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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, BY AND THROUGH ATTORNEY GENERAL XAVIER BECERRA; STATE OF CONNECTICUT; STATE OF OREGON AND GOVERNOR KATE BROWN; COMMONWEALTH OF MASSACHUSETTS; AND STATE OF WASHINGTON; Plaintiffs, **v.** **ALEX M. AZAR II, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,** Defendants.	3:19-cv-02552-VC **PLAINTIFFS' OPPOSITION TO PROPOSED DEFENDANT-INTERVENORS' MOTION TO INTERVENE** Administrative Procedure Act Case Date: August 1, 2019 Time: 10:00 a.m. Courtroom: 4, 17th Floor Judge: The Honorable Vince Chhabria Trial Date: TBD Action Filed: March 13, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(continued)

STATUTES

TABLE OF AUTHORITIES
(continued)

CONSTITUTIONAL PROVISIONS

COURT RULES

OTHER AUTHORITIES

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In this lawsuit, Plaintiffs the States of California, Connecticut, Oregon and its Governor Kate Brown, Massachusetts, and Washington (collectively, the States) challenge Defendants the U.S. Department of Health and Human Services and Secretary Alex M. Azar II's adoption of a new and unfounded interpretation of a 47-year-old provision of the Medicaid Act. Defendants seek to bar voluntary payroll deductions for ordinary employee expenses such as union membership dues or healthcare premiums for providers of home and community-based services hired directly by Medicaid beneficiaries. Defendants' action would "upend careful arrangements created by States to allow older adults and individuals with disabilities to maximize their autonomy and independence by directing their own care, with support from state and local governments relating to the financial logistics of paying care providers." Complaint ¶ 1.

Now, individual care providers Michaela Bruckshaw, Bettina Joyner, Marck Juvonen, Elesha Martin, Jennifer Mendivil, Linda Murphy, Sandra Sumner, Elnaz Toussi, Richard Velador, and Eric Wright (collectively, Proposed Defendant-Intervenors)—represented by the same organizations that instigated Defendants' new rule—seek to intervene in the States' lawsuit based on an allegation that the States' payroll deductions for union members constitutes improper "divert[ing of] Medicaid payments owed to homecare providers." Proposed Def.-Intervenors' Mot. to Intervene, ECF No. 53, at 2 (hereinafter "Mot. to Intervene"). The proposed intervention would unnecessarily duplicate the positions taken by Defendants with respect to their new rule, and could inappropriately transform this lawsuit into a fight over the validity of the individual Proposed Defendant-Intervenors' differing union membership agreements.

Proposed Defendant-Intervenors have not met the criteria for intervention as of right. To the extent that they seek relief that is different from that of Defendants, they must have standing. Proposed Defendant-Intervenors do not, because their crossclaim seeking to invalidate a now-rescinded 2014 regulation is not justiciable, and their counterclaims against the States of California, Oregon, and Washington fail to state a cognizable legal claim. The only real harms

that they have articulated stem from the validity of their membership agreements with the unions, a contract question that is not at issue in this lawsuit. And Proposed Defendant-Intervenors have not shown that the original named Defendants cannot adequately represent their interests as they share the "same ultimate objective"—denial of the relief sought by Plaintiffs.

Plaintiffs do not oppose Proposed Defendant-Intervenors' or their counsel's participation in this case as amici. But it is neither necessary nor appropriate for them to intervene as parties. This motion to intervene should be denied.

BACKGROUND

This case concerns public sector employment in the context of Medicaid consumer-directed home and community-based personal care services (referred to hereafter generally as "homecare"). Each of the States has chosen to offer these services as an element of their Medicaid programs, in order to provide assistance that eligible individuals who are aged, blind and have disabilities need to live safely in their own homes and communities, and avoid unnecessary institutionalization. Complaint ¶ 2. Collectively, the States' Medicaid programs serve more than 700,000 individuals in need of in-home assistance through consumer-directed programs. *Id*. ¶ 3. Each of the States has sought to improve the quality and stability of Medicaid homecare services by extending state laws that authorize public-sector bargaining to the homecare workforce and permitting voluntary payroll deductions and/or benefit contributions. Complaint ¶¶ 44, 51, 55, 63-64, 70-72, 75.

