IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

EAST TEXAS BAPTIST UNIVERSITY, *et al.*, Plaintiffs,	)	
v.	)	Case No. 4:12-cv-03009
KATHLEEN SEBELIUS, *et al.*, Defendants.	)	

DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION TO INTERVENE

INTRODUCTION

Defendants respectfully oppose the motion by Westminster Theological Seminary to intervene in this action, which is stayed as defendants amend the regulations being challenged by plaintiffs. Westminster is located in Pennsylvania, and there is no material connection between the Southern District of Texas and Westminster. Westminster could not maintain an independent action in this Court, and Westminster's ability to protect its interests will not be affected by the disposition of this case, which will not serve as precedent in federal courts in Pennsylvania. And, to the degree Westminster has an interest that could be affected by this case, there is no reason to think plaintiffs East Texas Baptist University and Houston Baptist University will not adequately represent that interest. This Court is not the proper forum for Westminster's claims, and its motion to intervene should be denied.

BACKGROUND

At an initial status conference on December 20, 2012, this Court stayed this case in light of defendants' ongoing rulemaking to amend the contraceptive coverage requirement as it applies to plaintiffs, as well as other religious employers and eligible non-profit religious organizations with religious objections to the contraceptive coverage requirement.

On March 8, 2013, Westminster moved to intervene in this case. *See* Mot. to Intervene as a Pl. ("Mot. to Intervene"), ECF No. 35. Westminster "is a graduate level Christian seminary located in Glenside, Pennsylvania." Compl. in Intervention ¶ 3, ECF No. 35-1. Westminster has 620 students and approximately 60 full-time and 65 part-time employees, to whom it provides "health services and health insurance." *Id.* ¶¶ 24-26. The seminary alleges that its "religious beliefs forbid it from participating in, providing access to, paying for, training others to engage in, or otherwise supporting abortion." *Id.* ¶ 12. Westminster seeks to challenge the lawfulness of

the preventive services coverage regulations to the extent that the regulations require that the health coverage it makes available to its employees and students covers certain emergency contraceptive services. Westminster claims the regulations violate the Religious Freedom Restoration Act, the First and Fifth Amendments to the United States Constitution, and the Administrative Procedure Act.

ARGUMENT

I. The Motion to Intervene Should Be Denied Because the Complaint-in-Intervention Could Not Survive in This Court as a Separate Action

A. The Complaint-in-Intervention Cannot Cure the Jurisdictional Defects in the Original Plaintiffs' Complaint

It is "well-settled that '[a]n existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit.'" *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 675 (5th Cir. 1985) (quoting *Kendrick v. Kendrick*, 16 F.2d 744, 745 (5th Cir. 1926)). "Indeed, this rule is so deeply entrenched in our jurisprudence that it is an axiomatic principle of federal jurisdiction in every circuit to have addressed the question." *Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living*, 675 F.3d 149, 160-61 (2d Cir. 2012) (collecting cases, including *Kendrick*). As a corollary, "[i]ntervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action." 7C Charles A. Wright et al., Federal Practice & Procedure § 1917 (3d ed. 2012); Fed. R. Civ. P. 82; *see, e.g.*, *Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir. 1965).

Here, there is no "existing suit within the court's jurisdiction" because the regulations plaintiffs challenge are not being enforced against plaintiffs by defendants, will never be enforced against plaintiffs by defendants in their current form, and are being amended to accommodate the religious objections of organizations like plaintiffs. Section 1001 of the Patient

Protection and Affordable Care Act requires all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing. 42 U.S.C. § 300gg-13. To implement this provision, defendants issued interim final regulations requiring group health plans and health insurance issuers to cover, *inter alia*, all Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider. 76 Fed. Reg. 46,621 (Aug. 3, 2011). The regulations exempt certain religious employers from the contraceptive coverage requirement. *See* HRSA Guidelines, *available at* http://www.hrsa.gov/womensguidelines (last visited March 13, 2013); 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012); 45 C.F.R. § 147.130(a)(1)(iv)(A). After considering comments, defendants promulgated final regulations and simultaneously established a temporary enforcement safe harbor for certain non-profit organizations (and their health plans) that will be in effect until the first plan year that begins on or after August 1, 2013. 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012); HHS, Guidance on the Temporary Enforcement Safe Harbor (Aug. 15, 2012), *available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf (last visited March 13, 2013). Pursuant to the safe harbor, defendants will not take any enforcement action against an employer (or its group health plan or group health insurance issuer) that fails to cover some or all recommended contraceptive services if the employer is a non-profit organization with religious objections to contraceptive coverage that meets certain other criteria. Plaintiffs acknowledge that they are protected by the enforcement safe harbor.

