

1 Eric C. Rassbach – No. 288041
2 Mark Rienzi *pro hac vice*
3 Lori Windham *pro hac vice*
4 Diana Verm *pro hac vice*
5 The Becket Fund for Religious Liberty
6 1200 New Hampshire Ave. NW, Suite 700
7 Washington, DC 20036
8 Telephone: (202) 955-0095
9 Facsimile: (202) 955-0090
10 erassbach@becketlaw.org

11 (continued on next page)

12 **IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14 THE STATE OF CALIFORNIA; THE STATE OF
15 CONNECTICUT; THE STATE OF DELAWARE;
16 THE DISTRICT OF COLUMBIA; THE STATE
17 OF HAWAII; THE STATE OF ILLINOIS; THE
18 STATE OF MARYLAND; THE STATE OF
19 MINNESOTA, by and through its Department of
20 Human Services; THE STATE OF NEW YORK;
21 THE STATE OF NORTH CAROLINA; THE STATE OF
22 RHODE ISLAND; THE STATE OF
23 VERMONT; THE COMMONWEALTH OF
24 VIRGINIA; THE STATE OF WASHINGTON,
Plaintiffs,

v.

15 ALEX M. AZAR, II, in his Official Capacity as
16 Secretary of the U.S. Department of Health &
17 Human Services; U.S. DEPARTMENT OF
18 HEALTH AND HUMAN SERVICES; R.
19 ALEXANDER ACOSTA, in his Official Capacity
20 as Secretary of the U.S. Department of Labor; U.S.
21 DEPARTMENT OF LABOR; STEVEN
22 MNUCHIN, in his Official Capacity as Secretary of
23 the U.S. Department of the Treasury; U.S.
24 DEPARTMENT OF THE TREASURY; DOES 1-
100,

Defendants,

21 and,

22 THE LITTLE SISTERS OF THE POOR, JEANNE
23 JUGAN RESIDENCE; MARCH FOR LIFE
EDUCATION AND DEFENSE FUND,
Defendant-Intervenors.

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

15 **BRIEF REGARDING INTERVENOR-
16 DEFENDANT LITTLE SISTERS'
17 POSITION ON DISCOVERY AND
18 THE ADMINISTRATIVE RECORD**

19 Date: February 12, 2019

20 Judge: Hon. Haywood S. Gilliam, Jr.

1 John Charles Peiffer, II
2 The Busch Firm
3 860 Napa Valley Corporate Way
4 Suite O
5 Napa, CA 94458
6 Telephone: (707) 400-6243
7 Facsimile: (707) 260-6151
8 jpeiffer@buschfirm.com

9
10 *Counsel for Defendant-Intervenors*

11 Pursuant to this Court's order of January 30, 2019, Dkt. 270, Defendant-Intervenors The Little
12 Sisters of the Poor, Jeanne Jugan Residence hereby submit their position on discovery and whether
13 this case should be limited to the administrative record.

14 As a preliminary matter, the Little Sisters do not request that the Court set a discovery period. The
15 Little Sisters do not intend to seek discovery, and believe that the case can be decided on summary
16 judgment without discovery. The only situation in which the Little Sisters would anticipate seeking
17 discovery is if another party seeks, and this Court grants, a discovery period to explore some issue that
18 the Court determines merits discovery.

19 On the question of whether this case calls for evidence outside the administrative record, the Little
20 Sisters do not object to the Plaintiff States relying on the declarations and evidence they have already
21 submitted to this Court. The Little Sisters are unaware, however, what further evidence the States may
22 seek to submit. In general, there are many instances in which materials outside the administrative
23 record are relevant and admissible for the Court's consideration. For example, the Court may take
24 judicial notice of adjudicative facts that are "not subject to reasonable dispute," such as government
documents. Federal Rule of Evidence 201(b); *see Transmission Agency of N. Cal. v. Sierra Pac. Power
Co.*, 295 F.3d 918, 924 n.3 (9th Cir. 2002) (noting existence of ongoing litigation in related case). And
other extra-record evidence is permitted when "(1) it is necessary to determine whether the agency has

1 considered all relevant factors and explained its decision, (2) the agency has relied on documents not
 2 in the record, (3) supplementing the record is necessary to explain technical terms or complex subject
 3 matter, or (4) plaintiffs make a showing of bad faith.” *City of Las Vegas, Nev. v. FAA*, 570 F.3d 1109,
 4 1116 (9th Cir. 2009). Additionally, when a party challenges agency action as unconstitutional, courts
 5 must “make an independent assessment of a citizen’s claim of constitutional right.” *Porter v. Califano*,
 6 592 F.2d 770, 780 (5th Cir. 1979). Thus, “the court is entitled to look beyond the administrative
 7 record,” and “discovery as to [a] non-APA claim is permissible.” *Grill v. Quinn*, CIV S-10-0757 GEB,
 8 2012 WL 174873, at *2 (E.D. Cal. Jan. 20, 2012).

9 Accordingly, the Little Sisters do not anticipate raising objections to any party’s reliance on
 10 documents outside the administrative record.

11
 12
 13
 14
 15
 16 Dated: February 12, 2019

Respectfully submitted,

17
 18
 19
 20
 21
 22
 23
 24 /s/ Mark L. Rienzi
 Eric C. Rassbach – No. 288041
 Mark L. Rienzi – *pro hac vice*
 Lori H. Windham – *pro hac vice*
 Diana M. Verm – *pro hac vice*
 The Becket Fund for Religious Liberty
 1200 New Hampshire Ave. NW, Suite 700
 Washington, DC 20036
 Telephone: (202) 955-0095
 Facsimile: (202) 955-0090
 erassbach@becketlaw.org

Counsel for Defendant-Intervenors