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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

THE STATE OF OREGON,

Plaintiff-Intervenor,

THE STATE OF COLORADO; THE STATE OF MICHIGAN; THE STATE OF NEVADA,

Proposed-Plaintiffs-Intervenors,

v.

ALEX M. AZAR, II, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; R. ALEXANDER ACOSTA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF LABOR; U.S.

4:17-cv-05783-HSG

REPLY IN SUPPORT OF STATE OF OREGON'S MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: August 22, 2019
Hearing Time: 2:00 PM
Dept: 2, 4th Floor
Judge: Hon. Haywood S. Gilliam, Jr.
Trial Date: Not set
Action Filed: Oct. 6, 2017

DEPARTMENT OF LABOR; STEVEN MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE TREASURY; DOES 1-100,

Defendants,

and,

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

Defendant-Intervenors.

INTRODUCTION

This Court's prior Order Granting Plaintiffs' Motion for a Preliminary Injunction ("Order") has already rejected each legal argument made by defendants and defendant-intervenors in opposition to Oregon's motion. Defendants and defendant-intervenors offer no reason for a different result here. The only new issue for this Court to address is irreparable harm, in light of the nationwide injunction and the timing of Oregon's motion. Oregon's reply brief focuses on those topics and supplements with recent relevant court decisions.[1]

Oregon agrees with defendant-intervenor Little Sisters that an in-person hearing on this motion for preliminary injunction is not necessary, but if the Court intends to hold oral argument, a timely hearing is necessary. Little Sisters' Opp. to Mtn. for Prelim. Inj. and Mtn. to Shorten Time at 2. Since no other objections having been timely filed to the Motion to Shorten Time, Oregon requests that it be granted.

ARGUMENT

I. OREGON HAS STANDING TO CHALLENGE THE RULES

The Little Sisters renew their arguments on standing, by incorporating by reference their prior response brief to the State's Motion for Preliminary Injunction. There is new authority on the issue of standing since Oregon filed its motion for preliminary injunction. The First Circuit recently ruled that Massachusetts had standing to raise a nearly identical challenge to the rules.

[1] To avoid needless repetition, the State of Oregon also incorporates by reference the Plaintiff States' Reply in Support of their Motion for Preliminary Injunction [Docket #218], attached hereto as Exhibit A.

Massachusetts v. United States Dept. of Health & Human Servs., ___ F.3d ___, 2019 WL 1950427, at *1 (1st Cir. May 2, 2019) (finding "a sufficiently imminent fiscal injury under a traditional standing analysis"). Thus, the three circuits to address the standing issue for the challenge to the interim and final rules now unanimously hold that the states have standing.

II. OREGON IS LIKELY TO SUCCEED ON THE MERITS

No new substantive arguments are presented by defendants or defendant-intervenors regarding likelihood of success on the merits.[2] Thus, Oregon has satisfied this "most important" factor. *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017).

III. OREGON WILL LIKELY SUFFER IRREPARABLE HARM

The Ninth Circuit found that Plaintiff States were likely to suffer irreparable harm absent an injunction under the Interim Rules. *California*, 911 F.3d 558, 581 (9th Cir. 2018); *see also id.* at 571 ("The states show, with reasonable probability, that the IFRs will first lead to women losing employer-sponsored contraceptive coverage, which will then result in economic harm to the states."). On further proceedings, this Court found that the Plaintiff States had equally shown a likelihood of irreparable injury from the Final Rules. Order at 39-40. There is no need to re-brief those issues.

Oregon similarly is at risk of irreparable injury as a result of potential implementation of the Final Rules. Rimberg Decl. ¶¶ 6-9 [Docket #210]. As further evidence of irreparable harm to Oregon, on April 30, 2019, the day Oregon's preliminary injunction was filed, the Oregon Department of Consumer and Business Services received an application for exemption from the

[2] Defendants cite to ORS § 435.435, to show that Oregon protects "moral beliefs in healthcare." Fed. Defs' Opp. at 23. ORS § 435.435 provides that "[t]he refusal of any person to consent to a termination of pregnancy or to submit thereto shall not be grounds for loss of any privilege or immunity to which the person is otherwise entitled nor shall consent to or submission to a termination of pregnancy be imposed as a condition to the receipt of any public benefits." It is a law protecting a woman's choice. It is not a law allowing any employer to take away contraceptive coverage from female employees on the basis of undocumented "moral beliefs" as would be permitted under the Final Rules. Intervenor MFLEDF cites to ORS § 743A.066(4), to argue that Oregon is unlikely to succeed on the merits. MFLEDF's Opp. at n 6. However, ORS § 743A.066(4), narrowly exempts religious non-profit employers, that primarily employ and serve "persons who share the religious tenets of the employer," from providing prescription contraceptives in the health plan it provides to its employees. Again, this state statute is far narrower than the federal rule challenged in the current action. Neither state statute impacts this court's legal analysis regarding the pending motion for preliminary injunction.

mandate from Oregon Right to Life. DeFever Decl., Ex. A.[3] Thus, there is evidence that Oregonian women will be directly impacted if an injunction is not in place.

Three interrelated points are raised by defendants regarding the irreparable harm analysis as to Oregon: (a) whether the nationwide injunction eliminates imminent harm, (b) whether the harm is speculative in light of the nationwide injunction, and (c) whether the timing of Oregon's motion for preliminary injunction implies less harm. Fed. Defs' Opp. at 2.

A. This Court may grant Oregon's motion for preliminary injunction while a nationwide injunction is in effect in a parallel proceeding.

The Pennsylvania court's nationwide injunction does not prevent this Court from also issuing an overlapping injunction. Courts may issue injunctions in parallel actions. *See California Med. Ass'n v. Douglas*, 848 F. Supp. 2d 1117, 1124 n.1 (C.D. Cal. 2012), *rev'd on different grounds in Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235 (9thCir. 2013) ("The Director argues that the present action is redundant and that Plaintiffs cannot establish irreparable harm [because of a parallel injunction under the APA].... The Court finds this argument unavailing because the issuance of a preliminary injunction in an overlapping case does not operate to moot a parallel action because the original order is 'subject to reopening.'").

In numerous recent instances, entry of nationwide injunctive relief by one district judge did nothing to interfere with adjudication of similar or identical challenges to federal agency action by other federal judges in other districts. *See, e.g.*, *Kravitz v. U.S. Dep't of Commerce*, No. 8:18-cv-01041-GJH, at 117-18 (D. Md. Apr. 5, 2019) (vacating agency decision to add citizenship question to U.S. Census and issuing nationwide permanent injunction); *California v. Ross*, 358 F. Supp. 3d 965, 1049-51 (N.D. Cal. 2019) (same); *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 673-78 (S.D.N.Y. 2019) (same); *NAACP v. Trump*, 315 F. Supp. 3d 457, 460-62 (D.D.C. 2018) (in denying reconsideration of vacatur of agency decision to rescind the Deferred Action for Childhood Arrivals program, noting that the same rescission had been preliminarily enjoined without geographic limitation in district courts in

[3] Oregon does not suggest that Oregon Right to Life would be subject to exemption under the Final Rules, merely that these are live issues with real world consequences to Oregon women.

California and New York); *State of California v. Azar*, 19-cv-01184-EMC (N.D. Cal. Apr. 26, 2019), ECF No. 103, p. 3, n. 1 ("The recent injunction issued … in *State of Washington v. Azar*, No. 1:19-cv-3040 (E.D. Wash. filed Mar. 5, 2019), does not obviate this Court's duty to resolve the dispute before it.").

Indeed, the federal defendants' filing this week in the Ninth Circuit, addressing the mootness question, supports Oregon's position. Defendants wrote that:

> although this Court has not expressly held as much, its prior practice is consistent with the fundamental and commonsense principle that a nationwide injunction entered in another circuit does not moot an appeal from a parallel injunction entered in this circuit. For example, in *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017), this Court adjudicated the government's appeal of an injunction against an executive order even though another circuit had already upheld a nationwide injunction barring enforcement of the same executive order, *see International Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017). Likewise, in *Regents of the University of California v. U.S. Department of Homeland Security*, 908 F.3d 476 (9th Cir. 2018), this Court adjudicated the government's appeal of an injunction against certain aspects of the rescission of an executive policy even though a district court in another circuit had issued a nationwide injunction against the same aspects of the rescission, *see Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018), *appeal docketed*, No. 18-485 (2d Cir. Feb. 20, 2018).

DeFever Decl., Ex. B: Supplemental Brief for the Federal Appellants at 6.

Ironically, defendants cite in their opposition brief to the district court case of *Hawai'i v. Trump*, 233 F. Supp. 3d 850 (D. Haw. 2017) for the proposition that another injunction should not issue when a nationwide injunction is in place. Fed. Defs' Opp. at 11. Later in that same litigation, the Hawai'i district court issued an overlapping injunction with the Maryland district court on the Muslim Travel Ban. *Hawai'i v. Trump*, 265 F. Supp. 3d 1140, 1145 (D. Haw. 2017). The Ninth Circuit case, cited by defendants in their Supplemental Brief, noted the parallel injunctions and upheld the Hawai'i district court's injunction without further ado. *Hawai'i v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam). Moreover, in *Trump v. Intern. Refugee Assistance Proj.*, 137 S. Ct. 2080, 2084-2088 (2017) the Supreme Court consolidated the cases on the multiple preliminary injunctions, and then *upheld* the nationwide preliminary injunctions

against the Muslim Travel ban for individuals "who have a credible claim of a bona fide relationship with a person or entity in the United States." In sum, the full case history of the *Hawai'i v. Trump* injunction shows that this Court may issue an injunction even if a nationwide injunction has been entered in a parallel proceeding—as the federal defendants have conceded.

B. The nationwide injunction does not make Oregon's risk of harm or challenge to the Final Rules speculative.

Defendants also assert that because the nationwide injunction is in place, any harm is contingent or speculative. Fed. Defs' Opp. at 11. However, defendants' cited cases regarding speculation are not apropos. In *Henke v. Dep't of Interior*, 842 F. Supp. 2d 54 (D.D.C. 2012), the plaintiffs were challenging a potential future agency action to close a publicly-owned square. The court found a challenge to "the legality of potential future agency action" was speculative and "amorphous." *Id*. at 59. The court contrasted those facts with cases challenging "particular ordinances or regulations" that present "defined legal issues." *Id*. Oregon raises a challenge to particular regulations: the Final Rules. State of Oregon's Complaint, *passim.* The agency action is complete. Oregon's challenge to that agency action presents defined legal issues. Unlike in *Henke*, there is no speculation about the issues presented to this Court for resolution.

Also inapplicable is *In re Excel Innovations, Inc.*, 502 F.3d 1086 (9th Cir. 2007), which involved a bankruptcy court's injunction where the court "did not explain" its reasoning and there did not appear to be a factual or legal basis for the court's concerns. As a result, the Ninth Circuit overturned the injunction as based on speculation. *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1097–98 (9th Cir. 2007). Since *In re Excel* lacks deep analysis, following up by reviewing its citation to *Goldie's Bookstore, Inc. v. Superior Court,* for the law on speculation, reveals a similar injunction overturned because it was "not based on any factual allegations" and so was speculative. *Goldie's Bookstore, Inc. v. Superior Court of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984). Unlike in *In re Excel* and *Goldie's Bookstore,* Oregon and the other Plaintiff States have provided substantial factual evidence of the harms if the Final Rules go into effect.

Further, there is no speculation that the nationwide injunction has been appealed or that oral argument will be heard by the Third Circuit on May 21, 2019. This makes the possibility of

reopening the Pennsylvania court's nationwide injunction more likely. *Boardman v. Pacific Seafood Group*, 822 F.3d 1011, 1023 (9th Cir. 2016) (irreparable harm existed where defendants could terminate a stipulation with 60-days notice); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005) (a controversy "remains live" while it is pending appeal)).

The Ninth Circuit, this Court and the Washington district court have all found that the states will suffer irreparable and concrete harm. If Oregon is not protected from implementation of the Final Rules like the other Plaintiff States, Oregon will be burdened not only with providing contraceptive coverage to women who lose it, but with the irreversible consequences of an upswing in unintended pregnancies—short-term medical costs associated with the pregnancies and their aftermath and long-term costs from the interference with women's ability to contribute to Oregon as students, researchers, workers, and taxpayers. Rimberg Decl. ¶¶ 6-9; Finer Decl. ¶¶ 45, 54, 61, 69, 77, 85, 93; Tosh Decl. ¶¶ 26-28, Rattay Decl. ¶¶ 5, 8; Lawrence Decl. ¶ 5; Arensmeyer Decl. ¶ 4; Nelson Decl. ¶ 31, Bates Decl. ¶¶ 3, 6. An Oregon district court, in a parallel case regarding proposed rules that would alter Title X of the Public Health Service Act, recently found that the "likely harm to the public health, in the form of an increase in sexually transmitted diseases and unexpected pregnancies, is not speculative." *Oregon v. Azar*, No. 6:19-CV-00317-MC, 2019 WL 1897475, at *15 (D. Or., Apr. 29, 2019). Similarly, eliminating contraceptive coverage for many women will result in harm to Oregon's public health, which is sufficient to show a threat to the state's economic interests. Thus, the only potential "speculation" is how the Third Circuit will rule. As explained above, the nationwide injunction in a parallel proceeding is not a basis for this Court to forego its independent determination of Oregon's motion.

C. The timing of Oregon's motion for preliminary injunction is reasonable under the circumstances, and does not imply a lack of irreparable harm.

Although failure to seek judicial protection can imply the lack of need for speedy action, such timing is not particularly probative in the context of this action. Oregon filed for a preliminary injunction shortly after the Court gave it leave to intervene (and its motion to intervene was filed before the preliminary injunction was entered). In any event, because the

nationwide injunction has been protecting Oregonian women's rights to contraceptive coverage, waiting to file for preliminary relief is not dilatory.

"[D]elay is but a single factor to consider in evaluating irreparable injury; but noting that courts are "loath to withhold relief solely on that ground." *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1214-16 (9th Cir.1984) (denying injunction in part because "appellees … waited five years to challenge the ordinance, although that delay is not the principal basis of our decision."). In *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, the Ninth Circuit considered a plaintiff's delay before seeking a preliminary injunction - without any explanation - as implying a lack of urgency and irreparable harm. 762 F.2d 1374, 1377 (9th Cir. 1985). Yet, the court found this was only one factor among many at the discretion of the trial court. *Id.*

The other cases cited by defendants involve fact situations where there is active, on-going harm which is ignored by the plaintiff. In *Garcia v. Google, Inc*., 786 F.3d 733 (9th Cir. 2015), the district court denied the injunction because (i) plaintiff was not likely to success on the merits, and (ii) five months of delay in seeking a mandatory injunction in copyright case, after the video was uploaded to YouTube, undercut the plaintiff's claim of irreparable harm. Likewise, in *Hi-Rise Tech., Inc. v. Amateurindex.com*, 2007 WL 1847249 (W.D. Wash. June 27, 2007), plaintiff knew for over four years about the use of the domain name "amatuerindex.com." The court found that this long delay weighed against granting injunctive relief. *Id.* at *4.

Oregon did not unnecessarily delay in filing this motion. Oregon's motion to intervene and join the action was timely. [Docket #274]. Once intervention was granted in February 2019, Oregon filed its complaint and Joinder in State's Motion for Preliminary Injunction that same month. [Docket #288]. The Court initially denied motion for preliminary injunction on procedural grounds. [Docket #297]. After conferring on a potential stipulation, in April, Oregon filed the pending motion for preliminary injunction. Importantly, during that entire time period, the nationwide injunction has been in effect. Only now, as the nationwide injunction is heading to appeal before the Third Circuit, does Oregon have renewed risk of irreparable harm. Under this fact scenario, Oregon has not unreasonably delayed seeking judicial protection.

IV. ISSUING AN INJUNCTION TO PRESERVE THE STATUS QUO WOULD PROPERLY BALANCE THE EQUITIES AND SERVE THE PUBLIC INTEREST

This Court's Order found that Plaintiff States prevailed on the balance of the equities and public interest analysis. Order at 40. There is no new substantive argument on this issue by defendants or defendant-intervenors. Adding the State of Oregon to the preliminary injunction would maintain the status quo of providing contraceptive coverage and properly balance the equities and serve the public interest by ensuring that the significant public health benefits of contraception remain available to Oregonian women. *Chalk v. U.S. Dist. Court Cent. Dist. Cal.*, 840 F.2d 701, 704 (9th Cir. 1988) (purpose of injunction is to preserve the status quo).

CONCLUSION

Oregon requests that the Court grant its motion for preliminary injunction. Expanding the injunction to include Oregon would make the relief "no broader and no narrower than necessary to redress the injury shown" by Oregon. *California*, 911 F.3d at 585.

DATED May 21, 2019.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

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ALEX M. AZAR, II, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; R. ALEXANDER ACOSTA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF LABOR; STEVEN MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE TREASURY; DOES 1-100,

Defendants,

and,

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

Defendants-Intervenors.

4:17-cv-05783-HSG

STATES' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date:	January 11, 2019
Time:	10:00 a.m.
Dept:	2, 4th Floor
Judge:	The Honorable Haywood S. Gilliam, Jr.
Trial Date:	Not set.
Action Filed:	October 6, 2017

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INTRODUCTION

At the heart of the States' motion is a Congressional enactment: the Women's Health Amendment to the Patient Protection and Affordable Care Act (ACA), which gave women across the country guaranteed access to preventive healthcare. Congress sought to ensure that women receive full and equal health coverage appropriate to their medical needs. To that end, the Women's Health Amendment—or the statutory "Mandate," as Defendants and Intervenors call it—provides that health plans "shall" provide women's "preventive care and screenings" without "impos[ing] any cost sharing." 42 U.S.C. § 300gg-13(a)(4). The only delegation of authority to Defendants—through the Health Resources and Services Administration (HRSA), an agency within the U.S. Department of Health and Human Services (HHS)—was limited to determining the *scope* of those additional preventive services (and not *who* must provide those services). *Id.* On two separate occasions, Congress considered but declined to amend the ACA to permit employers and insurers to deny coverage based on religious beliefs or moral convictions.

The States do not bring an "all-or nothing" choice to this Court. On the contrary, all that the States seek is for the federal government to "ensur[e] that women covered by [religious employers'] health plans receive full and equal health coverage, including contraceptive coverage," while protecting the religious beliefs of employers. *Zubik v. Burwell*, 136 S.Ct. 1557, 1559-60 (2016). The new rules fail the directives of *Zubik*, and therefore they should be enjoined.

ARGUMENT

I. THE STATES HAVE STANDING[1]

Only the Little Sisters challenge the States' standing. Dkt. No. 197 at 9. However, the Ninth Circuit concluded that the Rules "will first lead to women losing employer-sponsored contraceptive coverage, which will then result in economic harm to the states." *California*, 2018 WL 6566752 at *6; *see also e.g.*, Kost Decl. ¶¶ 54, 61, 69, 77, 85, 93; Whorley Decl. ¶¶ 8, 10, 11; Cantwell Decl. ¶¶ 17, 18; Tosh Decl. ¶¶ 26-28, 34; Nelson Decl. ¶ 15; Rattay Decl. ¶¶ 5, 7, 8.

