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State of Oregon

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 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 & HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; R. ALEXANDER ACOSTA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE 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,

4:17-cv-05783-HSG

STATE OF OREGON'S REPLY IN SUPPORT OF MOTION TO INTERVENE

and,

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

Defendant-Intervenors.

STATE OF OREGON,

Intervenor-Plaintiff,

v.

ALEX M. AZAR, II, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; R. ALEXANDER ACOSTA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE 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,

Intervenor-Defendants.

I. SUMMARY OF THE PARTIES' POSITIONS

Plaintiff States, the United States' defendants and defendant Little Sisters of the Poor do not oppose intervention by the State of Oregon.

Only intervenor-defendant March for Life Education and Defense Fund ("MFLEDF") opposes Oregon's intervention. MFLEDF objects on every factor for evaluating both intervention as of right and permissive intervention. But MFLEDF does not claim any prejudice would result by granting intervention to Oregon. While not a factor in the analysis for intervention, MFLEDF's motion expresses the concern that other states may also seek to intervene in the future. However, Oregon timely intervened before the Motion for Preliminary Injunction was fully briefed or heard. Hypothetical future intervention motions are irrelevant to Oregon's pending motion. As explained below, Oregon has met all of the factors and its motion to intervene should be granted.

II. INTERVENTION AS OF RIGHT

FRCP 24 is "broadly interpreted in favor of intervention." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). Even MFLEDF recognizes "the Ninth Circuit's liberal policy in favor of intervention." Proposed Defendant-Intervenor's Motion to Intervene at 8 (Docket #87). The district court's determination of a motion for intervention as of right is reviewed de novo, except that questions of timeliness are reviewed for abuse of discretion. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). As explained below, Oregon meets each of the four factors for intervention as a matter of right under Rule 24.

1. Oregon's motion is timely.

MFLEDF incorrectly argues that the timing analysis should reference the date of the initial complaint filing, which challenged the interim rules. MLFEDF Opp at 3. However, "[w]here a change of circumstances occurs, and that change is the 'major reason' for the motion to intervene, the stage of proceedings factor should be analyzed by reference to the change in circumstances, and not the commencement of the litigation." *Smith v. Los Angeles Unified Sch. Dist.,* 830 F.3d 843, 854 (9th Cir. 2016), citing to *United States v. State of Oregon,* 745 F.2d 550 (9th Cir. 1984) (finding a change in circumstance allowed for intervention approximately twenty years after the case's commencement).

The changes in circumstances include the issuance of the final rules on November 15, 2018. 83 Fed. Reg. 57,536 ("Religious Exemption"); 83 Fed. Reg. 57,592 ("Moral Exemption"). These Final Rules were scheduled to take effect on January 14, 2019. Oregon is only suing over the final rules[1], and Oregon's declaration and factual support depended on the content of those final rules. As important, another change in circumstance is the Ninth Circuit's December 13, 2018 decision on the interim rules injunction in *California v. Azar*, 911 F.3d 558 (9th Cir. 2018). That decision made it clear that Oregon needed to become a party to the litigation if it wanted its interests represented; that is, it could not depend on the existing parties to obtain a nationwide injunction.

These two changes in circumstances are a major reason for Oregon's motion to intervene. Using the proper reference point of the change in circumstances, Oregon timely filed its motion

[1] Oregon only seeks to file a complaint against the federal defendants, not MFLEDF.

on January 7, 2019.

The litigation is also in a new stage of proceedings. As a result of the above changes in circumstances, a Second Amended Complaint was filed on December 18, 2018, challenging the new final rules. Oregon moved to intervene twenty days after the Second Amended Complaint was filed. Moreover, Oregon "moved to intervene prior to the hearing on the preliminary injunction motion" and "before any hearings or rulings on substantive matters." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995). No defendant has yet filed an answer. *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011)(citation omitted) (motion to intervene files less than two weeks after the answer was "made at an early stage of the proceedings, the parties would not have suffered prejudice from the grant of intervention at that early stage, and intervention would not cause disruption or delay in the proceedings.").

Importantly, MFLEDF does not contend that Oregon's intervention would be prejudicial. Given that the court has not yet set a trial date, and that delay is the only relevant prejudice under this factor, it would be difficult to make such an argument. *See Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 857 (9th Cir. 2016) ("the only 'prejudice' that is relevant under this factor is that which flows from [the] prospective intervenor's" delay) (citation omitted). Oregon has therefore satisfied the timeliness factor.

2. Oregon has a significant protectable interest.

MLFEDF takes a myopic view of Oregon's protectable interests in this litigation, and focuses only on the nationwide injunction. But protectable interests are not limited to the preliminary injunction phase of litigation. Rather, the court looks to "the claims at issue" in the case. *Arakaki v. Cayetano,* 324 F.3d 1078, 1084 (9th Cir. 2003). Oregon has protectable interests related to the claims at issue in its finances, public health and sovereign interests. *See* Declaration of Helene Rimberg, ECF No. 211 at 3-5. The resolution of these claims will be addressed in the upcoming substantive motions for a permanent injunction or other decisions on the merits. A preliminary injunction – nationwide or limited – does not impact the claims at issue or Oregon's significant protectable interests related to those claims. And, of course, Oregon has no guaranty that the

nationwide preliminary injunction issued in Pennsylvania will survive on appeal.[2] Thus, Oregon has satisfied the second factor.

3. The claims at issue will impair Oregon's ability to protect its interests.

Similarly, the proper analysis of the ability of Oregon to protect its interests should examine the claims at issue and not be limited to the preliminary injunction phase of litigation. MLFEDF does not suggest that Oregon does not have an interest in the claims in this action or the outcome of the case. Rather, it asserts that Oregon could file a separate lawsuit. MFLEDF at n 7.

