ELIZABETH O. GILL (SBN 218311)
JENNIFER L. CHOU (SBN 304838)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-8437
Email: *egill@aclunc.org*
Email: *jchou@aclunc.org*

BRIGITTE AMIRI (*pro hac vice)*
BRIAN HAUSS (SBN 284759)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2633
Facsimile: (212) 549-2652
Email: *bamiri@aclu.org*
Email: *bhauss@aclu.org*

MELISSA GOODMAN (SBN 289464)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
OF SOUTHERN CALIFORNIA
1313 West 8th Street
Los Angeles, California 90017
Telephone: (213) 977-9500
Facsimile: (213) 977-5299
Email: *mgoodman@aclusocal.org*

DANIEL MACH (*pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW
Washington, DC 20005
Telephone: (202) 675-2330
Email: *dmach@aclu.org*

Attorneys for Plaintiff

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, Plaintiff, vs. SYLVIA MATHEWS BURWELL, Secretary of Health and Human Services. *et al.*, Defendants.	Civil No. 3:16-cv-3539-LB **PLAINTIFF'S OPPOSITION TO USCCB'S MOTION TO INTERVENE** Date: February 2, 2017 Time: 9:30 a.m. Courtroom: Courtroom C, 15th Floor Judge: Hon. Laurel Beeler

Table of Contents

Table of Authorities

Cases

INTRODUCTION

The motion to intervene filed by the United States Conference of Catholic Bishops ("USCCB") should be denied for two reasons. First, USCCB is not entitled to intervene as of right because it has not rebutted the presumption that Defendants will adequately represent its interests. Instead, it has manufactured a statutory Religious Freedom Restoration Act ("RFRA") defense that cannot possibly have any bearing on the constitutional claim at stake in this case. Moreover, USCCB previously intervened in a similar Establishment Clause lawsuit challenging the federal government's authorization of religious restrictions on trafficking victims' access to reproductive healthcare. *See ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 478 (D. Mass. 2012), *vacated as moot sub nom. ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013). In that case, Defendants more than adequately represented USCCB's interests, strenuously opposing Plaintiff's Establishment Clause claim through summary judgment and appeal. And USCCB's arguments in that case did not substantially diverge from the original parties' arguments. So, too, here—there is no reason to believe that USCCB's interests will not be adequately represented by the government, particularly given the policy positions of the incoming presidential administration.

Second, USCCB should be denied permissive intervention because its litigation tactics—including its suggestion that Plaintiff acted in bad faith when it moved for a short, two-week holiday extension to brief the instant motion to intervene—will likely foster needless disputes, which will burden the existing parties and the Court and which could ultimately delay adjudication of Plaintiff's Establishment Clause claim.

For these reasons, USCCB's motion to intervene should be denied. If, however, the Court allows USCCB to intervene, it should impose reasonable conditions to prevent USCCB from engaging in duplicative litigation.

ARGUMENT

I. USCCB Has Failed to Establish the Prerequisites for Intervention as of Right.

Intervention as of right is governed by Federal Rule of Civil Procedure 24(a), and a proposed intervenor must satisfy each of the following four elements:

> (1) the application for intervention must be timely; (2) the applicant must have a "significantly protectable" interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit.

Sw. Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 817–18 (9th Cir. 2001). The proposed intervenor must satisfy all of these requirements—failure to satisfy even one is "fatal," and the court need no longer consider any of the remaining elements. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009) ("*Prop. 8*") (citing *California ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 792 F.2d 779, 781 (9th Cir. 1986)).

A. USCCB Has Not Shown That Defendants Will Not Adequately Represent Its Interests.

A proposed intervenor bears the burden of demonstrating that the existing parties may not adequately represent its interests in litigation. *See Berg*, 268 F.3d at 822–23; *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997) ("*LULAC*"). While "the burden of establishing inadequacy of representation may be

minimal, the requirement is not without teeth." *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006). There is a presumption of adequacy when "the representative is a governmental body or officer charged by law with representing the interests of the absentee." *United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 401 (9th Cir. 2002) (quoting *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995)). There is also a presumption of adequacy when a proposed intervenor shares the same "ultimate objective" as another party to the litigation. *Prop. 8*, 587 F.3d at 951 (citation omitted).

