UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, *Plaintiff*, v. DONALD J. TRUMP, *et al.* *Defendants*, LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME, *Proposed Defendant-Intervenors.*	Civil No. 2:17-CV-4540 **PROPOSED INTERVENOR'S REPLY IN SUPPORT OF MOTION TO INTERVENE**

REPLY

To hear the Commonwealth tell it, the Little Sisters of the Poor mistakenly stumbled into the wrong case. The Little Sisters have nothing at stake because the Commonwealth's lawsuit "cannot force federal regulations upon the Little Sisters." Opp. 5. The lawsuit is not designed to take away the rights of organizations that received judicial protection because such protection "will continue to exist—irrespective of what happens in this lawsuit." Opp. 2. Those organizations' rights under the Religious Freedom Restoration Act ("RFRA") are not threatened because, well, "RFRA is not at issue here." Opp. 8, n.5. The Little Sisters—while admittedly praiseworthy and "commendable,"

Opp. 1—are just "mistaken about the purpose and effect of this lawsuit." Opp. 2, n.2. Allowing the Little Sisters into the room would turn the Attorney General's simple lawsuit against the President of the United States into a "political and media circus." Opp. 3.

Aside from their condescending tone, these arguments bear no relation to the lawsuit the Commonwealth actually filed. In the case actually filed, the Commonwealth seeks an injunction against exemptions to the federal contraceptive mandate—the precise exemption the federal government crafted due to lawsuits by the Little Sisters and other objectors. The whole point of suing to enjoin an *exemption* from regulations is to "force . . . regulations upon" (Opp. 5) the party you have deprived of the exemption. That is the only way that eliminating an exemption could result in the broader contraceptive access the suit claims to seek. *E.g.*, Compl. ¶¶ 8, 10.

The far-reaching lawsuit the Commonwealth actually filed is not written to dodge the RFRA issues the Commonwealth runs from in its opposition papers. *Compare* Mot. for Prelim. Inj. ("Mot.") 24-27 (Commonwealth extensively briefing RFRA in asking for an injunction) *with* Opp. 8 n.5 ("RFRA is not at issue here."); *see also* Compl. ¶¶117-18, 173-74. Nor does the actual suit exclude from its reach those who, like the Little Sisters, have sought judicial relief in pending or prior-filed cases. To the contrary, the Commonwealth told this Court that, absent an injunction, it will suffer "irreparable harm" because of "entities currently litigating against the government" over the contraceptive mandate. Mot. 41; *see also id.* ("And Pennsylvania may have a greater proportional share of objecting employers than other states, as many of the lawsuits challenging the Contraceptive Care Mandate have involved Pennsylvania entities."). And, in arguing that it will suffer irreparable harm, the Commonwealth specifically focused on entities that, just like the Little Sisters, have injunctions against the Mandate from prior or pending cases. *Id.* ("*Zubik* was also filed by Pennsylvania plaintiffs, along with three other cases initiated in the same district, all

of which challenge the Contraceptive Care Mandate."). The only way an order from this Court could possibly remedy that alleged irreparable harm is by undermining the existing injunctions for the Little Sisters and other employers.

If the Commonwealth actually wishes to exclude from its lawsuit any consideration of RFRA, or any application to entities who have received prior judicial protection, then it needs to withdraw the currently operative pleadings and replace them with some that accurately state its claims. Until that time, the Little Sisters have a direct, concrete interest in participating in this lawsuit to protect their rights under the IFR.

As to the Commonwealth's other arguments:

1. ***Standing.*** The Commonwealth argues that the Little Sisters lack standing to intervene under the Supreme Court's recent decision in *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017). But *Town of Chester* only requires a separate showing of standing if an intervenor of right "pursue[s] relief that is *different from* that which is sought by a party with standing." *Id.* at 1651 (emphasis supplied). When, by contrast, the intervenor and a party "seek identical relief," *Town of Chester* is "distinguishable." *U.S. Dep't of Justice v. Utah Dep't of Commerce*, No. 16-cv-1611, 2017 WL 3189868, at *4-5 (D. Utah July 27, 2017). In such cases, this Court continues to be governed by the Third Circuit's rule that once "there is a justiciable case into which an individual wants to intervene," the intervenor "need not demonstrate Article III standing in order to intervene." *King v. Governor of State of N.J.*, 767 F.3d 216, 245-46 (3d Cir. 2014) (internal quotation marks omitted) (permitting private party to intervene in defense of state law); *see also McConnell v. FEC*, 540 U.S. 93, 233 (2003), *overruled on other grounds by Citizens United v. FEC*, 540 U.S. 310 (2010) (when intervenor-defendants and government agency both defend a law, the court "need not address the standing of" the intervenor-defendants).