The opportunity to sue independently of the existing action is not a basis for denying intervention. Setting aside issues of judicial economy (discussed below), the court should evaluate intervention, as explained in a case where the State of Alaska moved to intervene, by

> "looking to the practical consequences of denying intervention, even where the possibility of future challenge to the regulation remains available." *Fund for Animals,* 322 F.3d at 735 (internal quotation marks omitted) (recognizing that even if the intervenor could challenge the decision in a subsequent lawsuit, reversing an unfavorable ruling in a subsequent case would be "difficult and burdensome"). * * *
> Although Alaska, if not a party to the present case, would not be precluded from challenging a change to the existing regulatory bar in a subsequent case, under *Fund for Animals,* the prejudice caused by an unfavorable judgment in the present case would sufficiently impair Alaska's interests for the purpose of satisfying Rule 24(a) intervention as of right. *See id.*

Akiachak Native Cmty. v. U.S. Dep't of Interior, 584 F. Supp. 2d 1, 6–7 (D.D.C. 2008), citing to *Fund For Animals, Inc. v. Norton*, 322 F.3d 728 (D.C. Cir. 2003)(allowing the country of Mongolia to intervene), and cited with approval by *WildEarth Guardians v. Jewell*, 320 FRD 1, 4–5 (D.D.C. 2017)(allowing Colorado and Utah to intervene).

If defendants prevail in this action, an adverse judgment would make a subsequent case more difficult, as this district court's ruling would have persuasive weight with a new court in the same circuit. The fact that Oregon could challenge an adverse decision in a subsequent lawsuit ignores the practical consequences an adverse decision would have on Oregon's interests. In sum, Oregon has legally protectable interests that may be impaired by this action.

[2] Moreover, the Ninth Circuit's decision in this case makes clear that Oregon has standing, which supports the conclusion that Oregon has an interest relating to the claims in this action.

4. Only Oregon can adequately represent its interests and those if its citizens.

None of the other plaintiff states have the unique financial damages and sovereign interests of Oregon. No other state has a duty to consider the interests of Oregon's citizens. Only Oregon can represent Oregonians. *WildEarth Guardians v. Jewell*, 320 FRD 1, 4–5 (D.D.C. 2017) ("the state-intervenors will primarily consider the interests of their own citizens. Furthermore, Wyoming, Colorado, and Utah may have unique sovereign interests not shared by the federal government.").

MLFEDF asserts that because Oregon would join the other states' position, that its interests are adequately represented. However, the Ninth Circuit has recognized that being on the same side of an issue does not mean that the interests of two parties are identical:

> As one of our sister circuits has persuasively explained, the government's representation of the public interest may not be "identical to the individual parochial interest" of a particular group just because "both entities occupy the same posture in the litigation." *WildEarth Guardians v. U.S. Forest Serv.,* 573 F.3d 992, 996 (10th Cir.2009) (quoting *Utah Ass'n of Cntys. v. Clinton,* 255 F.3d 1246, 1256 (10th Cir.2001)).

Citizens for Balanced Use v. Montana Wilderness Ass'n, 647 F.3d 893, 899 (9th Cir. 2011).

Indeed, if the other plaintiff states could adequately represent Oregon's interests, then presumably the preliminary injunction would apply to Oregon. As the Ninth Circuit held, it does not. That alone is conclusive evidence of the inadequacy of representation. *See California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018)(narrowing the preliminary injunction to redress only the plaintiff states). While the Ninth Circuit was concerned for "nonparties who had no opportunity to argue for more limited relief," *id*. at 583, Oregon is moving for intervention so that it can argue for full relief in Oregon. If Oregon is a plaintiff, it will be able to represent the facts, damages and sovereign interests of Oregon and its citizens. *Arakaki*, 324 F.3d at 1086 (citing *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986)). Accordingly, Oregon has met the fourth factor as well.

In sum, Oregon has satisfied all of the factors for intervention as a matter of right, and there is no claim of prejudice. Oregon's motion to intervene should be granted as a matter of right.

III. PERMISSIVE INTERVENTION

Permissive intervention has more relaxed standards. "District courts have discretion to permit an entity to intervene if the entity raises a claim that has a legal or factual issue or issues in common with the underlying action. In exercising their discretion, courts must consider whether intervention will unduly delay or prejudice the existing parties." *In re Benny*, 791 F.2d 712, 722 (9th Cir. 1986) (internal citations omitted).

As explained above, Oregon has an interest in and standing to raise the claims at issue. Oregon's motion is timely for this stage of the proceedings, and no party asserts prejudice from granting intervention to Oregon. Moreover, resolution of Oregon's facts in this same lawsuit promotes judicial economy, so that the Ninth Circuit can hear a single appeal. *Venegas v. Skaggs*, 867 F.2d 527, 531 (9th Cir. 1989) ("judicial economy is a relevant consideration in deciding a motion for permissive intervention").

MFLEDF speculates that other states may seek to join the lawsuit too (which, of course, would also advance the interests of judicial economy as opposed to those states filing separate lawsuits). Of course, such motions are purely hypothetical and, when and if filed, will have to be evaluated on their own merits. Nothing in the Ninth Circuit's *Azar* opinion on the preliminary injunction prohibited other proper states joining this action or in any way amended the law regarding intervention, nor suggested that such joinder would be a basis to deny Oregon's motion. Thus, Oregon also qualifies for permissive intervention.

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2 **IV. CONCLUSION**
3 Oregon's Motion to Intervene should be granted.
4 DATED January __28__, 2019.
5 Respectfully submitted,
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