Brian R. Chavez-Ochoa
Chavez-Ochoa Law Offices, Inc.
4 Jean Street, Suite 4
Valley Springs, CA 95252
(209) 772-3013
(209) 772-3090 Fax
chavezochoa@yahoo.com

David A. Cortman, AZ Bar No. 029490**
Kevin H. Theriot, AZ Bar No. 030446**
Kenneth J. Connelly, AZ Bar No. 025420**
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
(480) 444-0028 Fax
dcortman@ADFlegal.org
ktheriot@ADFlegal.org
kconnelly@ADFlegal.org

Counsel for Intervenor-Defendant

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

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

Defendants,

and,

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,

Intervenor-Defendant,

and,

MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

Intervenor-Defendant.

Case No. 4:17-cv-05783-HSG

INTERVENOR-DEFENDANT MARCH FOR LIFE'S OPPOSITION TO PLAINTIFF-INTERVENOR STATE OF OREGON'S MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: August 22, 2019
Time: 2:00 pm
Courtroom: 2, 4th Floor
Judge: Hon. Haywood S. Gilliam, Jr.

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STATEMENT OF THE ISSUES

Whether Oregon has shown that the Final Rules promulgated by the Departments on November 15, 2018, which provide religious and moral exemptions to the ACA's contraceptive mandate, violate the APA or any other applicable law, such that preliminary injunctive relief is appropriate.

INTRODUCTION

The motion for preliminary injunction filed by Oregon, which is almost identical to the one filed by the Plaintiff States on December 19, 2018 (Dkt. No. 174), is again an ode to the centrality and importance of contraception to women in particular, and society in general. But it suffers the same infirmities as the Plaintiff States' motion by conspicuously ignoring the fact that the Ninth Circuit, in this very case, has confirmed that the "free exercise of religion and conscience is undoubtedly[] fundamentally important," and "[p]rotecting religious liberty and conscience is obviously in the public interest." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018). The central question before this Court, then, is not whether contraception is the good that Oregon says it is, but rather whether the Final Rules promulgated by the Departments—which provide religious and moral exemptions to the Affordable Care Act's contraceptive-coverage requirement, while ensuring that women's access to preventive care is preserved—are infirm under the APA or any other controlling legal authority, including the United States Constitution. The answer to that question is "No."

As this Court well knows, the interplay between religious liberty and freedom of conscience, on the one hand, and the contraceptive-coverage requirement, on the other, has been the subject of continued litigation throughout the federal court system for some seven years now. Oregon's filing is a meritless attempt to thwart the Departments' considered efforts to finally bring an end to this protracted affair, through a resolution which simultaneously recognizes fundamental constitutional rights and women's access to preventive care. What's more, Oregon's effort once again places at risk groups like March for Life, which would be threatened with severe

repercussions for simply abiding by their moral convictions in refusing to provide contraception they believe may cause abortions.

The Final Rules prevent such an unfortunate outcome. Indeed, the moral exemption created by the Final Rules represents the first instance in which the federal government has definitively provided protections for non-religious but morally-convicted entities from the unconstitutional burden represented by the contraceptive-coverage requirement. This exemption provides March for Life (and entities like it) with the assurance that it can continue pursuing its life-saving mission without threat of government fines and penalties for refusing to comply with a requirement that violates its very reason for existence. Enjoining the Final Rules would put that relief in jeopardy.

But no such step is necessary, as Oregon has failed to show any entitlement to a preliminary injunction. As an initial matter, Oregon has failed to state a legally cognizable injury. *See infra* at 20-21. The federal government is under no obligation to fund or to provide contraception coverage at all. So an adjustment to the regulatory regime it created cannot constitute a harm for which Oregon may be granted relief. Moreover, the Plaintiff States were granted relief on their first motion for preliminary injunction based upon a lack of notice and comment as to the promulgation of the Interim Final Rules (IFRs), but Oregon cannot plausibly claim such a defect here.[1] Indeed, the Departments "solicited public comments on these issues" and "[a]fter consideration of the comments and feedback received from stakeholders," finalized the rules "with changes based on comments as indicated." 83 Fed. Reg. at 57,596 (revealing that "[d]uring the 60-day comment period for the Moral IFC . . . the Departments received over 54,000 public comment submissions"); *see also* 83 Fed. Reg. at 57,539-40 (revealing that during the "60-day public comment period for the Religious IFC," the "Departments received over 56,000 public comment submissions"). Oregon had ample notice and opportunity to comment upon the rules, and took that opportunity, formally submitting comments publicly along with many of the

[1] Intervenor-Defendant March for Life maintains that no procedural defect existed in the promulgation of the IFRs in the first instance.

other Plaintiff States.[2] Finally, contrary to Oregon's assertions, the Final Rules comport with existing law, and are in no way arbitrary and capricious. Its claim that the Final Rules coerce women to participate in the religious beliefs of their employers, or that they discriminate based on sex, find no foundation in either law or logic. That the Final Rules do not meet with Oregon's total approval does not render them in any way infirm under the APA or any other extant authority. Otherwise, the federal government could not act unless all 50 states agreed. Because the Final Rules are equitable and lawful, Oregon's motion for relief should be denied.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In March 2010, Congress passed the Patient Protection and Affordable Care Act, Pub. L. 111-148 (March 23, 2010), and the Health Care and Education Reconciliation Act, Pub. L. 111-152 (March 30, 2010), collectively known as the Affordable Care Act. One ACA provision mandates that any "group health plan" (including employers offering the plan) or "health insurance issuer offering group or individual health insurance coverage" must provide coverage for certain preventive care services without any cost-sharing. 42 U.S.C. § 300gg-13(a).

