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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al., Plaintiffs, **v.** HEALTH AND HUMAN SERVICES, et al. Defendants.	Case No. 17-cv-05783-HSG **MOTION TO INTERVENE BY THE STATES OF COLORADO, MICHIGAN, AND NEVADA** Date: June 6, 2019 Time: 2:00 pm

INTRODUCTION

Please take notice on June 6, 2019 at 2 pm, the hearing for the Motion to Intervene by the States of Colorado, Michigan, and Nevada ("Intervening States") will occur at Courtroom 2 of the United States Courthouse, 1301 Clay Street, Oakland, California.

Intervening States move for permissive intervention as plaintiffs under Federal Rule of Civil Procedure 24(b). Like the current Plaintiffs, the Intervening States face significant harm from the Final Rules.[1] Intervening States will incur additional costs when women who would have been covered by their employers' insurance instead use state-funded programs and when women who no longer have access to contraceptive care have unintended pregnancies.

Plaintiffs do not oppose this motion. Defendants and Defendant Intervenors oppose this motion.

Permissive intervention is appropriate under both Rule 24(b)(1) and (b)(2). Under Rule 24(b)(1), the Intervening States have claims that share common questions of law and fact with the claims asserted by Plaintiffs. Rule 24(b)(2) recognizes the need of states and agencies to intervene to address disputes concerning statutes and regulations they administer. Here, numerous agencies in the Intervening States are affected by the Final Rules and the attorneys general sue on their behalf.

This motion to intervene is timely because the Intervening States move to intervene before the Final Rules become effective against them—the Eastern District of Pennsylvania enjoined the Final Rules nationwide on January 14, 2019. That injunction is currently on appeal and will be argued in late May. In this case, no significant substantive developments have occurred since the entry of the injunction on January 13, 2019.

Because the Intervening States will work with Plaintiffs and will seek no extra time or separate briefing (other than on extending the current preliminary injunction to apply to them as well), no prejudice or delay will result from this intervention. Attached as Exhibit 1 is the

[1] Defined terms are the same as used in the Court's January 13 Order Granting Plaintiffs' Motion for a Preliminary Injunction, Dkt. No. 174. ("Final Rules Injunction Order")

pleading—the Complaint by the States of Colorado, Michigan, and Nevada—that Rule 24(c) requires.

STATEMENT OF FACTS

The Court set forth the facts related to the history of the case and the issues in dispute in its Final Rules Injunction Order and Intervening States do not repeat them here. Dkt. No. 234, pp. 2–15.

Intervening States face real and specific harm from the Final Rules. Intervening States summarize the harms below and do not provide declarations at this stage. *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001) (holding "Courts are to take all well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint . . . as true absent sham, frivolity or other objections"). Intervening States will provide declarations to support the harms created by the Final Rules if they are permitted to intervene when they move to extend the preliminary injunction to cover Intervening States as well.

Colorado. Colorado expects that the Final Rules, if implemented, will cause substantial harm because thousands of men and women will be left without access to healthcare and Colorado will see an increase in unintended pregnancies, an increase in STD infections and an increase in terminations and many other detrimental effects to the health of our state. Colorado's recent experience shows that when full family planning services are provided, the number of unintended pregnancies among young women dropped by over half. The abortion rate among women ages 15 to 19 fell by 60% and among women aged 20 to 24 fell by 41%.

Colorado estimates that in 2017, 533,100 women received employer insurance coverage who would be eligible for publicly funded family planning. Based on Colorado's experience, its public health experts believe that a large portion of these insured women will turn to Title X for these family planning services, which would increase costs in an already underfunded program. In addition, individuals may forgo coverage and risk an unintended pregnancy, also leading to increased State health care costs and an increase in abortions.

Michigan. As of February 2019, Michigan serves 686,000 beneficiaries under the Healthy Michigan Plan, Michigan's Medicaid Section 1115 Demonstration waiver program. 48% of these

beneficiaries are women, and 31% are women of reproductive age. Michigan expects that additional women will come into this program if they lose access to full family planning services due to the Final Rules. These additional beneficiaries will cost Michigan money. Finally, additional unintended pregnancies will occur if employers do not provide full family planning services, including contraception. Some of these additional unintended pregnancies will occur in Medicaid eligible families, either because of job transition or loss of benefits. The average Michigan Medicaid covered birth costs $16,608, including child birth, related prenatal and postpartum care, and costs for a Medicaid-covered child for the first year of life.

