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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA *et al.*,
Plaintiffs–Appellees
v.
ALEX M. AZAR II, in his official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,
Defendants-Appellants,
and
THE LITTLE SISTERS OF THE POOR, JEANNE JUGAN RESIDENCE,
Intervenor-Defendant-Appellant.

STATE OF CALIFORNIA *et al.*,
Plaintiffs–Appellees
v.
ALEX M. AZAR II, in his official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,
Defendants-Appellants,
and
MARCH FOR LIFE EDUCATION AND DEFENSE FUND,
Intervenor-Defendant–Appellant.

STATE OF CALIFORNIA *et al.*,
Plaintiffs–Appellees
v.
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Defendants-Appellants,

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

REPLY BRIEF FOR INTERVENOR-DEFENDANT-APPELLANT MARCH FOR LIFE

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v.
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Intervenor-Defendant–Appellant.

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REPLY BRIEF FOR INTERVENOR-DEFENDANT-APPELLANT MARCH FOR LIFE

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INTRODUCTION

The States build the edifice of their argument on a seemingly plausible assumption: that a significant number of health plan sponsors will invoke the Interim Final Rules' newly available exemptions and thereby deprive many individuals of cost-free contraceptive coverage.

On this foundation they add layer upon layer of additional speculation: (1) that many plan beneficiaries will have no other way of obtaining the omitted items, will stop using them, and experience unintended pregnancies; (2) that these individuals, who by definition participate in employer- or school-based health plans, will be eligible for and utilize State-funded prenatal and maternity care; (3) that others, also having no other way of getting contraceptives, will be eligible for and utilize state-funded family planning programs; and (4) that the States will respond to growing demand by spending more on the relevant programs.

The fragile foundation of the States' layers of conjecture crumbles upon examination. As discussed in detail below, the evidence simply does not show that significant numbers of health plan sponsors will

invoke the Interim Final Rules' newly available exemptions and thereby deprive many individuals of cost-free contraceptive coverage, especially in the plaintiff States. The entire edifice collapses, leaving the States no place to stand.

Because the States lack standing, this Court must reverse the district court's preliminary injunction and order dismissal of the suit.

ARGUMENT

I. THE STATES HAVE NOT SHOWN THAT THE INTERIM FINAL RULES WILL HARM THEM, AND THEY THUS LACK STANDING.

The Appellee States have not proven that the Interim Final Rules (IFRs) will likely injure them. They have not shown that *any* health plan sponsor will stop providing their residents some or all contraceptives because of the IFRs. Even if one assumes otherwise, the States have not proven that such actions by plan sponsors will cost the States money. As a result, they lack standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (requiring proof of injury that is "actual or imminent, not conjectural or hypothetical") (internal quotations omitted).

In erroneously concluding that the States had standing to sue, the district court relied almost exclusively on the States' purported procedural injury, caused by the Departments' alleged violation of the Administrative Procedure Act's requirement to provide notice and an opportunity to comment before implementing the new rules. ER 13-14. The court correctly acknowledged that a procedural injury alone was insufficient to establish standing, requiring the States to show a more concrete interest harmed by the rules and the manner in which the Departments adopted them. ER 13 (citing *Citizens for a Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969 (9th Cir. 2003)). *See also Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015).

The district court accepted the States' claims that they "will incur economic obligations," concluding that "they have shown that the 2017 IFRs will impact their fiscs in a manner that corresponds with the IFRs' impact on their citizens' access to contraceptive care." ER 14. The district court erred.

A. The Evidence Fails to Show That the IFRs Will Injure the States.

The record below contains three sources of evidence about the potential impact of the IFRs: (1) the administrative record on which the Departments relied in formulating the IFRs;[1] (2) the preambles to the IFRs, in which the Departments explain the conclusions they drew from the administrative record, ER 283-319 (Religious IFR), ER 327-350 (Moral IFR); and (3) declarations submitted by the States in support of their motion for preliminary injunction. ER 95-249. None of this evidence demonstrates that *any* plan sponsors in the plaintiff States will stop covering some or all contraceptives because of the IFRs, much less that this will impact the States fiscally.