Although the ACA did not specify what preventive care for women included, the Health Resources and Services Administration (HRSA), within the Department of Health and Human Services, eventually issued guidelines on August 1, 2011, providing that women's preventive care would include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA, Women's Preventive Services Guidelines (Aug. 1, 2011). Among these items are hormonal oral and implantable contraceptives, IUDs, and products categorized as emergency contraception.

On the same day that HRSA issued these guidelines, the Departments promulgated another regulation which exempted some entities that objected to providing contraceptive coverage. 76 Fed. Reg. 46,621 (Aug. 3, 2011); *see also* 45 C.F.R. § 147.130(a)(1)(iv)(A)-(B).

[2] *See* https://www.regulations.gov./document?D=CMS-2014-0115-58168 (last visited May 13, 2019).

This second regulation granted HRSA "discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned." 76 Fed. Reg. 46,621, 46,623. The term "religious employer" referred, in general, to churches, religious orders, and their integrated auxiliaries. *See id*. at 46,626; 45 C.F.R. § 147.131(a) (final exemption). The exemption did not include pro-life, non-religious entities like March for Life, even though its moral convictions mirror the religious beliefs of those churches opposing abortion and prevent it from complying with the contraceptive-coverage requirement. Mot. to Intervene, Mancini Decl. ¶ 15, 17, Dkt. No. 87-1 (Dec. 8, 2017).

Indeed, March for Life exists to protect, defend, and respect human life at every stage, and as such is opposed to abortion. Because it believes that many of the contraceptives required by the Mandate can prevent the implantation of a newly conceived human embryo, thereby causing an abortion, it cannot agree to provide them. Accordingly, to vindicate its right to operate in a manner that is consistent with its moral convictions, March for Life sued the federal government on July 7, 2014. Verified Complaint, *March for Life, et al. v. Burwell, et al.*, No. 14-cv-1149 (D.D.C. July 7, 2014). March for Life eventually secured a permanent injunction, which the federal government appealed. *See March for Life v. Burwell*, 128 F. Supp. 3d 116 (D.D.C. 2015), appeal docketed, No. 15-5301 (D.C. Cir. Oct. 30, 2015). In the wake of the promulgation of the IFRs, however, the federal government later dismissed its appeal on September 5, 2018. *See* Mtn. for Voluntary Dismissal, *March for Life v. Azar*, No. 15-5301, Document No. 1749057.

IFRs that provided exemptions for both religious and moral actors were promulgated on October 6, 2017, with an eye toward balancing the rights of religious liberty and conscience with the provision of contraceptives. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the ACA, 82 Fed. Reg. 47,792 (Oct. 13, 2017); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the ACA, 82 Fed. Reg. 47,838 (Oct. 13, 2017). Although the Plaintiff States had not before entered the litigation fray on this otherwise conspicuous and long-litigated issue, they would allow no compromise. Plaintiff States immediately filed suit to enjoin the IFRs, contending that the rules

interfered with "women's access to essential health care," Mem. in Support of Pl.'s Mot. for a Prelim. Inj. at 1, Dkt. No. 28. In so doing, the Plaintiff States alleged that the IFRs violated the Administrative Procedure Act, the Establishment Clause, and the Equal Protection Clause. Oregon did not formally challenge the IFRs at this time.

This Court enjoined the IFRs after it found that the Plaintiff States had shown that they were likely to succeed on their procedural APA claim, because the "highly-consequential IFRs were implemented without any prior notice or opportunity to comment." Dkt. No. 105 at 2.[3] Intervenor-Defendant The Little Sisters of the Poor filed their notice of appeal on January 26, 2018, Dkt. No. 135, March for Life filed its notice of appeal on January 31, 2018, Dkt. No. 137, and the Departments filed their notice of appeal on February 16, 2018, Dkt. No 142. On December 13, 2018, the Ninth Circuit affirmed in part and reversed in part this Court's preliminary injunction order. It found that the Plaintiff States had "standing to sue on their procedural APA claim," and further found that the Departments "likely did not have good cause for bypassing notice and comment" and "likely did not have statutory authority for bypassing notice and comment." *Azar*, 911 F.3d at 571, 578, 580. In so holding, however, the Ninth Circuit reversed this Court's nationwide injunction and declared that the "free exercise of religion and conscience is . . . fundamentally important." *Id*. at 582, 585.