Nevada. Nevada will likely be injured because the Contraception Exemption Rules will likely result in increased costs and burdens on Nevada, along with reproductive health access challenges for Nevada residents.

In 2012, as part of the Patient Protection and Affordable Care Act, certain group health insurance plans were required to cover all FDA-approved contraceptive methods and contraceptive counseling at no charge to the patient. In the following years, from 2012 to 2017, Nevada's abortion rate among women aged 15 to 19 decreased by 35%, and among women aged 20 to 24 decreased by 10%.

Nevada estimates that more than 379,000 women of child bearing age (aged 15–44) receive private insurance coverage and could be affected by the Exemption Rules. On information and belief, these individuals could lose current access to contraception, leading them to turn to Title X for family planning services. Some of these individuals could forego coverage, potentially leading to an increase in abortions or risking an unplanned pregnancy.

According to the Centers for Disease Control and Prevention, or CDC, unintended pregnancy is associated with an increased risk of problems for the mother and baby, which increase overall healthcare costs. Also according to the CDC, women with unintended pregnancies may delay prenatal care. Early and adequate prenatal care is imperative to positive birth outcomes.

ARGUMENT

I. Intervention is Timely

The timeliness of a motion to intervene is determined by "the totality of the circumstances facing would-be intervenors, with a focus on three primary factors: (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." *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016) (quotation omitted).

Here Intervening States seek to intervene at the early stage in this case. Only a preliminary injunction has been decided and the summary judgment briefs are not due until April 30, 2019. Dkt. No. 275.

Both avenues for permissive intervention require the court to consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). No such delay or prejudice will arise from this intervention. Intervening States, like recent Intervenor Oregon, will join in the briefing of Plaintiffs and will not file separate briefs. As this Court recognized in permitting Oregon to intervene, intervention "will promote judicial economy and spare the parties from needing to litigate a similar case in another district." Order Granting M. to Intervene 7, Dkt. No. 274 (citations omitted).

Finally, the reason for and length of the delay supports intervention here. For the Final Rules, Plaintiffs sought a preliminary injunction with nationwide scope on December 19, 2018, addressing the factors discussed in *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018). M. for Prelim. Inj. at 25, Dkt. No. 174. On January 13, 2019, this Court limited the injunction to the parties in the case. Final Rules Injunction Order at 42–44, Dkt. No. 234. The date of this order is "[t]he crucial date for assessing the timeliness of a motion to intervene" because this Court's injunction limited to the parties "is when proposed intervenors should have been aware that their interests would not be adequately protected by the existing parties." *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). In addition, new attorney generals took office in the Intervening States in January and have been reassessing their states' litigation. These states, after a quick investigation into the appropriate facts, decided to join promptly.

Because of the nationwide injunction issued by the Eastern District of Pennsylvania on January 14, 2019, the Final Rules have not yet been enforced against the Intervening States. *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 834–35 (E.D. Penn. 2019). Under the argument schedule established by the Third Circuit, that appeal will not be addressed until late May at the earliest. Letter in *Pennsylvania v. Trump*, Case No. 19-1129 (3d Cir. Mar. 6, 2019) (explaining that the case as "been tentatively listed on the merits on Tuesday, May 21, 2019"). Like Oregon, the Intervening States' motion is filed before major substantive issues have been addressed and will create no prejudice to other parties. The Intervening States filed the motion shortly after the Court did not grant the nationwide injunction sought by Plaintiffs. The motion is therefore timely.

II. The Intervening States Satisfy Rule 24(b)(1)'s Requirements

Rule 24(b)(1) permits intervention when "anyone … has a claim … that shares with the main action a common question of law." Here, like Plaintiffs, the Intervening States claim that the Final Rules violate the Administrative Procedure Act and the Establishment Clause and Equal Protection Clause of the U.S. Constitution. *Compare* 2d Am. Compl. ¶¶ 235–260, Dkt. No. 170, *with* Intervening States Compl. ¶¶ 47–65, attached as Ex. 1.

