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12 **IN THE UNITED STATES DISTRICT COURT**  
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
14 **OAKLAND DIVISION**

16 STATE OF CALIFORNIA, *et al.*,

17 Plaintiffs,

18 v.

19 ERIC D. HARGAN, Acting Secretary of  
20 Health and Human Services, *et al.*,

21 Defendants.

Case No. 4:17-cv-5783-HSG

**AMICUS CURIAE BRIEF OF AMERICAN  
CENTER FOR LAW & JUSTICE IN  
SUPPORT OF DEFENDANTS'  
OPPOSITION TO PLAINTIFFS' MOTION  
FOR A PRELIMINARY INJUNCTION**

Date: December 12, 2017

Time: 2:00 p.m.

Courtroom: 2, 4th Floor

Hon. Haywood S. Gilliam Jr.

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1 **CORPORATE DISCLOSURE STATEMENT**

2 The American Center for Law and Justice is a nonprofit organization that has no parent and  
3 issues no stock.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **INTEREST OF *AMICUS***

6 The American Center for Law & Justice (“ACLJ”) is an organization dedicated to the defense of  
7 constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the  
8 United States in a number of significant cases involving the freedoms of speech and religion.<sup>1</sup> In  
9 addition, the ACLJ represented thirty-two individuals and for-profit corporations in seven legal actions  
10 against the federal government’s contraceptive services mandate (“Mandate”).<sup>2</sup> The ACLJ also  
11 submitted amicus briefs with the U.S. Supreme Court in support of petitioners in both *Hobby Lobby v.*  
12 *Burwell*, 134 S. Ct. 2751 (2014), and *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

13 The ACLJ has vigorously opposed the Mandate since it was first imposed on the country by  
14 regulatory fiat over five years ago. Through litigation, public advocacy, and in formal comments filed  
15 with the departments of the previous administration, the ACLJ has argued that the Mandate, including  
16 the numerous faulty regulatory attempts to accommodate religious objections to the Mandate, violated  
17 both the First Amendment and federal law, most notably, the Religious Freedom Restoration Act  
18 (“RFRA”), 42 U.S.C. § 2000bb *et seq.* Prior to the promulgation of the Interim Final Rules (“IFRs”),  
19 the Mandate substantially burdened the religious exercise of objecting organizations because it required  
20

21 <sup>1</sup> *See, e.g., Pleasant Grove v. Sumnum*, 555 U.S. 460 (2009) (holding that the government is not  
22 required to accept counter-monuments when it displays a war memorial or Ten Commandments  
23 monument); *McConnell v. FEC*, 540 U.S. 93 (2003) (holding that minors have First Amendment  
24 rights); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (holding that denying a  
25 church access to public school premises to show a film series violated the First Amendment); *Bd. of*  
*Educ. v. Mergens*, 496 U.S. 226 (1990) (holding that allowing a student Bible club to meet on a public  
26 school’s campus did not violate the Establishment Clause); *Bd. of Airport Comm’rs v. Jews for Jesus*,  
482 U.S. 569 (1987) (striking down an airport’s ban on First Amendment activities).

27 <sup>2</sup> *Gilardi v. United States HHS*, 733 F.3d 1208 (D.C. Cir. 2013); *Korte v. Sebelius*, 735 F.3d 654 (7th  
28 Cir. 2013); *O’Brien v. U.S. HHS*, 766 F.3d 862 (8th Cir. 2014); *Am. Pulverizer Co. v. U.S. HHS*, No.  
6:12-cv- 03459-MDH (W.D. Mo.); *Lindsay v. U.S. HHS*, No. 1:13-cv-01210 (N.D. Ill.); *Bick Holdings,*  
*Inc. v. U.S. HHS*, No. 4:13-cv-00462-AGF (E.D. Mo.); *Hartenbower v. U.S. HHS*, No. 1:13-cv-2253  
(N.D. Ill.).

1 them to be complicit in the provision of objectionable services, under threat of ruinous penalties, in  
2 violation of their religious and moral beliefs. In addition, the Mandate was never the least restrictive  
3 means to achieve a compelling governmental purpose.