While the appeal was pending, the Departments—after soliciting public comments, considering those comments, and making changes to the rules based upon those comments—promulgated the Final Rules on November 15, 2018, thereby establishing moral and religious exemptions to the contraceptive-coverage requirement. *See, e.g.*, 83 Fed. Reg. at 57,596 (moral exemptions); 83 Fed. Reg. at 57,539-40 (religious exemptions). These Final Rules were scheduled to take effect on January 14, 2019. *See* 83 Fed. Reg. at 57,536; 83 Fed. Reg. at 57,592. Like the IFRs, the Final Rules provide both religious and moral exemptions to the Mandate. *See*

[3] On December 8, 2017, Intervenor-Defendant March for Life filed a motion to intervene in this action. Dkt. No. 87. This Court granted March for Life's motion to intervene on January 26, 2018. Dkt. No. 134.

id. Those rules, however, were also found wanting by the Plaintiff States, so on December 18, 2018, they filed a Second Amended Complaint, adding nine states as plaintiffs. On December 19, 2018 the Plaintiff States filed a motion for preliminary injunction seeking to bar implementation of the Final Rules. *See* Mem. in Support of Pl.'s Mot. for a Prelim. Inj., Dkt. No. 174. On January 13, 2019, this Court granted the motion and enjoined the Final Rules. Dkt. No. 234.

Oregon, however, was not one of the states added to the roster of Plaintiffs in the Second Amended Complaint. Instead, Oregon moved to intervene just weeks after the Second Amended Complaint was filed. *See* Dkt. No. 210. This Court granted Oregon's motion to intervene on February 1, 2019. Dkt. No. 274. But because Oregon was granted intervention after this Court granted the Plaintiff States' motion for preliminary injunction, the order did not extend to it. Accordingly, Oregon filed a motion to join in the Plaintiff States' motion for preliminary injunction, Dkt. No. 288, which this Court denied on March 22, 2019. Dkt. No. 297. Oregon then filed its Motion for Preliminary Injunction, Dkt. No. 312, seeking the same relief this Court previously granted the Plaintiff States in its January 13, 2019 Order.

Oregon's motion suffers from the same infirmities the Plaintiff States' motion suffered from, and should be denied.[4]

ARGUMENT

The United States Supreme Court has cautioned that a "preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Because this remedy is so "drastic," *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008) (quoting 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948, p. 129 (2d ed.1995)), plaintiffs seeking a preliminary injunction "face a difficult task" in establishing that they are entitled to one. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010).

[4] March for Life acknowledges that this Court granted the Plaintiff States' motion for preliminary injunction as to the Final Rules, but for purposes of preserving these issues for appeal as to any relief potentially granted to Oregon by this Court, it hereby incorporates and restates in this Opposition the arguments it made earlier as to the Plaintiff States.

Oregon has not met that heavy burden here. Indeed, it fails to even pass the threshold inquiry as to likelihood of success on the merits, because it had notice and an opportunity to submit comments (which it took advantage of) and because the Final Rules otherwise fully comport with the law. *See Azar*, 911 F.3d at 575 (stating that this preliminary injunction factor is "the most important," indeed a "threshold inquiry," and that if a movant fails to satisfy this factor, a court "need not consider the other factors").

I. Oregon is not likely to succeed on the merits of its APA claims.

A. The Final Rules accord with the law and are not in excess of statutory authority.[5]

1. RFRA requires the Religious Exemption.

Oregon argues that any "reliance on RFRA to enact the Rules is erroneous." Dkt. No. 312 at 22. It is mistaken. "Under RFRA, the Federal government may not, as a statutory matter, substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (internal quotation marks omitted). The contraceptive-coverage requirement—including its accommodation process—substantially burdens religious actors. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) ("Because the contraceptive mandate forces them to pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs."). The Departments therefore rightly concluded, after thorough deliberation and a period of notice and comment, that "requiring compliance through the Mandate or accommodation constituted a substantial burden on the religious exercise of many entities or

[5] In the interests of concision and judicial economy, and because many of the arguments raised by Oregon were already raised and fully argued by the parties as to the various motions filed by the Plaintiff States, March for Life hereby adopts and incorporates by reference, as its own, where applicable, the response of the federal defendants to those motions. *See* Dkt. No. 51; Dkt. No. 198. March for Life does address, however, Oregon's erroneous characterizations of RFRA and its implications for the promulgation of the Final Rules by the Departments, along with Oregon's contention that the Final Rules somehow discriminate against women.

individuals with religious objections." 83 Fed. Reg. at 57,546. The Departments also concluded the Mandate "did not serve a compelling interest, and was not the least restrictive means of serving a compelling interest." *Id*. Put simply, the Religious Exemption in the Final Rules is a natural, predictable, and legally permissible response to these conclusions. *See* 42 U.S.C. § 2000bb-1 (providing that the government may impose a substantial burden only where it can demonstrate it "is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest").

Oregon does not, and cannot, deny that the contraceptive-coverage requirement imposes a substantial burden. It instead (1) elides the very point of RFRA's analysis (Is there a substantial burden on religion? Is it justified by a compelling government interest? Are the least restrictive means being employed?), and (2) distorts the issue by claiming that it is actually "female employees" who are the ones who are "substantially burden[ed]," because they are "den[ied] . . . access to preventive care and services." Dkt. No. 312 at 23. Such obfuscation ignores the fact that the Final Rules leave the contraceptive-coverage requirement in place for the vast majority of covered entities, save for a "small group of newly exempt entities and plans" who have sincerely held religious beliefs preventing them from providing contraceptive coverage to their employees. 83 Fed. Reg. at 57,556. The doomsday characterizations by Oregon that the Final Rules will usher in a wholesale deprivation of "equal access to medical care" for women, Dkt. No. 312 at 23, also ignores the record and the fact that many religious employers will continue to provide "ordinary" contraceptives, even though they cannot provide those that may act as abortifacients. *See* 83 Fed. Reg. at 57,556 (concluding that the Final Rules "are not likely to have negative effects on the health or equality of women nationwide").

