No. ____

In the Supreme Court of the United States

THE LITTLE SISTERS OF THE POOR
SAINTS PETER AND PAUL HOME,

Petitioner,

v.

THE COMMONWEALTH OF PENNSYLVANIA AND
THE STATE OF NEW JERSEY, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Since 2011, federal courts have repeatedly considered whether forcing religious objectors to provide health plans that include contraceptive coverage violates the Religious Freedom Restoration Act (RFRA). Over and over again, this Court has reviewed these cases on an emergency basis or on the merits. Yet it has never definitively resolved the RFRA dispute. In 2016, an eight-Justice Court in *Zubik* v. *Burwell* did not reach the RFRA question and instead remanded for the parties to try to reach a resolution, on the evident assumption that the executive branch possessed the power to provide broader accommodations and/or exemptions. After months of negotiations (and an intervening election), the agencies finally agreed to promulgate new rules providing a broader exemption, seemingly bringing an end to this long-running dispute.

Those new rules were challenged, however, by several states, resulting in a nationwide injunction on the theory that RFRA and the Affordable Care Act not only do not require, but do not even *allow*, the religious exemption rules. That nationwide injunction has stagnated other cases, and it conflicts with the judgments of many courts that have issued final orders affirmatively *requiring* comparable exemptions under RFRA. The rights of religious objectors—including the Little Sisters' right to defend an exemption—remain very much at issue.

The questions presented are:

1. Whether a litigant who is directly protected by an administrative rule and has been allowed to intervene to defend it lacks standing to appeal

a decision invalidating the rule if the litigant is also protected by an injunction from a different court?

2. Whether the federal government lawfully exempted religious objectors from the regulatory requirement to provide health plans that include contraceptive coverage?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner, the Little Sisters of the Poor Saints Peter and Paul Home, located in Pittsburgh, was defendant-intervenor-appellant below (Little Sisters). The Little Sisters do not have any parent entities and do not issue stock.

The State Respondents are the Commonwealth of Pennsylvania and the State of New Jersey, who were plaintiffs-appellees below.

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

RELATED PROCEEDINGS

Counsel is aware of no directly related proceedings arising from the same trial court case as this case other than those proceedings appealed here.

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INTRODUCTION

Since late 2013, this Court has repeatedly been presented with questions concerning the relationship between the federal contraceptive mandate and the Religious Freedom Restoration Act (RFRA) and the adequacy of ever-evolving government treatment of religious objectors. In a series of emergency orders, the Court protected religious non-profits from facing large fines for noncompliance, but repeatedly refrained from expressing any definitive view on the merits of their RFRA claims.

In its 2014 *Hobby Lobby* decision, the Court discussed the regulatory mechanism available to religious non-profits as one of several less restrictive alternatives to the mandate's treatment of religious for-profits. The Court understood that there were ongoing challenges to the sufficiency of that mechanism under RFRA, and it emphasized that it was not deciding whether it was sufficient for those who object to it. Nonetheless, by pointing to it as a potential less restrictive alternative, the Court seemed to assume that the executive branch had ample power to promulgate some sort of religious accommodation.

In the fall of 2015, as scores of cases involving religious non-profits worked their way through the courts, the Court granted certiorari to decide the RFRA question. But there too the Court demurred: the unanimous eight-Justice per curiam decision in *Zubik* noted the "substantial clarification and refinement" of the parties' positions and remanded for the parties to explore a resolution. Once again, the Court seemed to assume ample authority on the part of the executive to

accommodate religious exercise broadly enough to bring the litigation to an end.

Three years later, however, it is clear that the litigation will not end unless and until this Court provides definitive guidance on the RFRA question. After months of negotiations prompted by the *Zubik* remand (and an intervening election), the government finally acknowledged the RFRA problems with the regulatory mechanism and changed its rules to provide the full-blown religious exemption petitioners had been seeking for years, while expanding the provision of contraceptives in other ways. But rather than end this long-running litigation, the government's admirable effort to accommodate religious liberty prompted a new round of challenges by states. Those states took the extraordinary position that RFRA not only does not require, but does not even allow, the government to promulgate a broader religious exemption to protect religious objectors like petitioners. Even more remarkable, that position prevailed below, resulting in a nationwide injunction preventing the government from doing what RFRA requires and what our Nation's constitutional traditions applaud—namely, accommodating sincerely held religious beliefs.

This latest round of litigation makes clear that this Court must once more address RFRA and the contraceptive mandate and that there is no substitute for this Court definitely resolving the long-pending RFRA question once and for all. The decision below holds that the government can only accommodate religious exercise when it must, and cannot provide an exemption to petitioners because the pre-existing regulatory mechanism did not violate RFRA. That is doubly wrong and resuscitates the circuit split this Court

granted certiorari to resolve in *Zubik*. Only this Court can bring this litigation to a close and provide the protection promised by RFRA.

OPINIONS BELOW

The court of appeals' decision (Appendix (App.) 1a-53a) is reported at 930 F.3d 543, as amended. The district court's opinion granting a nationwide preliminary injunction against the interim final rules (App.138a-192a) is reported at 281 F. Supp. 3d 553, and its opinion granting a comparable injunction against the final rules (App.57a-137a) is reported at 351 F. Supp. 3d 791.

JURISDICTION

The court of appeals entered judgment on July 12, 2019. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory provisions are reproduced in Appendix G (App.202a-235a): 42 U.S.C. 2000bb-1, 42 U.S.C. 300gg-13, 29 U.S.C. 1185d, 26 U.S.C. 4980D, 26 U.S.C. 4980H, 26 U.S.C. 5000A, 45 C.F.R. 147.132.

STATEMENT

Litigation over the contraceptive mandate regulations has been ongoing for eight years and counting, since the mandate was first promulgated in August 2011 with insufficient consideration of its impact on religious objectors. The litigation can be divided into three main phases: (1) creation of the mandate until *Hobby Lobby* and *Wheaton*; (2) from *Hobby Lobby* and

Wheaton until *Zubik*; and (3) from *Zubik* until the present.

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

A. Federal agencies create the contraceptive mandate and some exemptions

The Affordable Care Act requires a significant subset of employers to offer health coverage that includes "preventive care and screenings" for women. The majority of employers—namely, those with fewer than 50 employees—are not required to provide health coverage at all, and so need not comply with that mandate. See 26 U.S.C. 4980H(c)(2); Kaiser Family Found., *Employer Health Benefits 2018 Annual Survey* 45 (2018), https://perma.cc/XM2A-JK2W ("most firms in the country are small" and only 56% of small firms offer health benefits). And approximately a fifth of large employers are exempt from the preventive care mandate through the ACA's exception for "grandfathered health plans." See 42 U.S.C. 18011; 75 Fed. Reg. 34,538, 34,542 (June 17, 2010); Kaiser Family Found., *Employer Health Benefits 2018 Annual Survey* 209 (2018), https://perma.cc/U4FS-VB6C.[1] But employers who do not fall into those large categories must comply with the mandate or face fines that can quickly reach millions of dollars per year.[2]

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[1] 26 U.S.C. 5000A(f)(2); 26 U.S.C. 4980H(a), (c)(2); 42 U.S.C. 300gg-13(a)(4); 29 U.S.C. 1185D.