Defendants have made clear that, during the safe harbor period, they will amend the regulations to establish alternative means of providing contraceptive coverage to those organizations' employees without cost-sharing to accommodate the organizations' religious

objections to covering contraceptive services. 77 Fed. Reg. at 8728. Defendants began the process of amending the regulations on March 21, 2012, when they published an Advance Notice of Proposed Rulemaking ("ANPRM") in the Federal Register. 77 Fed. Reg. 16,501 (Mar. 21, 2012). On February 1, 2013, after considering comments submitted in response to the ANPRM, Defendants released a Notice of Proposed Rulemaking ("NPRM") that would amend the contraceptive coverage requirement as it applies to plaintiffs.[1]

In light of these actions, the overwhelming majority of courts have held that they lack jurisdiction to review claims such as plaintiffs'. *See Eternal World Television Network, Inc. v. Sebelius*, No. 2:12-cv-00501-SLB (N.D. Ala. Mar. 25, 2013); *Franciscan Univ. of Steubenville v. Sebelius*, No. 2:12-CV-440, 2013 WL 1189854 (S.D. Ohio Mar. 22, 2013); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 838238 (W.D. Pa. Mar. 6, 2013); *Most Reverend Wenski v. Sebelius*, Case No. 12-23820-CIV-GRAHAM/GOODMAN (S.D. Fla. Mar. 5, 2013); *Roman Catholic Diocese of Dallas v. Sebelius*, Civil Action No. 3:12-cv-01589-B, 2013 WL 687080 (N.D. Tex. Feb. 26, 2013); *Conlon v. Sebelius*, No. 12-cv-3932, 2013 WL 500835 (N.D. Ill. Feb. 8, 2013); *Archdiocese of St. Louis v. Sebelius*, No. 4:12-cv-924-JAR, 2013 WL 328926 (E.D. Mo. Jan. 29, 2013); *Roman Catholic Archbishop of Washington v. Sebelius*, Civil Action No. 12-0815 (ABJ), 2013 WL 285599 (D.D.C. Jan. 25, 2013), *appeal noticed* (D.C. Cir. Mar. 25, 2013); *Most Reverend Lawrence T. Persico v. Sebelius*, No. 1:12-cv-123-SJM, 2013 WL 228200 (W.D.

[1] Specifically, the NPRM would, among other things, (1) "amend the criteria for the religious employer exemption to ensure that an otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths"; and (2) "establish accommodations for health coverage established or maintained by eligible organizations, or arranged by eligible organizations that are religious institutions of higher education, with religious objections to contraceptive coverage." 78 Fed. Reg. 8456, 8459-60 (Feb. 6, 2013). The NPRM requests comment on the proposed amendments to the regulations and, notably, does not propose an option of continuing the regulations in their current form. *Id.* at 8463-64. Defendants remain absolutely committed to finalizing changes to the regulations before the expiration of the enforcement safe harbor in August 2013, and, as the NPRM demonstrates, they are well on their way to doing so.

