No. 18-15144

In the United States Court of Appeals for the Ninth Circuit

THE STATE OF CALIFORNIA, *et al.*,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

and

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,

Intervenor-Defendant-Appellant,

and

MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

Intervenor-Defendant-Appellant.

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

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

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INTRODUCTION

For six years, religious groups like the Little Sisters fought the federal government in court, arguing that RFRA requires a religious exemption to the federal contraceptive mandate. The States' brief reveals a shocking unfamiliarity with that litigation and the obligations it imposed upon the federal government leading to the Fourth IFR.

The States might be excused for this unfamiliarity—after all, the States did not intervene in even one of the dozens of federal cases on the issue (presumably because the States knew they had no interest in the matter). And the States did not bother to file comments on any of the prior versions of the mandate (presumably, again, because the States knew they had no interest in whether the federal government imposes a contraceptive mandate or creates exemptions to it).

But the federal government did not have the States' luxury of pleading ignorance. After all, the federal agencies were actually the defendants in all those cases across the country. They had been on the losing end of the merits decision in *Burwell v. Hobby Lobby* and several

emergency orders at the Supreme Court.[1] They had to respond to an unprecedented supplemental briefing order from the Supreme Court forcing them to explain alternative options. They were ordered by the Supreme Court to try to resolve their differences with the Plaintiffs. And, even after *Zubik*, they remained bound by at least 15 court decisions finding that their conduct violated RFRA.

While the States sat on the sidelines, the federal government litigated through these developments and—most importantly—was bound by them. The federal government's position was thus hardly "unremarkable," SB 36, but instead involved unique and urgent circumstances that are more than adequate to establish good cause. Indeed, the well-established purpose of the APA's "good cause" requirement is to allow an agency to move quickly when it cannot fulfill a statutory duty like following RFRA.

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[1] *See, e.g.*, *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014); *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2810 (2014). The standard for these orders was extraordinarily high. *See Wheaton*, 134 S. Ct. at 2810 (Sotomayor, J., dissenting) ("This grant of equitable power is a failsafe, to be used sparingly and only in the most critical and exigent circumstances.") (citation and quotation marks omitted). Yet the Court repeatedly granted such relief to religious objectors to the mandate.

The States fare no better with the alternative arguments they raise. By no stretch of the Constitution does it violate either the Establishment Clause or the Equal Protection Clause to provide a religious exemption to the Little Sisters and other objectors. This argument is contradicted by several Supreme Court decisions, and is so weak it was not even tried by the agencies in all their years of defending the mandate. And the States themselves do not actually believe the argument: their own contraceptive mandates include religious exemptions.

At bottom, the States have a political objection to the fact that the federal government used the federal IFR process to fix a federal mandate that itself was imposed (and changed, repeatedly) using that same IFR process. The States remain free to disagree with the federal government's policies, and to try to pursue their own policies. But they are not free to enlist an Article III court to do it for them.

ARGUMENT

I. The agencies had good cause to issue the Fourth IFR.

The States argue that the federal government lacked "good cause" to issue the Fourth IFR because there was nothing unique or pressing

about the conflict over the contraceptive mandate that could justify an IFR. States' Br. (SB) 35-36. Rather, as the States see it, that conflict presented only "ubiquitous and unremarkable circumstances that attend numerous regulations," meriting business-as-usual treatment by the agencies. *Id.* But that ignores that the agencies were bound by RFRA, their own litigation positions, and multiple court orders that required urgent action, and that Congress deliberately constructed the APA to allow for flexibility in such circumstances.

A. *Zubik* provides good cause.

The States' discussion of *Zubik*, *e.g.*, SB 10, ignores significant aspects of that decision. First, *Zubik* was the result of the agencies' change in position at the Supreme Court; second, *Zubik* was a temporary solution; and third, *Zubik* explicitly ordered the agencies and the religious objectors to resolve their dispute. These aspects of *Zubik* put the federal government in a position in which it could no longer defend the mandate without a religious exemption and created good cause for issuing an IFR.

First, the Supreme Court's order in *Zubik* arose because the agencies (under President Obama) conceded key facts about the mandate. These

concessions—discussed in the Little Sisters' opening brief (Br.) at 49-52 and conceded by the States' silence—undermined arguments essential to the agencies' claim that they did not violate RFRA. *Contra* SB 42-43. The agencies conceded that the "accommodation" required the use of religious objectors' insurance plans, and thus permission from the objectors to use those plans, undermining their no-substantial-burden argument. Br. 49. And they conceded that women whose employers do not cover contraceptives can "ordinarily" get it from "a family member's employer," "an Exchange," or "another government program," showing the agencies had no compelling interest. Br. for the Resp'ts at 65, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418). Finally, the government acknowledged that the mandate "could be modified" to avoid forcing religious organizations to carry the coverage themselves, Suppl. Br. for the Resp'ts at 14-15, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418), thereby conceding the "least restrictive means" argument.