[1] Defendants also reassert their argument that venue is improper. Dkt. No. 198 at 10. The Ninth Circuit squarely concluded that "venue is proper in the Northern District of California." *California v. Azar*, --F.3d -- , 2018 WL 6566752 at *4 (9th Cir. Dec. 13, 2018).

"Just because a causal chain links the harm to the states does not foreclose standing." *California*, 2018 WL 6566752 at *6. Further, the "states need not have already suffered economic harm" and there is "no requirement that the economic harm be of a certain magnitude." *Id*. The Rules themselves predict tens of thousands of women will lose contraceptive coverage, and suggest that women seek coverage through state-funded programs. *Id*.; *see also* 83 Fed. Reg. 57,536, 57,548 (Nov. 15, 2018); *id*. at 57,551 n.26; *id*. at 57,578; 83 Fed. Reg. 57,592, 57,605 (Nov. 15, 2018); *id*. at 57,608. Thus, as the Ninth Circuit has already concluded, the States have standing. *California*, 2018 WL 6566752 at *6-8.[2]

II. THE STATES ARE LIKELY TO SUCCEED ON THE MERITS

A. The Rules Are Not in Accordance with the Women's Health Amendment

The Women's Health Amendment requires that health plans provide preventive services to women without cost sharing. 42 U.S.C. § 300gg-13(a)(4). While Congress did not provide a fixed list of covered preventive services, it "mandated" that preventive services according to recommendations of medical experts at HRSA "shall" be provided. *See Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 578 (E.D. Pa. 2017) (use of the word "shall" indicates that "no exemptions created by HHS are permissible (unless they are required by RFRA)").[3]

HRSA is the "primary federal agency for improving health care to people" and its mission is to "improve health and achieve health equity through access to quality services."[4] Congress delegated to HRSA the responsibility to develop "comprehensive guidelines" "for purposes of this paragraph." 42 U.S.C. § 300gg-13(a)(4).[5] Thus, HRSA's limited role is to craft Guidelines

[2] Furthermore, the States have "standing to seek judicial review of governmental action that affects the performance of [their] duties." *Central Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002); Kish Decl. ¶¶ 12-14; Jones Decl. ¶¶ 10, 23-24.

[3] *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) ("Shall" is a mandatory term that "normally creates an obligation impervious to judicial [or agency] discretion").

[4] About HRSA, https://www.hrsa.gov/about/index.html (last visited Jan. 5, 2019). Notably, HRSA's expertise is in *providing* access to medical care; it has no expertise in crafting religious or moral exceptions to such care.

[5] The Women's Health Amendment does not attempt to enumerate the *specific* services or treatments within the broad category of "preventive services." It would be untenable both legally and practically to expect Congress—a body of non-medically trained individuals—to expressly

carrying out the purpose of the Women's Health Amendment and determining the scope of preventive care services. HRSA does not have the authority to decide which employers are exempt from providing such preventive care. Having included all FDA-approved contraceptives within women's "preventive care"—first, based on the Institute of Medicine's recommendations in 2011 and then, based on American College of Obstetricians and Gynecologists' recommendations in 2016—HRSA cannot now declare that some employers need not provide that statutorily-required care. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (agency may not issue regulation unless it has "textual commitment of authority" to do so); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power upon it").

Defendants argue that pursuant to the Women's Health Amendment, they have the authority to "narrow the scope of the Mandate." Dkt. No. 198 at 18, 20; 83 Fed. Reg. at 57,540 (claiming that Defendants have broad authority "to administer these statutes.") This is not an accurate reading of the statute; when Congress wants to grant broad rulemaking authority to an agency, it does so.[6] It did not here. *See City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) ("Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge agency discretion").[7] Defendants' interpretation also runs afoul of

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do so, particularly in an evolving discipline such as medicine, where new treatments and therapies are developed and added (and sometimes deleted from or rendered obsolete) to the physician's toolkit every year. HRSA itself notes that since the Guidelines were originally established in 2011 "there have been advancements in science and gaps identified in the existing guidelines." *See* https://www.hrsa.gov/womens-guidelines-2016/index.html (last visited Jan. 7, 2019).

[6] *See, e.g.*, 47 U.S.C. § 201(b) (delegating federal agency authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act"); 15 U.S.C. § 1604(a) (delegating agency authority to "prescribe regulations to carry out" the statute); 15 U.S.C. § 77s(a) ("The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter ...."); *see also* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L.Rev. 467, 471 n.8 (2002) ("According to one report, by January 1, 1935, more than 190 federal statutes included rulemaking grants that gave agencies power to 'make any and all regulations 'to carry out the purposes of the Act.' Report of the Special Committee on Administrative Law, 61 Ann. Rep. A.B.A. 720, 778 (1936).").

[7] Defendants' unreasonably place undue reliance on the phrase "as provided for" and specifically on the word "as" to confer authority to HRSA to create Rules permitting categories of employers to exempt themselves from the Women's Health Amendment. Dkt. No. 198 at 18. As

separation-of-powers principles and, practically speaking, would render Defendants' authority limitless. *Am. Trucking*, 531 U.S. at 485 (agency "may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion").[8] Under their interpretation, HRSA—and by extension HHS—could exempt all employers from the Women's Health Amendment altogether because HRSA and HHS have the authority to "narrow the scope" of who must abide by the statutory requirements. That assertion is not supported by the plain text of the statute or the legislative history; indeed, such a notion would defeat the statute itself.

Defendants point out that grandfathered plans are excluded from the contraceptive-coverage requirement, as if this somehow weakens the statutory requirement. Dkt. No. 198 at 4, 23; *see also* Dkt. No. 197 at 3, 5, 12, 14; Dkt. No. 199 at 9 n.6. Congress expressly considered which employers to exempt under grandfathered plans, and it did not choose to exempt employers with religious or moral objections. This Court should decline to add statutory exemptions beyond what Congress expressly provided. *See Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius*"); *United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute," "[t]he proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited that statute to the ones set forth.").[9]

Notably, both before and after the implementation of the ACA, Congress considered legislation to add broad exemptions to the contraceptive-coverage requirement and in every

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one court explained, "'as' is used in anticipation of HRSA issuing guidelines and not to the conclusion that the ACA implicitly provides the Agencies with the authority to create non-statutory exemptions." *Pennsylvania*, 281 F. Supp. 3d at 579.

[8] *See also Schein v. Archer & White Sales*, -- S. Ct. --, 2019 WL 122164, at *5 (Jan. 8, 2019) (the parties and the Court "may not engraft [their] own exceptions onto the statutory text.").

[9] Furthermore, grandfathering these plans was a "transitional measure," meant to ease regulated entities into compliance with the ACA, and "will be eliminated as employers make changes to their health care plans." *Priests For Life v. HHS*, 772 F.3d 229, 266 (D.C. Cir. 2014), *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Hobby Lobby*, 134 S. Ct. at 2801 ("[T]he grandfathering provision is 'temporary, intended to be a means for gradually transitioning employers into mandatory coverage.'") (Ginsburg, J., dissenting); *see also* Kaiser Family Foundation, Employer Health Benefits 2017 Annual Survey 207 (Sept. 19, 2017), https://www.kff.org/health-costs/report/2017-employer-health-benefits-survey/ (last visited May 21, 2018) (showing decline in percentage of workers enrolled in a grandfathered plan).

instance, the legislation failed. *See, e.g.*, 158 Cong. Rec. S539 (Feb. 9, 2012) (S. Amdt. 1520, Section (b)(1)), 112th Congress (2011-2012) (arguing that a "conscience amendment" was necessary because the ACA does not allow employers or plan sponsors "with religious or moral objections to specific items or services to decline providing or obtaining coverage of such items or services").[10] Congress did provide a specific statutory exemption for those who have a religious objection to participating in aid-in-dying procedures (42 U.S.C. § 18113), but did not adopt such an exemption to contraceptive coverage. Thus, this Court need not speculate about whether Congress intended to allow broad religious or moral objections; it did not. This Court should reject Defendants' attempt to accomplish by regulation what Congress itself expressly declined to do.

B. The Rules Create Barriers for Women to Obtain Healthcare Coverage and Impede Timely Access to Healthcare, Thereby Violating the ACA

Congress was clear in its directive to HHS: The Secretary "shall not promulgate *any* regulation that—(1) creates *any* unreasonable barrier to the ability of an individual to obtain appropriate medical care [or] (2) impedes *timely access* to health care services." 42 U.S.C. § 18114 (emphasis added). These Exemption Rules, at a minimum, will result in women *losing* full and equal healthcare coverage, which necessarily will create additional barriers for women seeking healthcare. Without complete coverage, women will need to pay out-of-pocket for their basic healthcare services, unless they secure funding from other sources. Kost Decl. ¶ 26 (without coverage, contraceptives cost $50 per month or upwards of $600 per year); *id.* at ¶ 25 (cost of IUD exceeds $1000, which equates to a month's salary for a woman working full time at the federal minimum wage of $7.25 an hour); Grossman Decl. ¶¶ 6, 9; Childs-Roshak Decl. ¶ 25. Women who lose contraceptive coverage will also need to locate and secure a separate qualified medical provider, which may require transferring medical records or re-providing a complete medical history to a new provider to ensure proper care. Ikemoto Decl. ¶ 5; Kost Decl. ¶¶ 16, 41 (explaining the importance of seamless holistic coverage to ensure that women's "chosen provider" can "manage all health conditions and needs at the same time"). Women may also need

[10] *See also Hobby Lobby*, 134 S. Ct. at 2775 n.30; *id.* at 2789-2790 (Ginsburg, J., dissenting); 159 Cong. Rec. S2268 (Mar. 22, 2013).

to switch to a less expensive, but less effective, contraceptive method given the requirement to pay out-of-pocket. Kost Decl. ¶ 27; Grossman Decl. ¶¶ 8-9. These numerous steps demonstrate that the Rules undeniably create barriers obstructing women's access to care; this disruption in continuity of care results in delayed or no access to contraception. Moreover, it is directly contrary to Congress's intention to remedy the problem that women across the country were paying significantly more out-of-pocket for preventive care and thus often failed to seek critical preventive services. *Priests for Life*, 772 F.3d at 235; *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2785-2786 (2014) (Kennedy, J., concurring).

Defendants largely fail to respond to this clear statutory violation, except to blithely contend that the Rules do not "impose affirmative barriers on access to contraception." Dkt. No. 198 at. 20. Congress was clear in its command that HHS not take action impeding access to healthcare. Undeniably, these regulations will result in women losing healthcare coverage—which even Defendants admit (83 Fed. Reg. 57,581)—and as a result, women losing coverage will need to seek out that care from somewhere else—a fact that Defendants also admit and that the Ninth Circuit recognized (*id* at 57,548, 57,551; *id* at 57,605, 57,608; *California*, 2018 WL 6566752 at *7). Defendants cannot ignore the statutory command of Congress.

C. The Exemption Rules Violate the ACA's Nondiscrimination Provision

The Rules must be held unlawful and set aside because they permit employers to exclude women from full and equal participation in their employer-sponsored health plan, deny women full and equal healthcare benefits, and license employers to discriminate on the basis of sex. 42 U.S.C. § 18116. The U.S. Equal Employment Opportunity Commission has already concluded that offering coverage for preventive prescription drugs and services but not contraception constitutes discrimination on the basis of sex. *See* Commission Decision on Coverage of Contraception, EEOC, 2000 WL 33407187 (Dec. 14, 2000).

Defendants assert that the Rules do not violate the ACA's nondiscrimination requirement because any discrimination "flow[s] from the statute," not from the Rules. Dkt. No. 198 at 19; *see also* Dkt. No. 199 at 11. This logic turns the statutory nondiscrimination requirement on its head. Congress expressly provided that an individual shall not be "excluded from participation

in, denied the benefits of, or be subjected to discrimination under, any health program or activity" on the basis of sex. 42 U.S.C. § 18116. Defendants' Rules inflict the very exclusion, denial, and discrimination that § 18116 prohibits. The Rules single out a healthcare service utilized *exclusively* by women and permit employers to unilaterally exempt themselves from providing that service. There is no requirement that the States produce a "smoking gun" piece of evidence demonstrating invidious intent, as Defendants suggest. Dkt. No. 198 at 19. It is sufficient that the Rules on their face broadly permit employers to exempt themselves from abiding by a statutory requirement, thereby denying women full and equal participation in the health plan, in direct violation of the nondiscrimination statute.

D. The Broad Religious Exemption Rule is Not Mandated by RFRA

Relying in large part on *Hobby Lobby*, Defendants argue that the Religious Exemption Rule is necessary to ensure compliance with the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb-2000bb-4.[11] In *Hobby Lobby*, the Court held that the contraceptive-coverage requirement could not be applied to closely held for-profit companies that objected on religious grounds to providing contraceptive coverage. But, the Court emphasized that the effect of its decision "on the women employed by [Hobby Lobby] would be precisely zero" because the government could expand an already existing accommodation that relieved objecting religious nonprofit employers from the contraceptive-coverage requirement while still ensuring that the affected women received legally required coverage. 134 S. Ct. at 2760, 2763. The Court did not equate closely held organizations with churches and did not require that those entities be entirely exempt from the contraceptive-coverage requirement. Thus, Defendants' Rules go far beyond what the Supreme Court contemplated or required. *See also Zubik*, 136 S. Ct. at 1559-60.[12]

[11] Defendants are not entitled to deference in their RFRA analysis. *See Gonzales v. Oregon*, 546 U.S. 243, 258-259 (2006).

[12] Little Sisters' argument that rules cannot distinguish between churches and other religious objecting entities, like Hobby Lobby, is erroneous. Dkt. No. 197 at 10-11. While *Larson* forbids denominational preference; it does not require—or even hint—that non-churches must be treated precisely the same as houses of worship. *Larson v. Valente*, 456 U.S. 228, 246 (1982). Indeed, such a requirement would have lasting consequences far beyond this case.

In essence, Defendants assert that the accommodation on which *Hobby Lobby* relied is itself a violation of RFRA. In so doing, they insist that employers have a right not only to be relieved of the obligation to provide contraceptive coverage themselves, but also to prevent the government from arranging for third parties to fill the resulting gap. If accepted, that claim would deny tens of thousands of women the health coverage to which they are entitled under federal law, and subject them to the very harms that the statute is designed to eliminate.[13] The States do not question the sincerity of religious employers' beliefs. But as eight courts of appeals have held, Defendants' RFRA argument stretches too far. *See* Order Granting States' Preliminary Injunction, Dkt. No. 105 at 27 n.17 (summarizing cases); *see also Pennsylvania*, 281 F. Supp. 3d at 579-581 (Rules not required under RFRA where prior accommodation process did not impose substantial burden). To the extent RFRA applies, Defendants must harmonize RFRA with the Women's Health Amendment so as not to run afoul of congressional intent. They cannot simply prioritize one federal statute over the other. *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) (when two federal laws purportedly conflict, courts must strive to harmonize the two laws). In our diverse and pluralistic nation, the right to the free exercise of religion does not encompass a right to insist that the government take measures that "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Hobby Lobby*, 134 S. Ct. at 2787 (Kennedy, J., concurring).

As this Court previously held, it is "likely that the prior framing of the religious exemption and accommodation permissibly ensured [ ] protection" for employers' religious beliefs. Dkt. No. 105 at 27. This Court explained that it "view[ed] as likely correct the reasoning of the eight Circuit Courts of Appeal . . . which found that the procedure in place prior to the 2017 IFRs did

[13] Such a claim has far-reaching implications. Under RFRA, an entity must demonstrate a "substantial" burden; a burden does not rise to the level of being "substantial" when it places a de minimus burden on an adherent's religious exercise. This is particularly important given our modern administrative state. Here, the accommodation permits an employer to avoid providing, paying for, referring, contracting, or facilitating access to contraception. 78 Fed. Reg. 39,870, 39,878 (July 2, 2013). To obtain the accommodation, a religious entity need only provide a letter or two-page form notifying the government or its insurer of its religious objections to providing contraceptive coverage for women. All subsequent action is taken by third parties.

not impose a substantial burden on religious exercise." *Id.*[14] The broad religious exemption contained in the Rules is not required under RFRA.

E. The Rules Violate the APA Procedural Requirements

The Rules violate the APA for failing to provide adequate notice-and-comment. Before promulgating a regulation, the APA requires agencies to first publish in the Federal Register a notice of proposed rulemaking and then give the public an opportunity to participate in the rulemaking by submitting written comments. 5 U.S.C. § 553. Defendants skirted this deliberative rule-making process by initially promulgating these rules as Interim Final Rules, making them immediately effective. Then, Defendants sought comment on those already-effective rules, and received over 100,000 comments. Notwithstanding the volume of comments, Defendants issued Final Rules that were nearly identical to the Interim Final Rules that they initially promulgated.

Defendants ask this Court to interpret the APA as allowing them to "negate at will the Congressional decision that notice and an opportunity for comment must precede promulgation." *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979). If this Court adopts Defendants' interpretation, it would permit an agency to skirt the requirement for advance notice and comment by simply issuing an interim final rule, making the new rules effective immediately, and then accepting post-promulgation comment. Agencies would no longer have any incentive to issue a notice of proposed rulemaking, or to seriously consider submitted comments since the rules will already be in effect. Following this formula, agencies will suffer consequences only if a member of the public rushes to court and obtains an injunction. This Court should not incentivize

[14] It is not the States' position, as Defendants' claim, that the prior framework was improper or unlawful. Throughout this litigation, the States have asserted that the prior regulatory framework appropriately adheres to the Women's Health Amendment while also complying with RFRA. Under the carefully crafted prior system, Defendants provided a narrow automatic exemption from the contraceptive-coverage requirement for "'churches, their integrated auxiliaries, and conventions or associations of churches,' as well as 'the exclusively religious activities of any religious order,'" a category of employers defined in the Internal Revenue Code. *Hobby Lobby*, 134 S. Ct. at 2763 (quoting 26 U.S.C. § 6033(a)(3)(A)(i) and (iii)); *see* 45 C.F.R. 147.131(a). That exemption was adopted "against the backdrop of the longstanding governmental recognition of a particular sphere of autonomy for houses of worship." 80 Fed. Reg. 41,325 (July 14, 2015); *see* 76 Fed. Reg. 46,623 (Aug. 3, 2011). The States have no objection to this narrowly crafted exemption and do not seek to "sweep [it] away" as the Defendants assert. Dkt. No. 198 at 2.

agencies to thwart the will of Congress and deprive the public of its right to properly noticed rulemaking. The solution for Defendants was easy: This Court concluded that Defendants did not have good cause to bypass notice and comment; Defendants could have immediately—on December 21, 2017—withdrawn the IFRs and issued Notices of Proposed Rulemaking and thereafter proceed with the Notice of the Final Rules. Defendants provide no explanation why such a solution is not feasible or is contrary to law. Nor do they cite any authority that permits them to simply promulgate a final rule, despite judicial conclusions that the nearly identical IFRs were improperly issued.

