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

THE STATE OF CALIFORNIA, et al.,
Plaintiffs,
v.

ERIC D. HARGAN, in his official capacity
as Acting Secretary of the U.S. Department
of Health and Human Service, et al.,

Defendants,
and,

THE LITTLE SISTERS OF THE POOR
JEANNE JUGAN RESIDENCE,

Defendant-Intervenor,
and,

MARCH FOR LIFE EDUCATION AND
DEFENSE FUND,

Defendant- Intervenor.

**Pro hac vice forthcoming*

*** Pro hac vice granted*

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

**PROPOSED DEFENDANT-
INTERVENOR MARCH FOR LIFE'S
REPLY IN SUPPORT OF MOTION TO
INTERVENE**

Date: March 01, 2018

Time: 2:00 pm

Dept.: Courtroom 2

Judge: Hon. Haywood S. Gilliam, Jr.

1 Proposed Defendant-Intervenor March for Life holds the moral conviction that all unborn
2 children have inestimable worth and dignity and therefore should never be aborted. That moral
3 conviction means that under no circumstances could March for Life have complied with the ACA's
4 contraceptive mandate as originally conceived. Mancini Decl. at ¶¶ 4, 10, 11, 18. Fortunately, the
5 federal government recently revised its regulations pertaining to the mandate in the form of two
6 Interim Final Rules ("IFRs"), thereby exempting both religious and moral entities from being
7 compelled to provide controversial—and religiously and morally problematic—abortifacient
8 drugs and devices. Since these IFRs were promulgated, March for Life has been assured that after
9 years of litigation and petitioning the government for a reasonable accommodation, hard won relief
10 is finally at hand.

11 The Plaintiff States, however, now seek to undo all of March for Life's efforts and thwart its
12 hope that it would be able to operate according to its convictions going forward. Moreover, in
13 seeking a nationwide injunction that would eliminate the new IFRs, Plaintiffs threaten to send
14 March for Life back into ongoing litigation with the federal government, with all the uncertainty
15 such litigation promises. Put simply, if the Plaintiff States are granted the relief they seek in this
16 litigation, March for Life and other non-religious, non-profits may eventually be compelled to
17 choose between violating their moral convictions by providing health care coverage which
18 provides abortifacients, or hewing to those convictions under pain of crippling fines leading to the
19 likely extinction of their organizations and charitable missions.

20 But absent any alteration to the status quo represented by the new IFRs, March for Life would
21 not be subjected to such a Hobson's Choice. Accordingly, in order to carry out its mission
22 unperturbed by the looming prospect of penury, March for Life has reasonably sought intervention
23 in this matter to raise arguments on behalf of itself and other moral entities who for the first time
24 have enjoyed the solicitude of the federal government on this crucial matter of conscience.
25 Plaintiff States, however, seek not only to eliminate the exemptions March for Life fought so hard
26 to secure, but also to prevent March for Life from defending its interests in this matter by opposing
27 its Motion to Intervene.

1 Plaintiff States argue in their Response in Opposition that March for Life lacks a significantly
 2 protectable interest in this matter, that it has no interest that may be impaired, and that in any event
 3 it has failed to show that federal defendants cannot adequately represent any interest it may have.
 4 Plaintiffs, however, are mistaken. March for Life satisfies the requirements for both intervention
 5 as of right and permissive intervention, and therefore should be permitted to actively participate in
 6 this case going forward as a Defendant-Intervenor.

7 **STATEMENT OF THE ISSUES**

8 Whether Proposed Defendant-Intervenor March for Life should be granted intervention as
 9 of right to defend its interests in this matter, the resolution of which threatens to eliminate the
 10 exemptions recently granted by the federal government to non-religious non-profits which hold
 11 moral convictions against abortion. Alternatively, whether Defendant-Intervenor March for Life
 12 should be granted permissive intervention.