As a result, the Supreme Court remanded the cases to the lower courts for the parties to work out a solution. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). To be sure, *Zubik* enjoined the agencies from penalizing

the religious objectors. *Id.* at 1561. But the decision plainly anticipated the parties themselves reaching a final resolution on remand. *Id.* at 1560 ("We anticipate that the Courts of Appeals will allow the parties sufficient time to resolve any outstanding issues between them.").

The States do not deny that these concessions were made, or that they doomed the federal government's ability to defend against a RFRA claim. Yet to hear the States tell it, after conceding the heart of their case and being told—by the Supreme Court—to resolve the dispute, the agencies should have just reverted to doing the exact same thing they had been doing before. SB 42. The far more sensible approach is the one the agencies actually followed: trying to resolve the ongoing nationwide litigation by ameliorating what had become a concededly illegal regulation.

B. RFRA and federal court rulings provide good cause.

The States repeatedly emphasize that *Zubik* itself did not purport to make a final merits determination on the RFRA claim. SB 10, 17, 42. This observation both ignores *Zubik* and ignores the RFRA rulings by at

least 15 different courts finding that the mandate likely violated federal civil rights laws.[2]

Simply put, the agencies had good cause to proceed by IFR because many federal courts had already found that, without an exemption, the agencies were in violation of RFRA.[3] *Zubik* left those decisions in place, meaning that they continued to bind the federal government.

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[2] The existence of these rulings is presumably the reason for the States' careful phrasing at SB 42 ("No *Supreme Court* authority requires the broad exemptions created by the IFRs . . . .") (emphasis added). The States offer no authority for the implicit suggestion that the agencies would have been free to ignore lower court rulings against them by leaving the mandate unchanged.

[3] *Geneva Coll. v. Sebelius*, 960 F. Supp. 2d 588 (W.D. Pa. 2013) (plaintiffs were likely to succeed on merits of claim that mandate violated RFRA); *Zubik v. Sebelius*, 983 F. Supp. 2d 576 (W.D. Pa. 2013) (same); *S. Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013) (same); *Reaching Souls Int'l, Inc. v. Sebelius*, No. CIV-13-1092-D, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013) (same); *Catholic Diocese of Beaumont v. Sebelius*, 10 F. Supp. 3d. 725 (E.D. Tex. 2014) (same); *E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743 (S.D. Tex. 2013) (same); *Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957 (E.D. Mich. 2014) (same); *Archdiocese of St. Louis v. Burwell*, 28 F. Supp. 3d 944 (E.D. Mo. 2014) (same); *Catholic Benefits Ass'n v. Sebelius*, 81 F. Supp. 3d 1269 (W.D. Okla. 2014) (same); *Dobson v. Sebelius*, 38 F. Supp. 3d 1245 (D. Colo. 2014) (same); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794 (E.D. Mich. 2013) (same); *Colo. Christian Univ. v. Sebelius*, 51 F. Supp. 3d 1052 (D. Colo. 2014) (same); *Brandt v. Burwell*, 43 F. Supp. 3d 462 (W.D. Penn. 2014) (same); *Christian & Missionary All. Found., Inc. v. Burwell*, No. 2:14-CV-580-FTM-29CM,

Given that Congress imposed RFRA on all federal agencies, the agencies had no choice but to change their illegal rule. And while RFRA does not have any "good cause" exception that would allow the agencies to keep violating RFRA rights while they await notice and comment, the APA has precisely such a procedure. Thus, when faced with the conflict between federal court orders finding them in violation of RFRA, and an APA notice-and-comment requirement that could make it cumbersome to eliminate an illegal rule, the agencies properly recognized that Congress had already provided a mechanism for resolving such conflicts by allowing agencies to proceed by IFR under the APA.[4] In such circumstances, waiting for notice-and-comment is both "impracticable" and "contrary to the public interest." *NRDC v. Evans*, 316 F.3d 904, 911 (9th Cir. 2003) (citation omitted) ("impracticable" if agency unable to follow its "statutory duties") (citation and quotation marks omitted). Congress could not have been

2015 WL 437631 (M.D. Fla. Feb. 3, 2015) (same); *March for Life v. Burwell*, 128 F. Supp. 3d 116 (D.D.C. 2015) (same).

[4] This is in addition to any authority Congress granted in other statutes. *See* DOJ Br. 46-53.

clearer that a federal agency's "statutory duties" include obeying RFRA. 42 U.S.C. § 2000bb-2(1) ("the term 'government' includes a branch, department, agency . . . of the United States").

