No. 17-3752, 18-1253

United States Court of Appeals for the Third Circuit

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff-Appellee,

v.

PRESIDENT, UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellants,

and

LITTLE SISTERS OF THE POOR, SAINTS PETER AND PAUL HOME,
Intervenor-Defendant-Appellant.

On Appeal from the U.S District Court for the Eastern District of Pennsylvania, No. 2:17-cv-4540

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

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INTRODUCTION

For six years, during long battles over the federal contraceptive mandate, Pennsylvania was silent. It did not join lawsuits. It did not comment on rulemakings. It did not file amicus briefs. It did not warn of dire consequences to its coffers and its citizens. It did not even enact its own state-level contraceptive mandate.

Then, in October of last year, everything changed. Pennsylvania's attorney general announced that he would be suing the Trump administration over the latest revision to the federal mandate, a revision prompted by the many lawsuits Pennsylvania had no interest in. Pennsylvania warned of sudden dire consequences to its budget and its citizens and sought an immediate nationwide injunction.

The District Court held an evidentiary hearing on the motion and issued that nationwide injunction less than twenty-four hours later. That decision was wrong on standing, wrong on whether the agencies had good cause, and wrong that the latest rules were contrary to law.

Unlike Pennsylvania, the Little Sisters have been personally interested and involved in litigation over the federal contraceptive mandate for many years. They became so reluctantly, to protect their ministry to

the elderly poor, including women and men in Philadelphia, Pittsburgh, and Scranton. After taking their case all the way to the Supreme Court, which directed the government to arrive at an alternative result, the Little Sisters welcomed the new rules that respect their rights in compliance with civil rights laws. But now Pennsylvania has endangered the Sisters' ministry again, and wants to go one step further: it wants this Court to declare that religious protections like the one in the latest rule, and the one the Little Sisters fought for and won in court, are contrary to law.

The District Court's decision has put the Little Sisters, as well as the federal government, in an impossible position. Courts across the nation have ordered the agencies not to apply the old mandate because it violates federal civil rights law. Yet the District Court ordered the agencies to do the exact opposite, as if the agencies should just ignore the legal conclusions of other Article III courts.

In the District Court's 14,000-word decision creating that conflict, there are 10 that resolve it: "[A]ny exception to the ACA required by RFRA is permissible." Appx.37. The government made admissions before the Supreme Court in *Zubik* that fatally undercut its RFRA de-

fense. As every single court to consider the matter since *Zubik* has found, RFRA requires a religious exemption. Thus, both RFRA and the APA required that the agencies issue the latest rules, because it has always been entirely possible for the federal government—like Pennsylvania itself—to provide contraceptives without the forced involvement of nuns.

Pennsylvania sat on the sidelines for years precisely because it has no interest in the federal contraceptive mandate. Its belated political desire to join the fray does not create Article III standing, cannot erase contrary court orders that bind the agencies, and cannot revive RFRA defenses that the federal government has long since abandoned. The federal government had no choice but to fix the old, illegal mandate; Pennsylvania's effort to re-impose it must be rejected.

JURISDICTIONAL STATEMENT

Pennsylvania asserted jurisdiction in the District Court under 28 U.S.C. § 1331. Nonetheless, that court was without jurisdiction because Pennsylvania lacks Article III standing. *See infra* Part I. The District Court entered a preliminary injunction on December 15, 2017. Appx.51. This Court's appellate jurisdiction rests on 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

The Little Sisters' appeal presents three main issues:

Standing. Was the District Court correct that Pennsylvania has standing, despite the fact that is has not identified any Pennsylvania employers who plan to drop contraceptive coverage, nor any Pennsylvania citizens who stand to lose such coverage, nor any Pennsylvania citizens who would then qualify for and then turn to the government for coverage? Dkt. 15 at 13-18; Appx.14-23.

Success on the merits. Has Pennsylvania demonstrated a likelihood of success on the merits of its claims that the government lacked good cause to issue the interim final rule, and that the interim final rule was contrary to law? Dkt. 15 at 22-54; Appx.19-37.

Preliminary injunction. Do the remaining injunction factors justify the District Court's decision to issue a nationwide injunction against the interim final rule? Dkt. 15 at 19-22, 54-55; Appx.43-49.

STATEMENT OF RELATED CASES

This case has been before this Court previously in the related appeal No. 17-3679, resulting in the decision reported at 888 F.3d 52.

All of the actions listed below are related to this action. All of these actions include claims or defenses that overlap with Pennsylvania's claims here and are either pending, involve decisions of this Court at issue in this case, or resulted in permanent injunctions against former versions of the mandate. Unless otherwise noted, the dates listed are the dates the permanent injunction was issued.

Pending cases challenging the interim final rules at issue here:

1. *Am. Civil Liberties Union v. Azar*, No. 4:17-cv-05772 (N.D. Cal.)
2. *Campbell v. Trump*, No. 1:17-cv-02455 (D. Colo.)
3. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, No. 1:17-cv-11930 (D. Mass.)
4. *Medical Students for Choice v. Azar*, No. 1:17-cv-02096 (D.D.C.)
5. *Shiraef v. Azar*, No. 3:17-cv-00817 (N.D. Ind.)
6. *California v. Azar*, No. 4:17-cv-05783 (N.D. Cal.) (preliminary injunction issued Dec. 21, 2017)
7. *Washington v. Trump*, No. 2:17-cv-01510 (W.D. Wash.)

Pending cases challenging prior versions of the rules:

8. *Ass'n of Christian Sch. v. Azar*, No. 14-1492 (10th Cir.)
9. *Bindon v. Azar*, No. 1:13-cv-01207 (D.D.C.)
10. *Dobson v. Azar*, No. 1:13-cv-03326 (D. Colo.)
11. *E. Tex. Baptist Univ. v. Azar*, No. 4:12-cv-03009 (S.D. Tex.); No. 14-20112 (5th Cir.)

12. *Eternal Word Television Network v. U.S. Dep't of Health & Human Servs.*, No. 14-12696 (11th Cir.)

13. *La. Coll. v. Azar*, No. 14-31167 (5th Cir.)

14. *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 1:12-cv-06756 (N.D. Ill.)

15. *March for Life v. Azar*, No. 1:2014-cv-01149 (D.D.C.)

Cases resulting in permanent injunctions issued prior to October 2017 against prior versions of the rules:

16. *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 6:12-cv-03459 (W.D. Mo.) (Oct. 30, 2014)

17. *Annex Medical, Inc., v. Solis*, No. 0:12-cv-02804 (D. Minn.) (Aug. 18, 2015)

18. *Armstrong v. Sebelius*, No. 1:13-cv-00563 (D. Colo.) (Oct. 7, 2014)

19. *Autocam Corp. v. Sebelius*, No. 1:12-cv-01096 (W.D. Mich.) (Jan. 5, 2015)

20. *Barron Indus., Inc. v. Sebelius*, No. 1:13-cv-01330 (D.D.C.) (Oct. 27, 2014)

21. *Bick Holdings, Inc. v. U.S. Dep't of Health & Human Servs.,* No. 4:13-cv-00462 (E.D. Mo.) (Nov. 18, 2014)

22. *Brandt, Bishop of the Roman Catholic Diocese of Greensburg v. Sebelius*, No. 2:14-cv-00681 (W.D. Pa.) (Oct. 3, 2014), (appeal dismissed Oct. 19, 2017)

23. *Briscoe v. Sebelius*, No. 1:13-cv-00285 (D. Colo.) (Jan. 27, 2015)

24. *Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-00709 (E.D. Tex.) (Jan. 2, 2014) (appeal dismissed Oct. 19, 2017)

25. *C.W. Zumbiel Co. v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-01611 (D.D.C.) (Nov. 3, 2014)

26. *Conestoga Wood Specialties Corp. v. Sebelius*, No. 5:12-cv-06744 (E.D. Pa.) (Oct. 2, 2014)

27. *Korte v. HHS*, No. 3:12-cv-1072 (S.D. Ill.) (Nov. 7, 2014)

28. *Daniel Medford v. Sebelius*, No. 0:13-cv-01726 (D. Minn.) (Nov. 20, 2014)

29. *Doboszenski & Sons, Inc. v. Sebelius*, No. 0:13-cv-03148 (D. Minn.) (Nov. 18, 2014)

30. *Domino's Farms Corp. v. Sebelius*, No. 2:12-cv-15488 (E.D. Mich.) (Dec. 3, 2014)

31. *Eden Foods, Inc. v. Sebelius*, No. 2:13-cv-11229 (E.D. Mich.) (Feb. 12, 2015)

32. *Feltl and Co. v. Sebelius*, No. 0:13-cv-02635 (D. Minn.) (Nov. 26, 2014)

33. *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-00104 (D.D.C.) (Oct. 3, 2014)

34. *Grote Indus., LLC v. Sebelius*, No. 4:12-cv-00134 (S.D. Ind.) (Apr. 30, 2015)

