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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

THE STATE OF CALIFORNIA, THE STATE OF DELAWARE, THE STATE OF MARYLAND, THE STATE OF NEW YORK, THE COMMONWEALTH OF VIRGINIA,

Plaintiffs,

v.

ERIC D. HARGAN, In His Official Capacity as Acting Secretary of the U.S. Department of Health & Human Services; U.S. DEPARTMENT OF HEALTH HUMAN SERVICES; R. ALEXANDER ACOSTA, In His Official Capacity as Secretary of the 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; DOES 1-100

Defendants.

4:17-cv-05783-HSG

STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MARCH FOR LIFE'S MOTION TO INTERVENE

Date:	March 1, 2018
Time:	2:00 p.m.
Dept:	2, 4th Floor
Judge:	Hon. Haywood S. Gilliam, Jr.
Trial Date:	Not set.
Action Filed:	October 6, 2017

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INTRODUCTION

The March for Life Education and Defense Fund ("March for Life") seeks to intervene in this case "in order to protect and defend its right to operate its organization in a manner consistent with its moral convictions and its reason for being, free from the imposition of potentially crippling fines." Proposed Defendant-Intervenor's Motion to Intervene, ECF No. 87 at 1. But the relief sought by the States will not require March for Life to violate its moral convictions and will not impose fines on it, because the permanent injunction prohibiting the federal defendants from enforcing the contraceptive mandate against March for Life remains in place. The States seek to enjoin the interim final rule (IFR) establishing a moral exemption to the contraceptive mandate, but that will not affect March for Life's permanent injunction.[1] No relief granted by this Court can undermine that injunction in any way. March for Life has not cited any case permitting intervention for an intervenor with an injunction already protecting the interest at stake.

March for Life, moreover, has not shown that the federal defendants cannot adequately represent its interests in this litigation. By seeking to intervene as a defendant, March for Life plainly shares the "same ultimate objective" as the federal defendants—denial of the relief sought by the States. That gives rise to a presumption of adequate representation that requires a "compelling showing" to overcome. March for Life has not met—and cannot meet—that heavy burden. There is also a separate "assumption of adequacy when the government is acting on behalf of a constituency" that the intervenor represents. And that is precisely the situation here, where the federal defendants are promulgating the moral exemption on behalf of employers like March for Life. The IFR itself mentions March for Life at least 15 times in justifying this new rule, and there is no daylight between the federal defendants and March for Life with respect to their defense of the IFR. This is not a case where the federal defendants have staked out a legal position that compromises the interests of the intervenors.

[1] This Court's preliminary injunction, issued yesterday, explicitly states that "[t]his nationwide injunction does not conflict with the plaintiff-specific injunctions issued by the courts in the *Zubik* cases or any other case." *See* ECF No. 105 at 29.

Finally, permissive intervention should be denied because there is no common question of law or fact when March for Life does not need to rely on the IFR to protect its moral convictions because of the permanent injunction that it previously secured. The States do not question the sincerity or importance of March for Life's moral convictions. But it is neither necessary nor appropriate for March for Life to intervene in this lawsuit between the States and the federal government. The Motion to Intervene should be denied.

STATEMENT OF THE ISSUE TO BE DECIDED

Whether March for Life meets 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. MARCH FOR LIFE DOES NOT MEET ALL OF 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).

The States concede that March for Life's Motion to Intervene is timely. However, March for Life has not met the remaining requirements for mandatory intervention.

