommodation." ER 299-301 ¶¶35-38. The accommodation depends on religious objectors contracting with their insurer or TPA to provide contraceptive coverage through their own plan infrastructure. Failure to comply with the mandate, either outright or via the accommodation, would result in large fines under 26 U.S.C. § 4980D ($100/day per person) and 26 U.S.C. § 4980H(c)(1) ($2000 per employee, per year)—the same fines that constituted a substantial

burden in *Hobby Lobby*. 573 U.S. at 691 ("If these consequences do not amount to a substantial burden, it is hard to see what would.").

Substantial burden. The district court rejected the argument that the accommodation imposed a substantial burden, relying on vacated courts of appeals' decisions to determine that the delivery of contraceptive coverage does not depend on "any action taken by the objector." ER 27. That determination cannot stand, particularly after the government's admissions in *Zubik*. Religious objectors are required to execute Form 700, obligating their insurer to provide contraceptives to their employees through their plan infrastructure. 45 C.F.R. § 147.131(d). Or they must alternately inform HHS in writing not only of their religious objection, but also of the "name and type" of their plan, along with contact information for the health insurance issuers, and must keep HHS updated with changes to that information. 45 C.F.R. § 147.131(d)(1)(ii). In the case of religious entities with a self-insured plan—that is, a plan where the financial risk of claims is not borne by an insurance company—the notification via Form 700 or directly to HHS serves to "designate the relevant [TPA] as plan administrator," a role a TPA does not normally have, and that requires legal authority from the

employer, such that the notification becomes "an instrument under which the plan is operated." 79 Fed. Reg. at 51,095. That is not simply "opting out." ER 27 (quoting *Eternal Word Television Network, Inc. v. HHS*, 818 F.3d 1122, 1149 (11th Cir. 2016), *vacated by Eternal Word Television Network, Inc. v. HHS*, No. 14-12696-CC, 2016 WL 11503064, at *1 (11th Cir. May 31, 2016)). It is using legal authority to authorize and obligate a TPA to provide coverage.

The district court also erred when it concluded that there can be no substantial burden because the accommodation simply "shift[s] responsibility to non-objecting entities." ER 27 (quoting *Eternal Word Television Network, Inc.*, 818 F.3d at 1149, *vacated by Eternal Word Television Network, Inc.*, No. 14-12696-CC, 2016 WL 11503064, at *1 (11th Cir. May 31, 2016)). Religious employers making use of the accommodation are forced to maintain a health plan infrastructure that includes the very coverage the employer finds religiously objectionable. *See* 78 Fed. Reg. at 39,876 ("plan participants and beneficiaries (and their health care providers) do not have to have two separate health insurance policies (that is, the group health insurance policy and the individual contraceptive coverage policy)"). As the agencies have conceded, "the

coverage provided by the TPA is, as a formal ERISA matter, part of the same 'plan' as the coverage provided by the employer." Br. for the Resp'ts at 38, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (citation omitted).

That is why Solicitor General Verrilli conceded that contraceptive coverage must be "part of the same plan as the coverage provided by the employer," Br. for the Resp'ts at 38, *Zubik*, 136 S. Ct. 1557 (2016) (internal quotations marks and citation omitted), https://bit.ly/2DiCj32; Tr. of Oral Arg. at 60-61, *Zubik*, 136 S. Ct. 1557 (2016) (Chief Justice Roberts: "You want the coverage for contraceptive services to be provided, I think as you said, seamlessly. You want it to be in one insurance package. . . . Is that a fair understanding of the case?"; Solicitor General Verrilli: "I think it is one fair understanding of the case."). *Cf.* Tr. of Oral Arg. at 61, *Zubik*, 136 S. Ct. 1557 (2016) (Solicitor General Verrilli "would be content" if Court would "assume a substantial burden" and rule only on the government's strict scrutiny defense).

Consistent with their concessions in *Zubik*, the agencies themselves now concede that forcing religious groups to comply with the accommodation "constituted a substantial burden" on religious exercise. 82 Fed. Reg. at 47,806. The district court did not "believe[] it likely" that

the substantial burden analysis "is . . . altered by the position taken by the government in *Zubik*." ER 29. But since *Zubik*, federal courts have awarded at least 14 injunctions—not consent decrees—to religious objectors. *See infra* Part II.A.3.c. Each injunction required an Article III judge to determine that the movant had made "a clear showing" that the law required that "extraordinary and drastic remedy." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

What is more, the district court's substantial burden analysis relies on mutually exclusive premises. The agencies cannot simultaneously lack power to make exemptions from the contraceptive mandate, *see supra* Part II.A.2, and also offer an accommodation that allows objectors to "opt out" of that mandate. Either the accommodation itself is an exemption (and therefore unlawful in the district court's view because the agencies lack authority to create exemptions) *or* the accommodation is not a pure "opt out" but a separate obligation. The district court's analysis relies on the accommodation in its determination that the Final Rule is not required by RFRA. But if the accommodation is really an "opt out," neither the district court nor the States have offered an explanation as to

how the agencies had authority to implement it under the ACA, but somehow lacked authority to issue the Final Rule at issue here.