Pa. Jan. 22, 2013); *Colo. Christian Univ. v. Sebelius*, Civil Action No. 11-cv-03350-CMA-BNB, 2013 WL 93188 (D. Colo. Jan. 7, 2013); *Catholic Diocese of Peoria v. Sebelius*, No. 12-1276, 2013 WL 74240 (C.D. Ill. Jan. 4, 2013); *Univ. of Notre Dame v. Sebelius*, Cause No. 3:12CV253RLM, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012), *appeal docketed*, No. 13-1479 (7th Cir. Mar. 5, 2013); *Catholic Diocese of Biloxi v. Sebelius*, Civil No. 1:12CV158-HSO-RHW, 2012 WL 6831407 (S.D. Miss. Dec. 20, 2012), *mot. to alter or amend j. denied*, 2013 WL 690990 (S.D. Miss. Feb. 15, 2013); *Most Reverend David A. Zubik v. Sebelius*, No. 2:12-cv-00676, 2012 WL 5932977 (W.D. Pa. Nov. 27, 2012), *appeal noticed* (3d Cir. Jan. 23, 2013); *Catholic Diocese of Nashville v. Sebelius*, No. 3-12-0934, 2012 WL 5879796 (M.D. Tenn. Nov. 21, 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012), *appeal docketed*, Nos. 13-1092, 13-1093 (6th Cir. Jan. 24, 2013); *Nebraska v. U.S. Dep't of Health & Human Servs.*, No. 4:12CV3035, 2012 WL 2913402 (D. Neb. July 17, 2012), *appeal docketed*, No. 12-3238 (8th Cir. Sept. 25, 2012); *Wheaton Coll. v. Sebelius*, No. 12-5273, 2012 WL 6652505 (D.C. Cir. Dec. 18, 2012) (affirming in part and holding in abeyance appeals in *Wheaton Coll. v. Sebelius*, 887 F.Supp.2d 102 (D.D.C. Aug. 24, 2012), and *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25 (D.D.C. 2012)). *But see Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-00314-Y-TRM (N.D. Tex. Jan. 31, 2013); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12 Civ. 2542(BMC), 2012 WL 6042864 (E.D.N.Y. Dec. 4, 2012). Defendants anticipate that, when the stay is lifted in this case, they will move to dismiss this action for lack of jurisdiction. If the Court – like virtually every other court to consider similar motions – agrees with defendants, then the necessary prerequisite to Westminster's intervention will be lacking.

B. The Complaint-in-Intervention Could Not Survive as a Separate Action

To be sure, even if the Court lacks jurisdiction over the underlying complaint, it may exercise its "discretion to treat [the] pleadings of an intervenor as a separate action to adjudicate claims raised by the intervenor." *Miller & Miller Auctioneers, Inc. v. G.W. Murphy Indus., Inc.*, 472 F.2d 893, 895 (10th Cir. 1973). In order to survive as a separate action, however, the intervenor's complaint must meet the usual requirements of jurisdiction and venue:

> [I]ntervention presupposes the pendency of an action in a court of competent jurisdiction and . . . intervention cannot cure jurisdictional defects or create jurisdiction. By the same token defects in venue cannot be cured by intervention. However, the court has discretion to treat the intervenor's claim as if it were a separate suit and may entertain *it if it satisfies by itself the requirements of jurisdiction and venue*.

7C Charles A. Wright et al., Federal Practice & Procedure § 1918 (3d ed. 2012) (emphasis added).

Here, the proposed complaint-in-intervention could not survive as a separate action in this Court. Apart from any jurisdictional defects, venue is plainly lacking in this Court, because Westminster resides in Pennsylvania and its suit has no material connection to this district. Venue may be asserted in an action against federal officers in their official capacities or federal agencies "in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action." 28 U.S.C. § 1391(e)(1). Westminster satisfies none of these possible bases for venue. Westminster resides in the Eastern District of Pennsylvania. *See id.* § 118(a); Compl. ¶¶ 3, 20. The defendants reside in the District of Columbia. *See Miller v. Albright*, 523 U.S. 420, 427 (1998); *Reuben H. Donnelly Corp. v. FTC*, 580 F.2d 264, 266 n.1 (7th Cir. 1978) (holding that a federal agency resides only where it has its principal offices and a governmental

official resides where she performs her official duties).[2] And no event or omission has occurred in this district that gives rise to the claims that Westminster seeks to assert here. *See Emp'rs Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1166 (10th Cir. 2010) (to satisfy "substantial part" test under venue statutes, plaintiff must show acts or omissions that have a "close nexus" to the alleged claims). Thus, there is no basis for venue in this Court under 28 U.S.C. § 1391(e).

