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6 *(continued on next page)*

7  
8 **IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

9 THE STATE OF CALIFORNIA; THE STATE OF  
CONNECTICUT; THE STATE OF DELAWARE;  
10 THE DISTRICT OF COLUMBIA; THE STATE  
OF HAWAII; THE STATE OF ILLINOIS; THE  
STATE OF MARYLAND; THE STATE OF  
11 MINNESOTA, by and through its Department of  
Human Services; THE STATE OF NEW YORK;  
12 THE STATE OF NORTH CAROLINA; THE  
STATE OF RHODE ISLAND; THE STATE OF  
VERMONT; THE COMMONWEALTH OF  
13 VIRGINIA; THE STATE OF WASHINGTON,  
Plaintiffs,

14 THE STATE OF OREGON,  
Intervenor-Plaintiff,

15 v.

16 ALEX M. AZAR, II, in his Official Capacity as  
Secretary of the U.S. Department of Health &  
17 Human Services; U.S. DEPARTMENT OF  
HEALTH AND HUMAN SERVICES; R.  
18 ALEXANDER ACOSTA, in his Official Capacity  
as Secretary of the U.S. Department of Labor; U.S.  
19 DEPARTMENT OF LABOR; STEVEN  
MNUCHIN, in his Official Capacity as Secretary of  
20 the U.S. Department of the Treasury; U.S.  
DEPARTMENT OF THE TREASURY;  
21 Defendants,

22 and,

23 THE LITTLE SISTERS OF THE POOR, JEANNE  
JUGAN RESIDENCE; MARCH FOR LIFE  
EDUCATION AND DEFENSE FUND,  
24 Defendant-Intervenors.

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

**OPPOSITION TO MOTION FOR  
PRELIMINARY INJUNCTION AND  
MOTION TO SHORTEN TIME**

Date: May 14, 2019

Judge: Hon. Haywood S. Gilliam, Jr.

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6  
7 **OPPOSITION**

8 Intervenor-Plaintiff Oregon notes in its motion for a preliminary injunction that “Oregon’s position  
9 is the same as that of the plaintiff States.” Mot. 17, Dkt. 312. Indeed, Oregon’s motion is materially  
10 identical to the States’ motion, which this Court granted in January. Dkt. 234. For purposes of  
11 preserving their arguments, the Little Sisters oppose Oregon’s motion for the same reasons as those  
12 expressed in their opposition to the States’ motion, incorporated and attached hereto as Exhibit A and  
13 Exhibit A-1. For the same reason, the Little Sisters do not believe that an in-person hearing is necessary  
14 for the Court’s decision on this motion, and thus oppose Oregon’s motion to shorten the time for a  
15 hearing. Dkt. 353.

16 Oregon relies on one declaration, Dkt. 211, for state-specific facts in support of its motion. That  
17 declaration does not change any of the Little Sisters’ arguments. Oregon does not attempt to identify  
18 any employer who will drop contraceptive coverage for its employees as a result of the Final Rules,  
19 nor does it provide evidence that even one woman will lose coverage as a result of the Final Rules.  
20 Its evidence thus shares the same deficiencies as the evidence presented by the other state plaintiffs,  
21 as detailed in the attached briefing.

22 For the foregoing reasons, and for the reasons explained in the attached Opposition, the Court  
23 should deny Oregon’s motion for a preliminary injunction and Oregon’s motion to shorten the time  
24 for a hearing.

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Dated: May 14, 2019

Respectfully submitted,

/s/ Mark L. Rienzi

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

THE STATE OF CALIFORNIA; THE STATE OF CONNECTICUT; THE STATE OF DELAWARE; THE DISTRICT OF COLUMBIA; THE STATE OF HAWAII; THE STATE OF ILLINOIS; THE STATE OF MARYLAND; THE STATE OF MINNESOTA, BY AND THROUGH ITS DEPARTMENT OF HUMAN SERVICES; THE STATE OF NEW YORK; THE STATE OF NORTH CAROLINA; THE STATE OF RHODE ISLAND; THE STATE OF VERMONT; THE COMMONWEALTH OF VIRGINIA; THE STATE OF WASHINGTON,

*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; MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

*Defendants-Intervenors.*

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

**OPPOSITION TO MOTION FOR  
PRELIMINARY INJUNCTION**

**[N.D. CAL. CIVIL L.R. 6-3]**

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## INTRODUCTION

1  
2 This case concerns the validity of the federal government’s most recent efforts to both provide  
3 contraceptive access and protect religious liberty. The States disagree with the agencies’ policy  
4 choice to try to retain a broad contraceptive mandate for virtually all previously-covered employers,  
5 while providing a religious exemption for groups like the Little Sisters of the Poor. The States say  
6 that approach is invalid both because the final rules were preceded by interim final rules, and  
7 because providing a religious exemption supposedly violates statutory and constitutional law. The  
8 States ask this Court to invalidate the new final rules and thus force the federal government to  
9 choose between (a) a contraceptive mandate that applies to the Little Sisters and other religious  
10 groups, or (b) no contraceptive mandate at all.

11 Fortunately, there is no reason for this Court to put the Administration to that all-or-nothing  
12 choice. That is both because the States lack standing to invoke this Court’s jurisdiction, and because  
13 the federal agencies were legally required to provide the religious exemption in the latest final rules.  
14 While Congress gave the agencies discretion to decide whether or not to include contraception in  
15 their “guidelines” for preventative care—discretion the agencies still have—Congress did not make  
16 religious exemptions discretionary. The Religious Freedom Restoration Act (“RFRA”) recognizes  
17 that religious exercise is an “unalienable right,” that government should find “sensible balances”  
18 between religion and other values, and that the government “shall not” force someone to violate her  
19 religious beliefs unless the government proves that such coercion is the “least restrictive means” of  
20 achieving a “compelling governmental interest.” 42 U.S.C. §§ 2000bb, 2000bb-1.

21 The agencies were not merely balancing this mandatory statutory command against a  
22 discretionary agency policy choice. They were also subject to dozens of federal court injunctions  
23 finding that failure to provide a religious exemption violates RFRA, and a Supreme Court decision  
24 that an available alternative they are now pursuing was actually the “most straightforward” way to

1 achieve its goals and a “less restrictive” alternative. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct.  
2 2751, 2780 (2014). The agencies were not free to flout these congressional and judicial commands.

3 The States’ procedural attack on the new final rules fares no better. The States’ suggestion that  
4 the initial decision to issue the IFR always taints later rules issued *after* notice and comment is both  
5 unsupported by the caselaw and would have disruptive consequences. A decision embracing that  
6 principle would invalidate large portions of the Code of Federal Regulations, much of which was  
7 initially issued by IFR. If the States’ argument is followed to its conclusion, the very contraceptive  
8 mandate the States ask this Court to re-impose would also be unlawful, because those rules were also  
9 initially issued by IFR. In any case, because the agencies were legally obligated to provide a  
10 religious exemption, any such procedural defect would be harmless.

11 The federal government is trying to retain a contraceptive mandate (“Mandate”) for most  
12 employers while still respecting religious liberty. There is no basis to allow states to ask federal  
13 courts to dictate to the federal government that it must provide contraceptives indirectly via nuns,  
14 rather than directly through government programs like Title X. The motion should be denied.

## 15 **BACKGROUND**

### 16 **A. The federal Mandate and Its Exceptions**

17 Federal law requires some employers (namely, those with over 50 employees) to offer group  
18 benefits with “minimum essential coverage.” 26 U.S.C. § 5000A(f)(2), 26 U.S.C. § 4980H(a), (c)(2).  
19 That “minimum essential coverage” must include, among other things, coverage for “preventive care  
20 and screenings” for women. 42 U.S.C. § 300gg-13(a)(4); 29 U.S.C. § 1185d. Congress did not  
21 require that “preventive care” include contraceptive coverage. Instead, Congress delegated to HHS  
22 the authority to determine what should be included as preventive care “for purposes of this  
23 paragraph.” 42 U.S.C. § 300gg-13(a)(4).  
24

1 The preventive services mandate was first implemented in an interim final rule on July 19, 2010,  
2 published by the departments of Health and Human Services, Labor, and Treasury (the agencies). 75  
3 Fed. Reg. 41,726, 41,728 (July 19, 2010) (“First IFR”). The First IFR stated that the Health  
4 Resources and Services Administration (“HRSA”) would produce comprehensive guidelines for  
5 women’s preventive services. *Id.* This IFR was enacted without prior notice of rulemaking or  
6 opportunity for prior comment, as it came into effect on the day that comments were due. Following  
7 the comment period on the First IFR, and thirteen days after IOM issued its recommendations, HHS  
8 promulgated its second IFR. 76 Fed. Reg. 46,621 (Aug. 3, 2011) (“Second IFR”). That same day,  
9 HRSA issued guidelines on its website adopting the IOM recommendations in full, including all  
10 female contraceptive methods in the Mandate. HRSA, Women’s Preventive Services Guidelines,  
11 U.S. Department of Health & Human Services (Oct. 2017), <https://bit.ly/2OHsmgH>.

