Nos. 18-15144; 18-15166; 18-15255

In the United States Court of Appeals for the Ninth Circuit

THE STATE OF CALIFORNIA, *et al.*,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

and

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,

Intervenor-Defendant-Appellant,

and

MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

Intervenor-Defendant-Appellant.

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

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

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CORPORATE DISCLOSURE STATEMENT

Defendant-Intervenor-Appellant the Little Sisters of the Poor Jeanne Jugan Residence (the Little Sisters) make this disclosure statement pursuant to Federal Rule of Civil Procedure 26.1. The Little Sisters do not have any parent entities and do not issue stock.

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INTRODUCTION

The States' challenge is much worse than a day late and a dollar short. Having spent six years sitting on the sidelines while the federal government and religious organizations fought it out over interests the States now claim are incredibly important, the States cannot now come in and upset the resolution of that litigation, especially in defiance of a Supreme Court order still very much in force. And even if the States had bothered to bestir themselves earlier, they still would never have had standing, third-party or otherwise, to challenge the federal interim final rule (IFR) at issue here.

The States' six years of silence speak volumes. They made no attempt at all to intervene in any of the dozens of contraceptive mandate cases over the past six years, precisely because they had no actual interest at stake. And because they had no interest in whether private religious organizations were subject to a federal contraceptive mandate despite federal civil rights laws, the States do not claim (and appear not) to have filed comments about any of the prior versions of the contraceptive mandate—not in 2010, not in 2011, not in 2014. If hundreds of thousands of people and organizations could take that step, why didn't the States?

None of that changed with the federal government's most recent IFR, which grants a religious exemption to the Little Sisters of the Poor and other groups. The new federal exemption requires nothing at all from the States. For example, the States have no role in administering the federal exemption. Nothing in the challenged federal exemption stops the States from imposing their own contraceptive mandates, and nothing requires the States to grant a parallel exemption if they do so.

Nor were the States receiving contraceptive benefits that might suddenly be lost because of the challenged federal exemption. The States are not employees, beneficiaries, or third-party beneficiaries to insurance contracts obtained by the Little Sisters or other religious groups. They had no rights under those contracts, either before or after the federal mandate and federal exemption. In short, as to the issue of whether federal law requires a religious exemption from the federal contraceptive mandate, the States are exactly what they have been for the first seven years of comment periods and six years of litigation over this issue: complete bystanders.

Standing doctrine exists precisely to prevent such bystanders from dragooning the federal courts into what are essentially political

disagreements. There is no doubt that the state attorneys general who filed this lawsuit have strong political and career-based interests in suing the Trump Administration. But the States have no legally cognizable interest—no actual, imminent, or even foreseeable injury traceable to the IFR—that would satisfy Article III. The closest they can come is a long and far-fetched chain of speculation that the State fisc might someday be impacted because there might (1) be some employer, not already protected by an injunction, who would change coverage because of the rule (though to date the five plaintiff States together can't find even one such employer); (2) that the unidentified employer would have employees who do not share its religious views and who want the coverage the employer chooses not to provide (though to date the five States can't find even one such employee among their 74.9 million residents); (3) that the as-yet-unknown employee of the as-yet-unknown employer might choose a contraceptive method not covered by her employer's insurance; (4) that the as-yet-unknown employee would qualify for state aid; and (5) that the employee would either turn to the state for contraceptive coverage or, in an even less likely example, choose to forgo contraception, become pregnant, and choose state aid rather than private insurance to cover her

costs. This guesswork is not even close to an actual injury traceable to the new rule. The district court therefore had no authority to hear this case.

But even if it did, the court should have denied the injunction on the merits. That is because the federal government's ongoing violations of federal civil rights law (the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. (RFRA)) and the Free Exercise Clause required the new religious exemption. Put another way, the government had to issue the IFR, or it would have violated the Constitution and RFRA.

An IFR is even more justified in this particular context because the challenged IFR is actually the *fourth* IFR—an IFR issued after hundreds of thousands of comments to fix an earlier illegal system, created by earlier IFRs. The district court's injunction—issued on the ground that proceeding by a *fourth* IFR was suddenly illegal—thus bizarrely reinstituted a set of rules that had itself been initiated by IFR upon IFR upon IFR. But IFRs are either allowed in this context or they are not—it makes no sense to invalidate the IFR-based fix, but retain the underlying IFR-based mandate. If IFRs are impermissible, the underlying mandate

is likewise invalid, and the district court erred by reinstating it. For these reasons, this Court should reverse.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case under 28 U.S.C. § 1331, and this Court has jurisdiction under 28 U.S.C. § 1292(a)(1). The States, however, lack Article III standing. Thus, this Court lacks subject matter jurisdiction over this case. This appeal is timely filed under Fed. R. App. P. 4(a)(1)(B), as the order appealed from was filed December 21, 2017 (ER 29), and the notices of appeal were filed February 16, 2018 (ER 31), January 31, 2018 (ER 32) and January 26, 2018 (ER 34).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Can the States show an injury from the Fourth and Fifth IFRs that is not conjectural or hypothetical, that is fairly traceable to the conduct of the defendant agencies, and that affects the States in an individual and personal way sufficient for standing to bring this lawsuit?

2. Did the agencies have good cause to issue a religious exemption via IFR after public comments on three prior IFRs and six years of litigation indicated that the prior regulations violated federal law?

STATEMENT OF THE CASE

A. The mandate and its exceptions

This case originates with the Patient Protection and Affordable Care Act of 2010, (ACA) Pub. L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. The ACA requires that certain employers must offer "a group health plan . . . offering group or individual health insurance coverage" that provides coverage for "preventive care and screenings" for women without "any cost sharing requirements." 42 U.S.C. § 300gg-13(a)(4); 26 U.S.C. § 9815; 29 U.S.C. § 1185d.

Congress did not specify what "preventive care and screening" means. Instead, Congress delegated that question to the Health Resources and Services Administration (HRSA), a sub-agency within the Department of Health and Human Services (HHS). 42 U.S.C. § 300gg-13(a)(4). HHS, in turn, asked the Institute of Medicine (IOM), a private health policy organization, to develop recommendations. 77 Fed. Reg. 8,725, 8,726 (Feb. 15, 2012). IOM published a recommendation that excluded from consideration factors such as "the cost-effectiveness of screenings or services," or potential religious objections to the recommended drugs and

services.[1] The recommendation suggested that HHS define "preventive care" to include "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.* at 10. The 20 FDA-approved contraceptive methods include both drugs and devices that operate to prevent fertilization of an egg, and four drugs and devices—two types of intrauterine devices and the drugs commonly known as Plan B and *ella*—that can prevent implantation of a fertilized egg.

Thirteen days later, and without any opportunity for public comment, HHS adopted the IOM's recommendation entirely, 77 Fed. Reg. at 8,725-26; 76 Fed. Reg. 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv), and the Labor and Treasury Departments adopted regulations to the same effect, 29 C.F.R. § 2590.715-2713(a)(1)(iv); 26 C.F.R. § 54.9815-2713(a)(1)(iv) (reserved for further guidance).[2] The penalty for offering a

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[1] Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps*, 3 (2011), https://www.nap.edu/catalog/13181/clinical-preventive-services-for-women-closing-the-gaps.

[2] The guidelines are available at the HRSA website. HRSA, *Women's Preventive Services Guidelines*, https://www.hrsa.gov/womens-guidelines/index.html (last accessed Apr. 9, 2018).

plan that excludes coverage for even one of the FDA-approved contraceptive methods is $100 per day for each affected individual. 26 U.S.C. § 4980D(a)-(b). If an employer larger than 50 employees fails to offer a plan at all, the employer owes $2,000 per year for each of its full-time employees. 26 U.S.C. § 4980H(a), (c)(1).

The mandate offered exemptions for many employers. Grandfathered plans—plans that have not made certain changes since March 2010—are entirely exempt from the mandate indefinitely. 42 U.S.C. § 18011. In 2017, approximately 23% of employers offered grandfathered plans.[3]

Also under the statute, employers with fewer than 50 full-time employees are not required to provide employees with a health plan at all. *See* 26 U.S.C. § 4980H(c)(2). In 2014, 34 million Americans—more than a quarter of the private-sector workforce—worked for employers who were not obligated to provide health insurance under this exemption. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2764 (2014).

As set forth in more detail below, the Mandate was thus instituted through a series of "interim final rules" or "IFRs":

[3] *See* Kaiser Family Found., *Employer Health Benefits 2017 Annual Survey* 204 (2017).

