**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

Nos. 18-15144, 18-15166, 18-15255

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*.

# AMICUS CURIAE BRIEF OF FIRST LIBERTY INSTITUTE IN SUPPORT OF APPELLANTS

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

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## CORPORATE DISCLOSURE STATEMENT

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

## STATEMENT OF COMPLIANCE WITH RULE 29(a)

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

## INTEREST OF AMICUS CURIAE

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

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

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

## SUMMARY OF THE ARGUMENT

The district court erred in relying upon the brief of amicus curiae American Association of University Women ("AAUW") to find irreparable harm. *See* D. Ct. Op. at 25–26 (citing D. Ct. Dkt. No. 72). This brief is limited to controverting the unsubstantiated and wildly inflated allegations of the AAUW amicus brief regarding the scope and impact of the challenged Interim Final Rule ("IFR").

First, AAUW's analysis omits essential facts in order to exaggerate the IFR's impact. AAUW ignores the fact that many of the specific entities it claims will drop contraceptive coverage as a direct result of the IFR will not be affected by the IFR ***at all*** because they are already protected by pre-existing settlements or injunctions or because they do not have a health plan subject to the mandate in the first place. The remainder of AAUW's list have chosen to provide contraceptive coverage through the accommodation, and others merely have Christian individuals in leadership positions. AAUW's speculation that accommodated organizations will suddenly find the accommodation unsatisfactory is guesswork at most. Thus, the district court erred by repeating AAUW's conclusion that the IFR affects a "'wide and potentially boundless range' of employers," D. Ct. Op. at 26 (citing D. Ct.

Dkt. No. 72), when its brief does not identify ***even a single employer*** that is certain to drop coverage as a result of the IFR.

The brief next ignores essential limitations to the IFR in order to exaggerate the scope of its impact. The exemption is limited to those with "sincerely held" beliefs, a time-tested fixture of religious liberty law that has protected individuals of predominately minority faiths for decades. Next, the exemption only applies to the extent of the employer's objection, ensuring that its scope does not sweep more broadly than necessary to protect conscience rights. Moreover, the continued availability of the accommodation process further minimizes the IFR's practical effect on employees, because the accommodation process has proven an acceptable alternative for many conscientious objectors.

Finally, the remainder of AAUW's brief constitutes nothing more than speculation, which is insufficient as a matter of law to establish irreparable harm. For instance, AAUW speculates that entities will manufacture insincere religious or moral beliefs in order to take advantage of the IFR — even though it is far more costly for employers to cover pregnancy-related costs rather than contraceptive costs, and therefore they have no financial incentive to do so. Just as reality did not bear out predictions of vast numbers of for-profit companies taking advantage of the *Hobby Lobby*

decision, so too there is no reason to assume that swarms of companies will feign religious beliefs in order to take advantage of the exemption.

The Court should vacate the district court's preliminary injunction because of its reliance on speculative predictions, including AAUW's, regarding irreparable harm.

## ARGUMENT

Preliminary injunctive relief is "an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council., Inc.*, 555 U.S. 7, 24 (2008). A plaintiff must demonstrate all four of the following: "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 20. With respect to the irreparable harm prong, a preliminary injunction requires that the plaintiff demonstrate "irreparable injury is *likely* in the absence of an injunction," not that irreparable harm is merely possible. *Id.* at 22 (citing *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)).

In finding the appellee states to have shown a likelihood of irreparable harm, the district court relied in part on AAUW's characterization of the 2017 IFR's scope. *See* D. Ct. Op. at 25–26 (citing to AAUW Brief for the proposition that a "'wide and potentially boundless range' of employers . . . 'will be able to claim religious or moral exemptions' under the 2017 IFRs"). For the reasons that follow, AAUW's brief argues at most that it is possible for some employers to drop coverage — a far cry from the required showing

that irreparable harm to the appellee states is likely.[2] *See* AAUW Br. at 7 (arguing that "[i]t is entirely possible" that many employers would drop contraceptive coverage). The Supreme Court has expressly rejected a "possibility" standard of irreparable harm. *Winter*, 555 U.S. at 22. As the following will demonstrate, AAUW's speculative conclusions do not support the district court's preliminary injunction.

## I. The Challenged IFR Will Not Affect Many of the Specific Entities AAUW Asserts Will Drop Coverage.

As detailed below, the number of employers AAUW deems likely to drop contraception coverage as a result of the IFR is grossly inflated. Many of the brief's specifically listed employers will not be affected by the IFR *at all* because they are already exempt from providing the coverage to which they object by virtue of separate injunctions or settlements. *See* AAUW Br.