Moreover, contrary to Defendants' assertions that they made "numerous changes in response to the comments" (Dkt. No. 198 at 11), by their own admissions, the Rules are effectively the same. *See* Federal Defs.' Supplemental Br., Ninth Circuit No. 18-15144, Dkt. No. 125 at 6 ("the substance of the rules remains largely unchanged"); Little Sisters' Supplemental Br., Ninth Circuit No. 18-15144, Dkt. No. 128 at 2 (noting the final rule is "substantively identical" to the IFR). Indeed, Defendants made only minor technical changes. 83 Fed. Reg. at 57,537; 83 Fed. Reg. at 57,593. As outlined below, their Final Rules, like the interim rules, failed to account for the numerous healthcare consequences that will befall women and then failed to respond to comments pointing out such consequences. *See infra* at 11.

Intervenors contend that the States' challenge would invalidate all of the previous IFRs implementing the ACA. Dkt. No. 197 at 19. Not so. Because not all of the previous IFRs are before this Court, it need not consider the circumstances of their rulemaking. *See* Dkt. No. 170.

F. The Rules Are Arbitrary and Capricious

After Congress enacted the ACA, Defendants diligently pursued providing cost-free contraceptive coverage for American women. This pursuit was grounded in the scientific conclusions of the IOM report, which found that providing no-cost access to the full range of FDA-approved contraceptive methods, as well as education and counselling about contraception, are essential to prevent unintended pregnancies and the consequent negative impacts on both

mothers and children—a conclusion that was reaffirmed in 2016 by HHS, and remains the standard today under HHS's own Guidelines.[15]

The Rules summarily reject the agencies' prior evidence-based policy and now make contraceptive coverage optional. *See* 83 Fed. Reg. at 57,593-94 (leaving the "moral" objection broad and virtually limitless, thereby permitting most employers to exempt themselves). Where an agency departs from a prior policy, it must at a minimum "display awareness that it *is* changing position." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Jicarilla Apache Nation v. U.S. Dept. of Interior*, 613 F.3d 1112, 1119 (D.C. Cir. 2010) (holding that an agency that neglects to explain its departure from established precedent acts arbitrarily and capriciously). Defendants and Intervenors accuse the States of simply not liking Defendants' conclusion, but in fact Defendants fail to recognize the serious reliance interests at stake. Those interests require Defendants to provide a more "detailed justification" of its change of policy. *F.C.C.*, 556 U.S. at 515. A detailed justification is also required here because the new policy "rests upon factual findings that contradict those which underlay its prior policy." *Id.*

Defendants and Intervenors contend that the Rules' discussion of the abrupt change of course is adequate. Dkt. No. 198 at 14-15; Dkt. No. 199 at 8. But the Rules provide no new facts and no meaningful discussion that would discredit their prior factual findings establishing the beneficial and essential nature of contraceptive healthcare for women, or for their creation of an entirely new Rule—a broad moral exemption rule. As Defendants acknowledge, the Rules contain a mere four pages addressing the reversal of direction. Dkt. No. 198 at 14; 83 Fed. Reg. at 57,552–56. That discussion restates some public comments questioning the importance of contraception and then declines to "take a position on the variety of empirical issues." 83 Fed. Reg. at 57,555; *see also id.* at 57,556. Notwithstanding this shallow foundation, the Rules summarily conclude that "significantly more uncertainty and ambiguity exists on these issues than the Departments previously acknowledged when [they] declined to extend the exemption to certain objecting organizations and individuals." *Id.* at 57,555.

[15] *See* https://www.hrsa.gov/womens-guidelines/index.html; https://www.hrsa.gov/womens-guidelines-2016/index.html (last visited Jan. 6, 2019).

F.C.C. requires Defendants not only to explain their current position, but to explain *why* they have changed from their prior position, including why they added an entirely new "moral" exemption rule. Breezily declaring that there is "uncertainty and ambiguity" is insufficient. Given the overwhelming evidence of the importance of contraceptive coverage, Defendants cannot make that coverage essentially optional without a careful, detailed consideration of relevant facts and evidence. Indeed, had Defendants done a careful, detailed consideration of the relevant facts and evidence, they would not have issued such broad exemptions, particularly given Defendants' own prior findings about the need for coverage. 77 Fed. Reg. 8,725, 8,728 (2012); Supplemental Br. for Resp'ts at 1, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam) (No. 14-1418), 2016 WL 1445915, at *1. Defendants object that the States improperly rely on declarations rather than the administrative record. Dkt. No. 198 at 16. But the importance, reliability, and efficacy of contraceptives has been clearly established by Defendants themselves over the many years they required the provision of contraceptive coverage.[16]

Defendants also minimize the effect of the Rules, by stating that the contraceptive mandate remains in effect. Dkt. No. 198 at 14. This ignores that any employer could claim a "moral objection" by simply ceasing to provide coverage—thereby transmuting contraceptive coverage from a requirement into an option. Order Granting Preliminary Injunction, Dkt. No. 105 at 25-26. The Rules demonstrate an awareness of their change in policy yet fail to recognize the consequences of that reversal of course or to provide a sufficiently reasoned explanation for "why [they] deemed it necessary to overrule [their] previous position." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). As a result, the Rules are arbitrary, capricious, and "cannot carry the force of law." *Id*. at 2127.

III. ISSUING AN INJUNCTION TO PRESERVE THE STATUS QUO WOULD PROPERLY BALANCE THE EQUITIES AND SERVE THE PUBLIC INTEREST

While prior ACA regulations accommodated sincere religious beliefs and ensured full and equal health coverage for women—and the Supreme Court suggested such an approach (*Zubik*,

[16] *See, e.g.*, 76 Fed. Reg. at 46,623 (recognizing the need to extend "any coverage of contraceptive services under the HRSA Guidelines to as many women as possible"); 78 Fed. Reg. at 39,872–73 (discussing many benefits of contraception for women).

136 S. Ct. at 1560)—the Rules do not attempt to do both, but plainly prioritize one over the other. As the Ninth Circuit agreed, the States have demonstrated irreparable harm, warranting injunctive relief. *California*, 2018 WL 6566752, at *15. An injunction will prevent the immediate harm, including the "potentially dire public health and fiscal consequences" from curtailing the important public interest of access to contraceptive care. *Id.* This Court, too, has recognized the important public interest of "ensuring coverage for contraception and sterilization services" reflected in the ACA. Dkt. No. 105 at 15-16; *California*, 2018 WL 6566752, at *14.

In the face of judicial recognition of the important public interest at stake and widespread harm that would result from these massively expansive new exemptions, the Defendants and Intervenors fail to demonstrate that the public interest will be harmed by enjoining their effort to upend the carefully and deliberately crafted accommodation and exemption system currently in place. In fact, the Ninth Circuit seemed to question Defendants' allegations of purported harm given that Defendants had agreed to stay the district court proceedings rather than proceed on the merits, to enable a speedier resolution on the question of the Rules' legality. *California*, 2018 WL 6566752, at *11 n.5. Certainly these specific Intervenors will suffer no harms because they already have obtained permanent injunctions barring enforcement against them. *Little Sisters v. Azar*, 13-cv-02611 (D. Colo. May 29, 2018) (granting stipulated permanent injunction); Dkt. No. 199 at 4. And, the Defendants have stipulated to several other injunctions, including one that permits future objectors to join. Dkt. No. 197 at 7. Given that the Defendants' purported reason for their Rules was based on resolving ongoing litigation, it is disingenuous for them to claim additional employers will be harmed by an injunction maintaining the status quo when they are actively stipulating to permanent injunctions with those litigating entities. Simply put, the Defendants have offered nothing to cast doubt on the urgent need for a preliminary injunction.

IV. A NATIONWIDE INJUNCTION IS NECESSARY TO REDRESS THE INJURY SHOWN

The Ninth Circuit did not categorically prohibit nationwide injunctions and certainly did not prohibit them in this case. *California*, 2018 WL 6566752 at *15-17. Rather, the Court instructed that evidence was necessary to demonstrate the appropriateness of nationwide relief. *Id.* at *17. On the prior record, the Ninth Circuit recognized that "the record before the district court was

voluminous on the harm to the plaintiffs," but not "developed as to the economic impact on other states." *Id*. at *16. And thus, the injunction should have been "narrowed to redress only the injury shown as to the plaintiff states." *Id*. But a nationwide injunction is *not* foreclosed where there is a "showing of nationwide impact or sufficient similarity to the plaintiff states." *Id*. at *17; *see also NW Enviro. Defense Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 680-81 (9th Cir. 2007) (In the context of the APA, courts retain "broad equitable powers" "to grant any ancillary relief necessary to accomplish complete justice"). The States have heeded the Court's instruction and provided ample evidence—which is not controverted or even meaningfully discussed by any of the oppositions.

The record is now well "developed as to the economic impact on other states." *California*, 2018 WL 6566752 at *16. The record includes evidence that the Rules will have significant public health and fiscal consequences in all states. Kost Decl. ¶¶ 55-166 (Plaintiffs), 54 & Ex. B (all 50 states); Dkt. Nos. 170-1 & 170-2. Nationwide, if unable to access contraceptive coverage through their employer or university, some women would rely on publicly funded services. *Id*. Women who do not meet eligibility requirements of public programs would be at increased risk of unintended pregnancy. *Id*. Nationwide, both the immediate and long-term costs of the resulting unintended pregnancies would fall to the States. *Id*. The record before the Court provides more than ample evidence of economic impact on other States and demonstrates "sufficient similarity" to the "voluminous" evidence of harm to the Plaintiff States. *California*, 2018 WL 6566752 at *16, 17. Specifically, the record shows "sufficient similarity" in all States in terms of state spending on family planning, unmet need for publicly supported contraception across many States, and millions of dollars of public spending on unintended pregnancies. *Id*. The Women's Health Amendment was not designed to be implemented in some states and not others; this "Swiss cheese" approach runs directly counter to Congressional intent.

Under the Ninth Circuit's instructions, an injunction "must be no broader and *no narrower* than necessary to redress the injury shown by the plaintiff states." *California*, 2018 WL 6566752 at *16 (emphasis added). The Court is thus authorized to issue an injunction enjoining the Exemption Rules to "prevent the economic harm extensively detailed in the record," including a

nationwide injunction, because the record supports that scope of relief. *Id.* Just as the States have heeded the Ninth Circuit's instructions, the Court, too, should heed the instruction to issue an injunction no narrower than required to redress the injury shown by uncontroverted evidence.

The record also shows that absent a nationwide injunction, the States will not receive complete relief. Defendants fail to challenge the States' evidence showing that drawing a line around only the Plaintiff States would not fully alleviate the harm to the Plaintiff States. Absent a nationwide injunction, women (or covered dependents) in the Plaintiff States who are employed by an out-of-state employer might not continue receiving coverage. [17] Absent a nationwide injunction, students in Plaintiff States who receive healthcare on their out-of-state parents' plan would be affected by the Rules and may lose coverage. Pomales Decl. ¶¶ 9-11; Childs-Roshak Decl. ¶ 16; *e.g.*, Mot. at 25 n.24 (California is home to 25,000 out-of-state students); *see Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987) (district court did not abuse its discretion in granting nationwide relief where plaintiff laborers may travel to forestry jobs in other parts of the country). And Defendants have already conceded in the Rules themselves that 126,400 women *nationwide* will be negatively affected. 83 Fed. Reg. at 57,581. But, they fail to address the evidence of economic harm to the Plaintiff States resulting from increased costs if reproductive healthcare providers must serve more out-of-state residents because of the Rules. Tosh Decl. ¶ 33; Custer Decl. ¶ 8. This is a real prospect given the Rules' endorsement of these providers as an alternative to employer coverage of contraception. A nationwide injunction is required to redress demonstrated nationwide harm and to provide complete relief to the Plaintiff States.

CONCLUSION

The States respectfully request that the Court grant their motion for a preliminary injunction and enjoin implementation of the Exemption Rules.

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[17] Significant numbers of Maryland, Virginia, Delaware, and District of Columbia residents, in particular, travel each day to jobs in neighboring states—500,000 Maryland residents, or 18% of the workforce; 353,000 Virginia residents, or 10% of the workforce; and 65,000 Delaware residents, or 16% of the workforce. U.S. Census Bureau, Out-of-State and Long Commutes: 2011, American Community Survey Reports, at 10 & tbl. 6 (Feb. 2013), https://www.census.gov/prod/2013pubs/acs-20.pdf. The District of Columbia has the highest percentage of workers—25.2% of the workforce—who commute to another state to work. *Id.*

Dated: January 8, 2019

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CERTIFICATE OF SERVICE

Case Name: **State of California v. Health and Human Services, et al.** No. **4:17-cv-05783-HSG**

I hereby certify that on January 8, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

STATES' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 8, 2019, at Sacramento, California.

Michele Warburton	*/s/ Michele Warburton*
Declarant	Signature

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

THE STATE OF OREGON,

Plaintiff-Intervenor,

THE STATE OF COLORADO; THE STATE OF MICHIGAN; THE STATE OF NEVADA,

Proposed-Plaintiffs-Intervenors,

v.

ALEX M. AZAR, II, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; R. ALEXANDER ACOSTA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF LABOR; U.S.

4:17-cv-05783-HSG

DECLARATION OF NICOLE DeFEVER IN SUPPORT OF STATE OF OREGON'S MOTION FOR PRELIMINARY INJUNCTION

DEPARTMENT OF LABOR; STEVEN MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE TREASURY; DOES 1-100,

Defendants,

and,

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

Defendant-Intervenors.

I, J. Nicole DeFever, declare:

1. I am a Senior Assistant Attorney General representing the State of Oregon in the above-captioned case. I submit this declaration in support of Oregon's Motion for Preliminary Injunction.

2. Attached hereto as Exhibit A is a true and accurate copy of the submission from Patrick DeKlotz, counsel for Oregon Right to Life ("ORTL"), that was sent on or about April 30, 2019, to Cameron Smith, Director of the Oregon Department of Consumer and Business Services.

3. Attached hereto as Exhibit B is a true and accurate copy of the Supplemental Brief for the Federal Appellants, filed on May 20, 2019. [Ninth Circuit Docket #146].

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED this 21st of May, 2019.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

s/J. Nicole DeFever
J. NICOLE DEFEVER SBN #191525
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Of Attorneys for State of Oregon

PATRICK DE KLOTZ, ESQ.

April 30, 2019

Via Certified U.S. Mail and Email

Mr. Cameron Smith, Director
Oregon Department of Consumer and Business Services
350 Winter Street NE
P.O. Box 14480
Salem, OR 97309-0405
dcbs.director@oregon.gov

Re: Application for Exemption from HB 3391's Mandate at § 2 Under § 2(10)

Dear Director Smith:

On behalf of Oregon Right to Life, Inc. ("ORTL"), I submit herewith Oregon Right to Life, Inc.'s Request for Exemption from Oregon Enrolled House Bill 3391 ("Request") and the Declaration of Lois Anderson in Support of ORTL's Exemption Request ("Declaration").

The Request seeks from this Department ("DCBS") "an exemption" from the abortion-coverage requirement imposed by § 2 ("Mandate") of Enrolled House Bill 3391 ("HB 3391" or "Bill"), under the exemption authority at § 2(10). (The Mandate is codified at ORS 743A.067.)

ORTL seeks the exemption for itself and similarly situated entities who also object to providing insurance coverage for abortion and "contraceptives" that act after fertilization ("abortifacients"), as well as for services related to both. Though ORTL does not believe that it qualifies as a "religious employer" under the narrow definition of that phrase, ORTL seek an exemption *like* that authorized for "religious employers" at § 2(9) of the Bill, i.e., one that authorizes (i) *insurers to offer* and (ii) *employers to obtain* health benefit plans excluding contraceptive and abortion coverage to which employers object.

Patrick De Klotz
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In the language of §2(10) of the Bill, the reason to "grant an exemption" is that "enforcement of this section may adversely affect the allocation of federal funds to this state" under the federal Weldon Amendment. The Weldon violation is detailed in the accompanying Request, and relevant facts are provided in the accompanying Declaration.

I request that DCBS provide notice of the granted exemption from the Mandate by May 31, 2019, because (i) the Weldon violation is clear, (ii) the Weldon violation is ongoing and cumulative, (iii) the Mandate's violation of the conscience rights is substantial and ongoing, irreparably harming ORTL and similarly situated objectors.

Sincerely,

Patrick De Klotz

Information Copy by Certified U.S. Mail and Email to:
Centralized Case Management Operations
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Room 509F HHH Bldg.
Washington, D.C. 20201
OCRMail@hhs.gov

State of Oregon
Department of Consumer and Business Services
Insurance Division

BEFORE THE DIRECTOR OF THE DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

In the Matter of the Request by Oregon Right to Life, Inc. for Exemption from Oregon Enrolled House Bill 3391	**Case No. INS: _____**

Oregon Right to Life, Inc.'s Request for Exemption from Oregon Enrolled House Bill 3391

Introduction

Oregon Right to Life, Inc. ("ORTL"), a pro-life advocacy group, requests from the Oregon Department of Consumer and Business Services ("DCBS") an exemption from the abortion-related coverage mandated by § 2 (the "Mandate") of Enrolled House Bill 3391 ("HB 3391" or "Bill"),[1] called the Reproductive Health Equity Act ("RHEA").[2] The Mandate expressly targeted health benefit plans—along with insurers and employers providing such plans[3]—that didn't provide now-mandated coverage.

The exemption ORTL seeks is expressly authorized by § 2(10) of the Bill (emphasis added):

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[1] *Available at* https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/HB3391. Bill history is at https://gov.oregonlive.com/bill/2017/HB3391/. The Bill is codified at Oregon Revised Statutes ("ORS") 743A.067, but citations to the Bill are retained herein.

[2] *See* https://www.oregon.gov/oha/PH/HEALTHYPEOPLEFAMILIES/REPRODUCTIVESEXUALHEALTH/Pages/reproductive-health-equity-act.aspx.

[3] HB 3391 regulates "health benefit plan[s]" *and* insurers and plan sponsors (employers), conceding this by exempting "religious employers" and "insurers" who offer plans to them. § 2(9). *See also infra* at Part III.B.1. (federal Office for Civil Rights ("OCR") interprets the Weldon Amendment ("Weldon") to include insurers and plan sponsors (employers) in this context).

> If [DCBS] concludes that enforcement of this section may adversely affect the allocation of federal funds to this state, the department *may grant an exemption* to the requirements but only to the minimum extent necessary to ensure the continued receipt of federal funds.[4]

ORTL seeks such "an exemption" from the mandated abortion coverage—for itself and similarly situated entities—as applied to coverage for abortion, except where the life of the mother is in imminent danger,[5] for "contraceptives" that act after fertilization ("abortifacients"), and for services related to both. *See infra* at Part I.A. (listing four types of contraceptives for which an exemption is sought). Similarly situated entities include not only pro-life advocates like ORTL, for whom providing abortion and abortifacient coverage alters the message for which they exist, but also all who are unwilling[6] to provide such insurance coverage. Though ORTL does not believe that it qualifies as a "religious employer" under the narrow definition of that phrase, ORTL seeks an exemption *like* that authorized for "religious employers" at § 2(9) of the Bill, i.e., one that authorizes (i) *insurers to offer* and (ii) *employers to obtain* health benefit plans excluding contraceptive and abortion coverage to which employers object.