Leaving an illegal mandate in place with the expectation that it will violate federal civil rights is of course "contrary to the public interest." *See, e.g.*, *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("it is always in the public interest to prevent the violation of a party's constitutional rights") (citation and quotation marks omitted). Faced with these obligations, the agencies chose the legal path provided for them by Congress, which reconciled their statutory duties by using the statutory IFR authority to cease their ongoing violation of RFRA. The alternative path would have required continuing a knowing violation of federal civil rights laws, even though Congress had provided a way to stop.[5]

[5] That violation was causing "real harm." *United States v. Valverde,* 628 F.3d 1159, 1165 (9th Cir. 2010) (citation omitted). There is no dispute that the agencies issued the Fourth IFR with the understanding that they were resolving an ongoing problem for many religious objectors who had only temporary judicial relief, and with the expectation that some small number of new religious objectors would use it. 82 Fed. Reg. 47,792, 47,816 (Oct. 13, 2017).

The States' only answer is to pretend that the cases finding a RFRA violation never happened, and that the agencies never made concessions that jettisoned their prior RFRA argument. The agencies could not ignore these facts, and neither should this Court.

C. Litigation since the Fourth IFR proves the agencies were right.

Although the agencies had good cause at the time they issued the IFR, the wisdom and accuracy of the agencies' judgments has been confirmed by subsequent events.

The States deride the agencies for believing the IFR approach was needed to resolve ongoing litigation. SB 35. But the injunctions issued in this case and in the Eastern District of Pennsylvania against the Fourth IFR now offer additional proof that the agencies reasonably believed that the IFR would help them resolve ongoing litigation.[6] Thus, shortly after issuing the IFR (but before entry of the preliminary injunctions against the IFR), the government had some success in settling some mandate cases. For example, on October 17, 2017, the Department of Justice announced that it had reached a settlement

[6] *Pennsylvania v. Trump*, 281 F. Supp. 3d 553 (E.D. Pa. 2017).

agreement with over 70 plaintiffs.[7] But after the IFRs were enjoined, the government has been largely unable to settle the remaining cases. Instead, those cases have had to be litigated one at a time, generating yet more decisions finding that the mandate violated RFRA.[8]

As a result, the government is forced to litigate across the country in favor of a rule it has disavowed and is subjected to a patchwork of injunctions. Attempting to stem or avoid that result constitutes good cause for utilizing the interim final rule procedure Congress included in

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[7] Adelaide Mena, *Department of Justice Announces Settlement in HHS Mandate Suits*, The Pilot (Oct. 17, 2017), https://www.thebostonpilot.com/article.asp?ID=180546.

[8] *See, e.g.*, *Grace Schools v. Azar*, No. 3:12-cv-00459 (N.D. Ind. June 1, 2018), ECF No. 114 (granting motion for permanent injunction); *Little Sisters of the Poor v. Azar*, No. 1:13-cv-02611 (D. Colo. May 29, 2018), ECF No. 82 (same); *S. Nazarene Univ. v. Azar*, No. 5:13-cv-01015 (W.D. Okla. May 15, 2018), ECF No. 110 (same); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092 (E.D. Mo. Mar. 28, 2018), ECF No. 161 (same); *Catholic Benefits Ass'n v. Hargan*, No. 5:14-cv-00240-R (W.D. Okla. Mar. 7, 2018), ECF No. 184; *Reaching Souls Int'l, Inc. v. Sebelius*, No. 13-cv-01092 (W.D. Okla. Mar. 15, 2018), ECF No. 95 (same); *Wheaton Coll. v. Azar*, No. 13-cv-8910 (N.D. Ill. Feb. 22, 2018), ECF No. 119 (same); *Roman Catholic Archdiocese of Atlanta v. Sebelius*, No. 1:12-cv-03489, 2014 WL 1256373, at *33-34 (N.D. Ga. Mar. 26, 2014) (issuing permanent injunction), *appeal dismissed sub nom. Roman Catholic Archdiocese of Atlanta v. Sec'y of U.S. Dep't of HHS* (11th Cir. Nov. 7, 2017) (No. 14-12890) (leaving permanent injunction in place).

the APA. *See* 82 Fed. Reg. at 47,814 (IFR implemented "to help settle or resolve cases.").