In sum, because this Court lacks jurisdiction over the complaint of the original plaintiffs, Westminster must independently satisfy the ordinary requirements of jurisdiction and venue in order to proceed in this Court. It cannot meet those requirements, and, as a result, the motion to intervene should be denied

II. Westminster Has Not Established a Right to Intervene Pursuant to Rule 24(a)(2)

Although the above considerations alone warrant denying Westminster's motion, defendants note that Westminster also has not established its right to intervene. Westminster first contends that it is entitled to intervene as of right under Rule 24(a) and therefore bears the burden of demonstrating that it meets "each of the four requirements of the rule":

> (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 463 (5th Cir. 1984) (en banc) (internal quotations omitted) ("*NOPSI*"); *see also* Fed. R. Civ. P. 24(a)(2). "Failure to

[2] *See also, e.g.*, *Williams v. United States*, No. C-01-0024 EDL, 2001 WL 1352885, at *1 (N.D. Cal. Oct. 23, 2001) (finding venue improper and explaining that "[f]or purposes of venue, all federal defendants [in this case] reside in Washington, D.C. Venue does not lie in every judicial district where a federal agency has a regional office. Venue is proper in the District of Columbia based on Defendants' residence, as provided by section 1391(e)(1)." (internal citation omitted)); *Caremark Therapeutic Servs. v. Leavitt*, 405 F. Supp. 2d 454, 464 (S.D.N.Y. 2005) (finding venue lacking because both federal defendants reside in Washington, D.C.; secretary of agency "maintains his office in Washington, D.C." and a federal agency is "headquartered in Washington, D.C."); *Archuleta v. Sullivan*, 725 F. Supp. 602, 605 (D.D.C. 1989).

satisfy any one requirement precludes intervention of right." *Haspel & Davis Milling & Planting Co. Ltd. v. Bd. Of Levee Comm'rs*, 493 F.3d 570, 578 (5th Cir. 2007).

In order to intervene of right, the applicant must have "a 'direct, substantial, legally protectable interest in the proceedings.'" *NOPSI*, 732 F.2d at 463 (quoting *Diaz v. S. Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir. 1970)).[3] Westminster claims an interest in (1) lowering its litigation costs and (2) "the transaction that is the subject of this action"—presumably, the preventive services coverage regulations that plaintiffs seek to challenge, which are not being enforced against plaintiffs by defendants and are undergoing amendment to accommodate the religious objections of organizations like plaintiffs. Mot. to Intervene at 1, 4. Neither of Westminster's asserted interests entitles it to intervene here. Westminster's interest in lowering litigation costs, is insufficient to support intervention because "it is plain that something more than an economic interest is necessary." *NOPSI*, 732 F.2d at 464. Indeed, were such an interest sufficient, intervention as of right could nearly never be denied, since it will almost always be less expensive for a party to join an existing suit and to file and litigate its own. And Westminster's opposition to the regulations being challenged by plaintiffs is no more a direct, substantial, legally protectable interest in these proceedings than in dozens of similar lawsuits filed in jurisdictions across the country, including in Westminster's home state of Pennsylvania. Allowing intervention under the circumstances here would also enable forum shopping, because

[3] Westminster's suggestion that intervention of right turns wholly on questions of prejudice is incorrect. Although prejudice is an "important consideration in determining *timeliness*," *McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970) (emphasis added), intervention of right must be denied unless the applicants meets all four requirements, *see Haspel*, 493 F.3d at 578 ("To intervene of right under Fed. R. Civ. Proc. 24(a)(2), an applicant must meet four requirements . . . . Failure to satisfy any one requirement precludes intervention of right."). Thus, for example, "even though Rule 24(a)(2) provides that propriety of intervention is to be tested by practical considerations, intervention still requires a direct, substantial, legally protectable interest in the proceedings." *Diaz*, 427 F.2d at 1124 (quotations omitted). The Fifth Circuit "ha[s] never departed from, and ha[s] in several cases reiterated, the 'direct, substantial, legally protectable' definition of the required interest." *NOPSI*, 732 F.2d at 463.

a party could intervene in a district of its choosing by the simple expedient of choosing a lawyer in that district.