35. *Hall v. Sebelius*, No. 0:13-cv-00295 (D. Minn.) (Nov. 26, 2014)

36. *Hartenbower v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-02253 (N.D. Ill.) (Nov. 3, 2014)

37. *Hastings Chrysler Center, Inc. v. Sebelius*, No. 0:14-cv-00265 (D. Minn.) (Dec. 11, 2014)

38. *Hobby Lobby Stores, Inc. v. Sebelius*, No. 5:12-cv-01000 (W.D. Okla.) (Nov. 19, 2014)

39. *Holland v. U.S. Dep't of Health & Human Servs.*, No. 2:13-cv-15487 (S.D. W. Va.) (May 29, 2015)

40. *Johnson Welded Products, Inc. v. Sebelius*, No. 1:13-cv-00609 (D.D.C.) (Oct. 24, 2014)

41. *Lindsay v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-01210 (N.D. Ill.) (Dec. 3, 2014)

42. *M&N Plastics, Inc. v. Sebelius*, No. 5:13-cv-14754 (E.D. Mich.) (Nov. 17, 2015)

43. *Mersino Dewatering Inc. v. Sebelius*, No. 2:13-cv-15079 (E.D. Mich.) (Feb. 27, 2015)

44. *Mersino Mgmt. Co. v. Sebelius*, No. 2:13-cv-11296 (E.D. Mich.) (Feb. 4, 2015)

45. *Midwest Fastener Corp. v. Sebelius*, No. 1:13-cv-01337 (D.D.C.) (Oct. 24, 2014)

46. *MK Chambers Co. v. U.S. Dep't of Health & Human Servs.*, No. 2:13-cv-11379 (E.D. Mich.) (Nov. 21, 2014)

47. *Newland v. Sebelius*, No. 1:12-cv-01123 (D. Colo.) (Mar. 16, 2015)

48. *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-cv-00476 (E.D. Mo.) (Nov. 12, 2014)

49. *Randy Reed Auto., Inc. v. Sebelius*, No. 5:13-cv-06117 (W.D. Mo.) (Nov. 12, 2014)

50. *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 1:12-cv-02542 (E.D.N.Y.) (Dec. 16, 2013) (appeal dismissed Oct. 17, 2017)

51. *Sioux Chief MFG. Co. v. Sebelius*, No. 4:13-cv-00036 (W.D. Mo.) (Nov. 12, 2014)

52. *SMA, LLC v. Sebelius*, No. 0:13-cv-01375 (D. Minn.) (Nov. 20, 2014)

53. *Stewart v. Sebelius*, No. 1:13-cv-01879 (D.D.C.) (Feb. 2, 2015)

54. *Stinson Electric, Inc. v. Sebelius*, No. 0:14-cv-00830 (D. Minn.) (Nov. 18, 2014)

55. *Tonn and Blank Constr. LLC v. Sebelius*, No. 1:12-cv-00325 (N.D. Ind.) (Nov. 6, 2014)

56. *Tyndale House Publishers, Inc. v. Sebelius*, No. 1:12-cv-01635 (D.D.C.) (Jul. 15, 2015)

57. *Weingartz Supply Co. v. Sebelius*, No. 2:12-cv-12061 (E.D. Mich.) (Dec. 31, 2014)

58. *Wieland v. U.S. Dep't of Health & Human Servs.,* No. 4:13-cv-01577 (E.D. Mo.) (Jul 21, 2016)

59. *Williams v. Sebelius*, No. 1:13-cv-01699 (D.D.C.) (Nov. 5, 2014)

60. *Willis and Willis PLC v. Sebelius*, No. 1:13-cv-01124 (D.D.C.) (Oct. 27, 2014)

61. *Zubik v. Sebelius*, No. 2:13-cv-01459 (W.D. Pa.) (Dec. 20, 2013) (appeal dismissed Oct. 20, 2017)

Cases resulting in permanent injunctions issued since October 2017 against prior versions of the rules:

62. *Ave Maria Sch. of Law v. Sebelius*, No. 2:13-cv-00795 (M.D. Fla.) (Jul. 11, 2018)

63. *Ave Maria Univ. v. Sebelius*, No. 2:13-cv-00630 (M.D. Fla.) (Jul. 9, 2018)

64. *Catholic Benefits Ass'n LCA v. Sebelius*, No. 5:2014-cv-00240 (W.D. Okla.) (Mar. 7, 2018)

65. *Colorado Christian Univ. v. U.S. Dep't of Health & Human Servs.,* No. 1:13-cv-02105 (D. Colo.) (Jul. 11, 2018)

66. *Dordt Coll. v. Sebelius,* No. 5:13-cv-04100 (N.D. Iowa) (June 14, 2018)

67. *Geneva Coll. v. Sebelius,* No. 2:12-cv-00207 (W.D. Pa.) (Jul. 5, 2018)

68. *Grace Sch. v. Sebelius*, No. 3:12-cv-00459 (N.D. Ind.) (June 1, 2018)

69. *Little Sisters of the Poor v. Hargan*, No. 13-1540 (10th Cir.) (June 15, 2018)

70. *Priests For Life v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-01261 (D.D.C.) (Nov. 6, 2017)

71. *Reaching Souls Int'l Inc. v. Sebelius,* No. 5:13-cv-01092 (W.D. Okla.) (Mar. 15, 2018)

72. *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-cv-00092 (E.D. Mo.) (Mar. 28, 2018)

73. *S. Nazarene Univ. v. Hargan,* No. 5:13-cv-01015 (W.D. Okla.) (May 15, 2018)

74. *Wheaton Coll. v. Burwell*, No. 1:13-cv-08910 (N.D. Ill.) (Feb. 22, 2018)

Case challenging the prior rules resulting in judgment against plaintiff:

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

STATEMENT OF THE CASE

A. The mandate and its exceptions

This case originates with the Patient Protection and Affordable Care Act of 2010 (ACA).[1] The ACA requires certain employers to offer "health insurance coverage" that includes "preventive care and screenings" for women without "any cost sharing requirements." 42 U.S.C. § 300gg-13(a)(4); 26 U.S.C. § 9815; 29 U.S.C. § 1185d.

Congress did not specify what "preventive care and screening" means, instead deferring to whatever "comprehensive guidelines" are "supported" by the Health Resources and Services Administration (HRSA), which is within the Department of Health and Human Services (HHS). 42 U.S.C. § 300gg-13(a)(4). HHS asked for recommendations from the Institute of Medicine (IOM), 77 Fed. Reg. 8,725, 8,726 (Feb. 15,

[1] Pub. L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

2012), which proposed including, *inter alia*, all FDA-approved contraceptives and sterilization methods.[2]

Thirteen days later, without any opportunity for prior public comment, HHS exercised its discretion under 300gg-13(a)(4) to adopt IOM's recommendations as its "comprehensive guidelines." 77 Fed. Reg. at 8,725-26; 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv). The penalty for offering a plan that excludes coverage for even one of the FDA-approved contraceptive methods is $100 per day for each affected individual. 26 U.S.C. § 4980D(a)-(b). If an employer larger than 50 employees fails to offer a plan at all, the employer owes $2,000 per year for each of its full-time employees. 26 U.S.C. § 4980H(a), (c)(1).

The mandate exempted many employers. Plans that have not made certain changes since March 2010 are grandfathered and exempted

[2] Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps*, The National Academies Press 3 (2011), https://bit.ly/2QOysgH.

from the mandate indefinitely. 42 U.S.C. § 18011. In 2017, approximately 23% of employers offered grandfathered plans.[3]

Employers with fewer than 50 full-time employees are not required to provide health coverage at all. *See* 26 U.S.C. § 4980H(c)(2). In 2014, 34 million Americans—more than a quarter of the private-sector workforce—worked for such employers. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2764 (2014). The statute also does not cover government plans such as Medicare and some Medicaid programs. Such government programs may impose cost-sharing or exclude some forms of contraception.[4]

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[3] *See* Kaiser Family Found., *Employer Health Benefits 2017 Annual Survey* 204 (2017), https://kaiserf.am/2ptXLYM.

[4] *See* Congressional Research Service, *Federal Support for Reproductive Health Services: Frequently Asked Questions* 13 (2016), https://fas.org/sgp/crs/misc/R44130.pdf ("There is no explicit statutory requirement for Medicare to cover contraceptive services . . . . Sterilization is not covered as an elective procedure or for the sole purpose of preventing any effects of a future pregnancy"); *id.* at 7 ("States have discretion in identifying the specific services and supplies (including emergency contraception) covered under the traditional Medicaid state plan.").

B. The First IFR

The mandate was implemented in an interim final rule (IFR) on July 19, 2010, published by HHS, DOL, and Treasury (the agencies). 75 Fed. Reg. 41,726, 41,728 (July 19, 2010) ("First IFR"). The First IFR stated that HRSA would produce guidelines and provided further guidance concerning cost sharing. *Id.* This IFR was enacted without prior notice of rulemaking or opportunity for prior comment, going into effect on the day that comments were due. The agencies reasoned that "it would be impracticable and contrary to the public interest to delay putting the provisions in these [IFRs] in place until a full public notice and comment process was completed." *Id.* at 41,730.