12 The Second IFR stated that it “contain[ed] amendments” to the First IFR. 76 Fed. Reg. at 46,621.  
13 It implemented HRSA’s guidelines without notice and comment. *See id.* at 46,623. Not all private  
14 employers are subject to this Mandate. First, the vast majority of employers—namely, those with  
15 fewer than 50 employees—are not required to provide any insurance coverage at all.<sup>1</sup> Second,  
16 approximately a fifth of large employers are exempt through the ACA’s exception for  
17 “grandfathered health plans.” *See* 26 U.S.C. § 4980H(c)(2); 42 U.S.C. § 18011; 75 Fed. Reg. 34,538,  
18 34,542 (June 17, 2010); Kaiser Family Found., *Employer Health Benefits 2018 Annual Survey* 209  
19 (2018). It also granted HRSA “discretion to exempt certain religious employers from the Guidelines  
20 where contraceptive services are concerned.” 76 Fed. Reg. at 46,623. It defined the term “religious  
21 employer” narrowly. *Id.* at 46,626.

22 \_\_\_\_\_  
23 <sup>1</sup> According to some estimates, more than 97% of employers have fewer than 50 employees, and  
24 therefore face no federal obligation to provide coverage at all. *See, e.g.,* DMDatabases, *USA  
Business List*, <http://bit.ly/10yw56o>.

1 The Second IFR was effective immediately without prior notice or opportunity for public  
2 comment. The agencies received “over 200,000” comments on the Second IFR. 77 Fed. Reg. 8,725,  
3 8,726 (Feb. 15, 2012). Many of the comments explained the need for a broader religious exemption  
4 than that implemented by the Second IFR. However, on February 15, 2012, HHS adopted a final  
5 rule that “finaliz[ed], without change,” the Second IFR. *Id.* at 8,725.

6 The agencies then published an Advance Notice of Proposed Rulemaking (ANPRM), 77 Fed.  
7 Reg. 16,501 (Mar. 21, 2012), and a Notice of Proposed Rulemaking (NPRM), 78 Fed. Reg. 8,456  
8 (Feb. 6, 2013), which were later adopted in a final rule making further changes to the Mandate, 78  
9 Fed. Reg. 39,870 (July 2, 2013). Between the ANPRM and the NPRM, the agencies received over  
10 600,000 comments. 78 Fed. Reg. at 8,459 (“approximately 200,000 comments” submitted in  
11 response to ANPRM); 78 Fed. Reg. at 39,871 (“over 400,000 comments” submitted in response to  
12 NPRM). The agencies eventually amended the definition of a religious employer by eliminating  
13 some of the criteria from the Second IFR, limiting the definition to organizations “referred to in  
14 section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code.” 78 Fed. Reg. at 39,874. The  
15 agencies also adopted an arrangement—termed an “accommodation”—by which religious  
16 employers not covered by the exemption could offer the objected-to contraceptives on their health  
17 plans by executing a self-certification and delivering it to the organization’s insurer or the plan’s  
18 third-party administrator (TPA).

19 The system initiated by the first two IFRs did not address the concerns of many religious  
20 organizations, and many filed lawsuits seeking relief. In July 2013, one of those organizations,  
21 Wheaton College, received an emergency injunction from the Supreme Court that protected it from  
22 the penalties in the Mandate. *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014). Following that  
23 injunction, in August 2014, the agencies published a third IFR “in light of the Supreme Court’s  
24 interim order” in *Wheaton College v. Burwell*, again without notice and comment. 79 Fed. Reg.

1 51,092 (Aug. 27, 2014) (“Third IFR”). This Third IFR amended the Mandate to allow a religious  
2 objector to “notify HHS in writing of its religious objection” instead of notifying its insurer or third-  
3 party administrator. *Id.* at 51,094. The Third IFR received over 13,000 publicly posted comments.  
4 See EBSA, *Coverage of Certain Services Under the Affordable Care Act* (Aug. 27, 2014),  
5 <https://www.regulations.gov/document?D=EBSA-2014-0013-0002>. The Third IFR was ultimately  
6 finalized on July 14, 2015. 80 Fed. Reg. 41,318 (July 14, 2015). The Third IFR did not  
7 accommodate the religious beliefs of the Little Sisters and other religious objectors, and the Supreme  
8 Court revisited the issue in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (discussed below).

9 Not all private employers are subject to the federal contraceptive Mandate. First, the vast  
10 majority of employers—again, according to some estimates, more than 97%—are not required to  
11 provide any coverage at all. *Supra* n.1. Second, approximately a fifth of large employers are exempt  
12 through the ACA’s exception for “grandfathered health plans.” See 26 U.S.C. § 4980H(c)(2); 42  
13 U.S.C. § 18011; 75 Fed. Reg. at 34,542; Kaiser Family Found., *Employer Health Benefits 2018*  
14 *Annual Survey* 209 (2018). Third, even prior to the regulation at issue here, “churches, their  
15 integrated auxiliaries, and conventions or associations of churches,” as well as “the exclusively  
16 religious activities of any religious order,” 26 U.S.C. § 6033(a)(3)(A)(i), (iii), were exempt from the  
17 contraceptive Mandate for religious reasons. 82 Fed. Reg. 47,792, 47,795-96 (Oct. 13, 2017).

18 The federal government is also bound—in all of its actions, by any of its parts, under any  
19 statute—to obey federal religious freedom laws. See, e.g., 42 U.S.C. § 2000bb *et seq.* RFRA  
20 prohibits federal agencies from imposing substantial burdens on religion—they “shall not” do it—  
21 unless the agency demonstrates that the burden is required by a compelling government interest and  
22 there is no “less restrictive” means of achieving that interest. *Id.*; *Hobby Lobby*, 134 S. Ct. at 2780.

1           **B. The challenges to the Mandate and the resulting injunctions**

2           Because the Mandate required that many employers choose between violating their sincere  
3 religious beliefs and paying debilitating fines, dozens of cases were filed against it. Those ongoing  
4 lawsuits have resulted in dozens of injunctions from federal courts across the country, and multiple  
5 such cases were consolidated at the Supreme Court. *See Zubik v. Burwell*, 136 S. Ct. 1557 (2016)  
6 (consolidating cases from the Third, Fifth, Tenth, and D.C. Circuits).<sup>2</sup> Once the cases reached the  
7 Supreme Court, the agencies made new concessions that changed the facts and arguments they had  
8 previously relied on to defend the Mandate.

9           First, the government admitted for the first time that contraceptive coverage, rather than being  
10 provided as a “separate” plan under the accommodation, must be “part of the same plan as the  
11 coverage provided by the employer,” Br. for the Resp’ts at 38, *Zubik*, 136 S. Ct. 1557 (No. 14-1418)  
12 (quotations omitted), <https://bit.ly/2DiCj32>; Tr. of Oral Arg. at 60-61, *Zubik*, 136 S. Ct. 1557 (No.  
13 14-1418) (Chief Justice Roberts: “You want the coverage for contraceptive services to be provided, I  
14 think as you said, seamlessly. You want it to be in one insurance package. . . . Is that a fair  
15 understanding of the case?”; Solicitor General Verrilli: “I think it is one fair understanding of the  
16 case.”). The government thus removed any basis for lower courts’ prior holding that the Mandate did  
17 not impose a substantial burden on the religious exercise of objecting employers because the  
18 provision of contraceptives was separate from their plans. Tr. of Oral Arg. at 61, *Zubik*, 136 S. Ct.  
19 1557 (No. 14-1418) (Solicitor General Verrilli “would be content” if Court would “assume a  
20 substantial burden” and rule only on the government’s strict scrutiny defense).

21           Next, the agencies admitted to the Supreme Court that women who do not receive contraceptive  
22 coverage from their employer can “ordinarily” get it from “a family member’s employer,” “an

23 <sup>2</sup> The various cases challenging the Mandate are collected at Becket, *HHS Mandate Information*  
24 *Central*, <http://www.becketlaw.org/research-central/hhs-info-central/> (last accessed Jan. 3, 2019).



