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(continued on next page)

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,

THE STATE OF OREGON,
Intervenor-Plaintiff,

v.

ALEX M. AZAR, II, in his Official Capacity as Secretary of the U.S. Department of Health & Human Services; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; R. ALEXANDER ACOSTA, in his Official Capacity as Secretary of the 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;
Defendants,
and,

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

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

LITLE SISTERS' REPLY IN SUPPORT OF MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Date: September 5, 2019
Time: 2:00 p.m.
Dept. 2, 4th Floor
Judge: Hon. Haywood S. Gilliam, Jr.

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INTRODUCTION

The States' entire case depends on the "accommodation." The "accommodation" is the *only* argument the States offer against the existence of a "substantial burden" under RFRA. Opp. 15. It is "the answer" about how to harmonize the ACA and religious liberty. Opp. 37. It is the only acceptable response to what the States call the Supreme Court's "command" in *Zubik* that women receive "full and equal health coverage." Opp. 1, 41. The "accommodation" is the system the States want this Court to reinstate, the system that will supposedly prevent religious employer attempts to "steal away" "statutory benefit[s]" from women, Opp. 1, 52, and the system the agencies were legally required to retain, no matter their losses in court. The "accommodation" is the alpha and omega of the States' case.

But the States' reliance on the "accommodation" faces three problems that their brief cannot dispel. *First*, the States' theory of the Women's Health Amendment—namely that "[n]othing in the Women's Health Amendment explicitly or implicitly permits Defendants to exempt employers," Opp. 7—would make the "accommodation" illegal.

Second, forcing the Little Sisters to take actions forbidden by their religion, on pain of large fines, is a substantial burden under binding Ninth Circuit and Supreme Court precedent. The States can only avoid that obvious conclusion by injecting the States' view of the Sisters' religious exercise (the States think the Sisters should just sign the forms, since the States think they are no big deal) into what is supposed to be an analysis of whether the government is "putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th Cir. 2005) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981)). When the proper substantial burden analysis is conducted, it is clear that punishing the Sisters for failure to execute papers needed for the "accommodation" violates RFRA—thus triggering the need for the agencies to fix the law.

Third, the States simply have no answer (indeed, they do not even attempt one) as to how an order from this Court will redress their harms since the federal government has already been enjoined from enforcing the "accommodation" against religious objectors. The States need to tell this Court *how* a ruling in their favor could possibly force the federal government to enforce the accommodation against a single religious objector. The States may prefer to ignore the gaping hole in their Article III arguments, but this Court cannot.

Each of these problems is fatal to the States' claims. When the States do attempt to get past these problems, their arguments are deeply flawed and contradict: plain statutory language; the views of many courts; both presidential administrations to administer the ACA; and every presidential administration to administer RFRA. Nor can the States solve their legal problems with their factual declarations. While affidavits are permissible under Rule 56, they must present evidence that would be admissible at trial. The States' declarations fall woefully short of that standard and should be stricken.

For these reasons, and as set forth more fully below, the Little Sisters respectfully request that the Court dismiss this case with prejudice or, in the alternative, enter summary judgment against the States.

ARGUMENT

I. The States lack Article III standing.

Relying on this Court's past rulings on injury-in-fact as "controlling," Opp. 2, the States fail to engage with the Little Sisters' arguments on redressability or acknowledge that other litigation has undermined their arguments on this point since this Court's prior decision.

As an initial matter, "to withstand a motion for summary judgment on the ground that the plaintiff lacks standing, a plaintiff cannot rely on mere allegations but rather must "set forth by affidavit or other evidence specific facts," validating standing. *United States v. $133,420.00 in U.S. Currency*, 672

F.3d 629, 638 (9th Cir. 2012) (internal quotation marks omitted) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Yet all the States can muster is two declarations offering, at best, educated guesses of which employers might wish to be exempt from the Mandate. *See* Opp. 5 (citing Werberg Decl., Dkt. 385-42 and Chance Decl., Dkt. 385-5). These declarations are based not on personal knowledge, but on speculation about whether employers will take advantage of the final rule. Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."); *see Block v. City of Los Angeles*, 253 F.3d 410, 419 (9th Cir. 2001) (affidavit based on third-party knowledge, where "the source" of the third parties' information was "unclear," constituted "inadmissible hearsay"); *Hughes v. United States*, 953 F.2d 531, 543 (9th Cir. 1992) ("[T]he facts underlying the affidavit must be of a type that would be admissible as evidence[.]"). Furthermore, to the extent these declarations purport to rely on specialized knowledge, they are inadmissible expert declarations submitted without a prior witness report. Fed. R. Evid. 702; Fed. R. Civ. P. 26(a); *see* Werberg Decl. ¶ 1 ("I am frequently called upon to analyze public and private datasets to quantify the impacts of particular policies."); Chance Decl. ¶ 3 (role of "providing guidance and expertise on the content and the display of data"). To the extent they purport to be lay witnesses, they lack foundation of their own personal knowledge. Fed. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); Fed. R. Evid. 701 (lay witness opinion testimony must be "rationally based on the witness's perception"); *see, e.g.*, Chance Decl. ¶ 22 (relying on "internet searches" to predict the actions of religious employers). Indeed, the portions of all of Plaintiffs' declarations that attempt without personal knowledge to predict the future behavior of third parties based on hearsay about their past behavior are likewise inadmissible. *See, e.g.*, Childs-Roshak

Decl. ¶ 19, Dkt. 385-7 ("I anticipate that additional women who lose coverage for contraceptive services because of the Final Rules, either as the primary insured or as a dependent, will seek care at our health centers."); Zimmerman Decl. ¶ 5, Dkt. 385-46 ("women who lose contraceptive coverage as a result of these rules may seek coverage through" Minnesota programs). These declarations add no information—and certainly no admissible evidence—that shows the States will suffer a concrete injury, a deficit the Ninth Circuit panel has noted on more than one occasion. *See* Oral Argument, *California v. Little Sisters*, No. 19-15072 (June 6, 2019), https://cdn.ca9.uscourts.gov/datastore/media/2019/06/07/19-15072.mp3 at 50:56 (asking why "a declaration by some woman that she was not able to purchase birth control pills," if obtainable, hadn't "been filed right at the outset"), 53:25 ("How come we don't have one of those women [who could be harmed] as a plaintiff?"); Oral Argument, *California v. Little Sisters*, No. 18-15144 (Oct. 19, 2018), https://cdn.ca9.uscourts.gov/datastore/media/2018/10/19/18-15144.mp3 at 9:13 (noting the affidavits alleging possible fiscal harm are "not very detailed").