In the regulatory impact assessments, the Departments acknowledged that "[t]hese interim final rules will result in some persons covered in plans of newly exempt entities not receiving coverage or payments for contraceptive services." ER 307. They then

[1] The Departments manually filed nine compact discs containing the administrative record with the district court. *State of California v. Hargan*, No. 4:17-cv-05783-HSG, Dkt. No. 145 (Mar. 17, 2018). Excerpts of the administrative record are attached as Exhibit A to the Brief of Amici Curiae Massachusetts, *et al.*, No. 15-15255, Dkt. 58-2 (9th Cir. May 29, 2018) (hereinafter "Mass. Br.").

observed that they "do not have sufficient data to determine the actual effect of these rules on plan participants and beneficiaries, including for costs they may incur for contraceptive coverage, nor of unintended pregnancies that may occur." *Id.* The Departments listed no fewer than ten uncertainties that limit the ability of *anyone* to predict the rules' impact. ER 307-12.

Despite these uncertainties, the Departments attempted to estimate the IFRs' impact on plan beneficiaries, utilizing two different approaches. Under the first, the Departments relied on three sources of data to estimate the number of individuals who might lose some or all contraceptive coverage as a result of the IFRs: (1) the lawsuits that had been filed against them; (2) the number of notices filed with HHS invoking the accommodation; and (3) the number of third party administrators of self-insured plans utilizing the contraceptive user fee adjustment available under the accommodation.[2] ER 307-12. The

[2] The second, far more rudimentary approach starts with an estimate of the number of plans that did not cover contraceptives prior to the adoption of the Patient Protection and Affordable Care Act and the relevant implementing regulations. ER 312-15. The rest of this second approach is almost entirely guesswork, engaging in pure speculation about the reasons why plans may have excluded contraceptives, about how many of these plans were exempt under the original exemption

administrative record identifies by name the entities in all three categories, and the relevant excerpts of the record are attached as exhibits to the amicus brief submitted by Massachusetts and other states in support of the Appellees.[3]

Based on these sources of information, the Departments estimated "that approximately 7,221 women of childbearing age that use contraception covered by the Guidelines are covered by employer sponsored plans of entities that have filed lawsuits challenging the Mandate, where those plans are neither exempt under the prior rule nor are self-insured church plans."[4] ER 310. They also estimated that 1,462 individuals in student plans offered by litigating schools would be affected. ER 310-311. The sum of these two numbers is approximately 8,700.[5]

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expanded by the IFRs, and the like. *Id.* It is difficult to see how the States' further conjecture built on such a speculative exercise could somehow confer standing on them.

[3] *See supra* note 1.

[4] Self-insured church plans are functionally exempt from the Mandate. ER 292, 293, 296, 298, 301, 307.

[5] It bears noting that many litigating entities object only to a subset of mandated items, willingly covering 14 of 18 FDA-approved contraceptives. ER 292, 308, 314. As a result, even if 8,700 women

In addition to reviewing litigation records, the Departments studied available information about utilization of the available accommodation. ER 308-09. Through a series of what amount to educated guesses about the number of plan sponsors electing that option, the Departments speculated that an additional 23,000 individuals might lose some or all contraceptive coverage, even though only 46 entities had either notified HHS of their use of the accommodation or utilized user fee adjustments. ER 312. Adding this to the number drawn from litigation records, the total is approximately 31,700. *Id.*

The States assume that a significant number of this estimate of affected beneficiaries are their residents, Appellee States' Response Brief (hereinafter "States' Br.") at 15-16, 22-26, 55-57, laying the (shaky) foundation for their speculation that state agencies will end up bearing costs associated with these individuals. The evidence does not support this assumption.

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actually experience a reduction in coverage due to the IFRs, many of them will continue to receive most items, undermining the States' claim that the IFRs will inflict fiscal harm on them.

First, only 11 of the 209 litigating entities employ anyone in the plaintiff States.[6] Second, of these 11, eight have permanent injunctions or settlement agreements that fully protect them and thus render the IFRs irrelevant.[7] One of the ten, the Media Research Center (MRC) in Virginia, did not even challenge the accommodation; it merely sought a judicial declaration of its eligibility for the accommodation. *Media Research Ctr. v. Sebelius*, No. 1:14-cv-00379-GBL-IDD, Dkt. No. 1, ¶¶ 5-7 (E.D. Va. Apr. 11, 2014). Eventually satisfied that it was eligible, MRC voluntarily dismissed its lawsuit. *Id.*, Dkt. No. 50 (E.D. Va. Oct.