B. The First IFR

The mandate was first implemented in an interim final rule on July 19, 2010, published by the departments of Health and Human Services, Labor, and Treasury (the agencies). 75 Fed. Reg. 41,726, 41,728 (July 19, 2010) ("First IFR"). The First IFR reiterated the ACA's preventive service coverage requirements, stated that HRSA would produce comprehensive guidelines for women's preventive services, and provided further guidance concerning the ACA's restriction on cost sharing. *Id.* This IFR was enacted without prior notice of rulemaking or opportunity for prior comment, as it came into effect on the day that comments were due. The agencies' stated reason for not waiting for comment was that "it would be impracticable and contrary to the public interest to delay putting the provisions in these interim final regulations in place until a full public notice and comment process was completed." *Id.* at 41,730. They reasoned that, "in order to allow plans and health insurance coverage to be designed and implemented on a timely basis, regulations must be published and available to the public well in advance of the effective date of the requirements of the Affordable Care Act." *Id.* They also stated that because the ACA "protect[s] significant rights of plan participants and

beneficiaries and individuals . . . it is essential that participants, beneficiaries, insureds, plan sponsors, and issuers have certainty about their rights and responsibilities." *Id.* Defendants stated that they would later "provide the public with an opportunity for comment, but without delaying the effective date of the regulations." *Id.*

After the First IFR was issued, "several" commenters warned against the potential conscience implications of requiring religious individuals and organizations to include certain kinds of services—specifically contraception, sterilization, and abortion services—in their health plans. 76 Fed. Reg. at 46,623; *see, e.g.*, Catholic Medical Association, Comment Letter on First IFR (Sept. 17, 2010), https://www.regulations.gov/document?D=HHS-OS-2010-0018-0165. Two of the plaintiff States commented on the First IFR, but did not even bother to mention contraceptives in their comments at all. California Department of Public Health, Comment Letter on First IFR (Sept. 15, 2010), https://www.regulations.gov/document?D=HHS-OS-2010-0018-0078; New York State Insurance Department, Comment Letter on First IFR (Sept. 16, 2010), https://www.regulations.gov/document?D=HHS-OS-2010-0018-0091.

C. The Second IFR

Following the comment period on the First IFR, and thirteen days after IOM issued its recommendations, HHS promulgated its second IFR. 76 Fed. Reg. 46,621 ("Second IFR"). That same day, the HRSA issued guidelines on its website adopting the IOM recommendations in full, including all female contraceptive methods in the mandate.

The Second IFR stated that it "contain[ed] amendments" to the First IFR. *Id.* It granted HRSA "discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned." *Id.* at 46,623. It defined the term "religious employer" as an employer that (1) has as its purpose the "inculcation of religious values"; (2) "primarily employs persons who share the religious tenets of the organization"; (3) "serves primarily persons who share the religious tenets of the organization"; and (4) "is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." *Id.* at 46,626.

The Second IFR was effective immediately without prior notice or opportunity for public comment. The agencies stated that they had "good cause" to bypass that regulation because public comment was

"impracticable, unnecessary, or contrary to the public interest." *Id.* at 46,624. The stated reasons were that "a delay in implementation of the statutory requirement that women receive vital preventive services without cost-sharing . . . could result in adverse health consequences that may not otherwise have occurred." *Id.* They also said, "delay would mean many students could not benefit from the new prevention coverage without cost-sharing following from the issuance of the guidelines until the 2013-14 school year, as opposed to the 2012-13 school year." *Id.*

The agencies received "over 200,000" comments on the Second IFR. 77 Fed. Reg. at 8,726. Many of the comments explained the need for a broader religious exemption than that implemented by the Second IFR. However, on February 15, 2012, HHS adopted a final rule that "finaliz[ed], without change," the Second IFR. *Id.* at 8,725.

The agencies then published an Advance Notice of Proposed Rulemaking (ANPRM), 77 Fed. Reg. 16,501 (Mar. 21, 2012), and a Notice of Proposed Rulemaking (NPRM), 78 Fed. Reg. 8,456 (Feb. 6, 2013), which were later adopted in a final rule making further changes to the mandate, 78 Fed. Reg. 39,870 (July 2, 2013). Between the ANPRM and the NPRM, the agencies received over 600,000 comments. 78 Fed. Reg.

at 8,459 ("approximately 200,000 comments" submitted in response to ANPRM); 78 Fed. Reg. at 39,871 ("over 400,000 comments" submitted in response to NPRM). Many of those comments decried the suggestions as violating religious liberty, and explained how the mandate would violate the conscience of religious believers who objected to the contraceptives at issue. *Id.*; *see also*, *e.g.*, Christian Medical Association, Comment Letter on NPRM (Mar. 21, 2013), https://www.regulations.gov/document?D=CMS-2012-0031-64994 (NPRM "fails to avoid moral compromise for faith-based objectors"); Archdiocese of Washington, Comment Letter on NPRM (Apr. 4, 2013), https://www.regulations.gov/document?D=CMS-2012-0031-73981 ("Regrettably, the proposals contained in the NPRM fail to resolve the serious religious liberty issues presented by the Mandate.").

The agencies eventually amended the definition of a religious employer by eliminating some of the criteria from the Second IFR, limiting the definition to organizations "referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code." 78 Fed. Reg. at 39,874. Thus, the religious employers' exemption was limited to formal churches and religious orders, but not other religious nonprofits. The sole

contemporaneous explanation HHS offered for confining its exemption to this subset of religious employers is that it believed they are "more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at 39,874.

The agencies also adopted an arrangement—termed an "accommodation"—by which religious employers not covered by the exemption could offer the objected-to contraceptives on their health plans by executing a self-certification and delivering it to the organization's insurer, or if the organization has a self-insured plan, to the plan's third-party administrator (TPA). The self-certification would trigger the insurer or TPA's obligation to "provide[] payments for contraceptive services." 78 Fed. Reg. at 39,876 (insurers); *id.* at 39,879 (third-party administrators).

D. Mandate litigation and the Third IFR

The system initiated by the first two IFRs did not address the concerns of many religious organizations, and many filed lawsuits seeking relief under RFRA, the Constitution, and the Administrative Procedure Act. Intervenor-Appellants the Little Sisters of the Poor are part of a class action that was filed on September 24, 2013. Complaint, *Little Sisters of*

the Poor Home for the Aged v. Sebelius, 6 F. Supp. 3d 1225 (D. Colo. 2013) (No. 13-2611). The Little Sisters stated that they "are forbidden by their religion from participating in the federal government's regulatory scheme to promote, encourage, and subsidize the use of sterilization, contraceptives, and drugs that cause abortions." *Id.* ¶ 2. They also stated that they "have been offered a stark choice: they must either abandon their Catholic beliefs and participate in the [mandate], or they will be punished by the government with an array of fines and penalties unless and until they comply." *Id.* ¶ 5. Dozens of other religious organizations brought suit as well.[4] In July 2013, one of those organizations, Wheaton College, received an emergency injunction from the Supreme Court that protected it from the penalties in the mandate. *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014). Following that injunction, in August 2014 the agencies published a third IFR "in light of the Supreme Court's

[4] *See* Becket, *HHS Case Database*, https://www.becketlaw.org/research-central/hhs-info-central/hhs-case-database/ (last accessed Apr. 9, 2018). Many of these organizations made the argument that the mandate violated the Administrative Procedure Act because they did not allow sufficient time for notice and comment. The courts that considered the merits of the APA argument upheld the regulations. *See, e.g.*, *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 276 (D.C. Cir. 2014); *Real Alternatives, Inc. v. Burwell*, 150 F. Supp. 3d 419, 427 n.6 (M.D. Pa. 2015).

interim order" in *Wheaton College v. Burwell*, again without notice and comment. 79 Fed. Reg. 51,092 (Aug. 27, 2014) ("Third IFR").

This Third IFR amended the mandate to allow a religious objector to "notify HHS in writing of its religious objection" instead of notifying its insurer or third-party administrator. *Id.* at 51,094. The Third IFR stated that the self-certification sent to the government "shall be an instrument under which the plan is operated, shall be treated as a designation of the third party administrator as the plan administrator . . . and shall supersede any earlier designation." *Id.* at 51,099. The Third IFR received over 13,000 publicly posted comments. *See* EBSA, *Coverage of Certain Services Under the Affordable Care Act* (Aug. 27, 2014), https://www.regulations.gov/document?D=EBSA-2014-0013-0002. The States do not claim to have submitted any comments on the mandate, and a search of publicly available comments did not reveal any comments from the States other than comments submitted by agencies of California and New York on the First IFR, which did not even suggest including contraceptives as required preventive care.

As reasons for bypassing notice and comment, the agencies said that they must "provide other eligible organizations with an option equivalent

to the one the Supreme Court provided to Wheaton College . . . as soon as possible. Delaying the availability of the alternative process in order to allow for a full notice and comment period would delay the ability of eligible organizations to avail themselves of this alternative process . . . ." 79 Fed. Reg. at 51,095. The Third IFR was ultimately finalized on July 14, 2015. 80 Fed. Reg. 41,318 (July 14, 2015).