13 **I. March for Life is Entitled to Intervention as of Right.**

14 **A. March for Life Has a Significantly Protectable Interest in the Subject Matter** 15 **of this Action.**

16 The moral IFR promulgated by the federal government some two months ago represented a
 17 tectonic shift with respect to the protection of conscience for March for Life and similarly-situated
 18 organizations. Before the IFR, March for Life was irrationally excluded from even the thought of
 19 any accommodation or exemption, despite its clear and unquestioned moral convictions which
 20 prevent it from complying with the mandate. Mot. to Intervene at 6. After the IFR, the world was
 21 set aright—March for Life had finally secured the relief it had struggled to obtain from the time it
 22 realized no accommodation or exemption for its convictions would be forthcoming. Against this
 23 backdrop, Plaintiff States now seek to turn back the clock, depriving March for Life of the
 24 protections it fought so hard to secure.
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Plaintiff States contend that March for Life lacks a protectable interest in this case because, by virtue of the permanent injunction it secured against the federal government, *see March for Life v. Burwell*, 128 F. Supp.3d 116 (D.D.C. 2015), it “does not need to rely on the moral IFR to protect its sincerely held moral convictions.” Opp. at 3. But as already established in March for Life’s Motion to Intervene, that relief is yet temporary, and is subject to potential reversal on appeal, and appeal the federal government has yet to withdraw. Mot. to Intervene at 6-7. Plaintiff states assure this Court, and presumably intend to assure March for Life itself, that “it seems highly unlikely that the current administration will pursue [the pending] appeal.” Opp. at 3 n. 2. But even if such a self-serving, “all will be well” prognostication ultimately at some remote date turns out to be true, it is at this time insufficient to defeat the protectable interest in this litigation March for Life has already demonstrated.¹

Indeed, extant and controlling precedent establishes that a proposed intervenor has “significant protectable interest” if that “interest . . . is protected under some law” and “there is a relationship between [the] interest and the plaintiff’s claim.” *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) (internal quotations and citations omitted). Moreover, the Ninth Circuit’s “intervention caselaw [does not] turn on . . . technical distinctions,” but rather focuses on whether a proposed intervenor shows “it will suffer a practical impairment of its interests as a result of the pending litigation.” *Id.* March for Life has satisfied that standard here.

¹ Plaintiff States appear to suggest that the Ninth Circuit’s precedent as to the “significant protectable interest” analysis is somehow suspended where “an intervenor . . . already has an injunction protecting the interest allegedly at stake in [the lawsuit].” Opp. at 4. Curiously, Plaintiff States themselves cite to no case as authority for such a proposition, which is not surprising given the *sui generis* nature of this matter. Moreover, as March For Life has already established, its relief is not yet definitively established and may disappear as a result of the pending appeal filed by the federal government. Finally, the relief represented by a “temporary” permanent injunction, on the one hand, and the regulatory exemption represented by the IFRs is not the same—the latter is far stronger and broader.

1 It is patent that March for Life's interest in not having to choose between violating its
2 conscience and being saddled with exorbitant fines is protected by the moral IFR under challenge
3 here. It is also patent that there is a relationship—indeed a direct relationship—between March
4 for Life's interest and Plaintiff States' desired relief. If the latter is granted the former will be
5 greatly damaged, as the regulatory relief recently granted March for Life is eliminated as a
6 consequence of this action. Both *Lockyer and United States v. Aerojet Gen. Corp.*, 606 F.3d 1142
7 (9th Cir. 2010) are instructive here, and definitively establish that March for Life has met its burden
8 as to this factor.
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10 In *Lockyer* the court found a significant protectable interest for proposed intervenors who
11 were the “intended beneficiaries” of the Weldon Amendment, which “provide[d] an important
12 layer of protection” to those proposed intervenors, who would “likely . . . be forced to choose
13 between adhering to their beliefs and losing their professional licenses” if the challenge to the law
14 proved successful. 450 F.3d at 441. Here too, the moral IFR was created for organizations like
15 March for Life,² and if it is cast aside as a result of this litigation, March for Life will be subjected
16 to a similarly unenviable choice that faced the *Lockyer* intervenors. In *Aerojet* the court found a
17 significant protectable interest for proposed intervenors who, although they had not yet incurred
18 liability which would have given rise to a claim for contribution, would have had their right to
19 seek such contribution wiped out if the suit was successful. 606 F.3d at 1150-51. So too here,
20 although Plaintiff States make much of the fact that March for Life currently may not have a need
21 for the moral IFR because of the permanent injunction in place, that need may become urgent if
22 that relief proves short-lived as a result of the pending appeal. And in the event that its permanent
23 injunction is dissolved, March for Life will have nowhere to turn if the Plaintiff States have their
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27 ² Plaintiff States concede that March for Life was an intended beneficiary of the moral IFR. *See*
28 *Opp.* at 1 (“The IFR itself mentions March for Life . . . in justifying this new rule . . .”).