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[6] *See* Mass. Br., Ex. A, at 1-7. Two are in California (Biola University and Thomas Aquinas College); six are in New York (the Archdiocese of New York, ArchCare, Catholic Health Services of Long Island, the Diocese of Rockville Centre, Monsignor Farrell High School, and Cardinal Spellman High School); two have employees in Virginia (Media Research Center and Trijicon); and one (Hobby Lobby) has employees in multiple states (New York, Virginia, Maryland, and California).

[7] The eight are Biola University, Thomas Aquinas College, and the six New York plaintiffs listed in the previous footnote. *See Grace Schs. v. Azar,* No. 3:12-cv-00459-JD-MGG, Dkt. No. 114 (N.D. Ind. June 1, 2018); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 1:12-cv-02542, Dkt. No. 122 (E.D.N.Y. Oct. 17, 2017); *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 1:13-cv-01441 (D.D.C. Nov. 6, 2017)(https://www.justice.gov/civil/page/file/1044351/download). It also bears noting that the six New York plaintiffs all use a self-insured church plan, which means they are functionally exempt from the Mandate even without a settlement agreement, injunction, or the IFRs.

2, 2014). The remaining two, Trijicon and Hobby Lobby, secured victories in litigation against the original Mandate,[8] and the States have not presented any evidence either that those plaintiffs filed lawsuits challenging the accommodation or that they intend to switch from using the accommodation to claiming the exemption under the IFRs. The other 198 litigating entities do not employ anyone in the plaintiff States, and thus their actions cannot possibly impact the States.

As noted above, the Departments also based their estimate on the number of health plans that have been using the accommodation. ER 308-09. The administrative record identifies 46 plan sponsors that either notified HHS of their desire to use the accommodation or who utilized the contraceptive user fee adjustment available to plans that use the accommodation.[9] Of those 46, only two have employees in the

[8] *Bindon v. Sebelius*, No. 1:13-cv-01207, Dkt. No. 22 (D.D.C. Oct. 8, 2014); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

[9] This number comes from counting the entities (without duplication) that are in the administrative record excerpt that is attached to the amicus brief of the Commonwealth of Massachusetts and others. Mass. Br., Ex. A, at 8-24.

plaintiff States. One, The Energy Lab, Inc., is in California.[10] It has a fully-insured plan[11] and is thus subject to the California state contraceptive mandate. As a result, even if The Energy Lab switched from the accommodation to the exemption, it would not matter—state law would still require it to cover contraceptives. *See* Cal. Ins. Code § 10123.196. Therefore, the IFRs will not cause any of The Energy Lab's plan beneficiaries to impose costs on the State of California.

The other entity in a plaintiff State, Global Pump Company, has 34 employees spread among one foreign country and six states.[12] One of those is Maryland, but it is unclear how many employees are there, whether they participate in the company's health plan, whether they are female, whether they are of childbearing age, or whether they use mandated contraceptives. The States have presented no evidence that this employer will switch from the accommodation to the exemption and thereby create even the possibility that some individual might end up

[10] The Energy Lab, http://energylabfitness.com/ (last visited June 11, 2018).

[11] Mass. Br., Ex. A, at 30.

[12] Locations Where Global Pump is Represented, http://www.globalpump.com/locations.php (last visited June 11, 2018).

imposing fiscal costs upon them. The other 44 plan sponsors identified in the administrative record as users of the accommodation are not located in the plaintiff States, and thus these sponsors' potential invocation of the IFRs will not injure those States.

The numbers of plan participants potentially affected by the IFRs in states other than the plaintiffs are of course irrelevant to the plaintiff States' standing. Even so, the Departments' primary estimate of affected beneficiaries nationwide (31,700) is undoubtedly too high, as it does not account for all of the litigating entities protected from the Mandate by injunctions or settlement agreements. (The Departments' overestimate is understandable, as most of the permanent injunctions and settlements occurred after they issued the IFRs in early October 2017.)

To illustrate, the Departments observed in the administrative record that 12 colleges and universities in non-plaintiff states had sought judicial protection from the Mandate with respect to their student plans.[13] Based on that, the Departments speculated that the

[13] Mass. Br., Ex. A, at 1-7.

IFRs might affect approximately 1,462 student health plan participants. ER 310-311.