Strict scrutiny. Under RFRA, Congress permitted agencies to impose substantial burdens on religion only where they could prove that imposing the burden on a particular person was the least restrictive means of advancing a compelling government interest. 42 U.S.C. § 2000bb-1. Here, the government cannot carry that burden (and, to its credit, has finally stopped trying). The mandate fails strict scrutiny for many reasons, including:

- The government's interest in requiring employers to provide contraceptives cannot be "compelling" since small businesses, grandfathered plans, churches, and government-sponsored plans are exempt;
- The Obama Administration defended its decision to exempt grandfathered plans because the affected women would have many other avenues to obtain coverage. This concession undercuts any interest in seamless access to contraceptives. It is partly why the Supreme Court remanded *Zubik* and why the government subsequently lost every case.[15]
- A range of state programs provides contraceptives. Indeed, the States' entire case is premised on such programs. The very

[15] S*ee* Mark L. Rienzi, *Fool Me Twice:* Zubik v. Burwell *and the Perils of Judicial Faith in Government Claims*, 2016 Cato Sup. Ct. Rev. 123 (2015-2016) (detailing concessions leading to the *Zubik* remand).

existence of those programs proves that a plan run by nuns is not the least restrictive means of distributing contraceptives.

- As the Supreme Court explained in *Hobby Lobby*, "[t]he most straightforward way of [providing contraceptive coverage] would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Hobby Lobby*, 573 U.S. at 728.
- The federal government is prepared to pay directly via Title X, foreclosing any argument that the forced involvement of the Little Sisters is necessary.[16]
- The agencies have publicly acknowledged that the mandate fails strict scrutiny, 82 Fed. Reg. at 47,792, 47,806; they therefore cannot carry their statutory burden in this or any other court.

Accordingly, the prior version of the mandate cannot pass strict scrutiny, and exemptions to that mandate are compelled by RFRA.

Additionally, 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.

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[16] *See* 83 Fed. Reg. 25,502, 25,514 (June 1, 2018) ("[T]his proposed rule would amend the definition of 'low income family' to include women who are unable to obtain certain family planning services under their employer-sponsored health insurance policies due to their employers' religious beliefs or moral convictions.") (draft final rule available at https://www.hhs.gov/opa/sites/default/files/title-x-notice-of-final-rule.pdf).

That rule exempts religious orders which engage in what the government deems "exclusively religious" activities. *See* 78 Fed. Reg. at 39,874 (limiting exemption to the "exclusively religious activities of any religious order"). But it does not exempt religious orders that, because of their faith, engage in activities the government deems not "exclusively religious," such as serving the elderly poor.

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 (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 churches and religious orders to other types of religious orders and organizations, the mandate inappropriately "interfer[es] with an internal . . . decision that affects the faith and mission" of a religious organization. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012). 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).

c. After Zubik, *courts have unanimously found the mandate as applied to religious employers violated RFRA.*

Since the Supreme Court's *Zubik* order, every single religious employer case that has been litigated to conclusion has resulted in a permanent injunction. Those injunctions find a RFRA violation and forbid the agencies from enforcing the mandate. For example:

- *Wheaton Coll. v. Azar*, No. 1:13-cv-8910 (N.D. Ill. Feb. 22, 2018), ECF No. 119 at 3 ("enforcement of the contraceptive mandate against Wheaton would violate Wheaton's rights under" RFRA);
- *Little Sisters of the Poor v. Azar*, No. 1:13-cv-02611 (D. Colo. May 29, 2018), ECF No. 82 at 1-2 ("enforcement of the mandate against Plaintiffs, either through the accommodation or other regulatory means . . . violated and would violate the Religious Freedom Restoration Act");
- *Reaching Souls Int'l, Inc. v. Azar*, No. 13-cv-01092 (W.D. Okla. Mar. 15, 2018), ECF No. 95 at 3-4 ("enforcement of the contraceptive mandate against Plaintiffs . . . violated and would violate RFRA").