Equally unsupported is Oregon's assertion that protecting the fundamental constitutional right to the free exercise of religion for certain select entities, through the Final Rules, is somehow tantamount to "coerc[ing]" women "to participate in the religious beliefs of their employer." Dkt. No. 312 at 23. In fact, this "third-party" argument was squarely addressed and rejected by the Departments after receiving comments on the matter. *See* 83 Fed. Reg. at 57,548-49 ("In the

Religious IFC and these rules, the government has simply restored a zone of freedom where it once existed. There is no statutory or constitutional obstacle to the government doing so, and the doctrine of third-party burdens should not be interpreted to impose such an obstacle."). The decision of the Departments on this score is amply supported by controlling precedent. *See Hobby Lobby*, 134 S. Ct. at 2781 n.37 (rejecting HHS argument that a "plaintiff cannot prevail on a RFRA claim that seeks an exemption from a legal obligation requiring the plaintiff to confer benefits on third parties," because "[n]othing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals," and concluding that it cannot "reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties"). It is also supported by the contraceptive-coverage requirement's administrative origins, the practices of various states with respect to contraceptive coverage and religious exemptions, and the treatment of those exemptions by federal and state courts.[6]

Oregon's inaccurate characterization of the Final Rules' religious exemption should thus be rejected by this Court, as it is really little more than an implicit "smuggling in" of the Establishment Clause claim included in Oregon's Complaint-in-Intervention. *See* Dkt. No. 287

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[6] *See* 83 Fed. Reg. at 57,549-50 ("Before 2012 (when HRSA's Guidelines went into effect), there was no federal women's preventive services coverage mandate imposed nationally on health insurance and group health plans. The ACA did not require contraceptives to be included in HRSA's Guidelines, and it did not require any preventive services required under PHS Act section 2713 to be covered by grandfathered plans. Many States do not impose contraceptive coverage mandates, or they offer religious exemptions to the requirements of such coverage mandates—exemptions that have not been invalidated by federal or State courts."). Indeed, the third-party harms argument advanced by Oregon, if granted credence by this Court, would likely imperil the very exemptions permitted by its own laws *See* Or. Rev. Stat. § 743A.066(4) (providing that "[a] religious employer is exempt from the requirements of this section with respect to a prescription drug benefit program or a health benefit plan it provides to its employees")*; see also Planned Parenthood Arizona, Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181, 196 (Ct. App. 2011) ("[A] woman's right to an abortion or to contraception does not compel a private person or entity to facilitate either.").

at ¶¶ 41-46). As both federal defendants and Intervenor-Defendant The Little Sisters of the Poor have explained, and as discussed briefly below, this sort of claim necessarily fails.

First, the Final Rules protect both religious (e.g., The Little Sisters of the Poor) and non-religious (e.g., March for Life) actors, thereby dispelling any argument that the federal government advances religion. Neither on their face nor in their application do the Final Rules promote religion in general or any particular religious sect or message in particular. *See Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

Second, the Final Rules are an entirely permissible accommodation of religion, which rarely violates the Establishment Clause. *See, e.g.*, *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-145 (1987) (noting that the Supreme Court has "long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause"); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987) ("[T]here is ample room for accommodation of religion under the Establishment Clause"). As the Departments recognized in the Preamble to the Final Rules, the religious exemption merely lifts the burden on religious exercise that the government itself created through its original imposition of the Mandate. This exemption regime is entirely permissible. *See* Douglas Laycock, *The Religious Exemption Debate*, 11 Rutgers J. L. & Religion 139, 153-54 (2009) ("[G]overnment does not benefit religion by first imposing a burden through regulation and then lifting that burden through exemption.").

Third, the Final Rules do not encourage citizens to engage in or discourage them from engaging in religious exercise, and it is generally the case that laws that alleviate government-imposed burdens on religion "do not encourage anyone to engage in a religious practice." *Id.*

Fourth, and finally, as the government does not inquire into the centrality of any organization's or individual's religious beliefs, the Final Rules do not "result in extensive state involvement with religion." *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 689-90 (1970).

In sum, Oregon is wrong to suggest that the Final Rules compel women to participate in the religious beliefs of their employers. They merely ensure that a religious employer will not be conscripted to provide abortifacients their consciences do not permit. This arrangement is in no way forbidden by the Establishment Clause, and is actually compelled by RFRA. *See generally* 83 Fed. Reg. 57,549 (discussing exemptions, RFRA, and the Establishment Clause, and concluding that "[t]he fact that the government at one time exercised its administrative discretion to require private parties to provide coverage to benefit other private parties, does not prevent the government from relieving some or all of the burden of its Mandate," because "[o]therwise, any governmental coverage requirement would be a one-way ratchet").

