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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STATE OF CALIFORNIA, *et al.*,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary of the U.S. Dep't of Health and Human Services, *et al.*,

Defendants.

Case No.: 4:17-cv-5783-HSG

Federal Defendants' Opposition to Motion to Intervene by the States of Colorado, Michigan, and Nevada

INTRODUCTION

The Court should deny the request by the States of Colorado, Michigan, and Nevada ("Movants") to intervene in this case under the permissive intervention rule, Federal Rule of Civil Procedure 24(b)(2). They are, quite simply, too late. The Court has already issued an order preliminarily enjoining enforcement, in the plaintiff states, of the very rules that Movants seek to challenge. Allowing Movants to intervene at this point would be to countenance forum shopping. Individuals or entities should not be allowed to sit on the sidelines until a judge signals which way he or she is leaning, only then to try to finagle their way into a case. Not only is this maneuver inconsistent with traditional notions of fairness, but it causes concrete harms as well. Notably, if permitted in this case, intervention would stymy the development of the law with regard to important questions of religious liberty and the interpretation of federal statutes (like the Religious Freedom Restoration Act ("RFRA")) by depriving additional courts of the opportunity to weigh in on how these significant questions should be resolved. Intervention should not be a tool for mischief. The Court can and should exercise its discretion to deny Movants' motion.

BACKGROUND

This suit was originally filed in the fall of 2017, with an amended complaint filed only weeks later. Plaintiffs, the State of California and four other states, challenged two interim final rules (IFRs) that were issued by the U.S. Departments of Health and Human Services, Treasury, and Labor. Am. Compl., ECF No. 24, Nov. 1, 2017. These IFRs created exceptions to the so-called contraceptive coverage mandate for certain entities with sincerely held religious or non-religious moral objections to providing or facilitating the provision of insurance coverage for all or some contraceptives. *See* 82 Fed. Reg. 47,792 (Oct. 13, 2017); 82 Fed. Reg. 47,838 (Oct. 13, 2017). Plaintiffs alleged that the IFRs violated the Affordable Care Act ("ACA"), Administrative Procedure Act ("APA"), and Fifth Amendment to the U.S. Constitution, among other things. Am. Compl. ¶¶ 116-137. They also sought a preliminary injunction, ECF No. 28, Nov. 9, 2017, which Federal Defendants opposed on numerous threshold and merits grounds, ECF No. 51, Nov. 29, 2017. The Court granted Plaintiffs' motion, issuing a nationwide preliminary injunction on the grounds that Federal Defendants had

violated the APA's notice and comment requirement. ECF No. 105, Dec. 21, 2017. Federal Defendants, along with two intervening defendants, appealed the decision to the Ninth Circuit. In December 2018, the Ninth Circuit issued a decision, upholding this Court's decision except with regard to the nationwide scope of the injunction. *California v. Azar*, 911 F.3d 558 (9th Cir. 2018).

Plaintiffs filed a second amended complaint ("SAC") in December 2018. ECF No. 170, Dec. 18, 2018. This complaint challenged the final Religious and Moral Exemption Rules, which Federal Defendants issued in November 2018 after reviewing tens of thousands of comments on the IFRs. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the ACA, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (the "Religious Exemption Rule"); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the ACA, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (the "Moral Exemption Rule"). The second amended complaint, filed more than a year after the original complaint, also added seven new states and the District of Columbia as plaintiffs, though not, of course, Nevada, Michigan, or Colorado. SAC at 1. The parties briefed Plaintiffs' entitlement to a preliminary injunction. *See* ECF Nos. 174, 197, 198, 199, and 218. They also presented oral argument on January 11. See ECF No. 236, Jan. 11, 2019 (minute order regarding argument). The Court granted Plaintiffs' motion for a preliminary injunction, and in the course of doing so, made numerous statements regarding its views of the merits of the case. *See* Order Granting Plaintiffs' Mtn. for a Prelim. Inj., Jan. 13, 2019, ECF No. 234 ("PI Order"), at 21-39. For example, the Court announced with respect to the Religious Exemption Rule that "the Plaintiffs are likely correct, or have, at a minimum, raised serious questions going to the merits of th[e] claim" that Federal Defendants lacked the authority to issue the rule. *Id.* at 21. And with respect to the Moral Exemption Rule, the Court stated that "Plaintiffs are likely to succeed in their argument that the Moral Exemption is not in accordance with the ACA." *Id.* at 38.

