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

THE STATE OF CALIFORNIA; THE STATE OF CONNECTICUT; THE STATE OF DELAWARE; THE DISTRICT OF COLUMBIA; THE STATE OF HAWAII; THE STATE OF ILLINOIS; THE STATE OF MARYLAND; THE STATE OF MINNESOTA, BY AND THROUGH ITS DEPARTMENT OF HUMAN SERVICES; THE STATE OF NEW YORK; THE STATE OF NORTH CAROLINA; THE STATE OF OREGON; THE STATE OF RHODE ISLAND; THE STATE OF VERMONT; THE COMMONWEALTH OF VIRGINIA; THE STATE OF WASHINGTON,

Plaintiffs,

v.

ALEX M. AZAR, II, in his official capacity as Secretary of the U.S. Department of Health and Human Services; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; R. ALEXANDER ACOSTA, in his official capacity as Secretary of U.S. Department of Labor; U.S. DEPARTMENT OF LABOR; STEVEN MNUCHIN, in his official capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF THE TREASURY;

Defendants,

and,

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

Defendants-Intervenors.

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

LITTLE SISTERS' OPPOSITION TO MOTION TO INTERVENE BY THE STATES OF COLORADO, MICHIGAN, AND NEVADA

Date: June 6, 2019
Time: 2:00 pm
Judge: Hon Haywood S. Gilliam, Jr.

Defendant-Intervenor The Little Sisters of Poor Jeanne Jugan Residence ("Little Sisters") opposes the Motion to Intervene filed by Colorado, Michigan, and Nevada ("Additional States"). Additional States' Motion, filed fifteen months into proceedings, does not reasonably justify their delay in seeking permissive intervention. Further, two equitable considerations mediate against the intervention of these three states. First, Additional States have already taken a position contradicting that of the Plaintiffs in a prior case addressing the same questions at issue here. Second, Additional States' Motion explains their interest as preserving a prior expansion in contraceptive coverage and associated benefits. But between court rulings and existing statutory and regulatory exemptions, the status quo already provides exemptions to many employers, including all known religious objectors. The Additional States point to no employer who will withdraw coverage. Without more, the equities are against this delinquent intervention.

ARGUMENT

I. Intervention is untimely.

As Additional States concede, a "primary factor[ ]" in determining whether permissive intervention is appropriate is "the reason for and length of the delay." *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016) (internal quotation marks and citation omitted). Additional States do not argue they were prevented from joining this litigation at any time in the last fifteen months, nor do they assert they were unaware of the suit. When this case returned to the district court following the appeal of the first preliminary injunction, eight additional states and the District of Columbia joined the amended complaint. Dkt. 170. Oregon moved to intervene within a few weeks.

Dkt. 210. Had these states wanted to join the lawsuit, they could have done so then. They offer two proposed justifications for their untimeliness; neither is persuasive.

First, Additional States say that they could not have been expected to be "aware that their interests would not be adequately protected by the existing parties" before this Court limited the injunction against the Final Rules to the parties in the case. Mot. 5 (quoting *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999)). This conclusion relies on two assumptions. First, it assumes Additional States were entitled to expect the Court to grant a nationwide injunction, and the Ninth Circuit to sustain that drastic remedy, without ever having to make a showing that their state-specific interests were threatened by the Interim Final Rules or Final Rules. *See California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018) (determining that the first injunction must be "narrowed to redress only the injury shown as to the plaintiff states" because the record "was not developed as to the economic impact on other states"). Second, and relatedly, it assumes Additional States were entitled to expect that the existing Plaintiff States would adequately represent their interests—here, doing the work to provide evidence sufficient to justify a nationwide injunction. But as this Court noted when granting Oregon intervention, the existing Plaintiff States "ha[d] not provided" any "showing of [a] state-specific injury" for states not already in the Plaintiff group. Dkt. 274 at 6. And the Additional States make no argument as to why the finalization of the immediately-effective Interim Final Rules without substantive change altered their interest.

Second, Additional States state vaguely that their "new attorney generals . . . have been reassessing their states' litigation." Mot. 5. But at most this claim means that these

new attorneys general wish that their predecessors had filed in this case. The Additional States point to no authority suggesting that Rule 24 allows for intervention applications to be treated as timely every time new officials are elected.