To overcome these presumptions, a proposed intervenor must show "a likelihood" that the existing parties will not adequately represent their interests in litigation. *California ex rel. Lockyer vs. United States*, 450 F.3d 436, 444 (9th Cir. 2006). Mere differences in litigation strategy do not normally justify intervention. *Arakaki v. Cayatano*, 324 F.3d 1078, 1086 (9th Cir. 2003); *see also, e.g.*, *Jones v. Prince George's Cty., Maryland*, 348 F.3d 1014, 1020 (D.C. Cir. 2003) (stating that, if "quibbles over litigation tactics" or a "disagreement with an existing party over trial strategy qualified as inadequate representation, the requirement of Rule 24 would have no meaning" (quoting *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 181 (2d Cir. 2001))). The proposed intervenor must show that the existing parties will likely prove either unable or unwilling to make its proposed arguments, or that the proposed intervenor would otherwise offer any "necessary elements" that the existing parties would likely neglect. *Prop. 8*, 587 F.3d at 952 (quoting *Arakaki*, 324 F.3d at 1086). The Ninth Circuit has not hesitated to deny intervention in cases where the proposed intervenor fails to put forth evidence demonstrating that its interests will not be adequately represented. *See, e.g.*,

Gonzalez v. Arizona, 485 F.3d 1041, 1052 (9th Cir. 2007); *LULAC*, 131 F.3d at 1305–1307.

USCCB primarily argues that it must be allowed to intervene so that it can raise a defense under RFRA, 42 U.S.C. § 2000bb *et seq*. It claims that RFRA prohibits the government from denying unaccompanied immigrant program grants on account of USCCB's religiously motivated refusal to provide "or even facilitate" access to abortion and contraception. Mot. to Intervene at 9, ECF No. 29. USCCB maintains that if the Court finds in favor of Plaintiff's Establishment Clause claim, it "would effectively be declaring RFRA unconstitutional as applied." *Id.* at 11.[1] And USCCB speculates that the government might offer a limiting construction of RFRA to prevent this result. *Id.* USCCB concludes that Defendants' hypothesized "willingness to suggest a limiting construction in defense" of RFRA weighs heavily against the adequacy of its representation. *Id.* (citing *Lockyer*, 450 F.3d at 444).

USCCB's whole argument is premised on the mistaken notion that RFRA has some bearing on Plaintiff's Establishment Clause claim. But it is axiomatic that RFRA—a statute—cannot supersede Defendants' constitutional obligations. *See Marbury v. Madison*, 5 U.S. 137 (1803). And RFRA itself states clearly that "[n]othing in this chapter shall be construed to affect interpret, or in any way address" the Establishment

[1] According to USCCB, Plaintiff admitted at oral argument that "its requested injunctive relief would effectively exclude the Catholic Church from participating in ORR's mission of providing relief services to victims of human trafficking." Mot. to Intervene at 3, ECF No. 29. To the contrary, Plaintiff stressed at oral argument that it seeks only to ensure that unaccompanied immigrant minors receive the reproductive healthcare to which they are legally entitled. *See* Nov. 21, 2016, Hr'g Tr. at 8:19–9:7. Plaintiff has no objection to USCCB's participation in the Unaccompanied Immigrant Minor program, so long as USCCB does not seek to impose religious restrictions on access to care.

Clause. 42 U.S.C. § 2000bb-4; *see also Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (holding that courts must apply the Religious Land Use and Institutionalized Persons Act, which resembles RFRA in relevant respects, consistently with Establishment Clause principles). In other words, if Plaintiff is correct that the Establishment Clause prohibits Defendants from authorizing religious restrictions on access to reproductive healthcare for unaccompanied immigrant minors, then *ipso facto* USCCB has no RFRA right to impose these restrictions. If Plaintiff does not prevail, on the other hand, then USCCB's RFRA defense is moot because Plaintiff raises no other claims. This Court does not need to determine the scope of USCCB's alleged RFRA rights in order to adjudicate Plaintiff's Establishment Clause claim in either Plaintiff's or Defendants' favor. Thus, there is not even a hypothetical opportunity for Defendants to offer a limiting construction of RFRA that would somehow prejudice USCCB's interests, because RFRA simply does not enter into the equation. Notably, RFRA was never raised by any of the parties, including USCCB, in the substantively similar *ACLU of Massachusetts* litigation. *See* 821 F. Supp. 2d 474.[2]

[2] Although USCCB's putative RFRA defense cannot possibly influence the constitutional claim at the heart of this case, the broad sweep of its argument is worth noting: USCCB maintains that RFRA gives federal program grantees the right to refuse to perform—"or even facilitate"—services *required under the program*. This principle would quickly produce absurd results. For example, a culinary service could insist that the government alter a contract to provide cheeseburgers to military personnel on the ground that its religion prohibits the mixing of meat and milk; the government would be powerless to insist on the terms of its contract unless it could demonstrate both a compelling interest in the provision of cheeseburgers and the absence of a less restrictive alternative. USCCB's argument goes even further, though, because it would require the government to abrogate unaccompanied immigrant minors' legally protected right to access reproductive healthcare services in order to accommodate USCCB's religious beliefs.

