No. 19-431

In the Supreme Court of the United States

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

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA AND
STATE OF NEW JERSEY,

Respondents.

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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

The decision below declares it the law of the land that the federal government not only need not, but may not, exempt the Little Sisters and other religious objectors from the federal contraceptive mandate. Adding procedural insult to religious liberty injury, the decision holds that the Little Sisters do not even have appellate standing to challenge it. That decision is wrong in both respects and plainly merits this Court's review, as the Little Sisters and the Nation need a definitive answer to the persistent religious liberty questions this Court previously agreed to review.

Far from undermining that conclusion, respondents' brief in opposition reinforces it by embracing the extreme view that the federal government is virtually powerless to accommodate religious exercise. According to respondents, the Religious Freedom Restoration Act (RFRA) provides only a mechanism for the federal government to be sued for refusing to accommodate religion, and no authority for it to voluntarily accommodate religious exercise. Under that extreme view, it is not clear why the federal government had the power to create the so-called "accommodation" that the decision below reinstates, or even the power to exempt houses of worship from the contraceptive mandate. Instead, respondents appear to envision a world in which the government must consciously burden religious exercise, wait to be sued, and then endure costly litigation before rights to religious liberty can be vindicated. That version of RFRA would be unrecognizable to the Congresses that enacted it to promote government respect for religious exercise and amended it to provide even greater protection. And it would be unfathomable to the framers who enshrined religious

protection in the constitutional text, and to this Court, which has long recognized that the government "follows the best of our traditions" when it accommodates religious exercise. *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952).

That this position is advocated by states with their own duties to accommodate religious exercise under the First Amendment raises the stakes and underscores the need for this Court's review. Indeed, that this suit is brought by states to stop the federal government from easing the burdens its own regulations have imposed on religious exercise is as unseemly as it is unprecedented. And the fact that the states want to exclude the religious adherents from the case, so that a landmark religious liberty case can be decided as an intramural affair between two governments, is more troubling still. This Court should grant both this petition and the federal government's petition in No. 19-454, and bring definitive resolution to the critical religious liberty issues implicated by the contraceptive mandate. At a minimum, this Court should use these cases to make clear that when the federal government finally accepted this Court's invitation in *Zubik* to resolve this long-running dispute by accommodating the Little Sisters' religious exercise, it ran afoul of no law, but instead followed the best of our traditions.

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

It is settled law in both this Court and the Third Circuit that so long as one party invoking the court's jurisdiction has standing to seek the relief sought, there is no need to address the standing of any other. See, *e.g.*, *Rumsfeld* v. *FAIR*, 547 U.S. 47, 52 n.2 (2006)

(agreeing with Third Circuit that there was no need to "determine whether the other plaintiffs have standing because the presence of one party with standing is sufficient to satisfy Article III[]"). Indeed, a different panel of the Third Circuit applied that rule in an earlier appeal in this case, finding no need to address the Little Sisters' standing because they "seek the same relief as the federal government." *Pennsylvania* v. *President*, 888 F.3d 52, 57 n.2 (3d Cir. 2018). Here, by contrast, the panel went out of its way to hold that the Little Sisters lacked appellate standing, even though they undisputedly seek the same relief the federal government has unquestionable standing to seek.

Respondents try to defend that gratuitous effort to exclude the Little Sisters from a dispute about their own religious liberty by claiming that any party that files its own notice of appeal or petition for certiorari must demonstrate standing. BIO.15. That separate-filings-are-somehow-different claim is at odds not only with the Third Circuit's earlier decision in this case, but with the many cases in which this Court declined to address the standing of parties that filed separate petitions after finding that another petitioner had standing. See, *e.g.*, *Horne* v. *Flores*, 557 U.S. 433, 446 (2009); *Crawford* v. *Marion County Election Bd.*, 553 U.S. 181, 189 n.7 (2008) (plurality op.); *McConnell* v. *FEC*, 540 U.S. 93, 233 (2003).