On May 6, 2019, HHS issued a Final Rule, 84 Fed. Reg. 19718, that purports to reinterpret the Medicaid Act in a manner that would prohibit States from directly withholding these ordinary, voluntary deductions from homecare workers' paychecks. In doing so, the Final Rule abruptly and without any sound rationale rescinded a federal Medicaid regulation confirming an established practice of direct deductions. Defendants' purported basis for this rule change is a long-standing provision of the federal Medicaid Act, 42 U.S.C. Section 1396a(a)(32) (hereinafter Section (a)(32)), that prohibits assignment of rights to collect payment for Medicaid services to third parties: "no payment … for any care or service provided to an individual shall be made to

anyone other than such individual or the person or institution providing such care or service, under an assignment or power of attorney or otherwise […]." 42 U.S.C. § 1396a(a)(32). Congress enacted this provision in the 1970s in order to prohibit fraudulent medical-financing schemes known as "factoring," a type of insurance fraud. As Plaintiffs allege, neither the language of the statute, legislative history, long-standing judicial construction of Section (a)(32), nor Defendants' own recent rulemaking supports this new interpretation of the law. *See* Complaint ¶¶ 27-32, 84-109.

Although the preamble to the Final Rule contains Defendants' novel interpretation of Section (a)(32), the text of the Final Rule does not. Instead, it merely rescinds a 2014 regulation providing that "[i]n the class of practitioners for which the Medicaid program is the primary source of service revenue, payment may be made to a third party on behalf of the individual practitioner for benefits such as health insurance, skills training and other benefits customary for employees." 42 C.F.R. § 447.10(g)(4) (2014). As the States explained in their complaint, however, the regulatory subsection that the Secretary eliminated was not necessary to establish the lawfulness of payroll deductions to pay for items such as union membership dues or health benefits, because Section (a)(32) of the Medicaid Act did not prohibit them even without the regulation. Complaint ¶ 5. The States have extended public sector bargaining laws to include Medicaid homecare workers starting as early as 1992, and have deducted agreed-upon costs from provider paychecks since that time.[1] *See, e.g.*, Complaint ¶¶ 44, 51.

Only homecare providers who elect to join the union pay dues to the union. Complaint ¶ 37. Medicaid home-care providers who decline to join the union are not required to pay "fair share" or "agency" fees to cover the costs of collective bargaining. Direct deductions of union dues are authorized by workers' voluntary agreement; the States do not enforce agency shop

[1] At that time, long-standing United States Supreme Court precedent permitted laws requiring public employees who elected not to become to union members to pay "agency fees" covering the costs of representational activities as consistent with the First Amendment. *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), overruled by *Janus v. Am. Fed'n of State, Cty., and Mun. Emp. Council 31*, 138 S.Ct. 2448 (June 27, 2018). Agency fees in the context of consumer-directed Medicaid homecare programs were struck down by the Supreme Court in *Harris v. Quinn*, 573 U.S. 616 (2014)—four years before the *Janus* decision.

agreements. Decl. of Lisa Yanagida ¶¶ 3-4. The current, voluntary union membership agreements do not "assign" any Medicaid payment or rights to the union or any other entity; they are a voluntary payroll deduction, just like other common voluntary payroll deductions for health, dental, and vision insurance. As with all other elective deductions, such elections are generally effective for a certain period of time but may be changed during an applicable revocation period, subject to the terms of the particular agreement.

Now, ten individual Medicaid providers residing in three of the Plaintiff States seek to intervene in Plaintiffs' APA challenge to the Final Rule. They are represented by the Freedom Foundation and the National Right to Work Legal Foundation, two organizations that advocated in favor of the Final Rule. They seek to intervene to support the defense of the Final Rule; to assert a crossclaim against Defendants to declare the (now rescinded) 2014 regulation, 42 C.F.R. § 447.10(g)(4), invalid; and to pursue a counterclaim against California, Oregon, and Washington under 42 U.S.C. § 1983 for alleged violation of their rights under Section (a)(32) of the Medicaid Act.