E. Supreme Court litigation

The Third IFR did not accommodate the Little Sisters' religious beliefs, because it continued to require the Little Sisters to use their health plans to provide objectionable drugs and services to their employees, and because they were still required to provide permission to authorize the mechanism by which their plans did so. *See, e.g.*, Br. for the Resp'ts at 38, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (accommodation coverage is "part of the same plan as the coverage provided by the employer") (quotations omitted). The Little Sisters' case proceeded to the Tenth Circuit Court of Appeals, where the Tenth Circuit affirmed the denial of a preliminary injunction. *Little Sisters of the Poor v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016). The Tenth Circuit held

that under RFRA, the mandate did not "substantially burden" the Little Sisters' religious exercise, because "the accommodation relieves Plaintiffs from complying with the Mandate and guarantees they will not have to provide, pay for, or facilitate contraceptive coverage." *Id.* at 1173.

The Little Sisters appealed this ruling to the Supreme Court, which granted certiorari and consolidated the Little Sisters' case with similar cases from the Third, Fifth, and D.C. Circuits. *See Zubik v. Burwell*, 136 S. Ct. 1557 (2016). At the Supreme Court, the agencies abandoned the arguments and factual findings upon which they had relied below. First, the government admitted for the first time that the accommodation required contraceptive coverage to be "part of the same plan as the coverage provided by the employer," Br. for the Resp'ts at 38, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (quotations omitted); Tr. of Oral Arg. at 60-61, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (Chief Justice Roberts: "You want the coverage for contraceptive services to be provided, I think as you said, seamlessly. You want it to be in one insurance package. . . . Is that a fair understanding of the case?"; Solicitor General Verrilli: "I think it is one fair understanding of the case."). The government thus removed any basis for the lower courts' prior holding

that the mandate did not impose a substantial burden on the religious exercise of objecting employers. Tr. of Oral Arg. at 61, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (Solicitor General Verrilli "would be content" if Court would "assume a substantial burden" and rule only on the government's strict scrutiny defense).

Next, the agencies admitted to the Supreme Court that it does not matter where the contraceptive coverage comes from and that women who do not receive contraceptive coverage from their employer can "ordinarily" get it from "a family member's employer," "an Exchange," or "another government program." Br. for the Resp'ts at 65, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418). The government also acknowledged that the mandate "could be modified" to avoid forcing religious organizations to carry the coverage themselves, Suppl. Br. for the Resp'ts at 14-15, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418).

The Supreme Court unanimously vacated the decisions of the Courts of Appeals of the Third, Fifth, Tenth, and D.C. Circuits. *Zubik*, 136 S. Ct. at 1560. It ordered the government not to impose taxes or penalties on petitioners for failure to comply with the mandate, and remanded the

cases to the Courts of Appeals so that the parties could be "afforded an opportunity to arrive at an approach going forward" that would resolve the dispute. *Id.*

The Little Sisters' case was remanded to the Tenth Circuit, where litigation was stayed, and has remained so while the government reconsiders the exemptions to the mandate. *See, e.g.*, Order, *Little Sisters of the Poor v. Hargan*, No. 13-1540 (10th Cir. June 27, 2016) (ordering parties to file periodic status reports).

F. The Fourth and Fifth IFRs

After the Supreme Court's order in *Zubik*, the agencies issued a "Request for Information" (RFI) in July 2016 to seek input from stakeholders on "whether there are modifications to the accommodation that would be available under current law and that could resolve the RFRA claims raised by organizations that object to the existing accommodation on religious grounds." 81 Fed. Reg. 47,741, 47,743 (July 22, 2016). The RFI received "over 54,000 public comments." 82 Fed. Reg. 47,792, 47,814 (Oct. 13, 2017).

The agencies initially concluded that they could not modify the mandate.[5] In October 2017, however, the agencies issued the IFRs at issue in this lawsuit. 82 Fed. Reg. 47,792 ("Fourth IFR").[6] The Fourth IFR protects those with religious objections, expressly referring to the Little Sisters' lawsuit and the Supreme Court decision in *Zubik* as the impetus for the regulatory change: "Consistent with . . . the Government's desire to resolve the pending litigation and prevent future litigation from similar plaintiffs, the Departments have concluded that it is appropriate to reexamine the exemption and accommodation scheme currently in place for the Mandate." *Id.* at 47,799. The agencies stated:

> "Good cause exists to issue the expanded exemption in these interim final rules in order to cure such violations [of RFRA] (whether among litigants or among similarly situated parties that have not litigated), to help settle or resolve cases, and to ensure, moving forward, that our

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[5] U.S. Dep't of Labor, FAQs About Affordable Care Act Implementation Part 36 at 4 (Jan. 9, 2017), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/ aca-part-36.pdf.

[6] The agencies issued another IFR on the same day, addressing a "moral exemption." 82 Fed. Reg. 47,838, 47,849 (Oct. 13, 2017) ("Fifth IFR"). The Fifth IFR is also challenged by the States, but the Little Sisters do not address it.

regulations are consistent with any approach we have taken in resolving certain litigation matters."

Id. at 47,814. The Fourth IFR set a sixty-day period for comments, which ended on December 5, 2017.

G. This lawsuit

On the same day the Fourth IFR was issued, California filed this lawsuit, seeking an injunction against the religious exemption granted by the new rule and the reimposition of penalties on the Little Sisters and other religious objectors. Complaint, Dkt. 1 (filed Oct. 6, 2017). On November 1, California filed an amended complaint adding the states of Delaware, Maryland, New York, and the Commonwealth of Virginia as co-plaintiffs. ER250. This is the first time these states have moved to intervene in any mandate cases to protest exemptions for contraceptive coverage, despite several prior years of litigation in dozens of cases, in which religious objectors received preliminary and permanent injunctions against the mandate. *See HHS Case Database*, *supra* n.1.

In support of standing, the States alleged that their "state sovereignty" was injured by the issuance of the Fourth and Fifth IFRs, which would cause "immediate and irreparable" harm and "frustrate the

States' public health interests by curtailing women's access to contraceptive care through employer-sponsored health insurance." ER253 ¶ 3, 255 ¶ 14. The States alleged that they would suffer harm because of the "increased costs of providing contraceptive coverage to many of the women who lost coverage through the [Fourth and Fifth] IFRs, as well as increased costs associated with resulting unintended pregnancies." ER255 ¶ 15. Finally, without claiming to have commented on any prior versions of the mandate, they alleged that they were "denied the opportunity to comment and be heard, prior to the effective date of the [Fourth and Fifth] IFRs." ER255 ¶ 16.

On November 9, the states moved for a preliminary injunction against the Fourth and Fifth IFRs, asking the Court to instead reinstate the rules that had been initially established by the first three IFRs. Pls.' Mot. for Prelim. Inj. (Nov. 9, 2017), ECF 28 ("Mot."). On November 21, the Little Sisters moved to intervene. On December 8, Intervenor-Appellant March for Life Education and Defense Fund (March for Life) moved to intervene. On December 29, 2017, the district court granted the motion to intervene of the Little Sisters and March for Life, and granted the States' motion for a preliminary injunction against the Fourth and Fifth IFRs.

H. The decision below

The district court ruled that the States have Article III standing to challenge the exemption because "they have shown that the [Fourth and Fifth] IFRs will impact their fiscs in a manner that corresponds with the [Fourth and Fifth] IFRs' impact on their citizens' access to contraceptive care." ER14. Without analysis, the district court held that "while the causation and redressability requirements are relaxed in cases of procedural injury, Plaintiffs also satisfy those prongs of the standing inquiry." *Id.* The district court also held that the States have statutory standing under the APA. ER16.

The district court then ruled that the States meet the standard for a preliminary injunction, holding that they had a strong likelihood of success because the agencies did not have statutory authority to forgo notice and comment for the Fourth and Fifth IFRs, ER21, and because they "had no good cause to forgo notice and comment," *id.* The district court specifically held that the "desire to cure violations of RFRA" did not constitute good cause. ER21-22. The district court's order purported to reinstate the scheme initially established by the prior IFRs as it existed in October 2017. ER28-29.

SUMMARY OF ARGUMENT

After seven years of opportunities for comment during the regulatory process, and six years of litigation in which the States chose not to intervene, the States do not have an interest in challenging the Fourth and Fifth IFRs, nor do they have sufficient arguments on the merits.

The States do not have standing to challenge the Fourth IFR—a religious exemption from a federal mandate that has no effect on state law—because the States have no Article III injury. The States have presented no evidence that any of their citizens will suffer harm as a result of the IFR, let alone that a single dollar of costs may be passed on to them. Indeed, their theory of harm is so attenuated that the five States together have not found one person who has been harmed by the IFR. Even giving credence to such speculative harm, the States are foreclosed by Circuit and Supreme Court precedent from bringing their claims under the federal constitution or on behalf of their citizens.