Second, even if there were employers who would change their behavior, the States cannot explain how an order from this Court will redress the alleged harm to be caused by these employers, who are not before this court. As the Little Sisters explained, religious objectors have other available avenues to avoid the Mandate—not only by "bring[ing] their own RFRA lawsuits," but simply by "join[ing] existing classes that already have injunctions against the mandate." Little Sisters' Mot. Summ. J. (Mot.) 13-14, Dkt. 371. The States provide no explanation for how an order in this case would redress their harms, but this Court cannot grant them relief without specific facts demonstrating "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (citation omitted).

The States' redressability problem has grown worse with the *DeOtte* decision—which the States simply fail to address at all, despite knowing about it for 21 days before filing their brief. *See* Notice of Suppl. Authority, Dkt. 376 (attaching Order, *DeOtte v. Azar*, No. 4:18-cv-00825 (N.D. Tex. June 5, 2019), Dkt. 76). But ignoring *DeOtte* does not make it go away, and its injunction covers all religious objectors nationwide. Order at 31, *DeOtte*, No. 4:18-cv-00825 (N.D. Tex. June 5, 2019), *appeal filed by denied proposed intervenor*, *DeOtte*, No. 19-10754 (5th Cir. July 5, 2019).[1] Given that the federal government is forbidden from enforcing the prior rules against *all* objecting employers, how could a ruling from this Court help the States? Surely this Court is not going to affirmatively order the federal defendants to enforce a regulation which they have been permanently enjoined by another court from enforcing. Yet short of that relief, it is unclear what this Court could do that would make the federal government make other people facilitate access to contraceptives. The States simply ignore the problem, but this Court cannot.

Further, the Little Sisters have argued that a court fashioning an equitable remedy must consider the lawfulness of the resulting regime, and that this Court cannot therefore return to a prior regulatory regime based on reasoning that likewise invalidates that regime. Mot. 14; *cf. M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) ("[T]here is no redressability if a federal court lacks the power to issue

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[1] *DeOtte*'s injunction protects:

> Every current and future employer in the United States that objects, based on its sincerely held religious beliefs, to establishing, maintaining, providing, offering, or arranging for: (i) coverage or payments for some or all contraceptive services; or (ii) a plan, issuer, or third-party administrator that provides or arranges for such coverage or payments.

Order at 31, *DeOtte*, No. 4:18-cv-00825 (N.D. Tex. June 5, 2019). The district court denied Nevada's motion to intervene. *See* Order Denying Intervention, *DeOtte*, No. 4:18-cv-00825 (N.D. Tex. July 29, 2019).

such relief."). The States do not respond to this as a barrier to redressability, stating only—elsewhere in their brief—that the Court previously held that "the legality of [the church] exemption is not before the Court." Opp. 13 (citation omitted). But the States do not explain why this Court, in fashioning its final remedy, would not follow the rule of *Paulsen*, where the Ninth Circuit declined to impose a status quo *ante* it determined "erroneously interpreted" prior law. Mot. 41-42; *see Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005).

Nor do the States explain how this Court should deal with the legality of the "accommodation" under any ruling against the Final Rules. The States acknowledge that the "accommodation" is the entire basis for their RFRA argument. Opp. 15 ("Given the availability of the current accommodation process, Defendants are incorrect"). And the States claim that the accommodation "is the answer to harmonizing" RFRA and the Affordable Care Act. Opp. 37. But any order from this Court that forbids the agencies from deciding *who* has to provide contraceptive coverage would necessarily also foreclose "the answer" upon which the States so fully rely. After all, if, as the States contend, the accommodation really means that neither the Little Sisters nor their plan will be providing the coverage, then the accommodation necessarily decides "who" has to provide the coverage, and somehow makes parties that are not mentioned anywhere in the statutory language (such as TPAs) responsible instead. Any order against the Final Rules would be a pyrrhic victory for the States, as it could not result in greater access to contraception through religious employers' plans, because the accommodation is illegal by the same theory.

Finally, the States do not defend their standing to bring Establishment Clause or Equal Protection Clause claims as pleaded. In their opposition, they assert that their Establishment Clause and Equal Protection Clause claims are just other theories of unlawfulness, which permit APA standing even if the States do not have any real injury based in either clause. But the States' Second Amended

Complaint's three APA causes of action do not mention unlawfulness under either the Establishment Clause or Equal Protection Clause as grounds for relief under the APA. 2d Am. Compl. 61-63, Dkt. 170. Rather, the Complaint pleads these violations as separate causes of action. 2d Am. Compl. 63-65; *see* Opp. 51-56.

The closest the States come to defending their Establishment Clause standing as pleaded is to say in a footnote that "legislation constituting a governmental endorsement of religion inflicts cognizable injury per se" to every state and its citizens. Opp. 7 n.7. That argument is directly contrary to Supreme Court precedent that "the abstract injury in nonobservance of" the Establishment Cause is not a cognizable injury that can satisfy standing requirements. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 482 (1982) (citation omitted).

II. The Plaintiffs cannot prevail on their claims that the Final Rule is substantively invalid.

A. The Final Rule does not violate the Women's Health Amendment.

Regarding the scope of the Women's Health Amendment, the States repeatedly try to suggest that *Congress* insisted that contraceptive coverage be required of all employers. *See* Opp. 23, 25, 40. But that is simply false. As the States elsewhere concede, Congress instead did not specify, and instead entirely delegated, the "important and sensitive decision" of what preventive services would be covered. Opp. 8 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 697 (2014)). Congress knows how to make express reference to contraception where it wishes to do so, and in fact did so elsewhere in the Affordable Care Act. *Compare* 42 U.S.C. § 300gg-13(a)(4) ("preventive care and screenings") *with* 42 U.S.C. § 713(b)(2)(A) (sexual education program required to cover "both abstinence and contraception").

The States do not seem to understand how that fact undermines their argument that anything less than a full contraceptive mandate "does not comport with the basic purpose of the statute." Opp. 11-

12. The *statute* did not say contraceptives must be included; the *agency* did (at least when it understood that it had legal authority to exempt religious objectors). The statute itself was entirely silent, and thus entirely agnostic, as to whether contraceptives should be treated as required preventive care for *any* plans. This makes sense, particularly since the United States Preventive Services Task Force had not—and to this day *still* has not—ever included contraceptives among its recommended preventive services at all. *See USPSTF A and B Recommendations*, U.S. Preventive Services Task Force (July 2019), https://perma.cc/RUH8-2V7P.

Without having shown a statutory mandate, the States raise four arguments against allowing agencies to make exceptions to a rule whose substance the agencies, not Congress, imposed. Each is unpersuasive.