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A. March for Life Does Not Have a Significant Protectable Interest in the Moral IFR Because the Federal Government is Permanently Enjoined From Enforcing the Contraceptive Mandate Against It

March for Life asserts that it has a significant protectable interest in this litigation because the relief that the States seek "may force March for Life to decide between hewing to its convictions and suffering penury as a result, or complying with the contraceptive mandate and ignoring its moral conscience altogether." ECF No. 87 at 10; *see also id*. at 11 (discussing the "looming prospect of crippling fines."). But that assertion is incorrect because March for Life has "secured a permanent injunction from the United States District Court for the District of Columbia" preventing the federal government from enforcing the contraceptive mandate against it. *See* ECF No. 87 at 1, 6; *see also March for Life v. Burwell*, 128 F.Supp.3d 116 (D.D.C. 2015) (permanently enjoining the federal government from enforcing the contraceptive mandate against March for Life) & 82 Fed. Reg. at 47848 (October 13, 2017) (federal defendants acknowledging "our requirement to comply with [the] permanent injunctive relief currently imposed in *March for Life*."). That permanent injunction protects March for Life from having to comply with the contraceptive mandate in violation of its moral convictions, and it remains in force.[2] March for Life, therefore, does not need to rely on the moral IFR to protect its sincerely held moral convictions, and thus lacks a significant protectable interest in this lawsuit.

Tacitly recognizing this fact, March for Life argues that this lawsuit may "produce a ruling that contradicts the injunctive relief already secured by March for Life." ECF No. 87 at 2. Not so. The relief sought by the States will not affect March for Life's permanent injunction, or any injunction currently in place in other lawsuits over the contraceptive mandate. *See* ECF No. 105 at 29 (The Court's preliminary injunction "does not conflict with the plaintiff-specific injunctions issued by the courts in the Zubik cases or any other case.") As reflected in the Prayer for Relief in the First Amended Complaint, the States only seek declaratory and injunctive relief prohibiting implementation of the two IFRs. *See* ECF No. 24 at 32. Enjoining these IFRs will not—and,

[2] March for Life points out that the previous administration appealed the permanent injunction, and therefore its relief is not "final." ECF No. 87 at 7; *see also* ECF No. 87-1 at ¶ 23. But as March for Life itself notes, the permanent injunction is still in effect and that appeal is being held in abeyance. *Id*. Moreover, it seems highly unlikely that the *current* administration will pursue that appeal. March for Life does not suggest otherwise.

indeed, cannot—"contradict" any injunction issued by any other court. There is simply no factual basis for suggesting that the permanent injunction secured by March for Life could be imperiled by this lawsuit. Nor has March for Life cited any case permitting intervention for an intervenor that already *has* an injunction protecting the interest allegedly at stake in that lawsuit. March for Life lacks a significant protectable interest in this case, and therefore cannot meet the second requirement for mandatory intervention.

B. Because March For Life Has a Permanent Injunction Preventing Enforcement of the Contraceptive Mandate Against It, the Disposition of This Action Will Not Impede Its Ability to Adhere to Its Moral Convictions

For the same reason, March for Life cannot demonstrate that the disposition of this action will "impair or impede" its ability to adhere to its moral convictions. *Southwest Center for Biological Diversity*, 268 F.3d at 817. Because a permanent injunction prevents the government from enforcing the contraceptive mandate against March for Life, the outcome of this action will not impede March for Life's ability to adhere to its moral beliefs. March for Life cannot meet this third requirement for mandatory intervention either.

C. March for Life Has Not Shown that the Federal Defendants Cannot Adequately Represent Its Interests in this Litigation

Finally, March for Life has not shown—and cannot show—that the federal defendants are unable to adequately represent its interests in this litigation. 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.)

Two separate facts require March for Life to make a "compelling showing" that the federal defendants cannot adequately represent its interests. First, the federal defendants and March for Life (as a proposed defendant-intervenor) have the exact same ultimate objective: the complete denial of the relief that the States seek. Second, the federal government defendants are taking direct action on behalf of the constituency that March for Life represents: employers who object to the contraceptive mandate on moral grounds. *See* 82 Fed. Reg. at 47844 (October 13, 2017) (explaining that "these interim final rules expand exceptions to the contraceptive Mandate to protect certain entities and individuals that object to coverage of some or all contraceptives based on sincerely held moral convictions but not religious beliefs . . ."). In both of these circumstances, a proposed intervenor must make a "compelling showing" that the existing parties cannot adequately represent its interests. March for Life has not met that heavy burden.

