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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through ATTORNEY GENERAL XAVIER BECERRA, Plaintiff, **v.** **ALEX AZAR, in his OFFICIAL CAPACITY as SECRETARY of the U.S. DEPARTMENT of HEALTH & HUMAN SERVICES; U.S. DEPARTMENT of HEALTH & HUMAN SERVICES,** Defendants.	3:19-cv-01184-EMC **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO INTERVENE** Date: Time: Dept: Courtroom 5, 17th Floor Judge: The Honorable Edward M. Chen Trial Date: Not set Action Filed: March 4, 2019

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Mr. Sevier of the "De Facto Attorney Generals" and Mr. Christopher of "Special Forces of Liberty" (hereinafter "Proposed Intervenors") seek to intervene in this lawsuit because Plaintiff, through its motion for preliminary injunction, is purportedly forcing onto them "and other Christians and non-observers" "the religion of Secular Humanism" by interfering with conscience rights, and claiming that the use of federal tax payer dollars "appropriated to non-secular abortion facilities" violates the Establishment Clause. Proposed Pls.-Intervenors' Mot. to Intervene, ECF No. 47 at 10 n. 2. The Court should deny Proposed Intervenors' motion.

Proposed Intervenors do not meet the criteria for intervention as of right. First, Proposed Intervenors seek a relief different from that of Plaintiff, and therefore must meet Article III standing to intervene as of right. Proposed Intervenors fail to establish standing. Even as tax payers, Proposed Intervenors do not raise any violation of the Establishment Clause adequate to overcome the general rule against federal taxpayer standing. Second, Proposed Intervenors do not have a "significantly protectable interest" in this lawsuit because they are not alleging that HHS' Final Rule violates the Establishment Clause, nor have they have suffered any injury in fact, and therefore cannot establish standing.

In addition, Proposed Intervenors have not shown that Defendants, the Department of Health and Human Services (HHS) and Alex M. Azar, cannot adequately represent their interests in this litigation. Proposed Intervenors erroneously seek to intervene as plaintiffs, but they are not in fact challenging the constitutionality or legality of the Final Rule. Instead, Proposed Intervenors share the "same ultimate objective" as the federal defendants—denial of the relief sought by Plaintiff. *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011). That gives rise to a presumption of adequate representation that requires a "compelling showing" to overcome. *Id.* Proposed Intervenors do not meet that heavy burden. Moreover, there is a separate "assumption of adequacy when the government is acting on behalf of a constituency" that the intervenor represents. *Id.* And that is precisely the situation here, where Defendants are promulgating the Final Rule on behalf of individuals concerned with

adherence to religious beliefs and protection of conscience rights, a constituency which includes Proposed Intervenors. Once again, a "very compelling showing" is required to rebut this presumption of adequate representation. The Proposed Intervenors do not meet that burden.

Finally, permissive intervention should be denied because there is no common question of law or fact. Proposed Intervenors do not rely on the Final Rule to assert any plausible Establishment Clause violations.

Plaintiff does not question the sincerity or importance of Proposed Intervenors' religious beliefs. But it is neither necessary nor appropriate for them to intervene in this lawsuit. The Motion to Intervene should be denied.

STATEMENT OF THE ISSUE TO BE DECIDED

Whether Proposed Intervenors meet all of the requirements for intervention as of right under Fed. R. Civ. P. 24(a) or, in the alternative, whether the Court should grant permissive intervention pursuant to Fed. R. Civ. P. 24(b).

ARGUMENT

I. PROPOSED INTERVENORS DO NOT MEET ALL THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT

Federal Rule of Civil Procedure 24(a)(2) permits intervention as of right to one who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." The Ninth Circuit has established a four-part test pursuant to Rule 24: "(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." *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001). "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). Additionally, in a recent decision, the Supreme Court made clear that "an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017).

Proposed Intervenors' motion to intervene is timely, but they have not met the remaining requirements for intervention as of right.