DCBS should grant the requested exemption because the Mandate as applied to those unwilling to "provide coverage of . . . abortions" jeopardizes Oregon's receipt of federal funds under the Weldon Amendment ("Weldon"), which provides as follows:

> (1) None of the funds made available in this Act may be made available to a Federal agency or program, or to a *State* or local government, if such agency, program, or government subjects any institutional or individual health care entity to *discrimination* on the basis that the health care entity does not provide, pay for, *provide coverage of*, or refer for *abortions*.

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[4] The "extent necessary to ensure . . . federal funds" is established in Part III.

[5] This life-of-the-mother exception will not be repeated every time ORTL refers to its desire not to provide coverage for abortion, but such reference includes this exception.

[6] *See* Part III (Weldon requires only being *unwilling* to provide abortion coverage (for whatever reason), so the granted exemption should parallel Weldon's mandate).

> (2) In this subsection, the term "*health care entity*" includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a *health insurance plan*, or *any other kind of health care* facility, organization, or *plan*.

See, e.g., Consolidated Appropriations Act, 2018, Pub. L. 115-41, Div. H, § 507(d), 132 Stat. 348 (Mar. 23, 2018) (emphasis added).[7] Given OCR's current Weldon interpretation and enforcement, *see* Part III, and Oregon's federal funds,[8] the Mandate violates Weldon as applied to ORTL and similarly situated entities that object to covering abortion, including abortifacients.

The following discussion and analysis establishes: (**I**) ORTL's message and prior insurance; (**II**) the Mandate; (**III**) Weldon's scope; and (**IV**) the Weldon violation.

I.

ORTL's Pro-Life Message and Prior Insurance

As set out next, (**A**) ORTL is a pro-life, ideological expressive-association, a type of organization that is uniquely protected by federal safeguards (**B**) for free expression and association, (**C**) for religious free-exercise, (**D**) for equal protection, and (**E**) against compelled abortion coverage. The constitutional and Weldon protections are briefly sketched below to show the strong constitutional underpinning of ORTL's request to be free from Oregon's abortion Mandate and

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[7] *Available at* https://budgetcounsel.files.wordpress.com/2018/04/consolidated-appropriations-act-2018-pub-l-115-141-132-stat-348-march-23-2018-h-r-1625-115th-congress-enrolled-bill.pdf. Weldon has been added to Department of Health and Human Services ("HHS") appropriation bills since 2005. *See* https://www.hhs.gov/conscience/conscience-protections/index.html. HHS links the Amendment, https://www.hhs.gov/sites/default/files/ocr/civilrights/understanding/ConscienceProtect/publaw111_117_123_stat_3034.pdf, and instructs on "How to File a Conscience or Religious Freedom Complaint" with portal, https://www.hhs.gov/conscience/complaints/filing-a-complaint/index.html.

[8] Current HHS grants to Oregon include the following "Estimated Total Program Funding": CDC-RFA-CE19-1904 = $840,000,000; HHS-2019-ACL-AOD-DDUC-0315 = $1,710,000; CDC-RFA-CE19-1905 = $29,235,060; RFA-CE-19-005 = $3,150,000. *See* https://www.grants.gov/searchgrants.html?agencyCode=HHS.

to show Congress's strong justification for Weldon. But Oregon may avoid both OCR's Weldon enforcement and the constitutional problems by granting the requested exemption.

A. ORTL Is a Pro-Life, Ideological Expressive-Association.[9]

ORTL is a 501(c)(4) organization, founded in 1970. ORTL's mission is to advocate for the most vulnerable human beings whose right to life is denied or abridged under current law. In doing so, ORTL works to reestablish protection for all innocent human life from conception to natural death. Consistent with cell biology, ORTL understands individual human life to begin at conception, by which it means fertilization (not implantation or any other later time than fertilization), and ORTL believes that unborn human beings should be protected by law and that abortion on demand is a grave moral wrong and religiously forbidden under the traditional Judeo-Christian beliefs that motivate the actions of ORTL, its board members, and employees. ORTL believes that abortion is only permissible where the mother's life is imminently at risk. ORTL requires board members and employees to subscribe to, and abide by, its pro-life principles. ORTL is also a membership organization, comprised of numerous individuals who agree with ORTL's pro-life principles.

As a pro-life, issue-advocacy, expressive-association, ORTL seeks to have all that it says and does be consistent with its beliefs and a compatible part of its pro-life message. These goals apply to the health insurance coverage it offers to its employees. ORTL believes that funding insurance coverage for abortion or abortifacients involves moral complicity with those activities and would be against conscience—so being compelled by government to do so violates ORTL's religious free-exercise rights. ORTL believes that funding insurance coverage for abortion and

[9] ORTL facts are verified in the accompanying Declaration of Lois Anderson.

abortifacients would communicate a message contrary to the message for which ORTL exists—so being compelled by government to do so violates ORTL's free-expression and expressive-association rights.

ORTL's moral and religious beliefs include a duty of care for its employees, which includes providing health insurance for them. ORTL also believes that it should provide health insurance for its employees for the ordinary reasons of obtaining and retaining excellent employees to help ORTL further its mission, so forcing ORTL to forego such health insurance would put it at a competitive disadvantage and hamper its mission. But because of the enactment of the Mandate, ORTL is now unable to obtain a plan consistent with its moral and religious beliefs, and its mission.

Prior to the enactment of the Mandate, ORTL provided insurance for its employees through Providence Health Plan ("PHP"), which coverage it has provided since 2015. ORTL's prior insurance coverage did not include coverage for abortion. However, ORTL has recently learned that its prior insurance includes coverage for "contraceptives" that can act as abortifacients–which ORTL opposes and objects to providing. These abortifacients that ORTL does not want to be compelled by the Mandate to include in a sponsored health benefit plan are the same four "contraceptives" that the religious entities objected to in *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014) ("*Hobby Lobby*"). "These include two forms of emergency contraception commonly called 'morning after' pills and two types of intrauterine devices." *Id.* at 701-03. The Brief for Respondents, *Hobby Lobby*, 573 U.S. 682,[10] provides specific detail, quoting a lower court: "'Four of the twenty approved methods—two types of intrauterine devices (IUDs) and the

[10] *Available at* http://www.becketfund.org/wp-content/uploads/2014/02/13-354-bs.pdf.

emergency contraceptives commonly known as Plan B and Ella—can function by preventing the implantation of a fertilized egg." *Id.* at 4-5 (citation omitted). "[T]he government concedes that the drugs and devices at issue can prevent uterine implantation of an embryo." *Id.* at 5 n.2. Specifically, the government conceded that "Plan B (levonorgestrel), Ella (ulipristal acetate) and copper IUDs like ParaGard may act by 'preventing implantation (of a fertilized egg in the uterus)' [and that] IUDs with progestin 'alter[] the endometrium.'" *Id.* (citations omitted). Concerning these four abortifacients, ORTL believes like *Hobby Lobby* objectors that "'it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs.'" 573 U.S. at 702 (citation omitted).[11]

Continuing to obtain coverage from PHP is not suitable for ORTL and its employees because of this coverage of abortifacients. But PHP is also not suitable because Oregon Health & Science University ("OHSU") is not in-network.[12] Finally, PHP has shown an increase of 27.19% in plan costs for the upcoming plan year, an increase significantly higher than other Oregon insurers, making it economically undesirable.

Faith-based medical cost sharing groups and direct primary care alternatives are also inadequate because (inter alia) ORTL wants to provide, and its employees want to receive, traditional and comprehensive health insurance coverage of the sort governed by the Mandate, absent its coverage of abortion and abortifacients.

ORTL has not sought a "religious employer" exemption under § 2(9) of the Bill because doing so would be futile given the overly narrow "religious employer" definition. However,

[11] And as in *Hobby Lobby*, the issue is "*their religious beliefs*," "and it is not for us to say that their religious beliefs are mistaken of insubstantial." *Id.* at 724-25 (emphasis in original).

[12] OHSU is a premier health care facility that ORTL wants its employees to be able to access in-plan and which ORTL's employees want to access in-plan.

ORTL has inquired from Oregon insurers about whether plans exist for religious employers that would be ideologically compatible with ORTL's beliefs and has discovered that such plans either exist right now or will be offered in 2020. Though ORTL does not believe that it qualifies as a "religious employer" under the narrow definition of that phrase, ORTL seek an exemption like that authorized for "religious employers" at § 2(9) of the Bill, i.e., one that authorizes (i) insurers to offer and (ii) employers to obtain health benefit plans excluding contraceptive and abortion coverage to which employers object.

B. As a Pro-Life, Ideological Expressive-Association, ORTL Is Protected from Alteration of Its Message.

As a pro-life, ideological, issue-advocacy, expressive-association, ORTL is a type of ideological entity that is specially protected from government-compelled alteration of its message, which ORTL expresses in all that it both says and does. *See, e.g., National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*") (banning California from forcing pro-life, pregnancy-care centers from having to post state-mandated notices referring women for abortion, the very issue they exist to resist); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) ("*BSA*") (BSA need not include gay scoutmaster because doing so would alter group's own message); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (Irish-pride parade need not include gay-pride group and banner because doing so would alter group's own message).

Compelling an expressive-association to change its message violates the First Amendment protection against compelled speech. *See id.* First Amendment protections "include[ ] both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citations omitted); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2463

(2018) (citations omitted) (public-sector unions may not compel agency fees from objectors because that compels speech); *Hurley*, 515 U.S. at 573 ("one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'"). And "the Constitution looks beyond written or spoken words as mediums of expression. *Hurley*, 515 U.S. at 568-569 (holding that parades are a form of expression); *see also West Virginia Board of Education v. Barnette*, 319 U.S. 624, 632-633 (1943) (holding that a "flag salute is a form of utterance" and that "the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind"); *BSA*, 530 U.S. 640 (including gay scoutmaster is expression altering groups own message). Likewise, compelled abortion and abortifacient coverage is a form of compelled speech that forces pro-life groups to alter their own pro-life message.

Such government-compelled speech is banned by the free-expression and free-association protections of the First Amendment. In *Janus*, the Court held that "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command [against compelled speech], and in most contexts, any such effort would be universally condemned." *Janus*, 138 S. Ct. at 2463. Measures compelling speech coerce individuals "into betraying their convictions." *Id.* at 2464. Accordingly, "a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." *Id.* (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943); *see also Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796-797 (1988) (rejecting "deferential test" for compelled-speech claims)). Here, compelling ORTL to provide insurance coverage for abortion and abortifacients forces ORTL into betraying its conviction of the need to protect all innocent human life from conception to natural death and it forces ORTL into subsidizing objected-to

beliefs and activities. This compelled speech is unconstitutional.

ORTL is also protected from having its message altered by the government. In *NIFLA*, the Supreme Court analyzed abortion-notice requirements targeted at crisis-pregnancy centers, "commonly affiliated with, or run by organizations whose stated goal" is opposing abortion. 138 S. Ct. at 2368. The Court held that an abortion-notice requirement was a content based-regulation. *Id.* at 2371. And that by requiring crisis pregnancy centers to provide abortion notices, "the very practice that [the centers] are devoted to opposing[,]" the State altered the content of their speech. *Id.* By requiring organizations like ORTL to provide insurance coverage including abortion and abortifacients—what ORTL exists to resist—Oregon unconstitutionally alters ORTL's message.

The cited cases may not be distinguished successfully on the notion that no expressive activity is involved because this is just about buying insurance. On such reductionist grounds *NIFLA* was just about posting posters, *Janus* was just about paying agency fees, *BSA* was just a personnel issue, *Hurley* was just about allowing parade participation, etc. Such an erroneous reductionist approach would ignore the fact that an issue-advocacy group advocates a particular message and necessarily seeks to consistently advocate its issue in all that it does—to faithfully advocate for its issue in every way possible, to maintain consistency and credibility, and to avoid hypocrisy. Forcing a pro-life group to include abortion and abortifacient coverage in its health insurance forces the group to associate with a message precisely opposite to its pro-life message, i.e., to associate with the message that abortion and abortifacients are morally acceptable, are appropriate health care, and should be covered as ordinary health care. That drastically alters a pro-life group's own pro-life message—its very reason for existence.

C. As a Morally and Religiously Motivated Group, ORTL's Free Exercise Is Protected.[13]

Regarding religious free-exercise, the issue is whether government can justify (under strict or rational-basis scrutiny) denying an exemption to ORTL and those similarly situated.[14] The issue is *not* whether Oregon had a rational basis for the *Bill* because, under religious-liberty analysis, interest framing must "loo[k] beyond broadly formulated interests justifying the general applicability of government mandates and *scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants*." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 431 (2006) (emphasis added). *O Centro* applied the federal Religious Freedom Restoration Act ("RFRA"), but the same framing analysis applies under constitutional religious-liberty protection. *Id.* at 430-31 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963) (Seventh-day Adventist protected in unemployment-law context for declining to work on Sabbath), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish excluded from mandated school attendance after the eighth grade despite general interest in educating children)).

Consequently, *O Centro* rejected asserted interests in "uniformity" and maintaining a "closed system" for the Controlled Substances Act because a religious exemption had been allowed, undercutting any claim of a need for uniformity and a closed system. 546 U.S. at 434-37.

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[13] Government has no role in questioning the correctness, consistency, legitimacy, substantiality, etc. of religious beliefs, *Hobby Lobby*, 573 U.S. at 723-25, which need only be "sincerely held." *Frazee v. Illinois Dept of Emp't Sec.*, 489 U.S. 829, 834 (1989).

[14] As religious individuals have an association right under the First Amendment, they may act together through organizations such as ORTL, so the First Amendment protects religious free-exercise by such groups. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 199 (2012); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 525-26, 547 (1993) ("*Lukumi*"); *see also Hobby Lobby*, 574 U.S. at 713-19 (closely held corporation may exercise religion by being run under religious principles). Consequently, religious free-exercise protection extends to both groups and Hobby-Lobby-type businesses run under religiously motivated principles that object on moral and religious grounds to abortion-on-demand and abortifacients and covering them under provided health insurance.

Exemptions make laws underinclusive, thereby undercutting any claimed compelling interest. *See, e.g.*, *Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002) ("[T]he Court need not decide whether achieving "impartiality" (or its appearance) in the sense of openmindedness is a compelling state interest because, as a means of pursuing this interest, the announce clause is so woefully underinclusive that the Court does not believe it was adopted for that purpose. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53.")

Since strict scrutiny applies (as established in the paragraph following this one), *Hobby Lobby*, 134 S. Ct. 2751, provides the strict-scrutiny analysis (required there by RFRA).[15] *Hobby Lobby* held that any interest asserted to justify imposing insurance coverage of contraception on objectors[16] fails strict scrutiny because government payment for contraceptives for women lacking coverage can be met by the more narrowly tailored means of (i) government payment for

[15] Strict scrutiny is the "most rigorous" scrutiny, *Lukumi*, 508 U.S. at 546, under which government must prove an act "narrowly tailored" to an "interest of the highest order," *id.*, and "only in rare cases" do laws survive, *id.* Though the opinion in *Boerne v. Flores*, 521 U.S. 507 (1997), said that pre-*Smith* Supreme Court cases didn't use "least restrictive means" language for "narrowly tailored," Justice Ginsburg, a member of the *Boerne* majority, wrote in *Hobby Lobby* that "that statement does not accurately convey the Court's pre-*Smith* jurisprudence," 573 U.S. at 749-50 (Ginsburg, J., joined by Breyer, Sotamayor & Kagan, JJ., dissenting) (citing cases establishing least-restrictive-means as a narrow-tailoring requirement). The *Hobby Lobby* majority noted her dispute, deciding that "it is unnecessary to adjudicate this dispute." *Id.* at 706 n.18. Nonetheless, as *Lukumi* indicates, "[t]he compelling interest standard . . . is 'not water[ed] . . . down' but 'really means what it says.'" 508 U.S. at 546 (citation omitted).

[16] The Court rejected a "too attenuated" argument, 573 U.S. at 723, so any similar assertion that moral complicity does not exist for employers concerning insured actions by their employees likewise would fail here. Though the Court did not need to decide whether "the mandate serves a compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing," it said grandfathering undercut narrow tailoring. *Id.* at 727-28. The Court rejected interests in "promoting 'public health' and 'gender equality,'" because the analysis must "'loo[k] beyond broadly formulated interests' and 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants'—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases." *Id.* at 726-27 (citation omitted).

contraceptives at issue, *id.* at 728, or (ii) allowing Hobby Lobby to use an existing accommodation extended to nonprofits with religious objections, *id.* at 730-31.

Hobby Lobby's strict-scrutiny analysis applies here under the Free Exercise Clause[17] under *Employment Division v. Smith*, 494 U.S. 872 (1990), because (i) a hybrid claim exists (religious free-exercise coupled with free expression and expressive-association), *id.* at 881-82, and (ii) the Mandate is not an otherwise "'valid and neutral law of general applicability,'" *id.* at 789 (citation omitted). A law is not generally applicable if "in a selective manner [it] impose[s] burdens only on conduct motivated by religious belief," including by "fail[ing] to prohibit nonreligious conduct that endangers [its] interest in a similar or greater degree"). *Lukumi*, 508 U.S. at 543. Here, the lack of general application includes grandfathering on the sole basis that a plan "excluded coverage of abortion . . . during the 2017 plan year," HB 3391 § 2(7)(e), and affording an exemption to too narrowly defined "religious employers," *id.* § 2(9).[18] The Mandate is also not neutral because it impermissibly targets employers with moral/religious objections to abortion insurance coverage. *See, e.g.*, *Lukumi* 508 U.S. 520 (church targeted by ordinances not directly naming the church). By enacting the *Reproductive Health Equity* Act (emphasis added), Oregon targeted those not *offering* abortion coverage, i.e., those who did *not* provide such coverage because they objected to such coverage for whatever reason. Oregon concedes that many morally/religiously motivated persons object to providing abortion coverage by allowing the (overly narrow) "religious employer" exemption at HB 3391 § 2(9). Given the exclusions, the targeting,

[17] This is incorporated against states. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

[18] *Hobby Lobby* noted that employees covered by plans grandfathered by the Affordable Care Act ("ACA") had no coverage at all for the contraceptives to which Hobby Lobby objected, undercutting any asserted interest framed simply as providing coverage, 573 U.S. at 727, as did providing exemptions for "religious employers" and "certain nonprofit organizations with religious objections," but not extending a religious exemption to Hobby Lobby, *id.* at 724 n.33.

and the concession, any argument that the Bill is general and neutral is foreclosed.