USCCB's other arguments about inadequacy of representation are also meritless. For example, USCCB speculates that "Defendants might be inclined to settle with Plaintiff by agreeing to modify their cooperative agreements to reinsert Defendants' previous language requiring that awardees, such as USCCB, refer unaccompanied minors to abortion providers." Mot. to Intervene at 10, ECF No. 29. But there is no reason to believe that Defendants would ever agree to such a settlement. Indeed, as USCCB itself acknowledges, Defendants *removed* the referral language at USCCB's request. Compl. ¶ 33, ECF No. 1; Mot. to Intervene at 8, ECF No. 29. Moreover, the parties agree that this case is not ripe for alternative dispute resolution because of the constitutional nature of the issues. Joint Case Management Statement at 6, ECF No. 35.[3]

Similarly, even if—contrary to all indications—Defendants decide to unilaterally alter the terms of future cooperative agreements before a resolution in this case, USCCB's intervention here would have no effect one way or the other. Defendants have sole authority to modify future cooperative agreements for the Unaccompanied Immigrant Minors program, and will retain that authority regardless whether USCCB is allowed to intervene. If Defendants decide to modify future cooperative agreements, and

[3] *United States v. City of Los Angeles, Cal.*, 288 F.3d 391 (9th Cir. 2002), on which USCCB relies, is not to the contrary. There, the federal government and the City of Los Angeles filed a joint application for a consent decree regarding allegedly unlawful practices by the Los Angeles Police Department, and the police officers' union sought intervention to prevent implementation of the consent decree on the ground that it conflicted with the union's collective bargaining agreement. *Id.* at 396, 400–01. Here, there is no proposed consent decree in the offing, and USCCB has not identified any disagreement with Defendants regarding the sole Establishment Clause issue at the heart of this case. If—at some point far down the road—the parties propose a consent decree to which USCCB objects, USCCB would be free to intervene at that point to challenge the decree, just as the police unions did in *City of Los Angeles*.

if USCCB disagrees with the proposed modifications, it is free to challenge the modifications in a separate RFRA lawsuit.

USCCB also argues that Defendants' representation is inadequate because Defendants' interest in "providing relief services to unaccompanied children" is distinct from USCCB's interest "in receipt of the actual funding at issue" and its interest in preserving religious restrictions on access to reproductive healthcare for unaccompanied immigrant minors. Mot. to Intervene at 7–8, ECF No. 29 (citing *Berg*, 268 F.3d at 823 (allowing construction contractor and building trade associations to intervene in an environmental dispute, where the municipal defendant affirmatively stated that it "[would] not represent proposed intervenors' interests in the action")). But, as USCCB itself acknowledges, Defendants have indicated that they will continue to defend the constitutionality of the cooperative agreements. Mot. to Intervene at 7, ECF No. 29. In fact, in *ACLU of Massachusetts*, Defendants argued strenuously that the Establishment Clause does not prohibit the government from awarding the contracts to USCCB, even though USCCB was imposing religious restrictions on trafficking victims' access to reproductive healthcare. *See* Appellant's Br. for Defs. Kathleen Sebelius, Esking Negash, and George Sheldon at 45–62, *ACLU of Mass.*, No. 12-1658 (1st Cir. Aug. 24, 2012).[4] In

[4] USCCB states that Defendants have a "preference" for Unaccompanied Immigrant Minor program grantees that provide access to reproductive healthcare services, including abortion and contraception. Mot. to Intervene at 8, ECF No. 29. This "preference," however, merely reflects the fact that these young people are *legally entitled* to receive these services. *See Flores v. Reno* Settlement Agreement, No. CV 85-4544-RJK(Px) (Jan. 17, 1997) (requiring the government to provide or arrange for, among other things, "appropriate routine medical . . . care," including specifically "family planning services[] and emergency health care services"); 45 C.F.R. § 411.92(a) (stating that, pursuant to Defendants' obligations under the Prison Rape Elimination Act and the Violence Against Women Reauthorization Act of 2013, grantees providing care

the absence of any indication that Defendants' representation will prove inadequate here, USCCB cannot justify intervention as of right. *See LULAC*, 131 F.3d at 1305 (holding that a proposed intervenor, who shared with California state defendants an interest in upholding the constitutionality of a ballot proposition, was adequately represented by the state defendants (cited in *Berg*, 268 F.3d at 823, n.5)).