ARGUMENT

I. PROPOSED INTERVENORS DO NOT MEET ALL THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT

Federal Rule of Civil Procedure 24(a)(2) permits intervention as of right to one who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." The Ninth Circuit has established a four-part test pursuant to Rule 24: "(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 (9th Cir. 2001). "Each of these four requirements must be satisfied to support a right to intervene." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003).

Proposed Defendant-Intervenors' motion to intervene is timely, but they have not met any of the remaining requirements for intervention as of right.

A. Proposed Defendant-Intervenors Have Not Identified Significant, Protectable Interests in the Litigation

To demonstrate a significant protectable interest, a proposed intervenor "must establish that the interest is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). A proposed intervenor has "a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation." *Cal. ex rel. Lockyer v. U.S.*, 450 F.3d 436, 441 (9th Cir. 2002). Here, for the reasons described below, Proposed Intervenor-Defendants have failed to allege concrete or particularized injury that can be redressed by intervention as defendants in the States' lawsuit.

1. Proposed Defendant-Intervenors' Asserted Interests are Not Redressable by or Sufficiently Related to this Lawsuit

To the extent that Proposed Defendant-Intervenors' asserted interests pertain to alleged financial harm caused by loss of union dues or other payments, or associational harms caused by continued, unwanted membership in the union, those interests do not constitute "significant protectable interests" in the context of this lawsuit. Plaintiffs' current claims address only interpretation of the Medicaid Act and the legality of recent, related federal rulemaking. Yet Proposed Defendant-Intervenors raise a number of generalized grievances against their individual unions (e.g., they felt pressured into signing a union card, misled about the benefits of membership, or misinformed about the disenrollment process). To the extent that Proposed Defendant-Intervenors' allegations have any merit,[2] those interests may be protectable under

[2] Proposed Plaintiff-Intervenors have filed a Motion for Administrative Relief requesting permission to file additional declarations challenging Proposed Defendant-Intervenors' recollection of the facts and circumstances of their interactions with the unions is incomplete and unreliable. ECF No. 63. In any event, the evidence submitted by Proposed Defendant-Intervenors does not suggest that their experiences are typical of union members.

contract law. Neither the States nor federal Defendants are parties to those membership agreements, and this action is not the proper place to resolve contract disputes between unions and putative members. Nothing in any of the declarations submitted in support of the motion to intervene suggests any improper behavior on the part of the States with respect to payroll administration, apart from Proposed Defendant-Intervenors' general opinion that the Medicaid Act deprives Plaintiffs of the authority to make voluntary payroll deductions for *any* homecare worker providing consumer-directed care—a position that is already adequately represented by Defendants, *see* Section I(C) below. And the Proposed Defendant-Intervenors have adequate independent vehicles for termination of their dues deductions and any deductions occurring as the result of their initial voluntary authorizations, as described in Section I(B). [3]

2. Proposed Defendant-Intervenors' Counterclaim Fails to Establish a Protectable Interest

Proposed Defendant-Intervenors fail to establish a protectable interest with respect to their Medicaid Act counterclaim against California, Washington, and Oregon, because Section (a)(32) does not provide for a private right of action.[4]

Count II alleges that the these three States violated Proposed Defendant-Intervenors' rights under Section (a)(32) of the Medicaid Act. PAI ¶¶ 200-201. To state a claim for relief, Proposed Intervenor-Defendants must demonstrate that Section (a)(32) provides a private right of action either under its own terms or as implied through Congressional intent. *See In re Digimarc Corp. Derivative Litig*., 549 F.3d 1223, 1230 (9th Cir. 2008) ("Where a federal statute does not explicitly create a private right of action, a plaintiff can maintain a suit only if Congress intended to provide the plaintiff with a[n implied] private right of action") (internal quotation omitted). Without such a private right of action, the counterclaim fails as a matter of law.

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[3] Moreover, the interests of the California-based Proposed Intervenor-Defendants are already being asserted in a related case, *Aliser v. SEIU*, No. 3:19-cv-00426-VC (filed Sept. 17, 2018), in which they are putative class members.

[4] These arguments are set forth in greater detail in California and the unions' pending motions to dismiss in *Aliser*, ECF No. 107-1 (California's motion to dismiss) and No. 109 (SEIU Defendants' motion to dismiss).