Intervening States bring the same legal claims against the same defendants and thus satisfy Rule 24(b)(1)'s requirements.

III. The Intervening States Satisfy Rule 24(b)(2)'s Requirements

Rule 24(b)(2) permits a court to allow a "state governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute … administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute." Here, the Intervening States have agencies that administer the Final Rules.

The attorneys general, all of whom seek to intervene on behalf of their states, including their state agencies, have specific state statutory authority to appear and represent the state and its agencies in these suits. In Colorado, COLO. REV. STAT. § 24-31-101(1)(a) states that "the attorney general … shall prosecute and defend for the state all actions and proceedings, civil and criminal, in which the state is a party or is interested."

In Michigan, the attorney general is the chief law enforcement officer of the State, *Fieger v. Cox*, 734 N.W.2d 602, 604 (Mich. Ct. App. 2007), and the attorney general has the authority to intervene in any action in which the attorney general believes the interests of the People of the State of Michigan are implicated, MICH. COMP. LAWS § 14.28. In Nevada, "when, in the opinion of the Attorney General, to protect and secure the interest of the State it is necessary that a suit be commenced or defended in any federal or state court, the Attorney General shall commence the action or make the defense." NEV. REV. STAT. § 228.170. Likewise, under federal law, the state attorney general represents the legal position for the State. *Cf.* 28 U.S.C. § 2403(b); Fed. R. Civ. P. 5.1(a)(2).

Given this specific rules permitting government entities to intervene where they administer the statute, courts routinely permit such intervention. *See Appleton v. C.I.R.*, 430 Fed. Appx. 135, 136 (3d. Cir 2011) (reversing to permit intervention under Rule 24(b)(2) because "Rule 24(b)(2) specifically provides for governments to protect their interests in matters in litigation"); *Coffey v. C.I.R.*, 663 F.3d 947, 951 (8th Cir. 2011) (relying on *Appleton* to reverse denial of permissive intervention under Rule 24(b)(2)); *Miami Health Studios, Inc. v. City of Miami Beach*, 491 F.2d 98, 100 (5th Cir. 1974) (holding that "[t]he Attorney General of Florida should have been permitted to intervene" under Rule 24(b)(2)). Indeed, the leading treatise, Federal Practice and Procedure, recognizes that "the whole thrust of [adding Rule 24(b)(2)] is in the direction of allowing intervention liberally to governmental agencies and officers seeking to speak for the public interest" 7C Charles Alan Wright et al., FED. PRAC. & PROC. CIV. § 1912 (3d ed. 1998).

Because the Intervening States administer the challenged regulations, they satisfy Rule 24(b)(2)'s requirements for intervention.

CONCLUSION

Because the Intervening States satisfy both standards for permissive intervention and intervention creates no prejudice, the Intervening States respectfully request that this Court permit them to intervene.

Dated: March 14, 2019

Respectfully submitted,

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EXHIBIT 1

COMPLAINT BY THE STATES OF COLORADO, MICHIGAN, AND NEVADA

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al., Plaintiffs, **v.** HEALTH AND HUMAN SERVICES, et al. Defendants.	Case No. 17-cv-05783-HSG **COMPLAINT BY THE STATES OF COLORADO, MICHIGAN, AND NEVADA**

1. The States of Colorado, Michigan and Nevada ("Intervening States") intervene in this action to protect our residents' access to contraception, which is a key element in safeguarding women's overall health and well-being, plays a key role in women's socioeconomic advancement, and benefits society as a whole. Contraceptives are among the most widely-used medical services in the United States and are much less costly than maternal deliveries for women, insurers, employers, and the State.