1. March for Life and the federal defendants share the same ultimate objective of denying the States the relief that they seek

March for Life plainly shares the "same ultimate objective" as the federal defendants: denial of the relief sought by the States. *See* ECF No. 87 at 13 (acknowledging that "their ultimate goal may be the same" as the federal defendants); *see also* ECF No. 87-2 at ¶ 137 (March for Life's Proposed Answer "denies that Plaintiffs are entitled to any relief whatsoever."). By seeking to intervene as a defendant, March for Life *cannot* seek different relief or pursue any litigation objective aside from defending the legality of the IFRs—just like the federal defendants. Nor would differences in litigation strategy justify intervention. *See Arakari*, 324 F.3d at 1086 ("Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention"); *see also Department of Fair Employment and Housing*, 642 F.3d at 740 (same). Accordingly, March for Life "must make a compelling showing of inadequacy of representation" to rebut the presumption of adequacy that arises in such circumstances. *Citizens for Balanced Use*, 647 F.3d at 898. March for Life's Motion to Intervene falls far short of that mark.

March for Life asserts that it maintains an "individual parochial interest" whereas "the federal government's interest is far more expansive and generalized." ECF No. 87 at 11-12. But that is the *inverse* of the situation in *Citizens for Balanced Use*, which March for Life cites in support of this proposition. In that case, conservation groups seeking to intervene requested "the broadest possible restrictions on recreational uses" while the Forest Service believed that "much narrower restrictions would suffice to comply with its statutory mandate." *Citizens for Balanced Use*, 647 F.3d at 899 & n.4. Moreover, though nominally aligned with the government, the conservation groups were actually adverse to the Forest Service because its interim order was issued "under compulsion of a district court decision gained by [the conservation groups'] previous litigation" and was being appealed at that time. *Id*. at 899. Those factors collectively constituted a "compelling" showing that the government could not adequately represent the interests of the conservation groups.

Here, in contrast to *Citizens for Balanced Use*, the federal defendants and March for Life both seek to defend the broad scope of the moral exemption. March for Life is not advocating for a broader interpretation of this IFR than the federal defendants. Nor has March for Life described any specific reason why its interests diverge from the federal defendants' interests, or highlighted any legal argument that it (but not the federal defendants) would make. And unlike *Citizens for Balanced Use*, the defendants and March for Life are not, in reality, adverse parties. To the contrary, the moral IFR references March for Life approximately 15 times when justifying this new rule. *See* 82 Fed. Reg. at 47838-47862 (October 13, 2017). This situation is also fundamentally different than *California ex rel. Lockyer v. U.S.*, 450 F.3d 436, 445 (9th Cir. 2006) where the Ninth Circuit permitted intervention 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." (emphasis added). The federal defendants here have not taken any position that compromises March for Life's interests. On the contrary, they are vigorously defending those interests on behalf of March for Life and other similarly situated employers with moral objections to providing contraceptive healthcare coverage. *See* 82 Fed. Reg. at 47838-47862 (October 13, 2017).

The general rule is that that where the intervenor shares the same ultimate objective as an existing party, a strong presumption of adequacy arises and intervention is typically not justified. *Citizens for Balanced Use*, 647 F.3d at 898. This case is no exception. March for Life's moving papers do not make a "compelling showing" sufficient to overcome that presumption. *Id*.

2. March for Life has not made a "very compelling showing" to rebut the presumption that arises when the government acts on behalf of the constituency that the intervenor represents

Even if this Court concludes that March for Life can overcome the presumption of adequacy that arises when an intervenor and an existing party share the same ultimate objective (and it should not so conclude), there is a 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. And that is precisely the situation in this case, where the federal defendants are promulgating the moral IFR on behalf of employers with moral objections to the contraceptive mandate, a constituency that includes March for Life. *See* 82 Fed. Reg. at 47844 (October 13, 2017) ("These interim final rules incorporate conscience protections into the contraceptive Mandate.") The Ninth Circuit has repeatedly held that "[i]n the absence of a very compelling showing to the contrary, it will be presumed that a state adequately represents its citizens when the applicant shares the same interest." *Department of Fair Employment and Housing*, 642 F.3d at 744; *Arakari*, 324 F.3d at 1086 (same). March for Life's Motion to Intervene does not come close to making the requisite showing.

