UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, *Plaintiff,* v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ERIC D. HARGAN, in his official capacity as Acting Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; STEVEN T. MNUCHIN, in his official capacity as Secretary of the Treasury; UNITED STATES DEPARTMENT OF LABOR; and R. ALEXANDER ACOSTA, in his official capacity as Secretary of Labor, *Defendants*.	Case No. 17-cv-11930-NMG

PLAINTIFF COMMMONWEALTH OF MASSACHUSETTS'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO INTERVENE BY DORDT COLLEGE AND MARCH FOR LIFE EDUCATION AND DEFENSE FUND

MAURA HEALEY
ATTORNEY GENERAL

Jonathan B. Miller, BBO # 663012
Jon Burke, BBO # 673472
Julia E. Kobick, BBO # 680194
Assistant Attorneys General
Elizabeth Carnes Flynn, BBO # 687708
Special Assistant Attorney General
Office of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108

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INTRODUCTION

Dordt College and March for Life Education and Defense Fund ("March for Life") (collectively, "Proposed Defendant-Intervenors") have moved to intervene in this case to help the federal government defend two Interim Final Rules ("IFRs") issued on October 6, 2017. The IFRs purport to create expansive religious and moral exemptions to provisions of the Patient Protection and Affordable Care Act ("ACA") that guarantee women equal access to preventive medical care—namely contraceptive care and services ("Contraceptive Mandate").

For the reasons set forth below, the motion should be denied. Proposed Defendant-Intervenors do not meet the criteria for intervention as of right and should not be granted permissive intervention. They cannot overcome the strong presumption that Defendants will provide adequate representation of any interest they may have in the litigation. Further, Proposed Defendant-Intervenors are already shielded from the Contraceptive Mandate by injunctions won through their own litigation. Their interests will not be directly harmed by any outcome in this case. As for permissive intervention, Proposed Defendant-Intervenors have failed to demonstrate how their participation in this case would aid the Court in its decision-making. To the contrary, because they did not seek to intervene until after both the Commonwealth and Defendants had moved for summary judgment, allowing the motion will likely delay resolution of this case.

BACKGROUND

The Commonwealth of Massachusetts filed this case on October 6, 2017 seeking, among other relief, to permanently enjoin enforcement of the IFRs. The Commonwealth alleges that the IFRs violate the Administrative Procedure Act, the Establishment Clause, and the equal protection guarantee of the Fifth Amendment.

On November 17, 2017, the Commonwealth moved for summary judgment on each of its claims. Pl.'s Mot. Summ. J., ECF 21; Mem. Supp. Pl.'s Mot. Summ. J., ECF 22. Defendants responded on December 8, 2017 by filing a Combined Opposition and Cross-Motion to Dismiss or for Summary Judgment. Defs.' Combined Opp'n Pl.'s Mot. Summ. J. & Cross-Mot. Dismiss or for Summ. J., ECF No. 32; Mem. Supp. Defs.' Cross-Mot. Dismiss or for Summ. J., ECF No. 33. Proposed Defendant-Intervenors filed the instant motion four days later on December 12, 2017.

Plaintiff's response to Defendants' Combined Opposition and Cross-Motion is currently due on January 19, 2018, and oral argument on the motions has been scheduled for January 30, 2018.

ARGUMENT

I. Proposed Defendant-Intervenors Have Not Established That They Meet The Requirements For Intervention As Of Right

To be granted intervention as of right, "a putative intervenor must establish: (i) the timeliness of its motion to intervene; (ii) the existence of an interest relating to the property or transaction that forms the basis of the pending action; (iii) a realistic threat that the disposition of the action will impede its ability to protect that interest; and (iv) the lack of adequate representation of its position by any existing party." *R & G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 7 (1st Cir. 2009) (citation omitted). The failure by a proposed intervenor "to satisfy any one of [the four factors] dooms intervention." *Pub. Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998). Here, Proposed Defendant-Intervenors do not satisfy at least three of the four factors.