[2] Even if it were shown that a wide range of employers would drop some or all contraceptive coverage as a result of the IFR, that still would be insufficient on its own to demonstrate a likelihood of harm to the states. *See* Brief for Defendant-Appellants Alex M. Azar II, *et al.*, *California, et al. v. Azar, et al.*, No. 18-15255 at 27–28 (explaining that the employer's health plan must no longer cover the employee's chosen contraceptive method; the employee must not be able to receive such coverage from an alternate source such as a family member's plan; the employee must be eligible for a state-funded program; *and* the employee must take advantage of that program); *see also* Brief of Intervenor-Defendant-Appellant March for Life, *California, et al. v. March for Life Educ. & Def. Fund*, No. 18-15166 at 12–13 (listing each required showing to establish economic injury).

at 6–9, 11–13. Some of the entities, such as DePaul University and St. John's University, do not have student health plans subject to the mandate.[3] Other entities already provide contraceptive coverage through the accommodation and have specifically stated that they will continue to do so under the new rules. The remainder of the entities AAUW identifies either have chosen to invoke the accommodation in the past or merely have Christians in leadership positions. *See*, *e.g.*, AAUW Br. at 11, 13 (citing, *inter alia*, Hobby Lobby and In-and-Out Burger). AAUW's speculation that these entities will suddenly find the accommodation insufficient and drop contraceptive coverage is guesswork at best.

A table specifically listing employers and colleges AAUW lists as likely to drop contraception coverage that are already exempt through separate injunctions or settlements follows.

[3] *See* DePaul University Division of Student Affairs, *Health Insurance*, https://offices.depaul.edu/student-affairs/support-services/health-wellness/Pages/health-insurance.aspx ("While we do not provide a student health insurance plan, we encourage students to explore their options in the Healthcare Marketplace and work with local community organizations to provide support.") (last visited Apr. 14, 2018); St. John's University, *Health Insurance*, https://www.stjohns.edu/admission-aid/tuition-and-financial-aid/tuition/health-insurance (providing accident and sickness insurance only) (last visited Apr. 14, 2018).

Figure 1

| Employer | Citations |
|---|---|
| **Geneva College** | *See Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (prohibiting penalties for noncompliance with contraception mandate pending settlement negotiation). |
| **Wheaton College** | *Wheaton Coll. v. Azar*, No. 1:13-cv-8910, Doc. No. 119 at 3 (N.D. Ill. Feb. 22, 2018) (granting permanent injunction). |
| **School of the Ozarks** | *School of the Ozarks v. U.S. Dep't of Health and Human Servs.*, 86 F. Supp. 3d 1066 (W.D. Mo. Jan. 13, 2015) (prohibiting penalties for noncompliance under *Zubik*). |
| **Colorado Christian University** | *Colo. Christian Univ. v. Sebelius*, No. 13-cv-02105-REB-MJW, Doc. No. 70 at 18–20 (D. Colo. June 20, 2014) (granting preliminary injunction), *appeal dismissed sub nom Colo. Christian Univ. v. Price, et al.*, No. 14-1329 (10th Cir. Oct. 18, 2017). |
| **East Texas Baptist University** | *See Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (prohibiting penalties for noncompliance with mandate). |
| **Union University** | *Union Univ. v. Sebelius*, No. 1:14-cv-01079-STA-egb, Doc. No. 15 (W.D. Tenn. Apr. 29, 2014) (granting preliminary injunction); Order of Dismissal, No. 1:14:cv:01079-STA-egb, Doc. No. 25 (W.D. Tenn. Nov. 16, 2017) (noting settlement). |
| **Dordt College** | *Dordt Coll. v. Sebelius*, 22 F. Supp. 3d 934 (N.D. Iowa May 21, 2014) (granting preliminary injunction); *Dordt Coll. v. Sebelius*, 801 F.3d 946 (8th Cir. 2015) (upholding preliminary injunction), vacated and remanded *Burwell v. Dordt Coll.*, 136 S. Ct. 2006 (2016) (prohibiting penalties under *Zubik*); Judgment, *Dordt Coll. v. Burwell*, No. 14-2726 (8th Cir. Oct. 27, 2017) (noting settlement). |
| **Heartland Christian College** | *See Sharpe Holdings, Inc. v. U.S. Dept. of Health & Human Servs.*, No. 2:12-cv-00092-DDN, Doc. No. 84, 2013 U.S. Dist. LEXIS 181316 (E.D. Mo. Dec. 30, 2013) (granting preliminary injunction); *Id.* No. 2:12-cv-00092-DDN, Doc. No. 160 (E.D. Mo. Dec. Mar. 28, 2018) (granting permanent injunction). |