A. Proposed Intervenors Do Not Have Article III Standing Necessary to Intervene as of Right

Proposed Intervenors are first required to establish Article III standing because they seek a relief that is different from that of Plaintiff's. *Town of Chester*, 137 S. Ct. 1645, at 1651. Unlike Plaintiff, Proposed Intervenors purport to demonstrate to this Court that "[t]he Old Rule [the previous Title X Rule] was unconstitutional, but the [N]ew [R]ule[,] [the Final Rule]…need[s] to be clarified," since they allege "the Establishment Clause is the legal basis for it." ECF No. 47 at 11, 26. In fact, Proposed Intervenors seek an injunction merely requiring HHS to clarify this legal basis in the Final Rule. *Id.* at 10. In complete opposition, Plaintiff seeks a preliminary injunction finding HHS' Final Title X Rule is illegal. Pl.'s Mot. Prelim. Inj. ECF No. 26 at 1, 7. As such, Proposed Intervenors must meet the requirements of Article III standing. *See Sevier v. Lowenthal*, D.D.C., 302 F. Supp. 3d 312, 317 (2018), *appeal dismissed*, No. 18-5125, 2018 WL 5603628 (D.C. Cir. Aug. 21, 2018) (finding that Mr. Sevier, as proposed intervenor as of right, lacked Article III standing to challenge alleged religious display of gay pride rainbow colored flags as a violation of the Establishment Clause); *see also Oregon Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 860 F.3d 1228, 1234-1235 (9th Cir. 2017) (Applying *Town of Chester*, holding also that intervenors must independently satisfy the test for standing if their interests do not align with those of a party with standing).

To establish standing, a party must allege (1) a "concrete and particularized" "injury in fact" that is (2) fairly traceable to the defendant's alleged unlawful conduct and (3) likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992). Proposed Intervenors assert taxpayer standing because they would be forced to "violate their own

conscience by the simple act of paying taxes, knowing that the funds [appropriated by HHS under Title X] will be used to advance what amounts to modern day child sacrifice." ECF No. 47 at 19. Payment of taxes is generally not enough to establish standing to challenge an action taken by the federal government. U.S. Const. art. III, § 2, cl. 1; *see Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 593, (2007). The Supreme Court has carved out a narrow exception to the general rule against federal taxpayer standing, under which a party has standing to challenge a law authorizing the use of federal funds in a way that allegedly violates the Establishment Clause. *Flast v. Cohen*, 392 U.S. 83, 105-106 (1968). Here, however, Proposed Intervenors do not meet the narrow exception requirements of taxpayer standing for Establishment Clause violations because they do not claim that the Final Rule violates the Establishment Clause.

Proposed Intervenors fail to meet the elements of Article III standing under *Lujan*. First, Proposed Intervenors do not claim any concrete injury in fact. A noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 (1982). Still, Proposed Intervenors do not allege that the legal action at issue here, the Final Rule, has caused any injury, intangible or otherwise, at all. ECF No. 26, at 8; 42 C.F.R. § 59.15 (Mar. 4, 2019). They maintain that Plaintiff's lawsuit itself constitutes injury in fact because it seeks "to convey that the State of California and the United States favors the religion of Secular Humanism over all other forms of religion." ECF No. 47 at 10. This is not a concrete injury demonstrating that Proposed Intervenors have suffered any harm.

Second, without a particularized harm, no injury is fairly traceable to any alleged unlawful conduct. Proposed Intervenors do not assert that Defendants have engaged in unlawful conduct from which they have sustained any harm. They merely offer "an alternative solution" intended to bolster the Final Rule's alleged constitutionality. ECF No. 47 at 13. They insist that Defendant's "guidelines need to reflect that the Establishment Clause of the First Amendment is the controlling legal basis for why the [f]ederal government is permanently getting out of [in their opinion,] the abortion funding business" of Title X—actions they fervently support. *Id.* at 23. Third, Proposed Intervenors' claims that Plaintiff's lawsuit favors a religion based on tenets of

abortion, are not likely to be redressed by the relief Proposed Intervenors seek. Forcing the defendants to clarify that the Final Rule's constitutionality rests on the Establishment Clause does not redress the unlawful conduct they allege has occurred. In the end, Proposed Intervenors fail to meet any of the standing elements.

