No. 17-3679

United States Court of Appeals for the Third Circuit

COMMONWEALTH OF PENNSYLVANIA, ET AL.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Pennsylvania, No. 2:17-cv-4540 (Hon. Wendy Beetlestone)

Brief of Defendant-Intervenor-Appellant The Little Sisters of the Poor, Saints Peter and Paul Home

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Defendant-Intervenor-Appellant represents that it does not have any parent entities and does not issue stock.

/s/ Eric Rassbach
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INTRODUCTION

This case is about whether the federal government violated the law in giving a religious exemption to Little Sisters of the Poor and others like them. The Little Sisters have an obvious and direct interest in the resolution of that question—indeed, a far more direct and concrete interest than the Commonwealth of Pennsylvania. In a parallel case brought by the State of California, the district court permitted the Little Sisters to intervene. Order Granting Defendant-Intervenor's Motion to Intervene, *California v. HHS*, No. 17-cv-05783-HSG, (N.D. Ca. Dec. 29, 2017), Dkt. 115. The district court's contrary decision here—that the Little Sisters have no interest and can be left on the sidelines while their rights are decided by others—should be reversed.

This Court will not be painting on a blank canvas. This is actually the third round of litigation over the Affordable Care Act's contraceptive mandate. In the first round, the Supreme Court ruled that the mandate imposed a substantial burden on religious businesses and that the government had less restrictive ways of achieving its claimed interest. In the second round—which remains ongoing—the Little Sisters of the Poor and other religious groups challenged the so-called accommodation offered to them. They won a Supreme Court ruling that the government could not

impose fines on them and should instead arrive at an alternative approach. That alternative approach arrived in the form of two interim final rules (IFRs) issued in October. The Commonwealth of Pennsylvania then began this third round of litigation, seeking a ruling that the IFRs exceeded the bounds laid out by the Supreme Court in its earlier cases, otherwise violate the Constitution and federal law, and should be invalidated.

Although Pennsylvania does not even have its own contraceptive mandate (at all, for any employer), and although it has never raised any objection to much larger exemptions for grandfathered plans, small employers, and houses of worship that have existed for years, it filed this lawsuit claiming that the Constitution forbids the government from exempting the Little Sisters. And Pennsylvania attempted to gerrymander its filing, avoiding the still-ongoing litigation between the federal government and the religious objectors, not seeking to intervene in the Little Sisters' existing lawsuit, nor in any one of the dozens of other such lawsuits in Pennsylvania and around the country. Nor did Pennsylvania address itself to the United States Supreme Court, which has issued an injunction that remains in force and that controls the federal government's actions related to religious objectors on this very issue. Nor did Pennsylvania even acknowledge these cases as related cases.

The Little Sisters cannot stand idly by while Pennsylvania threatens their ministry by trying to snatch away the protections the Sisters have fought so long to keep. The Little Sisters have an obvious and direct interest in the question of whether it is legal for the federal government to exempt them from the contraceptive mandate. That interest is palpably threatened here, as Pennsylvania has asked for—and already received—a ruling that such religious exemptions are illegal. And the Little Sisters' interests cannot be adequately protected by the same federal government that has opposed those interests for years, that remains adverse to the Little Sisters in the prior litigation, and that is the very party the Supreme Court restrained in *Zubik* and that Congress restrained in RFRA. The Little Sisters should be allowed to intervene to defend themselves, and the district court's ruling denying intervention should be reversed.

JURISDICTIONAL STATEMENT

The district court exercised jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction over this timely appeal under 28 U.S.C. § 1291. *See* App. 4 (final order denying motion to intervene dated December 8, 2017); App. 1 (notice of appeal dated December 8, 2017).

STATEMENT OF THE ISSUES

The Little Sisters' appeal presents three main issues:

A "Significantly Protectable" Interest. Under Rule 24, to intervene as of right one must have a specific, definable, direct interest that will be concretely affected. If Pennsylvania prevails, the Little Sisters will lose a religious exemption granted by the federal government, an exemption prompted by a Supreme Court order in the Little Sisters' ongoing case. Was the district court correct to decide the Little Sisters lack a "significantly protectable" interest? Dkt. 19-1 at 12-14 (raised); Dkt. 38 at 5-8 (objected to); App. 8-10 (ruled upon).

Inadequate Representation. Under Rule 24's right to intervene, a party must show that its interest "may be" inadequately represented by others. Here, the federal government is still adverse to the Little Sisters in a related lawsuit, where it is the enjoined party. The government has also conceded it has broader interests, which may be in tension with the Little Sisters' interests here. Was the district court correct to decide that the federal government adequately represents the Little Sisters' interests? Dkt. 19-1 at 15-18 (raised); Dkt. 38 at 8-10 (objected to); App. 10-13 (ruled upon).

Permissive Intervention. Under Rule 24, when deciding whether to grant permissive intervention, a court may consider whether such would

unduly delay or prejudice the original parties. Despite finding the Little Sisters' motion was timely, and proceeding in an expeditious manner in this case, the district court claimed intervention could result in delay in prejudice. Did the District Court abuse its discretion in denying permissive intervention? Dkt. 19-1 at 18-19 (raised); Dkt. 38 at 10-12 (objected to); App. 13 (ruled upon).

STATEMENT OF RELATED CASES

This case has not been before this court previously. The Little Sisters' related appeal of the preliminary injunction, No. 17-3752, has been stayed pending the outcome of the decision here.

Further, all of the actions listed below are related to this action. In particular, the actions all include claims or defenses that overlap with the Commonwealth's claims here, and are either pending or have ongoing permanent injunctions. These cases either challenge the same Interim Final Rules, or seek to protect the rights of claimants similarly situated to the Little Sisters of the Poor, and whose rights would be impaired if the Court orders the federal government to enforce the contraceptive mandate against them. 82 Fed. Reg. 47,792, 47,795-96 (Oct. 13, 2017).

1. *American Civil Liberties Union et al. v. Wright et al.*, No. 4:17-cv-05772 (N.D. Cal.).

2. *American Pulverizer Co. et al. v. United States Department of Health and Human Services et al.*, No. 6:12-cv-03459 (W.D. Mo.).

3. *Annex Medical, Inc. et al. v. Solis et al.,* No. 0:12-cv-02804 (D. Minn.).

4. *Armstrong et al. v. Sebelius et al.,* No. 1:13-cv-00563 (D. Colo.).

5. *Association of Christian, et al. v. Price, et al.,* No. 14-1492 (10th Cir.).

6. *Autocam Corporation et al. v. Sebelius et al.,* No. 1:12-cv-01096 (W.D. Mich.).

7. *Ave Maria School of Law v. Sebelius et al.,* No. 2:13-cv-00795 (M.D. Fla.).

8. *Ave Maria University v. Sebelius et al.,* No. 2:13-cv-00630 (M.D. Fla.).

9. *Barron Industries, Inc. et al. v. Sebelius et al.,* No. 1:13-cv-01330 (D.D.C.).

10. *Bick Holdings Inc. et al. v. United States Department of Health & Human Services et al.,* No. 4:13-cv-00462 (E.D. Mo.).

11. *Bindon et al. v. Sebelius et al.,* No. 1:13-cv-01207 (D.D.C.).

12. *Brandt, Bishop of the Roman Catholic Diocese of Greensburg et al. v. Sebelius et al.,* No. 2:14-cv-00681 (W.D. Pa.).

13. *Briscoe et al. v. Sebelius et al.,* No. 1:13-cv-00285 (D. Colo.).

14. *C.W. Zumbiel Co., et al. v. United States Department of Health and Human Services et al.*, No. 1:13-cv-01611 (D.D.C.).

15. *Campbell v. Trump et al.*, No. 1:17-cv-02455 (D. Colo.).

16. *Catholic Benefits Association LCA et al. v. Sebelius et al.,* No. 5:2014-cv-00240 (W.D. Okla.).

17. *Catholic Charities Archdiocese, et al. v. Secretary United States Depart, et al.*, No. 14-3126 (3rd Cir.).

18. *Catholic Diocese of Beaumont et al. v. Sebelius et al.*, No. 1:13-cv-00709 (E.D. Tex.).

19. *Colorado Christian University v. United States Department of Health and Human Services et al.,* No. 1:13-cv-02105 (D. Colo.).