| | |
|---|---|
| **Sharpe Holdings, Inc.** | *See Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092-DDN, Doc. No. 57 (E.D. Mo. Sep. 30, 2013) (granting preliminary injunction); *id.* Doc. No. 160 (E.D. Mo. Dec. Mar. 28, 2018) (granting permanent injunction). |
| **Eternal Word Television Network** | *See Eternal Word Television Network, Inc. v. U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339 (11th Cir. 2014), *modified in* Order of October 3, 2016, No. 14-12696 (11th Cir. 2016) (prohibiting penalties under *Zubik*). |
| **Triune Health Group** | See *Triune Health Grp., Inc. v. U.S. Dep't of Health & Human Servs.*, 2013 U.S. Dist. LEXIS 107648 (N.D. Ill. Jan. 3, 2013) (granting preliminary injunction); motion to dismiss pending, Case No. 1:12-cv-06756, Doc. No. 147. |

Many nonprofit religious organizations, including those listed in the above table, are exempted from contraceptive coverage or penalties through pre-existing injunctive relief or settlements.[4] In 2012 and 2013, the

[4] In addition to the employers AAUW specifically names, many other employers challenging the mandate are not subject to it by settlement or injunction. *See* March for Life Br. at 20–21 (citing *Archdiocese of St. Louis v. Hargan*, No. 4:13-cv-02300, Doc. No. 77 (E.D. Mo. Oct. 23, 2017); *Brandt v. Price*, No. 2:14-cv-00681, Doc. No. 58 (W.D. Pa. Oct. 20, 2017); *Catholic Diocese of Biloxi, Inc. v. Burwell*, No. 1:14-cv-00146, Doc. No. 32 (S.D. Miss. Oct. 23, 2017); *Christian and Missionary Alliance Found., Inc. v. Burwell*, No. 2:14-cv-580, Doc. No. 79 (M.D. Fla. Nov. 3, 2017); *Diocese of Cheyenne v. Sebelius*, No. 2:14-cv-00021, Doc. No. 64 (D. Wyo. Oct. 24, 2017); *Diocese of Ft. Wayne-South Bend, Inc. v. Hargan*, No. 1:12-cv-00159, Doc. No. 136 (N.D. Ind. Oct. 23, 2017); *Insight for Living Ministries v. Burwell*, No. 4:14-cv-00675, Doc. No. 56 (E.D. Tex. Oct. 31, 2017); *Persico v. Price*, No. 1:13-cv-00303, Doc. No. 95 (W.D. Pa. Oct. 20, 2017); *Michigan Catholic Conf. v. Hargan*, No. 1:13-cv-01247, Doc. No. 68 (W.D. Mich. Nov. 2, 2017); *Notre Dame Univ. v. Hargan*, No. 3:13-cv-01276, Doc. No. 86 (N.D. Ind., Oct. 24, 2017); *Roman Catholic Archdiocese of New York v. Hargan*, No. 1:12-cv-02542, Doc. No. 122 (E.D.N.Y. Oct. 17,

Department provided "safe harbor" periods for these nonprofits during which it refrained from enforcing the mandate. *See* 77 Fed. Reg. 8,727 (Feb. 15, 2012); 78 Fed. Reg. 39,871 (July 2, 2013). After that period elapsed, many of these employers obtained preliminary relief pending litigation. *See*, *e.g.*, *Geneva Coll., et al. v. Sebelius*, No. 2:12-cv-00207, Doc. No. 84 (W.D. Pa. Apr. 19, 2013). Ultimately, the Supreme Court's order in *Zubik* prevented the Government from penalizing the objecting entities for failing to provide the notice to which they objected until the litigation was resolved. *Zubik*, 136 S. Ct. at 1560. The Department has since settled many of these cases.[5] By virtue of those agreements, many of the employers, both nonprofit and for-profit, which AAUW lists are not and have not been subject to the contraception mandate, the present litigation notwithstanding.

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2017); *Catholic Charities Diocese of Ft. Worth*, No. 4:12-cv-314, Doc. No. 127 (N.D. Tex. Jan. 11, 2018); *Ave Maria Found. v. Hargan*, No. 2:13-cv-15198, Doc. No. 26 (E.D. Mich. Feb. 2, 2018); *The Catholic Diocese of Nashville v. Hargan*, No. 3:13-cv-01303, Doc. No. 88 (M.D. Tenn. Jan. 29, 2018); *Zubik v. Burwell*, No. 2:13-cv-01459, Doc. No. 94 (W.D. Pa. Oct 20, 2017); *Catholic Benefits Ass'n v. Hargan*, Nos. Civ-14-240-R and Civ-14-684-R, Doc. No. 184 (W.D. Okla. Mar. 7, 2018); *Reaching Souls Int'l v. Azar*, No. 5:13-cv-1092-D, Doc. No. 95 (W.D. Okla. Mar. 15, 2018)).

