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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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 MOTION TO INTERVENE

Date:	Dec. 12, 2017
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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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The Jeanne Jugan Residence of the Little Sisters of the Poor ("LSP") seeks to intervene in this case because the Plaintiff-States are purportedly seeking to "take away the Little Sisters' religious exemption." Proposed Defendant-Intervenor's Motion to Intervene, ECF No. 38 at 1. But nothing could be further from the truth. The unlawful interim final rules (IFRs) at issue in this case threaten to deprive millions of women from "receiv[ing] full and equal health coverage, including contraceptive coverage."[1] *Zubik v. Burwell*, 136 S.Ct. 1557, 1560 (2016) (*Zubik*). Far from being required by *Zubik* (as LSP suggests), these IFRs are in direct conflict with its mandate. But the States firmly believe that full and equal access to contraceptive coverage need not—and should not—come at the expense of anyone's religious convictions. There are ample means of guaranteeing women access to contraceptive care while respecting religious freedom. But the overly broad and unlawfully promulgated IFRs at issue in this case are not the answer.

There are many reasons why LSP does not meet the criteria for intervention as of right. First, LSP does not have a "significantly protectable interest" in this lawsuit because it does not need to rely on these IFRs to accommodate its religious beliefs. As shown below, because LSP utilizes a self-insured church plan, the government lacks the legal authority to require separate contraceptive coverage for its employees. Second, LSP has not shown that the federal defendants cannot adequately represent its interests in this litigation. By seeking to intervene as a defendant, LSP 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. LSP has not met—and cannot meet—that heavy burden.

Third, there is 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 these IFRs on behalf of employers with religious and moral objections to the contraceptive mandate, a constituency which includes LSP. Once again, a

[1] The Patient Protection and Affordable Care Act (ACA) and its implementing regulations guarantee "no cost" contraceptive coverage for tens of millions of women across the county. *See* ECF No. 28 at 4-10.

"very compelling showing" is required to rebut this assumption of adequate representation. The moving papers do not meet that burden. Finally, permissive intervention should be denied because there is no common question of law or fact when LSP does not need to rely on these IFRs to protect its religious convictions.

The States do not question the sincerity or importance of LSP's religious beliefs. But it is neither necessary nor appropriate for them 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 LSP 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. LSP HAS NOT ESTABLISHED THAT IT MEETS 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 LSP's Motion to Intervene is timely. However, LSP has not met the remaining requirements for mandatory intervention.

A. LSP Does Not Have a Significant Protectable Interest in These IFRs Because the Government Already Lacks Legal Authority to Require Contraceptive Coverage for Its Employees

LSP asserts that it has a significant protectable interest in this litigation because it "object[s] to being forced to facilitate the provision of contraceptive coverage through [its] own plan infrastructure . . ." ECF No. 38 at 5. But although LSP is not exempt outright from the contraceptive mandate, that mandate is essentially unenforceable for self-insured church plans such as those used by LSP. "The Little Sisters provide health insurance coverage to their employees through the Christian Brothers Employee Benefit Trust ("Trust"), a self-insured church plan that is not subject to ERISA."[2] *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1167 (10th Cir. 2015), *vacated and remanded by Zubik*, 136 S.Ct. at 1561; *see also* ECF No. 38-3 at ¶ 14 (LSP of San Pedro also uses the Christian Brothers Employee Benefit Trust to provide medical coverage for its employees). As the Tenth Circuit explained, self-insured "church plans," as defined in 29 U.S.C. 1002(33)(A), are generally exempt from regulation under ERISA. *Id*; *see also* 29 U.S.C. 1003(b)(2).

Crucially, the government's authority to require a third party administrator (TPA) to provide coverage under the accommodation process established by the Obama administration derives from ERISA. *See* 29 C.F.R. 2510.3-16(b); 80 Fed. Reg. at 41,323 n.22 (July 14, 2015). Accordingly, if an eligible organization with a self-insured church plan (such as LSP) invokes the accommodation, its TPA is *not* legally required to provide separate contraceptive coverage to the organization's employees (although the government will reimburse the TPA if it provides coverage voluntarily). 79 Fed. Reg. at 51,095 n.8 (Aug. 27, 2014); 80 Fed. Reg. at 41,323 n.22 (July 15, 2015). The federal government confirmed this fact in its Supreme Court Respondents' Brief in *Zubik*. *See* Respondent's Brief, *Zubik v. Burwell*, 136 S.Ct. 1557, 2016 WL 537623, at *17-18 ("Because the government's authority to require a TPA to provide separate contraceptive coverage under the regulations derives from ERISA, the government cannot require the TPA for a self-insured church plan to provide separate contraceptive coverage if the employer opts out."[3]

[2] ERISA refers to the Employee Retirement Income Security Act of 1974.
[3] *See also* http://files.kff.org/attachment/issue-brief-contraceptive-coverage-at-the-