4 *Amicus* is profoundly concerned that, should this Court grant the interim relief requested by  
5 Plaintiffs, it could have a direct and negative impact on the ability of its former clients and others to  
6 operate their charities or businesses in a manner consistent with their religious beliefs.

7 *Amicus* believes that the IFRs challenged by the Plaintiffs in this action comport fully with the  
8 Administrative Procedure Act and the Equal Protection Clause, but respectfully submits this brief in  
9 order to explain one point: the IFRs do not violate the Establishment Clause.

## 10 INTRODUCTION

11 The IFRs do not violate the Establishment Clause. Even before the founding of this country, the  
12 government alleviated burdens on religious exercise by granting exemptions, a practice wholly  
13 consistent with the religion clauses of the First Amendment. The IFRs, which are religiously neutral in  
14 purpose and effect, fall comfortably within that long-established historical tradition. Indeed, far from  
15 violating the religion clauses, the IFRs faithfully pursue the freedoms they guarantee.

## 16 ARGUMENT

### 17 **I. Governmental accommodations of religious exercise, like those afforded by the IFRs, are a** 18 **well-established historical practice of this country.**

19 The IFRs provide entities and individuals with an exemption from complying with the  
20 contraception mandate based on religious principles or moral convictions. The granting of such  
21 exemptions is fully consistent with the long and well-established history in this country of  
22 governmental accommodation of religious beliefs and practices.

23 “The pursuit of religious liberty was one of the most powerful forces driving early settlers to the  
24 American continent and remained a powerful force at the time of the founding of the American  
25 republic.” Brett G. Scharffs, *The Autonomy of Church and State*, 2004 B.Y.U.L. Rev. 1217, 1230  
26 (2004). Even before the ratification of the Constitution, “tension between religious conscience and  
27 generally applicable laws, though rare, was not unknown.” *City of Boerne v. Flores*, 521 U.S. 507, 557  
28 (1997) (O’Connor, dissenting). The resolution of conflicts over matters such as “oath requirements,

1 military conscription, and religious assessments” demonstrates that “Americans in the Colonies and  
2 early States thought that, if an individual’s religious scruples prevented him from complying with a  
3 generally applicable law, the government should, if possible, excuse the person from the law’s  
4 coverage.” *Id.* Exemptions were understood as “a natural and legitimate response to the tension  
5 between law and religious convictions.” Michael McConnell, *The Origins and Historical*  
6 *Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466 (1990).

7 In 1775, for example, the Continental Congress passed a resolution exempting individuals with  
8 pacifist religious convictions from military conscription:

9 As there are some people, who, from religious principles, cannot bear arms in any case,  
10 this Congress intend no violence to their consciences, but earnestly recommend it to  
11 them, to contribute liberally in this time of universal calamity, to the relief of their  
12 distressed brethren in the several colonies, and to do all other services to their oppressed  
13 Country, which they can consistently with their religious principles.

13 *Id.* at 1469 (citation omitted).

14 Thus, even when the country was in dire need of men to take up arms to fight for independence,  
15 our forefathers knew that conscience is inviolable and must be honored. They understood that to  
16 conscript men into military service against their religious conscience would have undermined the very  
17 cause of liberty to which they pledged their lives, fortunes, and sacred honor.

18 The care and concern for religious freedom prior to the ratification of the Constitution was the  
19 underlying and animating principle of the religion clauses of the First Amendment:

20 The core value of the religion clauses is liberty of conscience in religious matters, an  
21 ideal which recurs throughout American history from the colonial period of Roger  
22 Williams to the early national period of the Founders. All three traditions of church and  
23 state—Enlightenment, pietistic, and political centrist—regarded religious liberty as an  
24 inalienable right encompassing both belief and action and as an essential cornerstone of a  
25 free society.

24 A. Adams & C. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1664 (1989).<sup>3</sup>

26  
27 <sup>3</sup> The states at the time of the founding were similarly concerned with the preservation of religious  
28 liberty and conscience. “Between 1776 and 1792, every state that adopted a constitution sought to  
prevent the infringement of ‘liberty of conscience,’ ‘the dictates of conscience,’ ‘the rights of  
conscience,’ or the ‘free exercise of religion.’” *A Heritage of Religious Liberty*, *supra*, at 1600-01.