Under strict scrutiny, the Mandate would fail because, as in *Hobby Lobby*, other options are more narrowly tailored than forcing objectors to act against conscience, such as state payment for women lacking coverage (as already done for certain women in HB 3391 § 2(5)) or including objectors within an existing accommodation (such as that for "religious employers" in § 2(9)). Moreover, no court has ever held that forcing any third party—let alone a pro-life group—to fund abortion coverage for someone else is a compelling interest.

Nor would the Mandate survive rational-basis scrutiny.[19] There is no legitimate state interest—especially given the countervailing federal constitutional rights—in forcing pro-life groups to provide insurance coverage for abortion and abortifacients. So the Mandate is not rationally related to any legitimate governmental interest. And compelling groups that oppose abortion and abortifacients to fund abortion and abortifacients for their employees—who also oppose abortion and abortifacients—is simply irrational in itself under any commonsense notion of rationality.

D. ORTL Is Entitled to Equal Protection With Religious Employers.

The Equal Protection Clause of the Fourteenth Amendment protects against disparate treatment of similarly situated classes. HB 3391 creates disparately treated, similarly situated classes by exempting narrowly defined "religious employers," § 2(9), but not those who equally object to abortion on moral and religious grounds—such as ORTL and those similarly situated. Oregon would have to justify the disparate treatment of those two classes under strict scrutiny because fundamental rights to free expression, free expressive-association, and religious free-exercise are

[19] Rational-basis scrutiny can doom even applications of general, neutral laws. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 n.2 (2017) (citing *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012)).

also involved. *See, e.g.*, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). The Mandate would fail strict scrutiny (or even rational-basis scrutiny) for reasons similar to the prior analysis, as established in the following five points.

First, note that Oregon concedes that the Bill regulates more than health benefit *plans* because the religious-employer exemption expressly regulates both insurers and *employers*, § 2(9), so any argument that the Bill only regulates *plans* and doesn't regulate insurers and *employers* would fail (as it also would under simple logic in a causation analysis).

Second, any notion that a morally and religiously motivated issue-advocacy group like ORTL could not be deemed equally "religious" with narrowly defined "religious employers" for religious-free-exercise purposes would fail. *See, e.g.*, *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988) (term "religious organization" "clearly includes organizations less pervasively religious than churches"); the Ninth Circuit has "often assumed without discussion that organizations with religious elements have Free Exercise rights").

Third, the focal point of the *Reproductive Health Equity* Act is abortion and contraception, specifically, imposing abortion and contraceptive coverage on those who previously chose not to cover them in health benefit plans. *See* https://www.oregon.gov/oha/PH/HEALTHYPEOPLEFAMILIES/REPRODUCTIVESEXUALHEALTH/Pages/reproductive-health-equity-act.aspx ("the Reproductive Health Equity Act, is a bill that provides for expanded coverage for some Oregonians to access free *reproductive* health services, *especially those who, in the past, may have not been eligible for coverage of these services*" and "[t]he law improves *abortion* access" (emphasis added)). So in deciding whether the classes of "religious employers" and pro-life groups like ORTL are similarly situated, the issue is whether they are similarly situated con-

cerning their moral and religious opposition to abortion, necessarily including abortifacients. Some "religious employers" are opposed to abortion and abortifacient coverage, while some are not. But *all* pro-life groups oppose abortion and insurance coverage of abortion and abortifacients. So it is wholly illogical to allow a "religious employer" exemption but not a pro-life employer exemption because, as to Oregon's reason for creating the "religious employer" class (accommodation of possible opposition to abortion, necessarily including abortifacients), the class of pro-life employers is even more likely (indeed certain) to be opposed to abortion, necessarily including abortifacients.

Fourth, Oregon lacks a compelling (or even legitimate) interest in forcing religiously and morally motivated groups to act against conscience in violation of their constitutionally guaranteed right to religious free-exercise, and specifically to compel pro-life groups to fund activity antithetical to their reason for existence. And more specifically—for equal-protection purposes—Oregon lacks a compelling (or even legitimate) interest in protecting the beliefs and consciences of "religious employers" but not pro-life employers.

Fifth, the Mandate is neither rationally related nor narrowly related to any compelling or legitimate governmental interest because there is no such interest. Moreover, compelling groups that oppose abortion and abortifacients to fund abortion and abortifacients for their employees—who also oppose abortion and abortifacients—is irrational, and Oregon has less restrictive means of paying for coverage for women lacking it. And more specifically—for equal-protection purposes—Oregon's protection of "religious employers" but not pro-life employers is not narrowly tailored (or rationally related) to any legitimate interest, including an interest in accommodating the religious beliefs of "religious employers."

Consequently, providing "religious employers" but not pro-life employers an exemption from the Mandate violates the Equal Protection Clause. So ORTL and those similarly situated require an exemption *comparable* to that extended to "religious employers," i.e., an exemption that allows *insurers* to provide and *employers* to buy plans that comport with their pro-life beliefs concerning abortion, which necessarily includes abortifacients. Removing that government obstacle will allow insurers to issue the sort of plans they offered before the Bill's enactment.

Again, as stated at the beginning of Part I, the foregoing special constitutional protections are briefly sketched to show the strong constitutional underpinning of ORTL's request to be free from Oregon's abortion Mandate and to show Congress's strong justification for Weldon. But Oregon may readily avoid reaching the constitutional issues by granting the exemption that ORTL requests, given the clear Weldon protection discussed next and in Part III.

E. As an Insurance Sponsor, ORTL Has Weldon Protection.

As discussed further in Part III, employers who sponsor health-insurance coverage for employees are within Weldon's protection, so Weldon expressly protects against state coercion "on the basis that [ORTL] does not . . . *provide coverage of* . . . *abortions*." Consolidated Appropriations Act, 2018, Pub. L. 115-41, Div. H, § 507(d), 132 Stat. 348 (Mar. 23, 2018) (emphasis added).

In sum, ORTL is the sort of entity that has strong constitutional and statutory protections against what the Bill compels. These all strongly support granting the requested exemption.

II.
HB 3391's Abortion-Coverage Mandate

HB 3391, which took effect August 15, 2017, requires a health benefit plan in Oregon to provide coverage for (inter alia) "services, drugs, devices, products, and procedures," § 2(2), re-

lated to (inter alia) abortion and "[a]ny contraceptive drug, device or product approved by the United States Food and Drug Administration[,]" as well as related services, § 2(2)(g), (j), and (L). FDA-approved "contraceptives" include abortifacients.[20] HB 3391 mandates abortifacient coverage by requiring abortion coverage, by requiring coverage of all FDA-approved "contraceptives," and by mandating that "[a] health benefit plan may not infringe upon an enrollee's choice of contraceptive drug, device or product . . . ." § 2(2)(j)(D).

HB 3391 provides three limited exemptions. First, a health benefit plan is not required to cover "[a]bortion if the *insurer* offering the health benefit plan excluded coverage for abortion in all of its individual, small employer and large employer group plans during the 2017 plan year." HB 3391 § 2(7)(e) (emphasis added). Preliminarily, ORTL notes that HB 3391 again concedes, as established in the Introduction, that the Bill doesn't just regulate "plans" because here it expressly regulates an "insurer," so the Bill regulates, affects, and burdens not only plans, but also insurers, and employers offering health benefit plans, along with their employees. ORTL is aware of only *one* plan, PHP,[21] that qualifies for this exemption, indicating that Oregon granted PHP a monopoly on the segment of the market interested in an abortion-excluding plan, thereby creating a serious equal-protection problem.[22] PHP doesn't suffice for ORTL because (i) PHP's

[20] For example, the FDA's chart of approved contraceptives includes "emergency contraceptives" containing levonorgestrel and ulipristal acetate. *See* https://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm522453.htm. As the Ninth Circuit recognized "Plan B is an emergency contraceptive containing levonorgestrel" and "*elle* is an emergency contraceptive containing . . . ulipristal acetate." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1073 n.1 (9th Cir. 2015), which post-fertilization abortifacients the plaintiffs in *Stormans* and ORTL believe cause "the destruction of human life." *Id.* ORTL expressly objects to providing insurance coverage for these two abortifacients and any other FDA-approved "contraceptive" that does, or *can*, act after fertilization. *See supra* at Part I.A. (four "contraceptives" to which ORTL objects).

[21] *See* https://www.ehealthinsurance.com/health-insurance-companies/providence-oregon.

[22] HB 3391 grandfathered PHP because it "excluded coverage for abortion in all . . . plans,"

grandfathering provision doesn't authorize it to exclude abortifacients to which ORTL objects, both of which issues are substantial burdens on ORTL and its employees, (ii) the plan doesn't include as an in-plan provider OHSU, which is a premier health care facility that ORTL wants its employees to be able to access in-plan and that ORTL's employees want to access in-plan, and (iii) it has shown significant increases in plan premiums.

Second, "[a]n insurer may offer to a religious employer a health benefit plan that does not include coverage for contraceptives or abortion procedures that are contrary to the religious employer's religious tenets only if the insurer notifies in writing all employees who may be enrolled in the health benefit plan of the contraceptives and procedures the employer refuses to cover for religious reasons." HB 3391, § 2(9). Preliminarily, note again that HB 3391 concedes that the Bill doesn't just regulate "plans" because here it expressly regulates an "insurer," so the Bill regulates, affects, and burdens plans, insurers, and employers offering health benefit plans, along with their employees. In defining "religious employer," the Bill incorporates by reference ORS 743A.066, which defines religious employer narrowly to include only employers:

> **(a)** [w]hose purpose is the inculcation of religious values; **(b)** [t]hat primarily employs persons who share the religious tenets of the employer; **(c)** [t]hat primarily serves persons who share the religious tenets of the employers; **and (d)** [t]hat is a nonprofit organization under section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code.

While ORTL is certainly a religiously motivated § 501(c)(4) nonprofit corporation—with religiously motivated directors, officers, employees, and members—and its purpose is to inculcate pro-life values deeply rooted in Judeo-Christian teachings,[23] those religious teachings have also

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i.e., because it objects to abortion coverage. But that creates the equal-protection problem. The similarly situated post-2017 class and the 2017 class of abortion-coverage-objecting insurers is disparately treated, and the arbitrary temporal distinction doesn't justify the disparate treatment.

[23] *See, e.g.*, *Didache* 2:2 (J.B. Lightfoot trans. and ed., ca. A.D. 96), http://www.ear-

become embedded as *moral* values in traditional Western Civilization, so ORTL's values are not exclusively "religious" in the sense this exception seems to envision. Moreover, while ORTL requires that its employees share its pro-life views, ORTL seeks to serve all (regardless of their religious views) by advocating its pro-life issue in the marketplace of ideas and encouraging and supporting women in carrying preborn children to term. So ORTL doesn't believe it is a "religious employer" or that DCBS will deem it such. But it certainly has much in common with those receiving this sort of exemption—especially regarding its opposition to abortion and abortifacients (providing which was why the *Reproductive Health Equity* Act was enacted)—and should have been afforded a similar exemption in the Bill because, as discussed in Part I, ORTL is the sort of expressive-association that cannot be compelled to alter its message by the government, here by including insurance coverage for abortion and abortifacients—the very activity ORTL exists to resist. The notion that the government can't compel abortion coverage on pro-life groups should have occurred to Oregon when enacting the Bill imposing abortion coverage, because ORTL was active in opposing the Bill, and an exemption should have been provided already.

Third, "[i]f the Department of Consumer and Business Services concludes that enforcement of this section may adversely affect the allocation of federal funds to this state, the department *may grant an exemption* to the requirements but only to the minimum extent necessary to ensure the continued receipt of federal funds." HB 3391, § 2(10) (emphasis added). As set out in the Introduction, *supra*, and established next, this provision requires the exemption here requested.

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lychristianwritings.com/text/didache-lightfoot.html ("thou shalt not murder a child by abortion nor kill them when born").

III.

The Weldon Amendment's Scope

Weldon broadly mandates that federal funds not be provided to states that discriminate against "any . . . health care entity" for "not provid[ing] . . . coverage of . . . abortions":

> (1) None of the funds made available in this Act may be made available to a Federal agency or program, or to a *State* or local government, if such agency, program, or government subjects any institutional or individual health care entity to *discrimination* on the basis that the health care entity does not provide, pay for, *provide coverage of*, or refer for *abortions*.
>
> (2) In this subsection, the term "*health care entity*" includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a *health insurance plan*, or *any other kind of health care* facility, organization, or *plan*.

See, e.g., Consolidated Appropriations Act, 2018, Pub. L. 115-41, Div. H, § 507(d), 132 Stat. 348 (Mar. 23, 2018) (emphasis added). Weldon's scope is established in the following discussion of (**A**) the old OCR interpretation, (**B**) the current OCR interpretation, and (**C**) recent enforcement action.

A. The Old OCR Interpretation

Regarding the *old* interpretation, in 2016 OCR interpreted Weldon narrowly in rejecting complaints by churches against California's mandated health-insurance abortion coverage. The *current* OCR describes this 2016 history in "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," 83 Fed. Reg. 3880 (Jan. 26, 2018) (notice of proposed rulemaking ("Rulemaking")).[24] *Id.* at 3886, 3888-91, 3903. The current OCR declares its "intent[] to

[24] *See* https://www.federalregister.gov/documents/2018/01/26/2018-01226/protecting-statutory-conscience-rights-in-health-care-delegations-of-authority (HTML). *See also* https://www.govinfo.gov/content/pkg/FR-2018-01-26/pdf/2018-01226.pdf (PDF). To date, a final rule hasn't been issued, but OCR is enforcing Weldon under its current interpretation. *See, e.g.*, https://www.hhs.gov/about/news/2019/01/18/ocr-finds-state-california-violated-federal-law-discriminating-against-pregnancy-resource-centers.html (enforcement against California).

clear up confusion caused by" the old interpretation and describes the 2016 action in the following words, which are included in full because they provide specific guidance as to what OCR's current interpretation is *not* and the framework for OCR's new interpretation (discussed below):

> This proposed regulation intends to clear up confusion caused by OCR sub-regulatory guidance issued through OCR's high-profile closing of three Weldon Amendment complaints against the state of California filed in 2014.[FN 40] On June 21, 2016, OCR declared it found no violation stemming from California's policy requiring that health insurance plans include coverage for abortion based on the facts alleged in the three complaints it had received.[FN 41] OCR's closure letter concluded that the *Weldon Amendment's protection of health insurance plans included issuers of health insurance plans but not institutions or individuals who purchase or are insured by those plans.* Even though California's policy resulted in complainants losing abortion-free insurance that was consistent with their beliefs, *because none of the complainants were insurance issuers, the letter concluded that none qualified as an entity or person protected under the Weldon Amendment.* Relying on legislative history instead of the Weldon Amendment's text, OCR also declared that health care entities are not protected under Weldon unless they possess a "religious or moral objection to abortion," as opposed to some other reason for refusing to facilitate abortion, and concluded that the insurance issuers at issue did not merit protection because they had not raised any religious or moral objections. Finally, OCR called into question its ability to enforce the Weldon Amendment against a State at all because, according to the letter, to do so could "potentially" require the revocation of Federal funds to California in such a magnitude as to violate the Constitution's prohibition on the Federal government infringing State sovereignty through its Spending Clause power.[FN 42]

83 Fed. Reg. at 3890 (footnotes omitted) (emphasis added). In sum, the old OCR rejected the complaints because (i) employers providing health insurance were unprotected, (ii) the health insurance issuers involved raised no religious/moral objection to abortion, and (iii) potential constitutional problems might arise from revoking funds. As shown next, the current OCR rejects these grounds, so employers *are* protected and nothing bars them from complaining and OCR from enforcing Weldon against states compelling insurance coverage of abortion.

B. The Current OCR Interpretation

The *current* interpretation of Weldon by its current enforcer is set out in OCR's 2018 Rulemaking, stating its three-point rejection of the old 2016 interpretation just described and

broadly interpreting "health care entity" and "discrimination." (The fact that a final rule has not yet issued doesn't alter OCR's current interpretation of Weldon, and the current interpretation is seen in action in the enforcement described in Part III.C.)

1. "Health Care Entity" Encompasses Employers Who Provide Insurance.

In its 2018 Rulemaking, OCR notes the 2016 rejection of Weldon complaints against California's abortion-coverage insurance mandate and—without commenting on the merits of California's mandate—said "clarifications are in order with respect to the general interpretations of Weldon in OCR's previous closure of complaints against California's abortion coverage requirement." 83 Fed. Reg. at 3890. OCR then highlights its broad review of relevant matters and says: "Based on its review, [HHS] has concluded that the above-mentioned sub-regulatory guidance issued by OCR with respect to interpretation of Weldon *no longer reflects the current position* of HHS, OCR, or the HHS Office of the General Counsel." *Id.* (emphasis added).

Regarding "health care entity," OCR rejects the old notion that only insurers could file Weldon complaints: "in contrast to OCR's previous position, HHS concludes that Weldon's protection for health insurance and any other kinds of plans is not a protection that only may be invoked or complained of by issuers." *Id.* In footnote, OCR notes that the Amendment "doesn't explicitly mention issuers," which supports the current interpretation:

> HHS believes health insurance issuers are health care entities by that term's plain meaning in the Weldon Amendment. But, notably, while the Weldon Amendment explicitly protects plans, it does not explicitly mention issuers. This further undermines OCR's previous conclusion that the amendment protects issuers, but not plans distinct from issuers.

Id. n.43. Moreover, "health care entity" includes "the plan sponsor" (i.e., an employer[25]):

[25] *See, e.g.*, https://definitions.uslegal.com/s/sponsor-health-care/ ("Sponsor in the context of health care means an employer, a union, a company or some other entity that sets up and sponsors a health care plan . . . .").

> Because the Weldon Amendment protects not only the health insurance issuer, but also the health plan itself, *it can also be raised, at minimum, by the plan sponsor on behalf of the plan*, as well as by the issuer. Such an interpretation is not foreclosed by either the statute or the regulation. *Cf.* Department of Justice Title VI Legal Manual ("The financial assistance does not have to relate to a program in which the complainant participates or seeks to participate or [to a program] used for the complainant's benefit. Rather, an agency only has to prove that the entity received Federal financial assistance when the alleged discrimination occurred."). *Id.* at 3890 (emphasis added).

In its proposed rule defining "health insurance plan," OCR "proposes that it include the sponsors, issuers, and third-party administrators of health care plans or insurance "and protect[] such health care entities from being subject to discrimination on the basis that they do not provide, pay for, cover, or refer for abortions." *Id.* at 3893.

So employers (such as the 2016 churches) sponsoring a health benefit plan for employees are protected by Weldon and may complain under it.