Here, Section (a)(32) does not confer any privately enforceable federal right—either express or implied—on Plaintiffs. Rather, as courts have recognized, Section (a)(32) was enacted to prevent healthcare providers from assigning their entitlement to reimbursement (from the state) to a third party. *Michael Reese Physicians & Surgeons, S.C. v. Quern*, 606 F.2d 732, 734 (7th Cir. 1979), *adopted en banc*, 625 F.2d 764 (7th Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981). Specifically, Congress amended this part of the Medicaid Act to stop the "factoring" of Medicaid receivables. *Danvers Pathology Assocs., Inc. v. Atkins*, 757 F.2d 427, 428–31 (1st Cir. 1985) (Breyer, J.) (discussing the legislative history of Section (a)(32)).[5]

Nor does Section (a)(32) give rise to any private right of action through 42 U.S.C. § 1983. "Section 1983 does not create substantive rights; it merely serves as the procedural device for enforcing substantive provisions of the Constitution and federal statutes." *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). "Traditionally, the requirements for relief under section 1983 have been articulated as: (1) a violation of rights protected by the Constitution or created by federal statute, (2) proximately caused (3) by conduct of a 'person' (4) acting under color of state law." *Id.* (citations omitted). "Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law." *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989). Thus, a plaintiff seeking to sue under Section 1983 "must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (italics in original; citation omitted).

The Supreme Court has "made clear that unless Congress speaks with a clear voice, and manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (internal quotations omitted). For a statute to confer such a right, "its text must be 'phrased in terms of the person benefitted.'" *Id*. at 284 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677,

[5] As this legislative history discussion shows, the conduct complained of by Proposed Intervenor-Defendants is not encompassed by the Medicaid Act's anti-factoring prohibition.

692 n.13 (1979). After *Gonzaga*, it is not enough that "the plaintiff falls within the general zone of interest that the statute is intended to protect" to find a privately enforceable right. *Id*. at 283.

Therefore, as one district court already has observed:

> [I]t is clear that § 1396a(a)(32) does not confer a right upon [Plaintiffs]. The statute does not compel payment to healthcare providers, as [Plaintiffs] argue[]. On the contrary, the text is phrased conditionally, in the negative: the state's plan must provide that "no payment under the plan for any care or service provided to an individual shall be made to anyone other than such individual or the person or institution providing such care or service, under an assignment or otherwise . . . ." In other words, the provision states that if a payment is made under the plan, then it must be made to the provider alone. Thus, the provision does not require the state to issue any payment at all; instead, the provision places restrictions on who can receive such a payment. In other words, there is no rights-conferring language in the provision.

Transitional Servs. of N.Y. for Long Island, Inc. v. N.Y.S. Office of Mental Health, 91 F.Supp. 3d 438, 444 (E.D.N.Y. 2015). Like Section 30(A) of the Medicaid Act, a provision that the Ninth Circuit has already held does not create a private right of action, Section (a)(32) "speaks not of any individual's right," *Sanchez v. Johnson*, 416 F.3d 1051, 1059 (9th Cir. 2005), but rather adopts a statutory prohibition on certain practices that have historically injured the government. While it is true that the anti-reassignment provision does mention providers, it is "as a means to an administrative end rather than as individual beneficiaries of the statute." *Id*. Proposed Defendant-Intervenors would have the Court find that Section (a)(32) confers upon them an benefit even more novel than the right to payment at issue in *Sanchez*—the "right" to be free of direct payroll deductions for themselves, and every other employee. If Proposed Defendant-Intervenors' interpretation of the statute were correct, the States would be prohibited from processing any payroll deductions from Medicaid providers, including voluntarily designated deductions to pay their required monthly contributions toward health plans, dental plans, pensions, in addition to union dues. Section (a)(32) was not clearly intended to create, and therefore does not give, a right to private enforcement of the Medicaid Act against the States.