1 Exchange,” or “another government program.” Br. for the Resp’ts at 65, *Zubik*, 136 S. Ct. 1557 (No.  
2 14-1418), <https://bit.ly/2DiCj32>. The government also acknowledged that the Mandate “could be  
3 modified” to be more protective of religious liberty, Suppl. Br. for the Resp’ts at 14-15, *Zubik v.*  
4 *Burwell*, 136 S. Ct. 1557 (No. 14-1418), <https://bit.ly/2VjFsVb>, thus admitting the Mandate was not  
5 the least restrictive means of achieving the government’s interests.

6 The Supreme Court unanimously vacated the decisions of the Courts of Appeals of the Third,  
7 Fifth, Tenth, and D.C. Circuits, which had ruled in favor of the agencies. *Zubik*, 136 S. Ct. at 1561. It  
8 ordered the government not to impose taxes or penalties on petitioners for failure to comply with the  
9 Mandate and remanded the cases so that the parties could be “afforded an opportunity to arrive at an  
10 approach going forward” that would resolve the dispute. *Id.*

11 Other injunctions forbid the federal government from enforcing the Mandate against all known  
12 religious objectors. In fact, several injunctions have been entered in open-ended class or  
13 associational standing cases that allow new members to join. *See, e.g., Reaching Souls Int’l, Inc. v.*  
14 *Azar*, No. CIV-13-1092-D, 2018 WL 1352186, at \*2 (W.D. Okla. Mar. 15, 2018); Order, *Catholic*  
15 *Benefits Ass’n LCA v. Hargan*, No. 5:14-cv-00240-R, Dkt. 184 (W.D. Okla. Mar. 7, 2018) (granting  
16 permanent injunction of Mandate to current and future nonprofit members of Catholic Benefits  
17 Association).

### 18 **C. Challenges to the Final Rule**

19 After years of unsuccessful attempts to justify the Mandate in court, in compliance with  
20 Congress’s mandate that government “shall not” impose a substantial burden on religion, and in  
21 compliance with injunctions forbidding enforcement against religious and moral objectors, the  
22 federal defendants issued two interim final rules providing that the Mandate will not be enforced  
23 against employers with religious or moral objections. 82 Fed. Reg. 47,792; 82 Fed. Reg. 47,838 (Oct.  
24

1 13, 2017) (the “IFRs”).<sup>3</sup> The IFRs otherwise left the Mandate in place as to all employers previously  
2 covered. The IFRs also left in place the accommodation. 45 C.F.R § 147.131. The IFRs were  
3 immediately challenged in this lawsuit and in others around the country. This Court entered a  
4 nationwide injunction preventing the implementation of the IFRs on December 21, 2017 due to a  
5 lack of prior notice and comment. Dkt. 105. That injunction was appealed to the Ninth Circuit,  
6 which held that the plaintiff States California, Delaware, Maryland, New York, and the  
7 Commonwealth of Virginia met the “relaxed” requirements for standing to bring the procedural  
8 claim on appeal. *California v. Azar*, No. 18-15144, 2018 WL 6566752, at \*5 (9th Cir. Dec. 13, 2018).  
9 The Court also held that the IFRs likely violated the notice and comment provisions of the APA. *Id.*  
10 at \*7. The Ninth Circuit also held that a nationwide injunction was inappropriate and limited the  
11 injunction to the plaintiff States. *Id.* at \*8-9.

12 The federal defendants finalized the IFRs in final rules that will be effective on January 14, 2019,  
13 60 days after they were published in the federal register. 83 Fed. Reg. 57,536 (Nov. 15, 2018)  
14 (“Final Rule”). The Final Rules consider the comments submitted on the IFRs, and maintain the  
15 religious exemption for groups like the Little Sisters.

16 Following the publication of the Final Rules, the States submitted an amended complaint joining  
17 more plaintiff States, Connecticut, the District of Columbia, Hawaii, Illinois, Minnesota, North  
18 Carolina, Rhode Island, Vermont, and Washington. The States have now brought a second motion  
19 for a preliminary injunction, arguing that the Final Rules violate substantive provisions of the APA,  
20 and that the Final Rules are tainted by the lack of comment on the IFRs. In all of the States’ evidence,  
21

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22 <sup>3</sup> Many of the arguments presented here are relevant to both the religious and moral exemption, but  
23 the Little Sisters address only the religious exemption. Singular references to “IFR” or “Final Rule”  
24 are to that rule. The Little Sisters would only need to rely on the moral objector rule if the States  
argued, or the Court found, that the moral rule survives but the religious rule does not.

1 they still submit no evidence of any employer who will drop coverage as a result of the Final Rules,  
2 and no women who stand to lose coverage as a result of the Final Rules.

### 3 ARGUMENT

#### 4 I. The States lack standing.

5 Rather than providing additional evidence that they will be harmed by the Final Rules following  
6 their implementation, the States rely on the Ninth Circuit’s ruling that they are likely to suffer harm  
7 as a result of the IFRs. Dkt. 170 2d Am. Compl. ¶¶ 27-30; 223-232. They thus fail to identify any  
8 employers who are not protected by current court injunctions and who plan to take advantage of the  
9 exemption. Even with the addition of several new States—at least one of which abandoned its own  
10 separate case to litigate here—the States have still failed to identify anyone who will actually be  
11 harmed by the Mandate.

12 The Ninth Circuit held that the States need not “identify a specific woman likely to lose coverage”  
13 in order to show that the rule would “lead to women losing employer-sponsored contraceptive  
14 coverage, which will then result in economic harm to the states.” *California v. Azar*, No. 18-15144,  
15 2018 WL 6566752, at \*6. This reasoning extends existing standing precedent and allows the States  
16 to make a leap of faith to enter federal court. The Little Sisters thus incorporate the standing  
17 arguments from their opposition to the preliminary injunction against the IFRs, and their standing  
18 arguments at the Ninth Circuit, in order to preserve them in this Court and on appeal. Dkt. 75 at 6-  
19 10; Opening Br. at 26-40, *California v. Azar*, No. 18-15144, 2018 WL 6566752 (9th Cir. Apr. 9,  
20 2018), Dkt. 13; Reply Br. at 27-34, *California v. Azar*, No. 18-15144, 2018 WL 6566752 (9th Cir.  
21 June 11, 2018), Dkt. 90.

#### 22 II. The requested relief would violate judicial orders, the Constitution, and federal law.

23 Despite the Ninth Circuit’s holding limiting the IFR injunction to enforcement of the IFRs in the  
24 plaintiff States, the States seek a nationwide injunction against the Final Rule on the grounds that it

1 violates the APA. The States seek this relief, they say, in order to prevent the harm caused by  
2 religious objectors. But this Court cannot enter such relief, and cannot force the federal government  
3 to apply the Mandate to religious objectors, without running afoul of existing injunctions from a  
4 range of federal courts, including the Supreme Court. Simply put, many other courts have already  
5 ordered HHS *not* to enforce the very Mandate the States seek to make it enforce here. *See* Exhibit  
6 A.<sup>4</sup> Indeed, the Final Rule was motivated by the legal challenges to the various versions of the  
7 Mandate. *See* 83 Fed. Reg. at 57,539-40. The injunctions entered in those cases forbid the federal  
8 government from enforcing the Mandate against all known religious objectors. This was not for lack  
9 of effort on the part of the federal government, which had unsuccessfully asked the Supreme Court  
10 on *five separate occasions* to allow it to force compliance by religious objectors.<sup>5</sup> But instead, the  
11 Supreme Court had repeatedly entered injunctions protecting objectors, and had unanimously  
12 ordered the government to find a different approach. *Zubik*, 136 S. Ct 1557 (2016). In other words,  
13 the Final Rule was not an “unreasoned reversal of course,” Dkt. 174, Mot. at 17, but it was required  
14 to ensure compliance with multiple injunctions across the country.<sup>6</sup>

15 In any case, the relief requested by the States would violate the First Amendment. If the States  
16 prevail, the federal government would revert to a system in which some religious organizations get

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17 <sup>4</sup> In addition to the injunctions protecting the Plaintiffs in the finalized cases, there are also  
18 injunctions protecting each of the Plaintiffs in the pending cases challenging the Mandate. *See, e.g.,*  
19 *E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743, 772 (S.D. Tex. 2013) (permanent injunction).  
20 Counsel are aware of two updates since the list was filed. *Eternal Word Television Network* is now  
21 pending in the district court rather than the Eleventh Circuit, *Eternal Word Television Network v.*  
22 *Sec’y of U.S. Dep’t of Health & Human Servs.* 744 F. App’x 683, 684 (11th Cir. 2018) (vacating and  
23 remanding summary judgment against plaintiffs), No. 13-0521-CG-C (S.D. Ala.). And *Washington v.*  
24 *Trump* has been voluntarily dismissed. Stipulation of Dismissal, *Washington v. Trump*, No. 2:17-cv-  
01510-RBL, Dkt. 55 (W.D. Wash., Dec. 18, 2018). The plaintiff has joined this lawsuit

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

<sup>6</sup> In May 2018, the district court granted a permanent injunction in the Little Sisters’ case. *Little*  
*Sisters of the Poor v. Azar*, No. 1:13-cv-02611 (D. Colo. May 29, 2018), Dkt. 82.