[5] *See supra* Figure 1; *see also*, *e.g.*, Zoe Tillman, *The Trump Administration Agreed to Pay More Than $3 Million in Legal Fees to Settle Contraception Mandate Lawsuits*, BuzzFeed News (Jan. 9, 2018), https://www.buzzfeed.com/zoetillman/the-trump-administration-agreed-to-pay-more-than-3-million?utm_term=.lr1vG38ve#.ljyGEb4G8.

The Interim Final Rule, therefore, did not suddenly allow these entities to drop contraception coverage they already carried, and the preliminary injunction, by the same token, does not require them to provide it. Thus, the IFR itself has no impact upon employees of these entities seeking contraception coverage. Regardless of the merits of the Appellee-states' claims, the IFR does not change the status quo for the employees of many of the organizations AAUW lists.

Next, several employers AAUW lists have maintained coverage under the accommodation through the current plan year, and some have stated an intention to continue to use the accommodation notwithstanding the IFR's exemption. AAUW's list includes Catholic hospitals under the Catholic Hospital Association, DePaul University, Georgetown University, St. John's University, and St. Leo University. *See* AAUW Br. at 6–7. Notably, the Catholic Hospital Association ("CHA") departed from other Catholic groups in 2014 and determined that the accommodation ameliorated its religious objections.[6] In the wake of the IFR, CHA has not issued a statement

[6] *See* Catholic Health Ass'n of the U.S., *Women's Preventive Health Services Final Rule* (June 28, 2013), https://www.chausa.org/newsroom/women%27s-preventive-health-services-final-rule; *see also* Michael Sean Winters, *Catholic Health Association Says It Can Live with HHS Mandate*, National Catholic Reporter (July 9, 2013), https://www.ncronline.org/blogs/distinctly-catholic/catholic-health-association-says-it-can-live-hhs-mandate; David Gibson, *Catholic Hospitals*

departing from this position, and AAUW's assumption that it will suddenly find the accommodation insufficient is speculative at best.[7] DePaul University and St. John's University do not provide student health insurance plans subject to the mandate. *See supra* n.3. Moreover, health insurance plans at St. Leo University[8] and Georgetown University[9] cover contraception through the 2018 plan year. As a result, at the very least, students and employees of these colleges face no impending threat, and AAUW can only speculate that the colleges will drop coverage in the future. Indeed, Georgetown announced in December that it intends to continue to use the

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*and Birth Control: CHA at Odds with Catholic Bishops on Contraception Mandate*, The Huffington Post (July 10, 2013), https://www.huffingtonpost.com/2013/07/10/catholic-hospitals-birth-control_n_3568874.html.

[7] *See generally* Catholic Health Association of the United States, News Releases and Statements https://www.chausa.org/newsroom/news-releases (containing no statement on the 2017 IFR); Inés San Martín, *Head of Catholic Health Association Says "Excessive Treatment" Burdens Patients, Families*, Crux, (Nov. 19, 2017), https://cruxnow.com/interviews/2017/11/18/head-catholic-health-association-says-excessive-treatment-burdens-patients-families/ (explaining that "the accommodation worked very well for [Catholic Health Association] members, because quite frankly, we've always done what we're doing now").

[8] *See* St. Leo University, 2017–2018 Student Injury and Sickness Insurance Plan at 2, https://cdn2.hubspot.net/hubfs/206683/2017-2018_Student_Health_Insurance.pdf?t=1523376004023 (providing contraceptive coverage through the accommodation).

[9] *See* Georgetown University, 2017–2018 United Healthcare Insurance Company Student Injury and Sickness Insurance Plan Description of Benefits at 6, https://georgetown.app.box.com/s/0kms50unm7sgc3wqw6h9h8dooqq368qx.

accommodation process going forward, the new exemption notwithstanding.[10] As a result, individuals insured by these entities (and the states in which they reside) will not be affected by the IFR at all.

Finally, AAUW devotes pages to listing large corporations that it speculates could claim the exemption, "whether because of a religious CEO, a religious board of directors, or any number of other influences." AAUW Br. at 11–13. Singling out companies because they have Christians in leadership positions, without anything more, does not establish that these companies will take any particular action with respect to the IFR any more than singling out companies that have Jewish, Muslim, or Buddhist individuals in leadership. Such religious profiling is not competent evidence and should be disregarded by the Court.