20. *Commonwealth of Massachusetts v. U.S. Dept. of Health & Human Services et al.*, No. 1:17-cv-11930 (D. Mass.).

21. *Conestoga Wood Specialities Corp. et al. v. Sebelius et al.*, No. 5:12-cv-06744 (E.D. Pa.).

22. *Cyril Korte, et al. v. HHS, et al.,* No. 12-3841 (7th Cir.).

23. *Daniel Medford et al. Kathleen Sebelius et al.,* No. 0:13-cv-01726 (D. Minn.).

24. *Doboszenski & Sons, Inc. et al. v. Sebelius et al.,* No. 0:13-cv-03148 (D. Minn.).

25. *Dobson et al. v. Sebelius et al.*, No. 1:13-cv-03326 (D. Colo.).

26. *Domino's Farms Corporation et al. v. Sebelius et al.,* No. 2:12-cv-15488 (E.D. Mich.).

27. *Dordt College et al. v. Sebelius et al.,* No. 5:13-cv-04100 (N.D. Iowa).

28. *East Texas Baptist University et al. v. Sebelius et al.,* No. 4:12-cv-03009 (S.D. Tex.).

29. *Eden Foods, Inc. et al. v. Sebelius et al.,* No. 2:13-cv-11229 (E.D. Mich.).

30. *Eternal Word Television Network v. U.S. Department of Health and, et al.,* No. 14-12696 (11th Cir.).

31. *Feltl and Company, Inc. et al. v. Sebelius et al.,* No. 0:13-cv-02635 (D. Minn.).

32. *Geneva College v. Sebelius et al.,* No. 2:12-cv-00207 (W.D. Pa.).

33. *Gilardi et al. v. U.S. Department of Health and Human Services,* No. 1:13-cv-00104 (D.D.C.).

34. *Grace Schools et al. v. Sebelius et al.*, No. 3:12-cv-00459 (N.D. Ind.).

35. *Grote Industries, LLC et al. v. Sebelius et al.,* No. 4:12-cv-00134 (S.D. Ind.).

36. *Hall et al. v. Sebelius et al.,* No. 0:13-cv-00295 (D. Minn.).

37. *Hartenbower et al. v. United States Department of Health and Human Services et al.,* No. 1:13-cv-02253 (N.D. Ill.).

38. *Hastings Chrysler Center, Inc. et al. v. Sebelius et al.*, No. 0:14-cv-00265 (D. Minn.).

39. *Hobby Lobby Stores Inc et al. v. Sebelius et al.*, No. 5:12-cv-01000 (W.D. Okla.).

40. *Holland et al. v. United States Department of Health and Human Services et al.,* No. 2:13-cv-15487 (S.D. W. Va.).

41. *Johnson Welded Products, Inc et al. v. Sebelius et al.,* No. 1:13-cv-00609 (D.D.C.).

42. *Lindsay, et al. v. United States Department of Health and Human Services et al.,* No. 1:13-cv-01210 (N.D. Ill.).

43. *Little Sisters of the Poor, et al. v. Hargan, et al.,* No. 13-1540 (10th Cir.).

44. *Louisiana College v. Eric Hargan, et al.,* No. 14-31167 (5th Cir.).

45. *M&N Plastics, Inc. et al. v. Sebelius et al.,* No. 5:13-cv-14754 (E.D. Mich.).

46. *March for Life et al. v. Price et al.,* No. 1:2014-cv-01149 (D.D.C.).

47. *Medical Students for Choice et al. v. Wright et al.*, No. 1:17-cv-02096 (D.D.C.).

48. *Mersino Dewatering Inc., et al. v. Sebelius et al.,* No. 2:13-cv-15079 (E.D. Mich.).

49. *Mersino Management Company et al. v. Sebelius et al.*, No. 2:13-cv-11296 (E.D. Mich.).

50. *Midwest Fastener Corp. et al. v. Sebelius et al.*, No. 1:13-cv-01337 (D.D.C.).

51. *MK Chambers Company et al. v. Department of Health and Human Services et al.*, No. 2:13-cv-11379 (E.D. Mich.).

52. *Newland et al. v. Sebelius et al.*, No. 1:12-cv-01123 (D. Colo.).

53. *O'Brien et al. v. U.S. Department of Health and Human Services et al.*, No. 4:12-cv-00476 (E.D. Mo.).

54. *Priests For Life et al. v. United States Department of Health And Human Services et al.*, No. 1:13-cv-01261 (D.D.C.).

55. *Randy Reed Automotive, Inc. et al. v. Sebelius et al.,* No. 5:13-cv-06117 (W.D. Mo.).

56. *Reaching Souls International Inc. et al. v. Sebelius et al.*, No. 5:13-cv-01092 (W.D. Okla.).

57. *Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338 (3d Cir. 2017).

58. *Roman Catholic Archdiocese of New York et al. v. Sebelius et al.*, No. 1:12-cv-02542 (E. D.N.Y.).

59. *Sharpe Holdings, Inc. et al. v. United States Department of Health and Human Services et al.*, No. 2:12-cv-00092 (E. D. Mo.).

60. *Shiraef et al. v. Hargan et al.*, No. 3:17-cv-00817 (N.D. Ind.).

61. *Sioux Chief MFG. Co, Inc. et al. v. Sebelius et al.,* No. 4:13-cv-00036 (W.D. Mo.).

62. *SMA, LLC et al. v. Sebelius et al.,* No. 0:13-cv-01375 (D. Minn.).

63. *Southern Nazarene University et al. v. Hargan et al.*, No. 5:13-cv-01015 (W.D. Okla.).

64. *State of California v. Hargan et al.*, No. 4:17-cv-05783 (N.D. Cal.).

65. *State of Washington v. Trump et al.*, No. 2:17-cv-01510 (W.D. Wash.).

66. *Stewart et al. v. Sebelius et al.,* No. 1:13-cv-01879 (D.D.C.).

67. *Stinson Electric, Inc. et al. v. Sebelius et al.,* No. 0:14-cv-00830 (D. Minn.).

68. *The Ave Maria Foundation et al. v. Sebelius et al.*, No. 2:13-cv-15198 (E.D. Mich.).

69. *The School of the Ozarks, Inc. v. United States Dept. of Health, et al.,* No. 15-1330 (8th Cir.).

70. *Tonn and Blank Construction LLC v. Sebelius et al.,* No. 1:12-cv-00325 (N.D. Ind.).

71. *Triune Health Group, Inc. et al. v. United States Department of Health & Human Services et al.,* No. 1:12-cv-06756 (N.D. Ill.).

72. *Tyndale House Publishers, Inc. et al. v. Sebelius et al.,* No. 1:12-cv-01635 (D.D.C.).

73. *Weingartz Supply Company et al. v. Sebelius et al.,* No. 2:12-cv-12061 (E.D. Mich.).

74. *Wheaton College v. Burwell et al.,* No. 1:13-cv-08910 (N.D. Ill.).

75. *Wieland et al. v. United States Department of Health and Human Services et al.*, No. 4:13-cv-01577 (E.D. Mo.).

76. *Williams et al. v. Sebelius et al.,* No. 1:13-cv-01699 (D.D.C.).

77. *Willis and Willis PLC et al. v. Sebelius et al.*, No. 1:13-cv-01124 (D.D.C.).

78. *Zubik et al. v. Sebelius et al.,* No. 2:13-cv-01459 (W.D. Pa.).

STATEMENT OF THE CASE

A. Proposed Intervenors

The Little Sisters of the Poor Saints Peter and Paul Home in Pittsburgh, Pennsylvania, is a religious nonprofit corporation operated by an order of Catholic nuns whose faith inspires them to spend their lives serving the sick and elderly poor. Dkt. 19-2 ¶¶ 4, 12, 16-17. Each Little Sister takes a vow of obedience to God and of hospitality "to care for the aged as if [he or she] were Christ himself." *Id.* at ¶¶ 16, 36. The Little Sisters treat each "individual with the dignity they are due as a person loved and created by God," and they strive to "convey a public witness of respect for life, in the hope that [they] can build a Culture of Life in our society." *Id.* at ¶ 19. Based on Catholic doctrine, the Little Sisters oppose contraception, sterilization, and abortion, and they believe that it is religiously wrong for them to facilitate the provision of those services to their employees in connection with their health insurance plans. *Id.* at ¶ 37. As described in more detail below, the Little Sisters are involved in litigation

before another court regarding the provision of contraception, sterilization, and abortion in their health care plans, and have been litigating that issue since 2013.

