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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 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; DOES 1-100,

Defendants,

and,

THE LITTLE SISTERS OF THE POOR, JEANNE JUGAN RESIDENCE,

Defendant-Intervenor.

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

DEFENDANT-INTERVENOR'S REPLY IN SUPPORT OF MOTION TO INTERVENE

Date: Dec. 12, 2017
Time: 2:00 p.m.
Dept.: Courtroom 2
Judge: Hon. Haywood S. Gilliam, Jr.

The States admit the key fact that should resolve this case: "There are ample means of guaranteeing women access to contraceptive care while respecting religious freedom." States' Opposition ("Opp.") at 1. Amen. If all of the different governments in this case would just faithfully apply that principle, the Little Sisters would have nothing to fear. There is no valid reason for any government to force the Little Sisters to violate their religion, certainly not to make available drugs and devices that are already widely available both from governments and willing private parties. There are actual problems in this world; finding a way to distribute contraceptives without dragooning Catholic nuns is not one of them.

As the States' brief demonstrates, however, figuring out how to "respect[] religious freedom" can be a challenge, at least for government actors who do not quite understand the religious beliefs they are charged by the Constitution and the civil rights laws with respecting. Indeed, every government entity in this case, both state and federal, has at one time or another misunderstood or misstated the Little Sisters' religious objection. Nevertheless, the States think the Little Sisters should just wait demurely on the sidelines, while secular governments meet in court to work out among themselves how best to respect the Little Sisters' religious beliefs.

The Federal Rules allow intervention precisely for this situation. The Little Sisters are a "third side" to this case. They have an interest in the religious exemption granted by the IFR because it protects them from being forced to cooperate with the federal government's efforts to use the Sisters' health plan to distribute abortion-inducing drugs and devices. Mot. to Intervene at 12-14. The States argue (as the federal defendants did for years before them) that the Little Sisters should not object, because the federal government can only pay, but not force, others to use the Little Sisters' health plan in this way. Opp. at 1-4. But the fact is the Little Sisters do object to assisting in this way, Mother McCarthy Decl. at ¶¶ 37-38, whether the States think they ought to or not. The States cannot avoid Rule 24 intervention simply by telling the Little Sisters that they are confused about their religious beliefs, and

that the participation demanded of them is not really a violation of their faith.

Nor can the Little Sisters adequately be represented by a federal government that, for many years, either misunderstood or mischaracterized the Little Sisters' religious objections in precisely the same way the States do now. The IFR is a welcome change from the federal defendants, but it is also a very recent and possibly temporary change. In fact, the Little Sisters are still currently litigating against the federal defendants, and hold an injunction against them—an injunction the federal defendants would like to be rid of—over this same issue. It is not surprising that the States would prefer to litigate against a federal government that has compromised itself by taking the wrong position in dozens of courts for several years. But there is no reason that the Little Sisters—whose position has been constant across all cases—should be relegated to the sidelines and forced to have their interests represented by a federal government that has argued both sides of the same issue.

The *Zubik* injunction makes the States' suggestion even more absurd. How could the Little Sisters possibly rely on the government *that is the enjoined party* to litigate questions related to the proper scope and interpretation of the *Zubik* injunction? As the *enjoined party* in *Zubik*, the federal government's natural inclination (and the obligation of DOJ lawyers to their clients) will be toward a narrow reading of that injunction; the Little Sisters have precisely the opposite interest. Indeed, if the Department of Justice were a private law firm, no one would ever hire them to defend the Little Sisters' interest in the IFR and the injunction.[1]

At bottom, the States are trying to force this Court to decide important questions about the legality, availability, and constitutionality of religious exemptions for the Little Sisters without having the Little Sisters participate. Those questions should be decided with actual religious objectors in court, rather

[1] Indeed, if DOJ were a private law firm, it would be unethical for DOJ to represent the Little Sisters' interests in this matter. *See, e.g.*, Cal. R. of Prof'l Cond. 3-310 (Avoiding Representation of Adverse Interests). Forced acceptance of such representation can hardly be deemed "adequate."

than secular governments, neither of which is capable of or qualified to fully represent the Little Sisters' religious interests. Particularly in a case that is likely headed to the Supreme Court, there is no reason for this Court to decide such weighty issues without the Little Sisters' participation. Intervention should be granted.

As to the States' other arguments:

1. ***Protectable interest.*** The States argue that the Little Sisters lack a protectable interest in this case because they, according to the States "do[] not need to rely on these IFRs to accommodate [their] religious beliefs." Opp. at 1.