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[10] *See American Catholic Universities Notre Dame and Georgetown Will Continue Contraceptive Coverage in Insurance Plans Following Expanded Federal Exemption*, Conscience Magazine (Jan. 11, 2018), http://consciencemag.org/2018/01/11/american-catholic-universities-notre-dame-and-georgetown-will-continue-contraceptive-coverage-in-insurance-plans-following-expanded-federal-exemption/; *see also* Elizabeth Ash, *Facing Student Pressure, Georgetown Continues Contraception Coverage in Insurance Plans*, The Hoya (Dec. 3, 2017), http://www.thehoya.com/facing-student-pressure-georgetown-continue-covering-contraception-health-insurance-plans/; *Notre Dame Faculty, Students to Retain Birth Control Coverage*, Catholic News Agency (Nov. 7, 2017), https://www.catholicnewsagency.com/news/notre-dame-faculty-students-to-retain-birth-control-coverage-86263.

In sum, because many of the employers AAUW specifically lists were already exempt from the mandate or chose to use the accommodation process, the IFR did not alter the status quo and, thus, does not threaten irreparable harm.

## II. The IFR's Exemption is Limited, Well-Defined, and Within the Traditional Scope of Conscientious Exemption Laws.

As AAUW rightly concedes, claiming the exemption will not cause businesses to save money. AAUW Br. at 14. According to one study, "not covering contraceptives in employee health plans would cost employers 15–17% more than providing such coverage."[11] Nevertheless, AAUW argues that numerous companies will be clamoring to lose money by fraudulently invoking the exemption. *Cf.* infra Part III (describing in practical terms why few businesses are likely to invoke the exemption).

Even if there were a significant risk of fraudulent conscientious exemption claims — which there is not — the IFR's exemption includes two important limitations that cabin its scope and thus minimize the risk of fraud. Borrowing longstanding criteria from the religious liberty context, the

[11] Guttmacher Institute, *The Cost of Contraceptive Insurance Coverage*, Guttmacher Policy Review (Mar. 1, 2003), https://www.guttmacher.org/gpr/2003/03/cost-contraceptive-insurance-coverage.

exemption is limited to the extent of the objection and only applies to "sincerely held beliefs." *See* 82 Fed. Reg. 47,835 (Oct. 13, 2017). Consequently, AAUW's speculation that the IFR will result in a mass exodus of nefarious employers from the realm of contraception coverage is unfounded.

### A. The IFR Employs Time-Tested Religious Exemption Criteria to Limit the Extent and Eligibility for Exemptions.

The IFR includes two important limitations: 1) the exemption will apply only "to the extent that an entity . . . objects" to complying with the contraceptive mandate; and 2) that objection must be made on the basis of "sincerely held religious beliefs." 82 F.R. 47,835 (Oct. 13, 2017). The first limitation restricts the extent of the exemption to the precise objection at hand. As a result, an objecting entity will only be exempt from providing those specific services it objects to providing. The IFR does not extend automatic blanket exemptions to providing any and all contraceptive services. While some entities do object to providing any contraceptive coverage, *see, e.g.*, *Eternal Word Television Network, Inc. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1136 (11th Cir. 2016), many object only to specific kinds of contraceptives, *see, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2765–66 (explaining that Hobby Lobby and Conestoga

Wood objected only to four of the twenty FDA approved contraceptives). Such entities would still be required to provide those contraceptives to which they do not object. Thus, even if an employer is eligible for an exemption under the IFR, it does not necessarily mean that its employees will have no contraceptive coverage. Indeed, they may well have insurance coverage for the most widely used contraceptives.

Secondly, the IFR's criterion that the religious belief underlying the exemption request be "sincerely held" constrains the exemption's breadth and prevents unmerited exemptions. "Sincerely held" is a longstanding term of art in the religious liberty context. The criterion prevents opportunistic claimants pretending to hold a religious belief —if there were any such claimants in this context — from taking advantage of a religious accommodation for which they are not eligible.

Religious liberty and the laws that protect it are concerned with genuine religious exercise, not pretended religious exercise. Accordingly, in order to receive a religious accommodation, claimants must actually hold the religious belief they claim to hold. *See Hobby Lobby*, 134 S. Ct. at 2774 n.28 ("To qualify for RFRA's protection, an asserted belief must be 'sincere'; a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail."). This "sincerely held" criterion

dates back decades in the Free Exercise Clause context. *See*, *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 209 (1972) (considering sincerity in a free exercise claim). Sincerity endures in modern Free Exercise claims. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (considering sincerity in a free exercise claim).

Likewise, the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb–2000bb-4, and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc–2000cc-5, both require that the claimant sincerely hold the religious belief at issue. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006) ("RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' -- the particular claimant whose sincere exercise of religion is being substantially burdened.") (citing 42 U.S.C. § 2000bb-1(b)); *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) ("RLUIPA protects 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief,' [42 U.S.C.] § 2000cc-5(7)(A), but, of course, a prisoner's request for an accommodation must be sincerely based on a religious belief and not some other motivation.").

