

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 UNITED STATES OF AMERICA, et al.,)
)
 Defendants,)
)
 and)
)
 CATHERINA LORENA CENZON-DECARLO,)
)
 CHRISTIAN MEDICAL ASSOCIATION, on behalf)
 of its members,)
)
 AMERICAN ASSOCIATION OF PRO-LIFE)
 OBSTETRICIANS AND GYNECOLOGISTS,)
 on behalf of its members,)
)
 CATHOLIC MEDICAL ASSOCIATION, on behalf)
 of its members,)
)
 CONCERNED WOMEN FOR AMERICA, on behalf)
 of its individual members;)
)
 CHRISTIAN PHARMACISTS FELLOWSHIP)
 INTERNATIONAL, on behalf of its individual)
 members;)
)
 HEARTBEAT INTERNATIONAL, on behalf of its)
 individual members;)
)
 CARE NET, on behalf of its individual members;)
)
 NEW JERSEY PHYSICIAN'S RESOURCE)
 COUNCIL, on behalf of its individual members; and)
)
 ASSOCIATION OF AMERICAN PHYSICIANS &)
 SURGEONS, Inc., on behalf of its individual)
 members;)
)
 Proposed Defendant-Intervenors.)
)

CIVIL ACTION NO. 3:09-CV-00054-VLB

December 10, 2010

PROPOSED DEFENDANT-INTERVENOR
CATHERINA LORENA CENZON-
DECARLO'S BRIEF IN SUPPORT OF
MOTION TO INTERVENE AS
DEFENDANTS

COMES NOW Proposed Defendant-Intervenor CATHERINA LORENA CENZON-DECARLO, and submits this Brief in Support of Motion to Intervene as Defendant in the above-captioned case.

STATEMENT REGARDING ORAL ARGUMENT

Mrs. DeCarlo requests oral argument in this case. This case threatens to undermine the tangible interest she has in an actual pending investigation by Defendants pursuant to the Implementing Regulation that Plaintiffs seek to invalidate. The case also presents important issues of broad public importance regarding the ability of persons protected by federal laws and regulations to intervene to defend those laws and regulations, in particular when they are the complainants in pending investigations thereunder. Oral argument will assist this Court in reaching a full understanding of the motion, and allow the attorneys for all parties the opportunity to address any outstanding factual or legal issues which this Court deems relevant. Because of the paramount importance of the underlying litigation to Mrs. DeCarlo's interests and the complexity of the legal issues present in this case, Mrs. DeCarlo believes that oral argument will be necessary to address these matters thoroughly. Accordingly, Mrs. DeCarlo respectfully requests that this Court set this motion for oral argument.

INTRODUCTION

By being forced to assist a 22-week abortion in violation of federal law, Mrs. Catherina Cenzon-DeCarlo is an actual victim of a violation the right of conscience that President Bush's Implementing Regulation was written to protect. Moreover, that Regulation has helped empower Defendant HHS' Office of Civil Rights to actually and presently be investigating that violation on her behalf, explicitly telling Mrs. DeCarlo that the investigation is being pursued at least in part under the Implementing Regulation.

Yet in this case, Plaintiffs seek to invalidate that Regulation and Defendants have worked with Plaintiffs to stay the case based on their intent to rescind the Regulation. These efforts potentially leave Mrs. DeCarlo with no recourse to protect her rights. The Second Circuit recently ruled that Mrs. DeCarlo cannot assert her rights in court under the federal conscience statutes. Thus by threatening to take away her only present recourse, the pending HHS investigation of her rights under conscience statutes *and* the Implementing Regulation, this case may cause Mrs. DeCarlo to *again* be illegally compelled to assist in abortions by her federally-funded employer due to the removal of all her protective measures.

HHS's pending investigation on Mrs. DeCarlo's behalf shows that Defendants are presently enforcing the Implementing Regulation, at least to some degree, which is not consistent with the assumptions behind the stay of this case. Mrs. DeCarlo has a unique and tangible interest in lifting the stay to protect her rights, and thus she has a right to intervene under Fed. R. Civ. P. 24(a)(2). Mrs. DeCarlo also presents unique issues about to what extent Defendants are otherwise enforcing the Implementing Regulation, which information the stay has obscured.