2. Starting in 2012, as part of the Patient Protection and Affordable Care Act (ACA), certain group health insurance plans were required to cover all FDA-approved contraceptive methods and contraceptive counseling (collectively known as "contraceptive services") without cost-sharing (e.g. individual out of pocket health expenses on copays, deductibles, or coinsurance) for beneficiaries. 45 C.F.R. § 147.130(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 26 C.F.R. § 54.9815-2713(a)(1)(iv). However, on November 7, 2018, the Defendants issued their final rules which were published on November 15, 2018 (the Exemption Rules), 2018-24512 and 2018-24514. Though enforcement is now enjoined by this Court and other courts, the Exemption Rules became effective on January 14, 2019. The Exemption Rules expanded the scope of the religious exemption to allow employers and insurance companies with religious or "moral" objections to opt out of the contraceptive coverage requirement, with no way for the federal government to evaluate the legitimacy of an employer or insurance company's use of the exemption and no way for states to police the abuse of the exemption. Thus, under the Exemption Rules, for-profit corporations would have the virtually unfettered ability to deprive their employees and insureds of coverage for contraception, whether to discriminate against women, discourage women's employment, or simply to boost corporate profits.

3. The Exemption Rules would also leave the Intervening States to shoulder the additional fiscal and administrative costs as women seek access for this coverage through state-funded programs. The rules will further lead to public health consequences due to patients being unable to gain seamless access to critical and time-sensitive contraceptive care, including unplanned pregnancies.

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States), 28 U.S.C. § 1361 (action to compel officer or agency to perform duty owed to Plaintiff), and 5 U.S.C. §§ 701–706 (Administrative Procedure Act or APA). An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a), and this Court may grant declaratory relief, injunctive relief, and other relief pursuant to 28 U.S.C. §§ 2201–2202 and 5 U.S.C. §§ 705-706.

5. The publication of the Exemption Rules on November 15, 2018 constitutes final agency action that is judicially reviewable within the meaning of the Administrative Procedure Act. 5 U.S.C. §§ 704, 706. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1) because, without limitation, a state plaintiff (California) with multiple federal judicial districts resides in any of those districts and this action seeks relief against federal agencies and officials acting in their official capacities.

INTRADISTRICT ASSIGNMENT

6. Pursuant to Civil Local Rules 3-5(b) and 3-2(c), there is no basis for assignment of this action to any particular location or division of this Court.

PARTIES

7. Plaintiffs-intervenors are the following states:

a. The State of Colorado, acting through its attorney general with statutory authority to represent the state in this case, COLO. REV. STAT. § 24-31-101(1)(a);

b. The State of Michigan, acting through its attorney general with statutory authority to represent the state in this case, MICH. COMP. LAWS § 14.28; and

c. The State of Nevada, acting through its attorney general with statutory authority to represent the state in this case, NEV. REV. STAT. § 228.170.

8. Defendant Alex M. Azar, II, is Secretary of the Department of Health and Human Services (HHS) and is sued in his official capacity. Secretary Azar has responsibility for implementing and fulfilling HHS's duties under the Constitution, the ACA, and the APA.

9. Defendant HHS is an agency of the United States government and bears

responsibility, in whole or in part, for the acts complained of in this Complaint. The Centers for Medicare and Medicaid Services is an agency within the HHS.

10. Defendant R. Alexander Acosta is Secretary of the U.S. Department of Labor and is sued in his official capacity. Secretary Acosta has responsibility for implementing and fulfilling the U.S. Department of Labor's duties under the Constitution, the ACA, and the APA.

11. Defendant U.S. Department of Labor is an agency of the United States government and bears responsibility, in whole or in part, for the acts complained of in this Complaint. The Employee Benefits Security Administration is an entity within the U.S. Department of Labor.

12. Defendant Steven Mnuchin is Secretary of the U.S. Department of the Treasury and is sued in his official capacity. Secretary Mnuchin has responsibility for implementing and fulfilling the U.S. Department of the Treasury's duties under the Constitution, the ACA, and the APA.

13. Defendant U.S. Department of the Treasury is an agency of the United States government and bears responsibility, in whole or in part, for the acts complained of in this Complaint. The Internal Revenue Service (IRS) is an entity within the U.S. Department of the Treasury.

INTERVENING STATES' INTERESTS

14. The Intervening States have an interest in ensuring that women's healthcare is available, accessible, and affordable, especially women's reproductive healthcare. The Intervening States will suffer concrete and substantial harm because the Exemption Rules frustrate the State's public health interests by curtailing women's access to contraceptive care through employer-sponsored health insurance.

15. Additionally, the federal regulation inhibits state agencies from carrying out their statutorily required functions, including the Intervening States' antidiscrimination laws.

16. The Intervening States have a strong interest in making sure that its residents have safe and available contraception.