Furthermore, in an effort to avoid the general rule against federal taxpayer standing and couch their claims in the taxpayer exception set out in *Flast*, Proposed Intervenors purport to bring an Establishment Clause claim. Their argument, however, appears untethered from the elements and legal foundation of such a claim. Proposed Intervenors contend that Plaintiff "seeks to force" onto them "and other Christians and non-observers" "the religion of *Secular Humanism* to…violate their own conscience by the simple act of paying taxes that are then appropriated to non-secular abortion facilities." ECF No. 47 at 10 (emphasis added). Proposed Intervenors claim that California Attorney General Xavier Becerra is "basically the priest of Secular Humanism." *Id.* at 30. Among other claims, Proposed Intervenors allege that "Secular Humanism" is "postmodern western individualistic moral relativism," including that "[t]he church of Planned Parenthood is part of the non-institutionalized religion of Secular Humanism and must be treated as a bastion of non-secular practices." *Id.* at 11, 20. In an attempt to analogize Title X providers to religious institutions, Proposed Intervenors declare that "Planned Parenthood meets the definition of a religious institution because it is 'full, organized, and advocates a private moral code that its members can live their daily lives by.'" *Id.* at 21.

As a different district court once indicated to Mr. Sevier, "the Establishment Clause's meaning is not so capacious." *Sevier v. Lowenthal*, 302 F. Supp. 3d 312, 321 (citing *United States v. Seeger*, 380 U.S. 163, 165 (1965) (recognizing distinction between religious beliefs and those that are "essentially political, sociological, or philosophical")). As the Ninth Circuit put it:

> [I]f anything can be religion, then anything the government does can be construed as favoring one religion over another, and . . . the government is paralyzed . . . ." While the First Amendment must be held to protect unfamiliar and idiosyncratic as well as commonly recognized religions, it loses its sense and thus its ability to protect when carried to [such] extreme[s] . . . .

Alvarado v. City of San Jose, 94 F.3d 1223, 1231 (9th Cir. 1996) (first two alterations in original).

Moreover, even if Proposed Intervenors successfully identified the contours of "secular humanism" as anything resembling religion for Establishment Clause purposes, this claim fails to meet the narrow taxpayer exception because—plainly put—they are *not* alleging the Final Rule violates the Establishment Clause as required by *Flast*. 392 U.S. 83, 106 (holding that a taxpayer will have standing when there is a violation of specific constitutional protections, such as the Establishment Clause, where "such an injury is appropriate for judicial redress, and the taxpayer has established the necessary nexus between his status and the nature of the allegedly unconstitutional action to support his claim of standing"). Proposed Intervenors are not challenging the validity of the Final Rule as promulgated by HHS. As discussed above, they seek to merely clarify that the Establishment Clause is the basis, in their view, of its constitutionality.

In short, Proposed Intervenors fail to meet any of the requirements of Article III standing necessary under Rule 24(a).

B. Proposed Intervenors Do Not Have Significant Protectable Interests in the Final Rule

To demonstrate a significant protectable interest, a proposed intervenor "must establish that the interest is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). A proposed intervenor has "a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation." *Cal. ex rel. Lockyer v. U.S.*, 450 F.3d 436, 441 (9th Cir. 2002).

As discussed above, *supra* page 3-6, the Proposed Intervenors do not have a "significantly protectable interest" in this lawsuit because they fail to state a claim under the Establishment Clause, have not suffered any injury in fact, and therefore cannot meet the standing requirements.

C. Because the Final Rule Poses No Establishment Clause Violations, the Disposition of This Action Will Not Impede Proposed Intervenors' Ability to Adhere to Their Religious Beliefs

Furthermore, Proposed Intervenors cannot demonstrate that the disposition of this action will "impair or impede" their ability to abide by their religious conscience. *Southwest Center for*

Biological Diversity, 268 F.3d at 817. Because Proposed Intervenors do not challenge the constitutionality of the Final Rule pursuant to the Establishment Clause, they do not need to intervene in this action. Any outcome of this action will not impair Proposed Intervenors' ability to adhere to their religious beliefs. Proposed Intervenors cannot meet this third requirement for mandatory intervention either.

D. Proposed Intervenors Have Not Shown That Defendants Cannot Adequately Represent Their Interest in This Litigation

As demonstrated below, two separate facts require Proposed Intervenors to make a compelling showing that Defendants cannot adequately represent its interests. First, the Defendants and Proposed Intervenors have the same ultimate objective: the denial of the relief that Plaintiff seeks, and the upholding of the Final Rule. Second, Defendants are acting on behalf of the constituency that Proposed Intervenors allegedly represent: Americans concerned about violations of their religious beliefs. In either circumstance, Proposed Intervenors must make a "compelling showing" that the *existing parties* cannot adequately represent its interests. Proposed Intervenors have not met that heavy burden.