First, the States appear to suggest that the phrasing of *Hobby Lobby*'s description of the Mandate forecloses agency consideration of who must receive which services. *See* Opp. 8. This is cherry-picking: two paragraphs later the Court recognized that "HHS also authorized the HRSA to establish exemptions from the contraceptive mandate for" churches and integrated auxiliaries. 573 U.S. at 698.

Second, the States say that the Little Sisters seek to have "the language of the mandate . . . [have] different meanings in different subsections." Opp. 8. As explained, implementing guidelines for *both* Sections 300gg-13(a)(3) and (a)(4) define and limit not only "what types of" services must be provided, Opp. 8, but also "who" is eligible to receive a service with no insurer cost-sharing, with variation by age and individual circumstances. Mot. 17-18 (citing children's preventive care guidelines). Unfortunately for the States, nothing in the ACA requires the agencies to limit their considerations to factors like insurer profits, especially where other federal law affirmatively requires them to take religious practice into account.

Third, the States argue that the *expressio unius* canon instructs that, because the ACA expressly provides that no one can be required to participate in "mercy killing" programs (whether or not they have a specific religious or moral objection), no other part of the ACA can be read to allow implementing guidelines with religious exemptions. Opp. 10-11; *see* 42 U.S.C. § 18113(a). That would be a strained argument even if the Women's Health Amendment mandated contraceptive coverage, but again, it did not. The Mandate is a creature of the agency, not Congress, and it stands to reason that the agency may define exceptions to a rule that it itself prescribes. This is particularly true when the Supreme Court has already indicated that RFRA applies to the ACA, and that compliance with the Mandate is a substantial burden for some employers under RFRA. *Hobby Lobby*, 573 U.S. at 719, 736.

Fourth, and most ironically, the States argue that Congress's failure to enact a specific religious exemption to the preventive services mandate forecloses the agencies from doing so. But a later Congress's failure to enact a statutory exemption is not the same as Congress forbidding the agency from considering religion—particularly in the face of an existing federal statute that instructs *all agencies* to avoid imposing religious burdens *all the time*. The Supreme Court already rejected this argument in *Hobby Lobby* when it granted a religious exemption (not merely an accommodation) to closely-held corporations. And if the States' logic actually controlled, there could be no contraceptive mandate at all, because this Court would be bound by the many times Congress considered, but did not enact, prior contraceptive mandates. Mot. 19 & n.11; *see, e.g.*, Equity in Prescription Insurance and Contraceptive Coverage Act of 2007, H.R. 2412, 110th Congress (2007), https://perma.cc/P3F2-H7TY; Equity in Prescription Insurance and Contraceptive Coverage Act of 2005, H.R. 4651, 109th Congress (2005), https://perma.cc/6QS3-BK6G. The States' use of legislative history here is a quintessential example of what Justice Scalia noted as "the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends."

Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). Just like the many failed contraceptive mandate statutes did not deprive the agency of authority to choose to include contraceptives as required preventive care, no political statement during the 2012 debate changes either the discretion granted by the Women's Health Amendment in 2010 or the pre-existing protections of RFRA.

The States are forced to reason from such strained evidence—misplaced canons, stray legislative statements, and so forth—because their reading of the ACA is so divorced from the bipartisan understanding of the Obama and Trump administrations that prevailed up until the filing of this suit. In particular, the States have no persuasive answer as to why "HHS also authorized the HRSA to establish exemptions from the contraceptive mandate for" churches and integrated auxiliaries. *Hobby Lobby*, 573 U.S. at 698. After insisting that the question is not before the Court, the States say the church-exemption regulation refers to the agencies granting discretion to HRSA, not that the statute itself granted HRSA authority. Opp. 13 (citing 76 Fed. Reg. 44,621, 44,623-25 (Aug. 3, 2011)). But that does not demonstrate that the Government's "own account," *id.*, says the statute doesn't grant the authority. Rather, it just begs the question—the agencies granted discretion *because* they understood they had that authority from somewhere. The States suggest a connection with "the longstanding governmental recognition of [a] particular sphere of autonomy for houses of worship" reflected in the tax code, *id.*, but "longstanding recognition" would not be a source of *authority* if Section 300gg-13(a)(4) limits the agency to an all-or-nothing, mandate-for-everyone-or-cut-it approach.

Authority granted under the First Amendment also cannot explain a narrow religious exemption. The First Amendment does not allow, much less direct, "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"). To borrow a phrase from the States, Opp. 30, it would be "pick[ing] religious winners and losers" to prefer certain church-run organizations to other types of religious organizations, and would further "interfer[e] 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). Yet that is precisely how the prior religious exemption functioned because of its exclusion of the Little Sisters and other similar groups.

In any event, the States do not provide any defense of the authority to create the accommodation on which their RFRA arguments rely. In arguing both no authority under the ACA and RFRA to create general exemptions or accommodations, the States have created an all-or-nothing delegation that would give HRSA only one choice if extension of the Mandate to all employers violates anyone's rights: to simply strike contraception from the list of required preventive services. The three-tiered system they apparently want to have—an exemption for houses of worship, an "accommodation" for some religious objectors, and no protection for anyone else—is not permissible under any reading of the ACA advanced by the States. It therefore cannot lawfully be imposed here.

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

RFRA binds the agencies, and required them to issue the Final Rules. The States' arguments in response cannot be squared with either the plain text of RFRA, or the controlling Supreme Court and Ninth Circuit decisions applying RFRA.

As an initial point, the States do not respond to the fact that many injunctions exist that bind the government under RFRA. Mot. 8-10. Instead, they repeat their incorrect claim that the government has "stipulated" to injunctions and suggest that the number of injunctions means that the Final Rule is

not necessary. Opp. 50; *see* Mot. 28 n.14.[2] But it cannot be that an agency is required to maintain a rule that continues to break the law according to dozens of courts across the country, and to continue defending that rule with an affirmative defense it has already shown to be baseless. In any case, there were numerous live injunctions in nonprofit cases not among the *Zubik* appeals at the time the IFRs were issued, including injunctions that were *opposed by the government*.[3] Beyond these, nine more injunctions were in effect upon the *Zubik* vacatur. *See, e.g.*, *E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743 (S.D. Tex. 2013). All of these injunctions were contested and were live at the time of the IFRs. The States offer no theory by which the agencies were free to ignore them—and certainly no theory by which the agencies are free to ignore *those* injunctions but could somehow be constrained by *this* Court's injunction. Certainly, *Zubik*'s invitation to develop a new "approach going forward" without a merits ruling demonstrates consensus that the agencies had authority to adjust the Mandate without a further court order. 136 S. Ct. at 1560; *see also Hobby Lobby*, 573 U.S. at 730 ("RFRA surely allows" "the modification of an existing program"). Whatever this Court's view of RFRA's requirements, surely the agencies were within the bounds of the law to adjust the law so that it complied with these injunctions.