Even if the States did have standing, they should lose. The Fourth IFR is required by RFRA and the Free Exercise Clause, as shown by years' worth of public comments and court orders requiring a response from the agencies. The ongoing violation of federal civil rights law constitutes good

cause to forgo notice and comment, particularly on an issue about which the agencies had already read hundreds of thousands of comments. The district court relied on old arguments in holding that the mandate created by the first three IFRs were sufficient to protect the religious liberty of groups like the Little Sisters, but did not take into account the corrections/concessions the agencies made when the case was at the Supreme Court. Those concessions doomed the agencies' prior claim that the mandate did not violate RFRA, thus requiring a new approach.

Finally, the district court's ruling creates an untenable double standard. Since the use of IFRs has been central to the creation of the contraceptive mandate, either IFRs are permissible (in which case the States must lose) or IFRs are not permissible (in which case the underlying mandate must also be invalid). There is no room for the States' preferred IFRs-for-me-but-not-for-thee approach to this issue.

ARGUMENT

I. The States lack standing.

The injunction should never have issued because the States lack standing. They have no concrete interest at stake in their APA or other claims. Their constitutional claims are foreclosed as a matter of law. And

their *parens patriae* claims are both factually speculative and legally foreclosed.

A. The States lack standing in their own right because they cannot allege an injury traceable to the Fourth IFR.

1. The States have no concrete injury.

"Standing is a question of law reviewed de novo." *Carroll v. Nakatani*, 342 F.3d 934, 940 (9th Cir. 2003). In order to establish standing, the States must demonstrate an injury which is not "conjectural or hypothetical," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations marks and citation omitted), and "must affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (citation omitted). The injury must be "fairly traceable to the challenged conduct of the defendant," and must be redressable by a favorable judicial decision. *Id.* at 1547. The States must "'clearly . . . allege facts demonstrating' each element." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). And they "must demonstrate standing for each claim [they] seek[] to press and for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645,

1650 (2017) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008) (internal quotation marks omitted)). The States have failed each part of this test.[7]

a. The States' injuries are too generalized.

The States are asking the courts to set national policy through litigation, based upon vague assertions of harm. But as this Court has said: "The Supreme Court has repeatedly refused to recognize a generalized grievance against allegedly illegal government conduct as sufficient to confer standing." *Carroll*, 342 F.3d at 940 (quoting *United States v. Hays*, 515 U.S. 737, 743, (1995)). This rule applies in even the most serious circumstances: "even if a government actor discriminates on the basis of race, the resulting injury 'accords a basis for standing only to those persons who are personally denied equal treatment.'" *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)). The States must demonstrate harm to themselves, rather than to a different group.

The States claim harm in the lack of notice and comment on the Fourth IFR. But the States themselves had the opportunity to comment on the

[7] These problems are addressed with regard to the States' APA claims because they are the only claims that are not foreclosed as a matter of law. But the injuries asserted for this claim are the same as those asserted for the Establishment Clause and Equal Protection claims, so the same analysis applies.

mandate and its frequently shifting exemptions in the First, Second, and Third IFRs as well as the ANPRM, the NPRM, and the RFI, but make no allegation that they ever did so. Nor did they comment on the Fourth or Fifth IFRs prior to initiating this lawsuit and moving for a preliminary injunction. In the absence of any pressing interest in actually commenting on the regulations, the States cannot claim a concrete injury, much less an irreparable one mandating a nationwide injunction. Moreover, any injury the States suffered is now moot, as the States have now submitted comments and the government is considering them. *See* State Attorneys General, Comment Letter on Fourth IFR (Dec. 5, 2017), https://www.regulations.gov/document?D=CMS-2014-0115-58168 (including signatures of the Attorneys General of California, Delaware, Maryland, New York, and Virginia).

Most of the injuries that the States do assert are not to themselves, but to unnamed citizens or Planned Parenthood clinics. *See, e.g.*, ER260-262 ¶¶ 35-40, 271 ¶ 83, 276-277 ¶¶ 106-14. The States cannot establish standing in their own right as to those injuries. *See Carroll*, 342 F.3d at 940. The only alleged harms specific to the States are the lack of opportunity to comment—an argument their own actions foreclose—and

financial burdens on state-funded health programs. *See* ER263 ¶ 48, 264 ¶ 52, 266 ¶ 62, 267-268 ¶¶ 66-68, 270-271 ¶¶ 79, 82, 272 ¶ 92. This and the States' related interest in ensuring contraceptive coverage are the basis upon which the district court found standing. ER14. But analysis of the States' allegations on this point shows that they are entirely speculative.

b. The States' claimed injuries stem from pre-existing court orders, not the Fourth IFR.

The States' claims boil down to an allegation that, without proper notice and comment, the Fourth IFR will spark a "chain of events," Mot. 29, via which they will supposedly, someday, be injured. "Plaintiffs' causal chain" thus "consists of a series of links strung together by conclusory, generalized statements . . . without any plausible scientific or other evidentiary basis." *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1142 (9th Cir. 2013). This cannot be the basis for standing. *Id.*

To hear the States tell it, there will be many employers suddenly dropping coverage, with dramatic impacts on public health and a severe drain on the public fisc. Mot. 20 ("could impact over half of the U.S. population"); Mot. 32 ("Even a slight uptick in such costs will cause

irreparable harm to the States.”).[8] But the gaping hole in the States’ logic is that all known religious objectors are already protected by the existing injunctions. The States simply cannot show that even a single employer has dropped or will drop contraceptive coverage *because of the Fourth IFR*. The States try to obscure this failure by citing unsupported numbers of unnamed religious organizations “who will likely seek an exemption *or accommodation*.” *E.g.*, ER 276 ¶ 107 (emphasis added). But the careful inclusion of “or accommodation” makes this allegation meaningless for standing purposes. Employers seeking the “accommodation”—which may well be everyone the States’ allegation actually includes—do not threaten the States’ interests at all. The States themselves claim the accommodation provides women with “seamless” access to no-cost

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[8] The States’ claim that the exemptions could impact over half the population does not withstand the slightest scrutiny. The mandate does not affect women who are not of childbearing age, uninsured women, women who purchased plans on the exchanges, women on government-sponsored plans, women on plans already exempt due to grandfathering, women whose employers choose to utilize the accommodation, women who are on plans exempt under the old religious employer exemption that the district court reinstated, or women on plans subject to state coverage mandates. The States make no attempt to actually quantify how many citizens might be impacted, much less whether they constitute “a sufficiently substantial segment of its population.” *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 651 (9th Cir. 2017), *cert. denied sub nom. Missouri ex rel. Hawley v. Becerra*, 137 S. Ct. 2188 (2017).

contraceptives. ER252 ¶ 2. And the injunction leaves that accommodation (which the States have never challenged) intact. All the States' claims about costs and negative consequences of unintended pregnancies are meaningless when it comes to the accommodation. *See id.* Even in their conclusory terms, the States' inclusion of "or accommodation" means they have not actually *alleged* that the harm they are concerned with arises from the Fourth IFR. The accommodation existed in the prior rules the States want to leave in place. There is simply no marginal additional injury that arises from the Fourth IFR.

To have any relevance to the Fourth IFR at all, then, the States' alleged injuries would need to stem from employers who sought the exemption. But among their combined population of 74.9 million, the States have failed to identify anyone that would seek the exemption *because of the Fourth IFR.*[9] Indeed, the few employers specifically mentioned in the complaint have previously sued and therefore are already protected, either individually or by class-wide injunctions. ER276-277 ¶¶ 110-11. The States fail to adequately allege that an actual

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[9] *See* U.S. Census Bureau Annual Estimates, Table 1 (Dec. 2017), https://www.census.gov/data/tables/2017/demo/popest/state-total.html (listing state populations)

person—as opposed to a hypothetical person—will lose coverage based on the Fourth IFR. They thus assert no injury at all, and certainly none fairly traceable to the Fourth IFR.

c. *The States' purported injuries are entirely speculative.*

Even if the states could identify such employers, that alone does not establish an injury. The States' guesswork conveniently elides the fact that many employers in these states are already subject to state contraceptive mandates, so removing a duplicative federal mandate would cause the State no injury at all. ER262 ¶44, 265 ¶ 54, 266-267 ¶ 64, 269 ¶ 75. And many more were already exempt from the federal mandate, either through grandfathering (23% of employers have grandfathered plans),[10] the prior religious exemption that the district court re-instated, or because they work for small employers, which are not required to provide insurance at all.[11] These employers are not obligated to provide contraceptive coverage, regardless of the Fourth IFR, and their decisions

[10] *See* Kaiser Family Found., *Employer Health Benefits 2017 Annual Survey* 204 (2017); *Hobby Lobby*, 134 S. Ct. at 2763-64 (grandfathered plans are exempt from the preventive services mandate).
[11] *Hobby Lobby*, 134 S. Ct. at 2763-64 (discussing small employer exemption).

therefore cannot cause injury via the Fourth IFR. *Id.*

If the States could locate even one such employer who is expected to drop coverage because of the Fourth IFR, they next must speculate about the religious beliefs and choices of employees. For example, women working for religious employers may share common religious beliefs with the ministry. *See* 82 Fed. Reg. at 47,802. They might prefer a contraceptive method still covered by their employer, since many objectors object to only 4 out of 20 FDA-approved methods. *See Hobby Lobby,* 134 S. Ct. at 2762-63. Such employers do cover tubal ligations and the birth control pill, by far the most popular female contraceptives.[12] For those women who do wish to use a non-covered contraceptive option, they may "obtain coverage through a family member's employer, through an individual insurance policy purchased on an Exchange or directly from an insurer, or through Medicaid or another government program." Br. for the Resp'ts at 65, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418). That is what the Obama Administration told the Supreme Court in 2016, and it remains true today. Given the alternatives available, the

[12] *See* Fact Sheet: Contraceptive Use in the United States, Guttmacher Institute 2016, https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states.

