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

In the United States Court of Appeals for the Ninth Circuit

THE STATE OF CALIFORNIA, *et al.*,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

and

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

Intervenors-Defendants-Appellants.

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

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

Mark Rienzi
Eric C. Rassbach
Lori H. Windham
Diana M. Verm
Chris Pagliarella
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW, Ste. 700
Washington, DC 20036
(202) 955-0095

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INTRODUCTION

The States' brief shows exactly what the States seek in this case, and exactly why this Court must reverse.

The States now admit that they want to force religious objectors to provide their employees with health plans that include free coverage of contraceptives. For the Little Sisters and many other objectors, the States concede that these products must be provided as part of the "same ERISA plan" the religious employer provides. SB 47. Coverage must come automatically with the religious employer's plan and must be "seamless" with that plan. SB 53. Even free provision of contraceptives from the federal government is unacceptable to the States, because the States demand that the coverage must be provided *inside* the religious employer's normal coverage and not even one "additional step[] outside of their normal coverage." SB 56-57.

The States can only pretend that the ACA requires this approach (and that RFRA does not forbid it) by tying themselves in knots with a hopelessly self-contradictory brief: they insist that the ACA only granted the agency authority to determine *what* preventive services are covered, but not *who* covers them, SB 28; but then argue that the prior regulations

(which turned on *who* covers contraceptives) should be re-instated, SB 35. They argue that RFRA provides only plaintiff-by-plaintiff relief, not group-wide regulatory relief, SB 58-59; but then they base their entire RFRA argument on the so-called "accommodation," SB 36-37, which seeks group-wide regulatory relief.

This Court should not embrace such painfully conflicted arguments, and the federal government certainly had no obligation to do so either. To the contrary, the federal government acted appropriately when it relieved religious objectors from a burden that dozens of Article III courts had already found violated federal civil rights laws. The district court was wrong to re-impose the prior rules, and this Court should reverse.

ARGUMENT

I. The States have not met their burden on the merits.

For the States to prevail in this appeal, they must argue that the prior rules are compatible with RFRA *and* that absent RFRA, the ACA grants no authority to create the Final Rule. Recognizing this burden, the States spend the majority of their merits argument defending the accommodation under RFRA. SB 36-60. But their crabbed theory of RFRA, SB 58, is both obviously incorrect and would mean that *none* of

the prior exemptions or "accommodations" are permissible, including those they seek to have re-imposed, SB 35. But the Court need not decide the RFRA question to uphold the Final Rule. It may simply conclude that the Affordable Care Act or RFRA permit regulatory exceptions to a contraceptive mandate itself created by regulation. *See* Br. 29-32.

A. The prior regulations violate RFRA.

The Little Sisters' opening brief demonstrated that the "accommodation" the States wish to resurrect is illegal. Br. 34-42. Recognizing that the judgment below can only be affirmed if the accommodation is lawful, the States repeatedly rely on vacated circuit decisions upholding the accommodation. SB 44-45, 47, 51, 53; *see Zubik v. Burwell*, 136 S. Ct. 1557, 1561 (2016) (vacating and remanding all consolidated cases); *EWTN, Inc. v. Sec'y of HHS*, No. 14-12696-CC, 2016 WL 11503064, at *1 (11th Cir. May 31, 2016) (vacating prior opinion per *Zubik*). And the States fail to overcome the admissions made during the *Zubik* litigation that prompted the vacaturs. As explained herein: (1) the structure of the accommodation *does* require religious objectors to assist in providing contraception on penalty of overwhelming fines, establishing a substantial burden; (2) available, less restrictive alternatives for

accomplishing any plausible compelling interest have been identified; and (3) the Final Rule's displacement of the accommodation was therefore not arbitrary or capricious.

1. The accommodation imposes a substantial burden on the Little Sisters' exercise of religion.

The substantial burden inquiry of RFRA is a simple two-part question: whether a religious belief is sincerely held and, if so, whether the government is "putting substantial pressure on an adherent" to act contrary to that belief. *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981); *see Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("the pressure upon [a Seventh-day Adventist] to forego [abstaining from Saturday work] is unmistakable"); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695 n.3 (2014) (RFRA restored "*Sherbert* line of cases" and arguably "provide[s] even broader protection").

The States concede sincerity but then spend several pages attacking a straw man view of RFRA that no one has advanced. SB 38-43. The States argue that "sincerely held religious beliefs cannot—in and of themselves—answer the legal question of whether a law imposes a substantial burden under RFRA." SB 38-39. No one is arguing otherwise.

Nor have appellants argued that courts should treat "sincerely held beliefs and substantial burden as one and the same." SB 41.