Accordingly, determining whether a claimed religious belief is sincerely held is hardly a novel endeavor. Courts have been applying this criterion for decades. *See*, *e.g.*, *United States v. Ballard*, 322 U.S. 78, 87–88 (1944), *reversed on other grounds in Ballard v. United States*, 329 U.S. 187 (1946) (finding the sincerity of mail fraud defendants' religious claims an appropriate jury question — whether the defendants in good faith believed what they claimed, not whether those claims were factually true); *United States v. Anderson*, 854 F.3d 1033, 1035 (8th Cir. 2017) ("We note that a reasonable observer may legitimately question how plausible it is that Anderson exercised a sincerely held religious belief by distributing heroin."); *United States v. Christie*, 825 F.3d 1048, 1056 (9th Cir. 2016) (explaining that a prima facie case under RFRA requires claimants to demonstrate, *inter alia*, "that they sincerely hold those beliefs [they claim to espouse], and do not simply recite them for the purpose of draping religious garb" over non-religiously-motivated activity).

Indeed, employers that hold religious beliefs tend to manifest those beliefs clearly, publicly, and over time. Hobby Lobby, for example, included its religious beliefs in its corporate charter and manifested those beliefs over many years. *See Hobby Lobby*, 134 S. Ct. at 2766; *see also EWTN*, 818 F.3d at 1135 ("EWTN is a non-profit worldwide Catholic media network founded

in 1981 by Mother Mary Angelica, a Catholic nun. . . . Its programming includes . . . television and radio shows that support EWTN's mission of 'serv[ing] the orthodox belief and teaching of the Church as proclaimed by the Supreme Pontiff and his predecessors.'"). As a result, the government may have reason to be suspicious of an employer that suddenly asserts a religious belief to gain an exemption without having manifested any prior indication of such beliefs.

By building in a "sincerely held" criterion, the IFR provides a mechanism with which the government can evaluate and restrict employers that do not genuinely hold a religious belief from taking advantage of the religious accommodation under false pretenses. Thus, the IFR's exemption is designed to harmonize its authority under the ACA with its obligations under RFRA without creating a free pass for employers that may falsely assert a religious belief in order to serve some ulterior motive, as AAUW implies will occur. *See* AAUW Br. at 4–5.

### B. Moral Exemptions Analogous to Religious Exemptions Are Longstanding, Common, and Capable of Effective Administration.

Moreover, the addition of an exemption for employers that object to providing contraceptive coverage due to sincerely held moral beliefs is an appropriate and definable analogue to the religious exemption. It extends an

exemption to employers conscientiously opposed to providing contraception, but who may not derive this conviction from a religious source. 82 Fed. Reg. 47,862 (Oct. 13, 2017) (providing an exemption to contraceptive insurance requirements for eligible entities to the extent of the objection based upon "sincerely held moral convictions").

The federal government has historically provided exemptions and accommodations based on sincerely held moral beliefs as well as sincerely held religious beliefs. For example, during World War I, the government extended eligibility for religious exemptions from combatant military service to include individuals who held "personal scruples against war." *See United States v. Seeger*, 380 U.S. 163, 171 (1965) (describing 1917 conscientious objector rules). From time to time, courts have had to determine whether untraditional and abstract moral beliefs were sincere and supported an exemption or accommodation. *See*, *e.g.*, *Seeger*, 380 U.S. at 167–68, 183–84 (weighing the sincerity of claimants' claimed beliefs and explaining that a conscientious exemption to military service was appropriate where "the claimed belief occup[ies] the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption"); *Welsh v. United States*, 398 U.S. 333, 340, 343–44 (1970) (noting that conscientious objector held nontraditional beliefs

"with the strength of traditional religious convictions" and finding that he was entitled to an exemption).

Moreover, the IFR's moral exemption is in good company because conscientious exemptions encompassing both religious and moral beliefs are standard in federal laws regulating the healthcare industry. *See*, *e.g.*, 42 U.S.C. § 300a-7(b)(1)–(e) (protecting medical professionals and trainees' right to refuse to perform or assist in performing a sterilization or abortion procedure contrary to their "religious beliefs or moral convictions"); 42 U.S.C. § 2996f(b)(8) (preventing certain grant money from being used to force individuals or institutions to provide abortions contrary to their "religious beliefs or moral convictions"); 42 U.S.C. § 1396u-2(b)(3)(B)(i) (protecting the right of Medicaid managed care organizations from being forced to provide counseling or referrals against their "moral or religious" objections); 22 U.S.C. § 7631(d) (protecting the right of entities receiving HIV/AIDS relief funds to refuse to participate in any activity to which it has "a religious or moral objection"). Other federal regulations likewise account for moral objections. *See*, *e.g.*, 42 C.F.R. § 422.206(b) (providing that organizations offering Medicare Advantage plans are not required "to cover, furnish, or pay for a particular counseling or referral service" if the organization "[o]bjects to the provision of that service on moral or religious

grounds"); 48 C.F.R. § 1609.7001(c)(7) (providing that health plan sponsoring organizations are not required to discuss treatment options inconsistent with "their professional judgment or ethical, moral or religious beliefs").