B. The Preventive Services Mandate and Subsequent Litigation

This case is part of a third round of litigation over the legality of requiring employers with religious objections to provide health insurance coverage for contraception, sterilization, and abortion-inducing drugs and devices.

Under the Patient Protection and Affordable Care Act, certain employers with at least 50 full-time employees must offer "a group health plan or group health insurance coverage" that includes, among other things, coverage for "preventive care and screenings" for women. 26 U.S.C. § 5000A(f)(2); 42 U.S.C. § 300gg-13(a)(4); 29 U.S.C. § 1185d. Congress did not specify what "preventive care and screenings" means. Instead, Congress delegated that task to the Department of Health and Human Services ("HHS"). *Id.* HHS asked the Institute of Medicine for recommendations, and IOM recommended, among other things, "the full range of Food and Drug Administration-approved contraceptive methods, sterilization

procedures, and patient education and counseling for women with reproductive capacity."[1] The 20 FDA-approved contraceptive methods include both drugs and devices that operate to prevent fertilization of an egg, and four drugs and devices—two types of intrauterine devices and the drugs commonly known as Plan B and *ella*—that can prevent implantation of a fertilized egg. Food and Drug Administration, Birth Control Guide, http://bit.ly/2prP9QN. A few days after the recommendations were published, HHS adopted them entirely, in an interim final rule. 76 Fed. Reg. 46,621 (Aug. 3, 2011); 77 Fed. Reg. 8725 (Feb. 15, 2012); 45 C.F.R. § 147.130(a)(1)(iv).

The preventive services mandate has never applied to all employers in any of its several iterations; grandfathered plans are exempt from providing any women's preventive services. *See* 26 U.S.C. § 4980H(c)(2); 42

[1] Committee on Preventive Services for Women, Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gap* 109-10 (2011), https://www.nap.edu/read/13181/chapter/1

U.S.C. § 18011; 75 Fed. Reg. 34,538, 34,542 (June 17, 2010). So are certain government-sponsored plans.[2] And employers with fewer than 50 employees need not provide health coverage at all. 26 U.S.C. § 4980H(c)(2)(A). From its first iteration, the Mandate also exempted a narrow selection of religious organizations. Prior to the IFRs at issue here, it exempted "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order," 26 U.S.C. § 6033(a)(3)(A)(i), (iii). *See also* 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). Other religious employers outside this narrow religious exemption, such as the Little Sisters, still

[2] Congress has attempted, but failed, to pass a law requiring TriCare to cover all FDA-approved contraceptives without cost-sharing. *See* Access to Contraception for Women Servicemembers and Dependents Act of 2015, H.R.742, 114th Congress (2015), https://www.congress.gov/bill/114th-congress/house-bill/742/text. Also, even though hundreds of thousands of women of reproductive age are on Medicare due to disability, "There is no explicit statutory requirement for Medicare to cover contraceptive services or supplies for its enrollees." Congressional Research Services, *Federal Support for Reproductive Health Services: Frequently Asked Questions* 13 (2016).

had to comply with the mandate. *Id.* Pennsylvania did not file any lawsuit challenging this religious exemption, and claims not to challenge it now.[3]

That rule was challenged by a number of religious organizations and closely-held businesses with religious objections to providing some or all contraceptives. In response to those lawsuits, HHS initiated a new rule-making procedure to address concerns by religious groups. *See Wheaton Coll. v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012). HHS did not propose to address concerns from business owners, who continued to seek an exemption in court. After a split between this Circuit and the Tenth Circuit, the Supreme Court took up two cases from business owners challenging the mandate. *See Conestoga Wood Specialties Corp. v. Sec'y U.S. Dep't Health & Human Servs.,* 724 F.3d 377 (3d Cir. 2013), and *Hobby Lobby v. Sebelius,* 723 F.3d 1114 (10th Cir. 2013). The Court reversed this Court's decision and upheld the Tenth Circuit's decision, ruling that the mandate

[3] Nor did Pennsylvania, at any point, file a lawsuit challenging the far larger grandfathering exemption. Nearly a quarter of employers still use grandfathered plans. Kaiser Family Found., *Employer Health Benefits 2017 Annual Survey* 204 (2017), https://www.kff.org/health-costs/report/2017-employer-health-benefits-survey/ (23% of employers offered grandfathered plans in 2017).

imposed a substantial burden and that closely-held businesses were entitled to a religious exemption from the mandate. *Burwell v. Hobby Lobby,* 134 S. Ct. 2751 (2014).

While *Conestoga* and *Hobby Lobby* cases were proceeding, HHS completed its rulemaking. The outcome of the rulemaking was an alternative compliance mechanism, which HHS referred to as an "accommodation," for religious organizations that did not qualify for the church exemption. *See* 78 Fed. Reg. at 39,896. Under that approach, religious entities like the Little Sisters were required to comply with the mandate by signing a required notice to its insurer, third-party administrator (TPA) or the government. If a religious objector complies in this manner, the government would take steps to use their health plan to distribute contraceptives, including use its "insurance coverage network," its "coverage administration infrastructure," its information to "verify . . . identit[ies]," and its systems to "provide formatted claims data." 80 Fed. Reg. 41,318, 41,328-

29 (July 14, 2015). In such circumstances, the religious objector would be "considered to comply" with the mandate. 78 Fed. Reg. at 39,879.[4]

Unsurprisingly, nonexempt religious employers who hold sincere religious objections to facilitating access to contraception found little solace in this so-called "accommodation" of their religious beliefs. After all, these organizations do not merely object to directing or paying for the inclusion of contraceptive coverage in their plans; they object to being forced to facilitate the provision of contraceptive coverage through their own plan infrastructure as well. Dkt. 19-2 ¶ 37. Being forced to comply with the contraceptive mandate via a scheme that requires them to effectively authorize others to take over their health plans to provide coverage is thus no more compatible with their religious beliefs than being forced to comply by writing the coverage into their plans themselves. *Id.* Numerous nonprofit religious employers brought lawsuits challenging application of the contraceptive mandate to them as, among other things, a violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb ("RFRA"). *See*

[4] This alternative compliance mechanism was later extended to closely-held for-profit companies in the wake of the Supreme Court's decision in *Hobby Lobby*, 134 S. Ct. 2751. *See* 80 Fed. Reg. at 41,343-44.

Pet'rs' Br. at iii-iv, *Little Sisters of the Poor Home for the Aged, et al. v. Burwell*, 794 F.3d 1151 (10th Cir. 2015) (No. 13-1540).

C. Intervenor's Lawsuit, Supreme Court Orders, and the Interim Final Rule

One of those lawsuits is a class action on behalf of hundreds of Catholic employers who provide health benefits to their employees through the Christian Brothers church plan, including the Little Sisters. Facing the prospect of large penalties starting on January 1, 2014, the plaintiffs filed suit in 2013 and sought a preliminary injunction shielding them from the Mandate under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb. *See* Dkts. 1 & 15, *Little Sisters of the Poor v. Sebelius*, 6 F.Supp.3d 1225 (D. Colo. 2013) (No. 13-cv-2611). The district court denied the motion on December 27, 2013, just five days before the start of the penalties. *Id.* at Dkt. 52. The Little Sisters filed an emergency appeal to the Tenth Circuit and moved for an injunction pending appeal. *Id.* at Dkt. 53 & Dkt. 54, *see also* Emergency Motion for Injunction Pending Appeal, *Little Sisters of the Poor v. Burwell*, No. 13-1540 (10th Cir. Dec. 28, 2013). The Tenth Circuit denied the motion on December 31, hours before the fines were set to begin. *See* Order, *Little Sisters of the Poor v. Burwell*, No. 13-1540 (10th Cir. Dec. 31, 2013).