But this argument is premised on a misstatement of the Little Sisters' religious objection—indeed, the exact same objection they presented to the Supreme Court in *Zubik*. The States appear to believe that the Little Sisters should simply comply with the pre-IFR federal mandate, because under that scheme the government can only pay, but (supposedly) not force, third parties to use the plan to provide coverage. Opp. at 3 (noting that the Little Sisters are "not exempt outright" and that the federal government "will reimburse the TPA if it provides coverage voluntarily"). The States rely heavily on a *vacated* Tenth Circuit decision saying that the Little Sisters have nothing to fear. *Id.* But the fact is the Little Sisters continue, just as they have for years, to object to compliance with the mandate in these circumstances, McCarthy Decl. at ¶¶37-38, and the IFR is important because it protects them from a mandate that would otherwise demand compliance. Just as the Little Sisters told the Supreme Court, they cannot, in good religious conscience, comply with the pre-IFR mandate.

In any event, the States overstate what the Little Sisters are required to show under the interest prongs of Rule 24(a). *See Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 900 (9th Cir. 2011) ("stress[ing] that intervention of right does not require an absolute certainty that a party's interests will be impaired"). Under Ninth Circuit precedent, Rule 24's protectable-interest

requirement is met if the proposed intervenor "asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1149 (9th Cir. 2010). This is a "practical" inquiry; "[n]o specific legal or equitable interest need be established." *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002). And indeed, the requisite interest need not even "be direct as long as it may be impaired by the outcome of the litigation." *Cal. Dump Truck Owners Ass'n v. Nichols*, 275 F.R.D. 303, 306 (E.D. Cal. 2011) (citation omitted).

Here, the Little Sisters have an "interest" in not being forced to choose between practicing their faith and incurring massive fines—an interest that plainly "is protected under" the IFR. *Aerojet Gen. Corp.*, 606 F.3d at 1149. Further, the States' lawsuit has a "relationship" to that interest, because it by its own terms seeks to eliminate the "layer of protection" for the interest provided by the IFR. *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006). Just like the doctors in *Lockyer*, if the IFR is enjoined the little Sisters "will be more likely to be forced to choose between adhering to their beliefs and" paying the fines required under the mandate. *Id.* at 441; *see also Aerojet*, 606 F.3d at 1150-51 (permitting intervention in suit that would extinguish intervenors' right to seek contribution, even though intervenors had not yet incurred liability giving rise to claim for contribution). Further, the Little Sisters are "the intended beneficiaries of" the IFR, meaning that their interest in the layer of protection provided by it is "neither 'undifferentiated' nor 'generalized.'" *Lockyer*, 450 F.3d at 441; *see also Texas v. United States*, 805 F.3d 653, 661 (5th Cir. 2015) ("The [intervenors] are not individuals seeking to defend a governmental policy they support on ideological grounds; rather, they are the *intended beneficiaries* of the program being challenged." (emphasis added)).

Finally, the States' argument that the accommodation does not work for a church plan, Opp. at 1-4, actually heightens, rather than extinguishes, the Little Sisters' interest in this case. By the States' lights, the Establishment Clause forbids the federal government from allowing religious objectors like the Little Sisters to be exempt from the mandate unless their employees continue to receive "seamless" coverage of contraceptives. Am. Compl. ¶¶ 125-131. Under that argument, if the "accommodation" does not work for church plans, the logic of the States' argument would be that the federal government *must* force the Little Sisters to comply directly with the Mandate. That both gives the Little Sisters a strong and distinctive interest in the validity of the IFR and a strong need to participate in the case.

2. ***Adequacy of Representation.*** In their motion, the Little Sisters explained that the Ninth Circuit has repeatedly held that any presumption that an intervenor's interests in defending a regulation are adequately represented by the government is displaced when the regulation was issued in response to litigation pursued by that proposed intervenor. *See* Mot. at 16-17 (collecting cases); *see also Cal. Sea Urchin Comm'n v. Jacobson*, No. CV 13-05517, 2013 WL 12114517, at *4-5 & n.4 (C.D. Cal. Oct. 2, 2013) (explaining that the "Ninth Circuit has generally held that applicants moving to intervene in defense of an agency action that they themselves compelled through prior litigation are not adequately represented by the defendants" and that in this scenario "both . . . presumptions" identified by the States here are rebutted). That rule makes perfect sense: a government defendant "may not put forth as strong of an argument in defense of" a regulation as an intervenor would when until recently the government defendant had been *fighting* the intervenor to achieve the *opposite* of the legal result required under the regulation. *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 900 (9th Cir. 2011); *see also, e.g., Fresno County v. Andrus*, 622 F.2d 436, 439 (9th Cir. 1980).[2]

[2] The States rely upon the denial of intervention in *Pennsylvania v. Trump*, No. 2:17-cv-04540 (intervention denied Dec. 8, 2017). *See* Dkt. 84. But that decision was premised upon the Third