3. Proposed Defendant-Intervenor's Crossclaim Is Moot and Fails to Challenge Final Agency Action

Proposed Defendant-Intervenors fail to establish a protectable interest with respect to their APA crossclaim against Defendants, based upon a now-rescinded 2014 regulatory subsection, because any such claim is no longer justiciable. "[A]n intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1651 (2017); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992) (a party seeking to establish standing must allege (1) a "concrete and particularized" "injury in fact" that is (2) fairly traceable to the defendant's alleged unlawful conduct and (3) likely to be redressed by a favorable decision). When a case becones moot is is no longer a "case or controversy" for purposes of Article III. *Already, LLC v. Nike, Inc*., 568 U.S. 85, 90-91 (2013). As the Supreme Court has explained, mootness occurs "'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Id*. at 91 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)). Moreover, to obtain judicial review under the APA, litigants must challenge a "final agency action." 5 U.S.C. § 704; *Lujan*, 497 U.S. at 882; *Oregon Natural Desert Ass'n v. U.S. Forest Service* 465 F.3d 977, 982 (9th Cir. 2006). In order for an agency action to be "final," it "must mark the consummation of the agency's decisionmaking process," and it must "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations and internal quotation marks omitted).

The Proposed Answer-in-Intervention (PAI) asserts that 42 C.F.R. § 447.10(g)(4) is a "final agency action subject to judicial review under the APA." PAI ¶ 193. This is untrue. Defendants in their 2019 Final Rule rescinded subsection 447.10(g)(4), effective July 5, 2019. It can no longer be described as the "consummation" of the agency's decision-making process, and no legal consequences currently flow from it. Proposed Defendant-Intervenors' speculation

about what will happen if the Court orders relief is just that—speculation. Neither the APA nor Article III permits standing on such a basis.[6]

B. This Action Will Impose No Practical Impediment to the Proposed Intervenors' Interests

Proposed Intervenors cannot demonstrate that the disposition of this action will "impair or impede" their ability to protect their interests. *Sw. Ctr. for Biological Diversity*, 268 F.3d at 817.

The Proposed Defendant-Intervenors cannot meet this mandatory requirement because they do not need to rely on an abrupt new interpretation of the Medicaid Act in order to protect their finances and rights to free speech. Nothing in the Proposed Answer-in-Intervention or the supporting declarations indicates that Proposed Defendant-Intervenors cannot successfully revoke their union membership, provided they do so pursuant to the terms and conditions of their membership agreement. *See, e.g., Smith v. Beiker*, Case No. 18-cv-05472-VC, 2019 WL 2476679, *2 (N.D. Cal. June 13, 2019) (noting that continued collection of dues until the next revocation period was authorized by former member's union membership agreement). None of the Proposed Defendant-Intervenors claim to have submitted a timely withdrawal of their dues deduction authorizations during an applicable revocation period that was not honored by the States' payroll systems. Given the usual timeframe for litigation, there is no reason to think that Proposed Defendant-Intervenors will not be able to resign from the union (if they have not already) and effectively cease dues deductions before this case is resolved. At that point, Proposed Defendant-Intervenors will cease to have any interest whatsoever in this litigation.[7]

C. Proposed Defendant-Intervenors Have Not Shown That Defendants Cannot Adequately Represent Their Interest in This Litigation

In order to intervene in this case, Proposed Defendant-Intervenors must show that Defendants cannot adequately represent their interests. They cannot. First, Defendants are

[6] The federal Defendants address mootness of any attempted challenge to 42 C.F.R. § 447.10(g)(4) (2014) in greater detail in their motion to dismiss in *Aliser*, ECF No. 108, p. 5-8.

[7] In contrast, the Proposed Plaintiff-Intervenors have shown that the outcome of this action could substantially impair their ability to participate as union members on an ongoing basis.

already acting on behalf of the constituency that Proposed Defendant-Intervenors represent: those opposed to the deduction of union dues from Medicaid consumer-directed homecare providers' paychecks. Second, the Defendants and Proposed Defendant-Intervenors have the same ultimate objective: the denial of the relief that Plaintiffs seek, and the upholding of the Final Rule. In either circumstance, Proposed Defendant-Intervenors must show that the existing parties cannot adequately represent their interests. They have not met that burden.

As a general rule, "[t]he burden of showing inadequacy of representation is minimal and satisfied if the applicant can demonstrate that representation of its interests may be inadequate." *Citizens for Balanced Use*, 647 F.3d at 898 (internal citation omitted). However, "[i]f an applicant for intervention and an existing party share the same ultimate objective, a presumption of adequacy of representation arises." *Id.* "There is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents." *Id.*.