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

The ACA does not define "preventive care," but rather leaves that determination to the Health Resources and Service Administration (HRSA), part of the Department of Health and Human Services (HHS). 42 U.S.C. 300gg-13(a)(4). HHS has defined the substance and scope of that requirement through multiple rulemakings and website postings.

First, HHS issued an interim final rule (IFR) that clarified cost-sharing and sought recommendations on preventive care from the Institute of Medicine. 75 Fed. Reg. 41,726, 41,728 (July 19, 2010) (First IFR). Second, HHS issued an IFR giving affected employers one year to comply with the preventive care mandate and mandating coverage of items contained in HRSA's guidelines. 76 Fed. Reg. 46,621 (Aug. 3, 2011) (Second IFR). HRSA's guidelines were not part of that IFR, but were contemporaneously published on an agency website. HRSA, *Women's Preventive Services Guidelines*, U.S. Dep't of Health & Human Servs. (Aug. 2011), https://perma.cc/A8G8-NUMW. For certain employers, those guidelines required coverage for all FDA-approved female contraceptives.[3] HRSA, *Women's Preventive Services Guidelines*.

In the Second IFR and in the guidelines, HHS exempted a narrow subset of religious employers, determining that "it is appropriate to amend the interim final rules to provide HRSA the discretion to exempt from its guidelines group health plans maintained by

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[3] 'Contraceptives' here includes sterilization and four contraceptive methods that many "who believe that life begins at conception regard * * * as causing abortion." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 698 n.7 (2014).

certain religious employers where contraceptive services are concerned." 76 Fed. Reg. at 46,625.

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

Several religious employers who did not qualify for the exemption filed lawsuits seeking protection under RFRA, 42 U.S.C. 2000bb. See, *e.g.*, *Belmont Abbey Coll.* v. *Sebelius*, 878 F. Supp. 2d 25, 33 (D.D.C. 2012) (complaint filed November 2011); *Eternal Word Television Network, Inc.* v. *Sebelius*, 935 F. Supp. 2d 1196, 1207 (N.D. Ala. 2013) (complaint filed February 2012). The Little Sisters homes from Denver and Baltimore, along with their plan and plan administrator, Christian Brothers Employee Benefit Trust and Christian Brothers Services, were part of a class action filed on September 24, 2013. Complaint, *Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Sebelius*, 6 F. Supp. 3d 1225 (D. Colo. 2013) (No. 13-2611). The Little Sisters Pittsburgh home currently uses the Christian Brothers plan.

After lawsuits and thousands of public comments, in early 2012, HHS "finaliz[ed], without change," the Second IFR, 77 Fed. Reg. 8725 (Feb. 15, 2012), then began a new rulemaking focused upon the religious exemption, 77 Fed. Reg. 16,501 (Mar. 21, 2012). While that rulemaking was ongoing, HHS delayed enforcement of the Second IFR against certain non-profit religious employers via a bulletin posted on an agency website. *Id.* at 16,502-16,503. As a result of the pending rulemaking, most lawsuits by religious non-profit employers were dismissed as unripe or delayed. See, *e.g.*, *Wheaton Coll.* v. *Sebelius*, 703 F.3d 551, 553 (D.C. Cir. 2012) (holding case "in abeyance pending the new

rule that the government has promised"). But HHS made no delays or exceptions for for-profit businesses, several of whom had filed lawsuits against the Second IFR. The for-profit challenges were thus one year ahead of the non-profit challenges.

In July 2013, the agencies issued a final rule regarding religious employers. 78 Fed. Reg. 39,870 (July 2, 2013). The final rule created a three-tiered system: (1) a full exemption for churches and some religious orders, (2) an "accommodation" for certain religious non-profit employers, and (3) no exemptions for religious for-profit employers. See *id.* at 39,873-39,875. With regard to (2), the so-called "accommodation," the agencies created an alternative regulatory mechanism by which non-exempt religious non-profits could comply with the contraceptive mandate. A non-exempt religious employer was "considered to comply with" Section 4980D "if it provides to all third party administrators with which it or its plan has contracted a copy of its self-certification" form. Upon receiving the form, the administrator would then provide the contraceptives. 78 Fed. Reg. at 39,874, 39,879, 39,892-39,893.

Shortly after that rule was promulgated, this Court granted certiorari in two cases involving religious business owners. While those cases were pending, this Court granted emergency relief to the Little Sisters in their challenge to the regulatory mechanism, without addressing the merits. *Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Sebelius*, 571 U.S. 1171 (2014) ("this order should not be construed as an expression of the Court's views on the merits").

On June 30, 2014, this Court ruled in favor of Hobby Lobby and Conestoga, holding that forcing

them to comply with the mandate would violate RFRA. In so holding, the Court pointed to the regulatory mechanism as among the available less restrictive alternatives, while noting—without resolving—the ongoing challenges to the sufficiency of that mechanism under RFRA. *Hobby Lobby*, 573 U.S. at 731 ("We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims."). Thus, while the Court implicitly assumed that the executive branch had ample authority to promulgate the regulatory mechanism, it expressly reserved judgment on whether that mechanism was sufficient under RFRA. Four days later, the Court granted emergency relief to Wheaton College, which was challenging the regulatory mechanism, again without deciding the RFRA question. *Wheaton Coll.* v. *Burwell*, 573 U.S. 958 (2014) ("this order should not be construed as an expression of the Court's views on the merits").

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

In response to these rulings, the agencies issued a third IFR, which modified the regulatory mechanism "in light of the Supreme Court's interim order" in *Wheaton*. 79 Fed. Reg. 51,092 (Aug. 27, 2014) (Third IFR). The same day, responding to the *Hobby Lobby* decision, the agencies began a rulemaking to allow some closely-held businesses to use the same regulatory mechanism. *Id.* at 51,094. The Third IFR was finalized on July 14, 2015. 80 Fed. Reg. 41,318 (July 14, 2015).

In the Third IFR, the government did *not* exempt objecting religious non-profit employers, but rather continued to require them to comply via the regulatory

mechanism. The cases challenging that mechanism therefore continued. This Court granted emergency relief again, while again reserving judgment on the merits. See *Zubik* v. *Burwell*, 135 S. Ct. 2924 (mem.) (2015) ("This order should not be construed as an expression of the Court's views on the merits."). In November 2015, it granted certiorari and consolidated seven cases challenging the regulatory mechanism.

