No. 13-1540

In the United States Court of Appeals for the Tenth Circuit

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, a Colorado non-profit corporation, LITTLE SISTERS OF THE POOR, BALTIMORE, INC., a Maryland non-profit corporation, by themselves and on behalf of all others similarly situated, CHRISTIAN BROTHERS SERVICES, an Illinois non-profit corporation, and CHRISTIAN BROTHERS EMPLOYEE BENEFIT TRUST,

Appellants,

v.

SYLVIA BURWELL, Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THOMAS PEREZ, Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, JACOB J. LEW, Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY,

Appellees.

On Appeal from the United States District Court for the District of Colorado
Judge William J. Martinez
Civil Action No. 1:13-cv-02611-WJM-BNB

THE LITTLE SISTERS OF THE POOR'S BRIEF ON THE INTERIM FINAL REGULATIONS

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The government's latest interim rules—the *seventh* set of revisions to the Mandate in 36 months—change nothing of substance in this appeal. The Little Sisters of the Poor[1] continue to need a preliminary injunction to protect them from forced participation in the Mandate in violation of their undisputed religious beliefs.

The government easily could have eliminated the need for this appeal. It could have exempted the Little Sisters as "religious employers"—just as it would if the Little Sisters' homes were operated by Catholic bishops. Op. Br. at 12-13, n.3 and 47-51. It could have exempted church plans. It could have adopted the "most straightforward" path of just providing contraceptives itself, *Hobby Lobby v. Burwell*, 134 S. Ct. 2751, 2780 (2014), such as through Title X or tax incentives. Most simply, it could just allow employees of religious objectors to purchase subsidized coverage on the government's own exchanges.

But instead of these obvious and more direct approaches, the government continues to insist that the only way the United States could possibly distribute contraceptives is with the forced participation of the Little Sisters and their plan. Thus the government seeks to coerce the Little Sisters to participate by giving information about its plan and plan administrators, which the government uses to offer those entities incentives to take action contrary to the terms of the plan and religious beliefs of the Little Sisters. The new rules contradict not one, but two Supreme Court orders—in this case and *Wheaton College v.*

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[1] Appellants are the Little Sisters of the Poor Home for the Aged, Denver Colorado, Little Sisters of the Poor, Baltimore, Inc., Christian Brothers Employee Benefit Trust (the "Trust"), and Christian Brothers Services (the third-party administrator for the Trust). They are referred to collectively as the "Little Sisters" unless otherwise noted.

Burwell, 134 S. Ct. 2806 (2014)—each of which respected conscience by only requiring simple self-identification.[2] The government says its latest demand constitutes the (new) "minimum information necessary" to implement its scheme. And the rules continue the government's religious discrimination, excluding the Little Sisters from the "religious employer" exemption based on speculation about the religiosity of their ministries.

There is no need for remand or further delay, which would only add to the harm and uncertainty inflicted on the Little Sisters and their plan by the Mandate and by the government's litigation-driven regulatory process. The Little Sisters have stated a clear religious objection to facilitating the distribution of contraceptives in connection with their plan in any way. The government candidly admits that its newest revision is just an "augmentation" that leaves its current objectionable system in place and merely adds an "alternative" that has the exact "same" effect as before.[3] Indeed, on the day it issued its "augmentation," the government admitted to the D.C. Circuit that this adjustment was unlikely to resolve the concerns of Catholic objectors before that court. Offering the Little Sisters another way to violate their undisputed religious beliefs changes nothing.

For years, the Little Sisters—and hundreds of other class members using the Trust plan—have carried on under the cloud of the government's illegal threats. While the

[2] The Little Sisters have never objected to merely identifying themselves so that the government can leave them alone. What they object to is the government's unending attempt to use them and their benefits plan as the vehicle for contraceptive distribution.

[3] 79 Fed. Reg. 51092, 51092 (Aug. 27, 2014); The Center for Consumer Information & Insurance Oversight, Fact Sheet, http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html (last visited Sept. 8, 2014) ("CCIIO Fact Sheet").

government always retains the ability to revise its own rules, its new "augmentation" should not prevent the Little Sisters from obtaining an authoritative answer to the straightforward questions at the heart of this appeal. Accordingly, the Little Sisters respectfully request that this appeal continue as scheduled.

RESPONSES

Issue 1: The impact of the interim final rules on the Little Sisters' claims and requested remedies.