Here, Proposed Defendant-Intervenors have not overcome either assumption of adequacy. Defendants promulgated the Final Rule on behalf of a constituency which believes that "rescission of § 447.10(g)(4) would facilitate the proper use of Medicaid funds," 84 Fed. Reg. at 19721. *See* Proposed Complaint-in-Intervention, ECF No. 8-1, ¶¶ 58-59. The Rule relies in part upon a purported "Dues Skimming FAQ," 84 Fed. Reg. at 19726 n.2, published by the State Policy Network, which includes counsel for Proposed Defendant-Intervenors the Freedom Foundation. Indeed, the Freedom Foundation's policy director reportedly claimed that the Final Rule came about because he "was combing through the federal code two years ago" and then "brought the law to the attention of Trump administration officials."[8]

Nor have Proposed Defendant-Intervenors otherwise met their burden to show that the federal government Defendants will not adequately represent them. Proposed Defendant-Intervenors state that they "bring a perspective to this case not provided by Defendants because of the direct, personal impact the regulation has on them," Mot. to Intervene at 10, but they identify no aspect of the Final Rule with which they are at odds, and no factual or legal point

[8] Declaration of Anna Rich, Ex. A, at 2.

where their defense will differ from Defendants'. *Compare Dep't of Fair Emp't and Hous. v. Lucent*, 642 F.3d 728, 740 (9th Cir. 2011) (upholding denial of intervention as of right in a case brought by a California governmental agency to former employee on the basis of "vague speculation" that the agency could not adequately represent his interests) *with Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 266 F.R.D. 369, 374 (D. Ariz. 2010) (allowing the National Rifle Association to intervene as a defendant because the association and the original federal agency defendant took different positions as to the agency's factual findings). While the Proposed Defendant-Intervenors make the point that the Ninth Circuit has allowed intervention by workers and unions seeking to vindicate their own narrow economic interests, even when their objective is the same as existing government parties, that is not the case here, where Proposed Defendant-Intervenors lack any concrete economic and free speech interests because they can resign from the union at any time, and cease dues deductions within a year. *See* Sections I(A)(1) and (I)(B) above.

Nor are the alleged crossclaim and counterclaim sufficient to differentiate Proposed Defendant-Intervenors' interests. First, for the reasons described in Section I(A), Proposed Defendant-Intervenors have no protectable interests in those claims. Moreover, they offer no evidence that the federal Defendants will seek to defend the 2014 Rule that they already rescinded. And the counterclaim against California, Oregon, and Washington is merely a mirror image of Plaintiffs' claims to against the Final Rule. Overall, Proposed Defendant-Intervenors do not identify a single, substantive argument that they intend to raise in support of their counterclaim that is unlikely to be raised by Defendants in their defense of this lawsuit.

Finally, Proposed Defendant-Intervenors share the same objective as the federal Defendants—denial of the injunctive and declaratory relief sought by the States. They do not seek damages or any retrospective relief, or to pursue any objective separate from declaratory and injunctive relief consistent with Defendants' reasoning in the Final Rule. 642 F.3d at 740 n.11 (noting greater risk of inadequate representations if the parties seek different remedies).

In sum, Proposed Defendant-Intervenors have failed to establish that they meet three of the four requirements for intervening as of right. The motion to intervene should be denied.

II. THE COURT SHOULD DENY PERMISSIVE INTERVENTION

In the alternative, Proposed Defendant-Intervenors request permissive intervention. Under Federal Rule of Civil Procedure 24(b)(1)(B), the Court may permit anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." In making this discretionary determination, "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). The district court has discretion "to limit intervention to particular issues" and "is able to impose almost any condition" if it permits intervention. *Dep't of Fair Emp't and Hous.*, 642 F.3d at 741.