C. The Second IFR

HHS promulgated its second IFR thirteen days after IOM issued its recommendation regarding coverage of all FDA-approved contraceptives. 76 Fed. Reg. 46,621 ("Second IFR"). That same day, HRSA published guidelines on its website adopting the IOM recommendations in

full.[5] The Second IFR granted HRSA "discretion to exempt certain religious employers from the Guidelines." 76 Fed. Reg. at 46,623. But it defined the term "religious employer" so narrowly that it excluded religious non-profits that, like the Little Sisters, serve people of all faiths. *Id.* at 46,626.

The Second IFR was effective immediately without prior notice or public comment. The agencies stated that they had "good cause" because public comment was "impracticable, unnecessary, or contrary to the public interest." *Id.* at 46,624.

The agencies received "over 200,000" comments on the Second IFR. 77 Fed. Reg. at 8,726. Many of the comments explained the need for a broader religious exemption. However, on February 15, 2012, HHS adopted a rule that "finaliz[ed], without change," the Second IFR. *Id.* at 8,725.

The agencies then published an Advance Notice of Proposed Rulemaking (ANPRM), 77 Fed. Reg. 16,501 (Mar. 21, 2012), and a Notice of

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[5] 77 Fed. Reg. 8,725 & n.1; *see also* Health Resources & Services Administration, *Women's Preventative Services Guidelines,* U.S. Department of Health & Human Services (Oct. 2017), https://bit.ly/2OHsmgH.

Proposed Rulemaking (NPRM), 78 Fed. Reg. 8,456 (Feb. 6, 2013), which were later adopted in a final rule making further changes to the mandate, 78 Fed. Reg. 39,870 (July 2, 2013). The agencies received over 600,000 comments on those proposals, many of which explained how the mandate would violate the conscience of religious believers who objected to the contraceptives at issue.[6]

The agencies amended the definition of religious employer, but continued to limit that definition to churches and the "exclusively religious" activities of religious orders, but not to religious nonprofits like the homes run by the Little Sisters. 78 Fed. Reg. at 39,874. The agencies also adopted an arrangement—termed an "accommodation"—by which religious objectors could offer the objected-to coverage on their health plans by executing a self-certification and delivering it to the organization's insurer or third-party administrator (TPA). The self-certification would trigger the insurer or TPA's obligation to "provide[] payments for

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[6] 78 Fed. Reg. at 8,459; 78 Fed. Reg. at 39,871; *see also*, *e.g.*, Christian Medical Association, Comment Letter on NPRM (Mar. 21, 2013), https://bit.ly/2O28k3p (NPRM "fails to avoid moral compromise for faith-based objectors").

contraceptive services." 78 Fed. Reg. at 39,876 (insurers); *id.* at 39,879 (TPAs).

D. RFRA litigation and the Third IFR

The "accommodation" did not address the concerns of all religious organizations, and some filed RFRA lawsuits.[7] Intervenor-Appellants the Little Sisters of the Poor were part of a class action filed on September 24, 2013. Complaint, *Little Sisters of the Poor Home for the Aged v. Sebelius*, 6 F. Supp. 3d 1225 (D. Colo. 2013) (No. 13-2611). In August 2014, the agencies published a third IFR "in light of the Supreme Court's interim order" in *Wheaton Coll. v. Burwell*, again without notice and comment. 79 Fed. Reg. 51,092 (Aug. 27, 2014) ("Third IFR"); *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014).

This Third IFR amended the "accommodation" to allow a religious objector to "notify HHS in writing of its religious objection" instead of

[7] *See* Becket, *HHS Case Database*, https://bit.ly/2zlzvOs (last accessed Sept. 20, 2018).

notifying its insurer or TPA. *Id.* at 51,094. The Third IFR received over 13,000 comments.[8]

As reasons for bypassing notice and comment, the agencies said that they must "provide other eligible organizations with an option equivalent to the one the Supreme Court provided to Wheaton College . . . as soon as possible." 79 Fed. Reg. at 51,095. The Third IFR was ultimately finalized on July 14, 2015. 80 Fed. Reg. 41,318 (July 14, 2015).

E. Supreme Court litigation

The Third IFR did not accommodate the Little Sisters' religious beliefs. It continued to require the Little Sisters to authorize the provision of objectionable drugs and services on their health plan. The Little Sisters' case proceeded to the Tenth Circuit Court of Appeals, which ruled against them. *Little Sisters of the Poor v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

The Little Sisters' appeal to the Supreme Court was consolidated with similar cases from the Fifth and D.C. Circuits and this Circuit. *See*

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[8] *See* EBSA, *Coverage of Certain Services Under the Affordable Care Act* (Aug. 27, 2014), https://bit.ly/2Nv8Kjh.

Zubik v. Burwell, 136 S. Ct. 1557 (2016). At the Supreme Court, the agencies abandoned the arguments and factual findings upon which they had relied below. First, the government admitted for the first time that the accommodation 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*, 136 S. Ct. 1557 (No. 14-1418) (quotations omitted), https://bit.ly/2DiCj32; Tr. of Oral Arg. at 60-61, *Zubik v. Burwell*, 136 S. Ct. 1557 (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."). The government thus removed any basis for the lower courts' prior holding that the mandate did not impose a substantial burden on the religious exercise of objecting employers because the provision of contraceptives was separate from their plans. Tr. of Oral Arg. at 61, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) (Solicitor General Verrilli "would be content" if Court would "assume a substantial burden" and rule only on the government's strict scrutiny defense).

Next, 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, https://bit.ly/2DiCj32. The government also acknowledged that the mandate "could be modified" to be more protective of religious liberty, Suppl. Br. for the Resp'ts at 14-15, *Zubik v. Burwell*, 136 S. Ct. 1557, https://bit.ly/2O0oUAJ, thus admitting the mandate was not the least restrictive means of achieving the government's interests.

The Supreme Court unanimously vacated the decisions of the Courts of Appeals of the Third, Fifth, Tenth, and D.C. Circuits. *Zubik*, 136 S. Ct. at 1560. It ordered the government not to impose taxes or penalties on petitioners for failure to comply with the mandate 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.*

The Little Sisters' case was stayed while the government reconsidered the exemptions to the 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). In May 2018, after failing to reach a set-

tlement with the government, the Little Sisters sought and obtained a permanent injunction from the District Court. *Little Sisters v. Azar*, No. 1:13-cv-02611 (D. Colo. May 29, 2018), Dkt. 82.

F. The Fourth and Fifth IFRs

After making the concessions that prompted the Supreme Court's order in *Zubik*, the agencies issued a "Request for Information" (RFI) in July 2016 to seek input on "whether there are modifications to the accommodation that would be available under current law and that could resolve the RFRA claims raised by organizations that object to the existing accommodation on religious grounds." 81 Fed. Reg. 47,741, 47,743 (July 22, 2016). The RFI received "over 54,000 public comments." 82 Fed. Reg. 47,792, 47,814 (Oct. 13, 2017). The agencies concluded, in a set of FAQs published only on the Department of Labor's website, that they were unable to modify the accommodation in a way that respected both the agencies' goals and the religious objectors' concerns.[9]

In October 2017, the agencies engaged in another round of rulemaking and issued the IFRs at issue in this lawsuit. 82 Fed. Reg. 47,792

[9] U.S. Dep't of Labor, *FAQs About Affordable Care Act Implementation Part* 36 at 4 (Jan. 9, 2017), https://bit.ly/2O7yJNr.

("Fourth IFR").[10] The Fourth IFR protects those with religious objections, referring to the litigation as the impetus for the regulatory change: "Consistent with . . . 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." *Id.* at 47,799. The agencies stated:

> Good cause exists to issue the expanded exemption in these interim final rules in order to cure such violations [of RFRA] (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.

Id. at 47,814. The Fourth IFR set a sixty-day period for comments, which ended on December 5, 2017.

G. Pennsylvania's efforts to comment on all prior versions of the rules.

Pennsylvania does not claim to have submitted comments on *any* stage of the mandate until after this lawsuit was filed, and a search of

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[10] The agencies issued another IFR on the same day, addressing a "moral exemption." 82 Fed. Reg. 47,838, 47,849 (Oct. 13, 2017) ("Fifth IFR"). Pennsylvania also challenges the Fifth IFR, but the Little Sisters' arguments will focus on the Fourth IFR.

publicly available comments did not reveal any comments from the Commonwealth prior to December 2017, nearly two months after filing this lawsuit and a month after moving for a preliminary injunction.