D. Given the agencies' post-*Zubik* predicament, obeying the order in compliance with RFRA constituted good cause.

The need for the IFR was thus more than just "desire for speediness" or "need to reduce uncertainty," as the States allege. SB 36. The IFR was necessary to remedy ongoing violations of the Constitution and civil rights laws, and to comply with a Supreme Court order.[9] If preventing an "impending threat to the public fisc" can justify the use of an IFR, as the States concede, SB 39, then surely an ongoing violation of a federal statute and a fundamental liberty interest guaranteed by the Constitution can as well. *See Evans*, 316 F.3d at 911 (good cause where "agency cannot . . . execute its statutory duties").

Furthermore, the States ignore the authority that is the most factually similar to this case. In *Priests for Life*, the D.C. Circuit found that the agencies had good cause to bypass notice and comment

[9] Even if the agencies didn't expressly invoke the Free Exercise Clause as a reason for the IFR, the Court can still rely on the Constitution as an additional reason to reverse the district court's injunction, as the Fourth IFR was necessary to avoid violating the Free Exercise Clause, and upholding the injunction would re-impose that violation. *See* Br. 51-52.

rulemaking when issuing the Third IFR. *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 276 (D.C. Cir. 2014), *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016). Instead of engaging *Priests for Life*, the States claim that "each invocation of good cause must be independently justified." SB 39 (citing *Valverde*, 628 F.3d at 1164). But *Valverde* only says that good cause must be identified on a "case-by-case" basis, considering "the totality of factors at play." *Valverde*, 628 F.3d 1159 at 1164. Here, the "totality of factors" cannot be distinguished from the factors the D.C. Circuit identified in upholding the IFR. *See* Br. 55-64.

Each of six factors applies with equal or greater force to the Fourth and Fifth IFR:

- With each IFR, the agencies made an extensive good cause finding; Br. 56;
- Each IFR modified regulations that "were recently enacted pursuant to notice and comment rulemaking and presented virtually identical issues" for extensive public deliberation; *Priests for Life*, 772 F.3d at 276; Br. 56-59;
- The agencies have exposed each of the IFRs to further notice and comment rulemaking before permanent implementation; Br. 59;
- The IFRs were intended to "augment current regulations" rather than make broad and sweeping changes; *Priests for Life*, 772 F.3d at 276; Br. 59-61;

- The IFRs respond to court orders which could be "reasonably interpreted . . . as obligating [them] to take action to further alleviate any burden on the religious liberty of objecting religious organizations;" *Priests for Life*, 772 F.3d at 276; Br. 61-62;

- Finally, in each instance, the cost of delayed implementation could be severe for religious objectors; Br. 63-64.

The States' attempt to distinguish the changes in prior IFRs as "very minor," SB 40, "incremental," SB 47, or "less significant," SB 37, fails. Those are all subjective descriptions with no discernable relationship to the actual impact of each IFR. And the primary "paradigm shift" for the Little Sisters was initially being compelled via IFR to offer coverage of abortion-inducing drugs, sterilization, and contraceptives. Br. 60-61 & n.19. The States cannot cherry-pick which IFRs they like and which they oppose.

The Little Sisters are not suggesting that the legality of the older IFRs is before the Court such that the Court could invalidate them. SB 39-40; Br. 66. The point is that an injunction is ultimately an *equitable* remedy that requires "particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). "An injunction is a matter of equitable discretion; it does not follow from success on the

merits as a matter of course." *Winter v. NRDC*, 555 U.S. 7, 32 (2008). Here, the district court's injunction is doubly inequitable. It not only reverts to a regime that is contrary to RFRA and the Constitution, but also to a regime that was enacted by IFRs which were justified and upheld on a nearly identical basis. That inequitable outcome should be overturned by this Court.

II. The Fourth IFR does not violate the Establishment Clause.

The States and *amici* Americans United (AU) argue in the alternative that the Fourth IFR violates the Establishment Clause. SB 53; AU 20. That position misapplies, or outright ignores, binding precedent. Such an overbroad reading of the Establishment Clause would also invalidate a host of laws protecting religious minorities, as well as the States' own religious protections in their contraceptive mandates. In making this argument, the States use the wrong test and arrive at the wrong conclusion.

Over six years of litigation, neither the government, nor the lower federal courts, nor any Supreme Court Justice took the view that granting relief to religious organizations would violate the Establishment Clause. And with good reason: the IFR easily passes

Establishment Clause muster under any test, and the States' and *amici's* argument has been rightly rejected time and again.

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

Before the District Court, both the States and federal defendants wrongly assumed that the *Lemon* test controls Establishment Clause analysis.[10] But the Supreme Court has moved away from *Lemon* and required courts to focus on historical analysis, as outlined in *Town of Greece*. That decision is binding on this Court.

