IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

The State of California, *et al.*,
Plaintiffs-Appellees,

v.

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.

AMICUS CURIAE BRIEF OF FIRST LIBERTY INSTITUTE IN SUPPORT OF APPELLANTS

Appeal from the Judgment of the United States District Court for the
Northern District of California (Oakland)
Case No. 4:17-cv-05783-HSG

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(A), amicus curiae First Liberty Institute certifies that it is a non-profit organization. It has no parent corporations and does not issue stock.

STATEMENT OF COMPLIANCE WITH RULE 29(a)

This brief is submitted pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure with the consent of all parties.

INTEREST OF AMICUS CURIAE

First Liberty Institute is a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans.[1] First Liberty provides *pro bono* legal representation to individuals and institutions of all faiths — Catholic, Islamic, Jewish, Native American, Protestant, the Falun Gong, and others.

Over the past seven years, First Liberty has represented multiple faith-based organizations that hold sincere religious objections to portions of the contraception mandate. We have a strong interest in the outcome of this litigation because government compulsion to violate one's conscience or sincerely held religious beliefs threatens the ability of religious individuals to participate in the marketplace on equal terms as others. Because of our representation of a broader range of religious perspectives than those of the particular plaintiffs in this case, our interest in free exercise reaches beyond this particular dispute. Precedent that tramples on the right of conscience for one faith impacts all others.

[1] No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person, other than the amicus curiae, its members, or its counsel contributed money intended to fund preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The district court's irreparable harm holding is erroneous and could set a dangerous precedent if condoned by this Court.

The lower court's irreparable harm holding was based *entirely* on purported economic harm to the state appellees, which is an improper basis to support the injunction. The kind of harm that may be considered "irreparable" is determined by reference to the particular statute at issue. Economic harms are not the kind of harms designed to be addressed by the Administrative Procedure Act, and therefore should not be sufficient to establish irreparable harm.

Moreover, if all that were needed to establish irreparable harm is an alleged chain of events linking federal agency action to some purely economic consequence to a state, then states would satisfy this prong with respect to virtually any APA challenge to any federal agency action because virtually ***all*** federal actions could be construed to affect state coffers in some way. Here, the states have not established that they have been harmed in any meaningful way by the Final Rules because their alleged economic harms are negligible, speculative, and self-inflicted.

In contrast to the states' alleged economic harm, the harm to conscientious objectors caused by enjoining the Final Rules is truly

irreparable. It is beyond doubt that being forced to violate one's deeply-held beliefs is the kind of irreparable harm that the preliminary injunction standard is designed to address. Mere economic injury should not supersede injury to conscience or other First Amendment rights.

This Court should vacate the lower court's preliminary injunction on the basis that the state appellees have not established irreparable harm.

ARGUMENT

Irreparable harm is one of the four elements necessary for a preliminary injunction to issue. *Winter v. Nat. Res. Def. Council., Inc.*, 555 U.S. 7, 20 (2008). To establish this element, a plaintiff must demonstrate that "irreparable injury is *likely* in the absence of an injunction," not merely that irreparable harm is possible. *Id.* at 22 (emphasis in original). The lower court's irreparable harm holding was based entirely on a negligible amount of purported economic harm to the state appellees. The lower court erred by holding that the appellee states established irreparable harm.[2]

I. Pure Economic Harm Is Not the Kind of Harm That May Be Considered "Irreparable" Under the APA.

The type of harm that may be considered "irreparable," under the preliminary injunction analysis, "should be determined by reference to the purposes of the statute being enforced." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir. 2018). The kinds of harms that may be irreparable "will be different according to each statute's structure and purpose." *Id.* (quoting *Sierra Club v. Marsh*, 872 F.2d 497, 502–03 (1st Cir. 1989)). Courts must consider the "underlying substantive policy" the statute was designed to effect; it is error to do otherwise. *Id.* at 819 (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 544 (1987)).