Moreover, since the Little Sisters' motion was filed, additional classwide injunctions have been issued that forbid the agencies from enforcing the version of the mandate the States seek to make the

[2] This is puzzling in light of their claim that "tens of thousands," "millions," and even "tens of millions," of women will be affected by the Final Rule. Opp. 14 n.10 (citation omitted), 25, 26. But the States' attempt to have it both ways illustrates the paucity of their arguments. The Little Sisters, for example, would benefit from the protection of a Final Rule in addition to a permanent injunction, but there is no situation in which the Little Sisters would comply with the "accommodation," because that is forbidden by their religious beliefs.

[3] *See, e.g.*, *Ave Maria Univ. v. Burwell*, 63 F. Supp. 3d 1363 (M.D. Fla. 2014); *Dobson v. Sebelius*, 38 F. Supp. 3d 1245 (D. Colo. 2014); *Brandt v. Burwell*, 43 F. Supp. 3d 462 (W.D. Pa. 2014); *La. Coll. v. Sebelius*, 38 F. Supp. 3d 766 (W.D. La. Aug. 13, 2014).

federal government reimpose. Order at 8, 31, *DeOtte*, No. 4:18-cv-00825 (N.D. Tex. June 5, 2019). *DeOtte* granted a permanent injunction against the Mandate that protects "[e]very current and future employer in the United States" with religious objections to the "accommodation" the States wish to reinstate here. *Id.* Along with other orders protecting open-ended classes, the *DeOtte* order means that even more religious groups have access to judicial relief from the mandate. *Id.*; Mot. 10 n.6. These injunctions show both the need for a nationwide RFRA-compliant solution and the States' inability to obtain relief from this lawsuit that will redress their claimed injuries, because the mandate is unenforceable.

1. The Mandate substantially burdened religious employers.

The States agree with the Little Sisters that the sincere beliefs of the Little Sisters and religious objectors about complicity in the Mandate are "not in dispute here," Opp. 16, but they go on to treat the substantial burden analysis as if to contradict the Little Sisters' beliefs about complicity. In short, the States think they should win the substantial burden argument by proving that the actions forbidden by the Little Sisters' faith do not *really* make them complicit and therefore are not *really* burdensome. But this ignores the elephant in the room—that the States seek to force the Little Sisters to take actions that they are forbidden from taking, and want the Sisters to pay massive fines unless they violate their religion.

The agencies correctly concluded that RFRA required the Final Rule because that state of affairs imposed a substantial burden on the religious exercise of groups like the Little Sisters. The States pretend that such analysis treats a burden as substantial "solely because a litigant . . . believed that it was so," Opp. 18, and that it is wrong to focus on the monetary penalties. Opp. 20. But *Hobby Lobby* makes clear that the analysis requires a focus on the size of the penalties rather than on the government's assessment of the nature of the religious exercise. 573 U.S. at 691 ("If these

consequences [millions of dollars in fines per year] do not amount to a substantial burden, it is hard to see what would."). "Substantial" modifies burden and measures the strength of the government's coercion; it does not modify religious exercise and authorize state government second-guessing of whether particular conduct should or should not be forbidden. This understanding follows Ninth Circuit precedent, which the States ignore, that when a "policy intentionally puts significant pressure" on religious believers "to abandon their religious beliefs by" changing their religious practice, the "policy imposes a substantial burden." *Warsoldier*, 418 F.3d at 996. At bottom, the States' argument dodges the question that RFRA presents (whether the government is imposing substantial pressure on the Little Sisters to violate their undisputed religious beliefs) and instead addresses a very different question that the federal courts have no business addressing (whether the Little Sisters are right or wrong about whether their participation in the accommodation violates Catholic teaching).

Moreover, what the Sisters are asked to do is not just to "certif[y] [their] religious objection." Opp. at 15. The States cannot—and indeed do not even try to—deny that accommodation coverage comes from the employer's health plan, Mot. 26-28; that a touted *benefit* of the "accommodation" system was precisely that women would *not* have two separate plans, Mot. 27; that the coverage depends on issuance of a plan instrument under the employer's plan, *id.*, *see* Suppl. Br. for Resp'ts at 17, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418), https://perma.cc/29AF-BU54 ("There is *no mechanism* for requiring TPAs to provide separate contraceptive coverage *without a plan instrument*; *self-insured employers could not opt out of the contraceptive-coverage requirement by simply informing their TPAs that they do not want to provide coverage for contraceptives*.") (emphasis added); or that that the coverage relies on the employer's "coverage administration infrastructure," Mot. 27; *see also* 80 Fed. Reg. 41,318, 41,328-29 (July 14, 2015) (acknowledging the plan information is used to "verify the identity" of beneficiaries and "provide formatted claims data for government

reimbursement"). At least one court that has reviewed those facts has reached the opposite conclusion of the pre-*Zubik* courts the States cite, Opp. 16-17, on whether the plans are separate. *See* Order at 13-14, *DeOtte*, No. 4:18-cv-00825 (N.D. Tex. June 5, 2019).[4]

The Borzi declaration, which is inadmissible as an expert declaration, does not contradict the regulations.[5] Indeed, it simply repeats them. For example, the declarant agrees that the employer's coverage network and infrastructure is the same as the contraception coverage; she only claims that the employer doesn't "own[] or control[]" them. Borzi Decl. ¶ 16, Dkt. 385-3.[6] But that does nothing to contradict the fact that, as the regulations admit, without a contract with the Little Sisters and permission to alter that contract, the TPA or the insurer would "lack the coverage administration infrastructure to verify the identity of women." 80 Fed. Reg. at 41,328. And Borzi ignores the obvious problem with her argument: if the coverage really has nothing to do with the Little Sisters, why do the Little Sisters need to execute particular documents to make it work? Borzi never answers, and neither do the States. At bottom, Borzi's inadmissible legal conclusions constitute the same failing arguments

[4] *DeOtte* recognized the government's concessions, *id.* at 10, but made its own findings about the merits of the plaintiffs' claims, *id.* at 11 ("it is for the Court to say whether Plaintiffs prevail").