The *Lemon* test has been one of the most harshly criticized tests in all of constitutional law. At least five current Supreme Court Justices have criticized it.[11] One of its most forceful critics has been Justice Kennedy, who has argued for many years that the *Lemon* test is "flawed in its fundamentals and unworkable in practice"—and that

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[10] Dkt. 28 at 22-24; Dkt. 51 at 30-31.

[11] *See Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial of certiorari) (collecting criticism by Chief Justice Roberts and Justices Kennedy, Alito, Thomas, and Scalia); *Green v. Haskell Cty. Bd. of Comm'rs*, 574 F.3d 1235, 1245 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing *en banc*) (*Lemon* "leave[s] the state of the law 'in Establishment Clause purgatory.'") (citation omitted).

Establishment Clause cases should instead "be determined by reference to historical practices and understandings." *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 669-70 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

After years of criticism, the Supreme Court has finally moved away from *Lemon*. In the last 16 years, it has applied *Lemon* only once, and has decided six Establishment Clause cases that either ignored the *Lemon* test or expressly declined to apply it.[12] In *Town of Greece*, which involved a challenge to a town's practice of legislative prayer, a majority of the Court made a clean break with *Lemon* and its ahistorical approach. In an opinion by Justice Kennedy, the Court adopted language from Justice Kennedy's *dissent* in *Allegheny*, holding that "the Establishment Clause must be interpreted 'by reference to historical

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[12] *See McCreary Cty. v. ACLU*, 545 U.S. 844, 864-66 (2005) (applying *Lemon*); *contra Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (not applying *Lemon*); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (same); *Cutter v. Wilkinson*, 544 U.S. 709, 726 n.1 (2005) (Thomas, J., concurring) ("The Court properly declines to assess [the statute] under the discredited test of *Lemon*."); *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality) (not applying *Lemon*); *id.* at 698-99 (Breyer, J., concurring) (same); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (same); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (same).

practices and understandings.'" *Town of Greece*, 134 S. Ct. at 1819 (quoting *County of Allegheny*, 492 U.S. at 670 (op. of Kennedy, J.)). By adopting Justice Kennedy's *Allegheny* dissent, *Town of Greece* abrogated the contrary and *Lemon*-based approach of the *Allegheny* majority. The question here is therefore "whether the [IFR] fits within the tradition long followed" in our nation's history. *Id.* at 1819.

B. The Fourth IFR passes both Establishment Clause tests.

First, there is no historical evidence supporting the notion that a narrow exemption to the contraceptive mandate would be an establishment of religion. To the contrary, religious accommodations "fit[] within the tradition long followed" in our nation's history, even when they are broader than the Free Exercise Clause requires.[13] Indeed, the historical understanding of "establishments" in some cases *requires* broad exemptions. In *Hosanna-Tabor*, a unanimous Supreme Court held that historical anti-establishment interests required that churches be exempt from employment discrimination laws with regard

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

to their ministers. 565 U.S. 171. That exemption is required because "the Establishment Clause . . . prohibits government involvement in such ecclesiastical decisions." *Id.* at 189. The Fourth IFR falls within this tradition of avoiding government interference with the internal religious decision-making of groups like the Little Sisters.

Even under *Lemon*, the Supreme Court has long recognized that accommodation of religion is a permissible secular purpose, which does not advance or endorse religion, and which avoids, rather than creates, entanglement with religion. The leading case is *Amos*. There, a federal employment law prohibited discrimination on the basis of religion. But it also included a religious exemption, which permitted religious organizations to hire and fire on the basis of religion. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 329 n.1 (1987). That exemption was challenged as a violation of the Establishment Clause, allegedly because it advanced religion by "singl[ing] out religious entities for a benefit." *Id.* at 338. But the Supreme Court unanimously upheld the religious exemption, concluding that the "government acts with [a] proper purpose" when it "lift[s] a regulation that burdens the exercise of religion." *Id.*

The same is true here. HHS is not "advanc[ing] religion through its own activities and influence." *Id.* at 337. It is merely lifting a severe governmental burden on private religious exercise. Such religious accommodations are not just permissible under the Establishment Clause, they "follow[] the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).[14] The Supreme Court reaffirmed this principle with regard to RFRA's companion statute, RLUIPA, in *Cutter v. Wilkinson*, 544 U.S. 709 (2005). There, Justice Ginsburg, writing for a unanimous Court, stated that "that 'there is room for play in the joints between' the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause." *Id.* at 713 (quoting *Locke v. Davey*, 540 U.S. 712, 718 (2004)).