For instance, in *Garcia v. Google*, 786 F.3d 733, 744–45 (9th Cir. 2015) (en banc), the Ninth Circuit *en banc* held that the plaintiff failed to establish irreparable harm because the type of irreparable harm alleged (damage to reputation, privacy, and emotional distress) was not the type of harm protected by the claims alleged (copyright infringement). Emotional distress damages may not be awarded under the Copyright Act. *Id.* at 745. Thus, the Court recognized that even though the alleged harms to the plaintiff were serious, including threats to harm Garcia and her family, "her harms are untethered from—and incompatible with—copyright and copyright's function as the engine of expression." *Id.* at 744–45. In other words, the difficulty with the plaintiff's claim stemmed from "a mismatch between her substantive copyright claim and the dangers she hopes to remedy through an injunction." *Id.* at 744. Because the plaintiff sought "a preliminary injunction under copyright law, not privacy, fraud, false light or any other tort-based cause of action[,] [h]ence, [her] harm must stem from copyright—namely, harm to her

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[2] This brief is limited to addressing the economic harm to the states that was the basis of the lower court's irreparable harm holding. To the extent the states allege non-economic harm to third parties, these arguments are also insufficient to establish irreparable harm to the states. See, e.g., Pls.' Br. in Supp. Mot. Prelim. Inj. at 12 (discussing potential impacts to non-parties). Third-party harm is not sufficient to support standing, as argued in the March for Life brief on page 29, much less irreparable harm, as argued in the Little Sisters' brief on pages 51-54.

legal interests as an author." *Id.* at 744; *see also Salinger v. Colting*, 607 F.3d 68, 81 & n.9 (2d Cir. 2010) ("The relevant harm is the harm that . . . occurs to the parties' legal interests.").

As in *Garcia*, there is a "mismatch" between the substantive Administrative Procedure Act ("APA") claim alleged by the appellee states and the purely economic harm upon which the lower court based its irreparable harm finding. The purpose and structure of the APA clearly establish that the statute is not meant to address economic harms. The APA only allows reviewing courts to issue injunctions by "compel[ing] agency action unlawfully withheld or unreasonably delayed" or "hold[ing] unlawful and set[ting] aside agency action, findings, and conclusions." 5 U.S.C. § 706. The statute expressly states that claims for "money damages" are unavailable due to sovereign immunity. 5 U.S.C. § 702. Therefore, under the reasoning of *Garcia*, because economic harm is not recoverable under the APA, economic harm is not the kind of harm that can support a finding of irreparable harm for APA claims.

The Ninth Circuit has not clearly addressed this issue in the APA context. In *California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 851–52 (9th Cir. 2009), *vacated and remanded on other grounds Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606 (2012), the Ninth Circuit

considered the question of whether economic harm, unrecoverable due to sovereign immunity, can constitute irreparable harm in light of the "economic injury doctrine." The economic injury doctrine provides that money damages are generally insufficient to establish irreparable harm because successful litigants can recover them later in the litigation. After noting that there was no binding authority on the issue, the Ninth Circuit panel held that the "economic injury doctrine" does not apply where plaintiffs "can obtain no remedy in damages against the state because of the Eleventh Amendment."[3] *Id.* at 852; *accord Santa Rosa Mem'l Hosp. v. Maxwell-Jolly*, 380 F. App'x 656, 657 (9th Cir. 2010) (citing *Cal. Pharmacists Ass'n*, 563 F.3d at 851–52), *vacated and remanded on other grounds Santa Rosa Mem. Hosp. v. Douglas*, 552 F. App'x 637 (9th Cir. 2014). However, this opinion did not concern a claim under the Administrative Procedure Act, and, accordingly, it did not address whether the purpose and structure of the APA permit economic injury to constitute irreparable harm. Importantly, the opinion also did not hold that *any* amount of economic injury, no matter how small, is *per se* irreparable injury where

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[3] At least one federal appellate court has reached the opposite conclusion, holding that the unavailability of damages due to sovereign immunity does not make an injury irreparable. *Black United Fund, Inc. v. Kean*, 763 F.2d 156, 161 (3d Cir. 1985) ("That the Eleventh Amendment may pose an obstacle to recovery of damages in the federal court does not transform money loss into irreparable injury for equitable purposes.").

sovereign immunity prevents its ultimate recovery, only that it may constitute irreparable injury in some circumstances.[4] Moreover, in the event of a conflict, the 2015 *en banc Garcia* opinion supersedes the 2009 panel opinion in *California Pharmacists Association*. Because economic injury does not fall within the ambit of harms the APA is designed to prevent, this Court should hold that economic injury alone does not establish irreparable harm in the APA context.

The implications of the lower court's holding that any economic harm, however negligible, automatically constitutes irreparable harm if sovereign immunity bars money damages demonstrates the wisdom of the *Garcia* rule. The type of harm that can be considered irreparable should depend upon and be congruent with the plaintiff's underlying legal claims.