States have no reason to believe these employed and insured women would need to rely upon state programs to obtain contraception.

Nor would the States bear the costs of the feared unintended pregnancies. This would only happen if, for some reason, these women with health insurance did not obtain contraceptives in some other way *and* did not use their health insurance for their medical expenses related to pregnancy *and* qualified for state aid. The States offer no reason to think that even a single state resident will thread this particularly narrow needle; they have certainly failed to clearly allege facts demonstrating that these alleged future injuries are real and not speculative. A judicial decision based upon the supposition that this might theoretically occur is wholly advisory.

d. The States lack a legally protected interest.

The absence of an injury is exacerbated because the States have no "legally protected interest" at stake. *Lujan*, 504 U.S. at 560-61. The States are not subject to the Fourth IFR. Nor are they third-party beneficiaries of private insurance contracts. Nothing in the ACA, the mandate, or the Fourth IFR, indicates any "special solicitude" Congress (or the Executive Branch) might have shown for the States with respect

to these issues. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). Where the States can regulate insurance contracts, they can (and often do) impose their own direct mandates (ER262 ¶ 44, 265 ¶ 54, 266-67 ¶ 64, 269 ¶ 75); they cannot possibly be injured by the absence of a duplicative federal mandate. To the extent those contracts *cannot* be regulated by the States—that is, because the States are constitutionally preempted from regulating them (ER 263 ¶ 46, 265 ¶ 56, 267 ¶ 65, 270 ¶ 78)—then the States have no "legally protected interest" in their contents at all.[13]

Nothing in this analysis changes merely because the States allege a procedural injury. In order to establish standing for a procedural injury such as "be[ing] denied the ability to file comments on" federal regulatory actions, plaintiffs must establish an underlying concrete interest. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Id.* As this Court has held, "the fact that the [plaintiffs] are seeking to enforce a procedural right does not affect our

[13] This lack of an interest presumably explains why the States never bothered to intervene in the dozens of prior cases, and do not allege that they even bothered to comment on prior versions of the mandate.

injury in fact analysis: as in conventional standing cases, the [plaintiffs] must show the invasion of a concrete and particularized interest." *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001). The States, who do not even allege that they commented on any of the prior version of the mandate and religious accommodations, have failed to show any injury here.

2. The States' purported injuries are neither traceable to the IFR nor redressable by enjoining it.

Finally, the States' injury claims fail because the alleged injuries are not "fairly traceable" to the Fourth IFR, or redressable by order of this Court. Although these standards are relaxed in the case of procedural injuries, *see Cantrell*, 241 F.3d at 682, they do not disappear. Even if the States receive the relief they seek—reconsideration, with the benefit of their long-delayed comments—the outcome of the rulemaking will not redress their supposed injuries.

"[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Levine v. Vilsack*, 587 F.3d 986, 992 (9th Cir. 2009) (quoting *Lujan*, 504 U.S. at 561-62). Here, the object of the government action is not the States, but religious objectors. The

only religious objectors identified by the States, *see* ER276-277 ¶¶ 110-11, are employers who enjoy judicial protection today. If courts leave those judicial orders in place while enjoining the Fourth IFR, as the district court did here, then the States' situation is unchanged. Their injuries are traceable to the injunctions, not the Fourth IFR. Even if the States were ultimately successful in penalizing such employers, they cannot establish that the end result would be increased contraceptive coverage, rather than loss of social services provided by charities like the Little Sisters. The States cannot establish that an injunction in their favor would actually redress their claimed injuries.

Finally, the States also lack APA statutory standing and its cousin, prudential standing, because they are not themselves regulated by the mandate, and they cannot plausibly claim to be within its "zone of interests." *City of Los Angeles v. Cty. of Kern*, 581 F.3d 841, 846 (9th Cir. 2009).

B. The States cannot bring First Amendment or Equal Protection claims.

The States cite no authority for the idea that states can sue the federal government for an alleged violation of the First Amendment. It would be passing strange to give *State governments* the right to the free exercise of

religion and church-state separation. What religion would these States exercise? And how can they have "offended observer" or taxpayer standing under the Establishment Clause, particularly to challenge an exemption rather than an expenditure? To ask these questions is to answer them.

Similarly, the States are not "person[s]" under the Fifth Amendment capable of asserting an equal protection claim. *Premo v. Martin*, 119 F.3d 764, 771 (9th Cir. 1997) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966)); *Bd. of Nat. Res. of State of Wash. v. Brown*, 992 F.2d 937, 942 (9th Cir. 1993) ("States as states clearly are not persons for Fifth Amendment purposes."). So the states may not claim a procedural injury in their own right based upon either their Establishment Clause or Equal Protection claims.

C. The States cannot assert claims as *parens patriae*.

Most of the injuries claimed in the Amended Complaint are injuries to unnamed citizens, not to the States themselves. But the States are barred from asserting the rights of their citizens in *parens patriae* against the federal government. *See Massachusetts v. Mellon*, 262 U.S. 447 (1923). Not only are those alleged injuries entirely speculative, but even if they

existed, "it is the United States, and not the state, which represents them as *parens patriae*, when such representation becomes appropriate." *Id.* at 485-86. The States seek to protect citizens from the application of RFRA, arguing that a RFRA exemption violates other laws. Mot. 13, 21-28. But, as the Supreme Court recently confirmed, such a suit is precisely "what *Mellon* prohibits," namely a suit by a State "to protect her citizens from the operation of federal statutes." *EPA*, 549 U.S. at 520, n.17 (citation omitted).

Also, as California recently demonstrated, "*parens patriae* standing is inappropriate where an aggrieved party could seek private relief." *Koster,* 847 F.3d at 652; *id.* at 653 (rejecting claims as "necessarily speculative"). Aggrieved women—if any such women come forward with an allegation that they have been or will be harmed—are perfectly capable of suing to challenge the Fourth IFR or their employers' use of the exemption. They do not need five attorneys general to do it for them *in loco parentis*. Therefore, any standing the States assert must be in their own right, which they have failed to do.

II. The Fourth IFR is required by RFRA and the First Amendment.

Because the States do not have standing, the district court opinion should be vacated for lack of subject matter jurisdiction. Even on the merits, however, the district court opinion should be vacated, and the complaint dismissed. The APA allows agencies to publish rules in advance of notice and comment in some cases, including where the agency has "good cause," because notice and comment "are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B).

The inquiry into whether good cause exists is a "case-by-case" analysis that is "sensitive to the totality of the factors at play." *Haw. Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995). Courts find good cause where delay would "interfere with the agency's ability to fulfill its statutory mandate." *Nat. Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 906 (9th Cir. 2003); *accord Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992). Courts are careful not to find good cause for excuses "that would swallow the rule." *United States v. Valverde*, 628 F.3d 1159, 1166 (9th Cir. 2010) (citation omitted). This circumstance, however, is one "in which 'delay would do real harm.'" *Id.* at 1165 (quoting *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982). This

Court reviews the district court's determination that the Fourth IFR violated the APA de novo. *See Reno-Sparks Indian Colony v. EPA*, 336 F.3d 899, 909 n.11 (9th Cir. 2003).

Here, the Fourth IFR was implemented because the mandate violated the rights of many individuals and organizations to the free exercise of religion. The agencies came to this conclusion after six years of litigation and injunctions against the mandate. Before promulgating the rule, the agencies had already received hundreds of thousands of comments, many of them detailing the ongoing harm the mandate was causing. This is a circumstance where it is "impracticable, unnecessary, [and] contrary to the public interest" to issue a rule before notice and comment. *See Haw. Helicopter Operators Ass'n*, 51 F.3d at 214.