1 Examples of this truth are seen most clearly in the writings of the Founding Fathers themselves.  
2 James Madison, the Father of the Constitution, opined that “[c]onscience is the most sacred of all  
3 property,” and that man “has a property of peculiar value in his religious opinions, and in the profession  
4 and practice dictated by them.” *Property* (March 29, 1792), in *The Founders’ Constitution*, Vol. 1, Doc.  
5 23 (P. Kurland & R. Lerner eds. 1987). He understood that one’s duty to the “Creator . . . is precedent,  
6 both in order of time and in degree of obligation, to the claims of Civil Society.” *A Memorial and*  
7 *Remonstrance Against Religious Assessments* (1785), in *The Sacred Rights of Conscience*, 309 (D.  
8 Dreisbach & M.D. Hall eds. 2009). “The Religion . . . of every man must be left to the conviction and  
9 conscience of every man,” preventing efforts to “degrade[] from the equal rank of Citizens all those  
10 whose opinions in Religion do not bend to those of the Legislative authority.” *Id.*

11 George Washington, the Father of the Country, noted that “the establishment of Civil and  
12 Religious Liberty was the Motive that induced me to the field of battle.” Michael Novak & Jana Novak,  
13 *Washington’s God*, 111 (2006). In his famous 1789 letter to the Quakers, he wrote:

14 The conscientious scruples of all men should be treated with great delicacy and  
15 tenderness: and it is my wish and desire, that the laws may always be extensively  
16 accommodated to them, as a due regard for the protection and essential interests of the  
17 nation may justify and permit.

17 *Letter to the Annual Meeting of Quakers* (1789), in *The Papers of George Washington*, 266 (Dorothy  
18 Twohig ed. 1993).

19 Thomas Jefferson observed that “[n]o provision in our Constitution ought to be dearer to man  
20 than that which protects the rights of conscience against the enterprises of the civil authority.” *To the*  
21 *Society of the Methodist Episcopal Church at New London, Connecticut* (Feb. 4, 1809). Like Madison,  
22 Jefferson understood the right of conscience to be a *pre-political* one, *i.e.*, one that could not be  
23 surrendered to the government as a term of the social contract: “[O]ur rulers can have authority over  
24 such natural rights only as we have submitted to them. The rights of conscience we never submitted, we  
25 could not submit. We are answerable for them to our God.” *Notes on the State of Virginia*, in *The Basic*  
26 *Writings of Thomas Jefferson*, 157-58 (Philip S. Foner ed., 1944).

27 In sum, “[t]he victory for freedom of thought recorded in our Bill of Rights recognizes that in  
28 the domain of conscience there is a moral power higher than the State.” *Girouard v. United States*, 328

1 U.S. 61, 68 (1946). And it is the longstanding commitment to that principle which has animated the  
2 “happy tradition” in our country “of avoiding unnecessary clashes with the dictates of conscience.”  
3 *Gillette v. United States*, 401 U.S. 437, 453 (1970).

4 **II. Governmental accommodations of religious exercise, like those provided by the IFRs, are**  
5 **consistent with the Constitution’s religion clauses.**

6 In light of the foregoing, it cannot be gainsaid that the accommodation of religious or  
7 conscientious beliefs and practices, such as those afforded by the IFRs, is wholly consistent with the  
8 text, nature, and purpose of the First Amendment’s religion clauses.

