No. ____

In the Supreme Court of the United States

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE;

Petitioner,

v.

THE STATE OF CALIFORNIA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARK L. RIENZI
Counsel of Record
ERIC C. RASSBACH
LORI H. WINDHAM
DIANA M. VERM
CHRIS PAGLIARELLA
CHASE T. HARRINGTON*
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW, Suite 700
Washington, D.C. 20036
(202) 955-0095
mrienzi@becketlaw.org

Counsel for Petitioner

*Admitted only in Colorado; supervised by D.C. bar members

QUESTION PRESENTED

Since 2011, the federal courts have repeatedly considered whether forcing religious objectors to provide health plans that include contraceptive coverage violates the Religious Freedom Restoration Act (RFRA). That controversy has been addressed by more than 150 judges, in scores of lawsuits, across ten different circuits, and involving hundreds of religious organizations.

Over and over again, those suits have come to this Court, either for emergency relief or merits determination. Yet despite the repeated need for this Court's intervention, it has never resolved the merits of the RFRA dispute. Most recently, an eight-Justice Court in *Zubik* v. *Burwell* did not reach the RFRA question and instead remanded for the parties to reach a resolution. The federal government then conceded the RFRA violation and issued new rules exempting religious objectors.

But without resolution of the RFRA question from this Court, the litigation has continued unabated. Now States are suing the federal government because they disagree with its RFRA analysis and believe the religious exemption rules are impermissible. This latest set of cases thus arrives in a new posture—here, a dispute over whether the agencies had "good cause" to issue interim final rules to correct the RFRA violation—but presents the same unresolved issue that was at the heart of *Zubik* and several prior emergency applications:

Whether RFRA requires the government to exempt religious objectors from providing health plans that include contraceptive coverage.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner, the Little Sisters of the Poor Jeanne Jugan Residence, located in San Francisco, was defendant-intervenor-appellant below. The Little Sisters do not have any parent entities and do not issue stock.

The State Respondents are the State of California, State of Delaware, State of Maryland, State of New York, and the Commonwealth of Virginia, who were plaintiffs-appellees below.

The federal government Respondents, who were defendants-appellees below, are: Alex M. Azar, Secretary of the U.S. Department of Health & Human Services, the U.S. Department of Health & Human Services, R. Alexander Acosta, Secretary of the U.S. Department of Labor, the U.S. Department of Labor, Steven Tener Mnuchin, Secretary of the U.S. Department of the Treasury, and the U.S. Department of the Treasury. (the "agencies").

Respondent March for Life Education and Defense Fund was defendant-intervenor-appellant below.

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INTRODUCTION

Since late 2013, this Court has repeatedly been presented with the question whether applying the federal contraceptive mandate and its so-called "accommodation" to religious non-profits violates Religious Freedom Restoration Act (RFRA). In a series of emergency orders (*Little Sisters of the Poor* (2014), *Wheaton College* (2014), *Zubik* (2016)), the Court protected religious non-profits from large fines, but repeatedly refrained from expressing any view on the merits of the RFRA claim.

In *Hobby Lobby* (2014), the Court discussed the mandate's application to religious non-profits at length, but again emphasized that it was not deciding that question. In the fall of 2015, as scores of cases involving religious non-profits worked their way through the courts, the Court granted certiorari in a group of seven cases to decide the RFRA question. But there too the Court demurred: the eight-Justice unanimous per curiam decision in *Zubik* did not decide the merits.

Three years later, it is clear that the litigation will not end until this Court answers the RFRA question. The *Zubik* remand provided the federal government time to acknowledge its RFRA violation and change its rules to provide a religious exemption. But because this Court has not answered the RFRA question, many states and some lower federal courts have now taken the view that the mandate poses no RFRA problem at all, that the Affordable Care Act does not permit any religious exemptions, and that the federal government should be forced back to its pre-*Zubik* rules. Reimposition of the pre-*Zubik* rules has, in turn, generated

continued and additional litigation by religious objectors. The Court can expect that, with the vicissitudes of politics, it will keep seeing new petitions regarding the latest iteration of the contraceptive mandate as applied to religious objectors, whether from States, advocacy groups, or the directly-affected religious groups. The cycle shows no signs of stopping.

There is a way out. This Court can end the recurring parade of dueling mandate cases by granting certiorari in this appeal and deciding the long-pending RFRA question once and for all. That approach may displease some politicians and interest groups, to the extent that their interests are served by never-ending litigation. But resolving the RFRA question will allow the lower federal courts to finally extract themselves from the tangle of lawsuits. And it will allow religious non-profits to finally walk away from so many years of unwanted litigation against their governments.

We fully recognize that the course we urge is unconventional. But it is entirely appropriate, since the Court will have to decide the RFRA question sooner or later. Deciding the case now, and solely on the narrow RFRA question presented here, allows the Court to resolve the litigation in a surgical manner, and before it spreads further. Should this litigation come back to the Court two years hence, it will have grown more complicated, as there will be at least nine more state plaintiffs in the case (and possibly as many as thirteen more), and the lower courts might decide the case on other grounds (the second amended complaint states five different grounds for relief, and the administrative record on the Final Rule is over 800,000 pages).

Deferring the answer to the question of RFRA's application to the "accommodation" created for religious non-profits has not been beneficial to the courts, the government, religious objectors or public discourse over the relationship of religious organizations to the rest of American society. Although the States have asked for a delayed schedule in the lower courts, there is no reason to think further delay will suddenly yield better results: the question will not be any easier in two years, after yet more lower-court percolation, or under some future iteration of the rule issued by a new President. The Court should therefore grant the petition.

OPINIONS BELOW

The opinion of the court of appeals (Appendix (App.) 1a-58a) is reported at 911 F.3d 558. The opinion of the district court (App.83a-126a) is reported at 281 F. Supp. 3d 806.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory provisions are reproduced in Appendix C (App.127a-156a): 42 U.S.C. 2000bb-1, 42 U.S.C. 300gg-13, 29 U.S.C. 1185d, 26 U.S.C. 4980D, 26 U.S.C. 4980H, 26 U.S.C. 5000A, 45 C.F.R. 147.132 (Oct. 1, 2018).