Mrs. DeCarlo's employer, \$200 million-per-year federal grantee Mount Sinai Hospital in New York, continues to insist that it can flaunt the federal statutes and Implementing Regulation

at issue in this case by conditioning Mrs. DeCarlo's and others' jobs on their willingness to assist abortions in the future. Mrs. DeCarlo's interests in intervening in to protect her rights at issue in this case are therefore urgent. She should be allowed to intervene to prevent Plaintiffs or Defendants from allowing her rights to be trampled upon by recipients of federal tax dollars.

STATEMENT OF THE CASE

On December 19, 2008, the Department of Health and Human Services ("HHS") enacted a final rule, *Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law*, 73 Fed. Reg. 78,072 (Dec. 18, 2008) (codified at 45 C.F.R. p. 88.1 *et seq.*), hereinafter the "Implementing Regulation," providing that recipients of certain HHS funds may not discriminate against institutional healthcare providers or individual employees for exercising rights of conscience protected by law; that recipients of certain HHS funds must certify compliance with laws protecting healthcare provider conscience rights; and designating the HHS Office for Civil Rights as the entity to receive complaints of discrimination addressed by the existing statutes and the Regulation. The Implementing Regulation took effect at 12:01 a.m. on January 20, 2009.

On January 15, 2009, the state of Connecticut and two state officials, and the states of Illinois, California, New Jersey, Massachusetts, Rhode Island, and Oregon by and through their attorneys general, brought the instant action against the United States, HHS, and the Secretary of HHS, seeking a declaratory judgment that the Implementing Regulation violates the Administrative Procedures Act ("APA") and is facially unconstitutional, and seeking an injunction prohibiting its implementation and enforcement. States Compl. ¶ 8. The State of New York moved to intervene as a Plaintiff in the case on January 16, 2008. The States claim

that the Implementing Regulation suffers from a number of deficiencies, including that it violates the APA because HHS failed to respond adequately to comments in making this rule and because the underlying statutes do not authorize this rule, and that it violated the Spending Clause in part because of vagueness and because it is not related to the federal interest in the program receiving funding. States Compl. ¶¶ 64-100.

On March 10, 2009, the Office of the Federal Register published a Notice of Proposed Rulemaking (NPRM) by HHS proposing to rescind the December 19, 2008 Final Rule. See 74 Fed. Reg. 10207. Interested parties had until April 9, 2009, to submit comments on the proposed rescission of the December 19, 2008 Final Rule. *Id.* at 10207. In light of this notice, Defendants requested a stay of this case.

Judge Chatigny ordered a stay on April 27, 2009, and denied, without prejudice, various motions to intervene by proposed defendant-intervenors other than Mrs. DeCarlo. Pursuant to this Court's September 22, 2010 order, Defendants filed a status report on November 1, 2010, indicating that they are reviewing the comments submitted on 74 Fed. Reg. 10207 but without saying if or when the rescission would be finalized. On November 3, 2010, this Court ordered Defendants to show cause by December 2, 2010, "why the Court should not set a scheduling order inasmuch as the Defendants do not foresee completion of the Federal Rulemaking process at any point in time." On December 1, Defendants urged the court to continue the stay because of their plans to rescind the Implementing Regulation. On December 6, the Planned Parenthood Plaintiffs, despite admitting that their legal position should indicate a desire to pursue this case, declared that they agree with Defendants on continuing the stay to prevent the Court's consideration of this case.

MRS. DECARLO'S INTERESTS

Mrs. DeCarlo is the complainant in a pending HHS investigation under the Implementing Regulation and its underlying statutes. The investigation is being conducted against the illegal actions of Mount Sinai Hospital, whose officials forced Mrs. DeCarlo, a nurse well-respected by doctors and peers at Mount Sinai, to assist in a “D&E” abortion of a 22-week-old child.¹ Exh. 3, Verified First Amended Complaint in 09-cv-3120 (E.D.N.Y.) (hereinafter “*Compl.*”) ¶¶ 34–36, 61, 88–107. Mount Sinai officials threatened Mrs. DeCarlo’s job and career with charges of insubordination and patient abandonment if she did not immediately assist. *Compl.* ¶¶ 101–03. Mount Sinai engaged in this compulsion despite having known since she was hired Mrs. DeCarlo’s religious objection to participating in abortion, and despite her tearful pleas on the day of the incident. *Compl.* ¶¶ 41–43, 86–89.