17. **Colorado.** Colorado will be injured because the limitations on women's ability under the Exemption Rules to obtain contraception will cause increased costs to Colorado.

Colorado estimates that 533,100 women are eligible for publicly funded family planning and have non-Medicaid (employer) insurance. However, if the moral and religious exemption rules comes to fruition, a large portion of these insured women will likely turn to Title X. This new patient load will increase costs in an already underfunded program. Alternatively, individuals may forgo coverage and risk an unintended pregnancy, also leading to increased State health care costs.

18. Colorado has direct evidence of the impact that comprehensive family planning funding has on its residents.

19. Colorado received a grant in 2008 to substantially increase funding for family planning. Due to increased comprehensive family planning services, the birth rate for young women ages 15 to 19 was reduced by more than half, falling 59%between 2009 and 2017. The rate dropped by 37.5 births per 1,000 teens in 2009 to 15.5 births in 2017. A similar downward trend was seen among women ages 20 to 24, with their birth rates dropping 35% between 2009 and 2017.

20. The number of repeat teen births (teens < 18 years giving birth for the second or third time, etc.) dropped by 85% percent between 2009 and 2017.

21. The abortion rate among women ages 15 to 19 fell by 60 percent and among women ages 20 to 24 by 41 percent between 2009 and 2017.

22. The average age of first birth increased by 1.7 years among all women between 2009 and 2017, from 25.9 years to 27.6 years.

23. Based on Colorado's experience, it expects that the moral and religious exemption will jeopardize this progress and the State will see these data slide back to pre-investment birth rates and terminations, causing significant impact to Colorado

24. Individuals who lose contraception coverage because of the Conscience Exemption Rules at issue in this case can, if they meet the eligibility criteria, will seek coverage from the state, which will result in increased enrollment in these programs and additional costs to Colorado. Alternatively, individuals may forgo coverage and risk an unintended pregnancy, also leading to increased State health care costs.

25. **Michigan.** The Contraception Exemption Rules will likely result in increased costs

and burdens on Michigan, along with reproductive health access challenges for Michigan residents.

26. The Michigan Department of Health and Human Services (MDHHS) is the Title X grantee in Michigan. MDHHS's Michigan Family Planning Program is the sole Title X funded program in the State of Michigan, which operates 92 clinic locations through a statewide network of 31 local sub-grantees. The Michigan Family Planning Program is a safety-net program and provides reproductive health services, including access to a broad range of FDA-approved contraception to low-income, uninsured, or underinsured women and men in Michigan.

27. The Healthy Michigan Plan is Michigan's Medicaid Section 1115 Demonstration waiver program (established by Michigan Public Act 107 of 2013). The Healthy Michigan Plan provides health care coverage, including a full range of contraceptive methods and related preventive health services, to Michigan residents aged 19-64, with incomes at or below 133% of the federal poverty level, and who meet the eligibility requirements. As of February 2019, over 686,000 beneficiaries are enrolled. Of those enrolled, 48% are women and 31% are women of reproductive age.

28. Unlike other states with contraceptive equity laws that assure women access to contraceptive services without copay or other limiting restrictions, the protections covered under the ACA are the only safeguards ensuring Michigan women access to contraceptive benefits and services approved by the FDA without cost-sharing.

29. Among women aged 15-44, about 50% of pregnancies in Michigan are unintended. The Contraception Exemption Rules will likely raise that percentage even higher, as they will impose significant barriers to women who lose contraceptive coverage through their employer. These women will be forced to identify other coverage if available, pay for contraception out of pocket, or find a publicly-funded clinic to access contraception. These women will also be at risk for an unintended pregnancy during this time. Unintended pregnancies can increase the risk of adverse health outcomes for women and infants and can contribute to infant and maternal morbidity and mortality.

30. The Contraception Exemption Rules will also burden publicly funded clinics.

Depending on the number of Michigan employers who claim the exemption, the increase in clients will tax an already underfunded public health system and result in access issues for all women seeking services at the clinics. In Michigan, the capacity of the Family Planning Program is already threatened by the Title X Final Rule, which will prohibit the largest Title X service providers in Michigan from participating in the program.