This is an appeal of the district court's denial of the Little Sisters' motion for preliminary injunction against the Mandate. The Little Sisters advanced three substantive arguments in support of that motion: that the Mandate violates RFRA; that the Mandate's religious discrimination violates the First Amendment; and that the Mandate's speech restrictions violate the First Amendment. Each theory, standing alone, merits a preliminary injunction for the reasons set forth in the Little Sisters' Opening Brief. For the reasons set forth below, the interim final rules do not change the Little Sisters' entitlement to or need for a preliminary injunction.

RFRA. The Mandate continues to violate RFRA because it imposes a substantial burden on the Little Sisters' undisputed religious exercise and is not the least restrictive means of serving a compelling government interest.

1. The Little Sisters' religious beliefs are undisputed. They have vowed to give their entire lives to their faith and to "convey a public witness of respect for life," JA148a, 152a, vows they must follow "at all times." JA156a-58a, 169a-70a. Among other things, this means that the Little Sisters cannot allow their health plan to facilitate, participate in, or

partner with others in providing sterilization, contraception, or abortion. JA39a-40a, 154a, 160a. The Little Sisters associated with the Trust and Christian Brothers Services to ensure their health plan's congruence with their faith. JA151a, 169a-171a.

In response to the Mandate, the Little Sisters have been crystal clear that their beliefs prevent them from taking "any action that would participate in facilitating access to abortifacients, contraceptives, or sterilization." JA342a; *see also* JA160a ("Our beliefs forbid us from participating, in any way, in the government's program to promote and facilitate access to sterilization, contraceptives, and abortion-inducing drugs and devices."); JA39a-40a, 154a-57a, 344a-45a. This is necessary not only to prevent complicity in grave sin, but also to avoid even *appearing* to condone wrongdoing, which would violate the Little Sisters' public witness to the sanctity of human life and could mislead other Catholics and the public. *Id*. Such scandal would itself be sinful and would undermine the Little Sisters' ability to carry out their ministry. JA155a.

The Christian Brothers ministries, which are bound by the same Catholic convictions as the Little Sisters, have been just as clear about their beliefs. JA169a-71a; 352a-54a. Thus, Christian Brothers Services cannot provide the mandated services, and neither the Trust nor its members (such as the Little Sisters) can: identify member-ministries' employees to a TPA for purposes of enabling the Mandate; coordinate with a TPA (such as during the adding or removing of employees and beneficiaries) for purposes of the Mandate; or coordinate with a TPA to provide notices of the Mandate's services. JA176a-77a. Any provision of the Mandate's services through the plan—even voluntarily by other

entities associated with the Trust—would violate the Christian Brothers' and the Little Sisters' faith. JA176a, 352a-354a, 495a.

2. The Mandate continues to violate the Little Sisters' undisputed religious beliefs. Unlike the Supreme Court's relief in this case, which completely removed the Little Sisters from the government's scheme, the interim final rules are merely an alternative way for the Little Sisters to do what their religion forbids: comply with the Mandate and facilitate the distribution of contraceptives in conjunction with their benefits plan. *See* 79 Fed. Reg. at 51092. The "augment[ed]" rules have the same goal as the old rules—"preserving participants' and beneficiaries' . . . access to coverage for the full range of Food and Drug Administration (FDA)-approved contraceptives." *Id*. Indeed they were rushed into effect without notice and comment because the government wants to provide "access to contraceptive coverage" without cost-sharing "as soon as possible." *Id.* at 51095-96. And the new rules have the same effect as the prior rules: "[r]egardless of whether the eligible organization self-certifies in accordance with the July 2013 final rules, or provides notice to HHS in accordance with the August 2014 [Interim Final Rules], the obligations of insurers and/or TPAs regarding providing or arranging separate payments for contraceptive services are the same." *See* CCIIO Fact Sheet.

The interim final rules therefore merely offer the Little Sisters another way to violate their religion and comply with the Mandate. If a Jewish prisoner objects to a steady diet of ham sandwiches on the ground that he cannot eat pork products, it is no answer for the government to "augment" the menu by adding the "alternatives" of eating pork chops or

bacon. Giving the prisoner a second (or third or fourth) way to do what his religion forbids does not change his case at all.