While it is of course true that courts and governments cannot second-guess whether a particular religious belief is "correct," the substantial burden inquiry focuses not on the "correctness" of a believer's view that she cannot engage in certain conduct, but rather on the coercive force applied by the government. As the States acknowledge, once a concededly-sincere religious belief is established (as here), the question is whether the religious objectors are "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions," SB 36 (quoting *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008)).

Here, if non-compliance were punishable by a $1 annual fine, the States might have a stronger argument. But non-compliance with the accommodation is punishable by crushing fines of $100 *per day* per beneficiary. *See* 26 U.S.C. § 4980D(b). For the Little Sisters, that penalty would add up to $3 million per year. ER 302. That should end the inquiry. *Hobby Lobby*, 573 U.S. at 726 ("Because the contraceptive mandate forces

them to pay an enormous sum of money" for following beliefs, "the mandate clearly imposes a substantial burden on those beliefs.")

Rather than address the burden's magnitude, the States argue that there is no substantial burden because "the accommodation process meticulously separates the employer's health plan from any involvement in the provision of contraceptive coverage." SB 44. As the States see it, the Little Sisters just *should not* think that God would be offended by their participation in this system, because the coverage is separate in a way that *should* alleviate the Sisters' moral qualms.

First, since the States concede that the Little Sisters sincerely believe they are forbidden from participating in this system, the States' argument is really that the Little Sisters' religious beliefs are wrong. Their claims are akin to telling an Orthodox Jew that it is okay to flip a light switch she feels forbidden from flipping on the Sabbath, or telling a Sikh that he can wear ceremonial headgear instead of a turban over his patka. The States offer no authority for the notion that courts can second-guess a believer's understanding that conduct is forbidden to her.

Second, despite repeatedly using words like "separate" and "independent," the States actually do not dispute the crucial fact that the

accommodation works by using the employer's plan. The regulations themselves announced that they relied on the employer's "coverage administration infrastructure" to achieve the mandate's coverage goal. 80 Fed. Reg. 41,318, 41,328 (July 14, 2015). The third-party administrator would contact all plan participants, identify participants by "payroll location," and perform "[o]ngoing, nightly feeds" of information. Joint Appendix at 1220-22 (Guidestone Declaration), *Zubik v. Burwell*, 136 S. Ct. 1557, https://s3.amazonaws.com/becketpdf/Supreme-Court-Joint-Appendix-III.pdf; *see also* 80 Fed. Reg. at 41,328-29 (acknowledging the plan information is used to "verify the identity" of beneficiaries and "provide formatted claims data for government reimbursement"). Further, the States do not dispute that registering an objection with HHS requires that the religious employer provide additional information to facilitate the provision of contraception. *See* Br. 35 (religious employer must provide and regularly update plan information).

Indeed, the States concede that, at least for self-insured plans where the "notice to the Secretary is an instrument under which the plan is operated," the supposedly separate contraceptive coverage "is part of the

same ERISA plan as the coverage provided by the employer," SB 46-47; EBSA Form 700—Certification at 2, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/ebsa-form-700-revised.pdf; *see also* Br. 35-36. The States argue only that this "does not affect the terms" of their other coverage. SB 47. But of course religious objectors are not concerned with alterations to the terms of *other* coverage, but with the complicity resulting from the inclusion of products they oppose in their own plans. The States make much of the fact that most insured workers are on self-insured plans, since the States have the authority to regulate non-self-insured plans.[1] Thus, their concessions that the government must take over the self-insured plan to make the accommodation work upends their RFRA argument where it matters the most.

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[1] *See* Kaiser Family Found., *2018 Employer Health Benefits Survey* (Oct. 03, 2018), https://www.kff.org/report-section/2018-employer-health-benefits-survey-section-10-plan-funding/ ("Sixty-one percent of covered workers are in a plan that is completely or partially self-funded"). *See also* ER 153 ("6.6 million Californians"); ER 156 ("over 30% of Delawareans"); ER 161 (30.5% of Hawaii's workforce); ER 164 ("50% of covered Marylanders"); ER 166 (60% of Minnesotans); 172 ("at least 192,368 Rhode Islanders"); ER 175 (66% of "women in Virginia between the ages of 15 and 49"); ER 177 ("57.4% of covered employees" in Washington State); ER 188 ("1.16 million women in New York State" (emphasis omitted)).

Indeed, the government's admitted use of self-insured plans illuminates the same problem with all plans. That is why the Solicitor General in *Zubik* deemed it a "fair understanding" that the accommodation left contraceptive coverage "in the one insurance package," for both self-insured and insured plans and specifically noted that the accommodation was necessary to avoid employees having to "sign up for a second plan," Tr. of Oral Arg. at 60-61, 72, 136 S. Ct. 1557 (2016). The States themselves highlight that the accommodation ensures that employees are not "required to take additional steps outside of their normal coverage." SB 56-57. Thus, religious objectors are not merely "object[ing] to notify[ing] the government of their objections," SB 41, or "opting out," SB 38, but objecting to assisting the provision of contraception through their own plan.