STATEMENT

The litigation over the contraceptive mandate regulations has lasted more than seven years, since the contraceptive mandate was first promulgated in August 2011. The litigation during that time can be divided into three main phases: (1) creation of the mandate until *Hobby Lobby* and *Wheaton*; (2) from *Hobby Lobby* until *Zubik*; and (3) from *Zubik* until the present. We describe each of those phases below.

I. Phase One: from creation of the mandate until *Hobby Lobby* and *Wheaton* (August 2011-July 2014).

A. Federal agencies create the contraceptive mandate and some exemptions.

The Affordable Care Act requires a significant subset of employers[1] to offer health coverage which includes "preventive care and screenings" for women. 26 U.S.C. 5000A(f)(2); 26 U.S.C. 4980H(a), (c)(2); 42

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[1] The majority of employers—namely, those with fewer than 50 employees—are not required to provide health coverage. See 26 U.S.C. 4980H(c)(2) (exempting employers with fewer than 50 employees); Kaiser Family Found., *Employer Health Benefits 2018 Annual Survey* 45 (2018), https://bit.ly/2T4qwbQ. (noting that "most firms in the country are small" and only 56% of small firms offer health benefits). Approximately a fifth of large employers are exempt through the ACA's exception for "grandfathered health plans." See 42 U.S.C. 18011; 75 Fed. Reg. 34,538, 34,542 (June 17, 2010); Kaiser Family Found., *Employer Health Benefits 2018 Annual Survey* 209 (2018), https://bit.ly/2T4qwbQ.

U.S.C. 300gg-13(a)(4); 29 U.S.C. 1185d. Employers who fail to comply face fines that can quickly reach millions of dollars per year.[2]

The ACA does not define "preventive care," but leaves that determination to the Health Resources and Service Administration (HRSA), part of the Department of Health and Human Services (HHS). 42 U.S.C. 300gg-13(a)(4). HHS has defined the substance and scope of that requirement through multiple rulemakings and website postings. First, HHS issued an interim final rule (IFR) that clarified cost-sharing and sought recommendations on preventive care from the Institute of Medicine. 75 Fed. Reg. 41,726, 41,728 (July 19, 2010) (First IFR).

Second, HHS issued an IFR giving affected employers one year to comply with the preventive care mandate and mandating coverage of items contained in HRSA's guidelines. 76 Fed. Reg. 46,621 (Aug. 3, 2011) (Second IFR). HRSA's guidelines were not part of that IFR, but were contemporaneously published on an agency website. HRSA, *Women's Preventive Services Guidelines*, U.S. Dep't of Health & Human Servs. (Aug. 2011), https://www.hrsa.gov/womens-guidelines/index.html (2011 Preventive Services Guidelines). For certain employers, those guidelines required coverage for all FDA-approved female contraceptives. *Ibid.*

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[2] See 26 U.S.C. 4980D(a)-(b) (non-compliant plans must pay daily fines of $100 per employee); 26 U.S.C. 4980H(a), (c)(1) (failure to offer health plans incurs annual fines of $2000 per employee).

In the Second IFR and in the guidelines, HHS exempted a narrow subset of religious employers, determining that "it is appropriate to amend the interim final rules to provide HRSA the discretion to exempt from its guidelines group health plans maintained by certain religious employers where contraceptive services are concerned." 76 Fed. Reg. at 46,625.

B. The rules lead to litigation, prompting repeated action in this Court.

Several religious employers who did not qualify for the exemption filed lawsuits seeking protection under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb. See, *e.g.*, *Belmont Abbey Coll.* v. *Sebelius*, 878 F. Supp. 2d 25, 33 (D.D.C. 2012) (complaint filed November 2011); *Eternal Word Television Network, Inc.* v. *Sebelius*, 935 F. Supp. 2d 1196, 1207 (N.D. Ala. 2013) (complaint filed February 2012).

After lawsuits and thousands of public comments, in early 2012, HHS "finaliz[ed], without change," the Second IFR, 77 Fed. Reg. 8,725 (Feb. 15, 2012), then began a new rulemaking focused upon the religious exemption, 77 Fed. Reg. 16,501 (Mar. 21, 2012). While that rulemaking was ongoing, HHS delayed enforcement of the Second IFR against certain non-profit religious employers, announcing the change via a bulletin posted on an agency website. *Id.* at 16,502-16,503. As a result of the pending rulemaking, most lawsuits by religious non-profit employers were dismissed as unripe or delayed while the for-profit cases continued. See, *e.g.*, *Wheaton Coll.* v. *Sebelius*, 703 F.3d 551, 553 (D.C. Cir. 2012) (holding case "in abeyance pending the new rule that the government has promised").

HHS made no delays or exceptions for religious owners of for-profit businesses, several of whom had filed lawsuits against the Second IFR. The HHS bulletin thus had the effect of putting the for-profit mandate challenges one year ahead of the non-profit mandate challenges.

One of those challenges was brought by Hobby Lobby and its owners, the Green family. On Dec. 26, 2012, Justice Sotomayor declined to issue emergency relief to Hobby Lobby, which proceeded with an expedited appeal. See *Hobby Lobby Stores, Inc.* v. *Sebelius*, 568 U.S. 1401, 1404 (2012) (Sotomayor, J., in chambers) (denying injunction); *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1125 (10th Cir. 2013) (noting expedited consideration).

In July 2013, the agencies issued a final rule regarding religious employers. 78 Fed. Reg. 39,870 (July 2, 2013). The final rule created a three-tiered system: (1) a full exemption for churches and some religious orders, (2) an "accommodation" for certain religious non-profit employers, and (3) no exemptions for religious for-profit employers. See *id.* at 39,873-39,875.