1 exemptions (primarily churches and their “integrated auxiliaries”), and some do not. This type of  
2 discrimination among religious organizations is impermissible under the Free Exercise and  
3 Establishment Clauses, which prohibit the government from making such “explicit and deliberate  
4 distinctions between different religious organizations.” *Larson v. Valente*, 456 U.S. 228, 246 n.23  
5 (1982) (striking down laws that created differential treatment between “well-established churches”  
6 and “churches which are new and lacking in a constituency”). By preferring certain churches and  
7 religious orders to other types of religious orders and organizations, the Mandate inappropriately  
8 “interfer[es] with an internal . . . decision that affects the faith and mission” of a religious  
9 organization. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190  
10 (2012). Doing so also requires illegal “discrimination . . . [among religious institutions] expressly  
11 based on the degree of religiosity of the institution and the extent to which that religiosity affects its  
12 operations[.]” *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (applying  
13 *Larson* to invalidate distinction between “sectarian” and “pervasively sectarian” organizations).

14 The States’ effort to thwart a small religious exemption, while never objecting to much larger  
15 and far-reaching secular exemptions, also violates the Free Exercise and Equal Protection Clauses.  
16 Simply put, governments may not single out religious conduct for special disabilities where they  
17 have taken no action to address comparable secular conduct that produces an even greater threat to  
18 the States’ claimed interests. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,  
19 508 U.S. 520, 532 (1993) (“At a minimum, the protections of the Free Exercise Clause pertain if the  
20 law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct  
21 because it is undertaken for religious reasons.”).

22 Finally, as explained below, the requested relief violates RFRA. The Supreme Court has already  
23 found that forced compliance with the Mandate constitutes a substantial burden on religion, and that  
24 direct government provision of coverage is “less restrictive.” *Hobby Lobby*, 134 S. Ct. 2775-80. The

1 federal defendants have not, and cannot, carry their statutory burden of demonstrating that forced  
2 compliance is the least restrictive means of advancing a compelling government interest. *See* 83 Fed.  
3 Reg. at 57,546-48. This is why every single court to consider an employer’s RFRA challenge after  
4 the *Zubik* concessions has found that application of the Mandate violates RFRA.

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

#### 6 **A. The Final Rule does not violate the substantive provisions of the APA.**

##### 7 **1. The ACA does not require contraceptive coverage.**

8 The ACA did not mandate contraceptive coverage. Instead, Congress delegated to HRSA  
9 discretion to determine the contours of the preventive services guidelines. 42 U.S.C. § 300gg-  
10 13(a)(4). In fact, the legislative history of the preventive services mandate has scant discussion of  
11 family planning and instead focuses primarily on mammograms and other screening tests.<sup>7</sup> The  
12 States therefore cannot escape the fact that it would have been (and would still be) perfectly  
13 consistent with the statute for HRSA to leave contraceptives off the list entirely. And Congress left  
14 the entire preventive services mandate out of its list of “particularly significant protections” that  
15 required across-the-board compliance even for grandfathered plans. 75 Fed. Reg. at 34,540; *Hobby*  
16 *Lobby*, 134 S. Ct. at 2780.

17 Against this backdrop, it makes no sense to assume, as the States do, that Congress intended to  
18 foreclose any exemptions to contraceptive coverage, forcing HRSA to make a binary all-or-nothing

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19  
20 <sup>7</sup> *See, e.g.*, 111<sup>th</sup> Cong. Rec. S11987 (daily ed. Nov. 30, 2009) (Statement of Sen. Mikulski)  
<https://www.congress.gov/congressional-record/2009/11/30/senate-section/article/S11985-2>  
21 (“overwhelming hurdles for women to access screening programs”); 111<sup>th</sup> Cong. Rec. S12019 (daily  
22 ed. Dec. 1, 2009) [https://www.congress.gov/congressional-record/2009/12/01/senate-](https://www.congress.gov/congressional-record/2009/12/01/senate-section/article/S12019-7)  
23 [section/article/S12019-7](https://www.congress.gov/congressional-record/2009/12/01/senate-section/article/S12019-7) (“They are skipping screenings for cervical cancer, they are skipping  
24 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. Mikulski Floor  
Statement on Women’s Healthcare Amendment, C-SPAN (Dec. 1, 2009) <https://cs.pn/2RiNUVz>.  
Thus, including contraceptives that the FDA says may terminate an embryo was particularly suspect.

1 choice. The better reading of the statute is the one the Obama Administration adopted in 2011 with  
2 the original church exemption, namely that the delegation of authority to HRSA included the  
3 authority to balance competing interests over coverage. The Obama Administration reaffirmed that  
4 understanding in 2012 with the slightly expanded church exemption; and again in 2013 with the  
5 “accommodation;” and yet again in 2014 with the modified “accommodation,” which is that the  
6 delegation of authority to HRSA included the authority to balance competing interests over coverage.  
7 *See supra* at 3-5. Indeed, the statutory grant of authority specifies “comprehensive guidelines  
8 supported by the Health Resources and Services Administration,” rather than merely a list of  
9 services. This shows that the authority delegated to HRSA was not merely the authority to create a  
10 list of services, but to produce “guidelines” that are “comprehensive” in scope, meaning that HRSA  
11 should provide context for the recommendations and take multiple factors into account. 42 U.S.C.  
12 § 300gg-13.

13 The States’ novel all-or-nothing reading of the discretion delegated in section 2713 would  
14 foreclose any true exemption for religious organizations, and would invalidate these Obama-era  
15 compromises. That approach would not result in more contraceptive coverage but less, as HHS, still  
16 constrained by RFRA’s command that it “shall not” burden religion where less restrictive  
17 alternatives exist, would have only one legally permissible choice: deleting contraceptive coverage  
18 entirely from required preventive care under the ACA for *all* employers. The States’ claimed  
19 interests are better protected by a contraceptive mandate with exemptions than with no contraceptive  
20 mandate at all. Indeed, it is difficult to see how a ruling from this Court forcing the federal  
21 government to make that all-or-nothing decision would necessarily decrease, rather than increase,  
22 the number of women who turn to the States for contraceptive access.

1                   **2. Section 1554 does not conflict with the Final Rule.**

2           Nor does section 1554 prohibit the Final Rule. As set forth above, Congress itself (a) chose not  
 3 to mandate contraceptive coverage at all but instead leave the matter entirely to HRSA’s discretion,  
 4 and (b) chose not to require grandfathered plans covering tens of millions of people to cover  
 5 preventive services. In light of these choices, it makes no sense to suggest that the ACA treats failure  
 6 to extend the Mandate to each and every potential employer as “creat[ing] an[] unreasonable  
 7 barrier[]” or “imped[ing] timely access to health care.” 42 U.S.C. § 18114. The ACA itself flunks  
 8 that test far worse than the comparatively tiny Final Rule does.<sup>8</sup> Furthermore, in light of (a) the  
 9 existing injunctions, (b) the wide availability of contraceptives generally, and (c) Title X programs  
 10 available to provide contraceptives to those who cannot afford them, the Final Rule cannot be said to  
 11 create an unreasonable barrier or impede timely access.

12                   **3. Section 1557 does not mandate contraceptive coverage.**

13           The States next argue that the Final Rule violates section 1557 of the ACA, which prohibits  
 14 discrimination “on the ground prohibited under . . . title IX of the Education Amendments of 1972.”  
 15 42 U.S.C. § 18116(a). But Title IX does not apply to organizations “controlled by a religious  
 16 organization if the application of this subsection would not be consistent with the religious tenets of  
 17 such organization.” 20 U.S.C. § 1681(a)(3). This is a broader exemption than that in earlier versions  
 18 of the Mandate; it applies to religious organizations such as universities which were not exempt from  
 19 the prior versions of the Mandate. *Cf. Wheaton Coll. v. Azar*, No. 1:13-cv-08910, Dkt. 119 (N.D. Ill.  
 20 Feb. 22, 2018) (injunction protecting religious college from Mandate). Therefore, an exemption  
 21 which protects religious organizations cannot be inconsistent with section 1557, since section 1557

22 \_\_\_\_\_  
 23 <sup>8</sup> And of course the plaintiff States—some of which have no contraceptive mandate *at all* and others  
 24 of which have religious exemptions similar to those they claim are illegal here—would flunk that  
 test worst of all.



