

1 Eric C. Rassbach – No. 288041  
Mark Rienzi *pro hac vice*  
2 Lori Windham *pro hac vice*  
Diana Verm *pro hac vice*  
3 The Becket Fund for Religious Liberty  
1200 New Hampshire Ave. NW, Suite 700  
4 Washington, DC 20036  
Telephone: (202) 955-0095  
5 Facsimile: (202) 955-0090  
erassbach@becketlaw.org

6 *(continued on next page)*  
7

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

9 THE STATE OF CALIFORNIA; THE STATE OF  
CONNECTICUT; THE STATE OF DELAWARE;  
10 THE DISTRICT OF COLUMBIA; THE STATE  
OF HAWAII; THE STATE OF ILLINOIS; THE  
11 STATE OF MARYLAND; THE STATE OF  
MINNESOTA, by and through its Department of  
Human Services; THE STATE OF NEW YORK;  
12 THE STATE OF NORTH CAROLINA; THE  
STATE OF RHODE ISLAND; THE STATE OF  
13 VERMONT; THE COMMONWEALTH OF  
VIRGINIA; THE STATE OF WASHINGTON,  
14 Plaintiffs,

15 v.

16 ALEX M. AZAR, II, in his Official Capacity as  
Secretary of the U.S. Department of Health &  
Human Services; U.S. DEPARTMENT OF  
17 HEALTH AND HUMAN SERVICES; R.  
ALEXANDER ACOSTA, in his Official Capacity  
as Secretary of the U.S. Department of Labor; U.S.  
18 DEPARTMENT OF LABOR; STEVEN  
MNUCHIN, in his Official Capacity as Secretary of  
19 the U.S. Department of the Treasury; U.S.  
DEPARTMENT OF THE TREASURY; DOES 1-  
20 100,

Defendants,

21 and,

22 THE LITTLE SISTERS OF THE POOR, JEANNE  
JUGAN RESIDENCE; MARCH FOR LIFE  
23 EDUCATION AND DEFENSE FUND,

Defendant-Intervenors.

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

**BRIEF REGARDING INTERVENOR-  
DEFENDANT LITTLE SISTERS’  
POSITION ON DISCOVERY AND  
THE ADMINISTRATIVE RECORD**

Date: February 12, 2019

Judge: Hon. Haywood S. Gilliam, Jr.

1 John Charles Peiffer, II  
The Busch Firm  
2 860 Napa Valley Corporate Way  
Suite O  
3 Napa, CA 94458  
Telephone: (707) 400-6243  
4 Facsimile: (707) 260-6151  
jpeiffer@buschfirm.com

5 *Counsel for Defendant-Intervenors*  
6

7 Pursuant to this Court’s order of January 30, 2019, Dkt. 270, Defendant-Intervenors The Little  
8 Sisters of the Poor, Jeanne Jugan Residence hereby submit their position on discovery and whether  
9 this case should be limited to the administrative record.

10 As a preliminary matter, the Little Sisters do not request that the Court set a discovery period. The  
11 Little Sisters do not intend to seek discovery, and believe that the case can be decided on summary  
12 judgment without discovery. The only situation in which the Little Sisters would anticipate seeking  
13 discovery is if another party seeks, and this Court grants, a discovery period to explore some issue that  
14 the Court determines merits discovery.

15 On the question of whether this case calls for evidence outside the administrative record, the Little  
16 Sisters do not object to the Plaintiff States relying on the declarations and evidence they have already  
17 submitted to this Court. The Little Sisters are unaware, however, what further evidence the States may  
18 seek to submit. In general, there are many instances in which materials outside the administrative  
19 record are relevant and admissible for the Court’s consideration. For example, the Court may take  
20 judicial notice of adjudicative facts that are “not subject to reasonable dispute,” such as government  
21 documents. Federal Rule of Evidence 201(b); *see Transmission Agency of N. Cal. v. Sierra Pac. Power*  
22 *Co.*, 295 F.3d 918, 924 n.3 (9th Cir. 2002) (noting existence of ongoing litigation in related case). And  
23 other extra-record evidence is permitted when “(1) it is necessary to determine whether the agency has

1 considered all relevant factors and explained its decision, (2) the agency has relied on documents not  
2 in the record, (3) supplementing the record is necessary to explain technical terms or complex subject  
3 matter, or (4) plaintiffs make a showing of bad faith.” *City of Las Vegas, Nev. v. FAA*, 570 F.3d 1109,  
4 1116 (9th Cir. 2009). Additionally, when a party challenges agency action as unconstitutional, courts  
5 must “make an independent assessment of a citizen’s claim of constitutional right.” *Porter v. Califano*,  
6 592 F.2d 770, 780 (5th Cir. 1979). Thus, “the court is entitled to look beyond the administrative  
7 record,” and “discovery as to [a] non-APA claim is permissible.” *Grill v. Quinn*, CIV S-10-0757 GEB,  
8 2012 WL 174873, at \*2 (E.D. Cal. Jan. 20, 2012).

9 Accordingly, the Little Sisters do not anticipate raising objections to any party’s reliance on  
10 documents outside the administrative record.

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15  
16 Dated: February 12, 2019

Respectfully submitted,

17 /s/ Mark L. Rienzi

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