With regard to (2), the so-called "accommodation," the agencies created an alternative compliance mechanism (the regulatory mechanism). A non-exempt religious employer was "considered to comply with" Section 4980D "if it provides to all third party administrators with which it or its plan has contracted a copy of its self-certification" form. Upon receiving the form, the administrator would then provide the contraceptives. 78 Fed. Reg. at 39,874, 39,879, 39,892-39,893. Because the regulatory mechanism did not address the concerns of many religious non-profit employers,

and the rule declined to make any changes for for-profit religious employers, the lawsuits continued.

This Court granted certiorari in two cases involving religious business owners. *Sebelius* v. *Hobby Lobby Stores, Inc.*, 571 U.S. 1067 (2013); *Conestoga Wood Specialties Corp.* v. *Sebelius*, 571 U.S. 1067 (2013). While those cases were pending, this Court granted emergency relief to the Little Sisters in their challenge to the regulatory mechanism without addressing the merits. *Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Sebelius*, 571 U.S. 1171 (2014) ("The Court issues this order based on all the circumstances of the case, and this order should not be construed as an expression of the Court's views on the merits.").

On June 30, 2014, this Court ruled in favor of Hobby Lobby and Conestoga, holding that RFRA protected them from direct compliance with the contraceptive mandate, but reserved the question of how to handle the regulatory mechanism. *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 731 (2014) ("We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims."). Four days later, the Court granted emergency relief to Wheaton College, which was challenging the regulatory mechanism, again without deciding the RFRA question. *Wheaton Coll.* v. *Burwell*, 573 U.S. 958 (2014) ("In light of the foregoing, this order should not be construed as an expression of the Court's views on the merits.").

II. Phase Two: from *Hobby Lobby* and *Wheaton College* until *Zubik* (July 2014-May 2016).

In response to these rulings, HHS issued a third IFR, which modified the regulatory mechanism "in light of the Supreme Court's interim order" in *Wheaton*. 79 Fed. Reg. 51,092 (Aug. 27, 2014) (Third IFR). The same day, responding to the Hobby Lobby decision, HHS also began a rulemaking to allow some closely-held businesses to use the same regulatory mechanism. *Id.* at 51,094.

In the Third IFR, the government did *not* extend a full exemption to objecting employers; the cases against the regulatory mechanism therefore continued. This Court granted emergency relief again. See *Zubik* v. *Burwell*, 135 S. Ct. 2924 (2015) ("This order should not be construed as an expression of the Court's views on the merits."). In November 2015, it granted certiorari and consolidated seven separate cases challenging the regulatory mechanism.

The eight-member Court heard argument in March 2016, and shortly thereafter took the unusual step of requiring additional briefing on the question of whether the regulatory mechanism could be modified. See *Zubik* v. *Burwell*, 194 L. Ed. 2d 599 (Mar. 29, 2016). In that briefing and before this Court, the agencies made several concessions relevant to this case.

First, the government admitted for the first time that contraceptive coverage, rather than being provided as a "separate" plan under the regulatory mechanism, must be "part of the same plan as the coverage provided by the employer," Br. for the Resp'ts at 38, *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (internal quotation marks and citation omitted),

https://bit.ly/2DiCj32; Tr. of Oral Arg. at 60-61, *Zubik*, 136 S. Ct. 1557 (2016) https://bit.ly/2VklhFx (Chief Justice Roberts: "You want the coverage for contraceptive services to be provided, I think as you * * * said, seamlessly. You want it to be in one insurance package. * * * Is that a fair understanding of the case?"; Solicitor General Verrilli: "I think it is one fair understanding of the case.").

Second, the agencies admitted to the Supreme Court that women who do not receive contraceptive coverage from their employer can "ordinarily" get it from "a family member's employer," "an Exchange," or "another government program." Br. for the Resp'ts at 65, *Zubik*, 136 S. Ct. 1557 (2016), https://bit.ly/2DiCj32.

Third, in its supplemental brief, the government acknowledged that the contraceptive mandate regulations "could be modified" to be more protective of religious liberty, Suppl. Br. for the Resp'ts at 14-15, *Zubik*, 136 S. Ct. 1557 (2016), https://bit.ly/2VjFsVb.

In light of the "the substantial clarification and refinement in the positions of the parties," this Court issued a per curiam order vacating the decisions of the Courts of Appeals of the Third, Fifth, Tenth, and D.C. Circuits. *Zubik*, 136 S. Ct. at 1561. The Court ordered the government not to impose taxes or penalties on the petitioners for failure to comply with the Third IFR and remanded the cases so that the parties could be "afforded an opportunity to arrive at an approach going forward" that would resolve the dispute. *Id.* at 1560. But the Court again emphasized that it was not deciding the RFRA question. *Ibid.* ("The Court expresses no view on the merits of the cases.").

III. Phase Three: from *Zubik* until the present (May 2016-March 2019).

A. The agencies respond to *Zubik* by creating exemptions via interim final rules.

After the *Zubik* order, the agencies put out a Request for Information on ways to modify the regulatory mechanism. 81 Fed. Reg. 47,741 (July 22, 2016). No rulemaking resulted from that RFI, and on January 9, 2017—eleven days before Inauguration Day—HHS published a statement on its webpage stating that it had determined it was infeasible to modify the regulatory mechanism after all. App.67a.

In May 2017, an executive order directed HHS to consider alternatives to the regulatory mechanism. Exec. Order No. 13,798, Promoting Free Speech and Religious Liberty, 82 Fed. Reg. 21,675 (May 9, 2017). In October 2017, HHS again modified the contraceptive mandate regulations by issuing the two interim final rules, the Fourth and Fifth IFRs. 82 Fed. Reg. 47,792 (Oct. 13, 2017) (Fourth IFR); 82 Fed. Reg. 47,838 (Oct. 13, 2017) (Fifth IFR).