2. No Religious/Moral Objection Is Required.

While the churches at issue in the old 2016 interpretation had moral and religious objections to offering abortion-coverage health insurance, the insurers apparently made no such assertion—on which the old OCR relied. But as the current OCR notes, Weldon requires no such thing:

> [T]he plain text of the Weldon Amendment prohibits discrimination against protected individuals and entities for being *unwilling* to take certain actions or to provide certain support in relation to abortion without requiring a specifically religious or moral motive for that decision or position.[FN 44] The Weldon Amendment states that funding shall not be available to an agency, program, or government if that "agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." *See, e.g.*, Consolidated Appropriations Act, 2017, Public Law 115-31, sec. 507(d). While Weldon certainly protects objections based on conscience or religion, nothing in the text limits its protection to those contexts. The legislative history of the Weldon Amendment cannot be used to contradict or limit the plain text of the statute. In any event, the legislative history in the form of a floor statement from the Amendment's sponsor, Representative Dave Weldon, reinforces the plain meaning of the amendment. Representative Weldon stated that his amendment "simply states you cannot force the *unwilling*" to participate in abortion, and that it protects those "who *choose not to* provide abortion services," including

> health professionals who say they are pro-choice and supportive of *Roe v. Wade*, but would rather not perform abortions themselves.[FN 45]

Id. at 3890-91 (footnotes omitted) (emphasis added). So it suffices to be "unwilling" to include abortion coverage, or to "choose not to," without more.

3. OCR Must Presume Laws Constitutional and Enforce Them.

In contrast to the old OCR's speculation about Weldon's constitutionality, the current OCR says federal law must be presumed constitutional and enforced, which it does:

> HHS does not believe that the "potential" constitutional concerns cited in the letter relieve HHS of the obligations Congress imposed on it to not make certain funding available to covered entities that discriminate in violation of the Weldon Amendment. Instead, HHS must diligently enforce the Weldon Amendment according to its text and to the extent allowed by the Constitution. It is a bedrock principle that the Federal government is to presume that statutes passed by Congress are constitutional. Additionally, if conflicts with the Constitution are clearly present, saving constructions should be employed to avoid interpreting statutes as dead letters. The Weldon Amendment's funding remedies in cases of violation can and should be read and applied consistently with the Constitution.

So the current OCR *enforces* Weldon, as discussed in Part III.C.

4. Compelling Abortion Coverage by Objectors Is "Discrimination."

As clearly seen from both the old and current OCRs' interpretations just discussed, both accepted that Weldon "discrimination" includes compelling objectors to include abortion coverage in health insurance plans. Though the old OCR found three *other* reasons not to protect churches seeking conscience-compliant health insurance under Weldon, the old OCR took no issue with the assertion that the mandate was "discrimination." And the new OCR, would protect the churches, clearly deeming the mandate "discrimination."

In its current Rulemaking, OCR proposes a definition of "*discriminate* or *discrimination*" that includes a wide range of possible forms of discrimination, including (without limitation) "laws . . . tend[ing] to subject . . . entities protected . . . to any adverse effect . . ." and "to other-

wise engage in any activity reasonably regarded as discrimination." 83 Fed. Reg. at 3892. And beyond the text of this (or a revised final) rule, the terms require "[a] functional concept . . . [that] must account for the various forms that violations of the right of conscience can take." *Id.* And crucially for present purposes, "[f]reedom from discrimination on the basis of religious belief or moral conviction . . . does not just mean the right not to be treated differently or adversely: *it also means being free not to act contrary to one's beliefs.*" *Id.* (emphasis added).

In its Rulemaking, OCR cited to two U.S. Supreme Court cases involving "insidious circumstances" that OCR intends to monitor. *Id.* The first, *Lukumi*, 508 U.S. 520, involved a city ordinance that the Supreme Court struck down on religious-free-exercise grounds because it impermissibly targeted a particular religious group and its religious beliefs and practices. 82 Fed. Reg. at 3892. The second, *Matal v. Tam*, 137 S.Ct. 1744, 1766 (2017) ("A law found to discriminate based on viewpoint is an egregious form of content discrimination, which is presumptively unconstitutional."), "made clear that governmental burdens on speech targeting particularly viewpoints are presumptively unconstitutional." 82 Fed. Reg. at 3892. So "OCR will regard as presumptively discriminatory any law . . . that has as its purpose, or explicit or otherwise clear application, the targeting of religious or conscience-motivated conduct." 83 Fed. Reg. at 3893. OCR also intends to apply disparate-impact analysis ("whether or not the exercise of authority has a disparate impact on religious believers or those who share a particular religious belief or moral conviction"), seeking comments on that analysis.

In sum, as relevant here, the current OCR interprets Weldon to (i) protect health insurance plans, issuers, and sponsors, (ii) require only unwillingness to provide abortion coverage, without more, (iii) be presumptively constitutional and enforceable, and (iv) cover imposed insurance

coverage of abortion on objectors as banned discrimination.

C. Recent Enforcement Action

Regarding OCR's recent Weldon enforcement against California, on January 18, 2019, OCR announced that it had "found that the State of California violated the federal conscience protection laws known as the Weldon and Coats-Snowe Amendments,"[26] noting that "[t]his is the first time since the launch of the new Conscience and Religious Freedom Division a year ago that OCR has found a violation under these laws. HHS Press Office, "OCR Finds the State of California Violated Federal Law in Discriminating Against Pregnancy Resource Centers," Jan. 18, 2019, https://www.hhs.gov/about/news/2019/01/18/ocr-finds-state-california-violated-federal-law-discriminating-against-pregnancy-resource-centers.html ("HHS Cal. Press Release"). The California violation notice is at https://www.hhs.gov/sites/default/files/california-notice-of-violation.pdf.

The new Division, focusing specifically on conscience-exemption and religious-liberty issues, was founded early on in the current presidential administration and is a central part of the new administration's efforts to highlight those issues and provide greater protection. *See, e.g.*, Katie Kieth, "HHS Office For Civil Rights Gets New Religious Freedom Center, Authority Over Discrimination Based On Refusal To Provide Abortions," Health Facts, Jan. 18, 2018, https://www.healthaffairs.org/do/10.1377/hblog20180118.536414/full/. The new Division was part of transferring enforcement authority for federal conscience provisions to OCR:

> In its restructuring notice, HHS cites an executive order on religious liberty issued by President Donald Trump in May 2017 and guidance on religious liberty protections issued by Attorney General Jeff Sessions in October 2017. HHS is also expected to release new

[26] Coats-Snow bans federal-funds recipients from discrimination based on refusal to perform, refer for, or arrange for abortion, 42 U.S.C. 238n, so it doesn't apply here.

> regulations on religious liberty in the near future that may mimic previous provider conscience regulations finalized in December 2008 under President George W. Bush's administration. This regulation was later largely rescinded by the Obama administration.
>
> OCR is headed by Roger Severino. He previously served as Director of the DeVos Center for Religion and Civil Society at the Heritage Foundation, as well as at the Department of Justice's Civil Rights Division and the Becket Fund for Religious Liberty.

Id. The cited Presidential Executive Order Protecting Free Speech and Religious Liberty (May 4, 2017) is at https://www.whitehouse.gov/presidential-actions/presidential-executive-order-promoting-free-speech-religious-liberty/. U.S. Attorney General guidance on promoting religious liberty is at https://assets.documentcloud.org/documents/4081502/171006-Implementation-of-Memorandum-on-Federal.pdf and https://www.justice.gov/opa/press-release/file/1001891/download (the latter item provides "Principles of Religious Liberty," "Guidance for Implementing Religious Liberty Principles," and a lengthy "Appendix" providing constitutional and statutory authorities for the principles and guidance). Both promise robust federal protection under federal conscience protections.

Regarding the enforcement against California, "[t]his matter arose from complaints filed by Sacramento Life Center, LivingWell Medical Clinic, Pregnancy Center of the North Coast, and Confidence Pregnancy Center alleging that California subjected them to potential fines and discrimination for refusing to post notices referring for abortion." HHS Cal. Press Release. HHS noted that the U.S. Supreme Court had already held that California's mandated abortion-referral notices likely violated the First Amendment's protection against compelled speech—in violation of these centers' own pro-life message—in *NIFLA*, 138 S. Ct. 2361, but that "OCR's Conscience and Religious Freedom Division . . . conducted an independent investigation and determined that the FACT Act violated the Weldon and Coats-Snowe Amendments . . . ." HHS Cal. Press Re-

lease.[27] Given a permanent injunction already issued against California, OCR issued a finding of violation and "clos[ed] the complaint as favorably resolved for the complainants and all similarly situated parties." *Id.*

In sum, OCR is actively pursuing Weldon enforcement under the current interpretations of federal conscience-protections set out in its Rulemaking, including the scope of "discrimination."

IV.
The Weldon Amendment Violation

From the foregoing, it should be clear that (i) Oregon's Mandate violates Weldon and (ii) OCR is highly likely to enforce Weldon against Oregon should a complaint be made. Nonetheless, for completeness the Weldon analysis as applied is summarized next in six points.

(1) Oregon has received, receives, and wants to continue receiving federal funds.

(2) ORTL is a Weldon-protected "health care entity."

(3) ORTL is unwilling to provide coverage for abortion, which necessarily includes abortifacients, and related services which suffices for Weldon, though ORTL also has moral and religious objections to providing services that counter its own pro-life message.

(4) Weldon must be presumed constitutional, and OCR is actively enforcing it as such.

(5) Mandating ORTL and others unwilling to provide abortion and abortifacient coverage in their health benefit plans is Weldon "discrimination."

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[27] California Attorney General Xavier Becerra, the defendant in *NIFLA v. Becerra*, 138 S. Ct. 2361, filed comments opposing OCR's Rulemaking on constitutional and statutory grounds, *see* https://oag.ca.gov/system/files/attachments/press_releases/Comment%20Letter.pdf. But of course that did not prevent OCR from enforcing Weldon against California under OCR's current interpretation in its Notice of Violation addressed to Attorney General Becerra. *See* https://www.hhs.gov/sites/default/files/california-notice-of-violation.pdf.

(6) Consequently, the Mandate violates Weldon and OCR is highly likely to enforce Weldon against Oregon if a complaint is filed, so DCBS should "grant an exemption" under the authority of HB 3391 § 2(10) because "enforcement of [the Mandate] may adversely affect the allocation of federal funds to this state."

In sum, the Mandate's as-applied Weldon violation and the need for exemption are clear.

Conclusion

Section 2(10) of the Bill authorizes DCBS to "grant an exemption" if "enforcement of this section may adversely affect the allocation of federal funds to this state." The standard is "may," but the foregoing establishes that federal-funds jeopardy is clear. So an exemption should be issued exempting ORTL and those similarly situated from having to provide coverage for abortion and abortifacient "contraceptives" under the Mandate consistent with Weldon. Thus, the scope of the exemption required here must satisfy three elements: (1) it must provide full compliance with Weldon; (2) it must provide the sort of exemption afforded "religious employers"; and (3) it must reach all who are similarly situated. These are addressed seriatim.

First, Weldon forbids Oregon to "subject[] any institutional or individual health care entity to *discrimination* on the basis that the health care entity does not provide, pay for, *provide coverage of*, or refer for *abortions*," with "health care entity" defined broadly to include insurance plans, insurers, and plan sponsors, and with "discrimination" defined to include what the Mandate requires regarding abortion, which necessarily includes abortifacients. So as relevant here, Weldon forbids (inter alia) imposing health insurance coverage on those who are unwilling (without more required) to provide health-insurance coverage for abortion and abortifacients. Oregon's Mandate is already in violation of Weldon and, to fully comply with Weldon, Oregon

should immediately cease imposing the Mandate on *all* covered by Weldon who are unwilling to "provide coverage for . . . abortion" and DCBS should publicly announce its intent not to enforce the Mandate to the full extent of this Weldon protection. That will fully protect Oregon's federal funds. But as applied to this particular exemption request specifically authorized by HB 3391 § 2(10), DCBS should promptly issue an order of exemption from the Mandate as requested for ORTL and those similarly situated.

Second, the exemption that DCBS provides to ORTL and those similarly situated must provide the sort of exemption afforded "religious employers" at § 2(9) of the Bill, i.e., one that authorizes (i) *insurers to offer* and (ii) *employers to obtain* health benefit plans excluding contraceptive and abortion coverage to which employers object. That will allow insurers again to issue, and employers to buy, the sort of plans available before the Mandate, i.e., plans that excluded "elective abortions," those "not medically necessary," etc. according to employers' beliefs and willingness to provide coverage.

Third, "those similarly situated" to ORTL should also be protected by the exemption to be issued. As noted in element one, Oregon is violation of Weldon to the extent it requires abortion-related insurance coverage on any health care entity unwilling to provide it, so to be in full compliance "those similarly situated" should be framed broadly to bring Oregon into compliance. As applied to this request authorized by HB 3391 § 2(10), DCBS should make clear that the phrase "those similarly situated" includes all employers unwilling—*for any reason*—to provide insurance coverage for their employees that includes coverage for abortion and abortifacients, according to their particular beliefs or willingness.

As set out in the accompanying cover letter, ORTL requests that DCBS provide it notice of

the granted exemption from the Mandate by May 31, 2019, because (i) the violation of the Weldon Amendment is clear, (ii) the Weldon Amendment violation is ongoing and cumulative, and (iii) the Mandate's violation of the conscience-rights of ORTL and similarly situated objectors to the Mandate is substantial and ongoing, irreparably harming ORTL and similarly situated objectors.

Sincerely,

Pat DeKlotz

Patrick De Klotz

State of Oregon
Department of Consumer and Business Services
Insurance Division

BEFORE THE DIRECTOR OF THE DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

In the Matter of the Request by Oregon Right to Life, Inc. for Exemption from ORS 753A.067	**Case No. INS:** _____

Declaration of Lois Anderson
In Support of ORTL's Exemption Request

Lois Anderson, Executive Director of Oregon Right to Life, Inc. ("ORTL"), verifies the following facts to support ORTL's request to the Oregon Department of Consumer and Business Services ("DCBS") for an exemption from the abortion-related health-insurance coverage mandated by § 2 (the "Mandate") of Enrolled House Bill 3391 ("HB 3391" or "Bill").[1]

ORTL's Organizational Nature

1. ORTL is an issue-advocacy, nonprofit (under § 501(c)(4) of the Internal Revenue Code), Oregon corporation, founded in 1970. ORTL's Articles of Incorporation are attached as Exhibit A. ORTL's By-Laws are attached as Exhibit B.

2. ORTL is controlled by its Board of Directors, with ORTL's daily operation under the direction of the Executive Director.

3. ORTL is a membership organization, comprised of numerous individuals who join because they agree with ORTL's pro-life principles and provide at least modest financial support. *See, e.g.*, https://www.ortl.org/get-involved/become-a-member ("Oregon Right to Life members

[1] *Available at* https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/HB3391.

are the financial foundation of the organization. Member contributions fund a wide variety of essential things like our lobbyist in Salem, the publication of Life in Oregon, and boring but important stuff like website and equipment maintenance."). Members select two members to serve as at-large members on the Board of Directors. These at-large board members have voting rights.

4. ORTL's website is at https://www.ortl.org, where information is publicly available about ORTL, including its related entities, beliefs (*see infra*), and activities.

5. Related to ORTL are two other entities, the Oregon Right to Life Education Foundation (a § 501(c)(3) nonprofit) and Oregon Right to Life PAC. *See* https://www.ortl.org/what-is-oregon-right-to-life/#1445930230395-d0e4383f-9e8a. The Foundation founded https://StandUpGirl.com, the most popular pro-life, online resource for girls in unplanned pregnancies.

6. ORTL is an affiliate of National Right to Life Committee ("NRLC"), America's oldest and largest national pro-life organization. NRLC information is at https://www.nrlc.org.

7. Current full time ORTL personnel include Executive Director Lois Anderson, Assistant Executive Director Jane Groff, Political Director David Kilada, Events Director Dawn Powers, Office Manager Nickie Snyder, and Public Affairs Director Jessica Stanton.

ORTL's Mission and Policies

8. ORTL's directors, officers, board members, and employees must, and do, subscribe to ORTL's mission and principles. ORTL members join because they agree with the mission and principles.

9. ORTL's mission is to advocate for the most vulnerable human beings whose right to life is denied or abridged under current law. In doing so, ORTL works to reestablish protection for all innocent human life from conception to natural death. *See* https://www.ortl.org/what-is-

oregon-right-to-life/.

10. ORTL operates under its stated policies, available at https://www.ortl.org/ortl-policies/, which include the following beliefs.

11. Consistent with cell biology, ORTL believes that individual human life begins at conception. By the term "conception," ORTL means fertilization (not implantation or any other time after fertilization). *See* https://www.ortl.org/ortl-policies/#1445966908208-623cd647-9788 ("Once the sperm and egg have united, . . . a new human life begins . . . .").

12. Because ORTL believes in the sanctity of human life from conception to natural death, it opposes abortion except where the mother's life is in imminent danger. *See* https://www.ortl.org/ortl-policies/#1445966656672-367a019a-db29.

13. ORTL takes no position on any birth control method that prohibits the sperm and egg from uniting, but once the sperm and egg unite a new human life begins and ORTL opposes any drug, device, or procedure that destroys the new human life. ORTL supports full disclosure of information by physicians to women considering contraceptives, including whether a particular "contraceptive" can act as an abortifacient (i.e., it can destroy individual human life in utero after fertilization). ORTL supports the right of medical professionals to exercise conscience in all medical care. *See* https://www.ortl.org/ortl-policies/#1445966908208-623cd647-9788.

14. Consequently, ORTL agrees with the plaintiffs in *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014), who believed that four types of "contraception" that could act after fertilization were against conscience as abortifacients, *id.* at 701-02. "These include two forms of emergency contraception commonly called 'morning after' pills and two types of intrauterine devices." *Id.*

at 701-03. The *Hobby Lobby* Brief for Respondents[2] provides specific detail, quoting a lower court: "'Four of the twenty approved methods—two types of intrauterine devices (IUDs) and the emergency contraceptives commonly known as Plan B and Ella—can function by preventing the implantation of a fertilized egg." *Id.* at 4-5 (citation omitted). "[T]he government concedes that the drugs and devices at issue can prevent uterine implantation of an embryo." *Id.* at 5 n.2. Specifically, the government conceded that "Plan B (levonorgestrel), Ella (ulipristal acetate) and copper IUDs like ParaGard may act by 'preventing implantation (of a fertilized egg in the uterus)' [and that] IUDs with progestin 'alter[] the endometrium.'" *Id.* (citations omitted). Those are the four abortifacients that ORTL does not want to be compelled by the Mandate to include in a sponsored health benefit plan. Concerning these four abortifacients, ORTL believes like the *Hobby Lobby* objectors that "'it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs.'" 573 U.S. at 702 (citation omitted). Ultimately, the *Hobby Lobby* objectors were not required to cover them in employee health insurance.

15. Regarding in-vitro fertilization, ORTL believes that the natural process of human conception is the union of egg and sperm within the maternal body, which provides the safest and most supportive environment for the maturation of the newly created, fragile human being. ORTL upholds the natural process of human conception. ORTL opposes all techniques of human conception occurring outside of the maternal body that lead to the destruction of human life, whether for family growth or experimentation. Presently, this includes any method of assisted reproduction that employs in vitro fertilization. *See* https://www.ortl.org/ortl-policies/#1445966

[2] *Available at* http://www.becketfund.org/wp-content/uploads/2014/02/13-354-bs.pdf.

952357-4d6d280d-d8e3.