Here, the Little Sisters and the government seek the same relief—dismissal of this lawsuit and denial of its claims. Thus, both *Town of Chester* and the sole other case the Commonwealth cites—*Seneca Resources Corp. v. Highland Twp.*, No. 16-cv-289, 2017 WL 4171703 (W.D. Pa. Sept. 20, 2017)—are distinguishable.[1] In any case, because the Commonwealth seeks to deprive the Little Sisters of their rights under the IFR, and for the reasons set forth in the Motion to intervene, the Little Sisters have standing.

2. ***The Sisters' interest.*** The Commonwealth's opposition focuses entirely on their newly-minted argument that this lawsuit does not seek to deprive the Little Sisters of their already-existing injunction. But even if this were true—and it isn't—the Commonwealth ignores the Little Sisters' argument that they have a protectable legal interest under Rule 24 in the "layer of protection" the IFR provides against the massive fines the mandate threatens to impose on the Little Sisters. *See* Memorandum in Support of Motion to Intervene ("Memo.") at 4 (citing *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006)). In *Lockyer*, the Ninth Circuit held that healthcare providers who objected to abortion on conscience grounds had a protectable interest in defending a federal law discouraging states from discriminating against doctors who refused to provide or refer for abortions. 450 F.3d at 441. The court explained that even though the law's being struck down would not *itself* result in the intervenors' being discriminated against for their beliefs, it would make that result "more likely," and "an important

[1] In *Seneca Resources*, the court applied *Town of Chester* because the defendant-intervenors sought different relief than the original government defendants: the intervenors sought to defend the government's policy and present counterclaims against the original plaintiffs, while the government defendants themselves did not "show any interest in defending the [policy] or continuing forward with the case against them." 2017 WL 4171703, at *1 &n.3, 4; *see also id.* at 4 (the question of standing for a defendant-intervenor "most commonly occurs in cases . . . when the original defendant declines or refuses to defend a challenged law and a certain interested party wishes to intervene on behalf of the defendant").

layer of protection" for the intervenors against having "to choose between adhering to their beliefs and losing their professional licenses" was itself a "sufficiently direct, non-contingent and substantial" interest to support intervention of right. *Id.* at 441 (internal quotation marks and alterations omitted). The same analysis applies here: the IFR represents "an important layer of protection" for the Little Sisters against having "to choose between adhering to their beliefs" and incurring the massive fines imposed under the mandate.

3. ***Tenth Circuit ruling.*** The Commonwealth argues that the Little Sisters lack an interest in this case because, it says, certain claims have already been resolved against the Little Sisters by the Tenth Circuit. Opp. 7-8; *id.* at 7 n.2 ("those arguments were rejected by the Tenth Circuit") (emphasis by the Commonwealth). But the Commonwealth fails to acknowledge that the Tenth Circuit opinion on which it relies so heavily was actually *vacated* by the Supreme Court. *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell,* 794 F.3d 1151 (10th Cir. 2015), *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

4. ***Kleissler.*** Citing the Third Circuit's *Kleissler* case, the Commonwealth admits that intervention would be appropriate if the Government's defense of its position is "necessarily colored by its view of the public welfare rather than the more parochial view" of the Little Sisters, but it asserts that the Little Sisters "do[] not claim" this argument. Opp. 9. To the contrary, the Little Sisters extensively rely on *Kleissler*, explaining that this case presents "a situation akin to *Kleissler*." Memo. at 16-18. As in *Kleissler*, the Little Sisters' motion explains, the Government's interests are "complex" and potentially conflicting—the Government is attempting to balance the Little Sisters' interests against its interest in ensuring coverage for contraception and sterilization, as well as its broader interests in public health, implementation of the ACA, and other Government programs—while the Little Sisters' interests are "straightforward" and

"parochial"—they want nothing more than to continue carrying out their ministry without having to choose between practicing their religion and incurring massive fines. *Id.* at 17-18. The Commonwealth's utter failure to distinguish *Kleissler* is itself grounds for finding this prong of the Rule 24 test to be met. The Commonwealth likewise fails to explain how the federal government could adequately represent the Little Sisters' interests when they remain adverse to one another in their original, earlier-filed, and still-ongoing case. Memo. at 9, 16.

5. ***Permissive intervention.*** The Commonwealth's opposition to permissive intervention revolves around its repeated assertions that the Little Sisters will not "add anything" to the litigation. Curiously, this gets Rule 24(b) exactly backwards: that rule asks not whether the proposed permissive intervenor's claims or defenses are sufficiently *different* from those already in the litigation but rather whether they have a question of law or fact "*in common*." Fed. R. Civ. P. 24(b)(1)(B) (emphasis added).