The eight-member Court heard argument in March 2016, and shortly thereafter took the unusual step of requiring additional briefing on whether the regulatory mechanism could be further modified to resolve the dispute. See *Zubik*, 194 L. Ed. 2d 599 (Mar. 29, 2016). Over the course of briefing and argument, the government made several key concessions.

First, the government admitted that contraceptive coverage, rather than being provided as a "separate" plan under the regulatory mechanism, must be "part of the same plan as the coverage provided by the employer," Br. for the Resp'ts at 38, *Zubik*, 136 S. Ct. 1557 (Br. for the Resp'ts) (internal quotation marks and citation omitted), https://perma.cc/A63A-V7HY; Tr. of Oral Arg. at 60-61, *Zubik*, 136 S. Ct. 1557 (Tr. of Oral Arg.) https://perma.cc/9ZF6-9ZC4 (Chief Justice Roberts: "You want the coverage for contraceptive services to be provided * * * in one insurance package. * * * Is that a fair understanding of the case?"; Solicitor General Verrilli: "I think it is one fair understanding of the case.").

Second, the agencies admitted 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.

Third, in its supplemental brief, the government acknowledged that the contraceptive mandate regulations "could be modified" to be more protective of religious liberty. Suppl. Br. for the Resp'ts at 14-15, *Zubik*, 136 S. Ct. 1557 (Suppl. Br. for the Resp'ts), https://perma.cc/9BEL-HCT7.

In light of "the substantial clarification and refinement in the positions of the parties," this Court issued a per curiam order vacating the decisions of the courts that had rejected RFRA challenges to the regulatory mechanism. *Zubik* v. *Burwell*, 136 S. Ct. 1557, 1560-1561 (2016). The Court ordered the government not to impose taxes or penalties on the petitioners for failure to comply with the contraceptive mandate and remanded the cases to afford the parties "an opportunity to arrive at an approach going forward" that would resolve the dispute. *Id.* at 1560. The Court again emphasized that it was not deciding the RFRA question. *Ibid.* ("The Court expresses no view on the merits of the cases."). But its order assumed that the executive branch had ample authority, independent of a court order, to adopt an approach that would resolve the dispute.

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

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

After the *Zubik* order, the agencies issued a Request for Information (RFI) on potential ways to modify the regulatory mechanism. 81 Fed. Reg. 47,741

(July 22, 2016). Neither Pennsylvania nor New Jersey—nor, to counsel's knowledge, any other state—filed comments asserting that the federal government was powerless to expand the exemption. The parties, including representatives of petitioners, met with the government to pursue a path forward. No rulemaking resulted from that RFI, and on January 9, 2017—two months after the 2016 presidential election and just eleven days before Inauguration Day—HHS stated on its website that it had determined it was infeasible to modify the regulatory mechanism. U.S. Dep't of Labor, *FAQs About Affordable Care Act Implementation Part 36* (Jan. 9, 2017), https://perma.cc/R3LN-CMSH.

With a change in administration, however, the effort to fashion a broader religious accommodation continued. In May 2017, an executive order directed the agencies to consider alternatives to the regulatory mechanism. Exec. Order No. 13,798, Promoting Free Speech and Religious Liberty, 82 Fed. Reg. 21,675 (May 4, 2017). In October 2017, the agencies modified the contraceptive mandate regulations by issuing two interim final rules, the Fourth and Fifth IFRs. 82 Fed. Reg. 47,792 (Oct. 13, 2017) (Fourth IFR); 82 Fed. Reg. 47,838 (Oct. 13, 2017) (Fifth IFR).

The Fourth IFR did what the Little Sisters had long sought: it expanded the religious exemption to apply to a broader group of religious objectors, including the Little Sisters. See, *e.g.*, 45 C.F.R. 147.132. The Fifth IFR provided a similar exemption to employers with moral objections.[4] The Fourth and Fifth IFRs

[4] Many of the arguments presented here are relevant to both the religious exemption (the Fourth IFR) and the moral exemption

otherwise left the contraceptive mandate regulations in place as to all employers previously covered. *Ibid.*

In the Fourth IFR, the agencies explained that the IFR was prompted by this Court's order in *Zubik* and the need to resolve the ongoing litigation by religious objectors. 82 Fed. Reg. at 47,796-47,799. The agencies engaged in a lengthy analysis of their RFRA obligations and concluded, based in part upon the concessions before this Court and the information gathered in the RFI process, that RFRA compelled them to broaden the religious exemption. *Id.* at 47,799-47,806.

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

The IFRs were announced on October 6, 2017, and were published in the Federal Register one week later. See 82 Fed. Reg. 47,792 (Oct. 13, 2017). Pennsylvania did not even await their publication before filing this lawsuit challenging them. Compl., *Pennsylvania* v. *Trump*, No. 2:17-cv-4540 (E.D. Pa. Oct. 11, 2017), Dkt. No. 1. Pennsylvania sought a nationwide preliminary injunction, alleging that the Fourth and Fifth IFR violate the APA and Title VII, as well as the Constitution's Equal Protection and Establishment Clauses. The district court had jurisdiction under 28 U.S.C. 1331.

Because Pennsylvania's suit sought to invalidate an exemption that the Little Sisters have long sought and directly benefited them, the Little Sisters moved

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(the Fifth IFR), but the Little Sisters address only the religious exemption here.

to intervene. The district court denied that motion, *Pennsylvania* v. *Trump*, No. 17-cv-4540, 2017 WL 6206133 (E.D. Pa. Dec. 8, 2017), but the Third Circuit reversed, concluding that the Little Sisters "have a significantly protectable interest in the religious exemption" that the IFRs provide. *Commonwealth of Pennsylvania* v. *President United States of Am.*, 888 F.3d 52, 58 (3d Cir. 2018).