[5] The Borzi declaration, since it is based on the declarant's specialized knowledge and does not set out facts which would be admissible in evidence, appears to be submitted as expert testimony that instructs on the law. Fed. R. Evid. 702. This poses at least two problems for its admissibility. First, Borzi was not proffered as an expert witness under Federal Rule of Civil Procedure 26(a)(2)(A), and no written report was provided to the Defendants in advance of her declaration. Second, her claimed expertise is on the law itself, and the conclusions in her testimony are purely legal. Legal conclusions are impermissible for expert witnesses. *See United States v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999) (quoting *United States v. Brodie*, 858 F.2d 492 (9th Cir. 1988)) (Experts "do not testify about the law because the judge's special legal knowledge is presumed to be sufficient[.]"). Her declaration is thus inadmissible for both reasons. Moreover, to the extent Borzi is testifying about how particular contractual and legal documents work, without providing the documents themselves, her testimony also violates Federal Rule of Evidence 1002.

[6] The Borzi declaration states that it has attached sample notices as exhibits, but the exhibits do not appear in the record.

that the States have made all along: that the Little Sisters are wrong about whether signing the form makes them complicit in the provision of contraceptives.

The Volk declaration submitting a letter containing hearsay from an employer's insurer does no better. Volk Decl., Dkt. 385-40. Even that letter does not claim that the coverage is from a different plan; in fact, multiple lines maintain the connection to the employer. *See, e.g.*, Volk Decl. Ex. 1 at 1, ("The accommodation provides that the cost of contraceptive services for members of the employer's health care plan will be reimbursed by CareFirst, when provided by an in-network provider, for as long as the member is covered under the employer's health care plan."); *id.* ("Your employer has certified that your group health plan qualifies for an accommodation").[7] Indeed, the States do not respond to the evidence that a TPA who provides coverage under the accommodation would contact all plan participants, identify them by "payroll location," and perform "[o]ngoing, nightly feeds" of information from the employer's plan. Mot. 27 (citing Joint Appendix at 1220-22 (Guidestone Declaration), *Zubik*, 136 S. Ct. 1557, https://perma.cc/54T3-ZYQ6). The States offer no argument as to how or why a declaration about what an insurance company says about how another insured's plan allegedly works could be admissible under either the hearsay rules or the best evidence rule. Fed. R. Evid. 1002.

The States suggest further that if religious objectors don't want their self-insured plans to be co-opted by the government under the accommodation, they can just switch to insured plans. But forcing every religious objector to abandon their church plans and switch to a commercial insured plan would

[7] The States claim that the letter is from a TPA, Opp. 21, but that claim is not supported by the declaration or by the exhibit. In fact, the issuer of the document calls itself an "insurance carrier," Volk Decl. Ex. 1 at 1. But an insurance carrier is typically an insurance underwriter, not a third party administrator. *See, e.g.*, Md. Code Ann., Ins. § 8-301 (West 2013) ("'Administrator' does not include a person that: (i) with respect to a particular plan: . . . is . . . an insurer.").

cause more problems than it would solve. Setting aside the untold costs and disruptions occasioned by such a compelled switch, religious organizations have a federal statutory right to a church plan in part so that churches can have more control over their own plans in compliance with their religious beliefs. *See generally Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1663 (2017). Indeed, the States' suggestion raises the question of their motive, as commercially insured plans are subject to state law and may be subject to mandates in those states that have adopted one, forcing the Little Sisters out of the frying pan and into the fire. *See, e.g.*, 2d Am. Compl. ¶¶ 69 n.9, 71 (California), 114 (Hawaii), 121 (Illinois), 151 (New York), 177 (Vermont), 195 (Washington). Forcing the Little Sisters, on penalty of substantial fines, to either cover contraception in their plan or abandon their church plan for a commercially insured plan that might also be required to cover contraception would substantially burden their religious exercise of choosing the plan itself. The Little Sisters' choice to work with the Christian Brothers—a plan administrator who shares their beliefs—is itself a religious exercise. *See* Decl. of Mother Superior McCarthy ¶ 15, Dkt. 38-3; *see also Hobby Lobby*, 573 U.S. at 721 (plaintiffs' "religious beliefs govern their relations with their employees" and they thus cannot be forced to drop their insurance plans). It is therefore inaccurate to say no party would object to being mandated to switch to an insured plan. Opp. 23; *see* Suppl. Br. for Petitioners at 17-18, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418), https://perma.cc/A5JT-S78W (explaining that the use of a "multiple-employer self-insured church plan[]" allows the Little Sisters to access "a plan specifically designed to be consistent with [their] beliefs").

2. The Mandate did not satisfy strict scrutiny.

The States' arguments cannot satisfy strict scrutiny. First, the States provide no authority for the proposition that they can carry the federal government's statutory burden on an affirmative defense the federal government is not asserting. *See* Mot. 29 (citing RFRA's text allocating strict scrutiny

burden to *federal* government); s*ee also* Order Denying Intervention at 21, *DeOtte v. Azar*, No. 4:18-cv-00825 (N.D. Tex. July 29, 2019), Dkt. 97 (rejecting effort by the State of Nevada to carry the federal government's RFRA strict scrutiny burden: "The text of [RFRA] makes plain that only the federal government can 'demonstrate' that this burden is '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'"). This alone defeats the States' strict scrutiny arguments.

Second, the States keep shifting what they think the compelling interest is: they say they want 'full and equal access' to contraception—which was the *only* allegedly compelling interest discussed in *Hobby Lobby*, 573 U.S. at 727—and cite statements from recent Supreme Court Justices saying access to contraception could be assumed to be a compelling interest. Opp. 23-24. But elsewhere they argue for a much more specific interest—namely that "*seamlessness*" is specifically required, without explaining why any additional step to obtain contraception should be considered a burden or barrier. Opp. 23. It is unclear, however, what additional steps are impermissible; their own affidavits seem to suggest, for example, that registering a separate card is not an issue. Volk Decl., Ex. 2 (card must be "registered and used separately"). Of course, the States themselves have not all felt compulsion to mandate "full and equal" contraceptive access, *id.*, much less *seamless* access for all women, and they do not explain the federal government's failure to do so until 2011. *See, e.g.*, Cantwell Decl. ¶¶ 4-11, Dkt. 385-4 (describing California PACT program as involving beneficiaries enrolling in the program, annually renewing, and sometimes changing health plans to receive services); Tomiyasu Decl. ¶ 3, Dkt. 385-38 (Hawaii mandate allowing co-payments).