That evening, the Little Sisters filed an emergency application for an injunction under the All Writs Act with the Supreme Court. Shortly before midnight, Justice Sotomayor granted a temporary injunction pending the receipt of a response brief from the defendants. Order, *Little Sisters of the Poor v. Sebelius*, No. 13A691 (Sup. Ct. Dec. 31, 2013). After receiving further briefing, on January 24, 2014, the Supreme Court granted a rare injunction pending appeal, without any noted dissent. *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014). The Court's order provided that:

> If the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of the appeal. . . . To meet the condition for injunction pending appeal, applicants need not use the form prescribed by the Government and need not send copies to third-party administrators.

Id.

The Tenth Circuit subsequently heard the Little Sisters' appeal and upheld the denial of their injunction. *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151 (10th Cir. 2015). The

Little Sisters immediately petitioned for certiorari, which the Supreme Court granted, consolidating their case with several others. *See Zubik v. Burwell,* 136 S. Ct. 1557 (2016).

A unanimous Supreme Court directed the government to reconsider its regulation and "arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage." *Id.* at 1560 (citation and internal quote omitted). The Supreme Court ordered that "the Government may not impose taxes or penalties on petitioners for failure to provide the relevant notice." *Id.* at 1561. That order is still in place.

The Little Sisters' case was remanded to the Tenth Circuit, where litigation was stayed, and has remained so while the government reconsiders the exemptions to the HHS Mandate. *See*, *e.g.*, Order, *Little Sisters of the Poor v. Hargan*, No. 13-1540 (10th Cir. June 27, 2016) (ordering parties to file periodic status reports).

On May 4, 2017, President Trump signed an Executive Order related to religious liberty. Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017). The Executive Order instructed HHS to "consider issuing

amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate promulgated under section 300gg-13(a)(4) of title 42, United States Code." *Id*.

On October 6, HHS complied with that executive order and the *Zubik* injunction by issuing the Interim Final Rule ("IFR") at issue in this lawsuit. 82 Fed. Reg. 47,792, 47,795-96 (Oct. 13, 2017).[5] The IFR protects those with religious objections, and expressly refers to the Little Sisters' lawsuit and the Supreme Court decision in their case as the impetus for the regulatory change: "Consistent with the President's Executive Order and the Government's desire to resolve the pending litigation and prevent future litigation from similar plaintiffs, the Departments have concluded that it is appropriate to reexamine the exemption and accommodation scheme currently in place for the Mandate." 82 Fed. Reg. at 47,799; *see also id.* at 47,798 (describing Little Sisters' lawsuit and *Zubik*

[5] The government issued two separate rules, one pertaining to moral objectors and one to religious objectors. Pennsylvania challenges both. The Little Sisters' interest is in the religious objection rule, so singular references to "the rule" or "the IFR" are meant to refer to the religious objector rule.

decision). HHS stated that "Good cause exists to issue the expanded exemption in these interim final rules in order to cure such violations (whether among litigants or among similarly situated parties that have not litigated), to help settle or resolve cases, and to ensure, moving forward, that our regulations are consistent with any approach we have taken in resolving certain litigation matters." 82 Fed. Reg. at 47,814.

After the IFR was issued, the Little Sisters and the government continued negotiations to resolve the case, but have not yet reached an agreement.

D. This Lawsuit

Just 5 days after the IFR was issued, Pennsylvania filed this lawsuit, seeking an injunction against the religious exemption granted by the new rule and the re-imposition of penalties on the Little Sisters and other religious objectors. App. 45-77 (Complaint); *see also* Dkt. 8-2 at 41-42 (preliminary injunction memorandum discussing mandate plaintiffs in Pennsylvania). Although it had failed to intervene in the prior four years of litigation—in which virtually every religious objector had received at least a preliminary injunction protecting them from having to provide contraceptive coverage—Pennsylvania said it would suffer irreparable

and imminent harm from the IFRs and moved for a preliminary injunction. Dkt. 8-2.

Pennsylvania has not identified even a single actual employer who had been covering contraception and was expected to stop on January 1; nor has Pennsylvania identified a single actual person who has had such coverage and expected to lose it on January 1. *See* Dkt. 8-2 at 13 & n.9 (identifying only one employer, which later changed course). Nevertheless, Pennsylvania sought a preliminary injunction based on claims that the IFR violates the Administrative Procedures Act and that the religious exemptions contained in the IFR violate the Establishment and Equal Protection Clauses of the Constitution. Dkt. 8-2. Pennsylvania seeks a declaratory judgment that the religious exemptions in the IFR are unlawful, and a nationwide injunction against enforcement of the IFR. App. 71-77. A key part of Pennsylvania's argument is that the IFR is not permitted by RFRA, fails to comport with *Zubik v. Burwell*, and that a full exemption for religious objectors like the Little Sisters violates the Constitution. *See* Dkt. 8-2 at 24-27

If Pennsylvania is successful, the Little Sisters will lose the exemption granted by the IFR and risk being forced to choose between violating

their sincerely held religious beliefs or paying almost $2.5 million in annual fines. Dkt. 19-2 ¶ 43.

E. The District Court Decision

The Little Sisters moved to intervene in this case on November 21, 2017. App. 78-79. That same day, the Little Sisters' Jeanne Jugan Residence in San Pedro, California also moved to intervene in a parallel case filed by the State of California, where the plaintiffs were also seeking a preliminary injunction. *See* Dkt. 38, *California v. HHS*, No. 17-cv-05783-HSG (N.D. Cal. filed Nov. 21, 2017). The Little Sisters sought expedited consideration of their motion so that they could participate in the evidentiary hearing on preliminary injunction scheduled for December 14-15. App. 78-79. Two weeks later, on December 6, Pennsylvania filed its opposition to the intervention. Dkt. 38. On December 7, the Little Sisters filed their reply. Dkt. 40. On the morning of December 8, the district court issued a nine-page opinion denying the Little Sisters intervention. App. 4 (order); App. 5-13 (opinion). The Little Sisters filed a notice of appeal that same day. App. 1.

The District Court held that the Little Sisters could neither intervene as of right or permission under Rule 24. As to intervention as of right,

while finding the Little Sisters had timely sought to intervene, the court determined they failed two of the four elements of the inquiry: having a sufficient interest in the litigation (the court said the Sisters assert "no more than a preferred outcome") and not being adequately represented by the other defendants (the court found that the same federal government that is restricted by RFRA and bound by *Zubik* can faithfully guard the Sisters' rights under both). App. 10.

As to permissive intervention, despite the timeliness of the Little Sister's attempted intervention, the court concluded that intervention would cause delay and prejudice the parties "in securing an efficient resolution," and that the Little Sisters' participation in the case "'would be superfluous' and needlessly complicate the proceedings." App. 13.

The district court subsequently held a one-day preliminary injunction hearing on December 14, taking evidence from several witnesses. *See* Dkt. 58. Just after 2 p.m. the following day, the court issued a 44-page preliminary injunction decision prohibiting enforcement of the IFR. The grounds for that injunction were (1) HHS did not have adequate justification for issuing an interim final rule without prior notice and comment, and (2) the IFR's exemption could not be justified by RFRA. App. 165-

208. In particular, the district court held that the accommodation imposes no substantial burden on religious exercise and that a true exemption for religious organizations is not justified by RFRA, not mandated by *Zubik*, and impermissible under the Affordable Care Act. App. 194-200. On December 18, this Court expedited this appeal.

On December 29, the Northern District of California granted the motion to intervene by the Little Sisters' Jeanne Jugan Residence. Order Granting Intervention, *California v. HHS*.

ARGUMENT

The Little Sisters of the Poor easily satisfy the criteria for intervention as of right. As the Commonwealth concedes, the motion to intervene was timely. The Little Sisters have a significant protectable interest at stake in this litigation, since the litigation seeks to revisit their prior Supreme Court order and remove a religious exemption they have been granted under federal law. Their interest may be impaired by this litigation, since the Commonwealth seeks a ruling that exempting the Little Sisters is unlawful. The existing Defendants cannot adequately represent the Little Sisters' interests, since they are the party restricted by RFRA and

enjoined by *Zubik*, and their broad and varied interests depart from the Little Sisters' specific and narrow one.

Even if the Little Sisters did not satisfy the criteria for intervention as of right, they should still be granted permissive intervention, since they undoubtedly have a "a claim or defense that shares with the main action a common question of law or fact." Fed R. Civ. P. 24(b). The district court abused its discretion in finding that intervention would cause delay or prejudice.