2. The Final Rules do not discriminate against women.

Oregon argues that the Final Rules violate Section 1557 of the ACA because they "selectively authorize denial of coverage for women's preventive coverage only." Dkt. No. 312 at 20. Much like the argument that women are forced by the rules to confess the religious beliefs of their employers, which functionally mirrored Oregon's Establishment Clause claim, this charge of sex discrimination functionally mirrors its Equal Protection claim. *See* Dkt. No. 287 at ¶¶ 48-52). It too should be summarily dismissed.

The Final Rules do not create sex-based classifications and are in fact facially gender-neutral. Any argument to the contrary rests not on anything specific in the language of the rules themselves but on the fact that the contraceptive-coverage requirement itself confers a unique benefit to women.[7] Thus, any modifications to that requirement, including the exemptions created by the Final Rules, necessarily affect contraceptive coverage for women. That does not mean the Final Rules make sex-based classifications, nor does it mean that the effect of the Final

[7] The claim advanced by Oregon that women are forced into a "Hobson's choice" by the Final Rules, wherein one of their choices is to "accept incomplete medical coverage unequal to that received by male colleagues," Dkt. No 312 at 20, is therefore specious.

Rules falls only upon women.[8] The sex-based classification is in the contraceptive-coverage requirement, which Oregon does not challenge here.[9]

The record underlying the Final Rules shows that the federal government issued them to protect religious freedom and conscience rights, and Oregon offers no evidence to suggest otherwise. Indeed, the real discrimination implicated by the contraceptive-coverage requirement—that against religious and moral entities compelled to provide abortifacients against their religious beliefs and consciences—has been rectified by the Final Rules. To enjoin those rules would be tantamount to permitting discrimination against morally convicted entities like March for Life, for which the contraceptive-coverage requirement made no provision as far as exemptions are concerned. *See, e.g.*, *March for Life v. Burwell*, 128 F. Supp. 3d 116, 127 (D.D.C. 2015) (finding that the refusal to grant an exemption from the contraceptive-coverage requirement to March for Life, a non-religious but morally convicted non-profit opposed to abortion, constituted a violation of equal protection, because "March for Life and exempted religious organizations are not just 'similarly situated,' they are *identically* situated" in terms of their opposition to abortion and refusal to provide abortifacient medication). Oregon should not be permitted to undo the Departments' progress toward real equality by advancing claims of phantom discrimination.

B. The Final Rules comply with the APA's procedural requirements because they were issued after a period of notice and comment.

Despite the fact that Oregon submitted a comment prior to the Final Rules being promulgated, it now contends that the Final Rules are invalid, because it "is undisputed that [the Departments] bypassed the notice and comment requirements of the APA." Dkt. No. 312 at 23. Oregon is mistaken. The Departments gave notice and then sought, received, and considered

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[8] For instance, where the primary insured is a male whose plan covers his wife, both husband and wife would be affected.

[9] Moreover, the exemptions do not ban birth control or contraceptive coverage. The contraceptive-coverage requirement still requires employers who have no religious or moral objections to pay for it. *Cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993) (opposition to abortion is not a sex-based classification).

thousands of comments before issuing the Final Rules. *See* 83 Fed. Reg. at 57,540, 57,552 (the Departments "provided a 60-day public comment period for the Religious IFC" and received "over 56,000 public comment submissions," which were "thoroughly considered" before the issuance of the Final Rules); 83 Fed. Reg. at 57,596 (noting that the "Departments . . . solicited public comments on these issues . . . in [the Religious and Moral IFCs] with request for comments published in the Federal Register on October 13, 2017," and further noting that as to the Moral IFCs, the Departments "received over 54,000 public comment submissions" during the 60-day comment period). "The purpose of the notice and comment requirement is to provide for meaningful public participation in the rule-making process." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995). There can be no doubt that Oregon meaningfully participated in the rulemaking process. So Oregon cannot plausibly claim that the Final Rules are procedurally defective.

Oregon cites to *Paulsen v. Daniels*, 413 F.3d 999 (9th Cir. 2005), *Natural Resources Defense Council, Inc. v. United States EPA*, 683 F.2d 752 (3d Cir. 1982), and *Levesque v. Block*, 723 F.2d 175 (1st Cir. 1983), to support the proposition that the Final Rules are procedurally defective for lack of notice and comment. Dkt. No. 312 at 23-24. Each case is distinguishable from the instant matter, and none requires enjoining the Final Rules.

In *Paulsen*, the Bureau of Prisons failed to provide notice and comment before an interim final rule became effective, and the court therefore concluded that the interim final rule itself was defective, not the final rule. Indeed, when the default reversion rule, the one "previously in force," was itself found to be erroneous, the court determined that the final rule was the applicable one to repair to, but that rule would "only have prospective effect." 413 F.3d at 1008. *Paulse*n thus debunks any notion that a notice-and-comment failure as to an interim final rule categorically infects the validity of a final rule. *Paulsen* actually supports allowing the Final Rules to go into effect without delay, once their effective date renders them fully operative.