1 itself incorporates the broad religious exemption scheme of Title IX. *See Franciscan All., Inc. v.*  
2 *Burwell*, 227 F. Supp. 3d 660, 690 (N.D. Tex. 2016) (noting both religious and abortion  
3 exemptions).<sup>9</sup>

4 In 2016, HHS issued a rule interpreting section 1557. A portion of that rule has been enjoined as  
5 contrary to law. *Id.* at 691. But even that overbroad rule did not attempt to incorporate the  
6 contraceptive Mandate into the strictures of 1557. *See* 81 Fed. Reg. 31,376-401 (May 18, 2016) (no  
7 mention of “contraception”). Thus, to strike down this Final Rule under Section 1557, this Court  
8 would have to reach significantly beyond any prior judicial construction of Section 1557; beyond the  
9 previous HHS interpretation of section 1557 (which was itself deemed contrary to law); and beyond  
10 the plain language of section 1557, which incorporates religious and abortion exemptions. The States  
11 have no likelihood of success on such a claim.

#### 12 **4. RFRA requires HHS to create religious exemptions.**

13 As the Little Sisters have long maintained, as HHS now admits, and as every single court to  
14 decide a RFRA case on the issue since the government’s concessions in *Zubik* has found, RFRA  
15 mandates a broad religious exemption. RFRA applies “to all Federal law, and the implementation of  
16 that law, whether statutory or otherwise.” 42 U.S.C. § 2000bb-3(a)-(b). RFRA thus applies to the  
17 ACA, regulations promulgated under it, and the implementation of those regulations. *Hobby Lobby*,  
18 134 S. Ct. at 2761-62.

19 Under RFRA, a regulation which imposes a substantial burden on religious exercise must pass  
20 strict scrutiny. As the Supreme Court has held, “[b]ecause the contraceptive mandate forces them to  
21 pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance  
22 with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.” *Id.* at

23 <sup>9</sup> Notably, the Title IX abortion provision applies specifically to non-religious entities, since  
24 religious institutions are already exempt from Title IX.

1 2779. The Little Sisters cannot, in good conscience, provide these services on their health benefits  
2 plan or authorize others to do so for them. Dkt. 38-3, Decl. of Mother Superior McCarthy ¶¶ 35-51.  
3 The Supreme Court has protected the Little Sisters twice. *See Little Sisters of the Poor Home for the*  
4 *Aged v. Sebelius*, 134 S. Ct. 1022 (2014); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

5 Therefore, the Mandate must pass strict scrutiny if it is to be applied to the Little Sisters—  
6 something that the government admits it cannot do. 83 Fed. Reg. at 57,546-47. Even prior to that  
7 admission, the government’s myriad exemptions from the Mandate, its ever-shifting enforcement  
8 schemes, and the vast range of alternative sources of contraception confirmed that its interest in  
9 enforcing the Mandate against religious objectors was not compelling, and that less restrictive  
10 alternatives were available. *See infra*.<sup>10</sup> Indeed, since the Supreme Court’s decision in *Zubik*, courts  
11 across the country have entered permanent injunctions against the Mandate as a violation of RFRA.  
12 *See, e.g.*, Order granting permanent injunction, *Wheaton Coll. v. Azar*, No. 1:13-cv-08910, Dkt 119  
13 (N.D. Ill. Feb. 22, 2018). Faced with unanimous rulings from all of these post-*Zubik* courts—to say  
14 nothing of a Supreme Court *Zubik* directive to arrive at an alternative approach—HHS is well within  
15 its statutory discretion to craft an exemption responsive to the judicial determinations and  
16 injunctions entered against it elsewhere. The agencies had only one legal option if they wanted to  
17 keep a contraceptive mandate: grant the exceptions required by RFRA.

18  
19  
20 \_\_\_\_\_  
21 <sup>10</sup> In *Hobby Lobby*, the Supreme Court found that the “most straightforward” way to meet the  
22 Government’s assumed interest—and the way that is less restrictive of religious liberty—is for the  
23 government to provide access directly, 134 S. Ct at 2780, which is precisely what the agencies are  
24 seeking to do under Title X. Indeed, a Guttmacher article has indicated that Title X is *better* at  
providing family planning services than insurance plans. Rachel Benson Gold, *Going the Extra  
Mile: The Difference Title X Makes*, Guttmacher Policy Rev., available at <https://bit.ly/2TqIQN8>  
(May 16, 2012) (“Title X has the flexibility [Medicaid] lacks”).

1           **5. RFRA authorizes HHS to lift government-created burdens on religious exercise.**

2           RFRA applies to “every agency *and official* of the Federal Government.” *Mack v. Warden*  
 3 *Loretto FCI*, 839 F.3d 286, 301 (3d Cir. 2016) (emphasis in original). As the Ninth Circuit has  
 4 recognized, “Congress derives its ability to protect the free exercise of religion from its plenary  
 5 authority found in Article I of the Constitution; it can carve out a religious exemption from otherwise  
 6 neutral, generally applicable laws based on its power to enact the underlying statute in the first place.”  
 7 *Guam v. Guerrero*, 290 F.3d 1210, 1220 (9th Cir. 2002). In RFRA, Congress adopted a broad policy  
 8 of lifting burdens on religious exercise and striking “sensible balance[.]s,” and in so doing it has  
 9 delegated authority to the agencies to create exemptions to protect religious exercise.<sup>11</sup>

10           RFRA thus contemplates that the government may choose to grant discretionary benefits or  
 11 exemptions to religious groups over and above those which are strictly required by RFRA. It  
 12 authorizes the government to grant “exemptions, to the extent permissible under the Establishment  
 13 Clause,” and to do so in regulations and the “implementation” of the law. 42 U.S.C. § 2000bb-3(a)-  
 14 (b), § 2000bb-4. RFRA thus operates as a floor on religious accommodation, not a ceiling. HHS was  
 15 well within its rights to use the discretion granted under RFRA to create exemptions, even if those  
 16 exemptions had not been required by RFRA’s substantial burden provision.

17           **6. The Final Rules do not violate the Establishment Clause.**

18           RFRA authorizes the government to grant “exemptions, to the extent permissible under the  
 19 Establishment Clause.” 42 U.S.C. § 2000bb-4. The States have argued that the Final Rule violates  
 20 the Establishment Clause. Dkt. 170, Am. Compl. ¶¶ 248-254. It does not. Over six years of hard-  
 21 fought litigation, neither the Obama Administration, nor the lower federal courts, nor any Supreme

22 \_\_\_\_\_  
 23 <sup>11</sup> RFRA does not “authorize any government to burden any religious belief.” 42 U.S.C. § 2000bb-3.  
 24 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.

1 Court Justice took the view that granting relief to religious organizations would violate the  
2 Establishment Clause. And with good reason: the Final Rule easily passes Establishment Clause  
3 muster under any test.

4 First, under the Supreme Court’s most recent precedent, “the Establishment Clause *must* be  
5 interpreted ‘by reference to historical practices and understandings.’” *Town of Greece v. Galloway*,  
6 572 U.S. 565, 576 (2014) (quoting *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492  
7 U.S. 573, 670 (1989)) (emphasis added). Religious accommodations “fit[] within the tradition long  
8 followed” in our nation’s history.<sup>12</sup> Indeed, the historical understanding of “establishments” in some  
9 cases *requires* broad exemptions for religious employers. In *Hosanna-Tabor*, a unanimous Supreme  
10 Court held that historical anti-establishment interests required that churches be exempt from  
11 employment discrimination laws with regard to their ministerial employees. 565 U.S. 171. That  
12 exemption is required because “the Establishment Clause . . . prohibits government involvement in  
13 such ecclesiastical decisions.” *Id.* at 189. Like the ministerial exception, the Final Rule belongs to a  
14 tradition of avoiding government interference with religious decision-making and the internal  
15 determinations of religious groups like the Little Sisters.

16 Even under the much-maligned *Lemon* test, the Supreme Court has long recognized that  
17 accommodation of religion is a permissible secular purpose, which does not advance or endorse  
18 religion, and which avoids, rather than creates, entanglement with religion.<sup>13</sup> The leading case is  
19 *Corp. of Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos*. There, a

20 <sup>12</sup> See, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of*  
*Religion*, 103 Harv. L. Rev. 1409 (1990).

21 <sup>13</sup> The *Lemon* test is one of the most criticized tests in constitutional law. See, e.g., *Utah Highway*  
22 *Patrol Ass’n v. American Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial of  
23 certiorari) (collecting criticism by Chief Justice Roberts and Justices Kennedy, Alito, Thomas, and  
24 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).