I. The district court erred by refusing to grant the Little Sisters intervention as of right.

Standard of Review. This Court reviews district court denials of intervention under an abuse of discretion standard, but that standard of review "is more stringent" than that for reviewing decisions of permissive intervention. *Harris v. Pernsley*, 820 F.2d 592, 597 (3d Cir. 1987). Thus, this Court "will reverse a district court's determination on a motion to intervene of right if the [district] court 'has applied an improper legal standard or reached a decision that [this Court is] confident is incorrect." *Id.* (quoting *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 992 (2d Cir. 1984).

* * *

The Little Sisters satisfy all the requirements for intervention as of right. Federal Rule of Civil Procedure 24(a)(2) requires intervention as of right if: "(1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation." *Wallach v. Eaton Corp.*, 837 F.3d 356, 372 n.18 (3d Cir. 2016) (quoting *Harris*, 820 F.2d at 596); Fed. R. Civ. P. 24(a) ("must permit"). These "requirements are intertwined," though "each must be met." *Harris,* 820 F.2d at 596. Yet, "a very strong showing that one of the requirements is met may result in requiring a lesser showing of another requirement." *Id.* at 596 n.6. The Little Sisters meet each of the four criteria and should be allowed to intervene as a matter of right.

A. The Little Sisters' motion is timely.

As the Commonwealth concedes and the District Court agreed, the Little Sisters' intervention motion was timely. *See* Dkt. 38 at 2 ("*Other than timely filing their Motion*, the Little Sisters fails to satisfy the legal requirements to intervene as of right . . .") (emphasis added); App. 8 ("Each of these [timeliness] factors weighs in favor of intervention."). The

Little Sisters moved to intervene less than two months after the complaint was filed and nineteen days after the preliminary injunction motion was filed. *See* App. 26-28; *see also Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369-70 (3d Cir. 1995) (permitting intervention after four years).

B. The Little Sisters have a protectable interest in the religious exemption they received under the interim final rule.

The Little Sisters also have a significant protectable interest in this litigation. Indeed, their interest is more significant and concrete than Pennsylvania's. For purposes of Rule 24(a)(2), "the applicant must have an interest 'relating to the property or transaction which is the subject of the action' that is 'significantly protectable.'" *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 969 (3rd Cir. 1998) (quoting *Donaldson v. United States,* 400 U.S. 517, 531 (1971)). A significantly protectable interest has been defined as "one that is specific to those seeking to intervene, is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought." *Benjamin ex rel. Yock v. Dep't of Public Welfare of Pa.,* 701 F.3d 938, 951 (3rd Cir. 2012) (citation and internal quote

omitted). And the "polestar for evaluating a claim for intervention is always whether the proposed intervenor's interest is direct or remote." *Kleissler,* 157 F.3d at 972.

The interest here is direct, specific and concrete. This case is about the legality of a religious exemption provided *to the Little Sisters*. The federal government candidly admits that the IFR was prompted by the Little Sisters' case and the Supreme Court order they obtained. It said so in public statements at the time of the executive order and the IFR, and the IFR itself states pending litigation was an impetus. *See* Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017) ("the Secretary of Health and Human Services shall consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate"); D. Jackson and M. Groppe, *Religious Conservatives Mixed on Trump's Order Targeting Birth Control, Church Involvement in Politics*, USA Today (May 4, 2017), https://www.usatoday.com/story/news/politics/2017/05/04/donald-trump-religious-liberty-johnson-amendment/101277724/ (quoting President Trump speaking to the Little Sisters: "Your long ordeal will soon be over."); Press Release, *Secretary Price Welcomes Opportunity to Re-*

examine Contraception Mandate, (May 4, 2017), https://www.hhs.gov/about/news/2017/05/04/secretary-price-welcomes-opportunity-to-reexamine-contraception-mandate.html (stating HHS "will be taking action in short order to follow the President's instruction to safeguard the deeply held religious beliefs of Americans who provide health insurance to their employees."); 82 Fed. Reg. at 47,799 ("Consistent with the President's Executive Order and the Government's desire to resolve the pending litigation and prevent future litigation from similar plaintiffs . . ."); *id.* at 47,798 (describing Little Sisters' lawsuit and *Zubik* decision); 82 Fed. Reg. at 47,814 ("Good cause exists to issue the expanded exemption . . . to help settle or resolve cases, and to ensure, moving forward, that our regulations are consistent with any approach we have taken in resolving certain litigation matters.").

Nevertheless, the district court characterized the Little Sisters' interest as "no more than a preferred outcome," App. 10, as if the Little Sisters are merely fans at a sports game, or interested citizens rooting for a preferred policy outcome. But the Little Sisters did not fight for four years for a mere "preferred outcome"—they fought to save their ministry from crushing fines threatened by a mandate that Pennsylvania seeks to re-

impose through this lawsuit. The IFR provides the Little Sisters with a religious exemption from that mandate, and the requested injunction takes away that exemption and impacts the Little Sisters in a direct, concrete way.

Worse yet, Pennsylvania seeks a ruling that would not only invalidate this IFR, but tie the government's hands in any future rulemaking to protect the Little Sisters. The Commonwealth sought—and the district court granted—a ruling stating that (1) the accommodation, which the Little Sisters challenged under RFRA, did not violate RFRA, and (2) because the accommodation did not violate RFRA, choosing to fully exempt rather than "accommodate" religious objectors is contrary to law. App. 198-200 (invalidating IFR on this ground). The Commonwealth also seeks rulings that this exemption violates the Equal Protection Clause, Title VII of the Civil Rights Act, and the Establishment Clause. *See* App. 71-73. Pennsylvania is thus seeking not only to invalidate the regulatory exemption the Little Sisters were given in the IFR, but to declare all similar regulations unlawful. In light of these claims, stated clearly on the face of the complaint and elucidated in the Commonwealth's preliminary injunction memorandum, the district court's conclusion that "there is no

suggestion that the Commonwealth through this lawsuit directly seeks to disturb [*Zubik*'s] holding" cannot be correct. App. 10.

The Commonwealth seeks to relitigate *Zubik*. It seeks a ruling re-instating this Court's pre-*Zubik* decision.[6] *See* Dkt. 8-2 at 25-27 (preliminary injunction motion discussing *Zubik* and *Geneva College v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 427 (3d Cir. 2015), *vacated and remanded sub nom. Zubik*, 136 S. Ct. at 1561). And the Commonwealth is no doubt willing to take this case all the way to the Supreme Court, where the Court will have to weigh in on the impact and parameters of the *Zubik* order, just like the district court already did, App. 9. To say that a party to *Zubik* has no "significantly protectable" interest in a case custom-designed to have the Supreme Court revisit *Zubik* strains credulity.

[6] To Appellant's knowledge, eight parallel lawsuits, including this one, have been filed nationwide. In only two of those lawsuits, including this one, have the plaintiffs filed motions for preliminary injunctive relief. Plaintiffs appear to believe that there is a political aspect to this litigation, as they have not sought interim injunctive relief in any cases assigned to Republican-appointed judges.

Indeed, the District Court conceded that "relief granted by another court . . . constitutes a sufficiently protectable legal interest to merit intervention as of right." App. 9. But then it proceeded to narrow that relief in finding that "[n]o matter how this litigation resolves, Little Sisters has still received what it was promised: 'an opportunity to arrive at an approach going forward . . .' and an injunction preventing the government from imposing any fines for non-compliance with the Accommodation Process." *Id.*

This conclusion has two flaws. First, the court's ellipses leave out the fact that the Little Sisters were granted not just an opportunity to negotiate an accommodation, but to "arrive at an approach going forward that accommodates petitioners' religious exercise." *Zubik,* 136 S. Ct. at 1560. Initial attempts by the Department of Justice to follow this order failed, with the final successful result being the IFR. Now the District Court reasons that the Little Sisters' only interest is in an "opportunity" to negotiate an accommodation, not the actual accommodation that is born of that opportunity. That is like claiming a citizen has an interest in registering to vote, but not in whether her ballot is counted. The Little Sisters have had an opportunity to negotiate a settlement since the day they filed

their case—they did not need a Supreme Court ruling to do that. And they have always had the opportunity to petition their government for a redress of their grievances. U.S. Const. amend. I. *Zubik* means nothing if it guaranteed only a right to talk, and not an interest in the outcome.