These post-*Zubik* injunctions join pre-*Zubik* injunctions. All told, more than 50 RFRA-based injunctions continue to bind the federal agencies. *See supra* note 4 & note 5.

The district court relied on an Eastern District of Pennsylvania opinion in a related case which stated, post-*Zubik*, that the Third Circuit has "foreclosed" the Little Sisters' substantial burden argument. ER 29 n.13 (quoting *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 581 (E.D. Pa. 2017)). But *Pennsylvania v. Trump* relied on two cases that are vacated or not binding here and, in any event, do not stand for the proposition the court relied upon.

The first case was a Third Circuit opinion that was vacated by the Supreme Court in *Zubik*. *See Geneva Coll. v. Sec'y Dep't Health & Human Servs.*, 778 F.3d 422, 439 (3d Cir. 2015), *vacated Zubik v. Burwell*, 136 S. Ct. 1557 (2016). Not only was the appellate decision vacated, but the district court subsequently entered a permanent injunction on RFRA grounds. *Geneva Coll. v. Azar*, No. 2:12-cv-00207 (W.D. Pa. July 5, 2018), ECF No. 153. Said otherwise, even on remand the Western District of Pennsylvania did not follow the Third Circuit's vacated *Geneva College* decision. This Court should not either.

The second case concerned whether an *employee* might have a RFRA claim based on participation in a health plan that offers objectionable benefits. *See Real Alternatives, Inc. v. Sec'y Dep't Health & Human Servs.*, 867 F.3d 338 (3d Cir. 2017). That decision expressly distinguished that factual scenario from the claim in *Geneva College*—thus distinguishing it from the RFRA argument advanced by the Little Sisters here. *See id.* at 355 (noting employee claim is "distinct from an employer's RFRA claim objecting to the mandated provision" of coverage). Neither case changes the fact that every known religious objector is protected by an injunction. And neither case changes the fact that, since the *Zubik* decision, every court to consider claims by a religious objector to the contraceptive mandate has entered an injunction against the mandate as it existed before the IFRs.

d. Where courts are divided, government has discretion to err on the side of not violating civil rights.

Since federal agencies have to implement national policy for all 50 states, it was at least a reasonable act of discretion for the agencies to comply with multiple injunctions and err on the side of not burdening religious liberty. RFRA is more than a judicial remedy; it "applies to all Federal law." 42 U.S.C. § 2000bb-3. *See also* 42 U.S.C. § 2000bb-2(1) ("the

term 'government' includes a[n] agency . . . of the United States."). When agencies implement federal law, they are necessarily implementing RFRA, and they are duty-bound to obey it. Accordingly, the Office of Legal Counsel has advised agencies that they can accommodate persons who they have reason to believe will face a substantial burden on religious exercise. *See, e.g.*, *Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act*, 31 Op. O.L.C. 162, 176-77 (2007); *cf. Charitable Choice Regulations Applicable to States Receiving Substance Abuse Prevention and Treatment Block Grants*, 68 Fed. Reg. 56,430, 56,435 (Sept. 30, 2003).

So too, here, the agencies were correct to the extent they erred on the side of protecting religious exercise under RFRA. This is particularly true because more than 50 federal courts have entered RFRA-based injunctions. That is why Congress made the Establishment Clause—not judicial pronouncements on the substantial burden test—the outer limit on exemptions: "Granting . . . exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter." 42 U.S.C. § 2000bb-4. RFRA thereby expresses Congress's

intent that federal agencies be allowed some leeway when accommodating religious exercise. Thus, the Final Rule is well within the discretion committed to HHS under the ACA and RFRA.

e. The Final Rule does not violate the Establishment Clause.

RFRA authorizes the government to grant "exemptions, to the extent permissible under the Establishment Clause." 42 U.S.C. § 2000bb-4. The States have argued that the Final Rule violates the Establishment Clause, ER 191-92 ¶¶248-54, and the district court has suggested that the Establishment Clause is "one of the core disputes here," ER 34. *See also* ER 34 ("at some point, accommodation may devolve into an unlawful fostering of religion") (internal quotation marks and citations omitted). Yet, 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 Final Rule easily passes Establishment Clause muster under any test.

First, under the Supreme Court's most recent precedent, "the Establishment Clause *must* be interpreted 'by reference to historical practices and understandings.'" *Town of Greece v. Galloway*, 572 U.S.