Crucially, the States seem not to understand how courts have applied the compelling interest test. It is not enough that some might think seamless access to contraception (however defined) important, even very important. In order for the government to use strict scrutiny as an affirmative defense, it has

to show that it has treated that interest as compelling with regard to non-religious objections. Mot. 29-30 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993)). In this case, Congress itself allowed "appreciable damage" to access to contraceptives in the ACA. *Id.* The States admit that there are exceptions to the contraceptive mandate. Opp. 26. They claim, however, that this Court should ignore them because they are "narrow[]" or "transitional." *Id.* But that does not explain how they do not do damage to their asserted interests. The fact that "nearly all laws contain exemptions," *id.*, is beside the point; the States make no effort to show the exemptions in the examples they provide (like the draft) do appreciable damages to those laws' purposes. And most importantly, they offer no argument or explanation as to how the exemptions identified in *this* law do not undermine their claimed interest in "seamlessness." If seamlessness for every person is compelling, why did Congress allow tens of millions of people to remain on grandfathered plans? Why did Congress not impose the mandate on the federal plans it controls directly? *See Hobby Lobby*, 573 U.S. at 727 (the contraceptive mandate is expressly excluded from subset of "particularly significant protections" required in grandfathered plans) (citing 75 Fed. Reg. 34,538, 34,540 (June 17, 2010)). If the States think seamlessness is important, why do they not require seamlessness themselves? *See, e.g.*, Cantwell Decl. ¶¶ 4-11 (California PACT program); Tomiyasu Decl. ¶ 3, Dkt. 385-38 (mandate allowing co-payment collections). All of these failures by all of these governments have—for *decades*—allowed "appreciable damage" to any alleged interest in seamlessness. Seamlessness-from-thee-but-not-from-me cannot be a compelling interest.

Furthermore, the third party benefits the ACA provides do not mean that RFRA does not apply to the ACA, however much the States might wish for that outcome. As the Supreme Court explained in *Hobby Lobby*, almost any regulation could be recast as a benefit to a third party. Instead, the

appropriate analysis is whether the government has allowed exceptions to the third-party benefits in both cases, which it has, as demonstrated above.

The States' least restrictive means analysis does no better. The question is whether, if the interest is compelling, the same interest can be accomplished by different means. Their assertion that the government has waived any argument about least restrictive means based on past statements reverses RFRA's burden. Opp. 29. The *government* has the burden to show no less restrictive means exist, and it has conceded less restrictive means throughout the course of the Mandate litigation; the States do not respond to the Little Sisters' arguments there. Indeed, multiple less restrictive means of providing access to contraceptives for employees of religious and moral objectors were suggested during the Request for Information process that would not require the use of the employers' plans. *See* 81 Fed. Reg. 47,741 (July 22, 2016). Those proposals included ways of providing contraceptives through willing doctors, pharmacies, or contraceptive-only plans. *See, e.g.*, Exs. 1-3 (D8 561,384-392; D8 568,142-150; D8 569,472-476). At least one comment explained a Missouri law that accomplished such an arrangement in 2001 with an available contraceptive-only plan. Ex. 2, (D8 568,144). Another comment suggested ways that pharmacies could be used to seamlessly provide contraceptives to women without the use of an employer's plan. Ex. 3 (D8 569,474-476). Even Blue Cross Blue Shield submitted a comment that suggested that "the government look at a more straightforward subsidy scheme to cover contraceptive services directly." Ex. 1 (D8 561,391). Under such a scheme, "HHS would transfer amounts in [a] Fund to a program devoted to prevention, such as (for example) the Title X Family Planning Program, which in turn would enter into contracts with public or nonprofit entities to reimburse participants in group health plans sponsored by Eligible Organizations." *Id.* No one has ever explained why those options are unavailable; and that failure is dispositive here. *See Hobby Lobby*, 573 U.S. at 728 ("The least-restrictive-means standard is exceptionally demanding" and the

government must show that another option is "not a viable alternative" in order to substantially burden religious beliefs).

Even if the States can take up that burden from the government and assert the affirmative defense the federal government has chosen not to assert—something RFRA does not permit—that burden cannot be satisfied by simply saying that the funding structure for one existing program is insufficient. As the Supreme Court said, RFRA can readily require additional spending. *Id.* at 730 (RFRA can "require the Government to expend additional funds to accommodate citizens' religious beliefs.").

3. Agencies can modify their own policies to comply with RFRA.

The States argue that agencies do not have authority to lift burdens under RFRA in the first instance because such authority will allow the government to "choose religious winners and losers." Opp. 34. But that argument reads the "Government shall not" affirmative command right out of RFRA. Of course when Congress commands federal agencies not to burden religion, those agencies have the authority to obey the command by lifting burdens on religious exercise. *See* 42 U.S.C. § 2000bb-2(1) (stating that RFRA applies to an "agency"). Indeed, practice from *every administration since RFRA's passage* confirms that RFRA authorizes modifications to federal regulations to lift burdens on religious exercise. This includes rules for agency adjudication of RFRA disputes under President Clinton,[8] charitable choice regulations under President Bush,[9] regulations governing religious

[8] *See* 14 C.F.R. § 1262.103(a)(4) (providing for NASA adjudication of RFRA disputes); 14 C.F.R. § 1262.101(b)(1)(iv) (providing for attorneys' fees in such adjudications); 49 C.F.R. § 6.5 (providing for attorneys' fees in Department of Transportation adjudications under RFRA).

[9] *See, e.g.*, 42 C.F.R. § 54.3 (provision on nondiscrimination against religious organizations receiving certain funding); 42 C.F.R. § 54.5 (guaranteeing independence of religious organizations receiving certain funding).

accommodations in the armed forces and eagle taking regulations under President Obama,[10] and the current regulations under President Trump.

At the very least, the litigation against the Mandate and the groundswell of comments explaining how the Mandate requires religious groups to violate their faith should raise a presumption that the agency can act to protect religious belief. The alternate approach—that Congress forbade the imposition of substantial burdens on religion but gave the agencies no authority to modify their actions to comply—makes no sense.

If the States are truly concerned with the government choosing religious winners and losers, they would support the Final Rule and admit that the church exemption was underinclusive. The church exemption chose its own winners and losers—churches and auxiliaries as defined by the IRS won (even if they do not object to contraceptives) and groups like the Little Sisters lost, even though they also exercise their religion in their relationship with their employees and are also protected by the First Amendment. Mot. 21-22. The States do not attempt to explain how the Final Rule is not an improvement on the church exemption for the very reason they highlight. Broad relief was appropriate in this case for the same reasons courts have issued classwide injunctions, even over the government's opposition to making injunctions classwide—significant fines apply in every case, and religious objectors need protection in every case. Mot. 10 n.6. *See, e.g.*, Order, *DeOtte*, No. 4:18-cv-00825 (N.D. Tex. June 5, 2019); Order, *Christian Emp's All. v. Azar*, No. 3:16-cv-00309 (D.N.D. May 15, 2019), Dkt. 53 (granting permanent injunction to current and future members of Christian Employers Alliance).