A. Proposed Defendant-Intervenors Do Not Have a Significantly Protectable Interest in This Case

"While the type of interest sufficient to sustain intervention as of right is not amenable to precise and authoritative definition, a putative intervenor must show at a bare minimum that it has a significantly protectable interest…that is direct, not contingent." *Patch*, 136 F.3d at 205 (internal quotations omitted). Proposed Defendant-Intervenors have not identified any such interest. As stressed in their memorandum, they have already "litigated to obtain relief akin to the very regulations at issue in this case." Proposed Defendant-Intervenors' Memorandum in Support of Motion to Intervene ("Int. Memo.") at 12 (ECF No. 41). Both Proposed Defendant-Intervenors are protected by injunctions that prevent the Government from enforcing the Contraceptive Mandate (or the requirements of the Accommodation) against them; neither is reliant on the IFRs to "permit them to operate consistent with their religious and moral convictions without risking crippling fines." Int. Memo at 14-15. As no order issued by this Court can lift the injunctions, the outcome of this case will decidedly not "have direct, harmful effects upon Proposed Intervenors' ability to operate their organizations and fulfill their mission in accord with their religious commitments or moral convictions." Int. Memo. at 13-14; *cf. Pennsylvania v. Trump*, No. 17-4540, 2017 WL 6206133, *3 (E.D. Pa. Dec. 8, 2017) (concluding that a proposed intervenor in Pennsylvania's challenge to the IFRs lacked a protectable interest in part because it had "the option of seeking recourse through its own lawsuit," which "remains open").

Recognizing this problem, Proposed Defendant-Intervenors advance an alternative theory: if the Commonwealth prevails, this case may result in a ruling that is "in tension" with one or both of their injunctions, which may, in turn, make it more difficult for them to defend

those injunctions if the Government proceeds to contest them. Int. Memo. at 14-15. Not surprisingly, Proposed Defendant-Intervenors have been unable to identify a case recognizing such a "contingent" interest as sufficient to support intervention as of right. As they acknowledge, *Verizon New England v. Maine Pub. Utilities Comm'n*, 229 F.R.D. 335, 337 (D. Me. 2005), *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 43 (1st Cir. 1992), and *Animal Prot. Inst. v. Martin*, 241 F.R.D. 66, 70 (D. Me. 2007), involved parties with "direct, substantial, and specific interest[s]" in the outcome of the at-issue litigation. Int. Memo at 13; *see also Verizon*, 29 F.R.D. at 337 (intervenor had "direct contractual and competitive interests" in outcome of litigation); *Conservation Law Found.*, 966 F.2d at 43 (intervenors were "real targets" of the litigation which would have immediate and ongoing impacts on their business interests); *Animal Prot. Inst.*, 241 F.R.D. at 70 (intervenors were "real targets" of litigation which would have direct and substantial impact on economic interests). Unlike in the cases that they cite, Proposed Defendant-Intervenors lack any such "direct" and "substantial" interest in the present litigation.

Proposed Defendant-Intervenors' alleged interest in defending the IFRs as a "backstop" protection, Int. Memo at 15, is clearly insufficient. It amounts to little more—and likely less—than the same "undifferentiated, generalized interest in the outcome of…[this] action" shared by every other entity that agrees with the IFRs. *Patch*, 136 F.3d at 205; *see also Pennsylvania*, 2017 WL 6206133, *4 (proposed intervenor's interest in the lawsuit was "no more than a preferred outcome").

B. Proposed Defendant-Intervenors' Purported Interests Will Not Be Threatened by the Disposition of This Case

For the reasons set forth above, Proposed Defendant-Intervenors cannot establish that

their interests would be cognizably threatened by the disposition of this case. In fact, their continuing ability to pursue their interests through their own lawsuits, which, while currently stayed, remain open, regardless of the outcome of this case, demonstrates that intervention is not necessary or appropriate. *See Maine v. Norton*, 203 F.R.D. 22, 27 (D. Me. 2001), *aff'd sub nom. Maine v. Dir., U.S. Fish & Wildlife Serv.*, 262 F.3d 13 (1st Cir. 2001) (considering intervenor's ability to seek relief in primary litigation against an agency to conclude that intervenor did not have a right to intervene in a separate challenge to agency's interpretation).