In the meantime, the district court ruled on the merits, holding, *inter alia*, that Pennsylvania was likely to succeed on its argument that the IFRs are neither compelled nor permitted by RFRA because the regulatory mechanism provided in earlier IFRs does not impose a substantial burden on religious exercise. App.180a-183a. And while the only plaintiff before the court was Pennsylvania and litigation was pending elsewhere, the court issued a nationwide preliminary injunction prohibiting enforcement of the IFRs and effectively compelling the agencies to resurrect the regulatory mechanism. App.193a-195a.[5]

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[5] In separate litigation, California and four other states sought and obtained a nationwide preliminary injunction against the Fourth and Fifth IFRs, which was narrowed by the Ninth Circuit. *California* v. *Health & Human Servs.*, 281 F. Supp. 3d 806 (N.D. Cal. 2017); *California* v. *Azar*, 911 F.3d 558 (9th Cir. 2018), cert. denied *sub nom. Little Sisters of the Poor Jeanne Jugan Residence* v. *California*, 129 S. Ct. 2716 (2019). Upon nine additional states joining that lawsuit and challenging the Final Rules, the district court granted a second preliminary injunction in January 2019, applicable in 14 plaintiff states. *California* v. *Health & Human Servs.*, 351 F. Supp. 3d 1267 (N.D. Cal. 2019); appeal docketed, Nos. 19-15072, 19-15118, 19-15150 (9th Cir. Jan. 14, 2019). In that court, motions for summary judgment are fully briefed, but the judge cancelled a September 5 hearing, "not[ing] that there is

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

The Fourth IFR was prompted in part to resolve the still-pending claims of religious employers like the Little Sisters who objected to the regulatory mechanism. See 82 Fed. Reg. at 47,798-47,800. But once the new IFRs were enjoined, those objectors who had not yet resolved their cases were no longer able to rely on the new rules and so were forced to continue to litigate. Ultimately, that litigation resulted in sixteen permanent injunctions *against* the prior versions of the contraceptive mandate regulations—the same versions that the district court reinstated below.[6]

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a nationwide injunction currently in place." Order, *California* v. *Health & Human Servs.*, No. 4:17-cv-05783-HSG (N.D. Cal. Aug. 30, 2019), Dkt. No. 396. In another similar case, the First Circuit overturned a summary judgment ruling in favor of the agencies on standing. *Massachusetts* v. *Health & Human Servs.*, 923 F.3d 209 (1st Cir. May 2, 2019).

[6] See Order, *Association of Christian Sch.* v. *Azar*, No. 1:14-cv-02966 (D. Colo. Dec. 10, 2018), Dkt. No. 49; Order, *Ave Maria Sch. of Law* v. *Sebelius*, No. 2:13-cv-00795 (M.D. Fla. Jul. 11, 2018), Dkt. No. 68; Order, *Ave Maria Univ.* v. *Sebelius*, No. 2:13-cv-00630 (M.D. Fla. Jul. 11, 2018), Dkt. No. 72; Order, *Catholic Benefits Ass'n LCA* v. *Hargan*, No. 5:14-cv-00240 (W.D. Okla. Mar. 7, 2018), Dkt. No. 184; Order, *Christian Emp'rs All.* v. *Azar*, No. 3:16-cv-00309 (D.N.D. May 15, 2019), Dkt. No. 53; Order, *Colorado Christian Univ.* v. *Health & Human Servs.*, No. 1:13-cv-02105 (D. Colo. Jul. 11, 2018), Dkt. No. 84; Order, *DeOtte* v. *Azar*, No. 4:18-cv-00825 (N.D. Tex. June 5, 2019), Dkt. No. 76, appeal docketed by putative intervenor, No. 19-10754 (5th Cir. July 5, 2019); Order, *Dobson* v. *Azar*, No. 13-cv-03326 (D. Colo. Mar. 26, 2019), Dkt. No. 61; Order, *Dordt Coll.* v. *Azar*, No. 5:13-cv-04100

These new injunctions joined dozens of similar injunctions issued to for-profit business owners in the wake of *Hobby Lobby*, and additional permanent injunctions against the regulatory mechanism for nonprofits issued before 2017.[7] These injunctions continue to bind the agencies and prohibit them from enforcing as to certain religious employers the very regulatory mechanism that the district court in this case resurrected nationwide.

(N.D. Iowa June 12, 2018), Dkt. No. 85; Order, *Geneva Coll.* v. *Sebelius*, No. 2:12-cv-00207 (W.D. Pa. Jul. 5, 2018), Dkt. No. 153; Order, *Grace Sch.* v. *Azar*, No. 3:12-cv-00459 (N.D. Ind. June 1, 2018), Dkt. No. 114; Order, *Little Sisters of the Poor* v. *Azar*, No. 1:13-cv-02611 (D. Colo. May 29, 2018), Dkt. No. 82; Order, *Reaching Souls Int'l Inc.* v. *Azar*, No. 5:13-cv-01092 (W.D. Okla. Mar. 15, 2018), Dkt. No. 95; Judgment Order, *Sharpe Holdings, Inc.* v. *Health & Human Servs.*, No. 2:12-cv-00092 (E.D. Mo. Mar. 28, 2018), Dkt. No. 161; Order, *Southern Nazarene Univ.* v. *Hargan*, No. 5:13-cv-01015 (W.D. Okla. May 15, 2018), Dkt. No. 109; Order, *Wheaton Coll.* v. *Azar*, No. 1:13-cv-08910 (N.D. Ill. Feb. 22, 2018), Dkt. No. 119.

[7] See, *e.g.*, Amended Final Judgment, *Armstrong* v. *Sebelius*, No. 1:13-cv-00563 (D. Colo. Oct. 7, 2014), Dkt. No. 82; Order, *Conestoga Wood Specialties Corp.* v. *Burwell*, No. 5:12-cv-06744 (E.D. Pa. Oct. 2, 2014), Dkt. No. 82; Order, *Gilardi* v. *Health & Human Servs.*, No. 1:13-cv-00104 (D.D.C. Oct. 20, 2014), Dkt. No. 49; Order, *Hobby Lobby Stores, Inc.* v. *Sebelius*, No. 5:12-cv-01000, 2014 WL 6603399 (W.D. Okla. Nov. 19, 2014), Dkt. No. 98; Order of Injunction, *Korte* v. *Health & Human Servs.*, No. 3:12-cv-1072 (S.D. Ill. Nov. 7, 2014), Dkt. No. 89; Order, *March for Life* v. *Burwell*, No. 1:14-cv-01149 (D.D.C. Aug. 31, 2015), Dkt. No. 31; Order, *Tyndale House Publishers, Inc.* v. *Burwell*, No. 1:12-cv-01635 (D.D.C. Jul. 15, 2015), Dkt. No. 53; Order, *Zubik* v. *Sebelius*, No. 2:13-cv-01459 (W.D. Pa. Dec. 20, 2013), Dkt. No. 81.

Among those litigants who obtained permanent injunctions were the Little Sisters' Denver and Baltimore homes, as well as their Christian Brothers plan and plan administrator. That injunction prohibits the government from, among other things, enforcing the contraceptive mandate against any entity so long as it is on the Christian Brothers plan. Order at 2-3, *Little Sisters*, No. 1:13-cv-02611, Dkt. No. 82.