In *Natural Resources Defense Council*, the court found that "post-promulgation notice and comment procedures cannot cure the failure to provide such procedures prior to the

promulgation of the rule at issue." 683 F.2d at 768. The "rule at issue" there was the rule that had not been subjected to notice and comment in the first place, much like the IFRs in this case. After the EPA postponed amendments without providing an opportunity for notice and comment, it thereafter sought to cure that failure by providing an opportunity for notice and comment as to whether the "amendments be further postponed." *Id*. But here the Departments provided an ample 60-day period for notice and comment, saw a broad swathe of active participation, received comments numbering over 100,000 combined, and then factored those comments into their development of the Final Rules. *See, e.g.*, 83 Fed. Reg. at 57,596 (stating that the "[a]fter consideration of the comments and feedback received from stakeholders," the Departments finalized the rules "with changes based on comments as indicated"). The notice and comment period here directly informed and altered the nature and form of the Final Rules. Oregon cannot argue that it was deprived of "effective participation in the rulemaking process," or that a party "must come hat-in-hand and run the risk that the decision maker is likely to resist change." *Natural Resources Defense Council*, 683 F.2d at 768.

Levesque v. Block is equally irrelevant. The *Levesque* court explained that "[p]ublic comment contributes importantly to self-governance and helps ensure that administrative agencies will consider all relevant factors before acting." 723 F.2d at 187. Accordingly, the court held that "notice and the opportunity for comment must come at a time when they can feasibly influence the final rule," which "[o]rdinarily" means "before a rule takes effect." *Id*. The *Levesque* court's concerns with "self-governance" and the ability of "interested persons to make their views known," *id*. at 187-88, have been fully vindicated here. Months before the Final Rules were promulgated, the public and many States, including Oregon, submitted comments, permitting ample time for the Departments to consider and account for all the input received. In fact, the timing of the notice and comment period here allowed for public participation in a way that precisely comports with the guidance of *Levesque*, in that the comments received were able to "feasibly influence the final rule." *Id*. at 187. Without any doubt, the public "participate[d] vigorously in comment" well before the Departments issued the Final Rules. *Id*. at 188.

That Oregon's procedural challenge must fail is demonstrated by the fact that this Court, along with a district court in Pennsylvania, *see Pennsylvania v. Trump*, 281 F. Supp. 3d 553 (E.D. Pa. 2017), enjoined the IFRs shortly after their promulgation. As a result, the IFRs were virtually a nullity from their inception. Moreover, even if those injunctions had not issued, extant authority suggests that the notice and comment opportunity provided by the Departments here is sufficient to overcome a procedural APA challenge.

First, even post-promulgation notice and comment has been found sufficient to meet the APA's procedural requirements. *See, e.g., Salman Ranch, Ltd. v. Comm'r*, 647 F.3d 929, 940 (10th Cir. 2011) ("While the . . . temporary regulations were issued without notice and comment, [n]ow that the regulations have issued in final form [after postpromulgation notice and comment], these arguments are moot." (first alteration in original) (internal quotation marks omitted)); *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368, 1380 (Fed. Cir. 2011) ("Grapevine also argues that the temporary Treasury regulations should not receive *Chevron* deference because of purported procedural shortcomings in their issuance. Now that the regulations have issued in final form [after postpromulgation notice and comment], these arguments are moot."). Bypassing notice and comment may prevent effective, meaningful participation in the rulemaking process. But the Departments encouraged participation in the formulation of the Final Rules and that participation actually happened on a wide scale. So there is no APA concern.

Second, even post-promulgation notice and comment accords with the APA's procedural dictates when an agency evinces an open mind with respect to the comments submitted. This does not mean that agencies are required to "make changes or revisions . . . in response to the public comments," as Oregon seems to think. *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994). Agencies must simply give "careful thought to" them. *Id.* Such "careful thought" clearly happened here, where the Departments responded in voluminous detail to the comments they received, and gave specific reasons for the positions they ultimately adopted or revised. *See* 83 Fed. Reg. at 57,540-57,556 (religious exemptions); 83 Fed. Reg. at 57,596-57,625 (moral exemptions). The sheer breadth of the

Departments' presentation of the issues and justification for their decision demonstrates that they maintained an open mind and carefully considered all comments put before them. *See Advocates for Highway & Auto Safety*, 28 F.3d at 1292 (finding post-promulgation notice and comment was sufficient where the agency showed it gave careful thought to comments in opposition, even though agency did not change or revise regulations in response to those comments).

These holdings make sense from the standpoint of judicial economy and the realities of the administrative state. If courts were to punish agencies each time they were ultimately found to be mistaken in claiming a good-cause exception to notice and comment,[10] when the departments did in fact provide a robust post-promulgation opportunity for notice and comment and those comments fully informed the final rules, the APA would serve no purpose. Agencies would simply be required to waste time starting over only to receive very similar or identical comments, which would presumably have the same effect on the "new" final rules. This approach would not result in meaningful public participation, just great expense and redundancy. It would also extinguish many existing regulations passed by a host of federal agencies.