The same is true here. One way or another, the government continues to insist that the Little Sisters must comply with this Mandate and facilitate the distribution of contraceptives in conjunction with their benefit plan, which is precisely what they have already said they cannot do. JA154a-158a, 160a, 169-171a, 176a-78a, 342a-345a, 352-355a. Whether they do that by signing and delivering EBSA Form 700, or by signing and delivering the "alternative" information that likewise facilitates access to contraceptives through the Little Sisters' plan, the effects are the same. Under the new option, if—and only if—the Little Sisters provide insurance and submit the required statements, the government "will send a separate notification to each of" Christian Brothers' TPAs "describing the obligations of the [TPA] under . . . this section and under § 54.9815-2713A"—which includes the TPA's obligation to deliver contraceptives to participants in the Little Sisters' health plan. *See* 26 C.F.R. § 54.9815-2713AT(b)(1)(ii)(B). Whether it receives EBSA Form 700 from the Little Sisters or a "separate notification" from the government, the legal effect remains the same: "the [TPA] shall provide or arrange payments for contraceptive services" to "participants and beneficiaries" in the Little Sisters' health plan. *Id.* at § 54.9815-2713AT(b)(2). Without either form from the Little Sisters, contraceptive coverage is not provided in conjunction with the plan.

3. To be sure, the government drops hints—confined to its regulatory preamble and absent from the rules themselves—that it may decide to treat church plan TPAs differently. 79 Fed. Reg. at 51095 & n.8. It acknowledges in a footnote that "[c]hurch plans are exempt

from ERISA" and that it cannot use ERISA regulations to turn church plan TPAs into plan administrators. *Id.* at n.8. And the government says that it will send out notifications to TPAs "[w]hen an eligible organization that establishes . . . a self-insured plan *subject to ERISA*" turns in a notice.[4] 79 Fed. Reg. at 51095 (emphasis added). But this trail of breadcrumbs ends before it reaches the regulations themselves. The actual regulations state the government's obligation to notify the TPAs in absolute terms, and state the TPA's obligation to distribute the drugs in absolute terms. And as before, the regulations are promulgated under the separate authority of the Internal Revenue Code, not just ERISA.[5] And even in the preamble, the government continues to hold out the "carrot" of federal reimbursement for church plan TPAs that "voluntarily provide" contraceptive services in conjunction with the Little Sisters' plan (79 Fed. Reg. at 51095 n.8)—a promise that makes

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[4] The government's coyness on this important point is odd, and—after nearly a year of litigation and a trip to the Supreme Court—cannot be written off as mere oversight. It has adopted rules which on their face require a notification to church plan TPAs and order those TPAs (including Christian Brothers Services) to comply. If the government means to exempt employers that participate in ERISA-exempt church plans, and means to exempt such plans from its effort to compel or pay TPAs to use plan information and provide contraceptives to plan participants, then it should do so expressly and agree to a permanent injunction in this case, or this Court should enter one. But the Little Sisters and Christian Brothers should not be forced to rely on mere breadcrumbs in the face of the rules' plain text, particularly where the government had every opportunity to make its meaning clear and chose not to. Nor is there any reason to force the Little Sisters to provide TPA identity and contact information if the government does not intend to use that information to prompt contraceptive distribution on the Little Sisters' plan.

[5] 79 Fed. Reg. at 51097-98 (citing Sections 7805 and 9833 of the Internal Revenue Code as authority for the temporary and proposed regulations under Code Section 9815). This is important because, as discussed in the Little Sisters' opening merits brief, Internal Revenue Code-based Treasury Regulations such as 26 C.F.R. 54.9815–2713AT are fully binding on church plans and their participating employers. Op. Br. at 37.

no sense unless the TPAs receive a form or notification pursuant to this new regulation that provides legal authority to do so. *See* 26 C.F.R. § 54.9815-2713AT(b)(2), (3) (TPAs may seek reimbursement based on either EBSA Form 700 or a government notification). Thus it is clear that, whatever the mechanism, the government remains bent on co-opting the Little Sisters' conscience-compliant benefit plan and using it to provide contraceptives.

All of this is exactly as it was before the interim final rules. The government continues to partially disclaim its authority to make its system work, but simultaneously demands immediate compliance from employers on pain of massive penalties. It continues to demand immediate compliance from TPAs (in the text of the actual rules) and admits that, at a minimum, it plans to seek voluntary provision of the drugs from the Little Sisters' TPAs, using the Little Sisters' plan information. Both Form 700 and its new "alternative" are legal devices that become instruments of the Trust plan and require amendment of the plan over the Appellants' objections. Thus, the goal of the system is the same, the obligations under the system are the same, and the coercion on the Little Sisters to participate in that system or pay massive penalties is the same. As the Little Sisters said when they filed this case a year ago, they cannot participate in or facilitate any such system. JA154a-160a, 169-171a, 176a-78a, 342a-345a, 352-355a.

