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**IN THE UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF CALIFORNIA**

THE STATE OF CALIFORNIA, et al.,

*Plaintiffs,*

v.

ALEX M. AZAR II, in his official capacity as Secretary of the U.S. Department of Health and Human Services, et al.,

*Defendants,*

and,

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,

*Intervenor-Defendant,*

and,

MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

*Intervenor-Defendant.*

Case No. 4:17-cv-05783-HSG

**INTERVENOR-DEFENDANT MARCH FOR LIFE'S OPPOSITION TO STATE OF OREGON'S MOTION TO INTERVENE**

## I. Introduction

"In determining whether intervention is appropriate, [courts] are guided primarily by practical and equitable considerations." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). Here, both considerations counsel against granting Oregon's motion to intervene. This litigation has been going on for well over a year now, yet Oregon never sought to intervene until it appeared it would not benefit through a nationwide injunction originally obtained by the efforts of the named Plaintiff States. Given this unexplained delay, permitting intervention would be inequitable. It would also protract matters going forward, as it would be an invitation to other states to follow suit to garner litigation rewards, without litigation effort.

This matter was commenced over 15 months ago when the state of California filed its complaint on October 6, 2017. *See* Dkt. No. 1. On November 1, 2017, Plaintiffs (with the addition of Delaware, Virginia, Maryland, and New York) filed an amended complaint seeking the same relief. *See* Dkt. No. 24. Those same Plaintiffs then filed on November 9, 2017, a motion for preliminary injunction seeking to preliminarily enjoin the IFRs promulgated by the Departments. *See* Dkt. No. 28. On November 21, 2017, The Little Sisters of the Poor filed a motion to intervene. *See* Dkt. No. 38. On December 6, 2017, a group of states, including Oregon, filed an amicus brief in support of the Plaintiff States. *See* Dkt. No. 74. On December 8, 2017, March for Life filed a motion to intervene. *See* Dkt. No. 87. On December 21, 2017 this Court granted the Plaintiff States' motion for preliminary injunction. *See* Dkt. No. 105.[1]

On December 13, 2018, the Ninth Circuit affirmed in large part this Court's preliminary injunction order, but reversed as to the scope of the nationwide injunction it ordered. *See California v. Azar*, 911 F.3d 558 (9th Cir. 2018). The Plaintiff States were then granted leave to file a second amended complaint, which they did on December 18, 2018. *See* Dkt. No. 170. This amended pleading, however, saw the ranks of the Plaintiff States swell in number from a previous

[1] On December 29, 2017, this Court granted Intervenor-Defendant The Little Sisters of the Poor's motion to intervene, *see* Dkt. No. 115, and on January 26, 2018, this Court granted Intervenor-Defendant March for Life's motion to intervene, *see* Dkt. No. 134.

five to now fourteen.[2] *See* Dkt. No. 170. On December 19, 2018, that expanded group of Plaintiff States then filed a second motion for preliminary injunction as to the Final Rules, *see* Dkt. No. 174, which this Court granted on January 13, 2019, *see* Dkt. No. 234. This Court, however, did not grant the Plaintiff States' request for a preliminary injunction that was nationwide in scope.

Despite the fact that this case is hardly of recent vintage or obscure from the public eye, and despite the fact that the state of Oregon can receive a hearing in a federal district court in Oregon as to harms it alleges the Final Rules impose on it, it now seeks to intervene in this matter in the Northern District of California, over fifteen months after it has commenced and as it appears to be going up to the Ninth Circuit on appeal for a second time.[3] Oregon has clearly known about this case virtually since its inception, as it filed an amicus brief on December 6, 2017. Not surprisingly then, its motion to intervene fails to establish that it satisfies the requirements for either intervention of right or permissive intervention. Moreover, if the logic upon which Oregon predicates its motion were to be adopted by this Court, it would threaten to open the floodgates to a host of other states seeking the same treatment in this case. This would effectively function as an end run around the Ninth Circuit's guidance regarding the propriety of nationwide injunctions, *see Azar*, 911 F.3d at 582-85, and this Court's recent decision to grant preliminary injunctive relief to only those states which are named plaintiffs, *see* Dkt. No. 234 at 44 (concluding that "[o]n the present record . . . in light of the concerns articulated in the *California* opinion," a nationwide injunction was not justified).[4] Moreover, a federal district court in Pennsylvania recently enjoined the Final Rules on a nationwide basis, thereby providing Oregon the relief and protection it seeks here. *Pennsylvania v. Trump*, No. 17-4540, 2019 WL 190324, at *29-33 (E.D. Pa. Jan. 14, 2019). For all these reasons, Oregon's motion to intervene should be denied.