In sum, in light of the notice and comment period provided by the Departments, and the fact that they thoroughly considered the public comments they received, this Court should find that the Final Rules comply with the APA. But even if this Court were to conclude that the notice and comments here were not pre-promulgation in nature, the guidance of *Salman Ranch*, *Grapevine Imports*, and *Advocates for Highway & Auto Safety* illustrates that even post-promulgation notice and comment would be sufficient.

C. The Final Rules are neither arbitrary nor capricious.

Oregon argues under the guise of the arbitrary and capricious standard that the Final Rules must be enjoined. But in reality its argument is one rooted in substantive disagreement with the Final Rules' content, and not any shortcoming in the Departments' drafting or explanation of the

[10] Which is precisely what happened here. *See Azar*, 911 F.3d at 575-579 (finding that the Departments' likely did not have good cause to issue the IFRs without first permitting notice and comment).

Final Rules. For instance, Oregon unilaterally concludes that "[g]iven the number of women nationwide who rely on the contraceptive-coverage requirement, the government must provide greater justification for the Rules." Dkt. No. 312 at 25. This is a pronouncement rooted in Oregon's view of the contraceptive-coverage requirement's importance, and contraceptives in particular, and not in the Departments' compliance with the APA in promulgating the Final Rules. With respect to that fealty to the APA, the record demonstrates that the Departments did not act either arbitrarily or capriciously but with great deliberation and care.

If an agency action "is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute," it is not arbitrary or capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). The arbitrary and capricious standard is highly deferential and presumes the validity and regularity of agency action. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Ruckelshaus*, 719 F.2d 1159, 1164 (D.C. Cir. 1983). Such deference, in practice, means that a court "is not empowered to substitute its judgment for that of the agency." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Indeed, even "a decision of less than ideal clarity [will be upheld] if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). Moreover, even when an agency changes its policy it need only show "that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better," not that it is "*better* than . . . the old one." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Under this standard, Oregon's arbitrary and capricious argument plainly fails.

The Departments, after all, proffered myriad—and valid—justifications for issuing the Final Rules, both as to the religious exemption and to the moral exemption. And they did so after accounting for a host of important factors and considerations. Among other things, for instance, the Departments considered "Congress's history of providing protections for religious beliefs regarding certain health services (including contraception, sterilization, and items or services believed to involve abortion); the text, context, and intent of section 2713(a)(4) and the ACA;

protection of the free exercise of religion in the First Amendment and, by Congress, in RFRA; Executive Order 13798, 'Promoting Free Speech and Religious Liberty' (May 4, 2017); previously submitted public comments; and the extensive litigation over the contraceptive Mandate." 83 Fed. Reg. at 57,539-40; *see also* 83 Fed. Reg. at 57,596 (considering similar factors with respect to the moral exemption). Given that the Departments took account of these diverse considerations, Oregon's claim that the Departments failed to provide a "detailed justification," Dkt. No. 312 at 25, for their change of course is specious. The Departments explained that

> reexamination of the record and review of the public comments has reinforced the Departments' conclusion that significantly more uncertainty and ambiguity exists on these issues than the Departments previously acknowledged when we declined to extend the exemption to certain objecting organizations and individuals. The uncertainty surrounding these weighty and important issues makes it appropriate to maintain the expanded exemptions and accommodation if and for as long as HRSA continues to include contraceptives in the Guidelines. The federal government has a long history, particularly in certain sensitive and multi-faceted health issues, of providing religious exemptions from governmental mandates. These final rules are consistent with that history and with the discretion Congress vested in the Departments for implementing the ACA.

83 Fed. Reg. at 57,555. This lucid explanation was the result of the Departments' extensive review of all pertinent factors implicating the contraceptive-coverage requirement and the advisability of the religious and moral exemptions, and it more than illustrates that the Departments acted rationally after accounting for all manner of relevant factors. That Oregon does not share the Departments' ultimate conclusion "that the best way to balance the various policy interests at stake . . . is to provide the exemptions set forth herein," 83 Fed. Reg. at 57,556; 83 Fed. Reg. at 57,613, is of no moment. Deference is due the Department's conclusion and because the Final Rules are rational and duly considered, this Court should reject Oregon's challenge.

II. Oregon cannot satisfy any of the remaining factors necessary to secure a preliminary injunction.

Because it cannot show that the Final Rules are either procedurally or substantively defective under the APA, Oregon is unlikely to succeed on the merits of its claims. As that is the most important factor in the preliminary injunction analysis, indeed it is a "threshold inquiry," this Court "need not consider the other factors," *Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017). Even if this Court were to disagree with the conclusion that Oregon had failed to carry its burden as to likelihood of success, however, it should still deny an injunction, because Oregon fails to satisfy any of the remaining preliminary-injunction factors.

A. In the absence of any procedural injury, Oregon cannot demonstrate irreparable injury.

Oregon cannot show irreparable harm. On appeal of the Plaintiff States' original motion for preliminary injunction, the Ninth Circuit found that "the states have shown that the threat to their economic interest is reasonably probable," but it did so in the context of the Plaintiff States' "procedural injury," to wit, their being shut out of the APA's notice and comment procedures as to the IFRs. *Azar*, 911 F.3d at 573. No such procedural infirmity is present here. *See supra* at 13-16. Oregon must therefore show irreparable harm some other way. This it cannot do. Moreover, as established above, the Final Rules accord with the APA's substantive requirements. Because Oregon actively participated in the formulation of the Final Rules, and because those rules as promulgated do not violate the APA, no irreparable injury exists. Oregon's dissatisfaction with the end result does not alter this reality.