[10] *See* Army Command Policy, *Accommodating religious practices*, Army Reg. 600-20 ch. 5-6 (Nov. 6, 2014) (prescribing religious accommodations under RFRA); 81 Fed. Reg. 91,494, 91,537 (Dec. 16, 2016) (citing RFRA to accommodate Native American eagle taking).

4. RFRA does not violate the nondelegation doctrine.

The States suggest that treating RFRA as requiring agencies to avoid imposing burdens on religion violates the nondelegation doctrine. But that turns the problem with the Mandate on its head. If the agencies have sufficient authority to *place* a burden on religious believers by imposing fines on them if they do not comply with a certain framework, then surely they have the authority to remove that burden under RFRA. Recognizing RFRA's command that agencies "shall not" impose unjustified burdens on religion does not give agencies "unfettered discretion to make whatever laws" they see fit. Opp. 33 (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-38 (1935)). Instead RFRA is a simple, direct, and intelligible command to the entire federal government not to impose a particular kind of burden unless it has very strong reasons and no better alternative. RFRA thus requires agencies to interpret and apply statutes to avoid imposing substantial burdens on religious exercise. Indeed, in *Hobby Lobby*, the Supreme Court considered multiple options the agency could have taken on its own without Congress' involvement, with no mention of any problems of delegation. 573 U.S. at 728 ("HHS has not shown . . . that [these solutions are] not a viable alternative."); *see also id.* at 730 ("RFRA surely allows" "the modification of an existing program"). No one suggests that this allows unreviewable "leeway" to the executive branch. Opp. 33. At least in the first instance, the agency has an affirmative statutory obligation to implement the statute by determining through factfinding whether its own regulations constitute a substantial burden and lifting that burden where it can in order to comply with RFRA. This allows agencies to comply with RFRA by preventing burdens from being imposed and religious organizations having to challenge every burdensome agency action. It instead offers "an intelligible principle"—whether a burden placed on religious exercise is substantial—to which the agencies are "directed to conform," and which is reviewable by courts. *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality). Rather than the Final Rule, it is the

Women's Health Amendment itself that is in greater danger of implicating the nondelegation doctrine. If allowing agencies to avoid imposing a substantial burden on religious exercise is too much to delegate, surely Congress's broad delegation of unchecked authority for HRSA to impose the burden in the first place constitutes a nondelegation problem.

C. The Final Rule does not violate Sections 1557 or 1554.

Section 1557. The States complain that the agencies did not respond separately to their 1557 argument and claim that the agencies waived an argument under Section 1557, Opp. 42, but they ignore the Little Sisters' arguments under Section 1557, Mot. 34. By their own reasoning, the States have waived any response.

The States further provide no authority for the proposition that an exception to a rule with a sex-based classification is itself a sex-based classification where that exception is offered without regard to sex. Again, the Little Sisters would object to providing male sterilization in their health care plans, but the Mandate only requires such coverage for women. The States list potential religious objections to the ACA that the Final Rule does not address, Opp. 43, but tellingly, they do not cite to any instances of actual objections to those provisions, let alone to an objection that produced a wave of lawsuits, multiple Supreme Court losses, and dozens of live injunctions. Not surprisingly, *Hobby Lobby* rejected this argument. 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.").

If taken seriously, the States' 1557 argument would invalidate *every* exemption from the federal contraceptive mandate, including the grandfathering exemption and the church exception, and every conscience exemption related to abortion nationwide. Furthermore, the States insist that Section 1557 incorporates the nondiscrimination provision of Title IX, Opp. 42, but they do not respond to the Little

Sisters' argument that it thus also incorporates Title IX's religious exemption. *See* Mot. 34 (citing *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 690 (N.D. Tex. 2016)). This Court should refrain from adopting the States' overbroad reasoning for the first time in this case.

Section 1554. The States' argument that an exemption for religious employers "'creates . . . unreasonable barriers' to medical care" and "impedes timely access to health care services" is likewise confused. Opp. 39-41 (quoting 42 U.S.C. § 18114(1)). They say the Final Rule "permit[s] employers to deny women access to healthcare that has been guaranteed to them by statute." Opp. 39. But of course as the States have to concede, the contraceptive mandate was not "guaranteed to them by statute" at all, because Congress delegated that question entirely to the agency. Opp. 39. And the States' argument that narrowing a policy intended to promote contraception access constitutes an "unreasonable barrier" runs headlong into the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991). There, the Court made clear that "Congress' refusal to fund abortion counseling and advocacy," even in a policy change, "leaves a pregnant woman with the same choices as if the Government had chosen not to fund family-planning services at all," and therefore "do[es] not impermissibly burden" access to abortion. 500 U.S. at 201-02. Here, too, the policy change does not reduce access from the status quo. If the government is permitted to choose not to provide services, surely the government can allow nuns to choose not to provide services, just like Virginia allows all employers not to provide contraception for any reason. 2d Am. Compl. ¶ 69. And here, of course, the federal government is actually trying to provide those services directly. *See* 84 Fed. Reg. 7714, 7739 (Mar. 4, 2019).

Finally, given that Congress created the much larger grandfathering exemption and the much larger small employer exemption, and that the agencies created the prior religious exemption, and the agencies could—tomorrow, if they like—choose to remove contraception from the HRSA website

listing of preventive services, the States' view would, if accepted, destroy the entire mandate system they seek to reimpose.

III. The Final Rule is not arbitrary and capricious.

The States' argument that the Final Rule is arbitrary and capricious turns on some factual disputes they have with the agencies: whether the agencies properly addressed the benefits of contraception, estimated costs to other parties, the exact affected population, or other significant issues raised by comments. But the agencies' justification for the Final Rule did not turn in significant part on these questions. Rather, the agencies' response by and large reflects the RFRA analysis above. First, the "previous accommodation process did not actually accommodate the objections of many entities" due to an insistence on a "seamless" structure. 83 Fed. Reg. 57,536, 57,544 (Nov. 15, 2018). Second, the agencies determined that "seamlessness between contraceptive coverage and employer sponsored insurance" could not be defended as a "compelling government interest" under Supreme Court precedent, given the significant damage law and regulation do to that interest. 83 Fed. Reg. at 57,548; *see Lukumi*, 508 U.S. at 546-47 (strict scrutiny defense fails at compelling interest stage if existing exemptions do "appreciable damage" to the alleged compelling interest). These legal conclusions would require the Final Rule no matter how the agency had responded on the ancillary questions raised by the States.