II. The Lower Court's Irreparable Harm Holding Creates Perverse Incentives to Bypass Sovereign Immunity and Standard Court Procedure.

The holding that a negligible amount of purely economic harm to the states automatically constitutes irreparable harm for the purposes of APA claims creates a number of perverse incentives.

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[4] The state appellees have not argued that the alleged economic harm to them is so significant as to threaten the functioning of the state in any meaningful way.

First, the holding erroneously transforms the concept of sovereign immunity into a *per se* rule that irreparable harm will virtually always exist when invoked by states on APA claims. Because sovereign immunity does not permit states to recover monetary damages on Administrative Procedure Act claims, and every federal agency action could allegedly have at least *some minimal* impact on state coffers, every state APA challenge to a federal agency action will satisfy this standard.

If the Ninth Circuit endorses this reasoning, it will incentivize plaintiffs to pursue cases against sovereigns, whether federal or state, based on legally unavailable damages precisely *because* the claimed money damages are legally unavailable due to sovereign immunity. This rule would thwart the purpose of sovereign immunity. "Immunity from private suits has long been considered 'central to sovereign dignity.'" *Sossamon v. Texas*, 563 U.S. 277, 283 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)). Sovereign immunity from money damages claims is especially inviolable. *See id.* at 285 ("[T]he waiver of sovereign immunity must extend unambiguously to such monetary claims."). When a plaintiff brings a claim against a government, sovereign immunity is designed to eliminate certain kinds of relief, not to tip the scales in favor of the plaintiff for kinds of relief that remain available. Yet, under the lower court's reasoning, the very fact that sovereign immunity bars

claims for money damages makes it virtually guaranteed that at least one of the preliminary injunction factors will favor those seeking to challenge the sovereign. Thus, the rule intended to shield government treasuries gives the plaintiff an automatic advantage, making it easier for the sovereign to be preliminarily enjoined than a comparable private defendant. Under this framework, parties not only may obtain a preliminary injunction based upon a type of harm that cannot constitute a viable claim, but they may also obtain such relief even where courts lack jurisdiction to hear such a claim in the first place. Indeed, the lower court cited *Haines v. Federal Motor Carrier Safety Administration*, 814 F.3d 417, 426 (6th Cir. 2016), for the proposition that "federal courts do not have jurisdiction to adjudicate suits seeking monetary damages under the APA," in order to support a finding of irreparable harm based on monetary damages. *See* D. Ct. Doc. 234 at 20. This reasoning turns sovereign immunity on its head.

Furthermore, not only does the rule create a perverse incentive with respect to sovereign immunity, it also creates a perverse incentive with respect to civil procedure. Preliminary injunctions are "extraordinary remed[ies]" that circumvent normal procedures. *Winter*, 555 U.S. at 24. They should not issue unless necessary to prevent truly irreparable harm pending the outcome of the litigation. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66

(2010) ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course."). The lower court's theory of irreparable harm incentivizes states to seek the extraordinary remedy of a preliminary injunction rather than the preferred full adjudication on the merits. This twists the purpose of a preliminary injunction—making it a matter of course rather than an extraordinary procedure.

III. Even If Economic Injury Could Suffice, the States Are Not Harmed in Any Meaningful Way by the Final Rules.

Mere economic harm is generally not sufficient to satisfy the irreparable harm standard. *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980). Monetary harm, even severe monetary harm, is usually not sufficiently irreparable to justify a preliminary injunction because most successful litigants are able to recover damages to mitigate their current harms later in the litigation. *Sampson v. Murray*, 415 U.S. 61, 90 (1974).

The lower court's irreparable harm holding was based *entirely* on a miniscule amount of purported *economic* harm to the state appellees. Even assuming the states had adequately established a chain of causation showing that the Final Rules will cause economic harm to the plaintiff states—which they have not—it is undeniable that any effect on the states' treasuries would be negligible and not affect the states in any meaningful way. This showing

should not be sufficient to meet the high bar of establishing irreparable harm, or else irreparable harm will be satisfied in virtually any state's APA challenge to any federal agency action, thus functionally eliminating the irreparable harm prong entirely.