A. The agencies acted against a backdrop of comments and lawsuits that revealed significant legal problems with the prior system.

The agencies had plenty of opportunity to gather information on the extent to which the mandate caused harm and violated existing law before they issued the Fourth IFR. Courts have considered prior comments on similar questions to constitute good cause for implementing a new rule before asking for comment. In *Priests for Life*, for example, the

D.C. Circuit upheld the Third IFR in part because the "regulations the interim final rule modifies were recently enacted pursuant to notice and comment rulemaking, and presented virtually identical issues." 772 F.3d at 276. Here, the comments the agencies received and the litigation against the mandate demonstrated that the then-operable law caused real harm and violated statutory law, which "interfer[ed] with the agenc[ies'] ability to fulfill [their] statutory mandate." *Evans*, 316 F.3d at 906.

The contraceptive mandate provoked controversy as soon as the First IFR was published in 2010 without prior notice or opportunity for public comment. 75 Fed. Reg. at 41,726, 41,728. That controversy led to hundreds of thousands of comments submitted over the course of seven years on the public's opinions about the scope of the mandate. Once the IFR was published, numerous commenters warned of the implications the rule would have on the consciences of individuals and organizations if the guidelines required employers to include certain drugs and services in their health plans, including contraceptives and abortifacients. *See, e.g.*, Catholic Medical Association, Comment Letter (Sept. 17, 2010), https://www.regulations.gov/document?D=HHS-OS-2010-0018-0165.

The Second IFR was also published without prior notice and comment. 76 Fed. Reg. at 46,621. It generated over 200,000 comments, many of which objected to the particularly narrow scope of the "religious employers" exemption, which was limited to formal churches, their integrated auxiliaries, and religious orders whose purpose it is to inculcate faith and hire and serve primarily people of their own faith tradition. 77 Fed. Reg. at 8,726.

The next two regulations, published in 2012 and 2013, added an "accommodation" to the Second IFR's treatment of religious objectors. 77 Fed. Reg. at 16,503, 78 Fed. Reg. at 8,459. They garnered "approximately 200,000" comments, and "over 400,000 comments" respectively, many of which detailed religious objections to the accommodation. 78 Fed. Reg. at 8,459; 78 Fed. Reg. at 39,871. In 2014, the Third IFR received over 13,000 comments. *See* EBSA, *Coverage of Certain Services Under the Affordable Care Act* (Aug. 27, 2014), https://www.regulations.gov/document?D=EBSA-2014-0013-0002. At each stage of the process, in addition to comments explaining the need for the religious exemption, the agencies also received and reviewed comments requesting robust and seamless

provision of contraceptives for women (though the States do not allege having made such comments themselves).[14]

Meanwhile, dozens of lawsuits were brought against the mandate, requiring the agencies and their counsel to address legal arguments against the mandate from hundreds of religious organizations whose faith prevented them from participating in the mandate in good conscience. *See HHS Case Database*, *supra* n.1. In every case, courts issued injunctions—either temporary or permanent—protecting organizations from the mandate either in the lower courts or at the Supreme Court. *See*, *e.g.*, *Zubik v. Burwell*, 135 S. Ct. 1544 (2015) (Mem) (staying mandate of Third Circuit order ruling against religious

[14] *See, e.g.*, Planned Parenthood Federation of America, Comment Letter on First IFR (Sept. 17, 2010), https://www.regulations.gov/document?D=HHS-OS-2010-0018-0162 (requesting inclusion of all FDA-approved contraceptive drugs and devices as preventive services under the mandate); National Family Planning & Reproductive Health Association, Comment Letter on Second IFR (Sept. 29, 2011), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB44-2/14695.pdf; Coalition for Liberty & Justice, Comment Letter on Third IFR (Oct. 21, 2014), https://www.regulations.gov/document?D=CMS-2014-0115-12732; ACLU, Comment Letter on Third IFR (Oct. 27, 2014), https://www.regulations.gov/document?D=EBSA-2014-0013-11090.

objectors); *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014) (Mem) (granting emergency application for injunction).

Finally, the Supreme Court ordered in *Zubik* that the parties be "afforded an opportunity to arrive at an approach going forward" that would resolve the dispute. *Zubik*, 136 S. Ct. at 1560. In response, on July 22, 2016, the agencies sought "comments from all interested stakeholders, including all objecting employers, on the procedure for invoking the accommodation." 81 Fed. Reg. 47,741. Comments were due on September 20, 2016. *Id.* The agencies received over 54,000 responses to the RFI. 82 Fed. Reg. at 47,814.[15] After those responses, and after an initial statement that accommodation would not be possible, the agencies issued the Fourth IFR.[16]

The years of litigation against the mandate and the hundreds of thousands of prior comments provided the agencies with sufficient information on "virtually identical issues" to the Fourth IFR, making

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[15] A search of public comments did not yield any comments from the States in response to the RFI.

[16] *See* U.S. Dep't of Labor, FAQs About Affordable Care Act Implementation Part 36 at 4 (Jan. 9, 2017), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf.

notice and comment unnecessary prior to the implementation of the IFR. *See Priests for Life*, 772 F.3d at 276. "But the world is not made brand new every morning," and the federal government is not required to act like it is because the States decided to show up. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 866 (2005).

More importantly, however, the agencies demonstrated that delay in implementing the IFR would have been contrary to public interest, because the mandate continued to cause "real harm" to individuals and organizations, and to "jeopardize [the agencies'] assigned missions" by violating civil rights and federal law. *See Valverde*, 628 F.3d at 1165; *Riverbend Farms*, 958 F.2d at 1484.

B. RFRA and the Free Exercise Clause require the IFR.

Following six years of litigation and hundreds of thousands of comments, the agencies concluded that the mandate and its accommodation resulting from the current regulations violated a federal civil rights statute. Once that determination was made, the agencies were effectively in an "emergency" situation in which their rules were violating a federal statute and the Constitution, and they could not maintain the status quo without doing "real harm" to religious

individuals, organizations, and their civil rights. *See SEIU Local 102 v. Cty. of San Diego*, 60 F.3d 1346, 1352 n.3 (9th Cir. 1994).

RFRA provides that "Government may substantially burden a person's exercise of religion only if it demonstrates that" the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). In the Fourth IFR, the agencies state that the mandate "constituted a substantial burden on the religious exercise of many" religious organizations, and that it "did not serve a compelling interest and was not the least restrictive means of serving a compelling interest." 82 Fed. Reg. at 47,806.

The mandate forces religious organizations like the Little Sisters to choose between offering items in their health plans that violate their faith and paying millions of dollars in annual fines. *See, e.g.*, 26 U.S.C. § 4980D(b)(1) ($100/day per person); 26 U.S.C. § 4980H(c)(1) ($2000 per employee, per year). The district court mistakenly "believe[d] it likely that the prior framing of the religious exemption and accommodation permissibly ensured . . . protection" and thus did not violate religious liberty principles, citing vacated opinions from courts of appeals as

persuasive in determining that the mandate did not violate RFRA. ER27. But that assumption does not take into account that the agencies corrected the arguments in support of the mandate that those courts relied on once the cases reached the Supreme Court, even before the agencies changed the mandate.

The prior courts of appeals who ruled against the religious objectors all held that the mandate did not pose a substantial burden on the religious organizations' religious beliefs. *See, e.g.*, *Little Sisters of the Poor*, 794 F.3d at 1183 ("Although a religious non-profit organization may opt out from providing contraceptive coverage, it cannot preclude the government from requiring others to provide the legally required coverage in its stead.").

But once they reached the Supreme Court, the agencies abandoned the arguments upon which they relied in the lower courts, and upon which the lower courts ruled. For example, in their brief and at oral argument, the agencies admitted that the accommodation required contraceptive coverage to be "part of the same plan as the coverage provided by the employer," Br. for the Resp'ts at 38, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (quotations omitted). *See* Tr. of Oral Arg. at 61,

Zubik v. Burwell, 136 S. Ct. 1557 (2016) (No. 14-1418) (government "would be content" if Court would "assume a substantial burden" and rule only on the government's strict scrutiny affirmative defense); *Id.* at 60-61 (Chief Justice Roberts: "You want the coverage for contraceptive services to be provided, I think as you said, seamlessly. You want it to be in one insurance package. . . . Is that a fair understanding of the case?"; Solicitor General Verrilli: "I think it is one fair understanding of the case."). This admission eliminated the prior argument on which the government had relied, namely that the "accommodation" was separate from the religious employer's health plan. *See Little Sisters of the Poor*, 794 F.3d at 1179.