In other words, LSP does not need to rely on the IFRs at issue in this lawsuit to accommodate its religious beliefs. Because LSP utilizes a self-insured church plan, the government lacks the legal authority to require separate contraceptive coverage for its employees. 79 Fed. Reg. 51,095 n.8 (Aug. 27, 2014); 80 Fed. Reg. at 41,323 n.22 (July 15, 2015); *Zubik v. Burwell*, 2016 WL 537623, at *17-18. LSP, therefore, cannot demonstrate "that there is a relationship between the legally protected interest and the claims at issue." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011); *see also California ex rel. Lockyer v. United States*, 459 F.3d 436, 441 (9th Cir. 2006) (*Lockyer*) (explaining, in contrast to this case, that the federal statute at issue there "provides an important layer of protection against state criminal prosecution or loss of [intervenors] medical licenses."). Because the government cannot force LSP's administrator—the Christian Brothers Employee Benefit Trust—to provide contraceptive coverage for its employees, LSP need not "facilitate the provision of contraceptive coverage" at all, irrespective of these IFRs. ECF No. 38 at 5. LSP has not met the second requirement for intervention of right.

B. Because the Government Lacks Legal Authority to Require Contraceptive Coverage for LSP's Employees, the Disposition of This Action Will Not Impede Its Ability to Adhere to Its Religious Beliefs

For the same reason, LSP cannot demonstrate that the disposition of this action will "impair or impede" its ability to adhere to its religious beliefs. *Southwest Center for Biological Diversity*, 268 F.3d at 817. Because the government cannot require contraceptive coverage for LSP's employees (because its health care is provided through a self-insured church plan), LSP does not need to rely on the IFRs in dispute to avoid "facilitating" contraceptive coverage for its employees. In light of that, the outcome of this action will not impair LSP's ability to adhere to its religious beliefs. LSP cannot meet this third requirement for mandatory intervention either.

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supreme-court-zubik-v-burwell at 5 (describing in detail how "the government cannot actually enforce these regulations for self-funded church plans.")

C. LSP Has Not Shown That the Federal Defendants Cannot Adequately Represent Its Interests in This Litigation

Finally, LSP has not shown—and cannot show—that the federal defendants are unable to adequately represent its interests in this litigation. As shown below, two separate facts require LSP to make a "compelling showing" that the federal defendants cannot adequately represent its interests. First, the federal defendants and LSP (as a proposed defendant-intervenor) have the same ultimate objective: the complete denial of the relief that the States seek. Second, the federal government defendants are acting on behalf of the constituency that LSP represents: religious employers who object to the contraceptive mandate on religious and/or moral grounds. In both circumstances, the proposed intervenor must make a "compelling showing" that the existing parties cannot adequately represent its interests. LSP has not met that heavy burden.

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.)

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

LSP plainly shares the "same ultimate objective" as the federal defendants—denial of the relief sought by the States. *See* ECF No. 38-2 at 24. ("Plaintiffs' request for relief must be denied" for various reasons). By seeking to intervene as a defendant, LSP *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.") Indeed, nowhere in LSP's intervention motion does it *deny* sharing the same ultimate objective as the federal defendants. Accordingly, LSP "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. LSP's Motion to Intervene falls far short of that mark.

LSP asserts that the federal defendants cannot adequately represent its interests because the federal defendants and LSP "have long been in conflict over these very issues" and thus are "antagonists."[4] ECF No. 38 at 16-17. But past conflicts with a previous administration in other lawsuits are not a basis for concluding that these federal defendants cannot adequately represent LSP's interests in *this* lawsuit. Here, the federal defendants and LSP seek the identical outcome, which is strong evidence of adequate representation. *See, e.g.*, *Department of Fair Employment and* Housing, 642 F.3d at 740 n.11 (explaining that "[a]rguably, if these parties sought drastically different remedies, there would be a greater risk of inadequate representations . . .[t]his, however, is not the case.")

LSP relies heavily on *Citizens for Balanced Use* to support its contention that the federal defendants cannot adequately represent its interests. ECF No. 38 at 10-11, 15-17. But that decision is not on point. In that case, the Ninth Circuit held that conservation groups were entitled to intervene as of right in defense of an interim order issued by the Forest Service. *Citizens for Balanced Use*, 647 F.3d at 899. Critically, the Forest Service issued that interim order "under compulsion of a district court decision gained by [the conservation groups'] previous litigation." *Id*. Under these circumstances, the Ninth Circuit concluded that the Forest Service could not adequately represent the interests of the conservation groups because the Forest

[4] Whatever may have been true in the past, LSP and the current administration are not "antagonists." President Trump, in fact, invited LSP to the White House and expressly recognized LSP when signing the Executive Order that led to the IFRs at issue in this case. ECF No. 38-3 at ¶¶ 58-59; *see also* https://www.usatoday.com/story/news/politics/2017/05/04/donald-trump-religious-liberty-johnson-amendment/101277724/; *see also* Defendants' Opposition to Plaintiffs' Preliminary Injunction Motion at 7 (discussing the same Executive Order).