Second, the Little Sisters' *Zubik* injunction strengthens, not weakens, their case for intervention. *See also* App. 10 (Little Sisters unharmed because they have "a Supreme Court Order preventing the government from imposing fines on it for failure to comply with the Contraceptive Mandate or the Accommodation Process."). The district court claimed that this litigation does not "*directly* seek[] to disturb that holding." *Id.* (emphasis in original). But, as described above, this litigation intends to revisit that holding and the district court's orders have already begun to do so. The government, through the IFR, sought to enshrine the protections in the *Zubik* order in law (namely, no fines for failure to comply with the accommodation), and now the Commonwealth seeks not only to enjoin that IFR, but to obtain a ruling that all similar protections are unlawful. This deals a major blow to the Little Sisters' attempts to finally resolve their lawsuit and enjoy permanent protection from the mandate.

That is why the Northern District of California permitted the Little Sisters to intervene in parallel litigation. Order Granting Intervention, *California v. HHS,* at 7-9. It held that the "a party has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation.'" *Id.* (quoting *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006)). Further, the court observed that "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, it should, as a general rule, be entitled to intervene." *Id.* (quoting *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011)). The court found that "[f]or purposes of [the Little Sisters' intervention] motion, the fact that the Little Sisters *may* be required to comply with the [pre-IFR *Zubik*-imposed accommodation] process is sufficient to establish their significant, protectable interest." *Id.* at 8 n.5 (emphasis in original).

The Northern District of California relied in part on *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006). There, the State of California sued the federal government over the Weldon Amendment, a law protecting healthcare providers with conscientious objections

to participating in abortion. 450 F.3d at 439. California sought to invalidate that law on Constitutional grounds. *Id.* Healthcare providers who might rely on the Weldon Amendment sought to intervene, and the Ninth Circuit reversed the district court's denial of their intervention. *Id.* at 439-40. The court reasoned that "[t]he fact that California brought this lawsuit seeking to invalidate the Amendment, or restrict its sweep, is proof in itself of . . . its significance to the proposed intervenors." *Id.* at 442. The intervenors had a protectable interest because "[i]f the Weldon Amendment is declared unconstitutional or substantially narrowed as a consequence of this litigation, they will be more likely to be forced to choose between adhering to their beliefs and losing their professional licenses." *Id.* at 441. The same is true here: if the IFR is "declared unconstitutional or substantially narrowed as a consequence of this litigation," then the Little Sisters "will be more likely to be forced to choose between adhering to their beliefs and" massive fines. And if courts reviewing *Zubik* "restrict its sweep," that has a direct impact on the resolution of the Little Sisters' case and the scope of their current injunction.

In sum, the Little Sisters' interest in this lawsuit is a textbook example of a protectable interest: it "is specific to those seeking to intervene,"

since it involves a rule expressly motivated by the Little Sisters' lawsuit and providing them with a religious exemption; it "is capable of definition," since it is the same right the Little Sisters have litigated for years to protect; and that interest "will be directly affected in a substantially concrete fashion by the relief sought," since the relief sought is an injunction against the rule and a declaration proclaiming that and all similar relief unlawful. *Benjamin ex rel. Yock*, 701 F.3d at 951.[7]

C. The Little Sisters' ability to protect their interests may be impaired by the disposition of this action.

The second prong of the test for intervention is whether there is "'a tangible threat' to the applicant's legal interest," *Brody ex rel. Sugzdinis v. Spang*, 957 F.2d 1108, 1123 (3d Cir. 1992) (quoting *Harris,* 820 F.2d at 601), or whether "he or she 'will be practically disadvantaged by the disposition of the action.'" *Benjamin ex rel. Yock*, 701 F.3d at 951 (quoting *Kleissler*, 157 F.3d at 970). "[T]his factor may be satisfied if, for example,

[7] For the same reasons, the Little Sisters also more than satisfy the requirements for Article III standing. Although Pennsylvania had argued to the contrary, the district court assumed that the Little Sisters would satisfy Article III. App. 8. In any case, proposed intervenors "need not demonstrate Article III standing in order to intervene." *King v. Governor of State of N.J.*, 767 F.3d 216, 245-46 (3d Cir. 2014) (permitting private party to intervene in defense of state law).

a determination of the action in the applicants' absence will have a significant stare decisis effect on their claims, or if the applicants' rights may be affected by a proposed remedy." *Brody*, 957 F.2d at 1123. The District Court did not directly address this prong of the test.

Here, the entire point of the lawsuit is to deprive religious objectors of the rights created by the IFR. In fact, Pennsylvania seeks not only to have the IFR permanently enjoined, but also a declaration that any religious exemption from the contraceptive mandate would violate the constitution and federal statutes. *See, e.g.*, App. 50, 72-73, 77.[8] If Pennsylvania ultimately prevails, the Little Sisters will be more than just "practically disadvantaged"—not only the IFR but any other attempt to protect their rights would be presumptively invalid. Because the Little Sisters'

[8] Pennsylvania, like the district court, claims not to attack the pre-existing exemption for churches. But that statement cannot be squared with the Commonwealth's constitutional arguments, nor with the district court's holding that exemptions are foreclosed because they were not mandated by RFRA. *See* App. 199-00. The district court provided no explanation for why an exemption for the "the exclusively religious activities of any religious order," 26 U.S.C. § 6033(a)(3)(A)(i), (iii), was a permissible lifting of government-created burdens, but an exemption for a religious order which serves the poor was impermissible. *See* App. 199-00.

"rights may be affected by a proposed remedy," this lawsuit poses a "tangible threat" to the relief the Little Sisters fought for and won, and to their rights under federal law. This is particularly true here, where the proposed intervenors are the "intended beneficiaries of the challenged federal policy." *Texas v. United States*, 805 F.3d 653, 660 (5th Cir. 2015) (holding that proposed intervenors were DAPA's intended beneficiaries and therefore had a sufficient interest to intervene in a challenge to DAPA).

Nor is this a case in which intervention is inappropriate because Intervenors have an adequate alternative forum in which they can protect their interests. This lawsuit—and the injunction it has spawned—is an attack on victories the Little Sisters have won in other courts. The Third Circuit has a "policy preference which, as a matter of judicial economy, favors intervention over subsequent collateral attacks." *Brody*, 957 F.2d at 1123. It would upend this policy entirely to deny intervention to the original plaintiffs in a lawsuit that functions as a collateral attack on their rights.

The Northern District of California likewise found the Little Sisters satisfied this third element of intervention as of right. The court concluded that because "the result of this case could impair or impede their ability to protect this asserted interest," "the Little Sisters have identified a 'practical impairment of their interests' that could result from the pending litigation." Order Granting Intervention, *California v. HHS*, at 7-9.

For these reasons, as well as those discussed in II.B, the Little Sisters have satisfied this element of the test.

D. The Little Sisters' interests are not adequately represented by the existing parties to the action.

Finally, intervention should be granted because the Government cannot adequately represent the Little Sisters in litigation concerning the scope of the Little Sisters' rights against the Government under RFRA, the First Amendment, and the *Zubik* injunction. These are issues on which the Little Sisters have been and remain *adverse* to the Government in ongoing litigation, and issues on which the interests of religious objectors and secular governments are necessarily distinct.

The burden of raising inadequacy "should be treated as minimal." *Benjamin ex rel. Yock,* 701 F.3d at 958 (quoting *Trbovich v. United Mine*

Workers, 404 U.S. 528, 538 n. 10 (1972)). The "requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate." *Mountain Top*, 72 F.3d at 368 (quoting *Trbovich*, 404 U.S. at 538 n.10). Inadequacy may be found where, "although the applicant's interests are similar to those of a party, they diverge sufficiently that the existing party cannot devote proper attention to the applicant's interests." *United States v. Territory of Virgin Islands*, 748 F.3d 514, 520 (3d Cir. 2014) (quoting *Brody*, 957 F.2d at 1123). A rebuttable presumption of adequacy applies "if one party is a government entity charged by law with representing the interests of the applicant for intervention," *id.*, but, as discussed below, that presumption does not apply here.