D. The Final Rule and the decisions below

While the appeal of the district court's preliminary injunction was pending, the agencies considered more than 56,000 comments on the Fourth IFR and ultimately memorialized the religious exemption in a final rule. 83 Fed. Reg. 57,536, 57,540 (Nov. 15, 2018) (Final Rule). Meanwhile, Pennsylvania filed an amended complaint adding New Jersey as a plaintiff and challenging the Final Rule. The district court granted a nationwide preliminary injunction against the Final Rule on the day it was set to take effect. App.126a-137a. The Little Sisters and the agencies filed appeals, which were consolidated with their prior appeals.

A new panel of the Third Circuit upheld the nationwide preliminary injunction. The panel held that the agencies lacked authority to issue the Final Rule because the ACA and RFRA neither require nor even permit the religious exemption. In light of the lack of any RFRA imperative to alter the regulatory mechanism, the panel held that the agencies did not have good cause or statutory authority to issue the IFRs without notice and comment, and that the failure to conduct notice and comment on the *interim* rules required invalidation of the *final* rule, even though it un-

derwent notice and comment. The Third Circuit upheld the nationwide scope of the injunction. App.49a-53a.

In a footnote, the panel held that even though a prior panel had allowed the Little Sisters to intervene to vindicate their right to an exemption and to defend rules that directly benefited them, the Little Sisters nonetheless lacked appellate standing because of the Colorado district court's injunction. App.15a n.6.

Following the Third Circuit's judgment, the district court stayed proceedings on summary judgment pending the filing of a petition for certiorari. App.201a.

REASONS FOR GRANTING THE PETITION

The decision below makes serious errors as to both appellate standing and the merits that cry out for this Court's review and correction. First, the decision unnecessarily and erroneously addressed petitioners' standing to appeal. Petitioners had already been granted intervention and appealed the district court's injunction alongside the government, whose standing has never been questioned. Under those circumstances, the Third Circuit was wrong to even address petitioners' standing to appeal, and it erred in finding it lacking just because petitioners might continue to benefit from an injunction in a different case. That injunction provides less protection than the Final Rule and is invalid under the RFRA analysis embraced by the Third Circuit. Thus, petitioners' stake in the Final Rule that directly protects their religious exercise is clear.

The Third Circuit's merits decision is flawed at every turn. First, the court has resurrected a regulatory mechanism that petitioners have long challenged

and that plainly violates RFRA. In the process, the decision effectively resuscitates the pre-*Zubik* circuit split. Worse still, the court arrived at that untenable result by embracing the novel theory that RFRA affords the government no leeway to alleviate potential burdens on religious exercise, but instead may be invoked only upon a showing of a RFRA violation. The court also invalidated a *final* rule that went through notice and comment on the theory that it was fatally infected by the agencies' failure to employ notice and comment before issuing an interim rule. And to top it all off, the court affirmed a nationwide injunction that effectively precludes other courts from considering these issues. By any measure, that extraordinary decision readily warrants this Court's review.

I. The Third Circuit's appellate standing ruling is both unnecessary and wrong.

The Third Circuit's attempt to deprive the Little Sisters of the right to challenge its decision is meritless. According to the panel, the Little Sisters lacked appellate standing because the they are "no longer aggrieved by the District Court's ruling" because of the injunction issued by the Colorado district court. App.15a n.6. The court was wrong to reach that question, and egregiously wrong in how it answered it.

As this Court recently reiterated, a party must demonstrate appellate standing only if it seeks to "invoke [a] court's jurisdiction." *Virginia House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). By contrast, when a party merely appears as "an intervenor in support of" another party that has undoubted standing, *ibid.*, it need not demonstrate, and a court need not assess, its standing to invoke jurisdiction or

seek the relief the principal party pursues. That holding comports with a long line of cases confirming that defendant-intervenors do not need to show standing unless they are going it alone. See, *e.g.*, *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 65 (1997); *Diamond* v. *Charles*, 476 U.S. 54, 64 (1986).

The Third Circuit thus should not have addressed whether the Little Sisters have appellate standing, as there is no question that the government—the party the Little Sisters intervened to support—had standing to appeal the district court's determination that the federal government lacked the power to grant the exemption the Little Sisters seek and the accompanying nationwide injunction. But in all events, the Third Circuit was flatly wrong to conclude that the Little Sisters lack standing.

To establish appellate standing, "a litigant must seek relief for an injury that affects him in a 'personal and individual way.' * * * He must possess a 'direct stake in the outcome' of the case." *Hollingsworth* v. *Perry*, 570 U.S. 693, 705 (2013) (citations omitted). The district court's decision (and the Third Circuit's decision affirming it) plainly affects the Little Sisters in a personal and individual way: it deprives them of the regulatory exemption to which they are otherwise entitled and holds that no such exemption is lawful. Contrary to the Third Circuit's contentions, the injunction issued by the Colorado court is not coterminous with that exemption. The Final Rule grants the Little Sisters an exemption that applies regardless of which plan or type of health coverage they provide; by contrast, the Colorado injunction protects them only so long as they remain on their current plan. Order at 2-3, *Little Sisters,* No. 1:13-cv-02611, Dkt. No. 82.

Equally important, the decision below is premised on a legal rule that RFRA does not compel—and federal law does not even *permit*—the exemption. App.43a-48a. That ruling is fundamentally inconsistent with the injunction, which is based on the opposite understanding of RFRA.

The Little Sisters' stake in this case thus is concrete and particularized. In fact, their interest is far more concrete and particularized than the interests of the plaintiff states. The states' injuries are premised upon speculation regarding the actions of multiple independent actors; indeed, the Third Circuit found that they had Article III standing even though they have "fail[ed] to identify a specific woman"—any woman—"who will be affected by the Final Rules." App.25a. If that speculative injury suffices to demonstrate standing, then surely the Little Sisters—one of the very entities that the exemption the states challenge protects—have standing as well.

II. The decision below is egregiously wrong and revives a circuit split this Court has repeatedly found warrants review.

A. The decision below resurrects an insufficient accommodation that violates RFRA.

The Final Rule should have marked the end of a long litigation battle concerning RFRA and the contraceptive mandate. In *Zubik,* this Court took the extraordinary step of preventing enforcement of the mandate against religious objectors like the Little Sisters, vacating decisions on both sides of a circuit split and remanding to give the parties an opportunity to fashion a more effective religious accommodation. Although those extraordinary actions obviated the need

for this Court to definitively decide what RFRA required, they were necessarily premised on the view that the agencies had ample power to provide broader accommodations and exemptions. The decision below, however, rejects that premise. It proceeds on the very different premise that the government can only provide exemptions and accommodations that are legally mandated, and cannot improve the accommodation at issue in *Zubik* because that regulatory mechanism is fully compliant with RFRA. Thus, in one fell swoop, the Third Circuit resurrected the pre-*Zubik* circuit split and adopted a miserly and incorrect view of the government's power to accommodate religious exercise under RFRA.