Only after the Court issued this ruling did the Movants file their motion for permissive intervention. Mtn. to Intervene by the States of Colorado, Michigan, and Nevada, ECF No. 293, March 14, 2019 ("Intv. Mtn.")

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ARGUMENT

Movants seek to intervene under both prongs of the permissive intervention rule, the first of which addresses permissive intervention in general, and the second of which addresses permissive intervention by government entities in certain circumstances. *See* Fed. R. Civ. 24(b)(1), (b)(2). Their motion fails under both prongs.

I. The Court Should Deny Movants' Motion under Rule 24(b)(1) as Untimely.

"Courts have broad discretion to deny permissive intervention under Federal Rule of Civil Procedure 24(b)." *McDonald v. Means*, 309 F.3d 530, 541 (9th Cir. 2002). "In exercising its discretion" on this issue, "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). Courts may allow permissive intervention under Rule 24(b)(1) where the applicant for intervention shows: "(1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *United States v. City of Los Angeles,* 288 F.3d 391, 403 (9th Cir. 2002). But "[e]ven if an applicant satisfies those threshold requirements, the district court has discretion to deny permissive intervention." *S. California Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir.), *modified*, 307 F.3d 943 (9th Cir. 2002).

The Court should consider three factors when assessing timeliness: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997). "[T]he timeliness inquiry demands a [ ] nuanced, pragmatic approach." *Id.* at 1303. Importantly, "[i]n the context of permissive intervention," courts in this circuit "analyze the timeliness element more strictly than [they] do with intervention as of right." *Id.* at 1308.

A "nuanced, pragmatic approach" demonstrates that Movants' request is untimely and should be rejected. "The Ninth Circuit has generally been reluctant to allow intervention when substantive issues have already been dealt with in a case." *Acosta v. Huppenthal*, 2012 WL 12829994, at *2 (D. Ariz. Feb. 6, 2012). And here, Movants sought to intervene weeks *after* the Court had issued an Order preliminarily enjoining the Final Rules and, thereby, necessarily finding that the Plaintiff states

had established a sufficient likelihood of success on the merits to secure a preliminary injunction. More specifically, the Court held that the "Plaintiffs are likely correct, or have, at a minimum, raised serious questions going to the merits of th[e] claim" that Federal Defendants lacked the authority to issue the Religious Exemption. PI Order at 21. And, in support of that conclusion, the Court rejected the Federal Defendants' arguments that: (i) the ACA granted the Health Resources and Service Administration ("HRSA") the authority to create the exemptions to the contraceptive coverage mandate, and (ii) RFRA requires the Religious Exemption Rule. *Id.* at 21-31. The Court's overall conclusion with regard to the Moral Exemption Rule was even starker: "Further, Plaintiffs are likely to succeed in their argument that the Moral Exemption is not in accordance with the ACA." *Id.* at 38. Thus, contrary to Movants' argument, they have not sought intervention "before major substantive issues have been addressed." Intv. Mtn. at 6.