The IFR is no different and recognizes that a sincere belief's origin in moral conviction instead of religious belief renders that conviction no less valid or deserving of an exemption. Also, like its religious counterpart, a qualifying moral conviction must be sincerely held, and the resulting exemption only applies to the extent of that conviction. 82 Fed. Reg. 47,862. As a result, a qualifying moral exemption claim must be made in good faith and must be specific enough to determine the extent of the applicable exemption.

The March for Life exemplifies the kind of employer this exemption is designed to accommodate. The March for Life "is a non-profit, non-religious pro-life organization" that "holds as a foundational tenet the idea that life begins at conception." *March for Life v. Burwell*, 128 F. Supp. 3d 116, 122 (D.D.C. Aug. 31, 2015). Accordingly, the March for Life objects to supporting abortion "in any way" and "opposes coverage in its health insurance plan for contraceptive methods it deems 'abortifacients.'" *Id.* It also only employs individuals who share its opposition to abortion,

including contraceptives it deems abortifacients, but these employees may derive their objections from a variety of religious and moral backgrounds. *See id.* at 123. Forcing such an entity to comply with the contraceptive mandate would force it to violate the core tenet it exists to advocate. Such an entity is tailor-made for a moral exemption.

Like religious objections, sincere moral objections regarding abortion or contraception tend to be consistently and clearly manifested over time and would thus be difficult to fabricate. *See*, *e.g.*, *id.* The same limitations discussed above with respect to religious objections apply to moral objections, and the status of the objection as moral instead of religious does not affect the government's ability to determine whether the belief is genuine. Accordingly, the moral exemption does not create a magnet for fraud as AAUW implies. *See* AAUW Br. at 10.

## III. Most Businesses Are Incentivized to Retain Contraceptive Coverage.

AAUW's assertion that, in practice, businesses will abandon contraceptive coverage in droves is unfounded. First, financial deterrents and practical limitations naturally prevent floods of new exemption claims, especially in the for-profit context. Because of a lack of financial incentives, for-profit corporations manifesting sincere religious or moral objections to

insuring contraception will be comparatively few and far between. Moreover, many organizations seeking an exemption do not seek exemption from all contraceptive coverage. Finally, assuming that employers previously using the accommodation will not continue to use that accommodation is speculative at best. Far from threatening irreparable harm, the IFR in practice will not lead to a "boundless" number of employers dropping coverage. *See* AAUW Br. at 9.

### A. For-Profit Corporations Manifesting Sincere Religious Beliefs Will Be Comparatively Few and Far Between.

Contrary to AAUW's implication, the number of for-profit corporations eligible for an exemption under the IFR is comparatively small. Corporations, closely held or otherwise, generally do not suddenly assert religious or moral convictions they have not previously demonstrated.

As the Supreme Court noted in *Hobby Lobby*, corporations manifesting religious beliefs are atypical:

> [I]t seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims. . . . [N]umerous practical restraints would likely prevent that from occurring. For example, the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.

134 S. Ct. at 2774. Most corporations will not be able to manifest religious beliefs simply because their constituent components will not agree on a

single, unified religious identity or moral conviction and, indeed, will have no particular reason to do so. *See id.* As a result, the for-profit businesses capable of utilizing the exemptions are comparatively small in number. To illustrate, AAUW points to as many as eighty for-profit businesses that may apply for the exemption. AAUW Br. at 11. Even assuming this number is correct, it is a drop in the bucket compared to the millions of for-profit businesses that call the United States home.

After the Supreme Court's decision in *Hobby Lobby*, the dire predictions of for-profit companies claiming exemptions *en masse* did not come to fruition. *See* Jennifer Haberkorn, *Two Years Later, Few Hobby Lobby Copycats Emerge*, Politico (October 11, 2016), https://www.politico.com/story/2016/10/obamacare-birth-control-mandate-employers-229627; *see also* Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 Seton Hall L. Rev. 353, 356 (2018) ("Contrary to predictions that *Hobby Lobby* would open the floodgates of religious liberty litigation, these cases remain scarce, making up only 0.6% of the federal docket. And contrary to predictions that religious people would be able to wield *Hobby Lobby* as a trump card, successful cases are even scarcer."). Moreover, employers have a financial incentive to insure contraception,

given the significant cost differential between contraception and pregnancy care leave.[12] A company asserting an exemption does not make a profit off of it. *See id.* Thus, a company mindful of its bottom line will have no interest in asserting an exemption when it does not hold a sincere belief.