Mrs. DeCarlo’s involvement in the abortion was unnecessary. Neither Mount Sinai, nor the patient’s health, would have been prejudiced if Mrs. DeCarlo’s religious rights had been

¹ The Supreme Court described the “D&E” abortion procedure as follows:

A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. . . . After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed.

Gonzales v. Carhart, 550 U.S. 124, 135–36 (2007); *see also Compl.* ¶ 61 (JA 74).

honored. *Compl.* ¶ 99. Other nurses were available to assist, including the supervisors who forced her to help. *Compl.* ¶¶ 62, 65, 92–100. Because Mrs. DeCarlo promptly reiterated to Mount Sinai her long-known objection, the hospital had ample time to find another nurse. *Compl.* ¶¶ 86–88, 92–100, 122. The D&E abortion procedure, though gynecological, is itself simple enough for any of Mount Sinai’s operating room nurses to assist (which Mount Sinai’s policy allows). *Compl.* ¶¶ 62, 65. But Mount Sinai did not even try to call other nurses. *Compl.* ¶ 95.

Not only was Mrs. DeCarlo’s assistance not needed, the abortion itself was neither an emergency nor urgent. No Mount Sinai official categorized the case as requiring immediate surgery, and the woman was not actually in crisis. *Compl.* ¶¶ 98, 117–28. The doctor omitted most if not all of the care that women having severe preeclampsia are given in a true crisis, and the condition is one that doctors regularly and safely treat without abortion. *Id.* Moreover, there was no need to use treatment that directly killed the child. Mount Sinai could have chosen a delivery method that tried to save rather than end the life of the viable child, but instead it elected a lethal procedure and forced Mrs. DeCarlo to assist. *Compl.* ¶¶ 24, 124.

After the incident, Mrs. DeCarlo properly followed internal procedures to complain about Mount Sinai’s coercion. *Compl.* ¶¶ 133–34. The hospital did not apologize; it did not pledge to follow the law; rather, it acquiesced in its managers’ compulsion of Mrs. DeCarlo and declared that she could be compelled similarly again. *Compl.* ¶¶ 135, 143–46, 157, 168. Moreover, Mount Sinai retaliated against Mrs. DeCarlo: it apparently took her off on-call shifts for August, and it specially subjected her to a bullying session aimed at forcing her to sign away her religious beliefs. *Compl.* ¶¶ 139–41, 148–57.

Mount Sinai's policy of compulsion and its retaliation violate 42 U.S.C. § 300a-7(c), which gives to Mrs. DeCarlo and similar employees an individual right against discrimination in the terms and privileges of their employment. Mount Sinai receives over \$200 million in federal health dollars every year, whereby it binds itself to comply with § 300a-7(c). *Compl.* ¶¶ 159–63. The statute does not allow Mount Sinai to compel employees to assist in abortions in some circumstances, or according to the hospital's own discretion. As a result of violating § 300a-7(c), Mount Sinai's actions also violate the Implementing Regulation, which implements § 300a-7(c) and requires fund recipients to abide by applicable statutes.

Mount Sinai's actions resulted in Mrs. DeCarlo's involvement in a procedure that was severely troubling to her conscientious beliefs about human life (see footnote 2), and therefore they caused Mrs. DeCarlo intense emotional harm and damages. *Compl.* ¶¶ 130–32, 153–56, 158, 174–76. Mount Sinai's continuing refusal to comply with § 300a-7(c) is inflicting further harm on Mrs. DeCarlo, as she is constantly threatened with Mount Sinai's position that it can repeat its violation of the law. *Compl.* ¶ 176.

Mrs. DeCarlo filed suit on July 21, 2009, in the United States District Court for the Eastern District of New York, seeking an injunction and damages against Defendant Mount Sinai's illegal discrimination against her under 42 U.S.C. § 300a-7(c). Mount Sinai served its motion to dismiss on September 18, 2009, alleging that Mrs. DeCarlo lacked any private right of action under § 300a-7(c). On January 15, 2010, the District Court granted Mount Sinai's motion to dismiss, concluding that no private right of action exists under § 300a-7(c). *Cenzon-DeCarlo v. Mount Sinai Hosp.*, No. 09-cv-3120, 2010 WL 169485 (E.D.N.Y. Jan. 15, 2010). And on November 23, 2010, United States Court of Appeals for the Second Circuit affirmed that ruling. *Cenzon-DeCarlo v. Mount Sinai Hosp.*, --- F.3d ----, 2010 WL 4723205 (2d Cir Nov. 23, 2010).