C. Proposed Defendant-Intervenors Have Not Shown that Defendants Cannot Adequately Represent Their Interests in This Case

Proposed Defendant-Intervenors also have not shown—and cannot show—that Defendants are unable to adequately represent Proposed Defendant-Intervenors' interests in this litigation. A movant cannot intervene as of right if "existing parties adequately represent [the movant's] interest." Fed. R. Civ. P. 24(a)(2). Proposed Defendant-Intervenors bear the burden of making "a satisfactory showing that existing parties inadequately represent [their] interest[s]." *Verizon*, 229 F.R.D. at 338 (internal quotation marks and citation omitted). Two presumptions work against Proposed Defendant-Intervenors on this factor: (1) "'[w]here the goals of the applicants are the same as those [of] the plaintiff or defendant,' there is a presumption of adequate representation that must be rebutted by the prospective intervenor," *id.* (quoting *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999)); and (2) when the government is the representing party, movant's "burden of persuasion is ratcheted upward." *Patch*, 136 F.3d at 207 ("the burden of persuasion is ratcheted upward in this case because the commissioners are defending the Plan in their capacity as members of a representative governmental body"). Rebuttal of the presumption that government representation

is adequate "requires a strong affirmative showing that the [government] (or its members) is not fairly representing [movants'] interests." *Id.* (internal quotation marks and citation omitted).

While Proposed Defendant-Intervenors claim an inadequacy of representation in part because their interests are private and not public, Int. Memo. at 15-17, they do not make a sufficient showing to rebut the presumptions that, where there are overlapping goals and the representative party is the government, representation is adequate. Defendants and Proposed Defendant-Intervenors share the same ultimate goal—complete denial of the relief sought by the Commonwealth. Int. Memo. at 19 ("Dordt College intends to defend the propriety of the exemption created by the religious IFR, and March for Life the exemption created by the moral IFR"). Proposed Defendant-Intervenors wish to defend the Religious and Moral IFRs in order to protect their "freedom of conscience without being subjected to ruinous fines," Int. Memo. at 17, while Defendants are actively defending the same IFRs. Proposed Defendant-Intervenors even acknowledge that there is an "overlap in the [their] goals [and] those of the current government." *Id.*

Where, as here, a prospective intervenor "ha[s] the same ultimate goal" as the government, it "'must demonstrate [among other things] adversity of interest, collusion, or nonfeasance' to overcome the presumption" of adequacy of representation. *Tutein v. Daley*, 43 F. Supp. 2d 113, 129 (D. Mass. 1999) (quoting *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982)); *see also B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 546 (1st Cir. 2006) ("trilogy of grounds for rebutting the adequate representation presumption is only illustrative"). Proposed Defendant-Intervenors do not come close to making that showing. At most, they argue that Defendants cannot *currently* represent Proposed Defendant-Intervenors'

interests because they are in an adversarial relationship with the government in ongoing litigation, and "a new administration could be in place before this is resolved." Int. Memo. at 17. This argument rings hollow.

Proposed Defendant-Intervenors look to join this litigation to fight side-by-side with the current administration, the administration that promulgated the IFRs Proposed Defendant-Intervenors seek to defend. Whatever differences the Proposed Defendant-Intervenors may have had in the past, it does not follow that the current Defendants cannot adequately represent Proposed Defendant-Intervenors' interests now. "An earlier adverse relationship with the government does not automatically make for a present adverse relationship." *Maine v. Dir., U.S. Fish & Wildlife Services*. 262 F.3d 13, 20 (1st Cir. 2001); *see also Pennsylvania*, 2017 WL 6206133, *5 ("It does not . . . follow from Little Sisters' adverse relationship with the prior administration that its interests will not be adequately represented by the Government in this litigation. Quite to the contrary, in its briefings the Government has vociferously defended . . . the propriety of the IFRs."); Order Granting Defendant-Intervenor's Motion to Intervene, *State of California v. Health and Human Services*, No. 17-cv-05783 (N.D. Cal. Dec. 29, 2017), ECF No. 115 at 10-11 (rejecting request to intervene as of right in case challenging the IFRs because, among other reasons, the "formal vestige of adversity notwithstanding, . . . it is clear that [the Government] now [is] fully advocating for the [proposed intervenors'] position").

Proposed Defendant-Intervenors have failed to establish the necessary requirements for intervention as of right.