March for Life asserts, in boilerplate fashion, that "the federal government's 'representation of the public interest' is not 'identical to the individual parochial interest' of March for Life" and that this "distinction is sufficient, by itself, to merit a grant of intervention." ECF No. 87 at 11-12. But March for Life does not offer even a single concrete example of how its interests, legal arguments, or litigation strategy diverge from those of the federal defendants in any way. *Id*. Moreover, it will always be the case that an individual's interests are narrower than the government's broader interests. If that was the legal standard, the government could *never* adequately represent the interests of a third party. But the law presumes the opposite when the

government is acting on behalf of the constituency that the proposed intervenor represents. *Arakari*, 324 F.3d at 1086; *Citizens for Balanced Use*, 647 F.3d at 898.

The Ninth Circuit's relatively recent 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 fall short of a 'very compelling showing.'" *Id*. So too here. March for Life's claim of having a "parochial" interest, without more, similarly falls short of making a "very compelling showing" that the federal defendants cannot adequately represent its interests in this matter.

The cases cited by March for Life are not to the contrary. In *Lockyer*, the Ninth Circuit found that the proposed intervenors made "a very compelling showing" that the federal government would not adequately represent its interests where the federal defendants had *already* filed a motion for summary judgment with a "limiting construction" of the statute that "actually compromises (and potentially eviscerates) the protections of the Weldon Amendment" claimed by the intervenors. *Lockyer*, 450 F.3d at 444. In *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated by Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173 (9th Cir. 2011), the Ninth Circuit permitted limited intervention to the State of Arizona and Maricopa County where the injunctive relief sought would directly affect them and the federal Forest Service had no "duty to represent" their unique interests in preventing the enjoining of all forest management activities in Arizona's national forests. And in *California Dump Truck Owners Ass'n v. Nichols*, 275 F.R.D. 303, 308 (E.D. Cal. 2011), the district court found that the state agency defendant and the intervenor "were directly at odds on a number of

pertinent issues" and that the state agency defendant "is willing to compromise, and potentially eviscerate, the regulation in favor Plaintiff's interests." In contrast, the federal defendants in this case are not compromising March for Life's interests or narrowing the scope of the IFR in any way; they are defending the moral exemption as vigorously as March for Life itself.

March for Life's own cases demonstrate that it cannot make a "very compelling showing" that the government is unable to adequately represent its interests. March for Life cannot establish that it meets 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, March for Life requests permissive intervention on the same grounds as its requested intervention as a matter of right. *See* ECF No. 87 at 13-14. 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 March for Life does not need to rely on the moral IFR at issue in this lawsuit because the federal defendants are already permanently enjoined from enforcing the contraceptive mandate against it. In light of that permanent injunction, March for Life does 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 the federal defendants will adequately represent March for Life's interests, as evidenced by the extensive discussion of March for Life and similarly situated moral objectors in the IFR itself. *See* 82 Fed. Reg. at 47838-47862 (October 13, 2017). March for Life's intervention is unnecessary for the full and fair presentation of the legal issues involved in this lawsuit. Permissive intervention should 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 March for Life to intervene, 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 resolving the merits of the case. Third, there should be no duplicative or unnecessary discovery. *Department of Fair Employment and Housing*, 642 F.3d at 741; *cf.* ECF No. 87 at 11 fn. 2 (March for Life seeks "to fully develop the factual record regarding the claim that its moral convictions somehow frustrate the 'scheme and purpose' of the ACA.") Under no circumstances should intervention prejudice the existing parties.

CONCLUSION

For the foregoing reasons, the States respectfully request that the Court deny March for Life's Motion to Intervene.

Dated: December 22, 2017

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