Finally, the impending change in Administration strongly suggests that Defendants will continue to vigorously defend USCCB's interests. In a letter to the Catholic Leadership Conference, President-Elect Donald Trump reiterated his opposition to abortion and committed to advocate for broad religious exemptions for Catholic-affiliated organizations, stating: "On life, I am, and will remain, pro-life. I will defend your religious liberties and the right to fully and freely practice your religion, as individuals, business owners and academic institutions. I will make absolutely certain religious orders like The Little Sisters of Poor are not bullied by the federal government because of their religious beliefs." Letter from Donald J. Trump to Gail Buckley, President, Catholic Leadership Conference (Oct. 5, 2016), http://www.catholic newsagency.com/pdf/DJT_catholic_leadership_conference_letter.pdf. For all these reasons, USCCB's motion to intervene as of right should be denied.

---

to unaccompanied immigrant minors who have experienced sexual abuse while in federal custody must ensure "unimpeded access to emergence medical treatment, crisis intervention services, emergency contraception, and sexually transmitted infections prophylaxis"). This supposed "preference" has not stopped the federal government from defending its right to provide grants to USCCB and is not a reason to find that representation might be inadequate.

II. The Court Should Exercise Its Discretion to Deny Permissive Intervention.

USCCB's request for permissive intervention should also be denied. Permissive intervention is governed by Federal Rule of Civil Procedure 24(b), which requires a proposed intervenor to show: (1) independent grounds for jurisdiction; (2) a timely motion; and (3) a common question of law or fact between the intervenor's claim and the main litigation. *Prop. 8*, 587 F.3d at 955. "Even if an applicant satisfies those threshold requirements, the district court has discretion to deny permissive intervention." *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). The Court may also consider other factors in exercising its discretion, including "'the nature and extent of the intervenors' interest' and 'whether the intervenors' interests are adequately represented by other parties.'" *Prop. 8*, 587 F.3d at 955 (quoting *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977)). Finally, 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).

This Court should exercise its discretion and deny intervention for two reasons. First, as explained in more detail above, Defendants will adequately represent USCCB's interest in defending against Plaintiff's Establishment Clause claim. This alone is enough to justify denying permissive intervention. *See, e.g.*, *Prop. 8*, 587 F.3d at 955 ("denial of [permissive] intervention based on the identity of interests of the Campaign and the Proponents and the Proponents' ability to represent those interests adequately is supported by our case law on intervention"); *United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 756 (9th Cir. 1993) (denying permissive intervention when

government party made same arguments as intervenors and would adequately represent their interests); *Doe v. Schwarzenegger*, No. CIV. S-06-2521 LKK/GGH, 2007 WL 163252, at *4 (E.D. Cal. Jan. 18, 2007) (denying permissive intervention because "the interests of the association are adequately represented by existing defendants").

Second, USCCB's conduct to date suggests that if they are granted permission to intervene they will unduly delay or prejudice the adjudication of the original parties' rights. After waiting more than *six months* to move for intervention, USCCB refused to consent to Plaintiff's request for a short, two-week extension—over Christmas, Hanukkah, and New Year's Day—to allow Plaintiff and Defendants to respond to the motion. Declaration of Robert Dunn, Exhibit A, ECF No. 43-2. USCCB took the position that it would consent to the extension only if the parties agreed to delay the discovery schedule or allow USCCB to participate in discovery, including stipulation discussions between Plaintiff and Defendants, even before a ruling on USCCB's intervention motion. *Id*. When Plaintiff refused to consent to these demands and filed its motion for extension, USCCB filed an opposition in which it accused the existing parties of "collusive action," and expressed doubts about Plaintiff's good faith in seeking the extension. USCCB's Opp. to Pl.'s Mot. for Extension at 2, ECF No. 43.