The Fourth IFR, which is at issue here, made the regulatory mechanism optional and did what the Little Sisters had sought: expanding the religious exemption to include a broader swath of religious objectors, including the Little Sisters. See, *e.g.*, 45 C.F.R. 147.132 (Oct. 1, 2018). The Fourth and Fifth IFRs otherwise left the contraceptive mandate regulations in place as to all employers previously covered. *Ibid.* The

Fifth IFR provided a similar exemption to employers with moral, rather than strictly religious, objections.[3]

In the Fourth IFR, HHS explained that the IFR was prompted by this Court's order in *Zubik* and the need to resolve the ongoing litigation by religious objectors. 82 Fed. Reg. at 47,796-47,799. HHS also engaged in a lengthy analysis of its obligations under RFRA and concluded, based in part upon the concessions before this Court and the information gathered in the RFI process, that RFRA compelled the agency to broaden the religious exemptions to the contraceptive mandate regulations, for both non-profit and for-profit religious objectors. *Id.* at 47,799-47,806.

B. The interim final rules prompt more litigation, resulting in the resurrection of the pre-*Zubik* contraceptive mandate regulations.

The IFRs were announced on October 6, 2017. California filed this lawsuit the same day. Compl., *California* v. *Azar*, No. 4:17-cv-5783 (N.D. Cal. Oct. 6,

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[3] Many of the arguments presented here are relevant to both the religious exemption (the Fourth IFR) and the moral exemption (the Fifth IFR), but we address only the religious exemption here. Of all the cases challenging the regulatory mechanism, only two involved moral objectors, both pro-life, non-profit organizations. See *Real Alternatives, Inc.* v. *Secretary Dep't of Health & Human Servs.*, 867 F.3d 338 (3d Cir. 2017); *March for Life* v. *Burwell*, 128 F. Supp. 3d 116 (D.D.C. 2015). March for Life has intervened in this case and defends the Fifth IFR.

2017), ECF No. 1. A week later, the IFRs were published in the Federal Register. See 82 Fed. Reg. 47,792 (Oct. 13, 2017). Four other states joined California's lawsuit in an amended complaint. The States sought a nationwide preliminary injunction, alleging that the Fourth and Fifth IFR violate the APA, as well as the Constitution's Equal Protection Clause and Establishment Clause.[4] In December 2017, the district court issued a nationwide preliminary injunction prohibiting enforcement of the Fourth and Fifth IFRs and directing the agencies to operate under the prior version of the rules. App.126a-127a.

C. Multiple courts enjoin application of the regulatory mechanism to religious nonprofits.

The Fourth IFR was prompted in part to resolve the still-pending claims of religious employers who objected to the regulatory mechanism. See 82 Fed. Reg. at 47,798-47,800. With the IFRs enjoined, those objectors who had not yet reached an agreement with the

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[4] Pennsylvania also sought and obtained a nationwide preliminary injunction against the Fourth and Fifth IFRs. *Pennsylvania* v. *Trump*, No. 2:17-cv-4540 (E.D. Pa.) (preliminary injunction granted Dec. 15, 2017; preliminary injunction granted Jan. 14, 2019; on appeal, No. 17-3752 (3d Cir.)). In a third related case, the district court granted summary judgment for the defendants, finding that the state lacked Article III standing. *Massachusetts* v. *HHS*, No. 1:17-cv-11930 (D. Mass.) (summary judgment granted in favor of defendants, Mar. 12, 2018; on appeal, No. 18-2514 (1st Cir.)).

federal government were unable to rely on the new rules and so continued to litigate. Since the beginning of 2018, those cases have resulted in thirteen permanent injunctions against the prior versions of the contraceptive mandate regulations—the same versions which the district court reinstated below.[5] Since the Fourth IFR was issued, no court has denied a request for a permanent injunction against the Third IFR (though at least one court has delayed ruling on such a request). See Order at 2, *East Tex. Baptist Univ.* v.

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[5] See Order, *Association of Christian Sch.* v. *Azar*, No. 1:14-cv-02966 (D. Colo. Dec. 10, 2018), ECF No. 49; Order, *Ave Maria Sch. of Law* v. *Sebelius*, No. 2:13-cv-00795 (M.D. Fla. Jul. 11, 2018), ECF No. 68; Order, *Ave Maria Univ.* v. *Sebelius*, No. 2:13-cv-00630 (M.D. Fla. Jul. 11, 2018), ECF No. 72; Order, *Catholic Benefits Ass'n LCA* v. *Hargan*, No. 5:14-cv-00240 (W.D. Okla. Mar. 7, 2018), ECF No. 184; Order, *Colorado Christian Univ.* v. *Health & Human Servs.*, No. 1:13-cv-02105 (D. Colo. Jul. 11, 2018), ECF No. 84; Order, *Dordt Coll.* v. *Sebelius*, No. 5:13-cv-04100 (N.D. Iowa June 12, 2018), ECF No. 85; Permanent Injunction, *Geneva Coll.* v. *Sebelius*, No. 2:12-cv-00207 (W.D. Pa. Jul. 5, 2018), ECF No. 153; Permanent Injunction, *Grace Sch.* v. *Sebelius*, No. 3:12-cv-00459 (N.D. Ind. June 1, 2018), ECF No. 114; Order, *Little Sisters of the Poor* v. *Hargan*, No. 1:13-cv-02611 (D. Colo. May 29, 2018), ECF No. 82; Permanent Injunction, *Reaching Souls Int'l Inc.* v. *Azar*, No. 5:13-cv-01092 (W.D. Okla. Mar. 15, 2018), ECF No. 95; Permanent Injunction, *Sharpe Holdings, Inc.* v. *HHS*, No. 2:12-cv-00092 (E.D. Mo. Mar. 28, 2018), ECF No. 161; Order, *Southern Nazarene Univ.* v. *Hargan*, No. 5:13-cv-01015 (W.D. Okla. May 15, 2018), ECF No. 109; Permanent Injunction, *Wheaton Coll.* v. *Azar*, No. 1:13-cv-08910 (N.D. Ill. Feb. 22, 2018), ECF No. 119.