As a general rule, "[t]he burden of showing inadequacy of representation is minimal and satisfied if the applicant can demonstrate that representation of its interests may be inadequate." *Citizens for Balanced Use*, 647 F.3d at 898 (internal citation omitted). However, "[i]f an applicant for intervention and an existing party share the same ultimate objective, a presumption of adequacy of representation arises" and the applicant must make "a *compelling showing* of inadequacy of representation." *Id*. (emphasis added.) Furthermore, "[t]here is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents which must be rebutted with a compelling showing." *Id.*; *see also Department of Fair Employment and Housing v. Lucent*, 642 F.3d 728, 740 (9th Cir. 2011) ("In the absence of a *very compelling showing* to the contrary, it will be presumed that the state adequately represents its citizens when the applicant shares the same interest.") (emphasis added.)

1. Proposed Intervenors and Defendants share the same ultimate objective of denying Plaintiff the relief that they seek

Proposed Intervenors share the same objective as the federal defendants—denial of the relief sought by Plaintiff. *See* ECF No. 47 at 12. Here, Proposed Intervenors are incorrectly seeking to intervene as plaintiffs because they are not challenging the validity of the Final Rule, but seek only to clarify the legal justification for the Rule. Their claims are already represented by Defendants, and they are *not* seeking a different relief or to pursue any litigation objective aside from defending the legality of the Final Rule—just like Defendants.

Proposed Intervenors assert that Defendants cannot adequately represent their interests because the federal government "must be religiously neutral" such that "the Court should automatically presume that the Defendants will not adequately represent the views and interest of the Christian [Proposed Intervenors]." ECF No. 47 at 31. This argument runs afoul of the very premise of their motion, that Defendants should be forced to "clarify" that HHS' Final Rule was created because the federal government already established that the Final Rule is necessary to ensure that the government is not excessively entangled "with the *religion* of Secular Humanism." *Id.* at 10-11 (emphasis added). This analysis suggests that Defendants can adequately evaluate the positions that pose potential Establishment Clause conflicts raised by the Proposed Intervenors. Indeed, in promulgating the Rule, Defendants echo the concerns brought forth by Proposed Intervenors, that they "would personally have to violate their own conscience through the simple act of paying taxes if the [Final] Rule became the Old Rule again." *Id.* at 31; s*ee also* 84 Fed. Reg. at 7716, 7747 (noting that "[t]he Department believes that it is appropriate and necessary to revise the Title X regulatory text to eliminate the provisions which are inconsistent with the health care conscience statutory provisions," and that it "intends to operate the Title X program consistent with federal conscience laws, the First Amendment, the Religious Freedom Restoration Act, and similar federal laws").

Here, Defendants and Proposed Intervenors seek an identical outcome, which is strong evidence of adequate representation. *See, e.g., Department of Fair Employment and* Housing, 642 F.3d at 740 n.11 (explaining that "[a]rguably, if these parties sought drastically different

remedies, there would be a greater risk of inadequate representations . . .[t]his, however, is not the case.")

2. Proposed Intervenors have failed to make the necessary "very compelling showing" to rebut the presumption that arises when the government acts on behalf of the constituency that the intervenor represents

Even if Proposed Intervenors could overcome the presumption of adequacy that arises when an applicant for intervention and an existing party share the same ultimate objective, they would also have to overcome the separate "assumption of adequacy when the government is acting on behalf of a constituency that it represents." *See Arakari*, 324 F.3d at 1086; *Citizens for Balanced Use*, 647 F.3d at 898. That is precisely the situation in this case, where Defendants have promulgated the Final Rule on behalf of a constituency which includes Proposed Intervenors. *See, e.g.*, ECF No. 26 at 12 n. 6. (Defendants' assertion that the 2000 regulations were "inconsistent with a number of federal conscience protection[s]," 84 Fed. Reg. at 7745).