9 The requirement of *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), that a law have a secular  
10 purpose, “does not mean that the law’s purpose must be unrelated to religion.” *Corp. of Presiding*  
11 *Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987). In fact,  
12 “[g]overnment policies of accommodation, acknowledgment, and support for religion are an accepted  
13 part of our political and cultural heritage.” *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989)  
14 (Kennedy, J., concurring in judgment in part and dissenting in part). Such solicitude “respects the  
15 religious nature of our people and accommodates the public service to their spiritual needs.” *Zorach v.*  
16 *Clauson*, 343 U.S. 306, 314 (1952). Indeed, “[s]ince the framing of the Constitution,” the Supreme  
17 Court “has approved legislative accommodations for a variety of religious practices.” *Bd. of Educ. v.*  
18 *Grumet*, 512 U.S. 687, 723 (1994) (Kennedy, J., concurring in judgment) (citing *Selective Draft Law*  
19 *Cases*, 245 U.S. 366, 389-90 (1918) and *Gillette* (military draft exemption for religious objectors);  
20 *Zorach* (program permitting public school children to leave school for one hour a week for religious  
21 observance and instruction); and *Amos* (exemption of religious organizations from Title VII’s  
22 prohibition of religious discrimination)); *see also Cutter v. Wilkinson*, 544 U.S. 709 (2005) (holding  
23 that the Religious Land Use and Institutionalized Persons Act does not violate Establishment Clause).

24 Importantly, “[t]he limits of permissible state accommodation to religion are by no means  
25 coextensive with the non-interference mandated by the Free Exercise Clause.” *Walz v. Tax Comm’n of*  
26 *New York City*, 397 U.S. 664, 673 (1970). In other words, a governmental accommodation of religious  
27 practices is not limited only to what the Free Exercise Clause requires; to the contrary, the government  
28 may afford *additional* religious protection by offering such accommodations. *See Hobbie v.*

1 *Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 144-45 (1987) (“ . . . the government may (and  
2 sometimes must) accommodate religious practices and . . . may do so without violating the  
3 Establishment Clause”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (not “all benefits  
4 conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are  
5 forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause”).<sup>4</sup> *Cf.*  
6 *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (“[T]o say that a nondiscriminatory religious-  
7 practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally  
8 required.”).

9 The Supreme Court has thus recognized that there is “play in the joints” in the First  
10 Amendment: a “space for legislative action that is neither compelled by the Free Exercise Clause nor  
11 prohibited by the Establishment Clause.” *Cutter*, 544 U.S. at 719, 720 (citing *Smith*, 494 U.S. at 890  
12 (“[A] society that believes in the negative protection accorded to religious belief can be expected to be  
13 solicitous of that value in its legislation.”)).

14 As the lengthy citation of statutes and regulations in the IFRs demonstrates, Congress has  
15 regularly operated within that zone to provide numerous religious and moral exemptions in the context  
16 of health and human services. 82 Fed. Reg. 47792, n.1 (Oct. 13, 2017). For example, the “Church  
17 Amendment” provides that individuals or entities receiving federal health grants, contracts, loans, or  
18 loan guarantees are not required to participate in abortion or sterilization procedures contrary to their  
19 religious or moral beliefs. 42 U.S.C. § 300a-7. Medicaid managed care organizations are not required to  
20 provide coverage or reimbursements for counseling or referrals contrary to their moral or religious  
21 objections. 42 U.S.C. § 1396u-2(b)(3)(B).

22 Obviously, religious exemptions in federal law are not limited to the provision of health care  
23 services. Title VII of the Civil Rights Act of 1964 specifically exempts religious employers from

24  
25 <sup>4</sup> In fact, there are numerous instances of Congress acting to protect religious practice after the Supreme  
26 Court denied relief under the Free Exercise Clause. For example, after the Supreme Court in *United*  
27 *States v. Lee*, 455 U.S. 252 (1982), denied a free exercise claim by an adherent of the Amish faith over  
28 the payment of social security taxes, Congress adopted 26 U.S.C. § 3127, granting the Amish (and  
others) such an exemption. Also, following the Supreme Court’s rejection of a free exercise right of an  
Air Force serviceman to wear a yarmulke while in uniform, *Goldman v. Weinberger*, 475 U.S. 503  
(1986), Congress enacted 10 U.S.C. § 774, allowing members of the armed services to wear “religious  
apparel.”