The actual number of affected student plan beneficiaries at these schools, however, is almost certainly zero. Four of the 12 schools have obtained permanent injunctions that allow them to exclude objectionable items from their student health plans.[14] Four more have entered into settlement agreements that give them the same freedom.[15] The remaining four institutions have been and continue to be protected

[14] The four are Grace College & Seminary, Southern Nazarene University, Oklahoma Baptist University, and Belmont Abbey College. *See S. Nazarene Univ. v. Azar*, No. 5:13-cv-01015-F, Dkt. No. 109 (W.D. Okla. May 15, 2018); *Little Sisters of the Poor v. Azar*, No. 1:13-cv-02611-WJM, Dkt. No. 82 (D. Colo. May 29, 2018); *Grace Schs. v. Azar,* No. 3:12-cv-00459-JD-MGG, Dkt. No. 114 (N.D. Ind. June 1, 2018). The first three of these schools include 14 non-abortifacient contraceptives in their student health plans.

[15] The four are Crown College, Catholic University of America, University of Dallas, and University of Notre Dame. *See Christian and Missionary Alliance Found. v. Burwell*, No. 2:14-cv-580, Dkt. No. 79 (M.D. Fla. Nov. 3, 2017); *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 1:13-cv-01441 (D.D.C. Nov. 6, 2017) (https://www.justice.gov/civil/page/file/1044351/download); *University of Notre Dame v. Sebelius*, No. 3:13-cv-01276-PPS-MGG, Dkt. No. 86 (N.D. Ind. Oct. 24, 2017). Notre Dame subsequently indicated that it would provide contraceptives through its student health plan. *See* March for Life Opening Brief at 35 n. 19.

by preliminary injunctions that will likely soon be transformed into permanent injunctions.[16]

Along the same lines, as noted in our opening brief, a large majority of the non-profit religious employers that challenged the accommodation are already protected by injunctions or settlement agreements. March for Life Opening Brief (hereinafter "MFL Br.") at 20-21 (listing cases). Since that brief was filed, ten more challengers in three lawsuits have secured permanent injunctions. *See So. Nazarene Univ. v. Azar*, No. 5:13-cv-01015-F, Dkt. No. 109 (W.D. Okla. May 15, 2018); *Little Sisters of the Poor v. Azar*, No. 1:13-cv-02611-WJM, Dkt. No. 82 (D. Colo. May 29, 2018); *Grace Schs. v. Azar,* No. 3:12-cv-00459-JD, Dkt. No. 114 (N.D. Ind. June 1, 2018).

In sum, the evidence presented to the district court fails to show that the IFRs will inflict fiscal injury on the States. They therefore lack standing.

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[16] The four are Geneva College, Dordt College, Colorado Christian University, and East Texas Baptist University. *Geneva Coll. v. Azar*, No. 2:12-cv-00207, Dkt. No. 144 (W.D. Pa. Mar. 20, 2018); *Dordt Coll. v. Sebelius*, 22 F. Supp. 3d 934 (N.D. Iowa 2014); *Colorado Christian Univ. v. Sebelius*, 51 F. Supp. 3d 1052 (D. Colo. 2014); *East Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743 (S.D. Tex. 2013). All of these include 14 non-abortifacient contraceptives in their student health plans.

B. The States Have Failed to Show that the IFRs Will Injure Them.

All of these realities demonstrate not only that the Departments' estimate is far too high, but also that the States' claims of imminent injury are unsubstantiated. In their brief, the States do not meaningfully confront these facts. They repeatedly just *assert* that large numbers of women will lose coverage and will end up pressuring them to spend more on contraceptives and health care. *See, e.g.,* States' Br. at 15-16, 22-26, 55-57.

In addition to bare assertions, the States make two efforts to bolster their suspect contentions. First, they rely upon their preliminary injunction declarations. *See* States' Br. at 23, 27, 55-59. Second, they claim that the Departments themselves have somehow conceded their assertions' validity. *See* States' Br. at 25-26, 62-63. Both efforts fail.

First, the declarations do not support the States' contentions. Only one of their 15 declarations (Mr. Werberg's) even *attempts* to estimate the number of individuals who might be affected by the IFRs. ER 246-49. As noted in our opening brief at pages 22-28, the Werberg declaration is woefully deficient, identifying just three employers—one

that has no employees in New York (Biola University), another that has not expressed any concern about the Mandate (and that may well be subject to the New York state mandate) (Nyack College), and a third that has apparently accepted the accommodation and expressed no intention to invoke the newly available exemption under the IFRs (Hobby Lobby). ER 248-49. Undeterred, the States cite the Werberg declaration for the proposition that the IFRs will "result[] in devastating consequences for the State." States' Br. at 55.