A. The Alleged Economic Harm to the States Is Negligible.

As evidence of harm, the district court cited the Final Rules' estimate that up to 126,400 women nationwide could lose some coverage as a result of the exemption. This works out to less than 0.093% of women under 65 in the United States.[5] Of that number, even fewer would be from one of the plaintiff states. According to the states' own expert, the number of women who could potentially lose some contraceptive coverage in the plaintiff states shrinks to only between 46,200 and 47,100, assuming even distribution across states. Decl. of Randie C. Chance at 7 Table B3, Dist. Ct. Doc. 174-5. Of that number, even fewer would actually be affected by the new rules because many women's chosen form of contraception may still be covered, they may be able to receive contraception from another non-state-sponsored source such as a family member's plan, or they may not need contraception.[6] Of that number,

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[5] According to the statistics compiled by the states' expert, the number of women under 65 was 137,021,411 in 2017. Decl. of Randie C. Chance at 6 Table B2, D. Ct. Doc. 174-5.

[6] The exemption applies only to the extent of the objection. Only about half of religious objectors objected to all contraceptive use. The other half only

even fewer would be eligible for and actually turn to state programs to receive contraception. The state appellees still have not pointed even to one person who is certain to be affected. Therefore, to the extent that the Final Rules affect the plaintiff states' programs at all, such financial impact would be negligible.[7]

Although this Court has held that irreparability does not depend upon the "magnitude" of the injury, *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999), the harm must be the kind of harm the statute is designed to addressed, the harm must be imminent, and the harm must be likely, rather than merely possible. *See Amylin Pharm., Inc. v. Eli Lilly & Co.*, 456 F. App'x 676, 679 (9th Cir. 2011) ("To support injunctive relief, harm must not only be

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objected to "emergency contraception," which accounts for only 0.2% of all contraceptive use. *See* Jennifer Haberkorn, Two Years Later, Few Hobby Lobby Copycats Emerge, Politico (October 11, 2016), https://www.politico.com/story/2016/10/obamacare-birth-control-mandate-employers-229627 (describing employers seeking exemptions after *Hobby Lobby*: "About half of the companies and schools objected to covering all forms of contraception. The other half objected to covering a particular approach — most often, to methods they equate to abortion, such as emergency contraception, including the morning-after pill, and certain intrauterine devices."); Guttmacher Institute, *Fact Sheet: Contraceptive Use in the United States* (Sept. 2016), https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states.

[7] This is particularly evident when compared with state expenditures. California alone has budgeted to spend $197.2 billion (excluding federal and bond funds), in its 2018-19 budget package. *See* California Spending Plan at 1, Oct. 2, 2018, *available at* https://lao.ca.gov/reports/2018/3870/spending-plan-2018.pdf.

irreparable, it must be imminent; establishing a threat of irreparable harm in the indefinite future is not enough."). For example, the Ninth Circuit recognizes that environmental harms could be irreparable, but even in that context, it "decline[s] to adopt a rule that any potential environmental injury *automatically* merits an injunction." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 474 (9th. Cir. 2010). If potential injuries to the environment do not automatically establish irreparable harm, potential injuries to state treasuries certainly should not be automatically considered irreparable.

The states insist that "[e]ven a slight uptick in [their] costs will cause irreparable harm to the States." Pls.' Br. Supp. Mot. Prelim. Inj. at 23, Dist. Ct. Doc. 174. It defies the plain meaning of the term to insist that a state is irreparably harmed because a federal agency action may prompt it to spend one more dollar than it would have otherwise.

B. The Alleged Economic Harm to the States Is Speculative.

Even if purely economic injury to states could suffice in some instances, the states' showing here does not rise to the level of probability necessary to establish a likelihood of irreparable harm. The states do not identify even a single employer that is certain to drop coverage as a result of the Final Rules. Instead, they continue to rely on a speculative chain of events in an attempt to link the federal action to the state's coffers, all the while unjustifiably inflating

the rule's purported impact. Even if such a speculative chain were sufficient to support standing, which requires a more lenient standard of injury, it falls far short of establishing a likelihood of irreparable harm.

First, to establish irreparable harm, the states are required to establish a solid causal link. Under *Winter*, the mere *possibility* of an economic impact is not sufficient. 555 U.S. at 22. Likewise, a "cursory and conclusory" analysis of irreparable harm is not sufficient; rather, the showing must be grounded in evidence. *Herb Reed Enters., LLC v. Fla. Entm't Mgmt.*, 736 F.3d 1239, 1250 (9th Cir. 2013). "A preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." *Winter*, 555 U.S. at 20 (quoting 1A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1, p. 154–55 (2d ed. 1995)). Indeed, the Supreme Court has emphasized that "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* Here, the states have not met their burden of showing a likelihood of irreparable harm.