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[2] The District of Columbia is treated as a "state" for purposes of this opposition.

[3] *See* Notice of Appeal filed by The Little Sister of the Poor at Dkt. No. 235.

[4] More generally, it would reward gamesmanship by permitting parties to sit on the sidelines, only to later jump into a case to take advantage of rulings made as to the litigating parties alone. This should not be countenanced by this Court.

## II. The State of Oregon Does Not Meet All the Requirements for Intervention as of Right.

The Ninth Circuit applies a four-part test to determine whether intervention of right is proper: "(1) the application for intervention must be timely; (2) the applicant must have a significantly protectable interest relating to the property or transaction that 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 the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001) (internal quotations omitted). "Each of these four requirements must be satisfied to support a right to intervene." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). Indeed, "[f]ailure to satisfy any one of the requirements is fatal to the application, and [a court] need not reach the remaining elements if one of the elements is not satisfied." *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009)

### A. Oregon's Motion to Intervene is Not Timely.

The Ninth Circuit has stated that "any substantial lapse of time weighs heavily against intervention." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1304 (9th Cir. 1997) (internal quotations omitted). Here, Oregon has waited over 15 months to intervene. "When the applicant appears to have been aware of the litigation but has delayed unduly seeking to intervene, courts generally have been reluctant to allow intervention." 7C Charles Alan Wright, et al., Federal Practice and Procedure § 1916 (3d ed. 2018). Oregon proffers no reason for its delay other than the "need to gather evidence." Dkt. No. 210 at 5. But because it has had some 15 months to do so, this Court should be reluctant to deem its motion timely now.

Moreover, if Oregon is permitted to intervene, it would presumably be immediately granted an injunction in its own right by virtue of this Court's January 13, 2019 Order. Other states would then likely seek to follow suit in similar fashion, thereby effectively creating a nationwide injunction when this Court has already determined one should not obtain based upon the Ninth Circuit's recent guidance. *See* Dkt. No. 234 at 42-44. Contrary to the claim that no

prejudice would ensue, permitting an end-run around that guidance by Oregon and then perhaps by other states' equally untimely interventions would be prejudicial to federal defendants and intervenor-defendants, who seek to have the exemptions in the Final Rules go into effect.

**B. Oregon Does Not Have A Significantly Protectable Interest In This Litigation.**

"The requirement of a significantly protectable interest is generally satisfied when the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Arakaki*, 324 F.3d at 1084 (internal quotations and citation omitted). But here Oregon lacks such an interest, because the resolution of this action will not "directly" affect the state. *See Greene v. United States*, 996 F.2d 973, 976–78 (9th Cir. 1993) (holding that an applicant lacked a "significant[ ] protectable interest" in an action when the resolution of the plaintiff's claims would not affect the applicant directly).

The resolution of the Plaintiff States' claims will affect whether the Final Rules may be applied in their respective jurisdictions. Oregon does not stand to be affected directly by the Court's decision on these claims, but rather by way of negative implication, to wit, in the absence of a nationwide injunction the Final Rules will not be enjoined as to the state of Oregon. *See* Dkt. No. 210 at 7 (explaining that because the Ninth Circuit in *Azar* reversed the nationwide injunction ordered by this Court, "unless Oregon is permitted to join this case, even if the Plaintiff States prevail in obtaining injunctive relief, this relief could very well not inure to Oregon's benefit"). But this does not mean Oregon will be harmed by the decision here, only that it does not stand to benefit in the same way the named Plaintiffs stand to benefit as parties petitioning this court for relief. As this is just another way of saying that the "resolution of plaintiff[s'] claims would not affect [Oregon] directly," it lacks a significantly protectable interest here.

**C. Oregon's Ability to Protects its Interests Will Not Be Impaired By this Action.**

As stated above, Oregon is free, and has been for some fifteen months, to seek the vindication of its alleged interests as to the IFRs and the Final Rules in a federal district court in

Oregon.[5] Moreover, despite the fact that this Court has—since Oregon filed its motion—declined to grant a nationwide injunction and has rather limited its relief to only the Plaintiff States, Oregon is nonetheless currently protected as to its alleged interests by virtue of the nationwide injunction entered by the federal district court in the Eastern District of Pennsylvania on January 14, 2019. *See Pennsylvania v. Trump*, No. 17-4540, 2019 WL 190324, at *29-33 (E.D. Pa. Jan. 14, 2019) (granting a nationwide injunction as to the Final Rules). Thus Oregon is currently unhindered in its ability to protect its purported interest, and at the same time insulated from any harm to that purported interest by virtue of an extant nationwide injunction. It cannot therefore establish that the disposition of this particular action will "as a practical matter, impair or impede [its] ability to protect [that] interest." *Donnelly*, 159 F.3d at 409.