The Ninth Circuit's decision in *Department of Fair Employment and Housing* illustrates this principle. In that case, the California Department of Fair Employment and Housing (DFEH) brought an action claiming that a disabled employee was terminated in violation of the Fair Employment and Housing Act. *Department of Fair Employment and Housing*, 642 F.3d at 735. The former employee moved to intervene as of right, claiming that DFEH could not adequately represent his interests because "DFEH litigate[s] in order to further the societal goal of ending discrimination, without regard to whether the result is the most advantageous that could be achieved on behalf of the individual victim." *Id*. at 740. In other words, the former employee's individual interests were narrower than the government's broader interests. *Id*. But the Ninth Circuit held that "[t]his claim lacks merit" and "falls far short of a 'very compelling showing.'" *Id*. So too here. Proposed Intervenors' claim of having a "particular" or a "Christian" interest, without more, similarly falls short of making a "very compelling showing" that Defendants cannot adequately represent its interests in this matter.

In *Lockyer*, the Ninth Circuit emphasized that "[i]n order to make a 'very compelling showing' of the government's inadequacy, the proposed intervenor must demonstrate a likelihood

that the government will abandon or concede a potentially meritorious reading of the statute." *Lockyer*, 450 F.3d at 444. There, the proposed intervenors met that standard because the federal defendants had *already* filed a motion for summary judgment with a "limiting construction" of the statute that did not protect the interests of the proposed intervenors. *Id*. Therefore, it was clear that "the proposed intervenors bring a point of view to the litigation not presented by either the plaintiffs or the defendants." *Id*. at 445. In light of "the presentation of *direct evidence* that the United States will take a position that actually compromises (and potentially eviscerates) the protections of the Weldon Amendment, the intervenors have overcome the presumption that the United States will act in their interest." *Id*. (emphasis added).

Proposed Intervenors here have "not demonstrated that the federal defendants will abandon or concede a potentially meritorious reading" of the Final Rule. *Id*. at 444. What is more, they have presented no direct evidence that the federal government will stake out a position that will compromise their interests. Proposed Intervenors cannot make a "very compelling showing" that the government is unable to adequately represent their interests. As such, their intervention as of right fails for this reason as well.

In sum, Proposed Intervenors have failed to establish that they meet all four requirements for intervening as of right. The motion to intervene should be denied.

II. THE COURT SHOULD DENY PERMISSIVE INTERVENTION

In the alternative, Proposed Intervenors request permissive intervention on the same grounds as they requested intervention as a matter of right. ECF No. 47 at 32. Under Fed. R. Civ. P. 24(b)(1)(B), the Court may permit anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." In making this discretionary determination, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). The district court has discretion "to limit intervention to particular issues" and "is able to impose almost any condition" if it permits intervention. *Department of Fair Employment and Housing*, 642 F.3d at 741.

The Court should deny permissive intervention for the same reasons that it should deny intervention as a matter of right. As outlined above, a principle reason is that Proposed Intervenors do not object to the constitutionality of the Final Rule, nor assert any plausible Establishment Clause violations at issue in this lawsuit to accommodate their religious beliefs. Because they fail to state a claim, Proposed Intervenors do not have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). There is, moreover, every reason to believe that Defendants will adequately represent Proposed Intervenors' interests. Proposed Intervenors are merely calling for clarification in the Final Rule that captures their personal perspective on its compliance with the Establishment Clause. *See* ECF No. 47 at 1. (Proposed Intervenors describing how President Trump's statement at the Susan B. Anthony Campaign for Life Gala on May 22, 2018 should be amended to include an Establishment Clause argument).

Proposed Intervenors' participation is unnecessary for the full and fair presentation of the legal issues involved in this lawsuit. Thus, permissive intervention should also be denied.

III. IF IT PERMITS INTERVENTION THE COURT SHOULD IMPOSE REASONABLE CONDITIONS TO ENSURE THAT THE EXISTING PARTIES ARE NOT PREJUDICED

At a minimum, if the Court permits intervention, it should impose reasonable conditions to ensure that the original parties are not prejudiced by the intervention. First, the issues before the Court should not be broadened or enlarged. *See, e.g.*, *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944) ("an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding.") Second, there should be no delay in ruling on Plaintiff's preliminary injunction motion or resolving the merits of the case. Third, there should be no duplicative discovery. *Department of Fair Employment and Housing*, 642 F.3d at 741. Finally, if the court does allow intervention, Plaintiff requests that Proposed Intervenors be required to file on Defendants' briefing schedule.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny the motion to intervene.

Dated: April 11, 2019

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