In any event, the Little Sisters *will* "add" something to this litigation outweighing whatever marginal burden would be caused by intervention. This is a case about the propriety of granting religious exemptions to those with religious objections to complying with the contraceptive mandate. And the Commonwealth has advanced several arguments that, if accepted, could foreclose any religious exemption at all. *See, e.g.*, Compl. at ¶¶ 141-67 (equal protection, Establishment, and Title VII claims). It makes no sense to decide whether such exemptions should be available without the participation of anyone who has such an objection.

In addition, the Little Sisters anticipate making additional arguments that the federal government has not made, including:

- The Commonwealth's claims are not ripe (especially now that they are attempting to disclaim their effort to reach the known religious objectors who filed lawsuits, it is not clear that the Commonwealth is aware of *any* employer who has yet taken advantage of the IFR or ever will);

- The Commonwealth lacks standing to pursue Equal Protection claims because States are not "persons" under the Fifth Amendment;

- The Commonwealth lacks standing because States cannot bring Establishment Clause claims;

- Both the Commonwealth and the federal Defendants are litigating under the wrong Establishment Clause test, because *Town of Greece* has superseded *Lemon* and requires analysis based on the historical purposes of the Establishment Clause rather than *Lemon*'s three prongs.

Many of these legal arguments go directly to this Court's Article III jurisdiction to even reach issues on which the Commonwealth seeks a rushed judgment. Because of their personal interest in this case, the Little Sisters have a stronger interest than either of the government parties in ensuring that the Court is properly informed on this issue before it reaches its decision (particularly since this case is likely to be the subject of appellate and Supreme Court litigation).

6. "***Political and media circus.***" The Attorney General's selective concern about political and media attention to this case is not a reason to deny intervention. The Attorney General announced this lawsuit with great fanfare, at a press conference, at an advocacy organization.[2] Rather than listing the head of the relevant federal agency first, he captioned his lawsuit "Pennsylvania v. Trump." He then tweeted about how, by suing the President of the United States, he would "stop them" from "eliminating guaranteed coverage" so that "2.5M PA women" could not be required to pay more for contraceptives.[3] He then tweeted "President Trump's rule eliminates contraceptive

[2] Press Release, Office of Attorney General Josh Shapiro, Commonwealth of Pennsylvania, *Attorney General Josh Shapiro Sues President Trump and Trump Administration for Eliminating Guaranteed Contraceptive Care*, October 11, 2017, https://www.attorneygeneral.gov/Media_and_Resources/Press_Releases/Press_Release/?pid=4047 (last visited December 7, 2017).
[3] AG Josh Shapiro (@PAAttorneyGen), Twitter (Oct. 11, 2017, 1:23 p.m.) https://twitter.com/PAAttorneyGen/status/918210370896089088.

coverage for 2.5 million PA women. His actions are unlawful. I sued him today. #HandsOffMyBC."[4] And then he kept tweeting.[5] We do not begrudge Attorney General Shapiro his right to tweet, but that means he should allow others to speak freely about the case as well.

Had these efforts failed to bring "political and media" attention to his lawsuit, surely Attorney General Shapiro would have been disappointed. In any case, the Commonwealth's case was a high-profile matter from the start; the Little Sisters' arrival to defend their rights is hardly the cause. Nor will their presence or absence make media attention any more or less likely. This is and will remain a high-profile case either way. Indeed, whatever happens in this Court, it seems likely that the parties will end up seeking relief in the United States Supreme Court.

CONCLUSION

The Commonwealth professes to be shocked that the Little Sisters might not like the Commonwealth suing to take away the protections they fought so many years to obtain. But the Little Sisters should not be forced to the sidelines while others decide their fate; their voices deserve to be heard.

For the foregoing reasons, the Little Sisters of the Poor respectfully request that this Court grant their motion to intervene. The Little Sisters further respectfully request that the Court grant the motion in time for them to be allowed to participate in the December 14 hearing.

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[4] Josh Shapiro (@JoshShapiroPA), Twitter (Oct. 11, 2017, 2:08 p.m.) https://twitter.com/JoshShapiroPA/status/918221871480438784

[5] *See, e.g.*, AG Josh Shapiro (@PAAttorneyGen), Twitter (Oct. 11, 2017, 1:33 p.m.) https://twitter.com/PAAttorneyGen/status/918213007083233280 ("For more information, please click here to read the release and complaint"); AG Josh Shapiro (@PAAttorneyGen), Twitter (Oct. 11, 2017, 8:18 p.m.) https://twitter.com/NBCNews/status/918314937948295168 (retweeting NBC News story about lawsuit); AG Josh Shapiro (@PAAttorneyGen), Twitter (Oct. 12, 2017, 10:45 a.m.) https://twitter.com/TheIntellNews/status/918532969987563520 (retweeting news article about lawsuit).

Dated: December 7, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: December 7, 2017

/s/ Mark Rienzi

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