**D. Oregon is Adequately Represented by the Plaintiff States.**

"Where the party and the proposed intervenor share the same 'ultimate objective,' a presumption of adequacy of representation applies, and the intervenor can rebut that presumption only with a 'compelling showing' to the contrary." *Perry*, 587 F.3d at 951 (quoting *Arakaki*, 324 F.3d at 1086). Here the Plaintiff States and Oregon share the same ultimate objective—both entities want the Final Rules permanently enjoined and the Departments prevented from instantiating the religious and moral exemptions to the Mandate. Oregon's proposed complaint-in-intervention establishes as much. *See* Dkt. No. 210 at 12. These identical interests mean that Oregon cannot make a compelling showing to rebut the presumption that the Plaintiff States adequately represent it. Put simply, the Plaintiff States "will undoubtedly make all of [Oregon's] proposed . . . arguments" and are "capable and willing to make such arguments."[6] *Arakaki*, 324 F.3d at 1086 (citing *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986)). Additionally, Oregon will not "offer any necessary elements to the proceeding that other

[5] March for Life continues to maintain that the IFRs and the Final Rules fully comport with the APA and the U.S. Constitution, that the Plaintiff States and proposed intervenors like Oregon lack standing, and that there is no legally cognizable harm asserted by either the Plaintiff States or Oregon. *See* Dkt. No. 199 at 20-22.

[6] Oregon's motion to join the Plaintiff States' arguments as to their motion for preliminary injunction, *see* Dkt. No. 210 at n.2 & Ex. 2, definitively establishes these elements.

parties would neglect." *Id*. Because it is adequately represented by the Plaintiff States, Oregon is not entitled to intervention as of right.[7]

**III. Oregon Should Not Be Granted Permissive Intervention.**

"Generally, permissive intervention under Rule 24(b) requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349, 1353 (9th Cir. 2013) (internal quotation marks and citation omitted). Additionally, in assessing whether permissive intervention is appropriate a district court should determine "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Dep't of Fair Emp't & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 741 (9th Cir. 2011) (quoting Fed. R. Civ. P. 24(b)(3)). Finally, under Rule 24(b) a court has "discretion to limit intervention to particular issues" and "is able to impose almost any condition." *Id*. (internal quotation marks and citations omitted).

As an initial matter, Oregon lacks standing to bring these claims, so there is no independent ground for jurisdiction. *See* Dkt. Nos. 51 at 8-11; 75 at 6-10; Brief of Appellant March for Life, *California v. March for Life*, No. 18-15166, Dkt. No. 17 at 10-54. Additionally, as established above, Oregon's motion is untimely. Therefore, it should not be granted permissive intervention.[8]

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[7] Even if this Court were to disagree that Oregon is adequately represented here, the solution is not to grant its motion to intervene. Oregon is free to seek the vindication of its purported interests in a federal district court in Oregon.

[8] Even if this Court were to find otherwise, however, it should exercise its discretion to require that, over and apart from any evidentiary submissions as to any alleged harm, Oregon be required to join in the collective briefing of the Plaintiff States going forward, and that no other state be permitted to join the proceedings as this case is litigated going forward. This is especially prudent because it is likely the Court's most recent ruling will be appealed, *see supra* at n. 3, and because both the Ninth Circuit and this Court have indicated that even while these appeals are pending the parties should continue to litigate the matter. *See, e.g.*, *Azar*, 911 F.3d at 584 (noting that as to the IFRs the case "could have well proceeded to a disposition on the merits" during an interlocutory appeal); Dkt. No. 234 at 45 (setting a case management conference "to discuss a plan for expeditiously resolving this matter on the merits"). Permitting other states to serially piggyback on the preliminary injunctive relief already granted by this Court will only protract efforts by the current parties to litigate this matter before this Court and at the Ninth Circuit.

## IV. Conclusion

For the reasons stated above, Oregon's motion should be denied. In the alternative, this Court should exercise its discretion to ensure that the current parties are able to resolve this matter without the additional delay promised by other eleventh hour attempts at intervention.

Respectfully submitted this 22nd day of January, 2019.

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* *Pro hac vice forthcoming*

** *Pro hac vice granted*