Service: (1) "acted under compulsion" of a court order and only "reluctantly adopted" the interim order; (2) appealed that district court decision and if that appeal succeeded, "the Forest Service predictably may change its litigation position or even abandon the defense of the Interim Order and withdraw it"; and (3) had "fundamentally differing points of view . . . on the litigation as a whole" than the conservation groups because the latter sought "the broadest possible restrictions on recreational uses" while the former believed that "much narrower restrictions would suffice to comply with its statutory mandate." *Citizens for Balanced Use*, 647 F.3d at 899 & n.4. The Ninth Circuit held that "[t]his showing is compelling." *Id*. at 899.

None of these rationales apply here. First, the IFRs at issue in this case were not compelled by a court order and "reluctantly adopted" by the federal defendants. The Supreme Court's *per curiam* opinion in *Zubik* merely instructed the parties "to arrive at an approach going forward that accommodates petitioners' religious beliefs while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'" 136 S.Ct. at 1560. The sweeping IFRs at issue here are not compelled by this directive: in fact, they likely run afoul of *Zubik* by *failing* to ensure contraceptive coverage for women covered by religious employers' health plans. *See* ECF No.28 at 9-10. Second, there is no pending appeal that could result in the federal defendants abandoning these IFRs. Third, LSP has not articulated any "fundamentally differing points of view" between itself and the federal defendants, 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. The multiple factors that overcame the intervenors' heavy burden and made a "compelling" showing in *Citizens for Balanced Use* are simply not applicable here.

2. LSP 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 LSP can overcome the presumption of adequacy that arises when an applicant for intervention 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 these IFRs on behalf of employers with religious and moral objections to the contraceptive mandate, a constituency which includes LSP. *See, e.g.*, ECF No. 38-3 at ¶¶ 60-61 (IFRs promulgated on behalf of LSP and similar groups). 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). LSP's Motion to Intervene does not come close to making the requisite showing.

LSP asserts, in boilerplate fashion, that there is a "distinction between the Little Sisters' particular interest and the federal government's broad interest" which means that the federal government cannot adequately represent it. ECF No. 38 at 17. But LSP never explains the nature of that distinction. *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. LSP's claim of having a "particular" or 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.

LSP also relies heavily on *Lockyer*, but that case only underscores LSP's inability to make the requisite showing on this prong. ECF No. 38 at 12-15. In *Lockyer*, the Ninth Circuit emphasized that "[i]n order to make a 'very compelling showing' of the government's inadequacy, the proposed intervenor must demonstrate a likelihood that the government will abandon or concede a potentially meritorious reading of the statute." *Lockyer*, 450 F.3d at 444. The proposed intervenors in that case met that standard because the federal defendants had *already* filed a motion for summary judgment with a "limiting construction" of the statute that did not protect the interests of the proposed intervenors. *Id*. Therefore, it was clear that "the proposed intervenors bring a point of view to the litigation not presented by either the plaintiffs or the defendants." *Id*. at 445. 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 Welton Amendment, the intervenors have overcome the presumption that the United States will act in their interest." *Id*. (emphasis added).

Here, in contrast, LSP has not "demonstrated a likelihood that the government will abandon or concede a potentially meritorious reading" of the IFRs. *Id*. at 444. LSP has not identified a single legal argument that it alone will make, let alone presented "direct evidence" that the federal government will stake out a position that will compromise its interests. LSP's own cases demonstrate that it cannot make a "very compelling showing" that the government is unable to adequately represent its interests. LSP's intervention of right fails for this reason as well.

In sum, LSP has failed to 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, LSP requests permissive intervention on the same grounds as its requested intervention as a matter of right. ECF No. 38 at 19. 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 LSP does not need to rely on the IFRs at issue in this lawsuit to accommodate its religious beliefs. Because it utilizes a self-insured church plan, the federal government lacks the legal authority to require separate contraceptive coverage for its employees. *See* 29 C.F.R. 2510.3-16(b); 79 Fed. Reg. 51,095 n.8 (Aug. 27, 2014); 80 Fed. Reg. at 41,323 n.22 (July 15, 2015). LSP, therefore, 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 LSP's interests. *See* ECF 38-3 at ¶¶ 58-61 (describing how "President Trump invited members of the Little Sisters of the Poor to the White House" for the signing of the Executive Order leading to these IFRs and referenced them during the signing ceremony).

LSP's intervention is wholly 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 LSP 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 ruling on the States' preliminary injunction motion or resolving the merits of the case. Third, there should be no duplicative discovery. *Department of Fair Employment and Housing*, 642 F.3d at 741.

CONCLUSION

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

Dated: December 5, 2017

Respectfully Submitted,

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