The States' own analogy is instructive. They compare religious employers to a draft objector who objects to the government replacing him with another draftee upon his objection. SB 41-42. Presumably, the objector has no continued involvement with the draft after registering his objection. If so, the hypothetical is unlike the accommodation, and more like the Title X rule that provides free or subsidized contraception for

persons whose religious employers object to providing contraceptive coverage. 84 Fed. Reg. 7714, 7734 (Mar. 4, 2019).[2]

But suppose the government required the draft objector to register his objection by providing his phone number and allowing the government to use his phone's contact list. The first eligible contact on the list would then be drafted in the objector's place, would be notified that he was receiving the draft notice due to his friend's objection, and would remain in service so long as the objector kept the draftee on his contact list, and the objector would be required to provide the government with ongoing access to his contacts to ensure that a suitable substitute was always available. Plainly, the draft objector is being compelled to assist the draft; it is irrelevant that the use of the information is the government's choice.

[2] At least two district courts have enjoined the Title X regulation in its entirety in a nationwide injunction, and one has enjoined it in California, in suits initiated by Plaintiffs California, Washington, and Oregon (plaintiff in this action below). *See* Dkt. 142, *Oregon v. Azar*, No. 6:19-cv-00317 (D. Or. Apr. 29, 2019); Dkt. 54, *Washington v. Azar*, No. 1:19-cv-03040 (E.D. Wash. Apr. 25, 2019); *see also* Dkt. 103, *California v. Azar*, No. 3:19-cv-01184 (N.D. Cal. Apr. 26, 2019) (state-wide injunction). No injunction's reasoning relates to any defect in the subsidy discussed here. And no employer challenging the mandate has objected to provision of contraceptives to their employees via Title X.

So too here. The accommodation relies on the Little Sisters' authorization to commandeer the Little Sisters' insurance policy to deliver the objected-to coverage to their employees using their plan. That is precisely how the system can ensure that the coverage is "seamless" and does not require any "additional steps outside of their normal coverage." SB 56-57.

The States therefore have not shown the Little Sisters are *factually* mistaken that the accommodation requires their assistance; they have only argued that the Little Sisters are *morally* mistaken about what constitutes complicity. And courts do not decide theological questions. *See, e.g.*, *Thomas*, 450 U.S. at 715-16 ("it is not for us to say that the line [plaintiff] drew was an unreasonable one" or "to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith").[3]

[3] That said, the Little Sisters' sincere belief that the accommodation constitutes cooperation with wrongdoing is by no means idiosyncratic. *See Catechism of the Catholic Church* ¶ 1868; Benedict M. Ashley, O.P. *et al.*, *Health Care Ethics: A Catholic Theological Analysis* 56 (5th ed. 2006) (defining material cooperation as "doing something necessary for the actual performance of the evil act").

Therefore the accommodation imposes a substantial burden by forcing religious objectors to choose between severe fines and taking actions they understand to be—and the States concede to be—prohibited by their faith. *See* SB 38.

2. The accommodation fails strict scrutiny.

The agencies acknowledged that the accommodation fails strict scrutiny, and they were correct. *See* 82 Fed. Reg. 47,792, 47,800 (Oct. 13, 2017). The dozens upon dozens of injunctions against the mandate and accommodation were neither an accident nor the result of a mass judicial abdication of responsibility. *See* Br. 13-15 n.4-5 (listing 47 injunctions and orders issued prior to the challenged rules and 13 issued thereafter).[4] Rather, the mandate and accommodation cannot pass strict scrutiny.

a. There is no compelling interest in applying the accommodation's burden to religious objectors.

The States ask the Court to hold that "seamless access to contraceptives is a compelling government interest," SB 47, which the States define as coverage "without cost-sharing or additional logistical or

[4] The States refer to "stipulated injunctions." SB 20, 65. Unlike a stipulated dismissal, however, an *injunction* necessarily requires independent judicial decisionmaking since Article III power is behind the order. That is why Rule 65 requires a court in "[e]very order granting an injunction . . . [to] state the reasons why it issued." Fed. R. Civ. P. 65.

administrative hurdles," SB 53. This interest—precluding *any* accommodation that could require a patient to fill out additional paperwork—is far more prescriptive than the interest discussed in the States' cited cases, that is, "a compelling interest in facilitating access to contraception." SB 50 (quoting *Priests for Life v. HHS*, 808 F.3d 1, 15 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing)). The States are attempting to gerrymander their preferred *means* as a compelling interest.

