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

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

Plaintiffs,

v.

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

Defendants,

and,

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

Defendants-Intervenors.

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

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

Date: June 6, 2019

Time: 2:00 pm

Judge: Hon Haywood S. Gilliam,
Jr.

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

13 ARGUMENT

14 I. Intervention is untimely.

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

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

3 First, Additional States say that they could not have been expected to be “aware that
4 their interests would not be adequately protected by the existing parties” before this
5 Court limited the injunction against the Final Rules to the parties in the case. Mot. 5
6 (quoting *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999)). This conclusion relies on
7 two assumptions. First, it assumes Additional States were entitled to expect the Court
8 to grant a nationwide injunction, and the Ninth Circuit to sustain that drastic remedy,
9 without ever having to make a showing that their state-specific interests were
10 threatened by the Interim Final Rules or Final Rules. See *California v. Azar*, 911 F.3d
11 558, 584 (9th Cir. 2018) (determining that the first injunction must be “narrowed to
12 redress only the injury shown as to the plaintiff states” because the record “was not
13 developed as to the economic impact on other states”). Second, and relatedly, it assumes
14 Additional States were entitled to expect that the existing Plaintiff States would
15 adequately represent their interests—here, doing the work to provide evidence sufficient
16 to justify a nationwide injunction. But as this Court noted when granting Oregon
17 intervention, the existing Plaintiff States “ha[d] not provided” any “showing of [a] state-
18 specific injury” for states not already in the Plaintiff group. Dkt. 274 at 6. And the
19 Additional States make no argument as to why the finalization of the immediately-
20 effective Interim Final Rules without substantive change altered their interest.

21 Second, Additional States state vaguely that their “new attorney generals . . . have
22 been reassessing their states’ litigation.” Mot. 5. But at most this claim means that these
23

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

4 **II. The equities are against intervention.**

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

11 Among the *amici curiae* briefs was a brief signed by all three states seeking here to
12 intervene taking the side of the Little Sisters. *See* Amicus Br. of Texas *et al.* Supporting
13 Petitioners, No. 14-1418 (Jan. 11, 2016), available at
14 <https://s3.amazonaws.com/becketnewsite/20-States-LSP-Amicus.pdf>. There, the
15 Additional States argued, *inter alia*: (1) that the federal government "has not shown that
16 its mandate to petitioners is the least restrictive means of advancing a compelling
17 interest," in violation of civil rights guaranteed by the Religious Freedom Restoration
18 Act (RFRA); (2) that the federal government had fatally conceded that denying
19 exemptions "cannot even accomplish the ends that purportedly justify [the mandate's]
20 substantial burden"; and (3) highlighted ways in which any gap could be filled, including
21 by the federal government or existing private funds. *See* Amicus Br. of Texas *et al.* at 5,
22 18, 20 (highlighting, for example, "Colorado's Family Planning Initiative" as a successful
23

1 state program “[f]unded by a private donor” though administered by the state). The
2 Additional States have not offered any reason to believe that the many available
3 mechanisms for providing contraception in their States have disappeared since 2016.¹

4 Further, Additional States frame their interest as concern for paying for those who
5 may “lose access” or “lose current access” to contraceptive care. Mot. 3-4. But Additional
6 States point to *no time* when objecting religious parties were compelled to provide or
7 facilitate any contraceptive coverage to which they objected. In fact, Additional States
8 point to no example of an in-state employer who will newly deny contraceptive coverage
9 if the Final Rules are allowed to go into effect. Substantiating their asserted harm would
10 require identifying an employer that was not already exempted: that is, for example, not
11 grandfathered, covered by the small business exception, or subject to the protection of
12 an existing injunction. *See, e.g., Catholic Benefits Ass’n LCA v. Hargan*, No. 5:14-cv-
13 00240-R, Order, Dkt.184 (W.D. Okla. Mar. 7, 2018) (granting permanent injunction of
14 Mandate to current and future nonprofit members of Catholic Benefits Association).

15 To the contrary, it appears Additional States are indeed happy with the status quo,
16 and they have given this Court no reason to think the status quo will change in their
17 states. The status quo, of course, offers an exemption for employers with grandfathered
18

19 ¹ To be sure, the Additional States are not the only government parties to have changed their position as
20 to the pre-IFR rules, or to have policies that contradict their positions before this Court. The federal
21 government, of course, changed its position on how the “accommodation” worked at the Supreme Court in
22 2016, thus forfeiting its prior RFRA argument. And plaintiff Virginia does not even have a contraceptive
23 mandate at all, despite claiming that even small exceptions to the federal mandate would violate Equal
Protection. Other states have religious exemptions in their state mandates that, by their own arguments,
would violate the Establishment Clause. But the one thing *every* government in this case seems to agree
on is what the Additional States told the Supreme Court: that there are a great many federal, state, and
local programs that can deliver contraceptives to those who want them without the participation of nuns.

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

The motion to intervene should be denied.

Dated: March 28, 2019

Respectfully submitted,

/s/ Mark L. Rienzi

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**[PROPOSED] ORDER
DENYING MOTION TO
INTERVENE**

Re: Dkt. No. 293

ORDER

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

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

Dated: _____

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