Vexatious litigation tactics like these will prejudice the existing parties by adding to their litigation expenses and delaying adjudication of Plaintiff's constitutional claim. They will also increase the burden on the Court. *See Venegas v. Skaggs*, 867 F.2d 527, 531 (9th Cir. 1989) ("[J]udicial economy is a relevant consideration in deciding a motion for permissive intervention."), *aff'd sub nom. Venegas v. Mitchell*, 495 U.S. 82 (1990). Thus, the Court should deny USCCB's request for permissive intervention.

III. If Intervention Is Granted, It Should Be Limited.

As the Advisory Committee's Notes to Rule 24(a) make clear, intervention as of right "may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." *Beauregard, Inc. v. Sword Servs. LLC*, 107 F.3d 351, 353 (5th Cir. 1997) (quoting Committee Note); *see also Donnelly*, 159 F.3d at 410 (noting Ninth Circuit decisions limiting intervention to a particular issue or stage of the proceeding). And a court that permits intervention under Rule 24(b) may impose almost any sort of condition that it deems appropriate. *Dep't of Fair Emp't & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 741 (9th Cir. 2011) ("The district court's discretion under . . . Rule 24(b), to grant or deny an application for permissive intervention includes discretion to limit intervention to particular issues." (internal quotation marks and citation omitted)).

If the Court grants intervention, it should impose restrictions that prevent needless duplication and delay. *Pac. Coast Fed'n of Fishermen's Ass'ns v. Guitierrez*, No. 1:06-CV-00245 OWW GSA, 2008 WL 4104257, at *7 (E.D. Cal. Sept. 2, 2008) (allowing intervention as of right on the conditions that—to avoid delay—intervenors "will not be permitted to . . . duplicate briefing and/or testimony going forward"); *Coal. for a Sustainable Delta v. Carlson*, No. 1:08-CV-00397 OWWGSA, 2008 WL 2899724, at *4 (E.D. Cal. July 24, 2008) (granting intervention as of right "conditioned upon strictly limiting [intervenors'] participation to issues about which they can provide unique information and/or arguments," and stating that "[f]urther conditions on combined briefing length or other measures to avoid duplication may be imposed at the case management conference"). In particular, where USCCB and Defendants take the same

position on an issue, they should be required to confer and file joint documents that represent them both. *See, e.g., Planned Parenthood Minn., N.D., S.D. v. Daugaard*, 836 F. Supp. 2d 933, 943 (D.S.D. 2011); *Wildearth Guardians, v. Salazar*, 272 F.R.D. 4, 20–21 (D.D.C. 2010); *Earthworks v. U.S. Dep't of Interior*, No. CIV.A. 09-01972 HHK, 2010 WL 3063143, at *2 (D.D.C. Aug. 3, 2010). If USCCB disagrees with Defendants on an issue, then it should be required to certify the disagreement as part of its separate filing. This restriction should be imposed with respect to the filing of motions, responsive filings, briefs, statements of fact, declarations, affidavits, and other documents that pertain to the case. Additionally, USCCB should be should be required to confer with Defendants regarding discovery. If USCCB and Defendants disagree with respect to a particular issue, then USCCB should be required to obtain the Court's permission before engaging in independent discovery. *Daugaard*, 836 F. Supp. 2d at 943; *United States v. Duke Energy Corp.*, 171 F. Supp. 2d 560, 565 (M.D.N.C. 2001). These conditions are reasonable and will assist both the Court and the parties to proceed efficiently in this litigation.

CONCLUSION

For the foregoing reasons, the Court should deny both USCCB's request for intervention as of right and its request for permissive intervention. If the Court disagrees and permits intervention, it should do so on the conditions set forth above.

Dated: January 12, 2017

Respectfully submitted,

/s/ Brian Hauss

BRIAN HAUSS (SBN 284759)
BRIGITTE AMIRI (*pro hac vice*)
AMERIAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Phone: 212-549-2633
Fax: 212-549-2650
bhauss@aclu.org
bamiri@aclu.org

ELIZABETH O. GILL (SBN 218311)
JENNIFER L. CHOU (SBN 304838)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111
Phone: 415-621-2493
Fax: 415-255-8437
egill@aclunc.org
jchou@aclunc.org

MELISSA GOODMAN (SBN 289464)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, CA 90017
Phone: 213-977-9500
Fax: 213-977-5297

mgoodman@aclu-sc.org

DANIEL MACH (*pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW
Washington, DC 20005
Phone: 202-675-2330
Fax: 202-546-0738
dmach@aclu.org

Attorneys for Plaintiff