1 antidiscrimination laws that apply to secular employers. 42 U.S.C. § 2000e-1. Under the Federal Death  
 2 Penalty Act, “[n]o employee . . . shall be required . . . to be in attendance at or to participate in any  
 3 prosecution or execution under this section if such participation is contrary to the moral or religious  
 4 convictions of the employee.” 18 U.S.C. § 3597(b). Federal law provides an exemption from  
 5 unemployment insurance obligations for employers that are “operated primarily for religious purposes.”  
 6 26 U.S.C. § 3309(b). ERISA exempts “church plan[s]” from its otherwise-comprehensive regulation of  
 7 employee benefit plans. 29 U.S.C. §1003(b)(2). The list goes on.<sup>5</sup>

8 RFRA itself—described as “the most important congressional action with respect to religion  
 9 since the First Congress proposed the First Amendment,” Douglas Laycock & Oliver S. Thomas,  
 10 *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 243 (1994)—authorizes  
 11 religious exemptions from complying with *any* federal law that is not specifically exempted from its  
 12 reach. 42 U.S.C. § 2000bb–3(a) (the statute “applies to all Federal law, and the implementation of that  
 13 law, whether statutory or otherwise, and whether adopted before or after November 16, 1993”).<sup>6</sup> The  
 14 sweeping breadth of RFRA is why it has been described as “super-statute.” Michael Paulsen, *A RFRA*  
 15 *Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995). While  
 16 RFRA is not *necessitated* by the Free Exercise Clause—in fact, it was adopted in the wake of a  
 17 Supreme Court decision limiting the Clause’s reach and scope, *see Hobby Lobby*, 134 S. Ct. at 2760-62  
 18 (discussing RFRA’s history)—the law furthers, and expands upon, the same underlying interests, *i.e.*,  
 19 the preservation and protection of religious exercise. This, as explained previously, is well within the  
 20 government’s authority and purview. “By enacting RFRA, Congress went far beyond what this Court  
 21

22 <sup>5</sup> According to a search conducted in 1992 of state and federal laws, “the terms ‘religion’ or ‘religious’  
 23 appear over 14,000 times. Religious exemptions, in turn, exist in over 2,000 statutes.” James E. Ryan,  
 24 *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407,  
 1445 (1992).

25 <sup>6</sup> Of course, under RFRA, no person is automatically exempt from complying with a federal law or  
 26 regulation if the claimant thinks the law is offensive to his religious sensibilities. First, a person’s  
 27 religious exercise must be *sincere*, *i.e.*, not a sham. *See Hobby Lobby*, 134 S. Ct. at 2774, n.28 Second,  
 28 the law must *substantially burden* that religious exercise, *i.e.*, not impart an insignificant incidental  
 burden. 42 U.S.C. § 2000bb–1(a). Third, even if a person has a *prima facie* claim under RFRA, that  
 person is not entitled to an exemption if the government can demonstrate that the law serves a  
 compelling governmental interest and is the least restrictive means to achieve that interest. 42 U.S.C. §  
 2000bb–1(b).

1 has held is constitutionally required.” *Id.* at 2767.

2 In sum, there is ample room within the religion clauses for the government to accommodate the  
3 religious exercise of persons, even where the Free Exercise Clause does not require it. As explained  
4 next, the Rules fall comfortably within that zone.

5 **III. The IFRs fall within the constitutionally permissible “play in the joints” that allows for**  
6 **protecting religious freedom without establishing religion.**

7 **A. *The IFRs are religiously neutral and are consistent with the historical practices and***  
8 ***understandings of the religion clauses.***

9 The IFRs fit within the permissible regulatory “play in the joints,” and are fully “compatible  
10 with the Establishment Clause because [they] alleviate[] exceptional government-created burdens on  
11 private religious exercise.” *Cutter*, 544 U.S. at 720. Regardless of whether they are *required* by the Free  
12 Exercise Clause, the IFRs are a justifiable and *permissible* regulatory measure under the Establishment  
13 Clause.

14 The hallmark principle of the Establishment Clause is *neutrality*, *see, e.g., Everson v. Bd. of*  
15 *Educ.*, 330 U.S. 1, 18 (1947), and there can be no doubt that the IFRs are religiously neutral. The IFRs  
16 do not give preference to one religion over another, as any person of any faith or religious belief may  
17 claim the exemption. Nor do the IFRs favor religion over non-religion, as any person with a non-  
18 religious, *moral* objection to the drugs required by the Mandate may also claim the exemption.<sup>7</sup> No  
19 matter what current judicial test this Court chooses to apply, including that of *Lemon v. Kurtzman*, the  
20 IFRs do not breach the First Amendment. “There is ample room under the Establishment Clause for  
21 ‘benevolent neutrality which will permit religious exercise to exist without sponsorship and without  
22 interference.’” *Amos*, 483 U.S. at 334 (quoting *Walz*, 397 U.S. at 673).