H. This lawsuit

Pennsylvania filed this lawsuit less than a week after the Fourth IFR was issued, seeking an injunction against the religious exemption that protected the Little Sisters and other religious objectors. Appx.82-114. This was the first time Pennsylvania involved itself in any mandate case, despite six years of litigation in which dozens of religious objectors received preliminary and permanent injunctions against the mandate. *See* Statement of Related Cases.

On November 11, Pennsylvania moved for a preliminary injunction against the Fourth and Fifth IFRs, asking the court to instead reinstate the rules established by the first three IFRs. Pls.' Mot. for Prelim. Inj. (Nov. 11, 2017), Dkt. 8 ("Mot."). On November 22, the Little Sisters moved to intervene. The District Court denied the Little Sisters' motion on December 8, and granted the motion for a preliminary injunction on December 15. The Little Sisters appealed both orders. This court reversed the denial of intervention. *Pennsylvania v. President, United*

States, 888 F.3d 52 (3d Cir. 2018). The District Court stayed the case pending this appeal. Dkt. 73.

I. The decision below

The District Court ruled that Pennsylvania has Article III standing to challenge the exemption because it "seeks to protect a quasi-sovereign interest—the health of its women residents," and because the exemption "will likely inflict a direct injury upon the Commonwealth by imposing substantial financial burdens on State coffers." Appx.19-20. The District Court held that Pennsylvania can assert "a procedural right under the APA . . . without meeting all the normal standards for redressability and immediacy." Appx.23.

The District Court then ruled that Pennsylvania has a "reasonable probability of success on the merits" because the agencies did not have good cause to forgo notice and comment, and because the exemption "contradict[s] the text of the [ACA]" by creating "sweeping exemptions" to the ACA's requirements. Appx.35.

STANDARD OF REVIEW

Legal conclusions regarding standing are reviewed *de novo*. *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 414 (3d Cir. 2013). This Court reviews the District Court's decision to enjoin the United States

for an abuse of discretion, but a district court necessarily abuses its discretion if it bases its ruling on legal errors, which are reviewed *de novo*. *See Dam Things from Denmark v. Russ Berrie & Co.*, 290 F.3d 548, 556 (3d Cir. 2002). With regard to factual determinations, "Where, as here, First Amendment rights are at issue . . . [Courts of Appeal] have a constitutional duty to conduct an independent examination of the record as a whole[.]" *Brown v. City of Pittsburgh*, 586 F.3d 263, 268-69 (3d Cir. 2009) (internal quotation omitted).

ARGUMENT

I. Pennsylvania lacks standing.

The injunction should never have issued because Pennsylvania lacks standing. It has no concrete interest at stake. Its constitutional claims are foreclosed as a matter of law. And its *parens patriae* claims are both factually speculative and legally foreclosed.

A. Pennsylvania cannot sue in its own right.

In order to establish standing, Pennsylvania must demonstrate an injury which is not "conjectural or hypothetical," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation omitted), and "must affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (citation omitted). The injury

must be "fairly traceable to the challenged conduct of the defendant," and must be redressable by a favorable judicial decision. *Id.* at 1547. Pennsylvania must "'clearly . . . allege facts demonstrating' each element." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). And it must "demonstrate standing for each claim [they] seek[] to press and for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008) (internal quotation marks omitted)). Pennsylvania fails every part of this test.

1. Pennsylvania cannot bring Equal Protection or Establishment Clause claims.

Pennsylvania cites no authority for the idea that states can sue the federal government for an alleged violation of the First Amendment. It would be passing strange to give *state governments* the right to enforce church-state separation. How can they have "offended observer" or taxpayer standing under the Establishment Clause, particularly to challenge an exemption rather than an expenditure? To ask these questions is to answer them.

Similarly, states are not "person[s]" under the Fifth Amendment capable of asserting an equal protection claim. *Pennsylvania v. Riley*, 84

F.3d 125, 130 n.2 (3d Cir. 1996) ("A State . . . is not entitled to due process protection") (citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

2. Pennsylvania's purported injuries are generalized and speculative.

Pennsylvania asks this Court to set national policy through litigation, based upon vague assertions of harm. But government action "accords a basis for standing only to those persons who are personally denied equal treatment.'" *Allen v. Wright*, 468 U.S. 737, 755 (1984) (internal quotation omitted). Pennsylvania must demonstrate harm to itself rather than to a different group.

Most of the injuries that Pennsylvania does assert are to unnamed citizens. *See, e.g.*, Appx.85, 106-07. The only alleged harms specific to Pennsylvania are the lack of opportunity to comment—an argument its own actions foreclose—and downstream financial burdens on state-funded health programs. *See* Appx.102, 106-08. The District Court found standing on this basis. Appx.20-23.

Pennsylvania's claims of injury are no more than a "chain of contingencies" that "amount[] to mere speculation" about the actions of third parties. *Sheller, P.C. v. U.S. Dep't of Health & Human Servs.*, 663 F.

App'x 150, 156 (3d Cir. 2016). Pennsylvania provides no support for its claim of financial burden. It has not identified a single employer in the Commonwealth which plans to drop contraceptive coverage because of the Fourth IFR. Many employers in the Commonwealth are already exempt from the federal mandate, either through grandfathering (23% of employers have grandfathered plans),[11] the prior religious exemption that the District Court reinstated, or because they are small employers and are not required to provide insurance at all.[12] These employers are not obligated to provide contraceptive coverage, regardless of the Fourth IFR, and their decisions therefore cannot cause injury via the Fourth IFR. *Id.* Pennsylvania never sought a nationwide injunction (or any other relief) against these far more sweeping exemptions, and claims no such harm today.

If Pennsylvania could locate even one employer who plans to drop coverage because of the Fourth IFR, it must next speculate as to the re-

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[11] *See* Kaiser Family Found., *supra* n.3 at 204; *Hobby Lobby*, 134 S. Ct. at 2763-64 (grandfathered plans are exempt from the preventive services mandate).

[12] *Hobby Lobby*, 134 S. Ct. at 2763-64 (discussing small employer exemption).

ligious beliefs and choices of employees. For example, women working for religious employers may share their employers' religious beliefs. *See* 82 Fed. Reg. at 47,802. They might prefer a contraceptive method still covered by their employer, since many objectors object to only 4 out of 20 FDA-approved methods. *See Hobby Lobby*, 134 S. Ct. at 2762-63. Or they may "obtain coverage through a family member's employer, through an individual insurance policy purchased on an Exchange or directly from an insurer, or through Medicaid or another government program." Br. for the Resp'ts at 65, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418), https://bit.ly/2DiCj32. That is what the Obama Administration told the Supreme Court in 2016, and it remains true today. Given the alternatives available—and their apparent efficacy in preventing Pennsylvania from feeling any effects from the prior and much larger exemptions—Pennsylvania has no reason to believe these employed and insured women would need to rely upon state programs to obtain contraception because of a much smaller religious exemption.

Nor would Pennsylvania bear the cost of the feared unintended pregnancies. This would only happen if, for some reason, these women with health insurance did not obtain contraceptives in some other way

and did not use their health insurance for their medical expenses related to pregnancy *and* qualified for state aid. Pennsylvania offers no reason to think that even a single state resident will thread this particularly narrow needle, or that a single state resident ever threaded it before, despite the absence of a federal mandate until 2012 or the much larger exemptions since 2012. A judicial decision based upon the supposition that this might theoretically occur just now (and, apparently, *only* now) is wholly advisory.

3. Pennsylvania's purported harms are neither traceable to the Fourth IFR nor redressable by enjoining it.

Pennsylvania's claims fail because the alleged injuries are not "fairly traceable" to the Fourth IFR, or redressable by order of this Court. "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges," it is "substantially more difficult to establish" standing. *Lujan*, 504 U.S. at 562 (internal quotation omitted). Here, Pennsylvania is neither a party to nor a beneficiary of any religious employer's health plan. As described above, its claims of harm are wholly speculative. Moreover, all the known religious objectors are already protected by existing injunctions, *see* Statement of Related Cases, and Pennsylvania did not offer evidence that even one of *their* employ-

ees turned to the State over the past several *years*. Pennsylvania thus states no injury at all, and certainly none fairly traceable to the Fourth IFR, or redressable by enjoining it.

B. Pennsylvania cannot sue as *parens patriae*.

Most of the injuries claimed in the Complaint are to unnamed citizens. But Pennsylvania is barred from asserting the rights of its citizens in *parens patriae* against the federal government. *See Massachusetts v. Mellon*, 262 U.S. 447 (1923). Even if such speculative injuries existed, "it is the United States, and not the state, which represents them as *parens patriae*, when such representation becomes appropriate." *Id.* at 485-86. Pennsylvania seeks to avoid the application of RFRA for its citizens, but that is precisely "what *Mellon* prohibits," namely a suit by a State "to protect her citizens from the operation of federal statutes." *Massachusetts v. EPA*, 549 U.S. 497, 520, n.17 (2007) (citation omitted).