way in eradicating the far more expansive moral IFR. Just like *Lockyer*, then, *Aerojet* supports a finding of significant protectable interest, especially given the unique facts of this case.³

B. March for Life’s Ability to Protect Its Interest May Be Impaired.

Because March for Life has established that it has a significant protectable interest, it is clear that “the disposition of th[is] case may, as a practical matter, affect” its interests. *Citizens for Balanced Use v. Montana Wilderness Ass.*, 647 F.3d 893, 898 (9th Cir. 2011) (citation omitted). Plaintiff States disagree, contending that “the outcome of this action will not impede March for Life’s ability to adhere to its moral beliefs.” Opp. at 4. Plaintiff States, however, are mistaken.

The moral IFR established protections which operated independently from those protections moral entities might finally secure through protracted litigation. But once removed by virtue of this action, those protections will evaporate, again leaving March for Life subject to the vagaries of the appeal process, with all its attendant uncertainty and even potential changes of position by the federal government.⁴ Put simply, because the outcome of this action could imperil the eventual outcome of March for Life’s current litigation posture, and because it most assuredly

³ The fact that this Court specifically noted that its Order granting Plaintiff States’ Motion for Preliminary Injunction did “not conflict with the plaintiff-specific injunctions issued by the courts in the *Zubik* cases or any other case,” ECF No. 105 at 29, does not alter the conclusion that March for Life has a significant protectable interest in this litigation. The permanent injunction currently in place can be eliminated independently of this Court’s decision, and in that eventuality March for Life would be bereft of the regulatory protection provided by the moral IFR, which in any event is broader and stronger in scope and effect than any particular relief fashioned by a single district court.

⁴ It is entirely conceivable that the outcome of this and other challenges to the IFRs would precipitate second thoughts by the federal government as to the IFRs and its new, and broader, approach to religious and moral exemptions. Those second thoughts could affect the appeals currently being held in abeyance, thereby making intervention here not only appropriate but necessary, as March for Life will have nowhere else to assert a defense of the IFRs. See *Lockyer*, 450 F.3d at 442 (finding impairment where proposed intervenors would have “no alternative forum where they [could] mount a robust defense of the” law under challenge).

would remove a regulatory backstop guaranteeing it freedom of conscience going forward regardless of the pending appeal, the impairment factor is comfortably satisfied here.

C. No Existing Parties to the Action Adequately Represent March for Life.

The Supreme Court has determined that satisfying the adequacy of representation factor should not be an onerous proposition. Indeed, “the burden of making th[is] showing should be treated as minimal.” *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10 (1972). Furthermore, if a proposed intervenor can “show[] that representation of [its] interest ‘*may be*’ inadequate,” then it has sustained its burden as to this factor. *Id.* (emphasis added). Plaintiff States attempt to complicate the analysis and elevate the minimal burden faced by March for Life by arguing that because the federal government and March for Life “‘share the same ultimate objective,’” a presumption of adequacy arises that can only be rebutted by “‘a compelling showing of inadequacy of representation.’” Opp. at 4 (quoting *Citizens for Balanced Use*, 647 F.3d at 898). Plaintiff States also argue that a similar presumption arises by virtue of the fact that the federal government is here acting on behalf of March for Life, which is rendered thereby a mere “constituency” of the federal government. Opp. at 4. However, neither of these arguments can be sustained once the law and the facts obtaining here are properly taken into account.

March for Life has already established that under controlling circuit precedent, where the federal government has acted only in response to the litigation efforts of proposed intervenors, any presumption of adequacy is thereby rendered nugatory. *See* Mot. to Intervene at 12-13; *Citizens for Balanced Use*, 647 F.3d at 900 (finding inadequate representation where government “issued the Interim Order . . . only reluctantly in response to successful litigation by” proposed intervenors); *see also Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1398 (finding adequacy of representation prong satisfied where federal agency action was precipitated by proposed intervenor’s decision to file a lawsuit); *Cal. Sea Urchin Comm’n v. Jacobson*, No. CV-

1 13-05517, 2013 WL 12114517, at *4 (C.D. Cal. Oct. 2, 2013) (stating that the “Ninth Circuit has
2 generally held that applicants moving to intervene in defense of an agency action that they
3 themselves compelled through prior litigation are not adequately represented by the
4 defendants”).