31. Many working women whose employers use the Contraception Exemption Rules will not qualify for Michigan Medicaid's income eligibility, which in 2018 was just over $16,000 for a family of one and just over $34,000 for a family of four. For the limited number that do qualify and successfully enroll, Michigan's Medicaid program will incur increased contraceptive costs. The cost of providing contraception to a woman for a year varies, but assuming one year of contraceptives costs $600, the estimated contraceptive cost for one woman per lifetime is about $18,000. This cost will be incurred by Medicaid instead of an employer sponsored plan. Further, if lack of contraceptive coverage results in a pregnancy, the average Michigan Medicaid-covered birth costs $16,608, inclusive of child birth, related prenatal and postpartum care, and costs for a Medicaid-covered child for the first year of life.

32. **Nevada.** Nevada will likely be injured because the Contraception Exemption Rules will likely result in increased costs and burdens on Nevada, along with reproductive health access challenges for Nevada residents.

33. In 2012, as part of the ACA, certain group health insurance plans were required to cover all FDA-approved contraceptive methods and contraceptive counseling at no charge to the patient. In the following years, from 2012 to 2017, Nevada's abortion rate among women aged 15 to 19 decreased by 35%, and among women aged 20 to 24 decreased by 10%.

34. Nevada estimates that more than 379,000 women of child bearing age (aged 15-44) receive private insurance coverage and could be affected by the Exemption Rules. On information and belief, these individuals could lose current access to contraception, leading them to turn to Title X for family planning services. Some of these individuals could forego coverage, potentially leading to an increase in abortions or risking an unplanned pregnancy.

35. According to the Centers for Disease Control and Prevention (CDC), unintended

pregnancy is associated with an increased risk of problems for the mother and baby, which increase overall healthcare costs. Also according to the CDC, women with unintended pregnancies may delay prenatal care. Early and adequate prenatal care is imperative to positive birth outcomes.

36. The Intervening States are also aggrieved by Defendants' failure to comply with the notice and comment procedures required by the APA. The Intervening States have been denied the opportunity to participate in a full, fair, and impartial administrative process by being denied the opportunity to comment on the Exemption Rules.

37. Indeed, Defendants have already conceded that states have standing because the Exemption Rules instruct women to seek out healthcare from state-funded clinics. 82 Fed. Reg. at 47792, 47807 (Oct. 13, 2017) (instructing that women obtain contraceptives through "various governmental programs," including "State sources"); 82 Fed. Reg. at 47803 (noting that various "State programs" provide contraceptive coverage). In fact, the Ninth Circuit also concluded that the States have standing. *California v. Azar*, 911 F.3d 558, 570–74 (9th Cir. 2018) (states have demonstrated that women in plaintiff states will lose some or all employer sponsored contraceptive coverage and that the loss of coverage will inflict economic harm to the states).

THE EXEMPTION RULES

38. Paragraphs 38 through 64 mirror Oregon's Complaint in Intervention, Dkt. No. 287.

39. On November 15, 2018, despite the pending litigation regarding Interim Final Rules to the same effect as the Exemption Rules pending before the Ninth Circuit Court of Appeals, the Defendants published the Exemption Rules.

40. The Exemption Rules vastly expand the scope of entities that may exempt themselves from the contraceptive-coverage requirement. Once effective, virtually any employer or individual or insurer, regardless of corporate structure or religious affiliation, can exempt themselves from the requirement. Further, once effective, virtually any employer, individual, or insurer can exempt themselves not only because of a religious objection, but also because of a "moral" objection—a newly created category. Potentially exempt entities now not only include

church-affiliated organizations, but also for-profit corporations whether or not publically traded and even insurance companies with claimed religious or moral objections to the extent they provide coverage to a plan sponsor or individual that is also exempt.

41. The Exemption Rules thus expand the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), to nearly any business, nonprofit or for-profit, faith claimed religious or moral objection to providing women access to contraceptive coverage, further frustrating the scheme and purpose of the ACA. However, Defendants admit, they are not aware of any publicly traded entities that have objected to providing contraceptive coverage on the basis of a religious or moral belief. Nevertheless, the Exemption Rules now make it easy for such entities to obtain an exemption for any reason, including economic, because there is no notice required and no oversight by the Defendants.