Respondents fare no better in trying to deny the Little Sisters' obvious stake in this dispute. While respondents note that the Little Sisters are presently protected by the Colorado injunction, they tellingly do not suggest that the injunction (or similar orders issued by other courts) could survive were this Court to grant review and accept their RFRA arguments. To

the contrary, the injunctions plainly rest on a view of RFRA and the burdens imposed by the regulatory mechanism that are incompatible with the decision below.

Moreover, respondents do not deny that the Colorado injunction provides the Little Sisters with less relief than the Final Rule that protects the Sisters and that respondents have successfully challenged and enjoined, because the injunction protects them only if they remain on their current plan. Instead, respondents claim that the Little Sisters "forfeited" that undisputed basis for appellate standing by raising it at oral argument below instead of in their reply brief. BIO.14. But the Third Circuit had already previously held that the Little Sisters had an interest in protecting the fruits of *Zubik*, protecting against RFRA interpretations that would jeopardize their injunctive relief, and in maintaining regulatory relief through the rules. *Pennsylvania*, 888 F.3d at 58-60. It is not clear how a party could "forfeit" further explications of these holdings by explaining how the injunction and the rule are different. In any case, this explanation only arose at oral argument because the states repackaged their intervention arguments as appellate standing arguments only in the final two pages of their 104-page brief, and did not clearly argue that the Colorado injunction eliminated standing on either page. Response Br. of Appellees 102-103. That likely explains why the Third Circuit itself made no mention of forfeiture or even tardiness in rejecting petitioner's appellate standing. Pet.App.15a n.6.

Respondents' contention (at 12) that the Third Circuit's standing decision is not cert-worthy likewise

misses the mark. This case as a whole necessitates review because the decision below renders it the law of the entire Nation that the federal government not only need not, but may not, exempt the Little Sisters and other religious objectors from the contraceptive mandate. The Little Sisters have an obvious and continuing interest in that issue: They were integral to challenging the mandate and the inadequacy of the federal government's initial efforts to accommodate religious objections, and to prompting an executive order that finally exempted them and other objectors from the mandate. Denying them appellate standing is not just wrong; it creates the anomaly of a massively consequential case about the government's obligations to accommodate religious exercise proceeding in this Court with two governments and zero religious adherents. The longstanding dispute about RFRA and the contraceptive mandate should not be resolved in litigation brought by two states with at best only a glancing interest in its resolution, and with no one to speak for those whose religious rights are actually at stake but the same federal government that needlessly burdened them for years before finally seeing the error of its ways.

II. The decision below is egregiously wrong and revives a circuit split that warrants review.

1. Respondents do not and cannot deny that the decision below resurrects the very circuit split that this Court granted certiorari to resolve in *Zubik*. Instead, they contend that resolution of that years-long RFRA dispute would be "premature" because the Third Circuit did not squarely resolve their novel "threshold" contention that RFRA gives the federal government no power to accommodate religious exercise at all.

BIO.22-23. In reality, that the Third Circuit (not to mention two states) even considered that proposition debatable underscores the need for this Court's review.

Respondents contend that RFRA leaves the government powerless to ensure compliance with its command not to substantially burden religion unless it is the least restrictive means of achieving a compelling interest. Respondents' notion that RFRA guarantees rights that can be accommodated only via litigation is a non-starter. This Court implicitly rejected that view by unanimously putting the *Zubik* litigation on hold to give the government an opportunity to offer the very religious accommodation that respondents now claim it lacks the power to provide. Similarly, this Court identified the regulatory mechanism as a potential means of "compl[ying] with RFRA," not violating that statute or acting ultra vires, in *Burwell* v. *Hobby Lobby Stores, Inc.* 573 U.S. 682, 731 (2014). And respondents do not even pause to appreciate the irony of defending a decision that resurrects a regulatory "accommodation" that itself could not survive under their own legal theory that RFRA requires lawsuits but provides no authority to avoid them by accommodating sincerely held religious beliefs. See, *e.g.*, *Zubik* Br. for Respondents 32 (describing challenged accommodation as an effort to comply with RFRA).