23 In fact, according to *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), the Supreme Court’s  
24 most recent application of the Establishment Clause, the Court held that “the Establishment Clause  
25 must be interpreted ‘by reference to historical practices and understandings.’” *Id.* at 1819 (quoting  
26 *Allegheny*, 492 U.S. at 670 (Kennedy, J.)). It observed that the line “between the permissible and the  
27

28 <sup>7</sup> It is nonetheless important to note that, where the “government acts with the proper purpose of lifting  
a regulation that burdens the exercise of religion,” there is “no reason to require that the exemption  
come packaged with benefits to secular entities.” *Amos*, 483 U.S. at 338.

1 impermissible” under the Establishment Clause has nothing to do with the reasonable observer and his  
2 perceptions of endorsement, but rather is “one which accords with history and faithfully reflects the  
3 understanding of the Founding Fathers.” *Id.* (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S.  
4 203, 294, (1963) (Brennan, J., concurring)).<sup>8</sup>

5 According to the history and tradition discussed previously, there can be no doubt that the effort  
6 of the government to lift a government-imposed burden on religious and moral beliefs, as do the IFRs,  
7 is an action that comports fully with the Establishment Clause. The practice of accommodating  
8 religious exercise has been a tradition of this country even before the adoption of the First  
9 Amendment’s religion clauses.

10 The Supreme Court’s decision in *Edwards v. Aguillard*, 482 U.S. 578 (1987), is not to the  
11 contrary. States’ Br. at 22. That decision had nothing to do with alleviating a government-imposed  
12 burden on religious exercise. And unlike the Louisiana law, which was adopted to advance in the public  
13 schools a specific allegedly religious belief regarding human origins, the IFRs do not themselves  
14 advance any set of religious beliefs on the part of the government. Rather, they simply permit private  
15 entities and persons to adhere to *their own* religious commitments. The government cannot be said to  
16 endorse everything it allows. *Cf. Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality) (“The  
17 proposition that [government bodies] do not endorse everything they fail to censor is not  
18 complicated.”).

19 **B. *Any alleged imposition on third parties does not constitute a governmental***  
20 ***endorsement or advancement of religion.***

21 Relying on the principle in *Cutter*, that “courts must take adequate account of the burdens a  
22 requested accommodation may impose on nonbeneficiaries,” 544 U.S. at 720, the States argue that the  
23 burden imposed on third parties render the Rules violative of the Establishment Clause. States’ Br. at  
24 23. That argument is unpersuasive for multiple reasons.

25  
26 <sup>8</sup> The Court in *Town of Greece* rejected the notion that its holding in *Marsh v. Chambers*, 463 U.S. 783  
27 (1983), “‘carv[ed] out an exception’ to the Court’s Establishment Clause jurisprudence” that is limited  
28 solely to legislative prayer. “*Marsh* stands for the proposition that it is not necessary to define the  
precise boundary of the Establishment Clause where history shows that the specific practice is  
permitted. *Any test* the Court adopts must acknowledge a practice that was accepted by the Framers and  
has withstood the critical scrutiny of time and political change.” 134 S. Ct. at 1819 (emphasis added).



1 First, the notion that a religious exemption that burdens any non-beneficiary must necessarily  
2 violate the Establishment Clause was rejected by the Supreme Court in *Hobby Lobby*, a decision  
3 providing, in part, the impetus for the IFRs themselves. In that case, the government suggested that “a  
4 plaintiff cannot prevail on a RFRA claim that seeks an exemption from a legal obligation requiring the  
5 plaintiff to confer benefits on third parties.” 134 S. Ct. at 2781, n.37. The Court responded that while  
6 burdens on non-beneficiaries can be taken into account in evaluating governmental interests and the  
7 means to further those interests, it “could not reasonably be maintained that any burden on religious  
8 exercise, no matter how onerous and no matter how readily the government interest could be achieved  
9 through alternative means, is permissible under RFRA so long as the relevant legal obligation requires  
10 the religious adherent to confer a benefit on third parties.” *Id.* Indeed, “[b]y framing any Government  
11 regulation as benefiting a third party, the Government could turn all regulations into entitlements to  
12 which nobody could object on religious grounds, rendering RFRA meaningless.” *Id.*