Similarly, the States invoke the Whorley declaration, ER 240-44, for the claim that "[m]any women who lose contraceptive coverage in Virginia will turn" to the Commonwealth's family planning program and thus "cause fiscal harm to Virginia." States' Br. at 57 (citing ¶¶ 3, 4, 10, and 11 of the declaration). The declaration does not say what the States' brief claims.

Paragraph 3 simply describes the family planning program. ER 242. Paragraph 4 states the program's income eligibility requirement. *Id*. Paragraph 10 is simply an assertion of the desired conclusion, not evidence to support it: "[w]omen impacted by the IFRs who are eligible for Plan First may be expected to enroll in Plan First, resulting in an

increase in enrollees in this state-supported program which would have a corresponding fiscal impact." ER 243. Paragraph 11 observes that two hospitals do not recover 100% of the cost of the services they provide under the state plan. *Id.*

The declaration does not even try to estimate how many Virginians will be "impacted by the IFRs" and what percentage of that group will, amidst all the other options, end up imposing a financial burden on the Commonwealth. But this is the sort of evidence that the States needed to prove the IFRs will harm them; their failure to proffer it means they lack standing.

The remaining declarations simply assert—without evidentiary support—that the IFRs will cause unspecified numbers of women to lose some or all contraceptive coverage, and that these women will inevitably pressure the States to spend more. *See, e.g.*, ER 116-17, 122, 130. Perhaps realizing that the declarations are vague and conclusory, the States make a logically fallacious appeal to authority, claiming that some of the declarants are "respected researchers and public servants." States' Br. at 27.

But these individuals' particular expertise and experience give them no insight into predicting the effect of the IFRs. Knowing about the impact of free contraceptives on unintended pregnancy rates does not qualify one to speculate about how many employers will invoke the IFRs' protections. Knowing how to run a Planned Parenthood clinic does not qualify one to opine on whether plan beneficiaries who lose employment-based contraceptive coverage will ultimately turn to the state. The fact that an unsupported assertion by an unqualified witness appears in a declaration does not make it persuasive.

The States also contend that the Departments have conceded facts that establish their standing. States' Br. at 25-26, 62. For example, they claim the Departments admitted that "hundreds of thousands of women will be affected by the IFRs." States' Br. at 26 (citing ER 314).

The Departments said no such thing. An honest reading of the preambles to the IFRs shows just how tenuous the Departments' estimates are. Indeed, their primary contention is that they "do not know how many entities will use the expanded exemption." ER 310. The Departments do not know, and the States most certainly do not

know either. But it is the States who bear the burden of proof, and they have not carried their burden.

The States also claim that the Departments "acknowledge[d] that state programs will bear a resultant financial burden." States' Br. at 26 (citing ER 294). This is untrue. In the preamble to the Religious IFR, the Departments explained their legal conclusion that imposing the Mandate on religious objectors violates the Religious Freedom Restoration Act. ER 290-97.

After demonstrating that the Mandate substantially burdens religious exercise, the Departments explain why the original decision in 2011 to impose the Mandate on religious objectors was not necessary to advance a "compelling governmental interest." ER 291-97.

They offered multiple reasons, one of which was that "there are multiple Federal, State, and local programs that provide free or subsidized contraceptives for low-income women." ER 294. Contrary to the States' suggestion, the Departments were not predicting what effect the IFRs would have going forward, but were instead explaining why the Mandate (at least as applied to religious objectors) was unnecessary in the first place.

In short, the Departments simply did not concede facts that satisfy the States' burden of proving the IFRs will injure them. Given this, plus the insufficiency of their preliminary injunction declarations, the States have not demonstrated standing.

In this Court, interestingly, the States shift tactics from the district court, mostly eschewing any effort to identify plan sponsors who will drop coverage because of the IFRs or any individuals who would consequently lose coverage and eventually impose costs on the States.

Instead, they now assert that they simply are not required to provide the sort of evidence they unsuccessfully attempted to supply in the district court and weakly try to provide in this Court. States' Br. at 23-26. Their basic argument is that there simply *must be* some employers within their borders who will curtail or drop contraceptive coverage; that there *must be* beneficiaries who, despite the existence of other avenues, will turn to the States; and that the States *definitely* will increase their expenditures in response. But assertions and assumptions are no substitute for evidence.