The states' showing of potential economic harm relies on speculative assumptions that employers that have been satisfied with the accommodation process up until now will cease using the accommodation upon the Final Rules

taking effect. At bottom, such reasoning is based on the unsupported assumption that employers satisfied with the accommodation act in bad faith rather than from sincere religious conviction. An employer that has found the accommodation process sufficient to ameliorate its sincere religious objections to the contraceptive mandate has no reason to stop using the accommodation unless its claimed religious beliefs were not sincere—something that would disqualify such an employer from receiving an exemption in the first place. *See* 83 Fed. Reg. 57,536, 57,537 (Nov. 15, 2018). Without more, the states cannot rely on the remote possibility that accommodated employers *might* decide to stop using the accommodation to establish that such employers *will* decide to stop using the accommodation.[8] The states provide no evidence to support the contention that these employers

[8] Indeed, some employers satisfied with the accommodation have announced that they intend to continue to use it once the expanded exemption takes effect. *See, e.g.*, Inés San Martín, *Head of Catholic Health Association Says "Excessive Treatment" Burdens Patients, Families*, Crux, (Nov. 19, 2017), https://cruxnow.com/interviews/2017/11/18/head-catholic-health-association-says-excessive-treatment-burdens-patients-families/ (explaining that "the accommodation worked very well for [Catholic Health Association] members, because quite frankly, we've always done what we're doing now"); *American Catholic Universities Notre Dame and Georgetown Will Continue Contraceptive Coverage in Insurance Plans Following Expanded Federal Exemption*, Conscience Magazine (Jan. 11, 2018), http://consciencemag.org/2018/01/11/american-catholic-universities-notre-dame-and-georgetown-will-continue-contraceptive-coverage-in-insurance-plans-following-expanded-federal-exemption/.

will stop using the accommodation if given the opportunity. Such speculation cannot demonstrate an irreparable injury.

Second, the states' experts struggle to connect employers becoming exempt to any injury to the states, couching their assessments in vague, conclusory language. *See, e.g.*, Decl. of Mari Cantwell at 5, Dist. Ct. Doc. 174-4 ("I believe that some California women and covered dependents who *could* lose coverage *could* become eligible for the Family PACT program, provided they meet other requirements . . . .") (emphasis added); Decl. of Kathryn Kost at 26, Dist. Ct. Doc. 174-19 ("[S]ome women would be at increased risk of unintended pregnancy."); Decl. of Nathan Moracco at 2, Dist. Ct. Doc. 174-23 ("Minnesota women who lose contraceptive coverage as a result of these rules *may* seek coverage through MA or MFPP.") (emphasis added); *see also* Decl. of Keisha Bates at , Dist. Ct. Doc. 174-3 (explaining that she does not expect to lose her contraceptive coverage and that the Final Rules would only affect her in the form of fewer potential job opportunities providing the contraceptive coverage she desires should she ever wish to change employers); Decl. of Robert Pomales at 2–3, Dist. Ct. Doc. 174-28 (explaining that 18 students with non-university insurance visited the University of Massachusetts-Boston's medical clinic for contraceptive services and asserting that "[a]n increase in the prevalence of

services provided by UHS and not covered by students' health insurance would financially harm UMass Boston" without explaining whether any of the students receive coverage from soon-to-be exempt employers or whether any such students are even female). Such timid, conclusory predictions cannot demonstrate the necessary causal link.

Indeed, one of the states' experts admitted that "[t]he evidence on whether the ACA's provision has affected contraceptive use at the population level is not definitive" because the contraceptive coverage mandate "only affects a subset of U.S. women, and because there are so many additional variables." Kost Decl. at 15. Notably, the states emphasize that their contraception programs are already overtaxed, *see, e.g.*, Kost Decl. at 26 (noting that California's Family PACT program only met 50% of need); *see also* Decl. of Phuong Nguyen at 4, Dist. Ct. Doc. 174-26 ("The County's health system already operates at a significant deficit . . . ."), but they do not demonstrate that the increase in demand that may or may not occur as a result of the Final Rules will appreciably change that situation. At a minimum, the states should be able to demonstrate why they have been able to endure the consequences of significantly overtaxed contraception programs but will not be able to endure the comparatively tiny increase that may potentially (but not necessarily) arise as a result of the Final Rules.