Moreover, existing exemptions that do "appreciable damage" to the interest in seamlessness prove that seamless access to all contraceptives is not an interest "of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (citations and internal alterations omitted). For example, the government in *Zubik* emphasized that the millions of employees of exempted businesses "will ordinarily obtain coverage through a family member's employer, through an individual insurance policy purchased on an Exchange or directly from an insurer, or through Medicaid or another government program"—that is, non-seamless means. Resp. Br. at *65, *Zubik*, 2016 WL 537623 (2016). Similarly, the government argued that the grandfathering exception—

which has covered over 49 million people, *Hobby Lobby*, 573 U.S. at 700—did not undercut the government's interests because "*most* women currently covered under grandfathered plans likely have (and will continue to have) *some* contraceptive coverage." Resp. Br. at *64, *Zubik*, 2016 WL 537623 (emphasis added).

This plainly falls short of seamless coverage of "the full range of FDA-approved contraceptives" that the States would require. SB 37. So does the church exemption, which the States declare irrelevant based on the agencies' prior assumption that "it would be reasonable to presume that line-level employees [in such places] would share their employer's religious objection to contraception." SB 7. In fact, the States argued below that the "automatic exemption" for churches "appropriately adheres to the Women's Health Amendment". States' Reply, Dkt. 218 at 9 n.14. But that exemption also denies seamless (or any) coverage to those employees and their dependents. *See* SB 2, 37, 52, 56, 63-64 (emphasizing interest in dependents' coverage).

The States' narrow definition of seamlessness puts them in the position of insisting a government interest is compelling despite the government's own objection. After all, RFRA permits "Government" to

impose a substantial burden "only if *it* demonstrates" that strict scrutiny is satisfied—not an interested third party. 42 U.S.C. §§ 2000bb-1(b), 2000bb-2(1). Even so, the States can hardly argue a compelling interest when some of them have adopted no contraceptive mandate at all—as 28 states did prior to *Hobby Lobby*. Resp. Br. at *64, *Zubik*, 2016 WL 537623.

The States also fail to show a compelling interest by failing to identify anyone who would lose coverage. The States *agree* that there exist "numerous . . . permanent injunctions allowing objecting employers not to provide contraceptive coverage, including 'open-ended' injunctions that allow additional employers to join," and go so far as to fault the *agencies* for "not identif[ying] a single employer that would be harmed by enjoining the Rules." SB 65. But if objectors are covered by the existing injunctions, *then what harm to the broader compelling interest could come from the Final Rule*? The States still, after nineteen months of litigation, decline to specify any actual person who stands to lose contraceptive coverage; now they suggest such a person may not exist.

b. Less restrictive alternatives exist.

Even if there were a compelling interest in seamless access, the accommodation would still fail strict scrutiny because the government

has alternatives to the forced cooperation of nuns. As the Supreme Court explained, "[t]he most straightforward way" of "guaranteeing cost-free access to the [relevant] contraceptive methods . . . would be for the Government to assume the cost." *Hobby Lobby*, 573 U.S. at 728. And here, the government is attempting to provide Title X-funded contraceptives for women whose employers conscientiously object to contraceptive coverage. 84 Fed. Reg. at 7,734 (enjoined on unrelated grounds, *see supra* note 2).

The States find fault with these efforts because they involve "discretion" on the part of Title X projects (many administered by the States' own *amici* like Planned Parenthood). But this complaint misses the mark: what matters is not whether the States agree any current program is a perfect substitute, but whether less restrictive alternatives are *available*. Of course, the federal government—and the States—could and often do make contraceptives directly available without involving nuns. The States also suggest that RFRA only allows accommodations that could burden third parties if "borne by the government or society as a whole." SB 42-43, 53-56. *Hobby Lobby* answers this objection in full, explaining that "it could not reasonably be maintained that any burden

on religious exercise . . . is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties." 573 U.S. at 729 n.37. Otherwise, the Court explained, Muslim supermarkets could be mandated to sell alcohol or Jewish restaurants mandated to open on Saturdays for others' benefit, with no protection from RFRA. *Id.*

Here, the "third-party harm" is not the result of the religious objector seeking to have contraceptives banned (or alcohol or Saturday work), but because the government has chosen to force third parties to distribute a product. The States thus have it backwards when they suggest (repeatedly) that women will be forced to "bear the cost of their employers' religious views about contraceptives." SB 37, 54. The Little Sisters' beliefs about contraceptives are cost-free; the "cost" comes in because the government chose the Little Sisters, rather than some other method, to provide such coverage. Per *Hobby Lobby*, the burdens on third parties are properly considered under the compelling interest test, not as a separate exception to RFRA. 573 U.S. at 732. As described above, that interest is not compelling here.