Azar, 988 F. Supp. 2d 743 (S.D. Tex. Jan. 15, 2019) (No. 12-cv-3009) ("To avoid creating confusion or conflicting obligations, the court will defer ruling on the plaintiffs' motion.").

These new injunctions against the regulatory mechanism join dozens of similar injunctions issued to for-profit business owners in the wake of *Hobby Lobby*, as well as additional permanent injunctions against the regulatory mechanism issued prior to 2017.[6] These injunctions continue to bind the agency defendants to this day.

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[6] See, *e.g.*, Amended Final Judgment, *Armstrong* v. *Sebelius*, No. 1:13-cv-00563 (D. Colo. Oct. 7, 2014), ECF No. 82; Order, *Brandt, Bishop of the Roman Catholic Diocese of Greensburg* v. *Sebelius*, No. 2:14-cv-00681 (W.D. Pa. Aug. 20, 2014), ECF No. 43; Order, *Conestoga Wood Specialties Corp.* v. *Sebelius*, No. 5:12-cv-06744 (E.D. Pa. Oct. 2, 2014), ECF No. 82; Order, *Gilardi* v. *Health & Human Servs.*, No. 1:13-cv-00104 (D.D.C. Oct. 20, 2014), ECF No. 49; Order, *Hobby Lobby Stores, Inc.* v. *Sebelius*, No. 5:12-cv-01000, 2014 WL 6603399 (W.D. Okla. Nov. 19, 2014) (ECF No. 98); Order of Injunction, *Korte* v. *Health & Human Servs.*, No. 3:12-cv-1072 (S.D. Ill. Nov. 7, 2014), ECF No. 89; Order, *March for Life* v. *Azar*, No. 1:14-cv-01149 (D.D.C. Aug. 31, 2015), ECF No. 31; Injunction, *Roman Catholic Archdiocese of N.Y.* v. *Sebelius*, No. 1:12-cv-02542 (E.D.N.Y. Dec. 16, 2013), ECF No. 117; Order, *Tyndale House Publishers, Inc.* v. *Sebelius*, No. 1:12-cv-01635 (D.D.C. Jul. 15, 2015), ECF No. 53; Order, *Zubik* v. *Sebelius*, No. 2:13-cv-01459 (W.D. Pa. Dec. 20, 2013), ECF No. 81. See also Becket Fund for Religious Liberty, *HHS Case Database*, https://bit.ly/2C8ZGcj (collecting cases).

D. The decision below and recent developments.

As noted above, in this case the district court entered a nationwide injunction preventing the implementation of the Fourth IFR. App.126a. The basis for that injunction was that the agencies lacked good cause to proceed by means of an IFR.

While that appeal was pending, the agencies completed the notice and comment process and issued final rules in November 2018. 83 Fed. Reg. 57,536 (Nov. 15, 2018) (Final Rule). The Final Rule, like the Fourth IFR, expanded the scope of the religious exemption and made use of the regulatory mechanism optional. It also made various alterations to the exemption and accommodation structure in response to comments received in the regulatory process. See *id.* at 57,537 (summarizing changes).

After the issuance of the Final Rule, but before it took effect, the Ninth Circuit ruled on the appeal. It held that the plaintiff States met the "[r]elaxed" requirements for standing to bring the procedural claim on appeal. App.21a. The Ninth Circuit upheld the injunction, holding that the IFRs likely violated the notice and comment provisions of the Administrative Procedure Act (APA). App.30a-37a. The Ninth Circuit limited the scope of the injunction to the plaintiff States. App.46a-51a.

Since that ruling, eight more states and the District of Columbia have joined the original five states in California's lawsuit and sought a second nationwide injunction against the Final Rule. The district court granted an injunction against the Final Rule which applies in these thirteen states and D.C. Four more

states then decided to intervene. The four proposed intervenor states are seeking to have that injunction amended to cover their jurisdictions, for a grand total of seventeen states and the District of Columbia seeking relief through this lawsuit. In the parallel litigation, the Eastern District of Pennsylvania granted a nationwide injunction. See note 4, *supra*. Both injunctions are currently on appeal. Part of the basis for the Pennsylvania injunction was the district court's earlier determination—and the Ninth Circuit's ruling—that the Fourth IFR was procedurally invalid. *Pennsylvania* v. *Trump*, 351 F. Supp. 3d 791, 814-816 (E.D. Pa. 2019).

REASONS FOR GRANTING THE PETITION

I. Whether RFRA requires the exemption of religious objectors from providing health plans that include contraceptive coverage is a question of national importance.

This case presents a question of profound and nationwide importance. There is no dispute that thousands of religious organizations throughout the country sincerely believe that complying with regulations requiring them to provide healthcare coverage that includes abortifacients and contraceptives via the regulatory mechanism violates their religious beliefs. Most of those religious organizations are currently protected by individual injunctions. For example, Petitioners are currently protected by the injunction issued in *Little Sisters of the Poor* v. *Hargan*, because that injunction extends to all entities that use the Christian Brothers church plan, which is how Petitioners arrange benefits for their employees. No. 1:13-

cv-02611 (D. Colo. May 29, 2018), ECF No. 82. But before the Fourth IFR, that protection was not enshrined in the regulations.

The Fourth IFR challenged in this lawsuit is the government's latest attempt to solve the longstanding problem of reconciling the contraceptive mandate regulations with its obligations under federal civil rights law. The agencies claim (and Petitioners agree) that they had good cause to proceed by interim-final rulemaking in order to obey this Court's directive in *Zubik* and comply with RFRA. The States claim the agencies lacked good cause because the RFRA concerns simply were not that pressing, and that RFRA-based exemptions were not permissible at all. The lower courts agreed with the States and enjoined the Fourth IFR, leaving the pre-*Zubik* contraceptive mandate regulations in place and allowing the litigation to continue. Without a clear directive from this Court that a religious exemption is required by RFRA, that litigation will continue indefinitely.