The fundamental problem with allowing permissive intervention at this point is that it would facilitate forum shopping. One court has defined forum shopping as the "[s]election of a court with an eye towards gaining an advantage based on the forum's favorable substantive law or the avoidance of unfavorable law in an alternative forum." *Util. Workers Union of Am., AFL–CIO v. Dominion Transmission, Inc*., C.A. 2006 WL 2794568 at *3 (W.D. Pa. Sept. 27, 2006). And Black's Law Dictionary defines "forum shopping" as "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard." Black's Law Dictionary (10th ed. 2014). The Court's decision on the preliminary injunction motion certainly constitutes "favorable substantive" law for proposed intervenors, explaining why, for example, the State of Colorado, the capital of which lies about 950 miles east of this Court and in the Tenth Circuit, and the State of Michigan, the capital of which lies about 2000 miles east of this Court and in the Sixth Circuit, want to trek all of the way out to Oakland, California to intervene in the case. And unlike the faraway states that originally joined this litigation as plaintiffs, Colorado, Michigan, and Nevada cannot claim the benefit of signing on to a brief in support of a motion for a preliminary injunction filed by the California Attorney General's Office; rather, they will have to draft and file their own preliminary injunction papers. *See* Order, ECF No. 297, March 22, 2019.

Colorado and Michigan likely made their way to this Court not only to benefit from favorable substantive law in this Court, but also to avoid law unfavorable to their position in their home jurisdictions. In *Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114, 1143-44 (10th Cir. 2013), the Tenth Circuit rejected the argument – advanced by Plaintiffs in this case, ECF No. 174, at 4 – that there is a compelling governmental interest in the contraceptive coverage mandate. Among other things, the Tenth Circuit concluded, as Federal Defendants have argued here, ECF No. 198, at 23, that "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014); *see also id*. at 728 ("find[ing] it unnecessary to adjudicate this issue" but "assum[ing] that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling"). This Court did not adopt Federal Defendants' argument in its preliminary order. PI Order at 37-38.

As for Michigan, in earlier rounds of litigation over the contraceptive coverage mandate, several district courts in Michigan upheld challenges brought by religious objectors, and in the course of doing so expressed great skepticism that a compelling interest in contraceptive coverage could be demonstrated. *See Ave Maria Found. v. Sebelius,* 991 F. Supp. 2d 957, 966 (E.D. Mich. 2014) ("Here, the sheer number of exceptions and stays to the HRSA Mandate undercut the government's argument that requiring religious objectors to provide contraceptive coverage furthers vital interests."); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 807 (E.D. Mich. 2013) ("Severely undermining any claim [of a compelling interest in the contraceptive coverage requirement] . . . is the existence of numerous exemptions to the mandate, resulting in approximately 190 million people falling outside of the mandate's purview."); *Legatus v. Sebelius*, 988 F. Supp. 2d 794, 809 (E.D. Mich. 2013) ("With tens of millions of people untouched, the Government has undermined its arguments that the HRSA Mandate promotes any compelling government interest.").

Thus, the Court should reject Movants' request to intervene because it is untimely and would facilitate forum shopping, a practice that has been decried by both the Supreme Court and Congress

for decades. *See, e.g.*, *Hanna v. Plumer*, 380 U.S. 460, 467-68 (1965) (explaining that a purpose of a judicially created standard was the "discouragement of forum-shopping"); *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984) ("The interpretation given to the Arbitration Act by the California Supreme Court would therefore encourage and reward forum shopping. We are unwilling to attribute to Congress th[at] intent . . . .); J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. Pa. L. Rev. 631, 634 n.6 (2015) ("Congress felt that patent forum shopping was so problematic that in 1982, it created the U.S. Court of Appeals for the Federal Circuit in an effort to curb the practice."); G. Marcus Cole & Todd J. Zywicki, *Anna Nicole Smith Goes Shopping: The New Forum-Shopping Problem in Bankruptcy*, 2010 Utah L. Rev. 511, 517 (2010) ("These forum-shopping difficulties were part of the problem that eventually led Congress to seek a complete overhaul of the Bankruptcy Act."). Moreover, allowing states to continue to pile into this case after the Court has issued a preliminary injunction obviates the ability of other courts and other circuits to weigh in on important questions of public law regarding, among other things, religious liberty and the meaning of the ACA and RFRA.