3. The exemption is not arbitrary and capricious.

As the Little Sisters have argued, the agencies were permitted to issue the Final Rule, not least in light of dozens of RFRA-based injunctions. Br. 44-46. Nevertheless, the States argue that the Final Rule is "arbitrary and capricious for failure to explain defendants' stark departure from prior policy." SB 22. But the Fourth IFR devoted nearly 8,000 words to explaining why the agencies changed course after their concessions in *Zubik* and the Supreme Court's substantive directive, 82 Fed. Reg. at 47,799-807, and the Final Rule is a longer exposition of the same, 83 Fed. Reg. 57,536 (Nov. 5, 2018).

The court below concluded that this extended explanation was insufficient because the Final Rule did not "discredit [] prior factual findings" on the benefits of contraception, and relied in significant part "on new *legal* assertions by the agencies." ER 37. But as explained below, if the Final Rule correctly identifies a civil rights violation in the prior regulations, based on facts the prior administration admitted but had not yet taken into account, that would be a perfectly justifiable reason to change course. That reconsideration was consistent with the requirement that any agency promulgating a regulation "must consider . . . the

wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). To hold otherwise would be to hold that an agency acts arbitrarily whenever it changes its views on the legality of its own regulations, without regard to whether the new view is *correct*, and without regard to whether federal courts (here, *dozens* of federal courts) had endorsed the new view as required by law.

B. RFRA authorizes federal agencies to modify the scope of regulations that substantially burden religious exercise.

As the Little Sisters explained in their opening brief, RFRA constrains "all Federal law, and the *implementation* of that law." 42 U.S.C. § 2000bb-3(a) (emphasis added); Br. 44-45. So when courts divide over how RFRA applies to a regulation implementing federal law, agencies necessarily have to judge whether the regulation impermissibly burdens religious liberty, and have discretion to side with those courts concluding that it does. The States' contrary conclusion—that RFRA is just a cause of action and that the agencies lack discretion to change their conduct to comply with Congress's command—is inconsistent with the statute's text, governing precedent, and established practice.

First, RFRA's text binds agency decisionmaking. As with many civil rights laws, RFRA provides "[j]udicial relief" for a "person whose religious exercise has been burdened in violation of this section." *Id.* at 62. But RFRA broadly commands that "Government," including "agenc[ies]," "shall not substantially burden a person's exercise of religion." 42 U.S.C. §§ 2000bb-1, 2000bb-2. RFRA's cause of action doesn't mean that agencies, who are bound by RFRA, must wait until they are sued before obeying Congress and trying to avoid unjustifiably burdening religious exercise.[5]

Second, the Supreme Court has treated RFRA as a basis for agencies to "modif[y]" existing programs, or create "an entirely new program.'" *Hobby Lobby*, 573 U.S. at 729-30. The States' position that RFRA solely contemplates individual-by-individual judicial remedies would render incoherent the Court's statement that RFRA "surely allows" modifying

[5] The States rely on *Gonzales v. O Centro* to support their cramped reading of RFRA. *See* SB 58. *O Centro* states the *government* cannot survive strict scrutiny until it proves not just that a policy serves a compelling interest, but that granting an exemption "to particular religious claimants" undermines the compelling interest. 546 U.S. 418, 431 (2006). The government's obligation to articulate its party-specific interest in a RFRA challenge does not preclude categorical remedies if a generally applicable law violates RFRA as to many similarly situated parties.

programs, and sometimes requires spending, to make national policies RFRA-compliant. *Id.* ("HHS's 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."). If RFRA is merely a cause of action, it would not require the Government to change policies and budgets beyond individualized settlements.

Indeed, the remand order in *Zubik* ordered the agencies to "modif[y]" their regulations and resolve the RFRA challenge to the accommodation. *Zubik*, 136 S. Ct. at 1560. The Court's directive to "[a]rrive at an approach" that avoided the RFRA question relied on the premise that agencies can make categorical changes to their policies in order prevent potential RFRA violations. *Id.* Once the agencies concluded they could not preemptively resolve the RFRA question by providing seamless contraceptive coverage while exempting groups like the Little Sisters, *see* U.S. Dep't of Labor, *FAQs About Affordable Care Act Implementation Part 36* at 4-5 (Jan. 09, 2017), https://bit.ly/2iaSoHW, that RFRA question became unavoidable. The agencies then reasonably chose to

resolve the RFRA challenge by erring on the side of protecting religious liberty.

Third, longstanding 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,[6] charitable choice regulations under President Bush,[7] regulations governing religious accommodations in the armed forces under President Obama,[8] and the current regulations under President Trump.

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[6] *See* 14 C.F.R. § 1262.103(a)(4) (providing for NASA adjudication of RFRA disputes); 14 C.F.R. § 1262.101(b)(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).

[7] *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).

[8] *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).

C. The States' RFRA and ACA arguments defeat the relief they seek.

As the Little Sisters noted in their opening brief, all prior versions of the contraceptive mandate have contained a complete and condition-less exemption for some religious institutions. Br. 8-10. If the States were correct that (1) the agencies lack "the authority to decide which employers are exempt from providing" all FDA-approved contraceptives, SB 28, and (2) RFRA only authorizes "individualized exceptions" as opposed to broader policy changes, SB 58, then all prior versions of the mandate regulations must be invalid as well, and no court can legally reinstate them.