Mrs. DeCarlo also described this violation of her rights to Defendants in the Department of Health and Human Services' Office of Civil Rights. Initially, HHS wrote to her and said that it had to decide whether it even "has authority and is able to take action" regarding the violation of her rights, and HHS's enclosed list of all the statutes and rules it enforces completely omitted the Implementing Regulation and its underlying statutes including 42 U.S.C. § 300a-7. Exh. 4, Letter from HHS (March 15, 2010). However, on June 7, 2010, HHS wrote back to Mrs. DeCarlo and said that "We will investigate your complaint pursuant to our authority under 42 U.S.C. § 300a-7, and its implementing regulation, 45 C.F.R., Part 88...." Exh. 5, Letter from HHS (June 7, 2010). Also, HHS specifically indicated that "OCR has been designated to receive complaints of discrimination and coercion that violate the Church Amendment, 42 U.S.C. § 300a-7, and its implementing regulation, 45 C.F.R., Part 88." *Id.* (emphasis added). Nevertheless, HHS's June 7 letter still wholly omitted both 42 U.S.C. § 300a-7, and its Implementing Regulation, 45 C.F.R., Part 88, from the list of laws and regulations that HHS OCR enforces. *Id.*

ARGUMENT

I. PROPOSED DEFENDANT-INTERVENOR IS NOT REQUIRED TO SHOW STANDING; HOWEVER, SHE HAS ASSOCIATIONAL STANDING TO INTERVENE AS A DEFENDANT.

The Second Circuit has held that "there [i]s no need to impose the standing requirement upon [a] proposed intervenor" because "[t]he existence of a case or controversy ha[s] been established as between the [existing parties]." *U. S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) (intervention denied on other grounds); see *Hoblock v. Albany Cty. Bd. of Elections*, 233 F.R.D. 95, 97 (N.D.N.Y. 2005) ("there is no Article III standing requirement in the Second Circuit, with an intervenor only needing to meet the Rule 24(a) requirements and

have an interest in the litigation”) (citing with *see* signal *Brennan*, 579 F.2d at 190; citing with *see also* signal *San Juan Cty., Utah v. United States*, 420 F.3d 1197, 1204-05 (10th Cir. 2005) (discussing differences between Circuits in addressing standing requirements for intervention). However, should this Court require Mrs. DeCarlo to show that she has standing to intervene as a defendant, she readily satisfies the requirements of standing for the reasons stated below.

For the reasons discussed below, Mrs. DeCarlo is entitled to intervene in the instant action to defend her rights, including those implicated by her pending investigation under the Implementing Regulation as well as her statutory and other legal rights. Mrs. DeCarlo’s interest in not being forced to assist abortion as occurred to her last year is the very subject of the Implementing Regulation that Plaintiffs are litigating against. Mrs. DeCarlo has a tangible, actual investigation pending under the very Regulation Plaintiffs seek to strike down and Defendants indicate they may rescind or not enforce. She has a right to intervene in this case.

II. MRS. DECARLO IS ENTITLED TO INTERVENE OF RIGHT UNDER FED. R. CIV. P. 24(A).

Federal Rule of Civil Procedure 24(a) provides,

On timely motion, the court must permit anyone to intervene 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.

Fed. R. Civ. P. 24(a). As the Second Circuit stated, “[a]pplication of the Rule requires that its components be read not discretely, but together” such that a strong showing on one factor compensates for a weaker showing on another factor. *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984). As demonstrated below, Mrs. DeCarlo readily satisfies this test.

- A. Mrs. DeCarlo's Motion is Timely Because It Was Filed Before Any Substantive Motions Were Granted or Responsive Pleadings Were Due.

Mrs. DeCarlo's motion is timely under Fed. R. Civ. P. 24(a). *See In re Bank of N.Y. Derivative Litig.*, 320 F.3d 291, 300 (2d Cir. 2003) (describing timeliness considerations). Mrs. DeCarlo has filed her motion before any substantive motions have been considered in this case. The case has been stayed since its early inception, before any substantive action occurred.