13 Second, any impact on third parties will not be a *government-imposed* impact, but rather the  
14 result of the discretionary choices of private actors made pursuant to their religious or moral beliefs.  
15 That distinction is crucial. *See Amos*, 483 U.S. at 337 n.15 (“it was *the Church . . . and not the*  
16 *Government,*” that “impinged” upon the employee’s choice).<sup>9</sup>

17 Third, even to the extent the effects an exemption will have on third parties is relevant, the  
18 standard for what burdens upon third parties are “too much” is high. Suffering religious discrimination,  
19 as in *Amos*, is not “too much.” Even being required to serve (in place of a conscientious objector) in the  
20 military in wartime, at risk of life and limb, as in *Gillette*, is not “too much.” *See Grumet*, 512 U.S. at  
21 724-25 (Kennedy, J., concurring in judgment) (citing *Amos* and *Gillette* as upholding laws under the  
22 Establishment Clause despite these “substantial” burdens on third parties). Declining to provide cost-  
23 free contraceptive services through an employer’s health insurance plan falls well below the burdens at  
24 issue—and tolerated—in those, and other, cases.

25 \_\_\_\_\_  
26 <sup>9</sup> The Free Exercise Clause, RFRA, RLUIPA, and the church autonomy doctrine, *like the IFRs*, all  
27 protect religious practice from *governmental* burdens. These situations are therefore quite unlike the  
28 case of *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), in which the government empowered  
all employees with an absolute right (to take off work on the Sabbath of their choosing) enforceable  
against *private* actors. *Id.* at 710.

1 Fourth, any alleged burdens placed on employees of employers who claim an exemption under  
2 the Rules must be considered in their proper context, namely, that inconveniences and burdens to  
3 employees are part and parcel of the employment context. A dress code denies the freedom to dress as  
4 one chooses. *E.g.*, *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282 (1977) (employee  
5 criticizing workplace dress code). Finite salaries deny employees money beyond their agreed upon pay.  
6 *E.g.*, *Comm’r of Internal Revenue v. Kowalski*, 434 U.S. 77, 81 (1977) (amount of salary subject to  
7 labor negotiation). Fixed work shifts deny employees the freedom to work the hours they choose. *E.g.*,  
8 *Bhd. of Locomotive Engineers v. Atchison, Topeka & Santa Fe R.R.*, 516 U.S. 152, 158 (1996) (noting  
9 fatigue likely to result from 12-hour shifts). The physical layout of an office will deny employees the  
10 space, window views, or furniture arrangements they might prefer. *E.g.*, *Kilby v. CVS Pharm., Inc.*, 739  
11 F.3d 1192, 1194 (9th Cir. 2013) (noting role of “business judgment” in determining the “physical  
12 layout of the workplace”). That employees do not always get what they deem to be optimum benefits  
13 and conditions is not remarkable, but rather a fact of life.

14 Fifth, the mischaracterization (*see Amos*, 483 U.S. at 337 n.15) of religious exemptions as  
15 imposing burdens upon third parties is a baseless charge that knows no limits. The employee who  
16 refuses a Sabbath shift imposes upon his employer or, perhaps, co-workers who need to fill in. *But see*  
17 *Sherbert v. Verner*, 374 U.S. 398 (1963). The parents who remove their Amish child from formal high  
18 school education deny that child the instruction that would otherwise be given. *But see Wisconsin v.*  
19 *Yoder*, 406 U.S. 205 (1972). The owners of a kosher deli who refuse to sell pork deny their patrons the  
20 option of a ham sandwich. *But see* Jonathan D. Sarna, “Constitutional Dilemma on Birth Control,”  
21 Forward.com (Mar. 16, 2012) (“We all might agree that kosher delis should not be coerced into selling  
22 ham”). And the physician who refuses to perform a “female circumcision,” *see* Female Genital  
23 Mutilation, WHO media centre fact sheet (Feb. 2014), or an unnecessary amputation, *see* David Brang  
24 *et al.*, “Apotemnophilia: a neurological disorder,” 19 NeuroReport 1305 (2008) (disorder characterized  
25 by intense desire for amputation of healthy limb), “imposes” upon the would-be recipients of those  
26 procedures (or their parents).