1. Pennsylvania cannot overcome these deficiencies with 'special solicitude.'

Nothing in the ACA, the mandate, or the Fourth IFR indicates any "special solicitude" Congress (or the Executive Branch) might have shown for states with respect to these issues. *See id.* at 520.

The District Court analogized to *Texas v. United States*, 809 F.3d 134, 151 (5th Cir. 2015) in finding "special solicitude in [the] standing analysis." Appx.16. But in *Texas*, the Fifth Circuit was careful not to substitute special solicitude for injury or for a legally protected interest. There, Texas was able to show 500,000 people who would automatically be eligible for a $130 subsidy benefit under the challenged federal program. "Even a modest estimate would put the loss at several million dollars." *Id.* at 155 (internal quotation marks omitted). Here, Pennsylvania has not identified a single person who would become eligible for state benefits.

For all these reasons, Pennsylvania lacks standing, and its case must be dismissed.

II. Pennsylvania cannot succeed on the merits.

Even if the Court were to determine that Pennsylvania had standing, the injunction should still be reversed because Pennsylvania failed to establish likelihood of success on the merits. A preliminary injunction—particularly one with the scope of the injunction here—is an "extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To earn a preliminary injunction Penn-

sylvania must prove that "[1] that [it] is likely to succeed on the merits, [2] that [it] is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in [its] favor, and [4] that an injunction is in the public interest." *Winter*, 555 U.S. at 20, 22. These are "demanding requirements." *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 480 (3d Cir. 2000).

A. The District Court erred by holding that the agencies could not use an IFR-based solution to rectify an IFR-created problem.

IFRs are either permissible modes of rulemaking to impose and modify the contraceptive mandate or they are not. But under no circumstance could the law be as the District Court and Pennsylvania envision it: that the government can use IFRs three times to impose a contraceptive mandate, create a religious exemption, and modify that exemption—but the fourth time it does so, it suddenly violates the APA. To the contrary, if anything, the case for proceeding by IFR is far more compelling now than it was in 2010, 2011, and 2014, when prior versions of the mandate and its exemptions were implemented by IFR. Under the APA, notice and opportunity to comment need only be "sufficient to fairly apprise interested parties of all significant subjects and

issues involved." *NVE, Inc. v. Dep't of Health & Human Servs.*, 436 F.3d 182, 191 (3d Cir. 2006). "Interested parties" had at least six opportunities to comment on the scope of exemptions to the mandate, and hundreds of thousands of them did. (Just not Pennsylvania.) Under the unique circumstances of this case, the agencies have more than met the threshold for "good cause" to proceed by IFR.

1. The agencies had good cause to issue the IFRs because interested parties had six opportunities to comment on the scope of exemptions to the mandate.

By 2017, interested parties had had the opportunity to comment on the subject of this lawsuit—the scope of exemptions to the mandate—no fewer than 6 times, and more than 600,000 did so. *See supra* at 16. As if that were not enough, the 2016 RFI specifically requested comments on *new* ways to provide contraceptive coverage and accommodate religious objectors in light of *Zubik*. The RFI was published in the Federal Register and garnered 54,000 comments—but none from Pennsylvania.

The District Court rejected this history out of hand, finding that the "outpouring" of past comments weighed in favor of seeking *more* comments before acting to protect religious objectors. Appx.32. But in 2014, the D.C. Circuit rejected nearly identical arguments when they were

made by the religious objectors. *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 276 (D.C. Cir. 2014).

The D.C. Circuit upheld the Third IFR because it modified regulations that "were recently enacted pursuant to notice and comment rulemaking, and presented virtually identical issues." *Id.* After the First IFR, each subsequent IFR—including the Fourth and Fifth—was intended to "augment current regulations." *Id.* In the IFRs at issue here, rather than making broad changes or eliminating the mandate altogether (which the agencies have the authority to do), the agencies took a modest approach and "determined that expanding the exemptions . . . is a more appropriate administrative response." Appx.497. They noted that "the number of organizations and individuals that may seek to take advantage of these exemptions and accommodations may be small." *Id.* The IFRs also "leave unchanged HRSA's authority to decide whether to include contraceptives in the women's preventive services Guidelines" and do not "change the many other mechanisms by which the Government advances contraceptive coverage, particularly for low-income women." *Id.* Accordingly, the Fourth and Fifth IFRs merely

"augment current regulations" just as the Third IFR did. *Priests for Life*, 772 F.3d at 276.

2. The agencies had good cause to issue the IFRs in light of Zubik *and RFRA.*

The agencies also had good cause because they reasonably believed that they were infringing on fundamental rights in violation of RFRA. The District Court dismissed this argument because the Third Circuit, prior to *Zubik*, concluded that religious objectors' rights were *not* being infringed. Appx.41-43. But dozens of courts nationwide have reached the opposite conclusion, and it cannot be the case that the agencies have good cause in districts that ruled for the religious objectors and none in the districts that did not. *See* Statement of Related Cases. Even where, as here, the federal courts were not unanimous at an earlier stage,[13] it is fully appropriate for federal agencies to do everything possible to avoid infringing fundamental rights or violating court orders.

[13] As discussed below, since the agencies' concessions to the Supreme Court in *Zubik*, the courts adjudicating RFRA challenges by religious employers to the old mandate *have* been unanimous in finding that the old mandate violates RFRA.

Indeed, when rejecting similar APA claims in 2014, the D.C. Circuit specifically noted that the agencies were responding to court orders across the country, and emphasized that the agencies had "reasonably interpreted" the orders "as obligating [them] to take action to further alleviate any burden on the religious liberty of objecting religious organizations." *Priests for Life*, 772 F.3d at 276.

Just as with the Third IFR, the Fourth and Fifth IFRs were issued in the face of dozens of lawsuits and court orders across the country. In May 2016, the Supreme Court vacated the judgments of several Courts of Appeals and remanded to "allow the parties sufficient time to resolve any outstanding issues between them." *Zubik*, 136 S. Ct. at 1560. Until such issues could be resolved in litigation, the government was enjoined from "impos[ing] taxes or penalties on petitioners for failure to" comply with the notice requirements of the mandate. *Id.* at 1561. And by the fall of 2017, courts had begun pressuring the government to take action. *See* Appx.464 (noting that the IFRs "provide a specific policy resolution that courts have been waiting to receive from the [agencies] for more than a year").

The agencies could have "reasonably interpreted" that cascade of injunctions and court orders across the country as a mandate "to take action to further alleviate any burden on the religious liberty of objecting religious organizations." *Priests for Life*, 772 F.3d at 276; *see also Am. Fed'n of Gov't Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981) (upholding an IFR that came in response to an injunction, even though the trial court emphasized that it "was only voiding the status quo order and was not mandating the action to be taken by the Department to comply with [the] injunction"). Indeed, since the District Court's order enjoining the IFR nationwide, many religious objectors have been forced to return to court for permanent injunctions—the very situation the agencies sought to avoid by issuing the IFRs. Appx.446-49.

3. If the agencies did not have good cause to issue IFRs modifying the mandate, then they certainly lacked good cause to impose the mandate by IFR.

The Second IFR created the nation's first nationwide contraceptive coverage mandate without any preliminary opportunity for public comment. It did not solicit prior comments on the anticipated guidelines nor issue any prior notice even mentioning contraceptives, let alone the question of conscience protections. 77 Fed. Reg. at 8,726 (noting that

"comments on the anticipated guidelines were not requested in the interim final regulations"). Nevertheless, the agencies argued that "an additional opportunity for public comment is unnecessary" because "the amendments made in these interim final rules in fact are based on . . . public comments" received on the First IFR—an IFR that never specifically mentioned contraceptives or a religious exemption. 76 Fed. Reg. at 46,624; *see also* 75 Fed. Reg. 41,726. If the Second IFR could be issued based on the public comments that had already been received, another IFR is even more warranted after seven years of vigorous debate and hundreds of thousands of comments. And more importantly, if the Fourth IFR is invalid for failure to have pre-IFR notice-and-comment, then so too is the rest of the IFR-based regime the District Court reinstated.

4. Any error in proceeding via IFR was harmless.

Moreover, any error in the failure to allow for notice and comment rulemaking is harmless. The party asserting error has the burden of demonstrating prejudice, and Pennsylvania has not done so here. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) ("[T]he burden of showing that an error is harmful normally falls upon the party attacking the

agency's determination."). Pennsylvania had six opportunities to comment on the scope of the religious exemption to the mandate before 2016, but it said nothing at all. Pennsylvania has not pointed to any specific comments that could not have been submitted in previous rounds of commentary. Pennsylvania has now commented, and the agencies are presently considering its comments. State Attorneys General, Comment on Interim Final Rules (Dec. 5, 2017), https://bit.ly/2xICBu2 (joined by Pennsylvania). Any interest it might have in belatedly commenting on this controversy has thus been satisfied.