Next, the government made further concessions that fatally undermined its strict scrutiny affirmative defense. The agencies admitted to the Supreme Court that it does not matter where the contraceptive coverage comes from and that women who do not receive contraceptive coverage from their employer can "ordinarily" get it from "a family member's employer," "an Exchange," or "another government program." Br. for the Resp'ts at 65, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418). The agencies also acknowledged that the mandate

"could be modified" to avoid forcing religious organizations to carry the coverage themselves. Suppl. Br. for the Resp'ts at 14-15, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418).

It was as a result of these concessions that the Supreme Court unanimously vacated the decisions of the Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits and remanded the cases so that the parties could be "afforded an opportunity to arrive at an approach going forward" that would resolve the dispute."' *Zubik*, 136 S. Ct. at 1560 (internal citation omitted). Based on these concessions and the Supreme Court's order, the agencies could *not* rely on the "prior framing of the religious exemption and accommodation" to comply with federal civil rights law. ER27.

Nor could the agencies escape the fact that the prior version of the "accommodation"—the one reinstated by the district court's ruling—also violates the First Amendment because it allowed some religious organizations to get exemptions (primarily churches and their "integrated auxiliaries"), but not others like the Little Sisters. This type of distinction among religious organizations is impermissible under the Free Exercise and Establishment Clauses, which prohibit the

government from making such "explicit and deliberate distinctions between different religious organizations." *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (striking down laws that created differential treatment between "well-established churches" and "churches which are new and lacking in a constituency"). By preferring certain church-run organizations to other types of religious organizations, the mandate inappropriately "interfer[es] with an internal . . . decision that affects the faith and mission" of a religious organization, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012). Doing so also requires illegal "discrimination . . . [among religious institutions] expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations[.]" *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (applying *Larson* to invalidate distinction between "sectarian" and "pervasively sectarian" organizations). The agencies were thus constitutionally *required* to provide the religious exemption in the Fourth IFR and were constitutionally *prohibited* from leaving the prior rule in place.

As required by the APA, the agencies explained their findings of good cause to issue the regulations without notice and comment. 5 U.S.C.

§ 553(b)(3)(B). The agencies cited the "dozens of lawsuits" over the mandate, the Supreme Court's order in *Zubik*, temporary injunctions filed against the agencies, the public comments, including extensive discussion of the scope of the exemption, and finally, the need to "provid[e] relief for entities and individuals for whom the Mandate operates in violation of their sincerely held religious beliefs." 82 Fed. Reg. at 47,814-15. In short, the agencies knew the mandate "led to the violation of RFRA in many instances." *Id.* at 47,806. RFRA constitutes a statutory mandate that binds all government entities. 42 U.S.C. § 2000bb-2(1) ("the term 'government' includes a[n] agency . . . of the United States."). The then-current status of the mandate interfered with the agencies' statutory mandate to implement exemptions in a way that complies with law. That is sufficient good cause to make delay of implementation not only "impracticable and contrary to the public interest," 82 Fed. Reg. at 47,813; 5 U.S.C. § 553(b)(3)(B), but a true "emergency" that hindered the agencies' ability to carry out their statutory mandate. *Valverde*, 628 F.3d at 1164-65.

The contraceptive mandate violated not just a federal law, but a civil rights statute, which means that without the IFRs, delay would cause

"real harm" to citizens who objected to including drugs and services in their health care plans that could terminate a human life. *See Hobby Lobby*, 134 S. Ct. at 2779 (explaining that the mandate imposes a substantial burden on religious belief by threatening religious objectors with penalties of "enormous sum[s] of money"). Indeed, a violation of RFRA causes not just "real harm" but the kind of "irreparable injury" that comes from a violation of First Amendment rights. *Warsoldier v. Woodford*, 418 F.3d 989, 1002 (9th Cir. 2005) (holding that substantial burden on prisoner's belief constituted irreparable harm under RFRA's sister statute, RLUIPA) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Preventing this irreparable injury to religious objectors caused by the contraceptive mandate and avoiding the violation of federal law and the Constitution constitute good cause for implementing the IFRs before notice and comment; indeed, any other course would have been unconstitutional and illegal.

III. The district court erred by holding that the agencies could not use an IFR-based solution to rectify an IFR-created problem.

IFRs are either permissible modes of rulemaking to impose or modify the contraceptive mandate or they are not. But under no circumstance could the law be as the district court and the States envision it: that a contraceptive mandate can be imposed (and modified, and re-modified, and re-re-modified) via IFR, but that suddenly the government cannot use an IFR to impose limits on that mandate. To the contrary, if anything, the case for proceeding by IFR is far more compelling now than it was in 2010, 2011, and 2014 when prior versions of the rules were implemented by IFR.

A. The agencies had at least as much reason to issue the IFRs as they did when they issued earlier IFRs, which were upheld.

In 2014, the D.C. Circuit held that the agencies had good cause to bypass notice and comment rulemaking and issue the Third IFR. *Priests for Life*, 772 F.3d at 276. The court found that six factors contributed to its conclusion that the agencies had good cause. All of them apply in full force to the Fourth IFR.

First, the D.C. Circuit noted that the agencies "made a good cause finding in the rule it issued." *Priests for Life*, 772 F.3d at 276; *see also Haw. Helicopter Operators Ass'n*, 51 F.3d at 214 (approving the use of an IFR when an agency "adequately explained the basis for taking emergency action without waiting for public participation"). The same is true with the Fourth and Fifth IFRs. 82 Fed. Reg. at 47,855; 82 Fed. Reg. 47,813-14 ("The Departments have determined that it would be impracticable and contrary to the public interest to delay putting these provisions in place until a full public notice-and-comment process is completed."). And indeed, the Fourth and Fifth IFRs offer a more extensive analysis of the basis for the good cause finding than any of the three prior IFRs.[17]

Second, the D.C. Circuit upheld the Third IFR because it modified regulations that "were recently enacted pursuant to notice and comment rulemaking, and presented virtually identical issues." *Priests for Life*, 772 F.3d at 276. In other words, the court credited the voluminous record

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[17] The justification for dispensing with notice and comment rulemaking took up five paragraphs in the First IFR, eight paragraphs in the Second IFR, four paragraphs in the Third IFR, and a whole eleven paragraphs in the Fourth and Fifth IFRs.

of existing commentary on the topic which mitigated against the need for notice and comment rulemaking. *See SEIU*, 60 F.3d at 1352 n.3 (concluding that use of an IFR was justified when the agency "was already reviewing public comments submitted in response to" an early request for comments because "[t]he public was not deprived of its input").

If that was true in 2014, it is even more the case today. All told, hundreds of thousands of public comments have been submitted on the proper scope of exemptions to the mandate. 82 Fed. Reg. at 47,814. *See supra* Part III.B. Many of these comments proposed broader protections for religious belief.[18] The district court improperly ignored or discredited the cumulative weight of hundreds of thousands of comments that had already been received on precisely the topic covered by the Fourth and Fifth IFRs, as well as the express effort by the agencies to solicit comments on that point. *See Real Alternatives*, 150 F. Supp. 3d at 427 n.7 (noting that for the 2011 IFR "over 200,000 comments were received,

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[18] *See, e.g.*, Priests for Life, Comment Letter on Request for Information: Coverage for Contraceptive Services (Sept. 19, 2016), https://www.regulations.gov/document?D=CMS-2016-0123-51181 (proposing granting employees of employers with religious objections contraceptive coverage through a separate enrollment process).

expressing a gamut of opinions on the exemption"); *see also Hall v. EPA*, 273 F.3d 1146, 1162 (9th Cir. 2001) ("Notice is adequate if it is sufficient to provide the public with a meaningful opportunity to comment on the proposed provisions." (internal quotation marks omitted)).

Indeed, by the time the Fourth and Fifth IFRs were published, the public discourse on the mandate was much more developed than in 2010 when the First IFR was published. The First IFR initially set out minimal coverage requirements without any preliminary opportunity for public comment. It did not solicit comments on the anticipated guidelines or even mention contraceptives, let alone specifically request submissions on the question of conscience protections. 77 Fed. Reg. at 8,726 (noting that "comments on the anticipated guidelines were not requested in the interim final regulations"). Thus, the Second IFR on religious exemptions was issued before the public had been formally requested to comment on the conscience implications of the contraceptive mandate. Nevertheless, the agencies argued that "an additional opportunity for public comment is unnecessary" because "the amendments made in these interim final rules in fact are based on . . . public comments" received on the First IFR. 76 Fed. Reg. at 46,624. If the Second IFR could be issued based on the

public comments that had already been received, then that applies even more fully after seven years of vigorous debate and hundreds of thousands of comments.