The States cite *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161 (9th Cir. 2011), for the proposition that their speculations, assumptions,

and conjecture are sufficient. States' Br. at 24-25. Yet *Sherman* does not support their argument. In that case, the State of California sued the United States Forest Service, alleging that it violated the National Environmental Policy Act when making changes to a forest management plan. *Id.* at 1168.

In defending its standing to sue, California correctly argued that its territorial and propriety interests were at stake, interests that courts have consistently deemed sufficient to establish standing. *Id.* at 1178 (citing *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907); and *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004)). No such interests are at stake in this case.

The court also observed that "there is no real possibility that the Forest Service will . . . decline to adopt *any* management projects under the framework governing over 10 million acres of federal land." 646 F.3d at 1179. In contrast, there *is* a real possibility in this case that the States will not incur any increased fiscal responsibilities because of the IFRs. The States certainly have not carried their burden of showing that they will.

C. The States' Supportive Amici Also Fail to Demonstrate Standing.

The States' supportive amici fare no better in establishing the States' standing. Only two of their ten amicus briefs make any effort at all to show that meaningful numbers of plan beneficiaries will lose some or all contraceptive coverage.

The brief submitted by the Commonwealth of Massachusetts and other states repeats the false contention that the Departments conceded facts that establish standing. *See* Mass. Br. at 7-10. They identify entities that challenged the Mandate, *id.* at 11, but fail to acknowledge that settlements or injunctions protect many of these entities (who thus do not need the IFRs' protection) and that others have not objected to the accommodation.

The brief submitted by the American Association of University Women and others claims that "hundreds of thousands—if not millions—of women will face a loss of contraceptive coverage." Brief of Amici Curiae American Association of University Women, Nos. 18-15144, 18-15166, and 18-15255, Dkt. No. 53 (9th Cir. May 25, 2018) (hereinafter "AAUW Br.") at 2; *see also id.* at 21 ("millions of women"). The brief focuses on college students and employees of hospitals,

religious non-profits, and non-religious employers, claiming that the IFRs will harm enormous numbers in each category. *Id.* at 6-9.

None of these assertions is persuasive. Regarding hospitals, the brief observes that they have large workforces and that many are religiously affiliated, noting especially the 649 hospitals connected with the Catholic Health Association (CHA). AAUW Br. at 9 & n. 29. The brief suggests that these hospitals are poised to stop providing drugs, devices, and procedures that they have been covering for years under the Affordable Care Act and its implementing regulations. AAUW Br. at 9-10.

To their credit, the AAUW and its co-amici acknowledge that the CHA *accepted* the accommodation as a morally permissible means of complying with the Mandate, *id.* at 10 n. 35; but the brief then accusingly declares that the CHA "has steadfastly opposed any requirement by which its member hospitals would have to directly pay for birth control coverage," as if that somehow undercuts the significance of the CHA's acceptance of the accommodation. *Id.*

The whole point of the accommodation is that it shifts *financial* responsibility for objectionable items from the plan sponsor to its

insurer or third party administrator, while still providing those items to plan beneficiaries. Contrary to the brief's intimation, the CHA's opposition to *paying* for contraceptives hardly translates into hospital employees losing coverage—something they retain under the accommodation.

The AAUW brief also cites a news story about a Catholic health system in New York that opposed the Mandate. AAUW Br. at 10 n. 35 (citing Joe Carlson, *N.Y. Catholic Health System Wins Ruling Against* Contraception *Mandate*, Modern Healthcare (Dec. 16, 2013), http://www.modernhealthcare.com/article/20131216/NEWS/312169935.)

This story undermines rather than supports the amicus brief's narrative. The health system mentioned in the story was one of the plaintiffs in *Roman Catholic Archdiocese of New York v. Sebelius*, No. 1:12-cv-02542 (E.D.N.Y. filed May 21, 2012). The plaintiffs in that case achieved a settlement that permits them to exclude contraceptives from their health plans. *See id.* Dkt. No. 122 (E.D.N.Y. Oct. 17, 2017). As a result, the IFRs will have no impact whatsoever on the health system's freedom to offer an employee benefit plan consistent with its religious convictions.

Moreover, the New York health system discussed in the news story and involved in litigation is an outlier among Catholic hospitals, one of the very few that mounted a legal challenge to the Mandate. *See* Mass. Br., Ex. A at 1-7. The willingness of one health system to sue does not mean that countless others have been biding their time and are poised to invoke the IFRs should they be permitted to go into effect.