Indeed, insufficiently rigorous enforcement of the restrictions on intervention would engender similar harms as nationwide injunctions, some of the flaws of which were recognized by the Ninth Circuit in this case. *California v. Azar*, 911 F.3d 558, 582-83 (9th Cir. 2018). In addition to generating similar concerns about forum shopping and stymying the development of the law, *see Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (discussing problems with nationwide injunctions), lax enforcement of the limits on permissive intervention, like a nationwide injunction, would create a one-way ratchet. In the realm of intervention, it would work like this: A victory by a plaintiff on a preliminary injunction motion would allow like-minded prospective plaintiffs to flock to a single case in which a conclusion may be foreordained, but a loss will not prevent these prospective intervenors from "run[ning] off to the 93 other districts for more bites at the apple." *City of Chicago v. Session*s, 888 F.3d 272, 298 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part) (describing harm of nationwide injunction*), reh'g en banc granted*, Order of June 4, 2018 (vacating panel judgment "insofar as it sustained the district

court's decision to extend preliminary relief nationwide"), *reh'g en banc vacated as moot*, Order of Aug. 10, 2018). This outcome can and should be avoided.

Finally, even if the Court were to conclude that Movants' motion were technically timely, it should nonetheless exercise its discretion to deny their motion for intervention in light of the harms of permitting intervention in these circumstances, as detailed above. *California Edison Co.*, 307 F.3d at 803 (recognizing discretion of court to reject motion for intervention even when threshold requirements are met).

II. The Court Should Also Deny Movants' Motion Under Rule 24(b)(2).

A court "may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on" either a "statute or executive order administered by the officer or agency" or "any regulation . . . issued or made under the statute or executive order." Fed. R. Civ. P. 24(b)(2). Of course, under this prong as well, the Court has broad discretion to deny intervention. *See* Fed. R. Civ. P. 24(b)(3).

Movants argue that "[b]ecause the Intervening States administer the challenged regulations, they satisfy Rule 24(b)(2)'s requirements for intervention." Mtn. Intv. at 7. Their argument is flawed. As an initial matter, the rule is focused on the source of the claims and defenses of the current parties to the case, not the intervenors. *See* Fed. R. Civ. P. 24(b)(2) (using the term "party" instead of "movant"); *Am. Fed'n of Teachers - W. Virginia, AFL-CIO v. Kanawha Cty. Bd. of Educ*., 2009 WL 10705182, at *4 (S.D.W. Va. Jan. 14, 2009) (concluding that Rule 24(b)(2) "allows a governmental agency to intervene in a case where *an existing party* raises a claim or defense based on a statute or executive order administered by the agency or on an agency's regulation, order, requirement, or agreement made under the statute) (emphasis in original). Moreover, Movants provide no support for the assertion that they administer the challenged regulations, which were promulgated by the federal government. *Cf. Lowry v. Barnhart*, 2002 WL 31487640, at *3 (D. Or. Feb. 15, 2002) (holding that a "skeletal 'argument,' really nothing more than an assertion, does not preserve a claim ... [e]specially when the brief presents a passel of other arguments."). While states certainly have a role in enforcing ACA insurance requirements, they do not "administer" the ACA

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or the Religious or Moral Exemption Rules, as by promulgating regulations pursuant to congressional authority. *See Crandon v. United States*, 494 U.S. 152, 177, 110 S. Ct. 997, 1011, 108 L. Ed. 2d 132 (1990) (Scalia, J., concurring) (noting that U.S. Department of Justice's responsibility to enforce a criminal law "is not the sort of specific responsibility for *administering* the law that triggers *Chevron*") (emphasis added). Thus, Movants do not satisfy the minimum requirements for intervention under Federal Rule of Civil Procedure 24(b)(2).

Finally, even if Movants could surmount all of these obstacles, the Court should deny intervention under Rule 24(b)(2) for the same reasons as it should deny intervention under Rule 24(b)(1): Intervention under Rule 24(b)(2) would cause the same harms.

CONCLUSION

For the reasons stated above, the Court should deny Movants' motion for permissive intervention.

Dated: March 28, 2019

Respectfully submitted,

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