1 federal employment law prohibited discrimination on the basis of religion. But it also included a  
2 religious exemption, which permitted religious organizations to hire and fire on the basis of religion.  
3 483 U.S. 327, 329 n.1 (1987). That exemption was challenged as a violation of the Establishment  
4 Clause, allegedly because it advanced religion by “singl[ing] out religious entities for a benefit.” *Id.*  
5 at 338. But the Supreme Court *unanimously* upheld the religious exemption, concluding that the  
6 “government acts with [a] proper purpose” when it “lift[s] a regulation that burdens the exercise of  
7 religion.” *Id.*

8 So here. HHS is not “advanc[ing] religion through its own activities and influence.” *Id.* at 337. It  
9 would merely be lifting a severe governmental burden on private religious exercise. Such religious  
10 accommodations are not just permissible under the Establishment Clause, they “follow[] the best of  
11 our traditions.” *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

#### 12 **B. The Final Rule does not violate the procedural provisions of the APA.**

13 The States’ position that post-IFR notice and comment is categorically unable to cure a  
14 procedurally defective interim rule is inconsistent with Ninth Circuit precedents and, if sustained,  
15 would have destabilizing consequences. The agencies created the Mandate via a series of IFRs  
16 without notice and comment. The States have not objected to those rules, and in fact have asked this  
17 Court to reinstate a prior version of the Mandate that was itself created via IFR. If the States were  
18 correct that lack of prior opportunity for comment on an IFR necessarily invalidates the later  
19 resulting final rule, then HHS would have no choice but to go back to the drawing board, eliminating  
20 the Mandate entirely, and reconsidering the entirety of the women’s preventive services regulations.

21 The agencies had more reason to issue the current Final Rule than it had for previous versions of  
22 the Mandate. After numerous courts held that the Mandate violated RFRA and entered injunctions  
23 binding the government, the agencies issued two additional IFRs that complied with the injunctions  
24 and with the positions the agencies had already taken in the Supreme Court. They simultaneously

1 asked for public comment. The agencies then superseded those IFRs with modified final rules. The  
2 religious exemption was created in a way commensurate to the method used to create the Mandate  
3 and was prompted not by policy change, but by court orders. Any procedural defect would not, in  
4 this limited circumstance, constitute “prejudicial error.” *See* 5 U.S.C. § 706; *see also Shinseki v.*  
5 *Sanders*, 556 U.S. 396, 406 (2009) (holding that § 706 is an administrative law “harmless error  
6 rule”) (quotations omitted).

7 The States, of course, must carry the “burden” to “explain why” the IFR “caused harm.” *Sanders*,  
8 556 U.S. at 410. A procedural error is harmless if “the outcome of the administrative proceedings  
9 will be the same absent [the agency]’s error.” *Green Island Power Auth. v. FERC*, 577 F.3d 148, 165  
10 (2d Cir. 2009); *see also PDK Labs. Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C.  
11 Cir. 2004) (“If the agency’s mistake did not affect the outcome, if it did not prejudice the petitioner,  
12 it would be senseless to vacate and remand for reconsideration.”). The States cannot show prejudice  
13 because, even accepting the Ninth Circuit’s holding that the IFRs lacked good cause, the Final Rules  
14 were issued *after* notice and comment, and on top of a regulatory regime that was itself implemented  
15 by interim rulemaking and which had garnered hundreds of thousands of comments.

16 None of the States’ precedents support a categorical rule that post-IFR notice and comment is  
17 meaningless for the subsequently-issued final rule if the earlier interim rule is procedurally invalid.  
18 The States’ only Ninth Circuit case for this proposition, *Paulsen v. Daniels*, actually concluded that  
19 the effect of invalidating the challenged interim rule simply meant that the final rule “can only have  
20 prospective effect” but otherwise was “the applicable rule.” 413 F.3d 999, 1008 (9th Cir. 2005).

21 *Paulsen* arose after Congress created an early release incentive for prisoners “convicted of a  
22 nonviolent offense” who successfully completed a substance abuse program. *Id.* at 1002. The Bureau  
23 of Prisons published a rule narrowing the category of prisoners who qualified, and a majority of  
24 federal circuit courts, including the Ninth Circuit, concluded that the rule “erroneously interpreted”

1 the statute. *Id.* at 1008 (citing *Downey v. Crabtree*, 100 F.3d 662, 668 (9th Cir. 1996)). The Bureau  
2 then issued an IFR taking similar action but changing the legal justification. That rule was finalized  
3 with post-IFR comment three years later. *Id.* at 1003. Sixteen prisoners affected by the IFR sued,  
4 arguing that the Bureau lacked good cause to bypass notice and comment. The *Paulsen* Court agreed  
5 and held that the “interim regulation is invalid as to those persons disqualified by it prior to the  
6 issuance of the final rule.” *Id.* at 1008. Critically, the court refused to invalidate both the interim rule  
7 and superseding final rule because that would “reinstate” the prior, unlawful regulation that  
8 misinterpreted the statute. *Id.*

9 Indeed, far from obliging this Court to vacate the Final Rule at stake here, *Paulsen* actually  
10 fortifies the Little Sisters’ conclusion that the Final Rule must be upheld since the prior regulation  
11 violated RFRA. *Paulsen* concluded that an interim rule did not infect the subsequent final rule,  
12 particularly because the Bureau used interim rulemaking to replace a regulation that was  
13 substantively unlawful. So too here. The agencies here resorted to an IFR to halt civil rights  
14 violations caused by the Mandate. That IFR is now superseded by a subsequently-issued Final Rule  
15 that followed notice and comment, and this Court should sustain that rule rather than reinstate the  
16 prior version of the Mandate that violates RFRA.

17 The States also attempt to derive their categorical bar against post-IFR comment from *Sharon*  
18 *Steel Corp. v. EPA*—an inapposite case that arose after the EPA administrator changed  
19 Pennsylvania’s Clean Air Act implementation plan without prior notice and comment. 597 F.2d 377,  
20 379 (3d Cir. 1979). In that context, prior notice and comment with States was essential to fulfill the  
21 Clean Air Act’s commitment to “cooperative federalism.” *Cf. GenOn REMA, LLC v. EPA*, 722 F.3d  
22 513, 516 (3d Cir. 2013). Moreover, *Sharon Steel* was only focused on the validity of the original rule  
23 issued without notice and comment. The Third Circuit did not suggest that what the agencies have  
24 done here—namely, issuing a subsequent final rule after notice and an opportunity to comment—

1 was also impermissible. To the contrary, the Third Circuit ordered the agency to “forbear” from  
2 enforcing the procedurally invalid rule and then *provide* the type of notice and comment opportunity  
3 that has already been provided here with respect to the (enjoined) IFRs. *Sharon Steel*, 597 F.2d at  
4 381-82. *Sharon Steel* not only permitted but mandated the development of a new final rule after  
5 notice and comment.

6 The States also cite *Levesque v. Block* for the modest proposition that post-IFR notice and  
7 comment is not a perfect “substitute.” 723 F.2d 175, 188 (1st Cir. 1983). But the States essentially  
8 ignore that *Levesque* ultimately *upheld* a final rule that superseded a procedurally invalid interim  
9 rule because “comment after the fact is better than none at all.” *Id.* at 188. The court concluded the  
10 rule satisfied the APA because the agency received “130 letters regarding the interim rules,” which  
11 were “enough to apprise the Secretary of matters of public concern, to provide a substantial public  
12 airing of relevant issues, and to modify the regulations to suit the Secretary’s, the states’, and the  
13 public’s needs.” *Id.* at 188-89. *Levesque* supports the Little Sisters’ position that the Final Rule,  
14 issued with modifications after the agencies reviewed over 56,000 comments for eleven months, and  
15 after further injunctions against the prior version of the regulation which this Court reinstated,  
16 provided a sufficient “public airing of the relevant issues” rendering the procedurally invalid IFR  
17 harmless error.