Likewise, if the accommodation were simply "opting out," SB 38, then under the States' theory, the agencies have no authority to create the accommodation in the first place. That would doom the States' RFRA argument, which is entirely dependent upon that accommodation. SB 36-59.

The States' primary argument in response is that the Court should pay no attention to the regulations behind the curtain. *See* SB 35 ("the legality of th[e church] exemption is not before the Court" (citation

omitted)); SB 59 n.36 ("the legality of the accommodation is not being challenged in this lawsuit").

But the remedy the States seek—and its legality—is necessarily part of the States' case. That system—which the States expressly ask to re-impose and spend the bulk of their brief defending, SB 35-60—is a central issue in this case. This is especially true where the States are invoking the Court's equitable powers to seek injunctive relief, and where the States need the Court to reinstate some prior version of the regulations to obtain any effective relief.

After all, the contraceptive mandate was never mandated by the ACA; it originated with HHS regulations and an agency website. *See* 42 U.S.C. § 300gg-13(4) (delegating authority to HRSA); HRSA, *Women's Preventive Services Guidelines*, U.S. Dep't of Health & Human Services (Aug. 2011) https://www.hrsa.gov/womens-guidelines/index.html. Effective relief for the States therefore requires not just invalidation of the current regulations, but reinstatement—whether express or implied—of some prior version of the regulations mandating contraceptive coverage. Otherwise, nothing forces religious objectors to provide the contraceptive coverage the States seek.

The closest the States come to distinguishing the accommodation from their arguments against the Final Rule is to say that, under RFRA, "the accommodation is now required, at least for some employers, under the Supreme Court's rulings in *Hobby Lobby* and *Wheaton College*." SB 59 n.36. That is incorrect. *Hobby Lobby* pointed to the accommodation as proof that "less restrictive" approaches were available, but reserved the question of whether the accommodation sufficed. 573 U.S. at 730. And *Wheaton College v. Burwell*, issued days after *Hobby Lobby*, granted an injunction to the plaintiff *against forced compliance with the accommodation*. 573 U.S. 958 (2014). Neither decision directed the government to adopt the challenged accommodation regulations. Dozens of court cases have since held the accommodation to be illegal.

Nor can the States distinguish the church exemption. The States suggest it may be permissible under the ACA because the government has long recognized "a particular sphere of autonomy" for churches.[9] SB 35-36 (quoting 80 Fed. Reg. at 41,325). The agencies initially claimed that

[9] The States also argue the exemption is "tethered" to the Internal Revenue Code, SB 35, which means only that the exemption uses a definition from a different statute. And whether "churches are more likely to hire co-religionists," SB 35-36 (citation omitted), is irrelevant to the underlying question of authority to create a regulatory exception.

the church exemption was justified under the ministerial exemption, but that would be a poor fit, since it *would* cover religious orders like the Little Sisters and other groups not previously exempt, and would *not* function as a blanket exception for all church employees. *See Hosanna-Tabor v. EEOC*, 565 U.S. 171, 190-94 (2012) (discussing indicia of ministerial role). Further, the States give no response to the Little Sisters' argument, Br. 40-41, that the church exemption's limitation to only groups the government deems involved in "exclusively religious" activity, 78 Fed. Reg. 39,870, 39,874 (July 2, 2013), violates the First Amendment's protection against disparate treatment "expressly based on the degree of religiosity of the institution[.]" *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008).

If this Court holds that the States are right and the agencies have no power to create exceptions under RFRA, or the ACA's inherent regulatory power (discussed below), then the church exemption and accommodation are simply invalid, and the Court cannot lawfully re-impose the prior system.

D. The agencies have authority to regulate under the ACA.

1. Section 300gg-13 of the ACA does not prohibit the Final Rule.

As the Little Sisters' opening brief demonstrated, section 300gg-13 of the ACA mandates a set of "preventive care" "*guidelines*." Br. 26 (quoting 42 U.S.C. § 300gg-13) (emphasis added). The States proceed as if those guidelines must delineate an inflexible list of covered services. SB 27. In reality, the guidelines specify *what* preventive services must be covered and to *whom* those services should apply. The "comprehensive guidelines" for mandatory minimum coverage for children's preventive care, sharing a subsection and a "shall" with the women's preventive care section, provide an analogue. *Compare* 42 U.S.C. § 300gg-13(a)(3) *with* (a)(4). Those guidelines make a variety of age- and individual-circumstance-based recommendations which note that "variations, taking into account individual circumstances, may be appropriate," and "[recommended procedures] may be modified, depending on entry point into schedule and individual need." Bright Futures/American Academy of Pediatrics, Recommendations for Preventive Pediatric Health Care (2019), https://www.aap.org/en-us/Documents/periodicity_schedule.pdf (children's preventive care guidelines).