4. For these reasons, the Mandate continues to impose a substantial burden on the Little Sisters' religious exercise under RFRA, in the same way as before. The Little Sisters cannot comply with the statutory mandate, which remains unchanged. The new rules share the same goal as the old rules—"preserving [plan] participants' and [plan] beneficiaries' . . . access to coverage for the full range of [FDA-] approved contraceptives." 79 Fed. Reg. at

51092. And they have the same effect, because "regardless" of which set of rules the Little Sisters comply with, the government says that the "obligations" of their church plan TPAs are the "same." *See* CCIIO Fact Sheet. The government has simply given the Little Sisters an alternative way of doing what their faith forbids them to do: converting their conscience-compliant health plan into a plan that violates their conscience. As with the plaintiffs in *Hobby Lobby*, because "the contraceptive mandate forces [the Little Sisters] 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." 134 S. Ct. at 2779.

The government knew that the new rules would not remove the burden on religious organizations that share the Little Sisters' religious beliefs. Indeed, it told the D.C. Circuit on the day that the interim final rules were released that the "type of relief" reflected in their rules "does not meet [the] concerns" of, among others, a Catholic church plan and the plan's Catholic member-ministries.[6]

One can only presume that the government will continue to press its argument that its "augmented" compliance system *should* be satisfactory, because the addition of a middle-man makes the complicity more "attenuated" in the government's eyes. But *Hobby Lobby* forecloses that argument entirely. The relevant question is only whether the Little Sisters sincerely believe they are forbidden from participating in the government's system to

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[6] *See* Gov't Letter to the Clerk at 2, *Roman Catholic Archbishop of Wash. v. Burwell*, No. 14-5371 (D.C. Cir. Aug. 22, 2014).

promote and facilitate contraceptive access. *Hobby Lobby*, 134 S. Ct. at 2778. That religious objection is undisputed, and is unaffected by the government's latest variation.

5. Nor do the new rules alter the strict scrutiny analysis. The interim final rules offer no *evidence* to demonstrate a compelling interest as to these parties, and otherwise cannot withstand the conclusion of both this Court and the Supreme Court that the only interests actually asserted in this case—public health and gender equality—are insufficient. *Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1143 (2013) (en banc) ("[B]oth interests as articulated by the government are insufficient" because they are "broadly formulated" and "because the contraceptive-coverage requirement presently does not apply to tens of millions of people."); *see also Hobby Lobby*, 134 S. Ct. at 2779 (dismissing "public health" and "gender equality" as "couched in very broad terms" where RFRA requires a "more focused" inquiry that "looks beyond broadly formulated interests"). Thus the Mandate fails at the compelling interest stage, under controlling circuit precedent, just as before.

With regard to the "exceptionally demanding" least restrictive means test, the government fares no better. *Hobby Lobby*, 134 S. Ct. at 2780. First, the new rules prove untrue the government's repeated prior claim that the least restrictive way to distribute contraceptives was to force the Little Sisters to sign and deliver Form 700.[7] Second, the government's latest variation does nothing to carry its statutory burden of actually proving that less restrictive means—such as providing the drugs itself, or using its own exchanges

[7] *See*, *e.g.*, Gov't Opp. Emerg. Mot. for Inj. Pend. App., *Little Sisters v. Sebelius*, No. 13-6827 (10th Cir. Dec. 30, 2013) ("The government believes that . . . the regulatory scheme to which they object . . . is the least restrictive means" of furthering its interests); JA312a.

to provide policies to anyone it pleases—would be inadequate. *Hobby Lobby*, 134 S.Ct. at 2782 n.41 (citing Brief of United States as *Amicus Curiae* in *Holt v. Hobbs*, No, 13-6827 at 10). RFRA requires strict scrutiny, not absolute deference to the government's latest claim that its current system is the least restrictive. Having failed to prove—or even introduce evidence—in court that less restrictive approaches do not work, the government cannot rescue its case via pronouncements in the Federal Register.