B. Pennsylvania is not likely to succeed on its claim that the Fourth IFR is "contrary to law."

1. The agencies can make exemptions from a mandate they were never obligated to create in the first place.

The District Court enjoined the Fourth and Fifth IFRs as contrary to law, reasoning that the agencies lacked authority to create exemptions from the mandate. But Pennsylvania faces an uphill battle challenging an exemption to a contraceptive mandate that the ACA did not require in the first place. The ACA merely requires certain employers to offer "a group health plan" that provides coverage for "preventive care" for

women. 42 U.S.C. § 300gg-13(a)(4); 26 U.S.C. § 9815; 29 U.S.C. § 1185d. Congress did not specify what "preventive care" means, but instead called upon HRSA. Congress directed HRSA to create a set of "guidelines," rather than a bare list of mandated items. Thus, the statute itself granted HRSA discretion in framing the coverage requirements.

The District Court held that the statutory delegation of authority did not include authority to create exemptions from the preventive care mandate. In making this determination, the District Court spent much time on the meaning of the word "as," Appx.39-40, but ignored the more relevant statutory term, "guidelines." 42 U.S.C. § 300gg-13(4). The dictionary definition of guideline is "an indication or outline of policy or conduct."[14] Had Congress meant for HRSA to simply create a list of covered items from which there could be no deviation, it could have said so. It did just this for subsections (1) and (2) of § 300gg-13:

> (1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force;
>
> (2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Cen-

[14] *The Merriam-Webster Dictionary* (New ed. 2016).

> ters for Disease Control and Prevention with respect to the individual involved;

42 U.S.C. § 300gg-13. These provisions require coverage of all "items or services" on a particular list, or all immunizations, if recommended "with respect to the individual involved." The language used in (4) is markedly different: "such additional preventive care and screenings . . . (1) as provided for in comprehensive guidelines" from HRSA. Since "it is presumed that Congress expresses its intent through the ordinary meaning of its language," the distinction between these provisions indicates a broader grant of discretion to HRSA in framing the regulations. *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d Cir. 1998).

Even under the District Court's strained reading of the statute, HRSA could have promulgated guidelines which required coverage of some contraceptives and not others, or permitted employers to exclude coverage of some due to cost considerations (which it in fact does),[15] or

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[15] HRSA permits employers to exclude or impose cost-sharing for more expensive contraceptives, so long as they include some contraceptive in each category. Centers for Consumer Information & Insurance Oversight, *Affordable Care Act Implementation FAQs, Set 12*, Centers for

determined that a contraception mandate was unnecessary due to widespread coverage pre-dating the ACA. Indeed, HRSA could edit its website tomorrow to eliminate some or all contraceptives from the list, and Pennsylvania would have no recourse, since the listing of contraceptives itself is not in the Code of Federal Regulations and has never been subject to formal rulemaking. To claim that HHS has no authority to create exemptions from the mandate it was under no obligation to promulgate in the first place, and never even wrote into a rule, is weaving new administrative law from whole cloth.

2. Pennsylvania's reasoning, if accepted, would invalidate the preexisting religious exemptions, too.

The contraceptive mandate has included a religious exemption from day one. In the beginning, HHS saw that "it is appropriate that HRSA, in issuing these Guidelines, takes into account the effect on the religious beliefs of certain religious employers" and gave HRSA "discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned." 76 Fed. Reg. at 46,623. The scope of

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Medicare & Medicaid Services, https://go.cms.gov/2I54sZV (last visited Sept. 20, 2018).

that exemption has shifted over time. If Pennsylvania is correct that HHS has no delegated authority to create exemptions from the mandate, then these exemptions must be invalid, too.

The District Court re-instated these exemptions by invalidating the Fourth IFR and leaving the prior version of the mandate in force instead. Appx.52. The District Court justified this decision by claiming that the exemption for churches and their integrated auxiliaries is mandated by the Constitution, but that further exemptions are not. Appx.42 (citing *Hobby Lobby*, 134 S. Ct. at 2794 & n.14). The court did not attempt to explain why the Constitution protects some religious orders (which were already exempt), but not the Little Sisters.

The court then, puzzlingly, concluded that further exemptions are not warranted "because the Third Circuit – twice now – has foreclosed the Agencies' legal conclusion that the Accommodation Process imposes a substantial burden." *Id.* This is the classic argument that proves too much. If the government is powerless to extend exemptions because the "accommodation" suffices as a matter of law, then by that theory the government has *no* power to exempt anyone—every religious objector must comply with the "accommodation."

3. The IFR is not contrary to law because it is mandated by RFRA.

The District Court correctly acknowledged—and plaintiffs nowhere dispute—that "any exception to the ACA required by RFRA is permissible." Appx.37. Obviously a religious exemption required by a federal civil rights statute cannot be "arbitrary [and] capricious" or "not in accordance with law." 5 U.S.C. § 706(2)(A). And stopping an ongoing violation of a federal statute is of course "good cause" to issue an IFR. 5 U.S.C. § 553(b). Thus, if the agencies are correct that the Fourth IFR was mandated by RFRA, the entire basis for the District Court's injunction falls away.

The agencies are correct that the Fourth IFR was mandated by RFRA. But the lower court misunderstood both RFRA and this Court's precedents, finding that the agencies' view of RFRA had been "foreclosed" by this Court "twice now." Appx.42. The District Court's confusion created the anomaly at issue here: an order from the District Court to reimpose a version of the mandate that is currently forbidden by RFRA-based injunctions from dozens of federal courts.

Properly understood, RFRA makes it illegal for the agencies to impose the contraceptive mandate without a religious exemption, and

nothing in this Court's precedents is to the contrary. Accordingly, the District Court's order must be reversed.

a. RFRA applies broadly to federal laws, federal agencies, and religious exercises.

RFRA requires the federal government to avoid substantially burdening "religious exercise," unless doing so is the "least restrictive means" of advancing a "compelling governmental interest." 42 U.S.C. § 2000bb-1. RFRA applies to any "agency" and "to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-2, bb-3. As the District Court correctly acknowledged, this means that RFRA applies to the federal agencies' actions under the ACA. Appx.37.

Congress also made clear that "religious exercise" under RFRA is a broad term, encompassing "any exercise of religion." 42 U.S.C. § 2000cc-5. Religious exercise includes "'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious purposes.'" *Hobby Lobby*, 134 S. Ct. at 2770 (quoting *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990)).

b. The contraceptive mandate violates RFRA.

The Little Sisters and other religious groups exercise religion by providing health insurance that complies with their religious beliefs. *See* Dkt. 19-2 ¶¶ 33-34 (declaration of Sr. Vincente). It is undisputed that these groups have a sincere religious objection to complying with the "accommodation." *Id.* ¶¶ 35-38. Failure to comply with that process, however, would result in large fines under 26 U.S.C. § 4980D ($100/day per person); 26 U.S.C. § 4980H(c)(1) ($2000 per employee, per year)—the same fines that constituted an obvious substantial burden in *Hobby Lobby*. 134 S. Ct. at 2759 ("If these consequences do not amount to a substantial burden, it is hard to see what would."). Indeed, the agencies themselves concede that forcing religious groups to comply with the accommodation "constituted a substantial burden" on their religious exercise. Appx.456.

Under RFRA, Congress permitted agencies to impose such burdens on religion only where they could prove that imposing the burden on a particular person was the least restrictive means of advancing a compelling government interest. 42 U.S.C. § 2000bb-01. Here, the govern-

ment cannot carry that burden (and, to its credit, has finally stopped trying). The mandate fails strict scrutiny for many reasons, including:

- There is no compelling government interest in forcing employers to provide contraceptives. This is why the original mandate (which the District Court's order illegally revived) had exemptions for grandfathered plans, churches, and government-sponsored plans.
- The lack of a compelling interest is emphasized by Pennsylvania's glaring failure to institute its own contraceptive mandate. Pennsylvania cannot seriously contend the interest in forcing *religious* employers to provide coverage is compelling when Pennsylvania has not bothered to require *any* employers to do so.
- As the Obama Administration acknowledged to the Supreme Court, women have many other avenues to obtain coverage. This concession is part of why the Supreme Court remanded *Zubik* and why the government subsequently lost every case.[16]
- Indeed, Pennsylvania's entire case is premised on the availability of a range of state programs to provide contraceptives. The very existence of those programs proves that a plan run by nuns is not the least restrictive means of distributing contraceptives.
- As the Supreme Court explained in *Hobby Lobby,* "[t]he most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their

[16] S*ee* Mark L. Rienzi, *Fool Me Twice:* Zubik v. Burwell *and the Perils of Judicial Faith in Government Claims*, 2016 Cato Sup. Ct. Rev. 123 (2015-2016) (detailing concessions leading to the *Zubik* remand).

health-insurance policies due to their employers' religious objections." *Hobby Lobby,* 134 S. Ct. at 2780.

- As the Trump Administration has now demonstrated, the federal government is prepared to pay directly via Title X.[17] The government's ability to use Title X to cover any additional expenses forecloses any argument that the forced involvement of the Little Sisters is necessary.