A. This Court's repeated orders on the central question in this case demonstrate that it has national importance.

The clearest evidence of the national importance of the central question in this case is this Court's own orders. Not only has this Court granted certiorari on this precise question and related matters, it has *three times* used its extraordinary authority under the All Writs Act to enjoin enforcement of the contraceptive mandate regulations against the Little Sisters and other religious objectors.

"Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. 1651(a) is not a matter of right,

but of discretion sparingly exercised." Sup. Ct. R. 20.1. (petition must show "exceptional circumstances"). The discretion is exercised "only in the most critical and exigent circumstances." *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers) (quoting *Fishman* v. *Schaffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers)). Injunctive relief particularly requires a "significantly higher justification" than a stay would require—including a showing of "indisputably clear" legal rights—since an injunction displaces "the status quo [in favor of] judicial intervention that has been withheld by lower courts." *Lux* v. *Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers) (citations omitted).

For that reason, requests for injunctions under the Court's extraordinary powers are nearly always denied. See *Turner Broad. Sys., Inc.* v. *Federal Communications Comm'n*, 507 U.S. 1301, 1301 (1993) (Rehnquist, C.J., in chambers) (noting applicants did not "cite any case in which such extraordinary relief has been granted, either by a single Justice or by the whole Court"). Here, the Court not only issued such injunctions in three separate cases, but issued two of those injunctions while appeal was pending in the *circuit* court. See *Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Sebelius*, 571 U.S. 1171 (2014); *Wheaton Coll.* v. *Burwell*, 573 U.S. 958 (2014). Such frequent and extraordinary intervention could only be required by—indeed, is only permitted in—issues of "critical" importance. *Fishman*, 429 U.S. at 1326 (quoting *Williams* v. *Rhodes*, 89 S. Ct. 1, 2 (1968) (Stewart, J., in chambers).

B. Sweeping injunctions against a federal rule present a question of national importance.

The injunction appealed here applies in five states. But that is not the only injunction that has been issued against the religious exemption set forth in the Fourth IFR and the Final Rule. The Eastern District of Pennsylvania has entered two nationwide injunctions against the religious exemption, one against the Fourth IFR, and a second against the Final Rule. *Pennsylvania* v. *Trump*, 281 F. Supp. 3d 553 (E.D. Pa. 2017); *Pennsylvania* v. *Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019). Both of those injunctions are currently on appeal to the Third Circuit. In this case, the district court has also entered an injunction against the Final Rule implementing the religious exemption, this time in thirteen states and the District of Columbia, and at least four more states have moved to intervene so that the preliminary injunction may extend to their territory as well.

Thus, the federal government is enjoined if it does, enjoined if it doesn't: it is subject to a patchwork of injunctions forbidding it to enforce the contraceptive mandate regulations against religious employers around the country, and it has multiple injunctions prohibiting it from implementing a regulatory fix—the religious exemption set out in the Fourth IFR and the Final Rule. At least one judge has delayed ruling on a permanent injunction for some of the *Zubik* petitioners as a result of the nationwide injunction against the Final Rule. Order at 2, *East Tex. Baptist Univ.*, 988 F. Supp. 2d 743 ("To avoid creating confusion or conflicting obligations, the court will defer ruling on the plaintiffs' motion"). These contradictory injunctions against

federal rules present a question of national importance that should be resolved now.

C. This Court has previously granted certiorari to resolve the RFRA question at the heart of this case.

In *Zubik* v. *Burwell*, this Court granted certiorari on "[w]hether the HHS Mandate and its 'accomodation' violate the Religious Freedom Restoration Act (RFRA) by forcing religious non-profits to act in violation of their sincerely held religious beliefs, when the Government has not proven that this compulsion is the least restrictive means of advancing any compelling interest." Pet. at i, *Zubik* v. *Burwell*, 136 S. Ct. 1557 (No. 14-1418); see Order of Nov. 6, 2015 (granting petition with respect to this question and similar questions from other petitions).

The Rules of this Court provide that, as relevant here, certiorari is only to be granted regarding an "important matter" dividing the federal courts or "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10; see *Triangle Improvement Council* v. *Ritchie*, 402 U.S. 497, 501 (1971) (Harlan, J., concurring) (dismissal of writ as improvidently granted was appropriate where subsequent events had "robbed the [issue] of all national significance"). The Court therefore previously recognized the national importance of this issue, which has resulted in extensive litigation here and in the lower courts, both before and after *Zubik*.

This Court might reasonably have hoped, following its decision in *Zubik*, that this issue could have been resolved amicably between the federal government and the religious objectors. Unfortunately, the entry

of the States as litigants ensures that no such resolution is possible. This Court must now decide the question it has already determined to be worthy of resolution.

D. Forcing religious objectors to provide a health plan that includes contraceptive coverage violates RFRA.

Once the Respondent agencies concluded that imposing the contraceptive mandate regulations on religious objectors violated RFRA, they were obligated to change course.

RFRA states that the federal government "shall not substantially burden a person's exercise of religion" unless the government proves that burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering" that interest. 42 U.S.C. 2000bb-1(a)-(b). After its concessions in *Zubik*, the government knew it was impossible for it to carry these burdens. See 82 Fed. Reg. at 47,800-47,806.

First, the contraceptive mandate regulations impose a substantial burden on religious exercise. They "force" religious organizations "to pay an enormous sum of money * * * if they insist on providing insurance coverage in accordance with their religious beliefs." *Hobby Lobby*, 573 U.S. at 726; 26 U.S.C. 4980D(b)(1); 26 U.S.C. 4980H(c)(1).