While the States argue that the extension of the Final Rule to cover all employers with a religious objection is not "tailored" to the RFRA violations identified, that claim is undermined by the multiple district courts that have now issued classwide injunctions against any enforcement of the mandate—including to a class of all religious objectors. Order at 31, *DeOtte*, No. 4:18-cv-00825 (N.D. Tex. June 5, 2019); *see, e.g.*, *Reaching Souls Int'l, Inc. v. Azar*, No. 5:13-cv-01092, 2018 WL 1352186, at *2 (W.D. Okla. Mar. 15, 2018); Order, *Catholic Benefits Ass'n LCA v. Hargan*, No. 5:14-cv-00240 (W.D.

Okla. Mar. 7, 2018), Dkt. 184; Order, *Christian Emp's All. v. Azar*, No. 3:16-cv-00309 (D.N.D. May 15, 2019), Dkt. 53 (granting permanent injunction). The States have not argued that the Final Rule is any less tailored than the relief already issued in these cases. Moreover, the Final Rule is perfectly tailored: it only applies to those who have a sincere religious objection to participating in the Mandate, and only applies to the extent of that objection. 83 Fed. Reg. at 57,590. That is precisely the class of employers against whom the agencies have lost RFRA cases, and against whom the agencies are enjoined from enforcing their illegal rule. Mot. 8-10 n.4-6 (collecting injunctions); Order, *DeOtte*, No. 4:18-cv-00825 (N.D. Tex. June 5, 2019).

It cannot be arbitrary and capricious for the federal government to create a religious objector exemption to a rule it cannot enforce against religious objectors.

IV. Exempting religious employers from a contraceptive mandate does not violate the Constitution.

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

The States do not respond to any of the Little Sisters' arguments regarding the Establishment Clause precedent they cite. Instead they repeat arguments that depend on ignoring the Supreme Court's distinction between alleged detriments that result from direct government action and alleged detriments that result from private choices permitted by the government.

While the States rely on *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), the Little Sisters have pointed out that this decision was already cabined in *Amos*. Mot. 38. *Amos* states that the law at issue in *Caldor* had "given the force of law to the employee's designation of a Sabbath" enforced by civil penalties, and that no comparison could be made to a religious exemption as in Title VII, where the government simply steps aside and allows a private party to make a choice that may work to another's detriment. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 337 n.15 (1987).

Hobby Lobby makes this clear by saying that RFRA obliges the government to excuse religious adherents from some legal obligations even in those instances where "the relevant legal obligation requires the religious adherent to confer a benefit on third parties." *Hobby Lobby,* 573 U.S. at 729 n.37 (giving examples of laws requiring stores to sell objectionable goods or be open during one's Sabbath). "By framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds" under the States' reading of the Establishment Clause. *Id.* But that reading has already been rejected by the Supreme Court. *Id.*

Finding an Establishment Clause violation would be a particularly absurd result here where respecting the Little Sisters' beliefs would not place *any* barriers to the States or the federal government directly providing or subsidizing contraception, either to religious objectors' employees or the millions of women whose insurance (if any) the Mandate does not regulate. If contraception without cost-sharing is denied to a single woman under the Final Rule, it will not be because the Little Sisters have been "delegated . . . control over access" to all avenues of free contraception. Opp. 52. It will be because the States and federal government decide—despite all the States' claims of a compelling interest—it is neither worth their time nor dime to take the "most straightforward" path and provide it themselves. *Hobby Lobby*, 573 U.S. at 728.

This fact distinguishes *United States v. Lee*, 455 U.S. 252 (1982), the other case on which the States principally rely. *Lee* is a Free Exercise case, not an Establishment Clause case. The Court's statement that the requested exemption could "operate[] to impose the employer's religious faith" on those who wanted Social Security was a summary of its conclusion that the Social Security system would be "difficult, if not impossible, to administer" while granting accommodations, such that accommodation would "radically restrict" the ability of the legislature to achieve its ends. *Id.* at 258-

59, 261 (citation omitted). Here, no religious objection would generate any barrier to Title X's expansion, or myriad other government methods of providing cost-free contraception.

B. The Final Rule does not violate the Equal Protection Clause.

As explained above with regard to Section 1557, the sex-based classification claimed to be at issue in this case derives from the parameters of the Women's Health Amendment, not the Final Rule. Religious objectors to contraception like the Little Sisters object to male and female contraception alike, but the Women's Health Amendment—or Section 300gg-13 more generally—never required them to provide male contraception or sterilization services. The Final Rule simply allows them to decline to provide either.

The Supreme Court has already said that the right to refrain from providing abortion for "moral or religious reasons" provides "appropriate protection" for freedom of conscience. *Doe v. Bolton*, 410 U.S. 179, 197-98 (1973). Federal law provides that protection with regard to facilitating sterilization and abortion. *See, e.g.*, 42 U.S.C. § 300a-7. But under the States' theory, *any* exemption from providing a service only useful to men or women would violate the Equal Protection Clause. So every conscience protection in the country pertaining to such services—including those blessed by *Doe*—would violate the Equal Protection Clause. The Mandate's church exception would violate the Equal Protection Clause. And the State Plaintiffs whose laws do not require cost-free contraceptive coverage would be violating the Equal Protection Clause. This is not a serious argument.

V. Any procedural deficiency did not infect the Final Rule.

This Court should decline the States' invitation to revisit whether prior procedural deficiencies in the Interim Final Rule infected the Final Rule. In the Ninth Circuit, final rules identical to prior interim final rules may remain valid even where the interim final rule has been struck as procedurally deficient. Mot. 41-42; *see Paulsen*, 413 F.3d at 1008 (rule "which adopted the [IFR] without change" retained);

Buschmann v. Schweiker, 676 F.2d 352, 358 (9th Cir. 1982) (final rule "identical to the interim regulation challenged" accepted as "valid" by all parties). As the Little Sisters have explained, any Third Circuit precedent conflicting with these cases simply reflects a circuit division. Mot. 43.

In any event, the Little Sisters have argued that if the Final Rule is required by RFRA, any procedural deficiency would be harmless because the agencies would not have been free to "read[] comments with an open mind" regardless. Mot. 44; Opp. 58. The States do not provide any reason why the lack of a "true comment period" would have harmed the States if RFRA controlled the outcome.

CONCLUSION

This Court should dismiss the States' complaint. In the alternative, it should grant summary judgment in favor of the Defendants and deny the States' summary judgment motion. The Court should additionally strike Plaintiffs' inadmissible declarations.

Dated: August 1, 2019

Respectfully submitted,

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