16. ORTL believes that terminating unborn human life after conception, except where abortion is done because the mother's life is in imminent danger, *see* https://www.ortl.org/ortl-policies/#1445966656777-0de2d24f-fbc3, is a grave moral wrong and is religiously forbidden under traditional Judeo-Christian beliefs.

17. Those sincerely held traditional moral and Judeo-Christian beliefs about the sanctity of human life and about abortion motivate the actions of ORTL, its board members, officers, employees, and its members, all of whom would be displeased if ORTL violated those beliefs and principles in any way, and would likely disassociate from ORTL were it to do so.

18. ORTL believes that funding insurance coverage for abortion or abortifacients involves moral complicity with those activities and would be against conscience and moral and religious beliefs—so compelling ORTL to do so would violate ORTL's religious free-exercise rights. ORTL's belief on moral complicity regarding providing health-insurance coverage of abortifacients is similar to that of the conscience objectors in *Hobby Lobby*, *see* 573 U.S. at 720, 724, who were protected under the federal Religious Freedom Restoration Act ("RFRA") from having to provide such morally and religiously objectionable insurance.

19. In addition to violating *ORTL*'s rights, ORTL believes that compelling the coverage in the prior paragraph would violate the religious free-exercise rights of ORTL's directors, officers, employees, and members.

20. As a *pro-life, issue-advocacy, expressive-association*, ORTL seeks to have all that it says and does be consistent with its beliefs and a compatible part of its pro-life *message*. This applies to the health insurance coverage it offers to its employees.

21. ORTL believes that funding insurance coverage for abortion and abortifacients would communicate a *message* contrary to the pro-life message for which ORTL exists—so compelling ORTL to do so would violate ORTL's free-expression and expressive-association rights.

22. In addition to violating *ORTL's* rights, ORTL believes that compelling the coverage in the prior paragraph would violate the free-expression and expressive-association rights of ORTL's directors, officers, employees, and members.

ORTL's Past Provision of Health Insurance

23. Three ORTL personnel are currently covered under ORTL's health benefit plan.

24. Prior to the enactment of the Mandate, ORTL provided health insurance for its employees through PHP, which coverage it has provided since 2015.

25. ORTL's prior insurance coverage did not include coverage for abortion. However, ORTL has recently learned that its prior insurance includes coverage for "contraceptives" that can act as abortifacients–which ORTL opposes and objects to providing.

26. Because of the enactment of the Mandate, ORTL is now unable to obtain a plan consistent with its moral and religious beliefs. *See infra* 28–34.

27. ORTL wants to continue providing a health benefit plan to its employees without the objectionable coverage imposed by the Mandate.

ORTL's Specific Objections to the Mandate

28. As part of seeking protection for all innocent human life from conception to natural death, ORTL promotes laws to protect unborn human beings and resists laws that remove such protection. Thus, ORTL opposes—and objects to providing—mandated coverage of (a) abortion, (b) "contraceptives" that can act as abortifacients, and (c) services related to both in an ORTL

health benefit plan, which coverage is required by the Mandate, in § 2 of HB 3391.

29. Though the Bill directly regulates health benefit *plans*, its effect—and ORTL believes its intent—is to impose such abortion-related coverage on insurers, plan sponsors, and insured who create, sponsor, and use such plans but choose not to offer, provide, or have, such coverage. ORTL believes that the Mandate, by imposing abortion-related coverage on those who choose not to provide it, directly targets those choosing not to provide such abortion-related health-insurance coverage—otherwise there would be no reason for the Mandate.

30. ORTL believes that Oregon recognizes (a) that the Bill restricts what "employers" do and (b) that some morally and religiously motivated employers will choose not to provide employees abortion-related coverage by providing a "religious employer" exemption at § 2(9), but ORTL doesn't believe that it fits the overly narrow "religious employer" definition.

31. ORTL's moral and religious beliefs include a duty of care for its employees, which includes providing health insurance for them. But ORTL believes it should not provide coverage contrary to the beliefs of ORTL, its directors, officers, employees, and members. Thus, the Mandate imposes a moral dilemma: not providing health insurance, which violates that belief, or provide health insurance with abortion-related coverage required by the Mandate, which violates ORTL's beliefs. Consequently, ORTL requires a conscience-exemption from the Mandate, but the Mandate provides for none for ORTL and similarly situated entities that choose not to provide abortion-related coverage in health insurance that they provide.

32. ORTL also believes that it should provide health insurance for its employees for the ordinary reasons of obtaining and retaining excellent employees to help ORTL further its mission, so forcing ORTL to forego such health insurance would put it at a competitive disadvantage and

hamper its mission. And the sort of employees that ORTL wants to obtain and retain, want health-insurance coverage, but without the coverage to which ORTL and they object.

33. ORTL's objection to the mandate is twofold. First, ORTL objects to providing coverage in the health benefit plan it provides its employees for *abortion and abortion-related services*—except where the mother's life is in imminent danger—on both (a) moral and religious free-exercise grounds and (b) free-expression and free-expressive-association grounds.

34. Second, on the same grounds and as part of its objection to covering abortion, ORTL objects to covering four *abortifacients*, i.e., (a) Plan B (levonorgestrel), (b) Ella (ulipristal acetate), (c) copper IUDs (like ParaGard), and (d) IUDs with progestin—or any comparable "contraceptives" of the same type and chemical makeup that can also act as abortifacients.

ORTL's Other Options Are Inadequate

ORTL's present exemption request to DCBS is brought under the Weldon Amendment, *see, e.g.*, Consolidated Appropriations Act, 2018, Pub. L. 115-41, Div. H, § 507(d), 132 Stat. 348 (Mar. 23, 2018) (emphasis added),[3] requiring only a showing of "discrimination on the basis that [ORTL] does not . . . provide coverage of . . . abortions"—with imposed abortion coverage comprising the triggering "discrimination." *See* Memorandum in Support of ORTL's Exemption Request at Part III. So ORTL need not show more, e.g., that other options don't exist, or that existing options are unsuitable, or that seeking other options would be futile. ORTL does in fact believe that seeking an exemption, given the Mandate, would be futile. Nonetheless, ORTL briefly

[3] *Available at* https://budgetcounsel.files.wordpress.com/2018/04/consolidated-appropriations-act-2018-pub-l-115-141-132-stat-348-march-23-2018-h-r-1625-115th-congress-enrolled-bill.pdf. Weldon has been added to Department of Health and Human Services ("HHS") appropriation bills since 2005. *See* https://www.hhs.gov/conscience/conscience-protections/index.html.

discusses why certain other options are inadequate.

35. Due to its number of employees, ORTL is not covered by the Affordable Care Act ("ACA"), so it is not required to provide ACA-compliant coverage, but if it were it would have conscience protections (like those sought from DCBS) under HHS rules issued in 2017. *See, e.g.*, https://www.hhs.gov/sites/default/files/fact-sheet-religious-exemptions-and-accommodations-for-coverage.pdf (conscience exemptions provided from ACA by rule for those objecting to covering abortion and certain "contraceptives" based on moral or religious grounds). In contrast, HB 3391's Mandate is designed to "ensure[] that people with Oregon private health insurance plans, including employee-sponsored coverage, have access to reproductive health and related preventive services with no cost sharing *regardless of what happens with the Affordable Care Act*." *See* https://www.oregon.gov/oha/PH/HEALTHYPEOPLEFAMILIES/REPRODUCTIVESEXUALHEALTH/Pages/reproductive-health-equity-act.aspx (emphasis added).

36. ORTL wants—under an Oregon-compliant health benefit plan—the sort of conscience protection currently available under the ACA, which protects employers from having to provide against conscience abortion and abortifacient coverage. *See, e.g.*, https://www.hhs.gov/sites/default/files/fact-sheet-religious-exemptions-and-accommodations-for-coverage.pdf.

37. ORTL wants to provide health insurance to its employees in a group plan approved by Oregon that is compatible with the moral and religious beliefs of ORTL and its directors, officers, employees, and members.

38. Providence Health Plan ("PHP") is not suitable for ORTL and its employees because Oregon Health & Science University ("OHSU") is not in-network. OHSU is a premier health care facility that ORTL wants its employees to be able to access in-plan and which ORTL's em-

ployees want to access in-plan. PHP is also not suitable because the basis of its grandfathered plan is only that it did not offer abortion coverage in 2017, not that it did not offer coverage to the four abortifacients to which ORTL objects. Finally, PHP has shown an increase of 27.19% in plan costs for the upcoming plan year, making it economically undesirable.[4]

39. Faith-based medical cost sharing groups are not suitable because (inter alia) ORTL wants to provide, and its employees want to receive, traditional and comprehensive health insurance coverage of the sort governed by the Mandate, absent its coverage of abortion and abortifacients.

40. Direct primary care alternatives are inadequate because (inter alia) ORTL wants to provide, and its employees want to receive, traditional and comprehensive health insurance coverage of the sort governed by the Mandate, absent its coverage of abortion and abortifacients.

41. ORTL has not sought a "religious employer" exemption under § 2(9) of the Bill because doing so would be futile given the overly narrow "religious employer" definition.

42. ORTL has inquired from Oregon insurers about whether plans exist for religious employers that would be ideologically compatible with ORTL's beliefs and has discovered that such plans either exist right now or will be offered in 2020.

43. Though ORTL does not believe that it qualifies as a "religious employer" under the narrow definition of that phrase, ORTL seek an exemption *like* that authorized for "religious employers" at § 2(9) of the Bill, i.e., one that authorizes (i) *insurers to offer* and (ii) *employers to obtain* health benefit plans excluding contraceptive and abortion coverage to which employers object.

[4] This increase is significantly higher than other Oregon insurers.

Verification

I, Lois Anderson, verify that:

- I am the Executive Director of ORTL;
- I am familiar with the facts about ORTL and its directors, employees, and members, including the foregoing facts;
- If called upon to give testify concerning the foregoing, I would do so competently; and
- I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence and is subject to penalty for perjury.

April 29, 2019
Date

Lois Anderson, ORTL Executive Director

Restated Articles of Incorporation of Right to Life/Oregon

EXHIBIT A

RESTATED ARTICLES OF INCORPORATION

OF

RIGHT TO LIFE/OREGON

These restated articles of incorporation are filed pursuant to ORS 65.047, 65.431, 65.434(1)(e) and (f), and 65.451.

These restated articles of incorporation were adopted by the board of directors of Right to Life/Oregon at its regularly scheduled meeting on July 17, 1993, in Salem, Oregon by a vote of 16 in favor and none opposed with a quorum of the board of directors present and voting. No persons other than members of the board of directors were entitled to vote on this matter.

The principal purposes of these restated articles are (i) to change the corporate name from Right to Life/Oregon to Oregon Right to Life, and (ii) to conform the articles of incorporation to Chapter 65 of the Oregon Revised Statutes.

The present (not new) name of this corporation is Right to Life/Oregon.

The following are the restated articles of incorporation:

ARTICLE I

Name

The name of this corporation is Oregon Right to Life.

ARTICLE II

Duration

The duration of this corporation is perpetual.

ARTICLE III

Public Benefit Corporation

This corporation is a public benefit corporation.

3/30/12

ARTICLE IV

Office

The corporation's registered office and its principal corporate mailing address is:

Oregon Right to Life
Suite 22
3857 Wolverine, N.E.
Salem, Oregon 97305

ARTICLE V

Registered Agent

The corporation's registered agent is Lynda Harrington.

ARTICLE VI

Members

A. Members of Oregon Right to Life are entitled to elect two directors at large at such times and in such manner as shall be provided in the bylaws.

B. Any person who indicates agreement with the philosophy and principles of Oregon Right to Life as stated in its bylaws by contributing $5.00 or more to Oregon Right to Life or to any of its chapters shall be a member of Oregon Right to Life beginning on the date of contributing and ending on the January 1st that follows the calendar date that is twenty months from the person's last such contribution.

ARTICLE VII

Directors

A. All corporate powers shall be exercised by or under the authority of the board of directors.

B. The board of directors shall consist of not less than 21 members and not more than 31 members.

C. The members of the board of directors shall be elected in such manner and for such terms of office as are stated in the bylaws.

ARTICLE VIII

Purpose

A. The general purpose of this corporation is to engage in any lawful activity permitted to it under Oregon and federal law.

B. The specific purpose of this corporation is to educate all people with respect to the medical and moral aspects of abortion, to promote enactment of legal safeguards to protect every human life, including the lives of the small, the weak, and the poor, to promote knowledge of human development, to encourage and support all persons and organizations which try to safeguard human life, and to preserve the inherent dignity of every human life from conception to death.

ARTICLE IX

Distribution of Assets upon Dissolution of Corporation

If this corporation is dissolved by action of its board of directors pursuant to the bylaws or otherwise in accord with Oregon law, its net assets shall be given in equal shares to St. Mary's Boys' Home, Beaverton, Oregon, and Shriners Hospital for Crippled Children, Portland, Oregon.

* * * *

Under penalties of perjury, we affirm the foregoing statements and articles to be true, correct, and complete.

Lynda Harrington,
Executive Director,
Oregon Right to Life

Date

Heidi Thomas,
President, Oregon Right to Life

Date

Beverly Bresnahan,
Secretary, Oregon Right to Life

Date

CERTIFICATE TO ACCOMPANY

RESTATED ARTICLES OF INCORPORATION

(ORS 65.451(6))

1. The present name of this corporation is Right to Life/Oregon. The corporation's name adopted in its restated articles of incorporation is Oregon Right to Life.

2. This certifies that pursuant to the assumed business name registration number 352165-89 most recently filed on June 26, 1993, Right to Life/Oregon holds the right to use the name "Oregon Right to Life" in Marion County, Oregon. This also certifies that the corporation hereby waives the use of that name under its assumed business name registration and releases the name to itself for use as its official corporate name as stated in its restated articles of incorporation.

3. The restated articles of incorporation did not require approval of the corporation's regular members and did not require approval of any other person (including any person described in ORS 65.467).

4. In accord with its bylaws, the restated articles of incorporation were approved by a vote of 16 in favor and none opposed at a regular meeting of the board of directors on July 17, 1993, in Salem, Oregon, with a quorum of the board of directors present and voting.

Under penalties of perjury, the undersigned affirm that the foregoing statements are true.

Lynda Harrington,
Executive Director,
Oregon Right to Life

Date

Heidi Thomas,
President, Oregon Right to Life

7-12-93
Date

Beverly Bresnahan,
Secretary, Oregon Right to Life

Date

CERTIFICATE - Page 1

The Bylaws of Oregon Right to Life

EXHIBIT B

THE BYLAWS OF OREGON RIGHT TO LIFE

(1993)

9/18/93

OREGON RIGHT TO LIFE BYLAWS

Table of Contents

OREGON RIGHT TO LIFE

Bylaws

Section 1. Name and Purpose

(a) The name of this organization is Oregon Right to Life. This organization is an Oregon non-profit, public benefit corporation organized under chapter 65 of the Oregon Revised Statutes.

(b) The specific purpose of this corporation is to promote the legal right of every innocent person to live from the point of conception to natural death, to educate the public and promote pro-life legislation regarding abortion, infanticide, and euthanasia, to encourage and assist other pro-life persons and organizations consistent with our by-laws, and to preserve the inherent dignity of human life.

(c) The corporation's members, chapters, directors, officers, and representatives shall carry out its stated purposes under the direction of the board of directors in accord with such programs and policies it may adopt and implement from time to time. The corporation does not promote or permit its members, chapters, directors, officers, or agents to support or engage in any illegal act of any kind in connection with the programs and policies of Oregon Right to Life.

Section 2. Effective Date and Transition Rules

(a) These bylaws restate and supercede the bylaws adopted in December, 1988. Except as provided in subsection (b), these bylaws shall be effective immediately upon adoption by an affirmative vote of a majority of all members of the board of directors serving on the date of the vote.

(b) (i) All officers taking office on or after the date these bylaws are adopted and during the calendar year 1993, shall serve a term of approximately two years which ends in 1995 when their respective successors have been elected under these bylaws. For the purposes of the preceding sentence, officers shall include only the president, vice-president, secretary, and treasurer.

(ii) Any National Right to Life Committee delegate taking office on or after the date these bylaws are adopted and during the calendar year 1993

shall serve a term which ends on the date in 1995 on which his or her replacement takes office under these bylaws.

(iii) All members of the board of directors shall stand for election or reappointment under these bylaws during 1993 and 1994; directors so elected or appointed shall serve a two year term beginning April 1, 1994, and ending March 31, 1996, in accord with these bylaws.

Section 3. Members

(a) Any person who indicates agreement with the philosophy and principles of Oregon Right to Life as stated in its bylaws by contributing $5.00 or more to Oregon Right to Life or to any of its chapters shall be a member of Oregon Right to Life beginning on the date of contributing and ending on the January 1st that follows the calendar date that is twenty months from the person's last such contribution. A member may be an individual, a partnership, a corporation, or a trust.

(b) Members of Oregon Right to Life are entitled to elect two directors at large at such times and in such manner as are provided in these bylaws. Except as provided in this subsection (b), members shall have no right to vote under these bylaws.

(c) Members representing Oregon Right to Life must conduct their activities under the direction of the board of directors and in accord with its programs and policies.

Section 4. Chapters

(a) Members may join with other members to form an Oregon Right to Life chapter in their locality. Each member of a chapter is also a member of Oregon Right to Life.

(b) Each chapter must have at least three members. Persons wishing to be recognized as a chapter shall apply to the board of directors for recognition and certification. A chapter shall be certified by a majority vote of all members of the board of directors. If necessary, a chapter may be decertified by a majority vote of all members of the board of directors.

(c) Chapters of Oregon Right to Life must conduct their activities under the direction of the board of directors and in accord with its programs and policies.

(d) The board of directors shall appoint a chapter liaison officer to whom the chapters may look for help and guidance and through whom the board may communicate with the chapters.

Section 5. Directors

(a) The affairs of the corporation shall be governed in all cases by a board of directors, which shall have not less than 21 members and not more than 31 members. Except as otherwise provided by law or by the articles of incorporation or in these bylaws, a majority vote of board members attending a duly called meeting with a quorum of the board present (a quorum being at least fifty-one percent of all board members then serving) shall be effective to carry any motion or resolution presented to the board for action.

(b) The board shall consist of at least the following persons:

-- the executive director appointed by the board;

-- the corporate president;

-- the corporate vice-president;

-- the corporate treasurer;

-- the corporate secretary;

-- the Oregon delegate to the National Right to Life Committee;

-- the political action committee chairman;

-- the education committee chairman;

-- two general directors elected by the members of Oregon Right to Life;

-- ten district directors, two from each of Oregon's five federal congressional districts; and

-- between two and eight at-large directors.

(c) Each director shall serve for a term designated in section 6. In the event any sitting director fails for any reason to complete his or her term, the board

shall, upon prompt nomination by the president, elect a person to fill the remainder of that term.

(d) The board must hold at least four regular meetings in each calendar year, as called by the president. Special meetings shall be held with at least 48 hours written notice from at least three directors.

(e) The board shall have an executive committee to oversee management of the corporation between board meetings. The executive committee shall consist of the executive director, president, vice-president, treasurer, secretary, education committee chairman, political action committee chairman, and two board members designated by the board.