The Third Circuit's holding that the regulatory mechanism is fully compliant with RFRA not only resuscitates a circuit split, but is also fundamentally mistaken. The one thing RFRA cannot possibly tolerate is an "accommodation" of religious exercise that itself substantially burdens religion. Yet that is what the Third Circuit sanctioned. The court found the exemption provided by the Final Rule neither warranted nor even permitted because it concluded that the regulatory mechanism does not substantially burden religious exercise. App.42a-47a. In doing so, the Third Circuit employed the reasoning of all the same decisions *Zubik* vacated—including its own vacated decision in *Geneva College*. App.45a-46a (quoting *Geneva Coll.* v. *Secretary of U.S. Dep't of Health & Human*

Servs., 778 F.3d 422, 437-438 (3d Cir. 2015), vacated and remanded *sub nom. Zubik*, 136 S. Ct. 1557).[8]

By doubling down on its pre-*Zubik* reasoning, the Third Circuit's decision conflicts not only with pre-*Zubik* decisions holding that the regulatory mechanism violates RFRA,[9] but also with the numerous courts that have interpreted RFRA post-*Zubik* to require injunctions prohibiting the government from requiring religious objectors to utilize the regulatory mechanism.[10] Those injunctions are fundamentally incompatible both with the Third Circuit's reasoning and with the nationwide injunction it affirmed.

Making matters worse, the Third Circuit's decision ignores the implications of the government concessions that led this Court to vacate *Geneva College* and other decisions upholding the regulatory mechanism in *Zubik*. While the Third Circuit persists in the view that the contraceptives provided under the regulatory mechanism are "separate" and independent from a religious organization's health plan, see App.11a, the government conceded during the *Zubik* litigation before this Court that the regulatory mechanism in fact

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[8] See *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014); *Catholic Health Care Sys.* v. *Burwell*, 796 F.3d 207 (2d Cir. 2015); *East Tex. Baptist Univ* v. *Burwell*, 793 F.3d 449 (5th Cir. 2015); *Michigan Catholic Conference & Catholic Family Servs.* v. *Burwell*, 807 F.3d 738 (6th Cir. 2015); *University of Notre Dame* v. *Burwell*, 786 F.3d 606 (7th Cir. 2015).

[9] See, *e.g.*, *Sharpe Holdings, Inc.* v. *U.S. Dep't of Health & Human Servs.*, 801 F.3d 927 (8th Cir. 2015).

[10] See, *e.g.*, Order, *Wheaton Coll.*, No. 1:13-cv-08910, Dkt. No. 119; Order, *Little Sisters*, No. 1:13-cv-02611, Dkt. No. 82; Order, *DeOtte*, No. 4:18-cv-00825, Dkt. No. 76.

requires contraceptive coverage to be "in * * * one insurance package." Tr. of Oral Arg. at 60-61. See Br. for the Resp'ts at 38 (in self-insured plans, coverage is "part of the same 'plan' as the coverage provided by the employer"). The government also acknowledged that the contraceptive mandate regulations "could be modified" to avoid forcing religious organizations to carry the coverage themselves. Suppl. Br. for the Resp'ts at 14-15.

These concessions both weaken the government's ability to defend the regulatory mechanism and are part of what led the government to shift to an exemption. As the Fourth IFR explained, the pre-*Zubik* regulatory mechanism not only "constituted a substantial burden on the religious exercise of many" religious organizations, but "was not the least restrictive means of serving a compelling interest." 82 Fed. Reg. at 47,806. For example, noting this Court's admonition from *Hobby Lobby* that the "most straightforward" way for the government to promote contraceptive access is for the government to assume the cost itself, 82 Fed. Reg. at 47,797 (quoting *Hobby Lobby*, 573 U.S. at 728), the agencies explained that many federal programs already exist to provide contraceptives to low-income women. 82 Fed. Reg. at 47,803 (noting, as examples "among others," Medicaid, Title X, community health center grants, and TANF); see also 83 Fed. Reg. at 57,546. And HHS has recently clarified that women whose employers do not provide contraceptive services due to a "sincerely held religious or moral objection" can be eligible for subsidized contraception. 84 Fed. Reg. 7714, 7734 (Mar. 4, 2019) (clarifying "good reason" to qualify for "low-income family" status for purposes of contraceptive services).

Having recognized the existence and feasibility of these more "straightforward" ways of providing access, and having taken steps to *add* to them by clarifying Title X, the agencies had no choice but to concede that the regulatory mechanism is not the least restrictive way to provide contraceptive coverage and hence violates RFRA. Yet despite all that, the Third Circuit reached precisely the opposite conclusion. Rather than even address whether the agencies' concessions before this Court and in subsequent proceedings weakened any claim that the regulatory mechanism complies with RFRA, the Third Circuit adopted wholesale the analysis from its vacated 2015 *Geneva College* decision, which pre-dated all those developments. App.45a-46a. By doing so, the court underscored that the circuit split that this Court granted certiorari to resolve in *Zubik* not only persists, but continues to have concrete effects today. Only an answer from this Court will bring an end to these contradictory decisions and clarify the rights of religious objectors who have been waiting eight years for just such an answer.

B. Federal agencies are permitted to comply with RFRA by lifting burdens they have themselves imposed.

The Third Circuit compounded its RFRA errors by failing to recognize a principle implicit in this Court's disposition of *Zubik*: agencies have ample authority to alleviate even potential RFRA violations by easing the burdens that generally applicable regulations would impose on religious exercise. The district court rejected that notion and held that RFRA does not even *authorize* the government to make religious exemptions, maintaining that RFRA's "remedial function

* * * places the responsibility for adjudicating religious burdens on the courts." App.20a (citing App.109a-113a). While the Third Circuit did not directly embrace that holding, it insisted that the government cannot provide a religious accommodation or exemption pursuant to RFRA unless the failure to do so would affirmatively violate RFRA. App.43a. Each proposition is wrong.

First, the notion that RFRA supplies only a judicial remedy is patently incorrect. RFRA commands that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." 42 U.S.C. 2000bb-1(a). Subsection (b), in turn, allows the government to substantially burden religious exercise only if it affirmatively proves that the burden both "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering" that interest. *Id.* § 2000bb-1(b). And RFRA states that it "applies to all Federal law, and the implementation of that law." *Id.* § 2000bb-3.

Agencies are thus duty-bound to ensure that even generally applicable laws *do not substantially burden religious exercise* unless RFRA's compelling-interest and least-restrictive means tests are satisfied. Consistent with that understanding, every administration since RFRA's enactment has taken agency action under RFRA, including citing RFRA as authority for altering a general rule when anticipated applications

would substantially burden religious exercise.[11] This well-established discretion is necessary to fulfill RFRA's purposes and protect religious organizations, given the sprawling administrative state. Otherwise, agencies would have to *violate* RFRA, await the adjudication of case-by-case showings of substantial burdens and strict scrutiny analysis, and pay attorney's fees for the litigation that those RFRA violations necessitated. Congress plainly did not intend such a nonsensical regime.