[14] AU takes the radical position that the Establishment Clause forbids any accommodation of religion except to remedy a substantial government-imposed burden. AU 20-21. That has never been the law. Rather, courts have upheld a variety of religious accommodations even without a concomitant government-imposed harm that would trigger a free exercise or RFRA violation. *See, e.g.*, *Cammack v. Waihee*, 932 F.2d 765, 776 & n.15 (9th Cir. 1991) (upholding Good Friday holiday and noting that "'accommodation' is not a principle limited to 'burdens on the free exercise of religion'"). In any event, the burden on religion that the Fourth IFR remedies is the same burden the Court recognized in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

Following *Amos*, the Ninth Circuit has repeatedly upheld religious accommodations—including those not mandated by the Free Exercise Clause. In a precursor to *Cutter,* the Ninth Circuit upheld RLUIPA, explaining that, "[w]hile [the Establishment] clause forbids Congress from advancing religion, the Supreme Court has interpreted it to allow, and sometimes to require, the accommodation of religious practices . . . ." *Mayweathers v. Newland*, 314 F.3d 1062, 1068 (9th Cir. 2002). Thus, it is no accident that the Ninth Circuit has repeatedly rejected Establishment Clause challenges to governmental accommodations of religion. *See, e.g.*, *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 975 (9th Cir. 2004) ("[c]arrying out government programs to avoid interference with a group's religious practices is a legitimate, secular purpose."); *Guam v. Guerrero*, 290 F.3d 1210, 1220 (9th Cir. 2002) ("plenary authority found in Article I" allows Congress to "carve out a religious exemption from otherwise neutral, generally applicable laws based on its power to enact the underlying statute in the first place.").

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

The States claimed below that the IFR violates the Establishment Clause because it "places an undue burden on third parties." Dkt. 28 at 23 (citing *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985)). Their overbroad reading of *Thornton* cannot be squared with their own actions, with hundreds of other state and federal religious exemptions, or with binding Supreme Court precedent.

First, the States' reading would invalidate their own exemptions for houses of worship and other religious employers from contraceptive coverage laws. *See, e.g.*, Cal. Health & Safety Code § 1367.25(c) (religious exemption); N.Y. Ins. Law § 3221(l)(16) (religious exemption). Yet the States hold their own laws up as models, not as illegal or discriminatory. *See, e.g.*, ER262-63.

Second, enjoining the Fourth IFR would do nothing to remedy the religious exemption for houses of worship in the prior version of the mandate, which the States praise and do not challenge here. Dkt. 28 at 6 ("properly tailored"). But the States' view of the Establishment Clause would mean that the exemption for houses of worship is

unconstitutional too—along with hundreds of other state and federal provisions that provide religious exemptions. *Cutter* rejected the same argument: "all manner of religious accommodations would fall" if the Court accepted the claim that providing religious exemptions impermissibly advances religion. 544 U.S. at 724.

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

would create a situation in which government may authorize the Little Sisters to hire and fire people on religious grounds, but may not authorize the Little Sisters to exclude a narrow subset of services from their health care plan on religious grounds. The two notions cannot be squared.

The idea that any religious accommodation which creates a burden is impermissible makes religious minorities particularly vulnerable, as their practices are often poorly understood and challenged by speculative claims of burdens on the community. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 544-45 (1993) (religious ceremonies banned under the guise of public health); *United States v. Rutherford Cty.*, No. 3:12-0737, 2012 WL 3775980, at *2 (M.D. Tenn. Aug. 29, 2012) (mosque challenged on the ground that it poses "elevated risks to public safety"); *Guru Nanak Sikh Soc'y of Yuba City v. Cty. of Sutter*, 456 F.3d 978, 990 (9th Cir. 2006) (gurdwaras excluded because they create traffic burdens in populated areas, and conversely because they create development burdens in rural ones). Thus the States' and *amici*'s overbroad reading of the Establishment Clause, in

addition to being incorrect on the law, would create easy cover for religious bigotry masked with the neutral language of "burden."

III. The Fourth IFR does not violate the Equal Protection Clause.

The States make the alternative argument that the IFR violates the Equal Protection Clause. SB 53. The States argue that the IFRs violate the equal protection component of the Fifth Amendment because they target women for worse treatment "simply because they are women." Dkt. 28 at 25 (quoting *Virginia v. United States*, 518 U.S. 515, 532 (1996)). This argument fails for four reasons.