  - The agencies have publicly acknowledged that the mandate fails strict scrutiny, Appx.442, 456; they therefore cannot carry their statutory burden in this or any other court.

    c. *After* Zubik*, courts have unanimously found the mandate applied to religious employers violated RFRA.*

After the Supreme Court's *Zubik* order, some of the RFRA cases settled. But many did not, and, to date, every single religious employer case that has been litigated to conclusion has resulted in a permanent injunction. Those injunctions find a RFRA violation and forbid the agencies from enforcing the mandate without a religious exemption. For example:

- *Geneva Coll. v. Azar*, No. 2:12-cv-00207 (W.D. Pa. July 5, 2018), Dkt. 153 at 2 ("defendants . . . violated Geneva College's rights

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[17] *See* 83 Fed. Reg. 25,502, 25,514 (June 1, 2018) ("[T]his proposed rule would amend the definition of 'low income family' to include women who are unable to obtain certain family planning services under their employer-sponsored health insurance policies due to their employers' religious beliefs or moral convictions.").

under RFRA" by enforcing "the accommodation procedure[] against Geneva College");

- *Little Sisters v. Azar*, No. 1:13-cv-02611 (D. Colo. May 29, 2018), Dkt. 82 at 1-2 ("enforcement of the mandate against Plaintiffs, either through the accommodation or other regulatory means . . . violated and would violate the Religious Freedom Restoration Act");

- *Wheaton Coll. v. Azar*, No. 1:13-cv-8910 (N.D. Ill. Feb. 22, 2018), Dkt. 119 at 3 ("enforcement of the contraceptive mandate against Wheaton would violate Wheaton's rights under the Religious Freedom Restoration Act");

- *Reaching Souls Int'l, Inc. v. Azar*, No. 13-cv-01092 (W.D. Okla. Mar. 15, 2018), Dkt. 95 at 3-4 ("enforcement of the contraceptive mandate against Plaintiffs . . . violated and would violate RFRA");

- *Grace Sch. v. Azar,* No. 3:12-cv-00459 (N.D. Ind. June 1, 2018), Dkt. 114 at 3 ("[G]iven Defendants' concessions on the merits of Plaintiffs' RFRA claims, the Court agrees that Plaintiffs are entitled to a permanent injunction and declaratory relief, similar to the relief provided in substantively identical cases.");

A complete list is included in the Statement of Related Cases. These injunctions continue to bind the federal agencies.

d. Neither Geneva College *nor* Real Alternatives *forecloses a RFRA finding.*

The District Court mistakenly thought *Geneva College* and *Real Alternatives* precluded a finding of a RFRA violation. Appx.41-42. But neither does.

First, *Geneva College* was one of the decisions vacated by the Supreme Court in *Zubik*. *Zubik,* 136 S. Ct. at 1561. It thus has no precedential force in this Circuit. Indeed, in the *Geneva College* case itself, the District Court subsequently entered a permanent injunction on RFRA grounds. *Geneva Coll. v. Azar,* No. 2:12-cv-00207 (W.D. Pa. July 5, 2018), Dkt. 153. The panel decision in *Geneva College* thus is not even the law of the *case* in *Geneva College*; it is certainly not the law of the *circuit*, binding other courts or subsequent panels in other cases.

Second, nothing in *Real Alternatives* revived *Geneva College*. The only RFRA claim at issue in *Real Alternatives* concerned whether an *employee* might have a RFRA claim based on participation in a health plan that offers objectionable benefits. *Real Alternatives v. Sec'y Dep't Health & Human Servs.*, 867 F.3d 338, 354-55 (3d Cir. 2017). That RFRA claim is fundamentally different from the claim in *Geneva College* and here—that it violates RFRA to force *employers* to authorize and facilitate the provision of objectionable products on the plans they sponsor. *Id.* (calling employee claim "a question of first impression" and "distinct from an employer's RFRA claim objecting to the mandated provision" of coverage). Indeed, the majority in *Real Alternatives* specifically disclaimed

treating *Geneva College* as precedential, *id.* at 356 n.18 ("*Geneva* is no longer controlling"), and specifically distinguished the RFRA claim of the employees from that of an employer. *Id.* at 362 ("There is a material difference between employers arranging or providing an insurance plan that includes contraception coverage" and an employee's act of signing up for the plan).

Finally, the vacated opinion in *Geneva College* was procured on false pretenses, which the government later admitted. In particular, to obtain the *Geneva College* opinion, the agencies repeatedly told this Court that contraceptive coverage under the "accommodation" was *not* part of the religious organization's health plan. For example:

- "in all cases" contraceptive coverage "is provided separately from [the religious employer's] health coverage" (Br. for the Appellants, *Geneva Coll. v. Sebelius,* No. 14-1376, 2014 WL 2812346, at *1-2 (3d Cir. June 10, 2014), *vacated and remanded by Zubik,* 137 S. Ct. 1557);
- "separate payments" (*id.* at *8, 9, 17, 18, 22, 28, 35, 38);
- "through alternative mechanisms" (*id.* at *8);
- "through other means" (*id.* at *38).

The *Geneva College* panel accepted these representations as true and relied on them in making its substantial burden holding. *See Geneva Coll. v. Sec'y Dep't Health & Human Servs.*, 778 F.3d 422, 439 (3d Cir.

2015) (coverage is "separate and apart from" religious employer's plan) (citation omitted).

At the Supreme Court, however, the agencies admitted that the accommodation "coverage" actually *is* "part of the same plan as the coverage provided by the employer." Br. for the Resp'ts at 38, *Zubik*, 136 S. Ct. 1557 (quotations omitted), https://bit.ly/2DiCj32; *see also* Tr. of Oral Arg. at 60-61, *Zubik*, 136 S. Ct. 1557 (admitting it is "one fair understanding of the case" that all services are "in the one insurance package"); *id.* at 61 (government "would be content" if Court would "assume a substantial burden" and rule only on strict scrutiny).

For these reasons, nothing in *Geneva College* or *Real Alternatives* forces this Court to put itself in the bizarre position of ordering the agencies to violate RFRA and the injunctions of dozens of other federal courts.

e. RFRA permits the government to accommodate religion even where not strictly mandated.

Even if the Fourth IFR had not been strictly mandated by RFRA, the agencies would still have discretion to create religious exemptions. RFRA itself gives the government discretion to create religious accommodations, up to the limits prescribed by the Establishment Clause.

RFRA "intru[des] at every level of government, displacing laws and *prohibiting official actions* of almost every description and regardless of subject matter," and its restrictions apply to "every agency *and official* of the Federal Government." *Mack v. Warden Loretto FCI*, 839 F.3d 286, 301 (3d Cir. 2016) (emphasis in original). Congress emphasized that RFRA should not be read "to authorize any government to burden any religious belief." 42 U.S.C. § 2000bb-3. RFRA's language is the inverse of the test used by the District Court, which treats RFRA as a ceiling on religious accommodation, holding that any exemption not mandated by RFRA is prohibited. Appx.39-40.

This reading is confirmed by RFRA's provision treating the Establishment Clause—not the substantial burden test—as the outer limit on exemptions: "Granting . . . exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter." 42 U.S.C. § 2000bb-4. RFRA thereby expresses Congress's intent to delegate to federal agencies some leeway to regulate, accommodating religion even in cases where RFRA might not strictly require a religious exemption.

This approach is consistent with longstanding Free Exercise and Establishment Clause precedent. The Supreme Court has long permitted the government to act to lift burdens on religious exercise, even when such accommodations are not constitutionally required. In *Corporation of the Presiding Bishop v. Amos*, the Supreme Court unanimously upheld Title VII's exclusion of religious organizations from the prohibition on religious discrimination. 483 U.S. 327 (1987). It did so regardless of the fact that the First Amendment does not require religious organizations to be exempt in all cases. *Id.* at 334-35. Thus, the Fourth IFR is well within the discretion committed to HHS under the ACA and RFRA.

f. The Fourth IFR does not violate the Establishment or Equal Protection Clauses.

In the District Court, Pennsylvania went so far as to argue that the Fourth IFR violates the Establishment and Equal Protection Clauses. The District Court did not reach these arguments, which was wise given that Pennsylvania lacks standing to bring such claims. *See supra* Part I. Even if it had standing, its claims are frivolous. Over six years of hard-fought litigation, neither the Obama Administration, nor the lower federal courts, nor any Supreme Court Justice took the view that granting relief to religious organizations would violate the Establishment Clause.

And with good reason: the IFR easily passes Establishment Clause muster under any test.

First, "the Establishment Clause *must* be interpreted 'by reference to historical practices and understandings.'" *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (quoting *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989)) (emphasis added). There is no historical evidence supporting the notion that a narrow exemption to the mandate would be an establishment of religion. To the contrary, history supports religious exemptions, even when they are broader than necessary to comport with the Free Exercise Clause. Religious accommodations "fit[] within the tradition long followed" in our nation's history. *Id.* at 1820.[18] Indeed, avoiding what would historically have been understood as an "establishment" in some cases *requires* broad exemptions for religious entities. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (Establishment Clause forbids government from interfering in the selection of ministers).