42. Additionally, under the Exemption Rules, employers exempting themselves from having to provide contraceptive coverage do not need to certify their objection to the coverage requirement. Rather, the employer can simply inform their employees they will no longer cover contraceptive benefits and counseling as part of their employer healthcare coverage. This is a significant change. By contrast, the prior federal regulations provided a notification process so that women would be informed of their employers' decision to opt out and that they would receive contraceptive coverage through the religious accommodation process. This process ensured that employers who had a religious objection to providing this coverage did not have to facilitate the provision of contraceptives, but that women would receive the required coverage. The government thereby ensured that there was a balance between the compelling interest that women have access to their federally entitled benefit under the ACA, while also accommodating those employers who sought not to provide this coverage for religious reasons. The Exemption Rules no longer require the accommodation, thereby eliminating the federally entitled benefit for women whose employers deem themselves exempt.

43. The Exemption Rules also create an entirely new "moral exemption," which was not previously contemplated by the federal government or the public. The moral exemption is overly broad and includes few boundaries or clear definitions. Moral convictions are defined as

convictions (1) that a person "deeply and sincerely holds;" (2) "that are purely ethical or moral in source and content;" (3) "but that nevertheless impose ... a duty;" (4) and that "certainly occupy .. a place parallel to that filled by ... God in traditionally religious persons," such that one could say the "beliefs function as a religion." Employers can now simply make use of the new vague moral exemption, without informing the federal government. Thus, a whole new universe of employers can avail themselves of this moral exemption without an accommodation to employees to ensure the seamless contraceptive coverage envisioned by the ACA, thereby vastly expanding the number of women who will lose access to care through their employer-sponsored coverage. The Intervening States will be forced to fill this gap.

44. The Exemption Rules suggest that women seek out contraceptive coverage through federal Title X family planning clinics; however, the Title X program simply cannot replicate or replace the seamless contraceptive-coverage requirement because it lacks the capacity. The Title X program is a safety-net program designed for low-income populations and is subject to discretionary funding by Congress. Indeed, from 2010-2014, even as the number of women in need of publicly funded contraceptive care grew by 5 percent representing an additional 1 million women in need, Congress cut funding for Title X by 10 percent. And a 2017 White House memorandum suggested cutting funding by 50 percent. Currently, the Title X program only serves 20 percent of the nationwide need for publicly funded contraceptive care.

45. The federal government also recently promulgated a proposed rule that, if it becomes effective, would severely undermine the Title X family planning program, restricting access to affordable, life-saving reproductive healthcare. See 84 Fed. Reg. 7794 (Mar. 4, 2019) (Final Rule). The Final Rule seeks to create barriers to access to women's healthcare. Among other things, it eliminates nondirective options counseling and gags all Title X providers by requiring that they steer all pregnant women towards prenatal care and social services, regardless of a patient's choice. This undermines the provider-patient relationship trust. The Final Rule also undermines the standard of care by allowing Title X providers to refuse to provide medically approved contraceptive methods, in favor of less effective methods such as abstinence only and

eliminates the "evidence-based" requirement that had previously been in effect.[1]

46. In short, under the Contraception Exemption Rules, entities exempting themselves do not need to certify to the federal government any objection to the contraceptive-coverage requirement, which all but ensures that women across United States will go without coverage for birth control access in contravention of the ACA. It further ensures that the federal government will not review the legitimacy of the religious or moral exemption, thereby inviting abuse. It appears inevitable that employers will simply opt out without consequence, including in the Intervening States to the detriment of the Intervening States' sovereign, quasi-sovereign and proprietary interests.

FIRST CAUSE OF ACTION

(Violation of APA; 5 U.S.C. § 553)

47. The Intervening States reallege and reincorporate paragraphs 1 through 46.

48. The final Exemption Rules do not comply with the APA's notice-and-comment requirement. 5 U.S.C. § 553(b) because Defendants failed to provide the opportunity for the Intervening States and others to comment.

49. Because Defendants failed to follow section 553's notice and comment procedures, the final rules are invalid.

SECOND CAUSE OF ACTION

(Violation of APA; 5 U.S.C. § 706)

50. The Intervening States reallege and reincorporate paragraphs 1 through 49.

51. The APA requires courts to "hold unlawful and set aside" agency action that is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706 (2).