Nowhere does the statute tell HRSA to include contraceptives in the guidelines; it would be strange indeed if the agencies had the discretionary power to create a nationwide contraceptive mandate but not the discretionary power to frame that mandate to balance competing interests. Indeed, that is how HRSA has understood its discretion from Day 1. *See* 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011) ("In the Departments' view, it is appropriate that HRSA, in issuing these Guidelines, takes into account the effect on the religious beliefs of certain religious employers if coverage of contraceptive services were required in the group health plans in which employees in certain religious positions participate.").

The States argue that it would "be untenable practically for Congress" to "enumerate the specific services contained" in the mandate. SB 27 n.16. Not so. Just *two subsections* away from the preventive services mandate, Congress prohibited cost-sharing requirements for "evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force" or "immunizations that have in effect a recommendation from the [relevant advisory committee] with respect to the individual involved."

42 U.S.C. § 300gg-13(a)(1)-(2). Congress could have also guaranteed women "all FDA-approved contraceptives." But Congress instead permitted HRSA to balance competing interests like expanding contraceptive access and protecting religious exercise.

The States point to an entirely unrelated section prohibiting the government from punishing, among others, hospitals that do not conduct "mercy killing[s]," 42 U.S.C. § 18113, from which they derive the negative implication that there are no other statutory exemptions for religious entities in the entire ACA. SB 29. Though the ACA nowhere mandates euthanasia coverage (the practice was illegal in forty-eight states at the time the ACA was enacted), the States call section 18113 a "statutory exemption" for "religious object[ors]." SB 29.

That towering inference misapplies the negative implication canon, which applies when the exception specified can reasonably be thought to express *all* exceptions to the prohibition involved. *See, e.g.*, *United States v. Giordana*, 416 U.S. 505, 514 (1974) (executive assistant cannot exercise wiretap authority delegated to the "Attorney General" and "any Assistant Attorney Generally specially designated by the Attorney General"); *see also* A. Scalia & B. Garner, *Reading Law* 107 (2012).

Section 18113 has nothing to do with preventive care or HRSA's discretion to craft preventive services policy, and therefore does not foreclose HRSA's discretion to not impose contraceptive coverage obligations on religious entities, particularly when RFRA explicitly applies to every government "agency, instrumentality, and official." 42 U.S.C. § 2000bb-2.[10]

The better reading of the statute—shared by both administrations to oversee the ACA—is that HRSA can decide to not impose certain coverage requirements on religious entities, provided that the scope of the exemption is not arbitrary and capricious. Though the States insist that arbitrary-and-capricious review is not a meaningful limit, SB 33 ("Under their interpretation, [the agencies] . . . could exempt all employers from" section 300gg-13), they *themselves* defend the church

[10] Equally meritless is any inference from Congress's decision to not pass the Conscience Amendment. *See* SB 29-30. As the Little Sisters explained, Congress also declined to pass legislation declaring that RFRA did *not* apply to portions of the mandate. Br. 33. Such failed legislative proposals "lack[] persuasive significance because several equally tenable inferences may be drawn from such inaction." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (citation omitted).

exemption because it is not arbitrary and capricious, *i.e.*, it is "narrow[]" and is mirrored by a provision in the Internal Revenue Code. SB 35.

As explained in the Little Sisters' opening brief and above, the Final Rules are necessary to cure civil rights violations under RFRA, or at a minimum, were reasonable efforts to respond to conflicting court judgments, and so are not arbitrary and capricious. Br. 32-49; *supra* Part I.A.

2. Section 1554 of the ACA does not prohibit the Final Rule.

Nor does section 1554 prohibit the Final Rule. *See* SB 61-62. Congress itself (a) chose not to mandate contraceptive coverage at all but left the matter entirely to HRSA's discretion, and (b) chose to allow grandfathered plans serving tens of millions of women to not cover preventive services. In light of these choices, it makes no sense to suggest that the ACA treats failure to extend a mandate to each and every potential employer as "creat[ing] an[] unreasonable barrier[]" or "imped[ing] timely access to health care." 42 U.S.C. § 18114. Furthermore, in light of (a) the existing injunctions, (b) the wide availability of contraceptives generally, and (c) Title X programs

available to provide contraceptives, the Final Rule does not create an unreasonable barrier or impede timely access.

3. Section 1557 of the ACA does not mandate contraceptive coverage.

The States next argue that the Final Rule violates section 1557 of the ACA, SB 62-63, which prohibits discrimination "on the ground prohibited under . . . title IX of the Education Amendments of 1972." 42 U.S.C. § 18116(a). But Title IX does not apply to organizations "controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3). Therefore, an exemption which protects religious organizations cannot be inconsistent with section 1557, since section 1557 itself incorporates the broad religious exemption scheme of Title IX. *See Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 690 (N.D. Tex. 2016) (noting both religious and abortion exemptions).