II. The Court Should Likewise Deny Permissive Intervention

In the alternative, Proposed Defendant-Intervenors urge this Court to allow them

permissive intervention. "On timely motion, 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." Fed. R. Civ. P 24(b)(1)(B). "In exercising its discretion, 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). In deciding whether to grant permissive intervention, "the district court can consider almost any factor rationally relevant but enjoys very broad discretion in granting or denying the motion." *Daggett*, 172 F.3d at 113 (citation omitted).

Aside from stating that "Dordt College intends to defend the propriety of the exemption created by the religious IFR, and March for Life the exemption created by the moral IFR," Int. Memo. at 19, and inviting the Court to consider Proposed Defendant-Intervenors' ability to assist in developing the record in the case, Proposed Defendant-Intervenors offer no insight into what they would add to this litigation. As discussed above, Defendants are already thoroughly pursuing the joint goal of Defendants and Proposed Defendant-Intervenors—the protection of the IFRs. Proposed Defendant-Intervenors seem to offer little more than amplification of the same arguments Defendants are already making. Re-hashing of the same arguments does not create grounds for intervention; in fact, it counsels against such a motion.

This Court has denied permissive intervention where a proposed intervenor and current party's "interests do not differ." *See Tutein*, 43 F. Supp. 2d at 131. In *Tutein*, the Court explained that, "where, as here, intervention as of right is decided based on the government's adequate representation, the case for permissive intervention diminishes, or disappears entirely." *Id.* (internal citation omitted); *see also Hoots v. Pennsylvania*, 672 F.2d 1133, 1136 (3d Cir. 1982) ("where, as here, the interests of the applicant in every manner match those of an existing party

and the party's representation is deemed adequate, the district court is well within its discretion in deciding that the applicant's contributions to the proceedings would be superfluous and that any resulting delay would be 'undue'"); *Maine v. Norton*, 203 F.R.D. at 29-30 ("Given the similarity of the goals of the Defendants and those of the Proposed Intervenors, the Court concludes that the granting of permissive intervention would not enhance the resolution of the case in any significant way.").

As mentioned above, Proposed Defendant-Intervenors are parties to litigation in which their interests can be protected, another factor counseling against permissive intervention. *See, e.g., Pub. Serv. Co. of New Hampshire v. Patch*, 173 F.R.D. 17, 29 (D.N.H. 1997), *aff'd*, 136 F.3d 197 (1st Cir. 1998). Moreover, granting permissive intervention would unnecessarily delay the proceedings in this case. The parties have already filed cross-motions for summary judgment, and a hearing on those motions is scheduled for January 30, 2018. If permissive intervention were granted, the parties would be required to respond to any additional pleadings filed by Proposed Defendant-Intervenors, and the hearing on those motions might need to be postponed. This case is therefore not comparable to *California v. Health and Human Services*, another case challenging the IFRs in which permissive intervention was granted, because in that case the parties had not yet filed dispositive motions on the merits. *See* No. 17-cv-05783, (N.D. Cal. Dec. 29, 2017), ECF No. 115 at 14-15.

Because Proposed Defendant-Intervenors' interests are already adequately represented by Defendants in this litigation, and the Court already has scheduled a hearing on January 30, 2018, the most efficient and least prejudicial way for Proposed Defendant-Intervenors to share their

views with the Court is to file an *amici curiae* brief. *See, e.g.*, *Tutein*, 43 F. Supp. 2d at 131. The Commonwealth would not oppose a motion for leave to file such a brief.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that the Court deny Proposed Defendant-Intervenors' Motion to Intervene.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS

ATTORNEY GENERAL
MAURA HEALEY

/s/ Jonathan B. Miller

Jonathan B. Miller, BBO # 663012
Jon Burke, BBO # 673472
Julia E. Kobick, BBO # 680194
Assistant Attorneys General
Elizabeth Carnes Flynn, BBO # 687708
Special Assistant Attorney General
Office of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2073
Jonathan.Miller@state.ma.us

Date: January 5, 2018

CERTIFICATE OF SERVICE

I certify that this document filed through the CM/ECF system will be sent electronically to registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on January 5, 2018.

Dated: January 5, 2018

/s/ Jonathan B. Miller
Jonathan B. Miller
Assistant Attorney General