The States have argued that no substantial burden—and therefore no RFRA violation—exists, and therefore no rule change is warranted (or even permitted). In doing so, the States have adopted the reasoning of since-vacated courts of appeals decisions issued

prior to *Zubik* to suggest that the contraceptives provided under the regulatory mechanism are actually "separate" and "independent" from the religious organization's health plan. See, *e.g.*, *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 239, 251, 253 (D.C. Cir. 2014), ("Once Plaintiffs take advantage of the accommodation, they are dissociated from the provision of contraceptive services.") vacated and remanded sub nom. *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016); *East Tex. Baptist Univ.* v. *Burwell*, 793 F.3d 449, 459, 461 (5th Cir. 2015) ("the government is requiring the insurers and third-party administrators to offer it—separately from the plans—despite the plaintiffs' opposition") vacated and remanded sub nom. *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016).

But once the case reached this Court, the government conceded that regulatory mechanism required contraceptive coverage to be "part of the same plan as the coverage provided by the employer," Br. for the Resp'ts at 38, *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (quotations omitted); see p.10, *supra* ("one insurance package"). This admission eliminated the prior argument that the regulatory mechanism coverage was separate from the religious employer's health plan.

The government then made further concessions that fatally undermined its strict scrutiny affirmative defense. In justifying the extensive exemptions the agencies offered for secular reasons, they explained that women who do not receive contraceptive coverage from their employer can "ordinarily" get it from "a family member's employer," "an Exchange," or "another government program." Br. for the Resp'ts at 65, *Zubik* v. *Burwell*, 136 S. Ct. 1557. The agencies also

acknowledged that the contraceptive mandate regulations "could be modified" to avoid forcing religious organizations to carry the coverage themselves. Suppl. Br. for the Resp'ts at 14-15, *Zubik* v. *Burwell*, 136 S. Ct. 1557.

Following these concessions, the agencies could no longer defend their prior positions regarding the contraceptive mandate regulations. In the Fourth IFR, they accordingly stated that the pre-*Zubik* contraceptive mandate regulations "constituted a substantial burden on the religious exercise of many" religious organizations, and that it "did not serve a compelling interest and was not the least restrictive means of serving a compelling interest." 82 Fed. Reg. at 47,806. They admitted that the pre-Fourth IFR versions of the contraceptive mandate regulations "led to the violation of RFRA in many instances." *Ibid.*; see *id.* at 47,798-47,799 (describing injunctions and the stay of enforcement in *Zubik*).

In addition, the agencies specifically noted that they have many other ways to provide contraceptives to those who want them. For example, while noting this Court's admonition from *Hobby Lobby* that the "most straightforward" way for the government to promote contraceptive access is for the government to assume the cost itself, 82 Fed. Reg. at 47,797 (quoting *Hobby Lobby*, 573 U.S. at 728), the agencies explained that many federal programs exist to provide contraceptives to low-income women. 82 Fed. Reg. at 47,803 (noting, as examples "among others," Medicaid, Title X, community health center grants, and TANF). And Respondent HHS has recently clarified that women whose employers do not provide contraceptive services due to a "sincerely held religious or moral objection"

can be eligible for subsidized contraception, even if they might not otherwise qualify. 84 Fed. Reg. 7,714, 7,734 (Mar. 4, 2019) (clarifying "good cause" to qualify for "low-income family" status for purposes of contraceptive services). Having recognized the existence and feasibility of these more "straightforward" ways of providing access, the agencies could not claim that]the regulatory mechanism was the least restrictive means of doing so. The agencies had no choice but to concede RFRA defeat.

Nevertheless, the Ninth Circuit held that the agency lacked good cause to issue the Fourth IFR. The court recognized that "[a]ny delay in rectifying violations of statutory rights has the potential to do real harm," and the potential for real harm constitutes good cause for "waive[r]" of notice and comment. App. 34a (quoting *Buschmann* v. *Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982)). It also acknowledged that the question of "[w]hether the accommodation actually violates RFRA" has not been decided by this Court. *Ibid.* But it declined to decide the question, instead suggesting that the agencies had failed to provide a reasoned explanation of their change in position. *Ibid.* That claim is belied by a simple review of the Fourth IFR itself, which devotes over 8,300 words to explaining the agencies' careful analysis of the RFRA issues. See 82 Fed. Reg. at 47,799-47,806.[7]

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[7] The agencies' detailed RFRA analysis also tracks the RFRA analysis of dozens of federal courts, both before and since *Zubik*,

Because the Ninth Circuit did not credit this RFRA analysis, it allowed the former regulatory regime to be reinstated. The lower courts' decision to reinstate the pre-*Zubik* contraceptive mandate regulations thus raises the question that has always been at the heart of the contraceptive mandate litigation: whether RFRA requires the government to exempt religious objectors from providing contraceptive coverage. It is time for this Court to answer that question.

II. This case presents an appropriate vehicle for bringing the contraceptive mandate litigation to conclusion.

A. This case presents a clear, narrow question: does RFRA require the agencies to exempt religious objectors?

The central issue in this case is precisely the one this Court needs to answer to end the contraceptive mandate litigation: whether forcing religious objectors to comply with the pre-*Zubik* contraceptive mandate regulations violates RFRA. If so, then the agencies had good cause to change the rules—by means of the Fourth IFR—in order to comply with federal civil rights law. And this litigation can come to a close.

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see notes 5-6, *supra*. The Ninth Circuit's suggestion that the agencies needed to provide something more may have been driven by its fixation on Department of Labor blogpost from January 2017, 11 days before the change in presidential administration. App.35a. That blogpost, however, simply confirmed that the regulatory mechanism itself could not be modified to avoid the RFRA problem. See App.67a. It did nothing to eliminate or change the concessions made during the *Zubik* litigation or the other considerations explained at length in the IFR. See pp. 9-10, *supra*; 82 Fed. Reg. at 47,799-47,806.

As both lower courts acknowledged, good cause exists to forgo notice and comment where an agency would be unable to comply with its statutory duties, or where prompt action is necessary to avoid "real harm." App.32a; App.111a, 115a. The States agree. Answering Br. 34 (9th Cir. 2018) (ECF. No. 48, Dkt. 18-15255). If RFRA required the agencies to make a change to comply with their statutory obligations, then they had good cause. App.32a; cf. *Pennsylvania* v. *Trump*, 281 F. Supp. 3d at 578 ("It follows that any exception to the ACA required by RFRA is permissible."). And because all parties understood the RFRA question to be at the heart of the case, it has been thoroughly briefed.