18 The States’ reliance on *NRDC v. EPA*, 683 F.2d 752 (3d Cir. 1982), is also misplaced. *NRDC*  
19 arose after the Reagan Administration’s EPA issued an IFR to “effectively repeal” a rule that had  
20 been the product “of a lengthy and intensive development process” during the Carter Administration.  
21 *Id.* at 758, 762. Given the asymmetry between using an interim rule to repeal a rule promulgated  
22 with prior notice and comment, and suspicious of the “sharp changes” in EPA policy, *id.* at 760, the  
23 Third Circuit held that post-promulgation comment did not “cure” the EPA’s procedurally invalid  
24 action. But here, HHS retained the existing Mandate while using post-IFR notice and comment to



1 address civil rights violations in the Mandate, which itself was finalized by post-IFR comment. *See*  
2 *United States v. Reynolds*, 710 F.3d 498, 518 (3d Cir. 2013) (noting that failure to provide notice and  
3 comment is harmless when “an agency’s substantive rule is ‘the only reasonable one’ that the court  
4 ‘would reverse’ [had the agency] ‘c[o]me out the other way.’”) (quoting *Sheppard v. Sullivan*, 906  
5 F.2d 756, 762 (D.C. Cir. 1990)); *cf. AFGE, Local 3090 v. FLRE*, 777 F.2d 751, 759 (D.C. Cir. 1985)  
6 (explaining that an agency “seeking to . . . modify” a rule should “undertake similar procedures to  
7 accomplish such modification”).

8 Moreover, in marked contrast to *NRDC*, the Final Rule is not an abrupt change in federal policy.  
9 Most importantly, HHS is not rescinding the entire Mandate, but leaving it in place for the vast  
10 majority of employers who were subject to it before. The narrow modifications are consistent with  
11 the previous administration’s concessions regarding the Mandate. *See* Suppl. Br. for the Resp’ts at  
12 14-15, *Zubik*, 136 S. Ct. 1557 (No. 14-1418), <https://bit.ly/2VjFsVb> (Mandate “could be modified”  
13 to be more protective of religious liberty). The previous administration undermined its contention  
14 that the Mandate was the least restrictive means of providing contraceptive coverage by conceding  
15 that women who do not receive contraceptive coverage from their employer can “ordinarily” get it  
16 from “a family member’s employer,” “an Exchange,” or “another government program.” Br. for the  
17 Resp’ts at 65, *Zubik*, 136 S. Ct. 1557, <https://bit.ly/2DiCj32>. And in briefing and at oral argument,  
18 the Solicitor General abandoned the lower court’s position that the Mandate did not impose a  
19 substantial burden on religious exercise because the provision of contraceptives was separate from  
20 the objecting employers’ plans. *See supra* at 6.<sup>14</sup> Consistent with those concessions and the resulting

21 \_\_\_\_\_  
22 <sup>14</sup> After receiving further comments after *Zubik*, HHS concluded that it could not modify the existing  
23 accommodation scheme. *See* U.S. Dep’t Labor, *FAQs About Affordable Care Act Implementation*  
24 *Part 36*, at 4-5 (Jan. 09, 2017), <https://bit.ly/2iaSoHW>. It was therefore necessary to either create a  
complete exemption or continue to face extended litigation under RFRA. *See* 83 Fed. Reg. 57,544 &  
n.14 (explaining that this conclusion necessitated a different approach).

1 Supreme Court order forbidding the government from fining the Little Sisters for not complying  
2 with the Mandate, *see Zubik*, 136 S. Ct. at 1561, the next administration admitted that the Mandate  
3 and accommodation as they stood violated RFRA, *see* 83 Fed. Reg. at 57,544 (Mandate “imposes a  
4 substantial burden on the exercise of religion under RFRA”). All of that makes this case readily  
5 distinguishable from *NRDC*. Here, the agencies used an interim rule to save a regulatory regime  
6 (itself issued via IFRs), creating targeted exemptions consistent with concessions made by the prior  
7 administration and in response to judicial injunctions. None of the States’ precedents, then, justify  
8 their conclusion that the Final Rule must be invalidated simply because the Court held that the  
9 previous IFR lacked good cause.

10 The better understanding of the law is that post-IFR notice and comment—which of course  
11 *precedes* issuance of a final rule—is proper, in many cases, to create a finalized rule. *See, e.g.,*  
12 *United States v. Johnson*, 632 F.3d 912, 930, 932 (5th Cir. 2011) (sex-offender not prejudiced by  
13 post-IFR notice and comment “because the Attorney General nevertheless considered the arguments  
14 Johnson has asserted and responded to those arguments during the interim rulemaking.”); *Friends of*  
15 *Iwo Jima v. Nat’l Capital Planning Comm’n*, 176 F.3d 768, 774 (4th Cir. 1999) (Wilkinson, J.)  
16 (holding harmless deficient notice because the “identical substantive claims” to that of plaintiffs was  
17 “the main focus of each stage in the approval process,” it “simply did not prevail”).<sup>15</sup> Case-specific  
18 factors can render the error prejudicial when the relevant organic statute relies on prior notice and  
19 comment (the Clean Air Act’s cooperative federalism) or where the invalid IFR attempted to repeal  
20 a prior regulation that was given prior notice and comment. No such factors exist here. Rather, the  
21 agencies’ resort to an interim rule to repair the Mandate reflects the fact that the Mandate itself

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22  
23 <sup>15</sup> *See also, e.g., Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292  
24 (D.C. Cir. 1994) (explaining that “tardy request for public comment, however, is not necessarily  
fatal” where the agency “displayed an open mind when considering the comments”).

1 began as an IFR, and it was forced not by politics but by in-court factual concessions and court  
2 orders requiring compliance with federal civil rights laws.

3 **IV. The States cannot meet the remaining preliminary injunction factors.**

4 For the reasons set forth above, the States have failed to demonstrate a likelihood of success on  
5 the merits. They have also failed to carry their burden as to the other injunction factors. In light of  
6 the existing injunctions, the States have failed to show irreparable harm, given that they cannot  
7 identify even a single employer expected to change (or employee expected to lose) coverage. Given  
8 that the States already suffer much greater “harm” from existing injunctions and the grandfathering  
9 exemption, they cannot show that the Final Rule will add anything to their alleged burdens.

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

17 **CONCLUSION**

18 The States’ motion should be denied.

19  
20 Dated: January 3, 2018

Respectfully submitted,

21  
22 /s/ Mark Rienzi

Mark L. Rienzi

Eric C. Rassbach

Lori H. Windham

The Becket Fund for Religious Liberty

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# **EXHIBIT A**

## STATEMENT OF THE ISSUES

The Little Sisters' appeal presents three main issues:

**Standing.** Was the District Court correct that Pennsylvania has standing, despite the fact that it has not identified any Pennsylvania employers who plan to drop contraceptive coverage, nor any Pennsylvania citizens who stand to lose such coverage, nor any Pennsylvania citizens who would then qualify for and then turn to the government for coverage? Dkt. 15 at 13-18; Appx.14-23.

**Success on the merits.** Has Pennsylvania demonstrated a likelihood of success on the merits of its claims that the government lacked good cause to issue the interim final rule, and that the interim final rule was contrary to law? Dkt. 15 at 22-54; Appx.19-37.

**Preliminary injunction.** Do the remaining injunction factors justify the District Court's decision to issue a nationwide injunction against the interim final rule? Dkt. 15 at 19-22, 54-55; Appx.43-49.

## STATEMENT OF RELATED CASES

This case has been before this Court previously in the related appeal No. 17-3679, resulting in the decision reported at 888 F.3d 52.

All of the actions listed below are related to this action. All of these actions include claims or defenses that overlap with Pennsylvania's claims here and are either pending, involve decisions of this Court at issue in this case, or resulted in permanent injunctions against former versions of the mandate. Unless otherwise noted, the dates listed are the dates the permanent injunction was issued.

**Pending cases challenging the interim final rules at issue here:**

1. *Am. Civil Liberties Union v. Azar*, No. 4:17-cv-05772 (N.D. Cal.)
2. *Campbell v. Trump*, No. 1:17-cv-02455 (D. Colo.)
3. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, No. 1:17-cv-11930 (D. Mass.)
4. *Medical Students for Choice v. Azar*, No. 1:17-cv-02096 (D.D.C.)
5. *Shiraef v. Azar*, No. 3:17-cv-00817 (N.D. Ind.)
6. *California v. Azar*, No. 4:17-cv-05783 (N.D. Cal.) (preliminary injunction issued Dec. 21, 2017)
7. *Washington v. Trump*, No. 2:17-cv-01510 (W.D. Wash.)

**Pending cases challenging prior versions of the rules:**

8. *Ass'n of Christian Sch. v. Azar*, No. 14-1492 (10th Cir.)
9. *Bindon v. Azar*, No. 1:13-cv-01207 (D.D.C.)
10. *Dobson v. Azar*, No. 1:13-cv-03326 (D. Colo.)
11. *E. Tex. Baptist Univ. v. Azar*, No. 4:12-cv-03009 (S.D. Tex.); No. 14-20112 (5th Cir.)