The Court should deny permissive intervention for the same reasons that it should deny intervention as a matter of right. *See, e.g.*, *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009) (stating that district court's denial of a Rule 24(b) motion to intervene based on the parties' "identity of interests" and the existing party's "ability to represent those interests adequately" was "supported by [Ninth Circuit] case law on intervention in other contexts"); *United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 756 (9th Cir. 1993) (upholding denial of permissive intervention in a subpoena enforcement proceeding seeking disclosure of tax records where the government party made the same arguments as the taxpayer intervenors, and the government party would adequately represent the intervenors' privacy interests). Proposed Defendant-Intervenors have not established essential elements of standing for their claims. As outlined above, they lack a protectable interest that is redressable in this litigation apart from their generalized defense of the Defendants' new interpretation of Section (a)(32). The deduction of dues is not caused by the 2014 rulemaking (and in fact, the practice of deducting dues predates those regulations), but by their own voluntary agreements. And there is every reason to believe that Defendants will adequately represent Proposed Defendant-Intervenors' interests with respect to defending that new interpretation. Allowing them to

intervene as parties in this case would not promote judicial efficiency, but lead to duplicative briefing and expansion of the issues involved in this case.

Neither equities nor any caselaw supports Proposed Defendant-Intervenors' claim that "equity" favors intervention so that they can "intervene to stop UDW and SEIU 503 from collecting dues from their Medicaid payments." Mot. to Intervene at 12-13. Indeed, the different sets of proposed intervenors in this lawsuit describe sharply contrasting sets of interests. The Union Intervenors allege that implementation and enforcement of the Final Rule will eliminate "the only efficient and reliable means for members to pay their voluntary dues," resulting "in financial losses to homecare provider unions, which in turn will disrupt important services provider by Local 503, UDWA, and the other unions that represent Individual [Plaintiff-]Intervenors." Union Mot. to Intervene at 9. These services include "collective bargaining, grievance processing, worker support, and advocate activities." *Id*. And in the absence of the option of direct payroll deductions, the Individual Intervenor Plaintiffs allege that they "will incur substantial burdens and costs in attempting to pay their union dues by other means, and risk losing access to their membership and benefits due to the unreliability and inconvenience of those other methods." *Id*. at 11. In contrast, the Proposed Defendant-Intervenors' declarations describe pecuniary and associational harms that will be remedied as soon as they effectively withdraw from their union and terminate their dues deduction authorizations.

Proposed Defendant-Intervenors' participation is unnecessary for the full and fair presentation of the legal issues involved in this lawsuit. Thus, permissive intervention should also be denied.

III. IF THE COURT PERMITS INTERVENTION, IT SHOULD IMPOSE REASONABLE CONDITIONS TO ENSURE THAT THE EXISTING PARTIES ARE NOT PREJUDICED

If the Court permits intervention, it should impose reasonable conditions to ensure that the original parties are not prejudiced by the intervention. First, the issues before the Court should not be broadened or enlarged. *See, e.g.*, *Vinson v. Washington Gas Light Co.*, 321 U.S.

489, 498 (1944) (intervenors are not "permitted to enlarge [..] issues or compel an alteration of the nature of the proceeding.") To take just a few examples of the extraneous allegations raised by the PAI, this case should not be used as a vehicle for individual union members to litigate disputes with their local unions regarding their difficulties in revoking their individual membership agreements, or with their individual states about the vendor selection process for workforce training. *See, e.g.*, PAI, ¶¶ 166, 182-84, 188-89. Second, there should be no delay in production or review of the administrative record, or otherwise moving toward resolving the merits of the case. Third, the Proposed Defendant-Intervenors should share in Defendants' discovery requests, and should not be allowed to propound any duplicative or unnecessary discovery. *Dep't of Fair Emp't and Hous.*, 642 F.3d at 741. Fourth, the Proposed Defendant-Intervenors should not be allowed to request attorneys' fees for work defending claims brought against Defendants, or any other duplicative work performed by their counsel. *Id*. Finally, if the court does allow intervention, Plaintiffs request that Proposed Defendant-Intervenors be required to file on Defendants' briefing schedule.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the motion to intervene.

Dated: July 11, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Case Name: **State of California v. Azar** No. **3:19-cv-02552-VC**

I hereby certify that on July 11, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

PLAINTIFFS' OPPOSITION TO PROPOSED DEFENDANT-INTERVENORS' MOTION TO INTERVENE

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 11, 2019, at Oakland, California.

Anna Rich	*/s/Anna Rich*
Declarant	Signature

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