5 Here, the Plaintiff States have all but admitted (as they must, given the facts underlying
6 the promulgation of the IFRs) that the litigation efforts of March for Life played a significant
7 role in prompting the federal government to act. *See* Opp. at 1, 6 (pointing out that the “IFR
8 itself mentioned March for Life at least 15 times in justifying th[e] new rule”); *see also* 82 Fed.
9 Reg. 47,797-47,799 (discussing effects of past and still-pending litigation on the development of
10 regulations and specifically citing to March for Life’s lawsuit). Moreover, because the federal
11 government “earlier opposed” the efforts of March for Life to secure an accommodation or
12 exemption to the mandate, it is clear that it “may not put forth as strong of an argument in
13 defense of” the moral IFR as March for Life would. *Citizens for Balanced Use*, 647 F.3d at 900.
14 Under these circumstances, there is no requirement for March for Life to make the compelling
15 showing that Plaintiff States seek to impose upon it.
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18 This conclusion is only further strengthened by the fact that March for Life is still in
19 ongoing litigation with the federal government on this very issue, and holds an injunction against
20 it, precisely because the federal government for years failed to recognize the merits of March for
21 Life’s push for an accommodation or exemption to the mandate. *See* Mot. to Intervene at 6, 11,
22 13. The fact that the federal government finally acted after the mass of litigation it faced does
23 not mean that its representation will be adequate with respect to March for Life in this case, nor
24 that it will make the full panoply of arguments that a moral entity like March for Life is prepared
25 to offer, which arguments are borne of hard experience and specific expertise.
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Given the default minimal burden required of proposed intervenors to show potentially inadequate representation, the fact that the federal government acted only after March for Life sued it for relief, and the general rule that “any doubt regarding adequacy of representation should be resolved in [a proposed intervenor’s] favor,” 6 Edward J. Brunet, *Moore’s Federal Practice* § 24.03[4][a] (3d ed. 1997); *In Def. of Animals v. United States Dep’t of the Interior*, No. 2-10-cv-1852, 2011 WL 1085991 (Mar. 21, 2011 E.D. Cal 2011) (same), March for Life has met its burden as to this factor.

In sum, having shown that it has a significant protectable interest that may be impaired by the outcome of this litigation, and that it is not adequately represented by any party to the litigation, March for Life is entitled to intervention as of right.

II. March for Life is Entitled to Permissive Intervention

Plaintiff States contend that because March for Life holds an injunction against the federal government, it lacks “a claim or defense that shares with the main action a common question of law or fact.” *Opp.* at 9 (quoting Fed. R. Civ. P. 24(b)(1)(B)). Not so. March for Life, by virtue of this matter, stands to lose a regulatory exemption that currently provides a conscience protection backstop to its heretofore unresolved litigation with the federal government. March for Life therefore intends to proffer a defense of the exemption created by the “moral” IFR, which defense arises directly from the challenge brought by the Plaintiff States in their Amended Complaint. Moreover, March for Life has the singular ability and necessary experience to present arguments on behalf of entities who object to the contraceptive mandate as a matter of moral conviction, a position that is advanced by no other party. Under these circumstances, especially where no delay or prejudice will accrue to any other party, permissive intervention is appropriate.

CONCLUSION

The Ninth Circuit has repeatedly expressed a preference that courts liberally construe intervention requirements, because doing so ensures “both efficient resolution of issues and broadened access to the courts.” *Forest Conservation Council v. United States Forest Serv.*, 66

1 F.3d 1489, 1496 n.8 (9th Cir. 1995) (internal citation omitted). Furthermore, in conducting the
 2 intervention analysis “courts are guided primarily by practical and equitable considerations” rather
 3 than technical or procedural niceties. *United States v. Alisal Water Corp.*, 370 F.3d 915, 918
 4 (9th Cir. 2004). Granting intervention to March for Life, either by right and/or permissively, would
 5 respect circuit precedent and serve the interests animating that precedent. It would also provide
 6 this Court and others going forward with the perspective of an organization that is not currently
 7 represented in this matter. Accordingly, in light of these general prescriptions, and the particular
 8 reasons presented here and in its Motion to Intervene, March for Life respectfully requests that
 9 this Court grant its motion to intervene.

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 11 Respectfully submitted this 29th day of December, 2017.

12 By: s/Kevin H. Theriot

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 24 ** *Pro hac vice granted*