B. Oregon cannot establish any injury, much less one that is irreparable.

The gravamen of Oregon's injury argument is that because the Departments have made the considered decision to expand religious exemptions to the contraceptive-coverage requirement, and because the Departments have created a moral exemption which mirrors its religious counterpart, any resulting impact on the states' fisc constitutes harm. Not so.

First, this argument is belied by the Oregon's acquiescence to the HRSA's exemption for churches and their integrated auxiliaries, along with Congress' exemption for myriad

grandfathered plans. These longstanding exemptions, especially the latter, impact millions of women, far more than the Departments have estimated will be impacted by the Final Rules' religious and moral exemptions. *See* 83 Fed. Reg. at 57,562 ("The ACA did not apply the preventive services mandate to the many grandfathered health plans among closely held as well as publicly traded for-profit entities, encompassing tens of millions of women. . . . we are not aware of evidence showing that the expanded exemptions finalized here will impact such a large number of women."). Yet Oregon never challenged those exemptions, and in fact it provides exemptions of its own to religious organizations. *See supra* at n.6. This Court should thus look askance at the allegations of monetary harm leveled by Oregon. The facts show that for years Oregon has tolerated—even encouraged—similar impacts on its own fisc, presumably to account for the very same concerns expressed by the Departments, a respect for religious liberty and conscience. Oregon should not be permitted to characterize a far lesser impact as somehow disastrous to its economic interests. In fact, because they were previously not considered harms at all by Oregon, they should not be viewed as such now. This conclusion is not foreclosed by the Ninth Circuit's decision, because the court made its "reasonable probability of harm" finding only as to the IFRs, and only after it had concluded that the Plaintiff States were likely to succeed on the merits of their procedural APA claim. Absent that injury,[11] Oregon's practice shows that the Final Rules cause it no harm.

Second, and more importantly, the federal government is under no obligation to provide contraceptive coverage through the ACA in the first instance, so any impact on Oregon's fisc is not a cognizable Article III harm. Because the Final Rules have been promulgated in accord with the ACA and the U.S. Constitution, they are lawful and the financial impact on Oregon is irrelevant. Indeed, Oregon can cite no controlling authority that States have the right to sue every time a federal agency does something that impacts its financial interests. More specifically, and contrary to Oregon's assertion that the ACA "requires . . . contraceptives," Dkt. No. 312 at 10, no such "mandate" was ever required. In fact, Congress merely delegated to HRSA the discretion

[11] *See supra* at n.1.

to decide what would constitute the full measure of "preventive health services." *See* 42 U.S.C. § 300gg-13(a)(4) ("A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph"). If the federal government was free not to provide for contraceptive coverage at all, Oregon can hardly claim that providing expanded exemptions to the regime it created constitutes a cognizable harm. *Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 579 (2012) ("Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds. In the typical case we look to the States to defend their prerogatives by adopting the simple expedient of not yielding to federal blandishments when they do not want to embrace the federal policies as their own. The States are separate and independent sovereigns. Sometimes they have to act like it.") (internal quotations and citation omitted).

C. The balance of equities and public interest favor protecting religious liberty and the right to conscience.

The public interest in complying with the APA, which the Ninth Circuit on appeal stated would be served by "the proper process itself," has been vindicated here. *Azar*, 911 F.3d at 582. Indeed, a "careful and open review" of the rules was encouraged and conducted. *Alcaraz v. Block*, 746 F.2d 593, 610 (9th Cir. 1984). Because there is no procedural shortcoming with the Final Rules, the "free exercise of religion and conscience," which the Ninth Circuit deemed "fundamentally important," now takes center stage. *Azar*, 911 F.3d at 582. There is simply no counterbalancing force to outweigh the "obvious[] . . . public interest" in "[p]rotecting religious liberty and conscience" and the importance of "rectifying violations of statutory rights," which "has the potential to do real harm." *Id.* at 577, 582. The resulting calculus is simple—Oregon's mere substantive disagreement with the Departments' decision cannot outweigh the damage to religious liberty and conscience rights that an injunction would cause. The balance of equities

and the public interest favor the Departments and warrant the denial of Oregon's attempt to thwart their efforts to arrive at a reasonable resolution of this issue once and for all.

CONCLUSION

For the foregoing reasons, the motion for preliminary injunction filed by Oregon should be denied.

Respectfully submitted this 14th day of May, 2019.

By: s/Kevin H. Theriot

Kevin H. Theriot, AZ Bar No. 030446**
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
(480) 444-0028 Fax
ktheriot@ADFlegal.org

Brian R. Chavez-Ochoa
Chavez-Ochoa Law Offices, Inc.
4 Jean Street, Suite 4
Valley Springs, CA 95252
(209) 772-3013
(209) 772-3090 Fax
chavezochoa@yahoo.com

Counsel for Proposed Intervenor-Defendant

** *Pro hac vice granted*