First, as set forth in the Little Sisters' opening brief, Br. 39, States are not persons under the Fifth Amendment and cannot assert Fifth Amendment claims at all. *See Premo v. Martin*, 119 F.3d 764, 771 (9th Cir. 1997).

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

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

Finally, the States themselves do not actually believe their equal protection argument. They boast of their own "contraceptive equity" laws, ER262, 265, 266-67, 269 (¶¶ 44, 54, 64, 75), but these laws—just like the IFRs—include religious exemptions from special benefits for women. *See, e.g.*, Cal. Health & Safety Code § 1367.25(c); N.Y. Ins. Law § 3221(l)(16). Many other state and federal laws provide similar protections related to abortion.[15]

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[15] *See, e.g.*, Cal. Health & Safety Code § 123420 (allowing "moral, ethical, or religious" exemption from abortion); 42 U.S.C. § 300a-7 (exemption from sterilization and abortion for "religious beliefs or moral convictions"); *Doe v. Bolton*, 410 U.S. 179, 197-98 (1973) (right to refrain from abortion for "moral or religious reasons" is "appropriate protection"). *See also, e.g.*, Rienzi, 62 Emory L.J. at 148-49 (detailing

As the States well know, these exemptions exist because abortion is a deeply important issue, impacting religious beliefs concerning the sanctity of human life. These exemptions were not sought or provided because the Little Sisters, the agencies, lower federal courts, nine Supreme Court Justices, or the States oppose equal treatment of women.

IV. The States are not injured by the IFR.

The States fail to provide evidence that they will be harmed by the IFR, and have not established standing to bring this lawsuit.[16] First, the States ignore the Little Sisters' argument, Br. 29, that the States have already submitted comments regarding the IFRs, and that their claim is thus moot. *See NRDC v. U.S. Nuclear Regulatory Comm'n*, 680

exemptions in nearly every state related to abortion and many others related to military service, capital punishment, and assisted suicide). The States seek a ruling from this Court that would treat all of these laws as unconstitutional.

[16] On reply, the Little Sisters rely on the federal defendants' standing arguments, but emphasize select responses to the States' arguments.

F.2d 810, 813 (D.C. Cir. 1982) (providing notice and opportunity for comment moots APA challenge).[17]

Second, the States' only allegations of injury from the IFRs are "conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (citation and quotations marks omitted). Rather than provide evidence that any women will lose contraceptive coverage because of the Fourth IFR, and that those women would pass any resulting harm onto the States, *see* Br. 34-35, the States say only that it is "amply reasonable" to assume that those things will happen. SB 24. But this reasoning contains several speculative hypotheticals. It first asks the Court to assume the existence of an employer within the States who is currently providing contraceptive coverage to its employees, but will drop it as a result of the Fourth IFR.[18] Then, even assuming the existence of such an employer, the States' causal chain relies on unpredictable intervening actions of third parties: it relies on employees

[17] The States also do not respond to the arguments, Br. 38-39, that they do not have standing under the First or Fifth Amendments.

[18] At the outset of this litigation, the Little Sisters were protected by a temporary injunction. They have now received a permanent injunction. *See supra* n.8. The States seek to undermine that injunction as unconstitutional.

who do not share the faith of their employer, who seek the kind of contraceptive their employer does not cover, who cannot obtain that coverage elsewhere or buy it themselves, who do not qualify for federal aid, and who then have an unintended pregnancy or seek contraceptives from the state. This kind of implausible "causal chain involv[ing] numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries" is "too weak to support standing." *See Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012) (citation and quotation marks omitted). It is not the "length of the chain of causation" that fails the States, SB 24, it is the "plausibility of the links that comprise the chain," *id.*[19] As California recently explained to the Supreme Court, it is "difficult to establish standing when the alleged injury depends on a chain of independent decisions." BIO at 18, *Missouri v. California*, No. 148, Orig. (U.S. Mar. 5, 2018) (citations and quotation marks omitted).

[19] Neither case the States cite aids their argument. SB 24. *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (plaintiffs established injury-in-fact, but lacked causation on one claim); *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002) (plausibility not at issue).

The States' analogy to *Sierra Forest Legacy v. Sherman* is unavailing. 646 F.3d 1161, 1178 (9th Cir. 2011). There, the Court held that California had standing to challenge the relaxation of federal logging regulations, because the state had a direct interest in logging on its territory, and because logging was sure to happen somewhere in the state. *Id.* at 1178-79. But the Court distinguished a case in which a private party did not have standing because it settled a site-specific dispute with the federal government. *Id.* at 1178 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 491-92 (2009)). Here, the States' hypothetical injuries do not stem directly from the IFRs, but supposedly derive from the actions of private parties (religious employers) who have already resolved their claims against the federal government, and then rest further on several layers of speculation about other private parties (employees) and their choices. For there to be an injury, there must be an injured party, and the speculation here is so thick that the States cannot find even one.