II. The equities are against intervention.

As this Court has previously noted, the Interim Final Rules and Final Rules in this case were designed subsequent to the Supreme Court's decision in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam). *Zubik* remanded to afford all parties "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise." *Id.* at 1560. The decision in *Zubik* was informed by the contributions of various stakeholder *amici*.

Among the *amici curiae* briefs was a brief signed by all three states seeking here to intervene taking the side of the Little Sisters. *See* Amicus Br. of Texas *et al*. Supporting Petitioners, No. 14-1418 (Jan. 11, 2016), available at https://s3.amazonaws.com/becketnewsite/20-States-LSP-Amicus.pdf. There, the Additional States argued, *inter alia*: (1) that the federal government "has not shown that its mandate to petitioners is the least restrictive means of advancing a compelling interest," in violation of civil rights guaranteed by the Religious Freedom Restoration Act (RFRA); (2) that the federal government had fatally conceded that denying exemptions "cannot even accomplish the ends that purportedly justify [the mandate's] substantial burden"; and (3) highlighted ways in which any gap could be filled, including by the federal government or existing private funds. *See* Amicus Br. of Texas *et al*. at 5, 18, 20 (highlighting, for example, "Colorado's Family Planning Initiative" as a successful

state program "[f]unded by a private donor" though administered by the state). The Additional States have not offered any reason to believe that the many available mechanisms for providing contraception in their States have disappeared since 2016.[1]

Further, Additional States frame their interest as concern for paying for those who may "lose access" or "lose current access" to contraceptive care. Mot. 3-4. But Additional States point to *no time* when objecting religious parties were compelled to provide or facilitate any contraceptive coverage to which they objected. In fact, Additional States point to no example of an in-state employer who will newly deny contraceptive coverage if the Final Rules are allowed to go into effect. Substantiating their asserted harm would require identifying an employer that was not already exempted: that is, for example, not grandfathered, covered by the small business exception, or subject to the protection of an existing injunction. *See, e.g.*, *Catholic Benefits Ass'n LCA v. Hargan*, No. 5:14-cv-00240-R, Order, Dkt.184 (W.D. Okla. Mar. 7, 2018) (granting permanent injunction of Mandate to current and future nonprofit members of Catholic Benefits Association).

To the contrary, it appears Additional States are indeed happy with the status quo, and they have given this Court no reason to think the status quo will change in their states. The status quo, of course, offers an exemption for employers with grandfathered

[1] To be sure, the Additional States are not the only government parties to have changed their position as to the pre-IFR rules, or to have policies that contradict their positions before this Court. The federal government, of course, changed its position on how the "accommodation" worked at the Supreme Court in 2016, thus forfeiting its prior RFRA argument. And plaintiff Virginia does not even have a contraceptive mandate at all, despite claiming that even small exceptions to the federal mandate would violate Equal Protection. Other states have religious exemptions in their state mandates that, by their own arguments, would violate the Establishment Clause. But the one thing *every* government in this case seems to agree on is what the Additional States told the Supreme Court: that there are a great many federal, state, and local programs that can deliver contraceptives to those who want them without the participation of nuns.

plans, for employers with fewer than 50 employees, for churches and integrated auxiliaries, and for everyone who is either a named party or otherwise participating in a class-wide injunction under the cases listed in Dkt. 223-1. Yet the Additional States profess to be completely happy with a status quo that includes all of those exemptions, including full exemptions for every religious employer they have ever heard of. Indeed, they claim that since the Affordable Care Act was implemented, unintended pregnancies and abortion rates have dropped even with those exemptions. *See* Mot. 3-4 (describing, for example, the status quo in Colorado of "full family planning services" as leading to fewer unintended pregnancies and lower abortions rates, and similarly touting a significant drop in youth abortion rates in Nevada under current law). Their motion does not explain why they expect this favorable status quo to change under the Final Rules.

The motion to intervene should be denied.

Dated: March 28, 2019

Respectfully submitted,

/s/ Mark L. Rienzi
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Counsel for Defendant-Intervenor the Little Sisters of the Poor, Jeanne Jugan Residence

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

[PROPOSED] ORDER DENYING MOTION TO INTERVENE

Re: Dkt. No. 293

ORDER

The Court, having considered the Motion to Intervene by the States of Colorado, Michigan, and Nevada, and all pleadings and papers filed in connection therewith and all other matters presented to the Court:

It is hereby **ORDERED** that the Motion is **DENIED**.

Dated: _____

_____
HON. HAYWOOD S. GILLIAM, JR.
UNITED STATES DISTRICT JUDGE