1. The Government Cannot Adequately Represent the Little Sisters Because It Is Adverse to the Little Sisters.

For the last four years, the Government has threatened the Little Sisters with massive fines if they continue to engage in their religious exercise. *Little Sisters of the Poor*, 794 F.3d at 1167, *vacated and remanded sub nom. Zubik*, 136 S. Ct. 1557 (noting that "a single Little Sisters home could incur penalties of up to $2.5 million per year"). And to this day, the Government and the Little Sisters remain adverse parties in separate litigation over the same issue. Order, *Little Sisters of the Poor Home for*

the Aged v. Burwell, No. 13-1540 (10th Cir. June 17, 2016) (vacating judgment but not entering any other judgment in the case). The Little Sisters and the Government are also adverse parties under the Supreme Court's *Zubik* injunction. It makes no sense to suggest that the Government—which is the enjoined party under *Zubik*—can adequately represent the injunction-holder in a case that turns, at least in part, on the meaning and scope of that injunction. The government is not "charged by law with representing the interests" of the Little Sisters—to the contrary, it is charged by law with representing the interests of the United States against the Little Sisters' continuing injunction.

Nor does it make sense to suggest that the Government—which is the party Congress intended to restrain in RFRA, 42 U.S.C. 2000bb-3(a)—can be trusted to adequately represent the interests of the adverse parties Congress sought to protect in RFRA. This is more than enough to show that HHS's representation "*may* be inadequate." *Mountain Top,* 72 F.3d at 368 (emphasis added).

This Court's decision in *Kleissler* is instructive. There, environmental groups sued the Forest Service over its new logging practices. 157 F.3d at 968. Local school districts and municipalities, as well as several timber

companies, sought to intervene over financial interests in logging in that area. *Id.* While noting the presumption of adequate representation by the government for the proposed intervenors, nevertheless the court reversed the district court's denial of motions to intervene. *Id.* at 972. The proposed intervenors' "comparatively light" burden of proof was met given that their "straightforward" interests did not match the government's "numerous complex and conflicting interests in matters of this nature." *Id.* at 972-73. Thus, the intervenors' interest "*may* become lost in the thicket of sometimes inconsistent governmental policies." *Id.* at 974 (emphasis added).

Likewise, in *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, the court allowed counties and landowners to intervene in a lawsuit by Chippewa Indians against the state. The court found that "no presumption of adequate representation arises" since "the counties and the landowners seek to protect local and individual interests not shared by the general citizenry of Minnesota." 989 F.2d 994, 1001 (8th Cir. 1993). And intervention was allowed despite the fact that "the counties' and the landowners' proposed answers are almost identical to the answer filed by the state" because the court observed that "there is no assurance that the

state will continue to support all the positions taken in its initial pleading." *Id.* Further playing into the court's decision was the worry that "if the case is disposed of by settlement rather than by litigation, what the state perceives as being in its interest may diverge substantially from the counties' and the landowners' interests." *Id.*

Here the facts are analogous to *Kleissler* and *Mille Lacs.* The Government's policies in this area have been anything but "static," and there is no guarantee it will adhere to its newfound views, *Kleissler*, 157 F.3d at 974, or even "support all the positions taken it its initial pleading." *Mille Lacs*, 989 F.2d at 1001. "[C]olored by its view of the public welfare," as compared to the Intervenor's "more parochial" interests, the Government has "numerous complex and conflicting interests in matters of this nature." *Kleissler,* 157 F.3d at 972, 973. The Government openly admits that it is "balanc[ing]" the Little Sisters' interests against "the Government's interest in ensuring coverage for contraceptive and sterilization services." 82 Fed. Reg. at 47,793. The Government is also considering its broader interests in public health, implementation of the Affordable Care Act, the cost of its regulations, and the potential impact on other Government programs. *See, e.g.*, 82 Fed. Reg. at 47,803 (considering the impact

on other programs); 47,821 (considering the cost of the exemption). Indeed, the IFR has been undergoing public comment during the pendency of this lawsuit, and the outcome of that process is still unknown. The Government has emphasized that its "mind remains open" and that the IFRs are temporary, "effective only until final rules are issued." Dkt. 15 at 27. Thus, as the Government considers all of its varied interests with its open mind, there is a real risk that the Little Sisters' "straightforward" interests "may become lost in the thicket of sometimes inconsistent governmental policies," driven by the Government's "numerous complex and conflicting interests" stemming from the public welfare writ large. *Kleissler*, 157 F.3d at 973-74.

That problem is exacerbated where, as here, the Government and the Little Sisters remain adverse on the central questions. For example, the Government (as the enjoined party) cannot possibly adequately represent the interests of the Little Sisters (the protected party) in litigating the metes and bounds of the *Zubik* injunction—an issue the district court has already reached, App. 9. The institutional interest of an enjoined party will be to seek a narrow reading of the injunction; the interest of the Little Sisters is the exact opposite.

Under this analysis, there can be no serious question about whether the Government's representation of the Little Sisters "may" be inadequate.

2. The District Court Misread Precedent and Misunderstood the Facts.

The district court only avoided a finding of inadequacy by misreading *Kleissler* and its progeny, mistakenly finding that the Little Sisters were "no longer adverse" to the Government, and that it is "purely speculative" to fear that the Government's and Little Sisters' interests might diverge. App. 12. These errors led the court to find adequacy where there is none.

1. First, the District Court wrongly concluded that *Kleissler*'s applicability here had been foreclosed by *United States v. Territory of Virgin Islands*, 748 F.3d 514, 522 (3d Cir. 2014). But *Territory of Virgin Islands* does not limit *Kleissler*; it merely gives one example of a situation in which government representation happened to be adequate.

In *Territory of the Virgin Islands*, a prisoner sought to intervene in twenty-eight-year-old litigation between the United States and the Virgin Islands over prison conditions. *Id.* at 516-17. The prisoner sought to rely on *Kleissler*, but this Court rejected *Kleissler*'s applicability because the prisoner had largely adopted as his own the Government's pleadings,

id. at 518. The Court contrasted the prisoner with the proposed intervenors in *Kleissler* who "all had a singular, direct financial stake in the underlying litigation that was necessarily in tension" with the agency's various and inconsistent policies. *Id.* at 522.

Nothing in *Territory of Virgin Islands* purports to change or limit *Kleissler*. *Territory of the Virgin Islands* just provides an example of a case in which the government representation was found adequate because the Court did not see any divergent interests and the proposed intervenor filed copycat briefs. But *Territory of the Virgin Islands* says nothing to limit *Kleissler's* applicability where, as here, there actually are divergent interests—so divergent that the parties remain in adverse litigation, and one holds a live injunction controlling the conduct of the other on the relevant issue.

Likewise, the Little Sisters will not simply copy-and-paste the United States' filings as their own as the prisoner did in *Territory of Virgin Islands*, or even make the same arguments. For example, the Government is arguing the Establishment Clause claim under the *Lemon* test, which the Little Sisters view as having been replaced by the historical test in

Town of Greece v. Galloway, 134 S. Ct. 1811 (2014). Also, the Little Sisters have long challenged the government's authority to regulate third-party administrators under the accommodation, but the IFR retains that same overbroad reading of government authority while making the accommodation optional. *See, e.g.*, Complaint at 58-61, *Little Sisters of the Poor v. Sebelius*, 6 F.Supp.3d 1225 (D. Colo. 2013) (No. 13-cv-2611) (challenging statutory authority to issue the accommodation). And, as the Little Sisters argued in the California case, they believe that RFRA provides an additional justification for regulatory authority broader than that asserted by the government here. The Little Sisters also lodged a notice of appeal on the day the preliminary injunction was granted; to date, no one knows whether the Government will even appeal. It is thus clear that the Little Sisters' interests will "diverge sufficiently that the existing party cannot devote proper attention to the applicant's interests." *Territory of Virgin Islands*, 748 F.3d at 520.

2. Second, the District Court incorrectly concluded that because the Little Sisters and the Government are on the same side in *this* litigation, "the parties are no longer adverse" despite a "prior" adverse relationship.

This conclusion was both factually wrong (the Little Sisters and the Government remain the opposing parties in the *Zubik* injunction and in the underlying litigation) and legally wrong.