Section 6. Election of Officers and Directors

(a) Principal Officers

(i) The officers of this corporation shall be a president, vice-president, treasurer, and secretary, and such other officers as the board shall nominate and elect from time to time. The duties of the officers shall be determined by the board.

(ii) Election of officers shall occur in each odd-numbered year. The first such election under these bylaws shall be in 1995. At the board's third meeting of the calendar year (which must be held during June, July, or August), the board shall appoint a nominating committee to nominate one or more candidates for each office of president, vice-president, treasurer, and secretary. The committee shall present its nominations to the board in writing during the board's fourth meeting of the calendar year (which must be held in September, October, November, or December). Additional nominations may also be made and seconded from board members at that meeting. The board shall elect a president, vice-president, treasurer, and secretary from among those nominated, respectively, for those four offices. Those elected shall take office at the end of the meeting at which they were elected. Each officer shall serve a term of approximately two years which shall end when their respective successors have been elected.

(b) National Delegate

Prior to his or her election, a national delegate candidate must have been a member of the board of directors for at least twenty-four months in the most recent thirty-six months. Any person wishing to be a candidate for national delegate shall mail to each sitting board member a written notification of candidacy at least fourteen days before the date of the board's fourth meeting of the calendar year. The notice shall state the candidate's name, address, telephone number, dates of prior service on the board, and any additional information the candidate may wish to include. The board shall elect a national delegate from among those candidates eligible under this subsection who have sent qualified notices, or if no one has sent a qualified notice, then from among those nominated and seconded at the fourth meeting. The national delegate so elected shall take office at the end of the meeting at which he or she was elected and shall serve a term of approximately two years which shall end when his or her successor has been elected.

(c) Political Action Committee Chairman

The political action committee chairman shall be elected or appointed by the Right to Life/Oregon Political Action Committee under its own rules and procedures, and shall serve for such a term on the board as may be determined by that committee.

(d) Education Committee Chairman

The education committee chairman shall be the person serving as president of the Oregon Right to Life Education Foundation under its own rules and procedures, and shall serve for such a term on the board as may be determined by that foundation.

(e) General Directors

Two general directors shall be elected by the members of Oregon Right to Life, as follows. In all odd-numbered years (beginning in 1993), the secretary shall mail in September or October to each Oregon Right to Life member a notice stating that any member may nominate one person for general director by mailing to the secretary in an envelope postmarked no later than November 30th, the name, address, telephone number, signed certificate of willingness to serve, and short biography, of the person to be nominated. The executive director (or the president if no executive

director is then serving) shall select eight names from those properly nominated by members (or all such nominees if less than eight were nominated) and submit their nominating papers to the board's executive committee. The executive committee shall select four nominees to be submitted to a vote of the members. During the month of January in each even-numbered year, the secretary shall mail suitable ballots to all members. All ballots returned by hand delivery or mail with a postmark before the end of February will be valid and shall be counted. Of the four persons voted upon, the two with the most votes shall serve as general directors for a two year term beginning April 1st of the even-numbered year and ending March 31st of the next even-numbered year.

(f) District Directors

There shall be two directors elected from each Oregon federal congressional district as follows. On or before January 31st in each even-numbered year, any person wishing to be a district director shall present to the secretary a nominating petition signed by at least two members from each Oregon Right to Life chapter in his or her district. During February, the secretary shall certify the election of those presenting their petitions, unless more than two valid petitions have been received from a district; in which case a majority of the chapters in each district (with each chapter having one vote) shall elect two directors from among all those presenting valid petitions, unless there is a tie vote; in which case a majority of the whole board of directors shall elect a district director from those candidates involved in the tie vote of chapters. District directors shall serve a two year term beginning April 1st of the even-numbered year and ending March 31st of the next even-numbered year.

(g) At-Large Directors

There shall be between two and eight at-large directors chosen as follows. At least fourteen days before the first meeting of the board of directors in each even-numbered year, the president shall send written notification of his or her nominations for at-large directors (from two to eight in number) to each member of the board then sitting. The first meeting must be held in January, February, or March of the calendar year. The written notification shall state the name, address, telephone number, and qualifications for office of each nominee. At its first meeting of the calendar year, the board shall accept or reject the president's

nominations one at a time. Those candidates accepted by the board shall serve a two year term, beginning April 1st of the even-numbered year and ending March 31st of the next even-numbered year.

Section 7. Budget and Finance

(a) All money received by Oregon Right to Life from any source shall be deposited into an Oregon Right to Life bank account and be recorded in its books of account.

(b) No Oregon Right to Life funds may be expended except by check bearing the signatures of two persons designated by the executive committee of the board.

(c) A petty cash fund may be maintained under rules and procedures established by the executive committee of the board.

(d) At least fourteen days before the first meeting of the board in every calendar year, a proposed calendar year budget for the then current calendar year prepared by the treasurer, the executive director, and the executive committee shall be mailed to each sitting board member. The board shall approve, or revise and approve, the proposed budget at its first meeting of the year.

(e) Prior to approval of the calendar year budget, expenditures may continue to be made under the terms of the prior year's budget as if they applied to the portion of the current year occurring before the board's first annual meeting. Such expenditures shall then be taken into account as part of the current year's budget as approved by the board.

(f) No funds shall be spent in any year in excess of the budgeted amount for each category for that year, except that the executive committee may approve no more than a total of $5,000 in expenditures over the entire budget with no more than $1,000 of such $5,000 being approved for any one item as determined by the executive committee. Any such excess expenditure shall be promptly reported in writing to the full board at its next regular meeting.

(g) Complete financial records shall be maintained by the treasurer, a summary which shall be submitted to the board at each of its regular meetings. Any board member may examine all financial records at any time.

Section 8. Bylaw Amendments

These bylaws may be amended by the board of directors by majority vote of all then sitting members.

Section 9. Operating Rules

(a) Executive committee members may not vote by proxy.

(b) Members of the board of directors may vote at directors' meetings by proxy given in writing for that meeting to another attending member of the board.

(c) The political action committee chairman and education committee chairman may vote by proxy at directors' meetings by giving a written proxy for that meeting to any person he or she selects, who may then attend the meeting and cast the vote of the person giving the proxy.

(d) Except as provided in these bylaws, Robert's Rules of Order shall govern all board or committee meetings.

* * *

Adopted by the board of directors this 18th day of September, 1993.

Attest:

Beverly Bresnahan, Secretary

OREGON RIGHT TO LIFE

Amendment to Bylaws

Declarations:

The current bylaws of the Oregon Right to Life were adopted on September 18, 1993, by the board of directors.

Section 5(e) of the bylaws was amended on January 23, 1994, to add the Oregon delegate to the National Right to Life committee to the designated members of the board's executive committee.

The purpose of this amendment to bylaws is to:

(i) add to the board's executive committee as a designated member the chairman of the issues political action committee;

(ii) to retain as a member of the board's executive committee the chairman of the candidates' political action committee; and

(iii) to add as a designated member of the full board of directors the chairman of the issues political action committee and to retain as a designated member of the full board of directors the chairman of the candidates' political action committee.

Resolutions:

Accordingly, the full board of directors of Oregon Right to Life hereby makes the following two changes in the bylaws dated September 18, 1993:

(1) Subsection (b) of section 5 of the bylaws is deleted in its entirety and in its place is inserted the following:

"The board shall consist of at least the following persons:

-- the executive director appointed by the board;

-- the corporate president;

-- the corporate vice-president;

-- the corporate treasurer;

-- the corporate secretary;

-- the Oregon delegate to the National Right to Life Committee;

-- the issues political action committee chairman;

-- the candidates' political action committee chairman;

-- the education committee chairman;

-- two general directors elected by the members of Oregon Right to Life;

-- ten district directors, two from each of Oregon's five federal congressional districts; and

-- between two and eight at-large directors."

(2) Subsection (e) of section 5 of the bylaws is deleted in its entirety and the following new subsection (e) is inserted in its place.

"(e) The board shall have an executive committee to oversee management of the corporation between board meetings. The executive committee shall consist of the executive director, president, vice-president, treasurer, secretary, education committee chairman, issues political action committee chairman, candidates' political action committee chairman, and two board members designated by the board."

* * *

Duly adopted this 3RD day of MAY, 1996.

Brenda Crosby
Secretary

OREGON RIGHT TO LIFE

Amendment to Bylaws

The bylaws of Oregon Right to Life were adopted by the Oregon Right to Life directors on September 18, 1993. Section 5(e) of the bylaws was amended on January 23, 1994, and sections 5(b) and 5(e) of the bylaws were amended May 3, 1996. This present amendment is adopted for the purpose of adding to the Oregon Right to Life board of directors five permanent seats dedicated to representatives from Oregon Right to Life Education Foundation and for the purpose of adding to the Oregon Right to Life executive committee two permanent seats for the president and the vice president of Oregon Right to Life Education Foundation.

Subsection (b) of section 5 of the Oregon Right to Life bylaws is amended by adding the following language designating members of the board of directors that replaces the board membership seat for the education committee chairman:

> "Five permanent seats for representatives of the Oregon Right to Life Education Foundation shall be filled from time-to-time by the president, the vice president, the secretary, the treasurer, and the executive director of Oregon Right to Life Education Foundation as designated by the Oregon Right to Life Education Foundation Executive Committee;"

Subsection (e) of section 5 of the Oregon Right to Life bylaws is amended by deleting as a member of the executive committee the education committee chairman, and by inserting in place of the education committee chairman the president and the vice president of Oregon Right to Life Education Foundation.

* * *

Duly adopted this 23rd day of April, 1999.

Secretary, or Secretary pro tem

OREGON RIGHT TO LIFE

Amendment to Bylaws

Declarations:

The current bylaws of Oregon Right to Life were adopted on September 18, 1993, by the board of directors.

Section 5(e) of the bylaws was amended on January 23, 1994, and Section 5(b) was amended on May 3, 1996. Section 5(b) was again amended on April 5, 1999.

The purpose of the current amendment is to designate at least one of the at-large directors to be of youthful age.

Resolution:

Accordingly, the full board of directors of Oregon Right to Life hereby amends the Bylaws dated September 18, 1993 (as later amended):

Subsection (b) of Section 5 is deleted in its entirety and in its place is inserted the following:

"(b) the board shall consist of at least the following persons:

- the executive director appointed by the board;
- the corporate president;
- the corporate vice-president;
- the corporate secretary;
- the corporate treasurer;
- the Oregon delegate to the National Right to Life Committee;
- the issues Political Action Committee chairman;
- the candidates Political Action Committee chairman;
- five permanent seats for representatives of the Oregon Right to Life Education Foundation which shall be filled from time to time by the president, the vice president, the secretary, the treasurer, and the executive director of Oregon Right to Life Education Foundation, each as designated by the Oregon Right to Life Education Foundation Executive

Committee;

– two general directors elected by the members of Oregon Right to Life;

– ten district directors, two from each of Oregon's five federal congressional districts; and

– between two and eight at-large directors, at least one of whom must be age 25 years of age or younger at the time he or she is chosen to serve."

Duly adopted this 2nd day of February 2008.

Secretary

Oregon Right to Life
Amendment to Bylaws

The following amendment, which is an addition to the bylaws, Section 5 was adopted by the Oregon Right to Life Board of Directors at the board meeting held on January 28, 2012:

(e)The combined total number of employees of Oregon Right to Life and Oregon Right to Life Education Foundation who may serve as Directors of the Board of Oregon Right to Life at the same time shall be no more than five (5).

The current subsection (e) is to be renamed as subsection (f).

Duly adopted January 28, 2012

Oregon Right to Life President, Dr. Joan Sage

Oregon Right to Life
Amendment to Bylaws

The following amendment to Section 8 of the by-laws was adopted by the Oregon Right to Life board of directors at the board meeting held on January 28, 2012:

These bylaws may be amended by a majority vote of all then sitting members of the Board of Directors, subject to the following requirements: An amendment to the Bylaws by such a vote of the Directors will not become effective unless and until written notice of the amendment language is given to all then sitting Board members at least one week before the next regular meeting of the board and the amendment is again ratified by a majority of all then sitting members.

Duly adopted January 28, 2012

Oregon Right to Life President, Dr. Joan Sage

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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.

On Appeal from the United States District Court
for the Northern District of California

SUPPLEMENTAL BRIEF FOR THE FEDERAL APPELLANTS

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ARGUMENT

On January 13, 2019, the district court below entered a preliminary injunction barring the government from implementing the challenged rules in the fourteen plaintiff States. *See* ER 1-45. It is indisputable that the government had standing to appeal the injunction at that point. A day later, a district court in Pennsylvania entered a preliminary injunction barring the government from enforcing the challenged rules against anyone nationwide. *See Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019). This Court has asked whether that intervening action mooted the government's appeal of the injunction in this case.

A case becomes moot when "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). But "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* Here, as a matter of both law and logic, the entry of the nationwide preliminary injunction in *Pennsylvania* did not eliminate the parties' continuing concrete interest in the validity of the injunction entered in this case.

1. To begin, the parties have a continuing interest in the injunction entered in this case because the *Pennsylvania* injunction is neither final nor permanent. The possibility that the *Pennsylvania* injunction may not persist is sufficient reason to conclude that this appeal is not moot.

As the Supreme Court recognized in *Chafin*, "[c]ourts often adjudicate disputes where the practical impact of any decision is not assured." 568 U.S. at 175. For example, the Court has heard the government's appeal from the reversal of a criminal conviction even after the defendants had been deported, because of the possibility that "the defendants might 're-enter this country on their own' and encounter the consequences of [the Court's] ruling." *Id.* at 176 (quoting *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983)).

Accordingly, a ruling by another court does not moot a case when further review of that ruling is being pursued. *See, e.g.*, *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 n.7 (2005) (Delaware Supreme Court ruling did not render similar action moot, because defendant "will petition [the U.S. Supreme] Court for a writ of certiorari"); *National Wildlife Fed'n v. Burford*, 677 F. Supp. 1445, 1453

(D. Mont. 1985) (action to set aside coal leases was not mooted by a judgment in another action voiding the leases, because post-judgment motions remained pending and appeal of the judgment was still possible), *aff'd*, 871 F.2d 849 (9th Cir. 1989).

The nationwide injunction in *Pennsylvania* thus does not moot this appeal, because the government's appeal of that injunction is pending. *See Pennsylvania v. President*, Nos. 17-3752, 18-1253, 19-1129, & 19-1189 (3d Cir.) (oral argument scheduled for May 21, 2019). If the government were to prevail in that appeal, the nationwide injunction would be lifted, freeing the government to implement the challenged rules in the fourteen plaintiff States here if this Court also were to vacate the more limited injunction the district court issued below. That is a sufficiently concrete interest to allow both appeals to go forward. And that is especially so because the *Pennsylvania* injunction is only a preliminary injunction—it remains possible the district court there may itself reconsider and deny a permanent injunction, leaving the injunction here as the only one on the books.

2. Even if the *Pennsylvania* injunction were permanent and final, the parties still would have a continuing interest in the validity of the

injunction entered in this case. That is because the injunction here is a separate judicial order that creates distinct rights and responsibilities for the parties with respect to future enforcement.

The Supreme Court has held that a "judgment adverse" to a defendant is "an adjudication of legal rights which constitutes the kind of injury cognizable" on appellate review, because the judgment has "disabling effects upon" the defendant and a successful appeal would eliminate those effects. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618-19 (1989). And conversely, a plaintiff that "obtains a judgment in its favor acquires a 'judicially cognizable' interest in ensuring compliance with that judgment." *Salazar v. Buono*, 559 U.S. 700, 712 (2010) (plurality opinion). All of this remains true even when a judgment in a different case has entered the same substantive relief: the order in each case remains separately enforceable against the defendants by the plaintiffs in each case. Here, even assuming the *Pennsylvania* injunction remains on the books, the government has a cognizable interest in not being subject to *additional* enforcement proceedings with respect to the injunction in this case, and the States have a cognizable interest in being able *themselves* to enforce the injunction they obtained (rather

than relying on the Commonwealth of Pennsylvania to enforce the nationwide injunction it obtained).

3. The analysis above is not affected by the fact that the *Pennsylvania* injunction was issued by a district court outside this circuit. But that geographic fact does underscore the practical problems with any contrary conclusion.

If the existence of one nationwide injunction mooted the appeal of all injunctions of narrower scope entered within a different circuit, that would necessarily mean the entry of *two* or more nationwide injunctions entered in different circuits would moot *any* appeal from *any* injunction. After all, a circuit court's vacatur of the nationwide injunction before it would not itself grant relief against the nationwide injunctions pending in other circuits, and there would be no logical basis for allowing an appeal to proceed in one case but not the rest.

This, of course, would exacerbate the problems with nationwide injunctions. In addition to improperly allowing a single district court or circuit court to enter relief governing non-parties throughout the country, *see California v. Azar*, 911 F.3d 558, 583-84 (9th Cir. 2018); *United States v. Mendoza*, 464 U.S. 154, 163 (1984), nationwide

injunctions could be wielded by district courts to insulate their decisions from appellate review altogether. The doctrine of mootness should not be construed to compel such a perverse result.

4. Indeed, although this Court has not expressly held as much, its prior practice is consistent with the fundamental and commonsense principle that a nationwide injunction entered in another circuit does not moot an appeal from a parallel injunction entered in this circuit. For example, in *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017), this Court adjudicated the government's appeal of an injunction against an executive order even though another circuit had already upheld a nationwide injunction barring enforcement of the same executive order, *see International Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017). Likewise, in *Regents of the University of California v. U.S. Department of Homeland Security*, 908 F.3d 476 (9th Cir. 2018), this Court adjudicated the government's appeal of an injunction against certain aspects of the rescission of an executive policy even though a district court in another circuit had issued a nationwide injunction against the same aspects of the rescission, *see Batalla Vidal v. Nielsen*,

279 F. Supp. 3d 401 (E.D.N.Y. 2018), *appeal docketed*, No. 18-485 (2d Cir. Feb. 20, 2018).

5. In any event, even assuming the *Pennsylvania* injunction has rendered the government's appeal moot, the proper disposition would still be to vacate the injunction below, for two reasons. First, when "the vagaries of circumstance" render a party's appeal moot, the "established practice" is to vacate the judgment below, because that party "ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22, 25 (1994). Second, if the *Pennsylvania* injunction moots the government's appeal, it likewise moots the States' underlying claims. The States would have no cognizable interest in obtaining an injunction, for the same reason the government would have no cognizable interest in vacating the injunction. And if the States' claims have become moot, then this Court can and must vacate the injunction in the States' favor. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-75 (1997). Of course, the absurdity of vacating the States' injunction and dismissing their claims as moot just underscores the error in concluding that the government's appeal is moot.

CONCLUSION

For the foregoing reasons, the government's appeal is not moot.

Respectfully submitted,

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MAY 2019

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

I further certify that, pursuant to 9th Cir. R. 32-3, this brief complies with the page limit in this Court's order dated April 29, 2019, because this brief contains 1,376 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word, and the word count divided by 280 does not exceed 5 pages.

/s/ Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.