Respondents claim that "[t]he Third Circuit correctly enjoined the religious exemption rule because the [former] accommodation does not" substantially burden petitioner's religious exercise. BIO.24-25. That is doubly wrong (and underscores the absurdity of litigating this case without the Sisters).

First, it ignores the policy that imposed the initial burden. What imposes a burden here in the first instance, and what the Little Sisters initially challenged as inconsistent with RFRA, is *the contraceptive mandate itself*—i.e., the same burden backed by massive fines that this Court had "little trouble" concluding triggered RFRA in *Hobby Lobby*, 573 U.S. at 719. Once it is clear that the contraceptive mandate requires some sort of accommodation under RFRA, there is no requirement under RFRA or anything else that the government offer the most miserly accommodation imaginable. In fact, RFRA demands very nearly the opposite: The government must employ "the least restrictive means of furthering" a compelling interest. 42 U.S.C. § 2000bb-1(b). Even assuming the government has a compelling interest in ensuring cost-free access to contraception, it has many means of achieving that objective that are far less restrictive than forcing religious objectors to facilitate the provision of contraceptive coverage through their own health plan infrastructure. See, *e.g.*, 83 Fed. Reg. 57,536, 57,548 (Nov. 15, 2018). RFRA not only permits, but affirmatively requires, the government to select the *least* restrictive of those means.

Second, even if it were correct to focus only on the regulatory mechanism as opposed to the mandate itself, the Third Circuit was equally wrong in finding no substantial burden. That conclusion resurrects the precise circuit split that this Court granted certiorari to resolve in *Zubik,* and it is in considerable tension with this Court's decision to unanimously *enjoin* enforcement of the same regulatory mechanism that the decision below reinstates to give the government an

opportunity to try to fashion a less burdensome accommodation in light of the parties' (including the United States') clarification of their positions. By the Third Circuit's telling, that remand was an exercise in futility, as there was no meaningful burden to accommodate and no authority to accommodate it. That decision is wrong, in conflict with the Eighth Circuit's pre-*Zubik* decision in *Sharpe Holdings, Inc.* v. *U.S. Department of Health & Human Services*, 801 F.3d 927 (8th Cir. 2015), and contrary to the premise of countless injunctions against the regulatory mechanism. It also highlights the fundamental flaw in litigating a case about the relative burdens on religious exercise posed by the mandate without the party whose religious exercise is burdened.

2. Respondents fare no better in defending the Third Circuit's conclusion that the ACA does not authorize the Final Rule. According to respondents, the ACA "authorized HRSA to determine *which* preventive services must be covered," but not "*who* is required to cover th[em]." BIO.20-21. If that were correct, then every exemption or "accommodation" either administration has provided in the nine years since HRSA first defined "preventive care" to include contraception violates the ACA. Indeed, respondents implicitly admit that their arguments would invalidate even the exemption for houses of worship to the extent it is broader than the constitutionally compelled ministerial exemption (which it unquestionably is, Pet.28). BIO.22 n.8.

Moreover, respondents' insistence that HHS lacks discretion to allow any "group health plan" to exclude contraceptive coverage further underscores the error of the RFRA analysis below. If the "accommodation" is

in fact a means of ensuring that petitioner's own "health plan" provides contraceptive coverage, BIO.21, then it cannot also be the case that it imposes only "an independent obligation on a third party," Pet.App.117a. Respondents cannot have it both ways. If the "accommodation" is consistent with the ACA because it does not alter "who" must provide the coverage, then it is consistent with the ACA only at the expense of substantially burdening petitioner's religious exercise under RFRA. Indeed, that is precisely the problem the *Zubik* petitioners explained.