Further percolation is unnecessary. An issue is fully percolated once it generates "diverse opinions" in the "state and federal appellate courts." *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting); see also *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984) (Court receives "the benefit" of percolation once "several courts of appeals" have "explore[d] [the] difficult question"). Here, this issue was adjudicated by ten courts of appeals and dozens of district courts. It was litigated fully at this Court in *Zubik*, and thoroughly briefed in several emergency applications. Dozens of *amici* have weighed in, and hundreds of thousands of commenters have provided their views to the agencies. The arguments were so thoroughly presented that lower court judges are for the most part just adopting RFRA analysis from earlier waves of litigation into their opinions. See App.124a-125a. The arguments have all been aired. Further delay in this Court's review will not yield meaningful percolation on the question of whether the federal government can

force nuns to participate in the distribution of contraception.

B. This Court has on several occasions reviewed challenges to interim regulations that expire or are replaced mid-litigation.

The fact that the Fourth IFR has been finalized makes this a less orthodox vehicle for resolving the RFRA conflict, but it is no impediment to this Court's review.

1. Both *Hobby Lobby* and *Zubik* considered appeals of preliminary injunction rulings, and in both cases, the regulations changed over the course of the litigation. See *Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Burwell*, 794 F.3d 1151, 1163-1164 (10th Cir. 2015), vacated and remanded sub nom. *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (noting that the regulations had changed since the district court's order); *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013), aff'd sub nom. *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (addressing pending proposed rules).[8] And in *Southern Pacific Terminal Co.* v. *ICC*, this Court reviewed an "expired" agency order, expressly holding that its power is not "defeated" by interim orders that are "capable of repetition, yet evading review." 219 U.S. 498, 514-516 (1911); see also *City of Mesquite* v. *Aladdin's*

[8] Alternatively, this Court should "clear[] the path for future relitigation of the issues between the parties" and "vacate the judgment below." *See United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *e.g.*, *Trump* v. *Hawaii*, 138 S. Ct. 377 (2017) (vacating under *Munsingwear* a judgment against an executive order after the order "expired by [its] own terms").

Castle, Inc., 455 U.S. 283, 289 (1982) (holding that a government's post-suit "repeal of the [challenged statute's] objectionable language" does not moot the case); cf. 13C C. Wright & A. Miller, Federal Practice & Procedure 3533.6 (3d ed.) (superseding rules do not moot an action so long as some "relief remains useful").

As in *Hobby Lobby* and *Zubik*, this suit raises a legal question that transcends any iteration of the regulatory scheme. The Little Sisters now face the *Fourth* IFR in a series of changes the agencies have made to their regulations under the ACA's "preventive care and screenings" provision. See 42 U.S.C. 300gg-13(a)(4); see also, *e.g.*, 75 Fed. Reg. 41,726, 41,728 (July 19, 2010) (First IFR); 76 Fed. Reg. 46,621 (Aug. 3, 2011) (Second IFR); 79 Fed. Reg. 51,092 (Aug. 27, 2014) (Third IFR). The scope to which RFRA constrains the contraceptive mandate regulations is a recurring issue that this Court should resolve.

2. The validity of the Fourth IFR remains front and center in the ongoing litigation over the finalized rule. Citing the Ninth Circuit's decision, the States argue that the Fourth IFR tainted notice and comment with respect to the Final Rule, rendering it, too, procedurally defective. See Mot. Prelim. Inj. 15-16 (N.D. Cal. 2019) (ECF No. 174, No. 17-05783). And the Pennsylvania district court held that the Fourth IFR "fatally infected" the Final Rule. *Pennsylvania* v. *Trump*, 351 F. Supp. at 812. Furthermore, because the Fourth IFR precedes the latest Final Rule, the Fourth IFR's validity remains dispositive because "[t]he effect of invalidating an agency rule is to reinstate the rule previously in force." App.125a. Accordingly, the validity of Fourth IFR—and the underlying RFRA justification for the Fourth IFR—"continues to affect" the Little

Sisters' "present interest." *Super Tire Eng'g Co.* v. *McCorkle*, 416 U.S. 115, 126 (1974) (deciding labor dispute after strike ended).

III. This case warrants immediate review.

From the beginning, the heart of the controversy over the contraceptive mandate regulations has been whether religious objectors can be forced to provide plans that include contraceptive coverage. That is the question that launched the litigation in 2011, see *Belmont Abbey*, 878 F. Supp. 2d at 29, and that repeatedly prompted this Court's emergency interventions and its grant of certiorari in *Zubik*. It is a question this Court should answer.

Allowing the controversy to linger helps no one. Over the course of many years this case has degenerated from a dispute about whether the federal government *may* force nuns to assist in the distribution of contraceptives to a dispute about whether the federal government *must* force nuns to assist in the distribution of contraceptives. Keeping the federal courts at the center of this culture war is bad for the country, bad for the courts, and bad for litigants.

Congress enacted RFRA precisely because it provided a "workable test" to help courts strike "sensible balances." 42 U.S.C. 2000bb(a)(5). Almost eight years into the contraceptive mandate litigation, that common sense is sorely needed so that the Little Sisters can serve in peace, and this litigation can be brought to an end.

CONCLUSION

This Court should grant the petition.

Respectfully submitted.

MARK L. RIENZI
Counsel of Record
ERIC C. RASSBACH
LORI H. WINDHAM
DIANA M. VERM
CHRIS PAGLIARELLA
CHASE T. HARRINGTON*
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1200 New Hampshire
Ave. NW, Suite 700
Washington, D.C. 20036
(202) 955-0095
mrienzi@becketlaw.org

Counsel for Petitioner

*Admitted only in Colorado;
supervised by D.C. bar members

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