The AAUW brief next contends that hundreds of colleges and universities will invoke the IFRs and remove contraceptive coverage from their student health plans. AAUW Br. at 11. This, too, is false.

The brief first points to the Association of Catholic Colleges and Universities (ACCU) and its 260 U.S. members, implying that most if not all of these institutions object to including contraceptives in their health plans and will use the IFRs. *Id.* The fact of the matter is that very few ACCU members have such an objection.

As noted in our opening brief, Georgetown, St. Leo's, and Notre Dame—three schools identified as potential "culprits" by the AAUW in the district court—all include contraceptives in their student health plans. MFL Br. at 33-35. In addition, many institutions of higher education do not offer student health plans at all. *See id.* at 34

(discussing DePaul and St. John's, identified by the AAUW in their district court amicus brief).

Only a small number of Catholic institutions of higher education challenged the Mandate: Ave Maria University and School of Law, Belmont Abbey College, Catholic University of America, Thomas Aquinas College, the University of St. Francis, Franciscan University of Steubenville, Aquinas College, and Notre Dame (which, after prevailing, reversed course and decided to provide contraceptives in its student and employee plans). *See* Mass. Br., Ex. A at 1-7; *see also* MFL Br. at 35 n. 19. The AAUW brief's implication that vast numbers of Catholic college students will lose contraceptive coverage under the IFRs is not credible.

The amicus brief then turns its attention to the Council for Christian Colleges and Universities (CCCU), suggesting that many of its members will invoke the IFRs if permitted to go into effect. AAUW Br. at 12-13. This suggestion is also false.

The AAUW correctly observes that a small number of CCCU members, including Wheaton, Dordt, and Geneva, challenged the Mandate in court. *Id*. at 12.

Once again, this undermines the amicus brief's narrative. The fact of the matter is that only a relatively small percentage of CCCU members challenged the Mandate. *See* Mass. Br., Ex. A at 1-7. Most have been complying with the Mandate (either directly or through the accommodation) for years, and there is no basis for believing that they will suddenly reverse course if this Court lifts the preliminary injunction against the IFRs.

In any event, all CCCU members that challenged the Mandate have been and are protected by injunctions or settlement agreements;[17] as a result, the IFRs will have no impact on the beneficiaries of their plans.

The brief next contends that "thousands" of other religious non-profits will invoke the exemptions available under the IFRs. AAUW Br. at 14. They cite a 2015 survey of fewer than 2,000 employers which inferred that 3% of America's 1.4 million non-profits had already invoked the accommodation (and thus are candidates to invoke an exemption under the IFRs). *Id.* Three percent of 1.4 million is 42,000.

[17] *See, e.g.*, *Southern Nazarene Univ. v. Azar*, No. 5:13-cv-01015-F, Dkt. No. 109 (W.D. Okla. May 15, 2018); *Grace Schs. v. Azar,* No. 3:12-cv-00459-JD, Dkt. No. 114 (N.D. Ind. June 1, 2018).

The number of entities that have invoked the accommodation is not even close to 42,000. Without any rebuttal from the plaintiff States, the Departments estimated in August 2014, July 2015, and October 2017, that 209 organizations would invoke (or had invoked) the accommodation. ER 308. The administrative record identified only 46 entities that had invoked the accommodation. *See* Mass. Br., Ex. B.

Accordingly, the AAUW brief's suggestion that "thousands" of other religious non-profits will invoke the IFRs' exemption is unpersuasive.

Finally, the AAUW brief suggests that large numbers of for-profit companies are poised to drop contraceptive coverage under the IFRs. AAUW Br. at 15-21. The brief first discusses employers that successfully challenged the Mandate. *Id*. 15-18. Although it is true that these employers objected to paying for contraceptives and thus filed suit, none of them challenged the accommodation imposed on them after *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Neither the States nor their supportive amici have given a basis to believe that any or all of these employers will find it necessary to invoke a full exemption under the IFRs.

The brief then suggests that many "large, multi-state corporations" will utilize the IFRs and discontinue some or all contraceptive coverage. AAUW Br. at 18-21. The brief mentions Chick-Fil-A, Forever 21, In-N-Out Burger, Marriott, and Republic Air, among others, *id*. at 19-20, but includes not a shred of evidence that any of these companies (some of which are publicly traded)[18] object to covering contraceptives or plan to invoke the IFRs.