By the States' reasoning, every change to the women's preventive services mandate violates section 1557, and the very mandate itself—which treats women different from men—violates 1557. Such an absurd result cannot have been Congress's intent.

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

As the Little Sisters' opening brief explained, the Final Rule follows "the best of our traditions." Br. 49 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). The States nevertheless suggest that the Final Rule raises "serious questions" concerning the Establishment Clause because it burdens third parties, citing *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). *See* SB 58 n.35.

The States are tilting at windmills. Religion-only exemptions, neutrally applied among different faiths, and which "lift[] a regulation that burdens the exercise of religion," are constitutional. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987). *Amos* upheld the Title VII exemption for religious employers—surely a more serious burden on employees than a narrow insurance coverage exemption. The distinction between *Amos* and *Thornton* is that in *Amos*, "it was the Church . . . not the Government," who created the employment policy, and in *Amos*, the government merely lifted a government-created burden on religious exercise. *Id.* at 337, n.15 (citing *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985)). Relying on that distinction, *Cutter* unanimously held that the Religious Land Use and Institutionalized

Persons Act (RLUIPA) was consistent with the Establishment Clause as it relieved "government-created burdens on private religious exercise. *Cutter*, 544 U.S. at 720; *see* Constitutional Law Scholars Br., Dkt. 45 at 22-28. Under *Cutter* and *Amos*, the Final Rule is a constitutional religious exemption. *Thornton* is inapposite because the Final Rule does not coerce private parties, but only suspends the application of the contraceptive mandate to religious objectors.

II. The States have not met their burden under the remaining preliminary injunction factors.

Beyond the States' inability to demonstrate a likelihood of success on the merits, they have also failed to carry their burden as to the other injunction factors. Considering the existing injunctions, the States have failed to show irreparable harm, given that they cannot identify even a single employer expected to change (or employee expected to lose) coverage based on the Final Rules. They offer no response to the Little Sisters' argument that the States have no evidence of harm even from much larger exemptions that have existed for years. Br. 32-34. The States simply have not shown that the Final Rule will add anything to their alleged burdens.

The balance of the equities also requires reversal of the district court's orders. While the States cannot find a single person who will be harmed by the Final Rule, there are known religious groups for whom the Final Rule brings the real benefit of codifying judicially-obtained protection. It would be far from equitable to allow the States, who sat on the sidelines for years while religious groups won protection in court, to collaterally attack that relief here. The public interest—both in the enforcement of federal civil rights laws and the orderly functioning of the judiciary—thus forecloses the injunction.

III. The States have not met their burden to show Article III standing.

As the Little Sisters have explained, Br. 21-24, the States lack Article III standing. The States rely primarily on the doctrine of "law of the case." SB 21 (citation omitted). But of course courts may "depart from the law of the case where," among other things, "changed circumstances exist." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (citation omitted)).

The States' brief presses that "defendants have not identified a single employer that would be harmed by enjoining the Rules," in light of "permanent injunctions . . . including 'open-ended' injunctions that allow

additional employers to join." SB 65 (quoting Br. 15); *see* SB 19-20. The implication is that the Final Rule may not cause a single objecting religious employer to cease contraceptive coverage in light of existing injunctions. Yet the panel previously found standing solely based on the argument "that women in the plaintiff states will lose some or all employer-sponsored contraceptive coverage *due to the IFRs*." *California v. Azar*, 911 F.3d 558, 572 (9th Cir. 2018) (emphasis added). The States should not be allowed to abuse the law of the case doctrine to have the facts both ways.

CONCLUSION

The preliminary injunction should be vacated.

Respectfully submitted this 6th day of May 2019,

/s/ *Mark L. Rienzi*
Mark L. Rienzi
Eric C. Rassbach
Lori H. Windham
Diana M. Verm
Chris Pagliarella
The Becket Fund for Religious Liberty
1200 New Hampshire Ave NW,
Ste. 700
Washington, D.C. 20036
(202) 995-0095
mrienzi@becketlaw.org

Attorneys for Intervenor-Defendant-Appellant

CERTIFICATE OF COMPLIANCE PURSUANT TO 9TH CIRCUIT RULE 32-1

I certify that:

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

The brief is 6984 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ *Mark L. Rienzi*

Mark L. Rienzi
1200 New Hampshire Ave NW, Ste. 700
Washington, D.C. 20036
(202) 995-0095
mrienzi@becketlaw.org

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 May 6, 2019.

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/s/ Mark L. Rienzi

Mark L. Rienzi
Counsel for Intervenor-Defendant-Appellant