The States' only response to this is to deny whether the federal government's issuance of the IFR was in fact compelled by the Supreme Court's order in *Zubik*. Opp. at 7 (arguing that "[t]he sweeping IFRs at issue here are not compelled by" the language of *Zubik*'s "directive"). But this argument mixes up the States' merits argument with the intervention standard. There is obviously a disagreement on the merits between the States (which think the IFR is not compelled by, and possibly inconsistent with *Zubik*) and the federal government (which asserts that "the *Zubik* remand" *did* obligate it to initiate the process leading to the IFR, Dkt. 51 at 7, 16, 17 n.16, 22). But in resolving the motion to intervene, the mere fact that this is a debated question tips the balance toward intervention because "[a]ny doubt as to" the adequate representation prong "should be resolved in favor of intervention." *In Def. of Animals v. U.S. Dep't of the Interior*, No. 2:10-cv-01852, 2011 WL 1085991, at *3 (E.D. Cal. 2011); *see also* Wright & Miller, 7C *Fed. Prac. & Proc. Civ.* § 1909 (3d ed.) ("Since [Rule 24(a)] is satisfied if there is a serious possibility that the representation may be inadequate, all reasonable doubts should be resolved in favor of allowing [intervention] so that [the absentee] may be heard in his own behalf.").

In any event, the relevant question for evaluating whether the federal government's representation of the Little Sisters' interests is likely to be adequate is not whether *Zubik* dictated the precise terms of the IFR but whether, until being persuaded otherwise in the course of litigation filed by the intervenor, the government had disputed the very legal propositions that it is now obligated to defend. *E.g.*, *Fresno County*, 622 F.2d at 439 (rulemaking began "only . . . after [the intervenor] brought a law suit" in earlier litigation). Because the States cannot and do not dispute that that is the case here, the long line of Ninth Circuit cases cited in the Little Sisters' motion are fully applicable.

Circuit's intervention standards; the Ninth Circuit has been clear that representation is inadequate in these circumstances.

And indeed, the States' heavy reliance on the Ninth Circuit's *Lucent Technologies* case only serves to illustrate the propriety of intervention here. *See* Opp. at 8-9. In *Lucent Technologies*, it was simply implausible to dispute that the government planned to vigorously assert the proposed intervenor's interest—unlike here, the government was not a reluctant defendant but the *plaintiff*, in an employment-discrimination enforcement action that it *chose* to bring to vindicate the employee-proposed intervenor's rights. *Dep't of Fair Emp't & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 735-36 (9th Cir. 2011). Here, by contrast, the federal government is defending the IFR only after being haled into court by the States, and only after fighting for years against extending the exemptions contemplated in the IFR. These facts more than suffice to show that the federal government's "representation of [the Little Sisters'] interests *may* be inadequate," such that the Little Sisters have carried their "minimal" burden on this point. *Citizens for Balanced Use*, 647 F.3d at 898 (quotation omitted).

Lastly, the States cannot point to any Ninth Circuit case in which a court has found adequate representation where the government in question (a) misunderstood or misrepresented the intervenor's position in court for several years and (b) is actually the *enjoined party in an injunction whose scope and interpretation may be at issue*. It makes perfect sense that the States would prefer to litigate against a party that is compromised in these ways. But it is absurd to suggest that the Little Sisters should entrust their fate, and their injunctions, to defense by the federal government rather than presenting their own interests to this Court.

3. ***Additional Defenses***. Finally, the States fail to address the range of additional defenses and arguments the Little Sisters have presented in their proposed opposition. Unlike the federal government, the Little Sisters argue:

- The States' claims are not ripe, given that they cannot yet identify a single employer who will change coverage, or a single employee who will lose it, Little Sisters' Opp. to Prelim. Inj. 4-5, 10;

- Both the States and the federal Defendants are litigating under the wrong Establishment Clause test, because *Town of Greece* has superseded *Lemon* and requires analysis based on the historical purposes of the Establishment Clause rather than *Lemon*'s three prongs Little Sisters' Opp. to Prelim. Inj. 17-20.

The ripeness argument, as well as the Little Sisters' standing arguments, go directly to this Court's Article III jurisdiction to even hear the case and reach issues on which the States seek a rushed judgment. In fact, because of their personal interest in this case, the Little Sisters have a ***stronger*** interest than either of the government parties in ensuring that the Court is properly informed on these issues before it reaches its decision (particularly since this case is likely to be the subject of appellate and Supreme Court litigation).

CONCLUSION

For these reasons, the Little Sisters respectfully request that this Court grant their motion to intervene and allow them to participate in the hearing on the States' motion for preliminary injunction.

Dated: December 11, 2017

Respectfully submitted,

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