### B. Many, if Not Most, of the Organizations Seeking an Exemption Do Not Object to All Forms of Contraception.

Moreover, of the companies AAUW lists, many object only to a few contraceptive methods. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2765; *see* AAUW Br. at 11 (listing Hobby Lobby, among others). Because the exemption only applies to the extent of the objection, *see* 82 Fed. Reg. 47,835, those companies will not be permitted to cease providing all contraceptive coverage, even if they do not opt to use the accommodation process. Although the AAUW implies that all or nearly all employers seeking an exemption will be able to drop all contraceptive coverage entirely, this is not the case. *See* Haberkorn, *supra* Part III A (describing employers seeking exemptions after *Hobby Lobby*: "About half of the companies and schools objected to covering all forms of contraception. The other half objected to covering a particular approach — most often, to

[12] Guttmacher Policy Review, *supra* note 11, ("[N]ot covering contraceptives in employee health plans would cost employers 15–17% more than providing such coverage.").

methods they equate to abortion, such as emergency contraception, including the morning-after pill, and certain intrauterine devices."); *see*, *e.g.*, Geneva College, *Geneva Lawsuit Information*, http://www.geneva.edu/lawsuit/lawsuit-FAQ ("Geneva has and intends to continue to provide coverage for birth control drugs that act before conception. The lawsuit is directed toward abortifacient drugs that, although classified by the FDA as contraceptives, act to induce abortions after life has begun. These include the drugs Plan B and Ella, sometimes referred to as 'morning-after' or 'week-after' pills."). Emergency contraception accounts for only 0.2% of all contraceptive use. *See* Guttmacher Institute, *Fact Sheet: Contraceptive Use in the United States* (September 2016), https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states. Thus, employers objecting only to emergency contraception are willing to provide the vast majority of contraceptive methods. Employees of such organizations still have a large menu of insured contraceptives from which to choose.

### C. Assuming that Employers Previously Using the Accommodation Will Not Continue to Use that Accommodation Is Speculative at Best.

Finally, AAUW's conclusion that a significant number of previously accommodated employers will stop using the accommodation process in the

future is based entirely on speculation. Although it acknowledges that many employers have been satisfied with the accommodation, AAUW claims "[i]t is entirely possible that many of these healthcare providers will seek to eliminate contraceptive coverage for their employees and dependents under the Exemption Rules." AAUW Br. at 7. Yet, AAUW provides no indication suggesting that the employers that have been satisfied with the existing accommodation process will not continue to use that process.[13] The administrative burdens and costs to the company are identical — in either situation, the company provides a notice to HHS and does not have to pay for the contraceptive coverage. *See* 82 Fed. Reg. 47,835. Employers dissatisfied with the accommodation have made their objections to that process clear already, *see*, *e.g.*, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), and some employers have even announced their intention to continue to use the accommodation.[14]

At bottom, the claim that currently accommodated employers will stop using the accommodation relies on the assumption that the

[13] Indeed, AAUW cites businesses' efforts to obtain accommodations for the proposition that they will stop using the accommodation under the IFR. *See* AAUW Br. at 11–12 (citing, *e.g.*, *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013).

[14] Conscience Magazine, *supra* note 10 (explaining that Georgetown University and Notre Dame University will continue to use the accommodation.).

accommodated employers do not act in good faith. AAUW provides no evidence that employers asserting religious objections do so from some unseemly ulterior motive to harm its female employees' careers. Indeed, any of AAUW's purportedly nefarious employers could have easily and more cheaply accomplished such a goal by dropping all insurance coverage. *See Hobby Lobby*, 134 S. Ct. at 2776. In short, AAUW's implication that many religious employers will choose to invoke the exemption out of a desire to harm women, rather than because of their sincerely held religious beliefs, is thinly veiled religious bigotry.

In sum, the federal government's decision to maintain contraceptive coverage requirements for the vast majority of employers, while allowing religious and conscience exemptions for a minority of dissenters, strikes a rational balance of conflicting interests. The state appellees and their amici have not demonstrated that this balance poses a likelihood of irreparable harm.

## CONCLUSION

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

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

DATED: April 16, 2018.

## CERTIFICATE OF COMPLIANCE

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

The undersigned further certifies that the brief contains 6,264 words, exclusive of the portions of the brief excepted by Rule 32(f) of the Federal Rules of Appellate Procedure. The undersigned used Microsoft Word for Mac Version 16.12 to compute the word count.

DATED: April 16, 2018.

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

## STATEMENT OF RELATED CASES

This case, 18-15144, has been consolidated with Case Nos. 18-15166 and 18-15255. I certify that I know of no other related cases pending in this Court.

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

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 16, 2018.

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

DATED: April 16, 2018.

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