C. The Alleged Economic Harm to the States Is Self-Inflicted.

Finally, self-inflicted injuries are not sufficient to establish standing, let alone a likelihood of irreparable harm. The challenged Final Rules do not direct the state to increase their expenditures on any particular program. Instead, the state appellees have voluntarily chosen to devote state resources to the family planning programs. Therefore, as explained further in the March for Life brief on pages 30–32, any harm caused by the Final Rules is a self-inflicted harm, which can support neither standing nor irreparable harm. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam) (holding that plaintiff states' self-inflicted economic injuries do not establish standing).

IV. Mere Economic Injury Should Not Supersede Injury to Conscience or Other First Amendment Rights.

Finally, whatever economic injury the plaintiff states may stand to suffer does not exist in a vacuum—other parties stand to suffer injury as well. Accordingly, the preliminary injunction framework obligates courts to "balance the competing claims of injury and . . . consider the effect on each party of the granting or withholding of the requested relief," *Winter*, 555 U.S. at 24, "before issuing a preliminary injunction," *Disney Enters. v. VidAngel, Inc.*, 869 F.3d 848, 866 (9th Cir. 2017). Mere economic harm—especially the negligible harm the plaintiff states allege—should not supersede the profound

injury that attends forced violation of conscience or the denial of other First Amendment rights.

Indeed, being forced to violate one's beliefs is the kind of irreparable harm that the preliminary injunction standard is designed to address. "[T]he deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). "[C]onstitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009). In the Ninth Circuit, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002 (quoting *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002)). Violations of the Religious Freedom Restoration Act (RFRA)[9] fall into the same category. *See, e.g.*, *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("[A] plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA."); *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 342 F.3d 1170, 1187 (10th Cir. 2003) (granting preliminary injunction to RFRA claimants) *injunction upheld en banc O Centro Espirita Beneficiente Uniao do Vegetal*

[9] 42 U.S.C. § 2000bb et seq.

v. Ashcroft, 389 F.3d 973, 975 (per curiam); *Catholic Diocese of Nashville v. Sebelius*, 2013 U.S. App. LEXIS 25936 at *8 (6th Cir. 2013).

Mere economic injury does not supersede injury to conscience. To the contrary, "both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs. . . . [The] view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 (2014). By the same token, the federal government's interest in protecting religious liberty does not vanish when the policies it creates to protect that liberty have an incidental financial impact on state governments. Exemptions by their nature are inconvenient to government. Nevertheless, statutes do and should contain religious exemptions and conscience protections in order to preserve principles of liberty that are superior to any singular policy goal. *See Emp't Div. Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 890 (1990) ("[A] society that believes in the negative protection accorded to religious belief [in the First Amendment] can be expected to be solicitous of that value in its legislation as well."). As discussed above, the states do not stand to suffer irreparable harm. However, those whose religious

liberty and conscience rights the Final Rules are designed to protect do stand to suffer irreparable injury if those rules cannot go into effect. *See, e.g.*, *Zubik v. Burwell*, 135 S. Ct. 2924 (2015) (preliminarily enjoining enforcement of contraceptive mandate against entities that conscientiously object to the accommodation process); *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014) (same); *Little Sisters of the Poor v. Sebelius*, 571 U.S. 1171, 1171 (2014) (same).

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's preliminary injunction.

DATED: March 4, 2019.

/s/ *Stephanie N. Taub*
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CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies that the accompanying brief uses a 14-point, proportionally spaced Times New Roman font.

The undersigned further certifies that the brief contains 4,766 words, exclusive of the portions of the brief excepted by Rule 32(f) of the Federal Rules of Appellate Procedure. The undersigned used Microsoft Word for Mac Version 16.12 to compute the word count.

DATED: March 4, 2019.

/s/ *Stephanie N. Taub*
Stephanie N. Taub

STATEMENT OF RELATED CASES

This case, 19-15072, has been consolidated with Case Nos. 19-15118 and 19-15150. I certify that I know of no other related cases pending in this Court.

DATED: March 4, 2019.

/s/ *Stephanie N. Taub*
Stephanie N. Taub

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 4, 2019.

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

DATED: March 4, 2019.

/s/ *Stephanie N. Taub*
Stephanie N. Taub