27 In sum, any attenuated, minor burden imposed on third parties on account of choices made by  
28 private actors pursuant to the IFRs do not render those rules unconstitutional under the Establishment



1 Clause. If purported harm to third parties is to be the measure of whether one can exercise a liberty  
2 granted by the Constitution, laws, or regulations, then those liberties are not truly liberties, but mere  
3 fleeting perks that can be easily rescinded by somebody else crying foul.

4  
5 **C. *The IFRs do not entangle government action and religious exercise or coerce third***  
6 ***parties to adhere to the religious beliefs of their employers.***

7 The IFRs do not entangle the government with the private exercise of religion, as suggested by  
8 the States. States’ Br. at 24. In fact, the opposite is the case: the IFRs *disentangle* the government from  
9 unilaterally deciding which types of religious entities should, or should not, be exempt from complying  
10 with the Mandate, allowing all with a religious or moral objection to the Mandate to choose a health  
11 insurance plan according to their beliefs and free from governmental coercion.

12 As in *Amos*, 483 U.S. at 339, the IFRs effectuate “a more complete separation” of “church and  
13 state” that “avoids the kind of intrusive inquiry into religious belief,” that the previous framework of  
14 illegal and unconstitutional exemptions and accommodations created. *See, e.g., Larson v. Valente*, 456  
15 U.S. 228, 247 n.23 (1982) (Establishment Clause prohibits government from making “explicit and  
16 deliberate distinctions between different religious organizations” without good reason); *Church of the*  
17 *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (reiterating that the Free Exercise  
18 Clause does not tolerate laws that “impose special disabilities on the basis of religious status”). As  
19 Justice Kennedy noted in *Hobby Lobby*, “RFRA is inconsistent with the insistence of an agency such as  
20 HHS on distinguishing between different religious believers—burdening one while accommodating the  
21 other—when it may treat both equally by offering both of them the same accommodation.” 134 S. Ct.  
22 at 2786 (Kennedy, J., concurring).

23 Nor do the IFRs coerce any person into participating in an act of religious worship or exercise.  
24 *See* States’ Br. at 24 (citing, *inter alia*, the prayer cases of *Town of Greece* and *Lee v. Weisman*, 505  
25 U.S. 577 (1992)). Nothing in the IFRs compels employees to agree with the religious or moral choice  
26 made an employer who objects to the Mandate. Nothing in the IFRs authorizes an employer to forbid  
27 their employees from using their salaries to obtain contraceptive services. Just as the employers are free  
28 to follow their conscience with respect to choosing and paying for a health insurance plan, employees

1 remain free to make their own private choices with respect to reproductive services using their own  
2 money and resources. No employee is a slave of his employer. If an employee does not like the choices  
3 his employer makes, with respect to the Mandate—or any other issue—he is free to walk away and  
4 seek employment elsewhere. To equate an employer’s decision to choose a health plan consistent with  
5 its religious beliefs with an act of worship like prayer is beyond reason.

6 Indeed, employees of objecting entities are no more coerced into religious exercise than  
7 employees of churches and auxiliaries, whose total exemption the States do not challenge. *See States’*  
8 *Br.* at 6 (stating their opinion that the prior regulatory scheme carved out a properly tailored  
9 exemption).

10 **CONCLUSION**

11 If Plaintiffs’ novel view of the Establishment Clause were actually the controlling legal  
12 standard, countless existing religious exemptions would fall by the wayside. Religion Clause  
13 jurisprudence neither supports nor requires such hostility toward religious accommodations. For the  
14 foregoing reasons, the IFRs are fully consistent with, and thus do not violate, the Establishment Clause.

15  
16  
17 Respectfully submitted,

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19  
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