Indeed, the States' injury has recently become even less plausible, because more women will have access to contraceptives through federal programs. Through Title X, the federal government appropriates funds

for low-income families who lack access to family planning services. 42 U.S.C. § 300 *et seq*. On June 1, 2018, HHS proposed a new regulation that would expand the definition of "low income family" under Title X to include "women who are unable to obtain certain family planning services under their employer-sponsored health insurance policies due to their employers' religious beliefs or moral convictions." 83 Fed. Reg. 25,502, 25,514 (June 1, 2018). This proposed rule will ensure that if someone actually loses employer-sponsored contraceptive coverage under the IFRs, she will nevertheless have access to "free or low-cost family planning services," including contraceptives. *Id*.

Finally, the States' suggestion that "social harms" will result from the Fourth and Fifth IFRs is just as speculative as their other standing arguments. Their claim that "hundreds of thousands of women" will be affected is false. SB 26. The agencies estimated that "no more than approximately 120,000" women could be affected, ER 314, but acknowledged that it is unknown how many employers who were not already providing contraceptive coverage before the ACA were religious objectors, and that it is unknown whether *any* religious objectors had not already received protection in court. *Id.* And while employers who

obtained relief under *Zubik* may prefer regulatory relief over injunctive relief, for employees—and therefore the States—the difference will have no impact.

Even more speculative is the States' conclusion that the IFRs will cause "social and economic" injury "from lost opportunities for affected women to succeed in the classroom, participate in the workforce, and to contribute as taxpayers." SB 59. The 2017 Guttmacher study that the States cite indicates that contraceptive use and unintended pregnancy rates did not change between 2012 and 2015 after the ACA was implemented.[20] This is consistent with prior evidence that state contraceptive mandates did not change the rate of unintended pregnancies. Michael J. New, *Analyzing the Impact of State Level Contraception Mandates on Public Health Outcomes*, 13 Ave Maria L. Rev. 345 (2015); 82 Fed. Reg. at 47,805 n.47. The States' predictions fail to account for this evidence.

[20] News Release, Guttmacher Institute, New Study Finds Little Change in Patterns of U.S. Contraceptive Use from 2012 to 2015 (Mar. 13, 2017), https://www.guttmacher.org/news-release/2017/new-study-finds-little-change-patterns-us-contraceptive-use-2012-2015.

With such a speculative injury, the States cannot produce a concrete and particularized interest in challenging the Fourth IFR. For example, the States do not explain why their interest in commenting on the Fourth and Fifth IFRs is stronger than in all the prior opportunities they had for comment. Br. 28-29. They complain that the IFRs represented an "abrupt change" for the agencies, SB 1-2, but the agencies' positions first changed during the *Zubik* litigation at the Supreme Court in 2016. The agencies' concessions there eventually resulted in the Fourth and Fifth IFRs. *See* Br. 49-51. Later, after the government submitted a Request for Information indicating a change to the mandate which received over 54,000 comments, Br. 20, the President indicated in a Rose Garden speech on May 4, 2017 that the mandate would change.[21] The agencies indicated in court filings that a follow-up regulation was on its way, and on May 31, 2017, a version of the new rule leaked to the public.[22]

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[21] President Donald Trump, Remarks (May 4, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-day-prayer-event-signing-executive-order-promoting-free-speech-religious-liberty/.

[22] *See* Status Report, *Univ. of Notre Dame v. Price*, No. 13-3853 (7th Cir. June 1, 2017), Dkt. 136; Dylan Scott & Sarah Kliff, *Leaked Regulation:*

Thus, it was no surprise to the States when the IFR was issued on October 6, 2017. 82 Fed. Reg. 47,792; Dkt. 1 (filed Oct. 6, 2017). This, combined with their failure to participate in notice-and-comment on prior IFRs, shows that the States did not need one more chance to comment when they had passed up so many earlier opportunities.

CONCLUSION

The Court should vacate the preliminary injunction and remand with instructions to dismiss the case for lack of jurisdiction. Alternatively, if the Court reaches the merits of the preliminary injunction, it should vacate the preliminary injunction.

Trump plans to roll back Obamacare birth control mandate, Vox.com, May 31, 2017, https://www.vox.com/policy-and-politics/2017/5/31/15716778/trump-birth-control-regulation.

Respectfully submitted this 11th day of June 2018.

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

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 11, 2018.

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