First Amendment – Religious Discrimination. The interim final rules continue the government's explicit discrimination against certain religious institutions like the Little Sisters "expressly based on the degree of religiosity of the institution[s] and the extent to which that religiosity affects [their] operations." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008); *see also* 78 Fed. Reg. 39870-01, 39874 (July 2, 2013). The interim final rules also do nothing to cure this open discrimination's basis in "mere speculation" about the religious beliefs of the Little Sisters and their employees—and speculation "cannot support a compelling interest." *Awad v. Ziriax*, 670 F.3d 1111, 1130 (10th Cir. 2012) (noting that, to pass strict scrutiny under *Larson v. Valente*, 456 U.S. 228 (1982), the government must provide "evidence" proving a challenged law's necessity); JA594a (admitting there is "no evidence" to support the government's speculation).

First Amendment - Free Speech. As with the earlier "accommodation," the new rules require the Little Sisters to speak in a manner and for a purpose that they cannot: "to trigger payments for the use of contraceptive and abortion-inducing drugs and devices." Op. Br. at 52. The government admits that this compelled speech provides "the minimum information necessary . . . to implement" its employer-based contraceptive distribution

scheme. 79 Fed. Reg. at 51095. To this end, the new rules compel the Little Sisters—for the first time, and in contrast to the innocuous content of the Supreme Court's *Little Sisters* and *Wheaton College* notices—to specifically provide their TPAs' identity and contact information.[8] For church plans, the government will use this speech to alter the terms of the Little Sisters' contract with their TPAs such that the TPAs can "voluntarily provide . . . and seek reimbursement for" providing the previously and otherwise forbidden "contraceptive services." 79 Fed. Reg. at 51095 n.8. Just as with Form 700, then, the Little Sisters do not wish to (and religiously cannot) speak in this way, since it furthers the government's scheme to deliver contraceptives via the Little Sisters' plan.[9]

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[8] At the Supreme Court, the government claimed that what Form 700 "accomplishes" in the church-plan context is merely a "regularized, orderly means" for the government to identify objectors. Brief of Respondents at 33, *Little Sisters of the Poor v. Sebelius*, No. 13A691, 2014 WL 108374 (U.S. Jan. 3, 2014). But if Form 700 merely identifies *objectors*, and if the new form is merely an "alternative" that has the "same" effect, why does the new form require identifying *TPAs* and providing their contact information?

[9] The interim final rules remove the government's regulatory gag rule. 79 Fed. Reg. at 51095. This is a beneficial change of position that at least partially resulted from this litigation, which means that the Little Sisters have prevailed on their claim against the rule as such. *See*, *e.g.*, 10 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2667 (2014). But the government still purports to restrict what the Little Sisters may say to plan TPAs. 79 Fed. Reg. at 51095 ("[A]n attempt to prevent a third party administrator from fulfilling its independent legal obligations to provide . . . contraceptive services" remains "generally unlawful" and "prohibited under other state and federal laws."). The new rules, then, still embrace the position repeatedly stated by the government that the Little Sisters cannot instruct their TPAs not to provide objectionable services on their plan. *See* Tr. of Hr'g at 40-41, Dkt. 54, *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441 (D.D.C. Nov. 22, 2013) (religious objectors cannot "say[] to the TPA, if you don't stop making the payments [for contraceptives], we're going to fire you."); JA679a-80a. Particularly since the government seeks to reform the Little Sisters' plan to allow their TPAs to "voluntarily" provide those services, the Little Sisters must retain their ability to persuade their TPAs not to make that choice. JA157a-58a, 346a.

Issue 3: Address whether any or all of the cases must be remanded for consideration in the district court in light of the interim final rules.

No. The interim final rules do not require a remand. They merely "augment" existing rules to provide an "alternative" way to do the same thing that the Little Sisters have long said they cannot do. There is no new legal ground to cover below, and there is no factual dispute about the scope of the Little Sisters' religious objection to any participation in the government's system to promote and distribute contraceptives. JA160a, 342a, 352a-355a. Notably, the government has not sought a remand from any of the several other appellate courts hearing similar cases. Nor has it dismissed its own appeals of preliminary or permanent injunctions entered against the Mandate on behalf of non-profits.[10] Rather, the government seems to agree with the Little Sisters that the "augmentation" of the Mandate does not work a change requiring a return to the trial court. *See* n.6, *supra*.