12. *Eternal Word Television Network v. U.S. Dep't of Health & Human Servs.*, No. 14-12696 (11th Cir.)
13. *La. Coll. v. Azar*, No. 14-31167 (5th Cir.)
14. *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 1:12-cv-06756 (N.D. Ill.)
15. *March for Life v. Azar*, No. 1:2014-cv-01149 (D.D.C.)

**Cases resulting in permanent injunctions issued prior to October 2017 against prior versions of the rules:**

16. *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 6:12-cv-03459 (W.D. Mo.) (Oct. 30, 2014)
17. *Annex Medical, Inc., v. Solis*, No. 0:12-cv-02804 (D. Minn.) (Aug. 18, 2015)
18. *Armstrong v. Sebelius*, No. 1:13-cv-00563 (D. Colo.) (Oct. 7, 2014)
19. *Autocam Corp. v. Sebelius*, No. 1:12-cv-01096 (W.D. Mich.) (Jan. 5, 2015)
20. *Barron Indus., Inc. v. Sebelius*, No. 1:13-cv-01330 (D.D.C.) (Oct. 27, 2014)
21. *Bick Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 4:13-cv-00462 (E.D. Mo.) (Nov. 18, 2014)
22. *Brandt, Bishop of the Roman Catholic Diocese of Greensburg v. Sebelius*, No. 2:14-cv-00681 (W.D. Pa.) (Oct. 3, 2014), (appeal dismissed Oct. 19, 2017)
23. *Briscoe v. Sebelius*, No. 1:13-cv-00285 (D. Colo.) (Jan. 27, 2015)
24. *Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-00709 (E.D. Tex.) (Jan. 2, 2014) (appeal dismissed Oct. 19, 2017)
25. *C.W. Zumbiel Co. v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-01611 (D.D.C.) (Nov. 3, 2014)



26. *Conestoga Wood Specialties Corp. v. Sebelius*, No. 5:12-cv-06744 (E.D. Pa.) (Oct. 2, 2014)
27. *Korte v. HHS*, No. 3:12-cv-1072 (S.D. Ill.) (Nov. 7, 2014)
28. *Daniel Medford v. Sebelius*, No. 0:13-cv-01726 (D. Minn.) (Nov. 20, 2014)
29. *Doboszinski & Sons, Inc. v. Sebelius*, No. 0:13-cv-03148 (D. Minn.) (Nov. 18, 2014)
30. *Domino's Farms Corp. v. Sebelius*, No. 2:12-cv-15488 (E.D. Mich.) (Dec. 3, 2014)
31. *Eden Foods, Inc. v. Sebelius*, No. 2:13-cv-11229 (E.D. Mich.) (Feb. 12, 2015)
32. *Feltl and Co. v. Sebelius*, No. 0:13-cv-02635 (D. Minn.) (Nov. 26, 2014)
33. *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-00104 (D.D.C.) (Oct. 3, 2014)
34. *Grote Indus., LLC v. Sebelius*, No. 4:12-cv-00134 (S.D. Ind.) (Apr. 30, 2015)
35. *Hall v. Sebelius*, No. 0:13-cv-00295 (D. Minn.) (Nov. 26, 2014)
36. *Hartenbower v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-02253 (N.D. Ill.) (Nov. 3, 2014)
37. *Hastings Chrysler Center, Inc. v. Sebelius*, No. 0:14-cv-00265 (D. Minn.) (Dec. 11, 2014)
38. *Hobby Lobby Stores, Inc. v. Sebelius*, No. 5:12-cv-01000 (W.D. Okla.) (Nov. 19, 2014)
39. *Holland v. U.S. Dep't of Health & Human Servs.*, No. 2:13-cv-15487 (S.D. W. Va.) (May 29, 2015)
40. *Johnson Welded Products, Inc. v. Sebelius*, No. 1:13-cv-00609 (D.D.C.) (Oct. 24, 2014)

41. *Lindsay v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-01210 (N.D. Ill.) (Dec. 3, 2014)
42. *M&N Plastics, Inc. v. Sebelius*, No. 5:13-cv-14754 (E.D. Mich.) (Nov. 17, 2015)
43. *Mersino Dewatering Inc. v. Sebelius*, No. 2:13-cv-15079 (E.D. Mich.) (Feb. 27, 2015)
44. *Mersino Mgmt. Co. v. Sebelius*, No. 2:13-cv-11296 (E.D. Mich.) (Feb. 4, 2015)
45. *Midwest Fastener Corp. v. Sebelius*, No. 1:13-cv-01337 (D.D.C.) (Oct. 24, 2014)
46. *MK Chambers Co. v. U.S. Dep't of Health & Human Servs.*, No. 2:13-cv-11379 (E.D. Mich.) (Nov. 21, 2014)
47. *Newland v. Sebelius*, No. 1:12-cv-01123 (D. Colo.) (Mar. 16, 2015)
48. *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-cv-00476 (E.D. Mo.) (Nov. 12, 2014)
49. *Randy Reed Auto., Inc. v. Sebelius*, No. 5:13-cv-06117 (W.D. Mo.) (Nov. 12, 2014)
50. *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 1:12-cv-02542 (E.D.N.Y.) (Dec. 16, 2013) (appeal dismissed Oct. 17, 2017)
51. *Sioux Chief MFG. Co. v. Sebelius*, No. 4:13-cv-00036 (W.D. Mo.) (Nov. 12, 2014)
52. *SMA, LLC v. Sebelius*, No. 0:13-cv-01375 (D. Minn.) (Nov. 20, 2014)
53. *Stewart v. Sebelius*, No. 1:13-cv-01879 (D.D.C.) (Feb. 2, 2015)
54. *Stinson Electric, Inc. v. Sebelius*, No. 0:14-cv-00830 (D. Minn.) (Nov. 18, 2014)

55. *Tonn and Blank Constr. LLC v. Sebelius*, No. 1:12-cv-00325 (N.D. Ind.) (Nov. 6, 2014)
56. *Tyndale House Publishers, Inc. v. Sebelius*, No. 1:12-cv-01635 (D.D.C.) (Jul. 15, 2015)
57. *Weingartz Supply Co. v. Sebelius*, No. 2:12-cv-12061 (E.D. Mich.) (Dec. 31, 2014)
58. *Wieland v. U.S. Dep't of Health & Human Servs.*, No. 4:13-cv-01577 (E.D. Mo.) (Jul 21, 2016)
59. *Williams v. Sebelius*, No. 1:13-cv-01699 (D.D.C.) (Nov. 5, 2014)
60. *Willis and Willis PLC v. Sebelius*, No. 1:13-cv-01124 (D.D.C.) (Oct. 27, 2014)
61. *Zubik v. Sebelius*, No. 2:13-cv-01459 (W.D. Pa.) (Dec. 20, 2013) (appeal dismissed Oct. 20, 2017)

**Cases resulting in permanent injunctions issued since October 2017 against prior versions of the rules:**

62. *Ave Maria Sch. of Law v. Sebelius*, No. 2:13-cv-00795 (M.D. Fla.) (Jul. 11, 2018)
63. *Ave Maria Univ. v. Sebelius*, No. 2:13-cv-00630 (M.D. Fla.) (Jul. 9, 2018)
64. *Catholic Benefits Ass'n LCA v. Sebelius*, No. 5:2014-cv-00240 (W.D. Okla.) (Mar. 7, 2018)
65. *Colorado Christian Univ. v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-02105 (D. Colo.) (Jul. 11, 2018)
66. *Dordt Coll. v. Sebelius*, No. 5:13-cv-04100 (N.D. Iowa) (June 14, 2018)
67. *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207 (W.D. Pa.) (Jul. 5, 2018)

68. *Grace Sch. v. Sebelius*, No. 3:12-cv-00459 (N.D. Ind.) (June 1, 2018)
69. *Little Sisters of the Poor v. Hargan*, No. 13-1540 (10th Cir.) (June 15, 2018)
70. *Priests For Life v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-01261 (D.D.C.) (Nov. 6, 2017)
71. *Reaching Souls Int'l Inc. v. Sebelius*, No. 5:13-cv-01092 (W.D. Okla.) (Mar. 15, 2018)
72. *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092 (E.D. Mo.) (Mar. 28, 2018)
73. *S. Nazarene Univ. v. Hargan*, No. 5:13-cv-01015 (W.D. Okla.) (May 15, 2018)
74. *Wheaton Coll. v. Burwell*, No. 1:13-cv-08910 (N.D. Ill.) (Feb. 22, 2018)

**Case challenging the prior rules resulting in judgment against plaintiff:**

75. *Real Alternatives, Inc. v. Sec'y, Dep't of Health & Human Servs.*, 867 F.3d 338 (3d Cir. 2017)