565, 576 (2014) (quoting *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989)) (emphasis added). Religious accommodations "fit[] within the tradition long followed" in our nation's history.[17] *Id.* at 577. 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 ministerial employees. 565 U.S. 171. That exemption is required because "the Establishment Clause . . . prohibits government involvement in such ecclesiastical decisions." *Id.* at 189. Like the ministerial exception, the Final Rule belongs to a tradition of avoiding government interference with religious decision-making and the internal determinations of religious groups like the Little Sisters.

Even under the much-maligned *Lemon* test, the Supreme Court has long recognized that accommodation of religion is a permissible secular

[17] *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).

purpose, which does not advance or endorse religion, and which avoids, rather than creates, entanglement with religion.[18] The leading case is *Corp. of Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. 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. 327, 329 n.1 (1987). 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.*

[18] The *Lemon* test is one of the most criticized tests in constitutional law. *See, e.g.*, *Utah Highway Patrol Ass'n v. Am. 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).

So 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, a burden that 50 federal courts have seen fit to lift for religious plaintiffs. 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).

B. The States are unlikely to succeed on their claim that the Final Rule is procedurally invalid.

In the district court, the States took the position that post-IFR notice and comment is categorically unable to cure a procedurally defective interim rule. ECF No. 174 at 15-16. The district court ignored this argument. The only Ninth Circuit case the States cited to justify that sweeping contention, *Paulsen v. Daniels*, actually concluded that the effect of invalidating the challenged interim rule simply meant that the final rule "can only have prospective effect" and otherwise was "the applicable rule." 413 F.3d 999, 1008 (9th Cir. 2005). Critically, *Paulsen* refused to invalidate both the interim rule and superseding final rule because that would "reinstate" a prior, unlawful regulation. *Id.* Accordingly, the States' procedural arguments fail.

III. The district court's injunction is an abuse of discretion because it orders the agencies to perpetuate the same violations of law that the court condemns.

The district court justified the preliminary injunction by holding the agencies could not add exceptions in the preventive services regulations, ER 23. But invalidating the Final Rule necessarily "reinstat[ed]" the prior contraceptive mandate regime. *See Paulsen*, 413 F.3d at 1008; *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987); *see also* ER 12 ("The Court's order reinstated the 'state of affairs' that existed prior to October 6, 2017, including the exemption and accommodation as they existed following *Zubik* . . . ."). And, as explained above, that regime itself created exemptions and "accommodations" to the contraceptive mandate.

Reinstating the mandate and its prior exemption and accommodation system is tantamount to ordering the agencies to carry out the same violation of law used to justify the injunction. Such an injunction is an abuse of discretion. *See Rappa v. New Castle Cty.*, 18 F.3d 1043, 1074 (3d Cir. 1994) (vacating an injunction because "the district court's injunction in this case itself perpetuates the constitutional infirmity of the statute by leaving in place" other unconstitutional restrictions on speech). The

district court's broad ruling does not merely lay the groundwork for a different lawsuit; it commits reversible error in this case. By its own reasoning, the district court saws off the branch on which it sits.

IV. The States cannot satisfy the remaining injunction factors.

A. The States are not suffering irreparable harm.

To earn a preliminary injunction, the States must show "irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Because the States cannot establish any cognizable injury, *see supra* Part I, they necessarily cannot establish an irreparable harm.

The States have not identified even one employer which will drop contraceptive coverage due to the IFR, nor have they identified any women who would fall into the exceedingly narrow category of women who would wish to use a non-covered contraceptive, have no access to contraceptives through a family member or other plan, and qualify for and seek state assistance for contraceptive services.

Nor can the States rely upon speculative predictions of harm to establish entitlement to an injunction. The district court relied upon hypotheticals about denial of coverage and warned of the "dire" consequences that would result from the Final Rule going into effect. ER 40-

41. The court ignores the seven-year history of the mandate and its legal battles. The slippery slope argument has been advanced against every challenge to the mandate and has proven false every time.

Most notably, the Supreme Court rejected this claim in *Hobby Lobby*. 573 U.S. at 733 ("Nor has HHS provided evidence that any significant number of employers sought exemption, on religious grounds, from any of ACA's coverage requirements other than the contraceptive mandate."). There, the dissent predicted a number of consequences, raising the specter of exemption claims by "employers with religiously grounded objections to . . . [1] blood transfusions (Jehovah's Witnesses); [2] antidepressants (Scientologists); [3] medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and [4] vaccinations (Christian Scientists, among others)." *Id.* at 770-71. But those claims never materialized.