Here, a remand is also harmful to the Little Sisters. The Little Sisters continue to need a preliminary injunction against the Mandate. The Supreme Court's injunction pending appeal protects the Little Sisters from enforcement of "the challenged provisions of the Patient Protection and Affordable Care Act . . . and related regulations," but only during the course of this appeal. JA725a. A remand to the trial court without a reversal of the denial of a preliminary injunction would harm the Little Sisters and expose them to massive penalties. Federal law provides that denials of preliminary injunctive relief are immediately

[10] By contrast, the government dismissed its appeals in the for-profit cases, presumably because it does not intend to defend the existing Mandate in those cases. *See* Gov't Notice of Dismissal, *Hobby Lobby v. Burwell*, No. 13-6215 (10th Cir. Sept. 3, 2014).

appealable as of right precisely so that parties denied such relief in a trial court have a prompt opportunity to obtain protection on appeal. That principle is even more important in the First Amendment context. The longer the threat of enforcement hangs over the Little Sisters, the more their rights are chilled. JA178a.[11]

Issue 4: Address whether these cases may be appropriately heard during the 60-day written comment period and before final regulations become effective.

Yes. The "interim final rules" are fully effective now. 79 Fed. Reg. at 51092 ("These interim final regulations are effective on August 27, 2014.").[12] That the rules might be revised after the 60-day comment period is irrelevant. "[A]n agency *always* retains the power to revise a final rule through additional rulemaking. If the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely." *Am. Petrol. Inst. v. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990).

Issue 5: Address (A) whether the interim final rules must satisfy the APA's "good cause" requirement, and (B) whether the rules satisfy that requirement.

(A): Yes. The interim final rules are subject to the APA's requirement to either proceed by notice and comment or satisfy the good cause requirement. The ACA neither "expressly" bypasses the APA nor establishes "procedures so clearly different from those required by the APA that [Congress] must have intended to displace the norm." *See*

[11] *See Laird v. Tatum*, 408 U.S. 1, 11 (1972) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of government regulations . . . [on] the exercise of First Amendment rights."); *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013) ("RFRA protects First Amendment rights").

[12] *Career Coll. Ass'n v. Riley*, 74 F.3d 1265, 1268 (D.C. Cir. 1996) ("The key word in the title 'Interim Final Rule' . . . is not interim, but final. 'Interim' refers only to the Rule's intended duration-not its tentative nature.").

Coalition for Parity, Inc. v. Sebelius, 709 F. Supp. 2d 10, 18 (D.D.C. 2010). Thus, the statute is best read "to require that interim final rules be promulgated either with notice and comment or with 'good cause' to forego notice and comment." *Id.* at 19; *see also Geneva Coll.v. Sebelius*, 929 F. Supp. 2d 402, 444 (W.D. Pa. 2013).

(B): No. An agency is "relieved of its obligation to provide notice and comment" when it for "good cause" finds that notice and comment is "impracticable" or "contrary to the public interest." *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 91 (D.C. Cir. 2012). Courts have "repeatedly made clear that the good cause exception is to be narrowly construed and only reluctantly countenanced." *Id.* at 93. The government bears the burden of meeting this narrow exception, *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 751 (10th Cir. 1987), and courts have declined to accord agency findings of good cause any "particular deference." *Mack Trucks*, 682 F.3d at 93. Having (1) exempted plans covering tens of millions of people from the Mandate (through both grandfathering and the religious employer exemption), (2) repeatedly extended safe harbors to thousands of religious objectors, and (3) apparently taken no steps to provide contraceptive access to the Little Sisters' employees in the first seven months after the district court's injunction, it is difficult to fathom how the government might now prove that it could not tolerate an additional short term delay. While that failure might *also* derail the rules as a violation of the APA, the Little Sisters' APA claims are not presently before this Court, and so the failure's main relevance is in simply providing yet another reason that this Court should not rely on the latest rushed "augmentation" to further delay this appeal.

Respectfully submitted this 8th day of September 2014,

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CERTIFICATIONS

I hereby certify that the length and spacing specifications of this Court's August 27, 2014 order have been met; that all of the required privacy redactions have been made; that any required paper copies are exact versions of the document filed electronically; that the electronic submission was scanned for viruses and found to be virus-free; and that, on September 8, 2014, I caused the foregoing response to be filed and served on counsel of record through this Court's CM/ECF system.

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