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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

STATE OF CALIFORNIA, *et al.*,

Plaintiffs,

v.

XAVIER BECERRA, Secretary of
Health and Human Services, *et al.*,

Defendants,

and,

THE LITTLE SISTERS OF THE POOR,
ST. MARY'S HOME, *et al.*,

Defendant-Intervenors

Case No.: 4:17-cv-5783-HSG

JOINT STATUS REPORT

On August 17, 2021, the Court stayed this case and ordered the parties to file status reports every three months. ECF No. 467. The parties report as follows:

1. This case concerns the validity of two rules which create a moral exemption, and expand a religious exemption, to the rules establishing the contraceptive coverage

- 1 requirement. *See* Religious Exemptions and Accommodations for Coverage of
 2 Certain Preventive Services Under the ACA, 83 Fed. Reg. 57,536 (Nov. 15,
 3 2018); Moral Exemptions and Accommodations for Coverage of Certain
 4 Preventive Services Under the ACA, 83 Fed. Reg. 57,592 (Nov. 15, 2018).
- 5 2. The Court has before it fully briefed dispositive motions, *see* ECF Nos. 311, 366,
 6 368, 370, as well as supplemental briefs addressing the Supreme Court’s decision
 7 in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct.
 8 2367 (2020), *see* ECF Nos. 433, 435, 437, 438, 440.
- 9 3. On August 16, 2021, Federal Defendants announced that “[t]he Departments [of
 10 Health and Human Services, Treasury, and Labor] intend to initiate rulemaking
 11 within 6 months to amend the 2018 final regulations and obtaining public input
 12 will be included as part of the Departments’ rulemaking process.” CMS.Gov,
 13 Frequently Asked Questions, Affordable Care Act Implementation FAQs (Set 48)
 14 (Aug. 16, 2021) (available at <https://perma.cc/2XH8-MDBX>).
- 15 4. The Federal Defendants published a notice of proposed rulemaking on February
 16 2, 2023, that would “amend regulations regarding coverage of certain preventive
 17 services under the Patient Protection and Affordable Care Act, which requires
 18 non-grandfathered group health plans and non-grandfathered group or individual
 19 health insurance coverage to cover certain contraceptive services without cost
 20 sharing.” U.S. Dep’t of Treasury, U.S. Dept’t of Labor, & Dep’t of Health &
 21 Human Servs., *Coverage of Certain Preventive Services Under the Affordable*
 22 *Care Act* (Feb. 2, 2023) (available at <https://perma.cc/L58Q-VY4Q>). The
 23 comment period for the proposed rule closed on April 3, 2023. The Federal
 24 Defendants received over 44,000 comments to the proposed rule.
- 25 5. The Court held its most recent status conference in this matter on February 7,
 26 2023. After the conference, the Court (1) ordered that the case should remain
 27 stayed and (2) directed the parties to attach to the next joint status report any
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1 comments on the notice of proposed rulemaking submitted by Plaintiffs or
2 intervenors. ECF No. 489.

3 6. The parties filed a status report with the comments of the Plaintiffs and intervenors
4 on the notice of proposed rulemaking on May 1, 2023. ECF No. 493.

5 7. The Federal Defendants can report that review and assessment of the comments
6 to the proposed rule, including comments from Plaintiffs and Intervenor, is
7 ongoing. Federal Defendants propose that the case remain stayed and that Federal
8 Defendants continue to file status reports every 90 days to apprise the Court of
9 the status of the rulemaking and their position on the need for a continued stay.
10 The next status report would therefore be due on January 29, 2024.

11 8. Plaintiff States do not oppose the case remaining in its current posture.

12 9. Intervenor-Defendant March for Life concurs in the federal government's
13 proposal of a continued stay.

14 10. Intervenor-Defendants The Little Sisters of the Poor maintain their position from
15 prior filings that the stay should be lifted—at least as to the religious conscientious
16 exemptions—and the Little Sisters' motion for summary judgment decided.
17 Plaintiff States' lawsuit with respect to the religious exemptions was already
18 futile, but it has become even more futile in light of the Ninth Circuit's recent en
19 banc decision in *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist.*
20 *Bd. of Educ.*, 82 F.4th 664 (9th Cir. 2023) (en banc). In *FCA*, the Ninth Circuit
21 recognized "three bedrock requirements of the Free Exercise Clause that the
22 government may not transgress." *Id.* at 686. "First, a purportedly neutral generally
23 applicable policy may not have a mechanism for individualized exemptions.
24 Second, the government may not treat comparable secular activity more favorably
25 than religious exercise. Third, the government may not act in a manner hostile to
26 religious beliefs or inconsistent with the Free Exercise Clause's bar on even
27 'subtle departures from neutrality.'" *Id.* (cleaned up). What the Plaintiff States
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1 have asked for in this case would violate all three of those bedrock requirements.
2 Continuing to wait for the Federal Defendants' Godot thus serves no purpose and
3 is deleterious to the rule of law. Indeed, as Intervenor-Defendants The Little
4 Sisters recently explained to the Supreme Court, this lawsuit (and its now six-year
5 pendency) epitomizes the brokenness of the federal regulatory process as it
6 intersects with the civil rights of religious people. *See* Amicus Br. of The Little
7 Sisters of the Poor, *Loper Bright Enterprises v. Raimondo*, No. 22-451, at 1-2
8 (filed July 24, 2023). No other area of civil rights litigation experiences the years-
9 long delays in this case, all based on the thinnest of regulatory reeds. Plaintiffs'
10 and Federal Defendants' charade thus casts a negative light on this Court while
11 allowing them to avoid any accountability. The Court should therefore resolve the
12 challenges to the religious exemption.
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1 Dated: October 30, 2023

Respectfully submitted,

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