The Third Circuit was equally wrong in its view that the government must prove a RFRA violation before it may accommodate religious exercise pursuant to RFRA. In fact, RFRA allows agencies leeway when accommodating religious exercise, as evidenced by Congress's decision to make the Establishment Clause—not judicial pronouncements of the substantial burden test—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.

This case illustrates the wisdom of that decision. Dozens of federal courts have entered RFRA-based injunctions against the regulatory mechanism, and this Court has ordered that the agencies may not fine the *Zubik* petitioners for not complying with the mandate. The agencies responded by taking the commendable step of providing a religious exemption that should

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[11] See, *e.g.*, 42 C.F.R. 54.5 (2003 regulation guaranteeing independence of religious organizations receiving certain funding, citing RFRA as authority); 81 Fed. Reg. 91,494, 91,537 (Dec. 16, 2016) (final rule citing RFRA to accommodate Native American eagle taking).

have ended this long-running dispute once and for all. Yet instead of applauding that effort, the Third Circuit employed a crabbed view of RFRA that would compel courts to definitively resolve in every instance whether government action in fact substantially burdens religious exercise and passes strict scrutiny. Indeed, the court went further and flipped RFRA's requirement that the government must choose the least restrictive alternative when burdening religious exercise to insist that the government must employ the least religiously accommodating means possible to alleviate a substantial burden on religious exercise. That upside-down view of RFRA is fundamentally incompatible not just with the text and purpose of RFRA, but this Court's long-held view that wholly apart from what is legally required, the government "follows the best of our traditions" when it accommodates religious exercise. *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952).

C. The ACA allows the agencies to exempt religious objectors.

The Third Circuit seemed to think its crabbed view of the agencies' remedial powers under RFRA was compelled at least in part by the ACA itself, which the court interpreted as leaving no room for *any* exemptions from the contraceptive mandate. In fact, as both the Obama and Trump Administrations have recognized, the ACA leaves the agencies free to grant exemptions from that mandate with or without RFRA concerns.

The contraceptive mandate is not a statutory command. It is a product of the "comprehensive guidelines" that HRSA was left to develop to decide what qualifies as "preventive care." 42 U.S.C. 300gg-

13(a)(4). Subsequent implementing guidelines requiring preventive care coverage have never guaranteed all employees all services mentioned in those guidelines. For instance, plans may exclude more expensive contraceptives if they cover a cheaper contraceptive in the same category.[12] There is no textual reason why "comprehensive guidelines" may limit the reach of the regulatory mandate due to concerns for insurer cost, but not due to concerns for employers' religious liberty.

Consistent with that understanding, churches and their integrated auxiliaries have always been exempt from the requirement to provide contraceptive services. The Third Circuit acknowledged that these exemptions are "facially at odds" with its view that the ACA tolerates no exceptions, but suggested that these exemptions are compelled by the ministerial exception. App.40a n.26. But these exemptions do not map on to the ministerial exception, as they reach both ministerial and non-ministerial employees of the entities they cover, and they exclude entities that plainly do have ministerial employees. The court then tried to reconcile the regulatory mechanism with its reading of the ACA by insisting that the regulatory mechanism does not excuse employers from complying with the contraceptive mandate, but rather "provides a process through which a statutorily identified actor 'shall provide' the mandated coverage." App.40a n.26. Of course,

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[12] See, *e.g.*, The Center for Consumer Information & Insurance Oversight, *Affordable Care Act Implementation FAQs - Set 12*, Centers for Medicare & Medicaid Services, https://perma.cc/93AZ-H9V3 ("[P]lans and issuers may use reasonable medical management techniques to control costs and promote efficient delivery of care.").

that is precisely why the regulatory mechanism substantially burdens many groups' religious exercise.

D. The Third Circuit's APA rulings were doubly wrong.

The Third Circuit's erroneous RFRA analysis infected its APA analysis as well. According to the Third Circuit, the agencies erred by failing to employ notice and comment before issuing the IFRs. And the court then held that this purported error required vacatur of *the Final Rule*—even though that rule went through full notice and comment—because it somehow forever tainted the agencies' rulemaking process. Each conclusion is wrong.

First, notice and comment is not required when an agency "for good cause finds" that it would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(3). Here, the agencies concluded that "requiring certain objecting entities or individuals to choose between the Mandate, the accommodation, or penalties for noncompliance has violated RFRA." 82 Fed. Reg. at 47,814. The agencies then concluded that a broader exemption was necessary to "cure such violations" and that avoiding "[d]elaying the availability of the expanded exemption" was sufficient good cause to immediately provide interim relief. *Id.* That conclusion was well within the agencies' broad discretion, especially in light of this Court's action in *Zubik* and the dozens of RFRA-based injunctions they faced; indeed, an ongoing violation of civil rights law—or even a substantial likelihood of such a violation in light of a Supreme Court remand—readily constitutes "good cause" to forgo notice and comment

for an interim rule. The Third Circuit concluded otherwise only because of its erroneous view that there was no RFRA violation to cure.

Even if the Fourth IFR contained a procedural defect, moreover, that error plainly would not be "prejudicial" since the agencies cured it by subjecting the final rule to notice and comment. See 5 U.S.C. 706; *Shinseki* v. *Sanders*, 556 U.S. 396, 406 (2009) (holding that § 706 is an administrative law "harmless error rule") (internal quotation marks and citation omitted). The Third Circuit's conclusion that notice and comment on a final rule can never cure the failure to provide notice and comment on an interim rule misreads this Court's precedents and would have destabilizing consequences. Indeed, if the lack of prior opportunity for comment on an IFR necessarily invalidates the resulting final rule, then HHS would have no choice but to go back to the drawing board and eliminate the contraceptive mandate entirely, for that mandate is itself the product of IFRs issued without notice and comment.

The far more sensible understanding of the governing harmless error standard is that post-IFR notice and comment—which of course *precedes* issuance of a final rule—cures any potential prejudice resulting from a lack of notice and comment on an IFR. See, *e.g.*, *United States* v. *Johnson*, 632 F.3d 912, 930, 932 (5th Cir. 2011) (sex offender not prejudiced by post-IFR notice and comment "because the Attorney General nevertheless considered the arguments Johnson has asserted and responded to those arguments during the interim rulemaking."); *Friends of Iwo Jima* v. *National Capital Planning Comm'n*, 176 F.3d 768, 774

(4th Cir. 1999) (Wilkinson, J.) (holding harmless deficient notice because plaintiff's position was "the main focus of each stage in the approval process," but "simply did not prevail").[13] Case-specific factors can render the error prejudicial, but no such factors exist here. The Third Circuit was therefore wrong to conclude that the final rule issued *after* notice-and-comment was invalid simply because the IFR was issued before notice-and-comment.