3. Respondents' perfunctory defense of the Third Circuit's APA analysis is equally unavailing and internally contradictory. Respondents first deny any connection between the court's APA and RFRA analyses. But it is hard to imagine the court would have concluded the agencies lacked the requisite good cause to employ an interim final rule (IFR) if it had thought the failure to do so would violate RFRA. While the court breezily suggested that "[a]ll regulations are directed toward reducing harm in some manner," Pet.App.33a, there is an obvious difference between acting promptly to reduce harm at the margin and doing so to halt an ongoing federal civil rights violation. If the latter does not constitute sufficient "good cause" to employ an IFR, then it is hard to see what would.

That is particularly true given that the contraceptive mandate itself was initially adopted through an IFR. 76 Fed. Reg. 46,621 (Aug. 3, 2011). If the need to immediately subject employers to a novel mandate that Congress itself did not impose was sufficiently pressing to forgo notice and comment, then surely the need to remedy a RFRA problem serious enough to

prompt an extraordinary remand from this Court must suffice.

At any rate, the whole IFR question should have been a moot point because there is now a final rule that went through notice and comment. Respondents claim that the Third Circuit's decision to invalidate the Final Rule anyway "rested on a fact-specific analysis of whether the agencies kept an open mind" during notice and comment. BIO.19. But even putting aside the workability of an "open-mind" standard, the only "fact" identified as suggesting closed-mindedness is that "the IFRs and the Final Rules are virtually identical." Pet.App.37a. If that sufficed, then the contraceptive mandate itself would be invalid, as it too adopted "without change" IFRs that drew thousands of objecting comments. 77 Fed. Reg. 8725 (Feb. 15, 2012). Indeed, virtually every aspect of the government's regulatory efforts with respect to the mandate began with an IFR, and most ended with a rule that reflected no "meaningful" change. Pet.4-10. There is, however, apparently no limit to the number of double standards respondents will embrace in an effort to deny the Little Sisters a meaningful accommodation or even a day in court.

4. Respondents have yet "to identify a specific woman"—any woman, inside or outside their borders—"who will be affected by the Final Rules." Pet.App.25a. Yet the court below nonetheless managed to conclude that respondents not only have standing, but face injury so pervasive as to warrant a nationwide injunction. The district court's decision to arrogate to itself the power to declare the law of the entire Nation makes this Court's review imperative.

Respondents protest that petitioner did not specifically challenge the scope of the injunction below. BIO.27. But the government did, and the Third Circuit passed on the question, Pet.App.49a-52a, so it is plainly properly before this Court. Respondents contend that the court's holding is simply a factbound application of settled law. BIO.27. But there is nothing settled about the circumstances under which nationwide injunctions may be granted, and the rank speculation on which this injunction rests cannot credibly be described as "fact." Respondents suggest that the injunction did not deter the Ninth Circuit from resolving parallel litigation brought by another group of states. BIO.29. But that court forged ahead only by a bare 2-1 majority, and pointed to the possibility that this Court might grant certiorari here to justify not declaring the matter settled. See *California* v. *U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 423 (9th Cir. 2019).

Enough is enough. This case should be settled by a nationwide resolution that ends the nearly decade-long dispute concerning the compatibility of the contraceptive mandate with RFRA. But that nationwide resolution should come from this Court, not a single district court purporting to enjoin the fruits of this Court's *Zubik* remand nationwide. And that final resolution should come with the Little Sisters as a party. The Little Sisters did not seek this confrontation, but when the federal government insisted that their religious beliefs and statutory rights yield to a series of regulatory decisions, the Little Sisters filed suit to explain and defend their religious exercise. The latest chapter of this saga still features continued debates about whether the regulatory mechanism replaced by

the Final Rule imposed a substantial burden on religious exercise or was just a harmless paperwork exercise blown out of proportion by religious adherents who misperceive their own faith's conceptions of complicity. The Third Circuit should not have the last word in that debate, and the debate should not be resolved without the voices of the Little Sisters.

CONCLUSION

This Court should grant the petition.

Respectfully submitted.

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