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[18] *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

Even under the *Lemon* test, the Supreme Court has long recognized that accommodation of religion is a permissible secular purpose, which does not advance or endorse religion, and which avoids, rather than creates, entanglement with religion. The leading case is *Amos*. There, the Supreme Court *unanimously* upheld Title VII's religious exemption, concluding that the "government acts with [a] proper purpose" when it "lift[s] a regulation that burdens the exercise of religion." *Amos*, 483 U.S. at 338. The same is true here. HHS is not "advanc[ing] religion through its own activities and influence." *Id.* at 337. It would merely be lifting a severe governmental burden on private religious exercise. Such religious accommodations are not just permissible under the Establishment Clause, they "follow[] the best of our traditions." *Zorach v. Clauson,* 343 U.S. 306, 314 (1952).

Pennsylvania's equal protection argument also fails. The IFRs make no sex classification. It is the underlying mandate, which the Commonwealth is here to *enforce*, that creates differential rights based on sex. The Little Sisters and other religious groups cannot participate in (for example) the sterilization of either men or women. But they only need a religious exemption from the latter because that is all Pennsylvania is

seeking to force them to provide. Pennsylvania's theory, if correct, would mean that the Supreme Court violated equal protection when it granted exemptions to the same mandate in *Little Sisters of the Poor v. Sebelius* and *Zubik*. Those orders—each issued without dissent—provided exemptions only as to women's preventive services, just like the IFR. No Justice in either case—or even in *Hobby Lobby*—so much as mentioned an equal protection violation, nor did the Obama Administration ever even argue that the requested relief would create one.

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The regulations here are fully consistent with—and in fact mandated by—RFRA. But religious exemptions should not be limited to those mandated by RFRA. That rule would be nearly impossible for agencies to follow *ex ante*, because they would have to be able to precisely predict their future RFRA losses in order to be allowed to remove burdens on religion. It is preposterous to think that Congress intended to impose so stingy a system in a statute designed to protect religious liberty broadly.

But even if it did, this would be the rare case where that rule would be satisfied. Because the agencies did not have to *guess* at whether they

would lose RFRA claims after their concessions in *Zubik*; they had litigated the cases for years, knew well that they could no longer sustain their legal arguments, gave up those arguments at the Supreme Court, and have subsequently lost again and again. Pennsylvania's suggestion that this was not enough—that the APA instead requires the federal government to keep running into the buzzsaw of meritorious RFRA claims forever—makes no sense.

III. Pennsylvania cannot satisfy the remaining injunction factors.

A. Pennsylvania is not suffering irreparable harm.

Pennsylvania also must show a preliminary injunction is necessary to prevent "irreparable harm" before the merits decision, that is, "harm that cannot adequately be compensated after the fact by monetary damages." *Adams*, 204 F.3d at 484-85. The risk of "irreparable harm" must be "significant," not "speculative." *Id.* at 484-85, 488. "This is not an easy burden." *Id.* Because Pennsylvania cannot establish any cognizable injury, *see supra* Part I, they necessarily cannot establish an irreparable harm.

Pennsylvania has not identified even one employer which will drop contraceptive coverage due to the IFR, nor has it identified any women

who would fall into the exceedingly narrow category of women who would choose to forego their employer's insurance coverage and rely upon state assistance for an unintended pregnancy.

Nor can Pennsylvania rely upon wholly speculative predictions of harm to establish entitlement to an injunction. The District Court relied upon hypotheticals about denial of coverage and warned of the dire consequences that would result from the IFRs going into effect. Appx.36-37, 43-48. The court's opinion ignores the seven-year history of the mandate and its legal battles. The slippery slope argument has been advanced against every challenge to the mandate, and has proven false every time.

Most notably, the Supreme Court rejected this claim in *Hobby Lobby*. 134 S. Ct. at 2783 ("Nor has HHS provided evidence that any significant number of employers sought exemption, on religious grounds, from any of ACA's coverage requirements other than the contraceptive mandate."). There, the dissent predicted a number of consequences, raising the specter of exemption claims by "employers with religiously grounded objections to . . . [1] blood transfusions (Jehovah's Witnesses); [2] antidepressants (Scientologists); [3] medications derived from pigs, includ-

ing anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and [4] vaccinations (Christian Scientists, among others)." *Hobby Lobby*, 134 S. Ct. at 2805. But those claims never materialized.

Searches of post-*Hobby Lobby* cases underscore this fact. A search for federal and state decisions involving employers seeking to avoid covering blood transfusions turns up no results. A search for federal and state decisions involving employers seeking to avoid covering antidepressants likewise turns up no results. A search for federal and state decisions involving employers seeking to avoid covering pork-derived products turns up no results. And finally, a search of federal and state decisions involving employers seeking to avoid covering vaccines turns up no results. In fact, each search turns up two kinds of cases: (1) cases which have nothing to do with employer health coverage, and (2) other contraceptive mandate cases discussing these dire predictions.

It has been four years since *Hobby Lobby*, and the horribles have not paraded. It is incumbent upon the plaintiff seeking a nationwide injunction to demonstrate that their fears of endless religious objection claims will come true. Pennsylvania cannot.

Even fears about lack of contraceptive coverage are overblown. Contraceptive coverage was widespread prior to the mandate, as the IOM acknowledged. The IOM found that "the vast majority of health plans cover contraceptives,"—89% of insurance plans included contraceptive coverage. Institute of Medicine, *supra* n.2, at 49. If 89% of plans covered contraceptives *before* the mandate, where is Plaintiffs' proof that many employers will choose to fake objections—thus risking fines—due to the IFRs? Indeed, the IFRs had already been in effect for two months before the injunction was granted, and yet the record is devoid of evidence of any employer, other than those like the Little Sisters who had already challenged the mandate, who had taken advantage of it. A Guttmacher study performed in 2017 actually found that contraceptive use among sexually active women had remained constant—not increased—after the mandate went into effect.[19] This is unsurprising given the many ex-

[19] Jonathan Bearak & Rachel K. Jones, *Did Contraceptive Use Patterns Change After the Affordable Care Act? A Descriptive Analysis*, Guttmacher Institute (Mar. 13, 2017), https://bit.ly/2NyhHIR ("We observed no changes in contraceptive use patterns among sexually active women.").

ceptions to the mandate and the widespread availability of contraceptive coverage prior to the mandate.

B. The public interest and the balance of the equities favor broad protection of religious exercise.

Unlike the speculative harms asserted by Pennsylvania, enjoining the accommodation will impinge the religious freedom of the Little Sisters. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The same is true of violations of RFRA. *See, e.g.*, *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("[A] plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA."). Therefore the public interest is in favor of broad protection for religious exercise.

This strong interest in fundamental freedoms, coupled with the lack of demonstrated harm if the IFR goes into effect, shows that the balance favors the IFR and religious objectors like the Little Sisters. The arguments here are similar to those in *Hobby Lobby*, where the Supreme Court found that it was actually the government's position that would lead to "intolerable consequences": 'Under HHS's view, RFRA would permit the Government to require all employers to provide coverage for

any medical procedure allowed by law in the jurisdiction in question—for instance, third-trimester abortions or assisted suicide." *Hobby Lobby*, 134 S. Ct. at 2783. Indeed, given the District Court's construction of substantial burden, the government could impose a third-trimester abortion "accommodation" or an assisted suicide "accommodation," and the Little Sisters would be powerless to fight it, since the accommodation would defeat any RFRA claim. *See* Appx.41-42 (no substantial burden). The danger in this case arises not from a sensible religious accommodation, but from inconsistent judicial decisions which first authorize the government to trample on religious freedom, then tie its hands when it attempts to fix the problem. After seven years, the government arrived at a win-win solution in which most employers provide contraceptive coverage, but the burden is lifted from religious employers, and employees may choose from a broad range of alternatives. This Court should reject Pennsylvania's belated attempt to dictate federal policy via nationwide injunction.

CONCLUSION

Pennsylvania lacks standing, so the decision below should be vacated and the case remanded with instructions to dismiss. If the Court

reaches the merits, it should find that Pennsylvania has not met any of the criteria to justify a preliminary injunction, and so the decision below should be reversed.

Dated: September 21, 2018

Respectfully submitted,

/s/ Mark Rienzi

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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.

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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 12,366 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 Century Schoolbook 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 the latest version of Bitdefender Endpoint Security has been run on the file containing the electronic version of this brief and no virus has been detected.

Executed this 21st day of September 2018.

/s/ Mark Rienzi
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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 the counsel of record for the parties. I further certify that all parties to this case are represented by counsel of record who are CM/ECF participants.

Executed this 21st day of September, 2018.

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