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9
10 IN THE UNITED STATES DISTRICT COURT
11
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 **THE STATE OF CALIFORNIA; THE**
14 **STATE OF DELAWARE; THE STATE OF**
15 **MARYLAND; THE STATE OF NEW**
16 **YORK; THE COMMONWEALTH OF**
17 **VIRGINIA,**

18 Plaintiffs,

19 v.

20 **ALEX M. AZAR, IN HIS OFFICIAL CAPACITY**
21 **AS SECRETARY OF THE U.S. DEPARTMENT OF**
22 **HEALTH & HUMAN SERVICES; U.S.**
23 **DEPARTMENT OF HEALTH AND**
24 **HUMAN SERVICES; R. ALEXANDER**
25 **ACOSTA, IN HIS OFFICIAL CAPACITY AS**
26 **SECRETARY OF THE U.S. DEPARTMENT OF**
DOES 1-100,
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,

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

Defendant-Intervenors.

4:17-cv-005783-HSG

DECLARATION OF KEVIN KISH IN
SUPPORT OF THE STATES' MOTION
FOR PRELIMINARY INJUNCTION

1
2 I, Kevin Kish declare:

3 1. I am the Director of the California Department of Fair Employment and Housing
4 (DFEH). I was appointed in December 2014 by Governor Jerry Brown to lead DFEH.

5 2. DFEH is the state agency charged by the California Legislature with enforcing
6 California's civil rights laws. The mission of DFEH is to protect the people of California from
7 unlawful discrimination in employment, housing, and public accommodations and from hate
8 violence and human trafficking. Cal. Gov't Code § 12930.

9 3. DFEH is responsible for enforcing state laws that make it illegal to discriminate
10 against an employee because of certain protected categories, including sex and gender (e.g.
11 pregnancy, childbirth, breastfeeding, or related medical conditions). Among other laws, DFEH
12 enforces the California Fair Employment and Housing Act (FEHA) (Cal. Gov't Code § 12900 et
13 seq.) and the Unruh Civil Rights Act (Cal. Civil Code § 51).

14 4. FEHA applies to public and private employers, labor organizations, and employment
15 agencies. Under FEHA, it is illegal for employers of five or more employees to discriminate
16 against employees because of a protected category (including sex and gender), or to retaliate
17 against them because they have asserted their rights under the law.

18 5. The Unruh Civil Rights Act prohibits discrimination by business establishments.

19 6. To carry out its responsibilities, DFEH facilitates a complaint process, whereby an
20 individual who feels that he or she was the victim of discrimination, may file a complaint with
21 DFEH, which is called an intake form. The submission of the intake form initiates an intake
22 interview with a department representative to determine whether a formal complaint will be
23 accepted for investigation. The DFEH investigator contacts the individual complainant and the
24 investigator seeks specific facts and any records about the incident(s) and copies of any
25 documents supporting the complaint. DFEH then evaluates the facts and decides whether the
26 case alleges facts within DFEH's jurisdiction. DFEH does not have discretion to decline to
27 investigate cases within its jurisdiction. If a case is within its jurisdiction, DFEH will prepare a

1 complaint form for the individual's signature and when the individual returns the complaint, it is
2 delivered to the person or entity that the person believes discriminated against him/her.

3 7. After a complaint is signed and issued, the respondent is required to answer the
4 complaint. DFEH reviews the answer with the complainant.

5 8. DFEH offers free dispute resolution services to encourage parties to resolve the
6 complaint, when appropriate. A voluntary resolution can be negotiated at any time during the
7 complaint process. When parties cannot resolve a complaint, DFEH continues an investigation to
8 determine if a violation of California law occurred. If it did not, the case is closed. If DFEH
9 finds there were probable violations of the law, the case moves into DFEH's Legal Division. At
10 that time, the parties are required to go to mediation. At mediation, the parties have the
11 opportunity to reach an agreement to resolve the dispute and close the case. If mediation fails,
12 DFEH may file a lawsuit in court.

13 9. If an individual prefers not to use the DFEH investigation process, he or she may
14 instead file his or her own lawsuit. In the context of employment discrimination, a complainant
15 must first obtain a Right-to-Sue notice from DFEH before filing a lawsuit in court.

16 10. DFEH does not take sides when a complaint is first filed. Rather, DFEH investigates
17 the facts and encourages the parties to resolve the dispute in appropriate cases. DFEH considers
18 taking legal action if evidence supports a finding of discrimination and the dispute is not resolved.

19 11. I have reviewed and am familiar with the two final exemption rules that the U.S.
20 Health and Human Services Department, in conjunction with the U.S. Department of Labor and
21 U.S. Department of Treasury, issued on November 15, 2018 (exemption rules). Under the
22 exemption rules, I understand that any employer could claim a religious or moral objection to
23 providing contraceptive coverage and leave their employees without no-cost contraceptive
24 coverage. I understand that this expanded exemption would effectively make contraceptive
25 coverage optional.

26 12. When an employer excludes healthcare coverage that only affects women employees
27 but demands that women employees continue to pay the same as their male colleagues, the
28 employer is creating a gender-based classification in the workplace.

1 13. If an employee were to file a complaint asserting that her employer excluded essential
2 healthcare benefits from the healthcare plan for women, but not for men, that complaint would
3 fall under DFEH's jurisdiction as a gender-based workplace classification and DFEH would have
4 a legal obligation to investigate the claim.

5 14. After considering the rules, I believe that they will impact the analysis that DFEH
6 must engage in to carry-out its required responsibilities under the law, including analysis of the
7 scope and application of California's own religion-based exemptions from anti-discrimination
8 principles of general applicability. See, e.g., Cal. Gov't Code § 12926.2.

9 I declare under penalty of perjury that the foregoing is true and correct and of my own
10 personal knowledge.

11 Executed on December 17, 2018, in Los Angeles, California.

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KEVIN KISH
DIRECTOR, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

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