52. By promulgating the Exemption Rules, without proper factual or legal basis,

[1] See Comment Letter of California, et al., available at https://www.regulations.gov/document?D=HHS-OS-2018-0008-161828.

Defendants have acted arbitrarily and capriciously, have abused their discretion, have acted otherwise not in accordance with law, have taken unconstitutional and unlawful action in violation of the APA, and have acted in excess of statutory jurisdiction and authority. Defendants' violation causes ongoing harm to the States and their residents.

THIRD CAUSE OF ACTION

(Violation of the Establishment Clause)

53. The Intervening States reallege and reincorporate paragraphs 1 through 52.

54. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); see also *McCreary County, Kentucky v. ACLU*, 545 U.S. 844, 875 (2005) ("the government may not favor one religion over another, or religion over irreligion").

55. The Contraception Exemption Rules privilege religious beliefs over secular beliefs as a basis for obtaining exemptions under the ACA.

56. In contrast, the prior regulations only allowed an exemption for churches and an accommodation for nonprofits and closely held for-profit companies with religious objections. This was narrowly tailored to accommodate religious beliefs and still provide essential women's healthcare services.

57. By promulgating the Exemption Rules, Defendants have violated the Establishment Clause because the Exemption Rules do not have a secular legislative purpose, the primary effect advances religion, especially in that they place an undue burden on third parties – the women who seek birth control, and the Exemption Rules foster excessive government entanglement with religion.

58. The Exemption Rules also ignore the compelling interest of seamless access to cost-free birth control. This crosses the line from acceptable accommodation to religious endorsement. Further, the Exemption Rules essentially coerce employees to participate in or support the religion of their employer.

59. Defendants' violation causes ongoing harm to the Intervening States and their residents.

FOURTH CAUSE OF ACTION

(Violation of the Equal Protection Clause)

60. The Intervening States reallege and reincorporate paragraphs 1 through 59.

61. The Equal Protection Clause of the Fifth Amendment prohibits the federal government from denying equal protection of the laws.

62. The Exemption Rules specifically target and harm women. The ACA contemplated disparities in healthcare costs between women and men, and some of these disparities were rectified by the cost-free preventive services provided to women. The expansive exemptions created by the Exemption Rules undermine this action and adversely target and are discriminatory to women.

63. The Exemption Rules, together with statements made by Defendants concerning their intent and application, target individuals for discriminatory treatment based on their gender, without lawful justification.

64. By promulgating the Exemption Rules, Defendants have violated the equal protection guarantee of the Fifth Amendment of the U.S. Constitution.

65. Defendants' violation causes ongoing harm to the Intervening States and their residents.

PRAYER FOR RELIEF

The Intervening States respectfully request that this Court:

1. Issue a declaratory judgment that the Exemption Rules were not promulgated in accordance with the Administrative Procedure Act;

2. Issue a declaratory judgment that the Exemption Rules are arbitrary and capricious, not in accordance with law, and Defendants acted in excess of statutory authority in promulgating them;

3. Issue a declaratory judgment that the Exemption Rules violate the Establishment Clause;

4. Issue a declaratory judgment that the Exemption Rules violate the Equal Protection Clause;

5. Issue a preliminary injunction prohibiting the implementation of the Exemption Rules;

6. Issue a mandatory injunction prohibiting the implementation of the Exemption Rules;

7. Award the Intervening States' costs, expenses, and reasonable attorneys' fees; and,

8. Award such other relief as the Court deems just and proper.

Dated: March 14, 2019

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al., Plaintiffs, v. HEALTH AND HUMAN SERVICES, et al. Defendants.	Case No. 17-cv-05783-HSG **[PROPOSED] ORDER GRANTING MOTION TO INTERVENE BY THE STATES OF COLORADO, MICHIGAN, AND NEVADA**

The States of Colorado, Michigan, and Nevada move to intervene permissively under Federal Rule of Civil Procedure 24(b). This Court finds that permissive intervention is appropriate under these circumstances. The Motion to Intervene is therefore **GRANTED.**

IT IS SO ORDERED.

Dated:

_____
HAYWOOD S. GILLIAM, JR
United States District Judge