Searches of post-*Hobby Lobby* cases underscore this fact. A search for federal and state decisions involving employers seeking to avoid covering blood transfusions turns up no such cases. A search for federal and state decisions involving employers seeking to avoid covering antidepressants

likewise turns up no such cases. A search for federal and state decisions involving employers seeking to avoid covering pork-derived products turns up no such cases. And finally, a search of federal and state decisions involving employers seeking to avoid covering vaccines turns up no such cases. In fact, each search turns up two kinds of results: (1) cases which have nothing to do with employer health coverage, and (2) other contraceptive mandate cases discussing these dire predictions.

It has been four years since *Hobby Lobby*, and the horribles have not paraded. It is incumbent upon plaintiffs seeking a preliminary injunction to demonstrate that their fears of endless religious objection claims will in fact come true. The States cannot.

Even fears about lack of contraceptive coverage are overblown. Contraceptive coverage was widespread prior to the mandate, as the IOM acknowledged. The IOM found that "the vast majority"—89%—"of health plans cover contraceptives." Institute of Medicine, *supra* note 1, at 49. If 89% of plans covered contraceptives *before* the mandate, where is the States' proof that many employers will choose to fake objections—thus risking fines—due to the Final Rule? Indeed, the IFRs had already been in effect for two months before the first preliminary injunction was

granted, and yet the record is devoid of evidence of any employer, other than those like the Little Sisters who had already challenged the mandate, who had taken advantage of it. A Guttmacher study performed in 2017 actually found that contraceptive use among sexually active women had remained constant—not increased—after the mandate went into effect.[19] This is unsurprising given the many exceptions to the mandate and the widespread availability of contraceptive coverage prior to the mandate.

B. The public interest and the balance of the equities favor broad protection of religious exercise.

Unlike the speculative harms asserted by the States, enjoining the Final Rule will impinge the religious freedom of religious objectors like the Little Sisters. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). A RFRA violation causes the same kind of "irreparable injury" as a violation of First Amendment

[19] Jonathan Bearak & Rachel K. Jones, *Did Contraceptive Use Patterns Change After the Affordable Care Act? A Descriptive Analysis*, Guttmacher Institute (Mar. 13, 2017), https://bit.ly/2NyhHIR ("We observed no changes in contraceptive use patterns among sexually active women.").

rights. *See Warsoldier v. Woodford*, 418 F.3d 989, 1002 (9th Cir. 2005) (holding that substantial burden on prisoner's belief constituted irreparable harm under RFRA's sister statute, RLUIPA) (quoting *Elrod*, 427 U.S. at 373). That is why so many courts enjoined the prior versions of the mandate, and why a regulatory fix is appropriate.

This interest in fundamental freedoms, coupled with the lack of demonstrated harm if the Final Rule goes into effect, shows that the balance favors the Final Rule and religious objectors like the Little Sisters. The arguments here are similar to those in *Hobby Lobby*, where the Supreme Court found that it was actually the government's position that would lead to "intolerable consequences": "Under HHS's view, RFRA would permit the Government to require all employers to provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, third-trimester abortions or assisted suicide." *Hobby Lobby*, 573 U.S. at 733. Indeed, given the district court's construction of substantial burden, the government could impose a third-trimester abortion "accommodation" or an assisted suicide "accommodation," and the Little Sisters would be powerless to fight it,

since the accommodation would defeat any RFRA claim. *See* ER 25-26 (likely no substantial burden).

The danger in this case arises not from a sensible religious accommodation, but from judicial decisions which tie the government's hands when it attempts to comply with civil rights laws and stop burdening religion. After seven years, the government arrived at a win-win solution in which most employers provide contraceptive coverage, but the burden is lifted from religious employers, and employees may choose from a broad range of alternatives. This Court should reject the States' belated attempt to dictate federal policy via sweeping injunction.

CONCLUSION

The States lack standing, so the preliminary injunction should be vacated and the case remanded with instructions to dismiss. If the Court reaches the merits, it should hold that the States have not met the criteria to justify a preliminary injunction and reverse the decision below.

Respectfully submitted this 25th day of February 2019,

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STATEMENT OF RELATED CASES

The Little Sisters are not aware of any related cases pending in this Court, pursuant to Ninth Circuit Rule 28-2.6.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO 9TH CIRCUIT RULE 32-1 FOR CASE NUMBER 18-15072

I certify that:

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.

The brief is 11,647 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 25, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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ADDENDUM

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.