The district court relied on *Maine v. Dir., U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 21 (1st Cir. 2001). There the First Circuit noted that "the former adversary relationship between the government and proposed intervenors may raise questions about adequacy." *Id.* at 20. Further, while the *Maine* court found the proposed intervenors were adequately represented by the government, that was in part because the proposed intervenors there—an environmental group—lacked any "direct private interests" which might distinguish them from the government. *Id.* But here, the Little Sisters do have "direct private interests"—practicing their religion while avoiding millions of dollars in fines or having to close their homes for the elderly poor—that the Government does not share. *See also Animal Prot. Inst. v. Martin*, 241 F.R.D. 66, 70 (D. Me. 2007) (refusing to follow *Maine* because "in contrast to *Maine*, there are private interests at stake, which the Intervenors stand to lose if [the Plaintiff] prevails in its action").

The District Court thus appears to have misread *Maine*, which would put the case at odds with this Court's decision in *Kleissler*, as well as with numerous sister circuits and the Supreme Court, which have repeatedly held that government entities cannot adequately represent private interests. *See Trbovich*, 404 U.S. at 538–39 (holding that the interest of a union member was not adequately represented by the Secretary of Labor because the Secretary had a "duty to serve two distinct interests"—the individual union member's and the general public's—"which are related, but not identical"); *Sierra Club v. Espy*, 18 F.3d 1202, 1207–08 (5th Cir. 1994) (holding that the government could not adequately represent representatives of the timber industry representatives because "[t]he government must represent the broad public interest, not just the economic concerns of the timber industry"); *Coal. of Arizona/New Mexico Counties For Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 845 (10th Cir. 1996) (allowing commercial wildlife photographer to intervene in dispute between counties and federal agency because "the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in interven-

tion . . . satisfies the minimal burden of showing inadequacy of representation") (quoting *National Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 384 (10th Cir. 1977); *In re Sierra Club*, 945 F.2d 776, 779–80 (4th Cir. 1991) (holding that a state administrative agency did not adequately represent an environmental group because the agency must represent the interests of all the citizens in defending its regulation, not just the regulation's proponents); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1398 (9th Cir. 1995) (holding that because a federal agency had listed an animal species as protected only after being sued by the environmental groups, the agency would not adequately represent the interests of environmental groups in an action challenging the listing); *Mille Lacs*, 989 F.2d at 1000-01 (holding that landowners could intervene as of right because they sought "to protect local and individual interests not shared by the general citizenry of Minnesota"); *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44-45 (1st Cir. 1992) (concluding there is inadequate representation of commercial fishing groups by the Secretary of Commerce because "a governmental entity charged by law with representing the public interest of its citizens might

shirk its duty were it to advance the narrower interest of a private entity," and thus "seeking to protect both the public interest and the interest of a private intervenor" is "a 'task which is on its face impossible'") (quoting *National Farm Lines*, 564 F.2d at 384).

3. Third, the district court erred in concluding that the Little Sisters' argument about divergent interests was "purely speculative." App. 12. This conclusion suffers from two flaws. First, the District Court relies on an unpublished, factually dissimilar case. *See Pennsylvania Gen. Energy Co., LLC v. Grant Twp.*, 658 F. App'x 37, 42 (3d Cir. 2016). There an advocacy organization sought to intervene in a legal dispute between a township and an oil and gas company. *Id.* at 38-39. Intervenors claimed the township's interests diverged from theirs because the township could change its position the future, but they neither pointed out any past adversity between them and the township, nor the township changing its position previously. And the proposed intervenors and the township shared the same attorney. *Id.* at 41. Here, however, the Little Sisters and the Government have been locked in litigation for four years. The Government has reversed its position. And not only do the Little Sisters and

the Government not share the same attorney, but they are still on opposite sides of litigation in a related case, with one side (the Little Sisters) holding an injunction and federal civil rights protections against the other (the Government).

For these reasons, it is clear that the Government cannot adequately represent the Little Sisters. Indeed, an attorney in private practice would not even ethically be permitted to represent both the Little Sisters and the Government concerning the scope of the *Zubik* injunction. See 204 Pa. Code § 1.7 (Conflicts of Interest: Current Clients). There is no reason that the Little Sisters should be forced to sit on the sidelines while two secular governments debate whether the Little Sisters are entitled to a religious exemption or not.

II. Alternatively, proposed Intervenors should be permitted to intervene under Rule 24(b).

Standard of Review. This Court applies an abuse of discretion standard of review to district court denials of permissive intervention. *Benjamin ex rel. Yock*, 701 F.3d at 947.

* * *

Even if the Little Sisters had not qualified for intervention as of right, the district court abused its discretion by denying them even permissive

intervention under Rule 24(b). By contrast, the Northern District of California allowed the Little Sisters to intervene in parallel litigation. Order Granting Intervention, *California v. HHS* at 14-15. Courts are authorized to "permit anyone to intervene" who "has a claim or defense that shares with the main action a common question of law or fact," as long as the intervenor has made a "timely motion," Fed R. Civ. P. 24(b), and has "an independent basis of subject matter jurisdiction," *In re Linerboard Antitrust Litigation*, 333 F. Supp. 2d 333, 338 (E.D. Pa. 2004).

When granting permissive intervention in parallel litigation, the Northern District of California noted that the "Plaintiffs concede that the Little Sisters' motion is timely"—the same was true here—and found that the Little Sisters "have some of the strongest interests in the outcome." Order Granting Intervention, *California v. HHS* at 7, 14. The court easily concluded that "the Little Sisters have a legitimate basis to intervene and present their position in this lawsuit." *Id.* at 14. *See also United States v. City of Los Angeles*, 288 F.3d 391, 404 (9th Cir. 2002) (reversing denial of permissive intervention, noting that "'streamlining' the litigation . . . should not be accomplished at the risk of marginalizing those . . . who have some of the strongest interests in the outcome"). Here, particularly

given the Little Sisters' prompt timing and the speed of the litigation, the Commonwealth had no basis to claim that the Little Sisters' intervention would "unduly delay or prejudice the adjudication of the original parties' rights" under Rule 24.

As required by Rule 24, the Little Sisters' interest in protecting the IFR presents common questions of law and fact with those of the existing parties. And, as conceded by Pennsylvania and determined by the district court, its motion was timely. Intervention at this early stage will not prejudice the current parties. The district court stated that "there is significant potential that Little Sisters' intervention will delay this litigation and prejudice the interest of the parties in securing an efficient resolution." App. 13. But the court cited to nothing to support this conclusion, and there is no reason to believe it is true. Indeed, the Little Sisters requested to appear and were prepared to participate in the district court's Dec. 14 preliminary injunction hearing. They did not seek additional time. And the time spent in denying the Little Sisters' intervention in a written opinion did not delay the court from holding that evidentiary hearing as scheduled, nor from issuing its lengthy preliminary injunction opinion less than 24 hours after the close of that hearing. The court's

conclusion that the Little Sisters' intervention would create delay or prejudice the parties is unsupported in the opinion and unsupportable given the course of events in the case.

The significance of the Little Sisters' interests in the subject matter of this litigation far outweighs any marginal additional burden that would be caused by intervention. Because the district court's conclusion on this point was unfounded, the Court should reverse its determination and permit the Little Sisters to intervene under Fed. R. Civ. P. 24(b), even if it does not grant intervention as of right.

CONCLUSION

For the foregoing reasons, the District Court's ruling on the Little Sisters motion to intervene should be reversed.

Dated: January 5, 2018

Respectfully submitted,

/s/ Eric Rassbach

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: January 5, 2018

/s/ Eric Rassbach
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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND LOCAL RULE 31.1

I hereby certify that the following statements are true:

1. This brief complies with the type-volume limitations imposed by Federal Rules of Appellate procedure 29(d) and 32(a)(7)(B). It contains 11,542 words, excluding the parts of the brief exempted by Federal Rule 32(a)(7)(B)(iii) and by Local Rule 29.1(b).
2. This brief complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.
3. This brief complies with the electronic filing requirements of Local Rule 31.1(c). The text of this electronic brief is identical to the text of the paper copies, and Windows Defender has been run on the file containing the electronic version of this brief and no virus has been detected.

Executed this 5th day of January 2018.

/s/ Eric Rassbach
Eric Rassbach

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will automatically send notification and a copy of the brief to counsel who have appeared for the parties and are CM/ECF participants. I further certify that counsel for all parties have consented to electronic service and that I made electronic service on all parties on this date.

Executed this 5th day of January 2018.

/s/ Eric Rassbach
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