Third, the D.C. Circuit favorably observed that the agencies planned to "expose" the Third IFR "to notice and comment before its permanent implementation." *Priests for Life*, 772 F.3d at 276. The same is true for the Fourth and Fifth IFRs. The IFRs note that "[t]he Departments will fully consider comments submitted in response to these interim final rules" and emphasize that "[i]ssuing interim final rules with a comment period provides the public with an opportunity to comment on whether these regulations expanding the exemption should be made permanent or subject to modification without delaying the effective date of the regulations." 82 Fed. Reg. 47,855; 82 Fed. Reg. 47,815. The agencies' willingness to incorporate public comment and to amend the interim rules supports the use of IFR. *See Mid-Tex Elec. Coop., Inc. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987) ("The interim status of the challenged rule is a significant factor" in the good cause analysis).

Fourth, after the First IFR, each subsequent IFR was intended to "augment current regulations." *Priests for Life*, 772 F.3d at 276. The same

can be said for the Fourth and Fifth IFRs. Rather than making broad or categorical changes to the minimal coverage requirements or eliminating the mandate altogether (which the agencies have the authority to do), the agencies took a modest approach and "determined that expanding the exemptions . . . is a more appropriate administrative response." 82 Fed. Reg. 47,849.[19] The Fourth and Fifth IFRs noted that "the number of organizations and individuals that may seek to take advantage of these exemptions and accommodations may be small" and explained that the IFRs merely codify "the long-standing recognition of such protections in health care and health insurance context in law and regulation," *id.* The IFRs also "leave unchanged HRSA's authority to decide whether to include contraceptives in the women's preventive services" and do not "change the many other mechanisms by which the Government advances contraceptive coverage, particularly for low-income women." *Id.*

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[19] The agencies' initial decision to require religious organizations to provide contraception was a far more radical departure from the status quo than anything in the Fourth or Fifth IFRs. Federal law had never before required coverage of abortion-inducing drugs, sterilization, or contraceptives, and yet the agencies decided that they could force religious organizations like the Little Sisters to provide birth control without serious public debate. Merely tweaking the scope of exemptions to the mandate is a small step compared to the giant leap of enacting the policy in the first place.

Accordingly, nothing in the Fourth or Fifth IFRs presents a "paradigm shift," *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F. Supp. 2d 1059, 1076 (N.D. Cal. 2007), and instead the IFRs merely "augment current regulations" just as the Third IFR did. *Priests for Life*, 772 F.3d at 276; *see also Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 582 (D.C. Cir. 1981) (explaining that "the limited scope of [an order] influences our finding that the [agency] possessed good cause to dispense with prior notice and comment").

Fifth, the D.C. Circuit noted that the agencies were responding to court orders across the country, and emphasized that the agencies had "reasonably interpreted" the orders "as obligating [them] to take action to further alleviate any burden on the religious liberty of objecting religious organizations." *Priests for Life*, 772 F.3d at 276. Just as with the Third IFR, the Fourth and Fifth IFRs were issued in the face of dozens of lawsuits and court orders across the country. In May 2016, the Supreme Court vacated the judgments of numerous Courts of Appeals and remanded to "allow the parties sufficient time to resolve any outstanding issues between them." *Zubik v. Burwell*, 136 S. Ct. at 1560. Until such issues could be resolved in litigation, the government was enjoined from

"impos[ing] taxes or penalties on petitioners for failure to" comply with the notice requirements of the mandate. *Id.* at 1561. And by the fall of 2017, courts had begun pressuring the government to take action to resolve the case and fix the mandate's defects. *See, e.g.*, Order, *Notre Dame Univ. v. Price*, No. 13-3853 (7th Cir. Aug. 14, 2017), ECF No. 150 (ordering the government to "detail what is the status of the Office of Management and Budget's review of the draft interim final rule"); 82 Fed. Reg. at 47,814 (noting that the IFRs "provide a specific policy resolution that courts have been waiting to receive from the [agencies] for more than a year"). The agencies could have "reasonably interpreted" that cascade of injunctions and court orders across the country as a mandate "to take action to further alleviate any burden on the religious liberty of objecting religious organizations." *Priests for Life*, 772 F.3d at 276; *see also Am. Fed'n of Gov't Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1157-58 (D.C. Cir. 1981) (upholding an IFR that came in response to an injunction even though the trial court emphasized that it "was only voiding the status quo order and was not mandating the action to be taken by the Department to comply with [the] injunction").

Sixth, the D.C. Circuit highlighted the cost of delayed implementation, and noted in particular that "delay in implementation . . . would interfere with . . . the implementation of the alternative opt-out for religious objectors." *Priests for Life*, 772 F.3d at 276-77. The same is true here, as a delay in implementing the Fourth and Fifth IFRs will result in religious objectors being forced to comply with an opt-out procedure that violates their conscience. *See* 82 Fed. Reg. 47,814-15 ("Good cause is supported by providing relief for entities and individuals for whom the Mandate operates in violation of their sincerely held religious beliefs, but who would have to experience that burden for many more months under the prior regulations if these rules are not issued on an interim final basis.").

Other deleterious consequences may also follow if implementation of the IFRs is delayed. For instance, insurance providers may delay needed cost-reducing changes because of the fear of losing grandfathered status. 82 Fed. Reg. 47,856. *See Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 19-20 (D.D.C. 2010) (noting that "the regulated industry's need for some regulation to be in place to avoid regulatory confusion" can justify the use of an IFR). The agencies' predictions of the negative consequences that would follow delay are entitled to significant deference. *See Tenn.*

Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1145 (D.C. Cir. 1992) ("We are hesitant to discount such forecasts, as they necessarily involve deductions based on expert knowledge of the Agency." (internal quotation marks omitted)). Thus, each rationale that the D.C. Circuit considered in justification of the earlier IFRs applies equally to the Fourth and Fifth IFRs.[20]

Any error in the failure to allow for notice and comment rulemaking is also harmless. *See Del Norte Cty. v. United States*, 732 F.2d 1462, 1467 (9th Cir. 1984) ("insubstantial errors in an administrative proceeding that prejudice no one do not require administrative decisions to be set aside"). The party asserting error has the burden of demonstrating prejudice. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) ("[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination."). In *Sagebrush Rebellion, Inc. v.*

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[20] The fact that the agencies had already utilized an IFR in 2010, 2011, and 2014 does not draw into question the use of IFR in 2017. This Court has rejected the argument that "habitual invocation" of the good cause exception "render[s] the exception unavailable." *Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1125 (9th Cir. 2006). Instead, the exception is available if the agency gives "season-specific reasons for why the good cause exception is needed." *Id.* The agencies have done so with at least as much persuasive force as they did to create the underlying system in 2010, 2011, and 2014.

Hodel, 790 F.2d 760 (9th Cir. 1986), this Court found that the agency's failure to provide adequate notice was harmless because the procedures it had followed "fully satisfied the purposes of [the APA] and thus rendered the minimal failure to comply harmless[.]" *Id.* at 766. In this case, likewise, any error was harmless because the public was given ample opportunity to comment on every aspect of the contraceptive mandate on numerous occasions. And the States have not pointed to any specific comments or arguments that they would like the agencies to consider that could not have been submitted to the agencies in previous rounds of commentary. *Compare* State Attorneys General, Comment Letter on Fourth IFR (Dec. 5, 2017), https://www.regulations.gov/document?D=CMS-2014-0115-58168, *with* Law Professors, Comment Letter on Third IFR (Oct. 21, 2014), https://www.regulations.gov/document?D=EBSA-2014-0013-10224 (making States' Establishment Clause argument). Nor do they even claim to have bothered commenting on the mandate in any prior IFRs, despite many opportunities to do so.

B. If failure to follow notice and comment invalidates the Fourth IFR, this Court must likewise invalidate the rest of the contraceptive mandate.

Invalidating the Fourth IFR while keeping in place the existing rule that was adopted by IFR would be deeply contradictory as well as harmful to faith-based organizations like the Little Sisters. If the Fourth IFR is irreparably invalid, then so too were the first three IFRs. Religious organizations should not be subject to a mandate imposed via IFR while being deprived of the similarly enacted remedy.

Unless the Court also invalidates the earlier IFRs and eliminates the contraceptive mandate, the proper remedy is not to invalidate the Fourth IFR. This Court has repeatedly noted that "[a] flawed rule need not be vacated." *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). "[W]hen equity demands, the regulation can be left in place while the agency follows the necessary procedures" to remedy the procedural flaws. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995). That approach is particularly appropriate here, where the agencies had already reviewed so many comments on the same issue, and were ordered by the Supreme Court to try to reach resolution.

CONCLUSION

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

STATEMENT OF RELATED CASES

The Little Sisters are not aware of any related cases pending in this Court, pursuant to Ninth Circuit Rule 28-2.6.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO 9TH CIRCUIT RULE 32-1 FOR CASE NUMBER 18-15144

I certify that:

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

The brief is 13,408 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Mark L. Rienzi
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 9, 2018.

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

s/ Mark L. Rienzi
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ADDENDUM

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.