It cites a news story entitled "7 CEOs with Notably Devout Religious Beliefs." *Id*. at 19 n. 70. The story includes no suggestion whatsoever that these CEOs of publicly traded companies object to the inclusion of contraceptives in their health plans, much less have the power to remove them in the face of inevitable opposition from their boards, shareholders, and employees.[19] Moreover, five of the seven are

[18] The Departments observed that no publicly traded company has challenged the Mandate. ER 313. Agreeing with the Supreme Court, they concluded it was highly unlikely such companies would do so. *Id*. (citing *Hobby Lobby*, 134 S. Ct. at 2774).

[19] *See Hobby Lobby*, 134 S. Ct. at 2774 ("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").

Buddhist, Hindu, Jewish, or mainline Protestant, and thus unlikely to even personally oppose some or all contraceptives.

The AAUW amicus brief improbably concludes that "it is reasonable to expect that millions of women—including members of Amici—could immediately be denied contraceptive coverage." *Id.* at 21. To the contrary: this is not a reasonable expectation. Because neither the States nor their supportive amici have proved that the IFRs will injure the States, they lack standing, and their lawsuit should be dismissed.

D. Any Economic Harm the States Suffer Will Be Self-Inflicted, and Thus Cannot Confer Standing on Them.

Even if one assumes that the States will bear additional costs in the wake of the IFRs, they still lack standing, as any such injury would be self-inflicted. The States have voluntarily chosen to allocate state resources to the family planning programs they claim will be pressed by the IFRs.

Self-inflicted injuries do not confer standing on plaintiffs. *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (holding that self-inflicted injuries could not establish standing where plaintiff state governments' own legislative decisions caused the fiscal harm at issue);

see also id. ("Nothing required Maine, Massachusetts, and Vermont to extend a tax credit to their residents for income taxes paid to New Hampshire, and nothing prevents Pennsylvania from withdrawing that credit for taxes paid to New Jersey.").

The Supreme Court stated that the "injuries to the plaintiffs' fiscs were self-inflicted, resulting from decisions by their respective state legislatures. No State can be heard to complain about damage inflicted by its own hand." *Pennsylvania*, 426 U.S. at 664. The Court confirmed this rule in a more recent case, finding that "respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (determining that plaintiffs' costs undertaken to avoid surveillance under challenged statute were self-inflicted harms). *See also Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) (internal citations omitted) (finding that any harm resulting from alleged ambiguity between a statute and regulation was self-inflicted, because the plaintiffs could have asked the agency to clarify the rules at issue) ("The supposed dilemma is

particularly chimerical here because the association's asserted injury appears to be largely of its own making. We have consistently held that self-inflicted harm doesn't satisfy the basic requirements for standing. Such harm does not amount to an 'injury' cognizable under Article III.").

Interestingly, the States themselves advanced essentially the same argument as amici in another case, arguing that self-inflicted harm could not form the basis for a preliminary injunction, and could "not justify using the federal courts to achieve a political victory that Plaintiffs could not achieve through the political process." Amicus Brief of the States of Washington, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maryland, Massachusetts, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and the District Of Columbia in Support of Petitioners at 8-9, *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015) (No. 15-674) 2015 WL 8138323.

So too here: the States assert self-inflicted injuries. The States' alleged economic harms are based on assumptions about an increase in the use of programs whose eligibility requirements the States set, and where the funding is determined by state budgets and taxes.

Specifically, the States claim:

> Some women who lose contraceptive coverage as a result of the regulations will seek contraceptive care through State-run programs, or programs that the States are legally responsible for reimbursing. Other women who lose coverage will not qualify for these programs, and will be at heightened risk for unintended pregnancies, which may also impose direct financial costs on the States. Finally, reduced access to birth control will have a negative impact on women's educational attainment, ability to participate in the labor force, and earnings potential.

States' Br. at 15-16.

The States chose to enact these programs, and they can change the relevant eligibility requirements: they can narrow them to decrease costs, or expand them to cover anyone who does not already qualify for the program, in which case they can also increase state revenue by raising taxes.

In other words, in addition to the fact that the State has not proven there will be any financial effect from the IFRs, the States will only suffer economic injury if they choose not to adjust their own programs in any way. Therefore, even if the not-yet-proven harms the States allege somehow materialize, those injuries will be self-inflicted, and thus insufficient to confer standing on the States.

CONCLUSION

For the foregoing reasons, the preliminary injunction should be reversed.

Dated: June 11, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook font, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,278 words, excluding the parts of the brief exempted under Rule32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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