Even if Westminster had a legally protectable interest in the proceeding, the disposition of this action will have no material effect on Westminster's ability to protect that interest. Westminster suggests that its ability to protect its asserted interests will be impaired by "the potential *stare decisis* effect on Westminster of a decision here that is reached without its involvement." Mot. to Intervene at 3. But no potential *stare decisis* effect exists. Westminster does not reside in the Southern District of Texas (or even in the Fifth Circuit). What is more, and as explained already, Westminster's proposed complaint could not be maintained as a separate action in this Court because venue would be lacking. *See supra* at 5-7. And, if Westminster were to file its suit in the Eastern District of Pennsylvania, where it resides, or in Washington, D.C., where defendants reside, case law from this circuit would not have precedential effect. *See Taylor v. Charter Med. Corp.*, 162 F.3d 827, 832 (5th Cir. 1998) ("[T]here is no rule of intercircuit *stare decisis*."); *compare Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994) (concluding that applicants' ability to protect their interest would be impaired by an adverse resolution of the case "because of the *precedential effect of the district court's decision*" (emphasis added)).

A further reason Westminster is not entitled to intervene is that it has not met its "burden of establishing inadequate representation." *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996) (en banc). Here, adequate representation is presumed because "the would-be intervenor has the same ultimate objective as a party to the lawsuit." *Id.*[4] In order to overcome

[4] Indeed, Westminster itself highlights the "near identity of issues raised in the [proposed] Complaint in Intervention and the Original Complaint in the original action." Mot. to Intervene at 6. Far from "sharp disalignment" between the parties and would-be intervenor that can block the presumption of adequate representation, *Edwards*, 78 F.3d at

(continued on next page…)

the presumption, the applicant "must show adversity of interest, collusion, or nonfeasance on the part of the existing party." *Id.* Westminster has not made the required showing. Westminster does not claim that plaintiffs' interests are adverse to its own. Although Westminster notes that plaintiffs serve undergraduate students, have different health coverage, and represent a different theological perspective, there is no reason to suspect that plaintiffs East Texas Baptist University and Houston Baptist University have an interest other than in prevailing on their claims. In fact, Westminster acknowledges that "the concerns of the existing plaintiffs are similar to Westminster's," Mot. to Intervene at 3, and plaintiffs seek the "same relief, on exactly the same grounds" and "theory of recovery," *NOPSI*, 732 F.2d at 472-73, as Westminster. Westminster has not suggested, moreover, any collusion or nonfeasance on the part of plaintiffs. Because the Court must presume adequate representation, and Westminster has not overcome the presumption, Westminster is not entitled to intervene in this case.

III. This Court Should Not Permit Westminster to Intervene Pursuant to Rule 24(b)

For similar reasons, the Court should exercise its direction to deny the motion for permissive intervention. *See NOPSI*, 732 F.2d at 471 ("Permissive intervention is wholly discretionary with the district court . . . even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied." (quotations and brackets omitted)). As explained already, plaintiffs adequately represent whatever legally protectable interest that Westminster may have in this proceeding (and there is none), and there is no reason to think Westminster's participation will significantly contribute to the factual development of this case. *Id.* at 472 ("In acting on a request for permissive intervention, it is proper to consider, among other things, 'whether the intervenors' interests are adequately represented by other parties' and

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1005, here, there is no reason to suspect a divergence between the ultimate objectives of plaintiffs – East Texas Baptist University and Houston Baptist University – and Westminster.

whether they 'will significantly contribute to full development of the underlying factual issues in the suit.'").

"Additionally, there is the issue of venue." *State of Oklahoma v. Sebelius*, 6:11-cv-00030-RAW (E.D. Okla. Mar. 4, 2013), ECF No. 59 (denying permissive intervention where venue would be improper for out-of-state intervenor). Although Westminster urges that denying permissive intervention "would have little constructive effect" because it could file its own action in this Court, Mot. to Intervene at 6, defendants have explained the flaw in Westminster's position, *supra* at 5-7. Improper venue is a further reason for denying intervention.

CONCLUSION

For the above reasons, defendants respectfully request that the Court deny Westminster's Motion to Intervene as a Plaintiff.

Respectfully submitted this 28th day of March, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

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