E. A nationwide injunction was inappropriate and harmful.

This case is a poster child for the worst excesses of nationwide injunctions. Here, the injunction was issued while litigation is pending in other courts, and where many other courts had already issued injunctions going the other way. Worse, this nationwide injunction was procured by a party with only the most speculative claims to injury and nothing in the way of irreparable injury.

A nationwide injunction is especially inappropriate when litigation in different courts over the course of nearly a decade has produced vastly different results. For example, the Third Circuit's decision, which is premised on the absence of a RFRA problem with the regulatory mechanism, purports to settle the issue na-

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[13] See also, *e.g.*, *Advocates for Highway & Auto Safety* v. *Federal Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994) (explaining that "tardy request for public comment, however, is not necessarily fatal" where the agency "displayed an open mind when considering the comments").

tionwide. Yet the Eighth Circuit and other courts previously reached the opposite conclusion as to whether the regulatory mechanism violates RFRA. And the nationwide injunction has forced litigants in other courts to obtain their own counter-injunctions because they cannot rely on the enjoined rule.[14] The agencies are thus subjected to a patchwork of competing injunctions ordering them to exempt employers from the contraceptive mandate (on the ground RFRA requires it) and at the same time forbidding them from providing a regulatory fix (on the ground RFRA does not require it). This is not a sustainable situation.

Compounding the problem, some lawsuits have been stymied by the nationwide injunction. In the parallel Ninth Circuit case, for example, the panel requested supplemental briefing on whether the case was moot because of the nationwide injunction in this case. Order, *California* v. *Health & Human Servs.*, No. 19-15072 (9th Cir. Apr. 29, 2019), Dkt. 131. At oral argument, the panel asked why it should resolve the appeal so long as the nationwide injunction remains in place. See Oral Argument, *California* v. *Little Sisters of the Poor*, No. 17-15072, at 5:40 (9th Cir. June 6, 2019), available at http://www.youtube.com/watch?v=GObnOAAzhIE ("Why shouldn't we await

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[14] See, *e.g.*, Order at 31, *DeOtte* v. *Azar*, No. 4:18-cv-00825 (N.D. Tex. June 5, 2019) (injunction protecting a class of religious objectors); Order, *Christian Emp's All.* v. *Azar*, No. 3:16-cv-00309 (D.N.D. May 15, 2019), Dkt. 53 (granting permanent injunction to current and future members of Christian Employers Alliance); Order, *Catholic Benefits Ass'n LCA* v. *Hargan*, No. 5:14-cv-00240-R (W.D. Okla. Mar. 7, 2018), Dkt.184 (granting permanent injunction of mandate to current and future nonprofit members of Catholic Benefits Association).

what the Third Circuit does, because if it upholds a nationwide injunction, * * * we would simply be giving an advisory opinion at that point."). And in the same parallel case in the Northern District of California, the district court canceled a hearing on summary judgment, asking the parties to notify the court within 24 hours should the nationwide injunction change. Order, *California*, No. 4:17-cv-05783-HSG, Dkt. 396.

As all of that underscores, this nationwide injunction not only vividly illustrates all the problems with nationwide injunctions, but also forecloses the possibility of further percolation and makes this Court's review imperative.

III. The questions presented are of nationwide importance.

This case presents questions of profound and nationwide importance. There is no dispute that thousands of religious organizations throughout the country sincerely believe that complying with regulations requiring them to provide healthcare coverage that includes abortifacients and contraceptives via the regulatory mechanism violates their religious beliefs. Most of those religious organizations are currently protected by injunctions. But those injunctions are premised on a view of RFRA flatly inconsistent with that embraced below.

The Final Rule is the government's attempt to solve the longstanding problem of reconciling the contraceptive mandate with its obligations under federal civil rights law. Without resolution from this Court as to whether RFRA requires—or at least permits—a religious exemption, the parties are doomed to continue

litigating this exceptionally important question in perpetuity.

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

This Court exercises its extraordinary writ authority "only in the most critical and exigent circumstances." *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (quoting *Fishman* v. *Schaffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers)). And injunctive relief requires a "significantly higher justification" even than a stay—including a showing of "indisputably clear" legal rights—since an injunction displaces "the status quo [in favor of] judicial intervention that has been withheld by lower courts." *Lux* v. *Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers) (citations omitted).

Here, the Court not only issued such injunctions in three separate cases, but issued two while an appeal was pending in the *circuit* court. See *Little Sisters*, 571 U.S. 1171 (2014); *Wheaton Coll.*, 573 U.S. 958 (2014); *Zubik*, 135 S. Ct. 2924. Such frequent and extraordinary intervention is itself proof positive of the "critical" importance of this issue. *Fishman*, 429 U.S. at 1326 (quoting *Williams* v. *Rhodes*, 89 S. Ct. 1, 2 (1968) (Stewart, J., in chambers)).

This Court has also twice granted certiorari to resolve questions regarding the contraceptive mandate—first in *Hobby Lobby* and a companion case, see *Sebelius* v. *Hobby Lobby Stores, Inc.*, 571 U.S. 1067 (2013) (mem.), and then in the seven petitions in *Zubik*, see 136 S. Ct. 444 (2015) (mem.). Again, that is a telling illustration of the importance of these issues.

This Court undoubtedly hoped, following its decision in *Zubik*, that this issue could be resolved amicably between the federal government and the religious objectors. And it was. But unfortunately, several states have taken it upon themselves to frustrate that resolution. This Court is thus left with no choice but to decide once and for all the question it has already found worthy of its resolution.

Resolving that question is critical not only to bring closure to this long-running dispute, but to restore the balance that RFRA commands. As this Court has long held, governments "follow[] the best of our traditions" when they accommodate religious exercise. *Clauson*, 343 U.S. at 314. State and federal governments have a strong history of doing just that. That is why, for example, the advent of legal abortion came with a host of statutory conscience protections at the state and federal levels. See Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121, 148-149 (2012). It is also why similar protections have been commonplace in states that authorize assisted suicide. *Id.* at 144-146.

The Third Circuit's approach is antithetical to all that. It holds that the federal government can only accommodate religion under RFRA when it must, and then adopts a crabbed view of what constitutes a

RFRA violation. That decision and the resulting patchwork of injunctions and counter-injunctions cries out for this Court's review. Religious liberty is too important for it to be accommodated only as a last resort, and the RFRA claims of the Little Sisters and other religious objectors are too important to be dismissed as insubstantial.

CONCLUSION

This Court should grant the petition.

Respectfully submitted.

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