Meanwhile, Mrs. DeCarlo did not have a pending investigation under the Implementing Regulation until June 7, 2010. It wasn't until November 1, 2010, when Defendants gave any indication of their progress on the rescission notice. Only on November 3, 2010, did this Court indicate the possibility of the case being scheduled for further proceedings, and only on December 2 did Defendants respond to the order to show cause.

Nothing on the merits of the case has transpired before or during the stay, and consequently Mrs. DeCarlo's motion does not prejudice any party due to the occurrence of any such proceedings prior to her motion. Mrs. DeCarlo does not intend to seek any delay in the case—on the contrary, she seeks to lift the stay and proceed to seek protection of her rights and other relief to maintain the rules protecting her and other conscientious providers' interests. Thus, this motion will cause neither prejudice to the existing parties or any delay in these proceedings. Moreover, denial of the motion will prejudice Mrs. DeCarlo for the reasons set forth below. *See infra* at § B; *see In re Bank of N.Y. Derivative Litig.*, 320 F.3d at 300 (in evaluating timeliness courts should consider “prejudice to the applicant if the motion is denied”). Under these circumstances, this motion is clearly timely.

- B. Mrs. DeCarlo Has Concrete, Tangible Interests Relating to the Subject Matter of this Action Because the Outcomes Signaled by Plaintiffs and Defendants Threaten to Impede or Impair Specific Relief Available to Protect Her Rights.

Mrs. DeCarlo has a pending HHS investigation under the Implementing Regulation at issue in this case, in which Defendants are investigating her federal grantee employer for its violation of rights that the Implementing Regulation and its underlying statutes squarely protect: the right not to assist in an abortion. Mrs. DeCarlo's intervention therefore establishes that Defendants are, in part, enforcing the Implementing Regulation. HHS specifically stated that it is pursuing the investigation under the Implementing Regulation, by its authority, and under its designation that it pursues complaints thereunder. Exh. 5. Yet HHS's general list of conscience rights that it enforces still fail to include either the Implementing Regulation or even the underlying statutes that protect conscience rights. Exh. 5.

Therefore it is at best unclear whether HHS believes that it will still have inherent statutory authority to continue its investigation if Plaintiffs succeed in obtaining relief against the Implementing Regulation, or if Defendants rescind it in collusion in this case with Plaintiffs. In either case, at least one significant and specific authority justifying the investigation of Mrs. DeCarlo's rights will be eliminated.

Meanwhile, the federal courts have left Mrs. DeCarlo with absolutely no other mechanism by which to protect her federal conscience rights, except for this pending investigation that is in peril. The federal grantee hospital that HHS is investigating has succeeded in convincing the district court and the Second Circuit that Mrs. DeCarlo cannot herself protect her rights by pursuing a right of action. Consequently, Plaintiffs' request to strike down the Implementing Regulation and Defendants' possible collusion with Plaintiffs to rescind it while this case is stayed are pulling the rug out from under a specific victim of conscience rights violations, and thereby causing Mrs. DeCarlo a specific, tangible injury. This shows that Mrs. DeCarlo indeed "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."

In *N.Y. Pub. Interest Research Group v. Regents of the Univ. of the State of N.Y.*, 516 F.2d 350, 351-52 (2d Cir. 1975) (*per curiam*), the court held that an organization of health professionals "has a sufficient interest to permit it to intervene since the validity of a regulation from which its members benefit is challenged" because they "have an interest in the action as professionals" in that the regulation "might well lead to significant changes in the profession and in the way [medical professionals] conduct their businesses." *Id.* at 352. The Court also noted that the medical association's members had economic interests at stake. *Id.* Lastly, the court denied that concern on the part of the regulation's promulgators for the interests of patients did *not* mean physicians "d[id] not also have interests at stake," *id.*, stating that the promulgators acknowledged that protecting the interests of the physicians "[wa]s one basis for sustaining the regulation." *Id.* Thus, such interests constitute "direct, substantial, and legally protectable" interests, *United States v. City of New York*, 198 F.3d 360, 365 (2d Cir. 1999) (citations omitted), and are "sufficient to support intervention of right." *Id.* (citing *N.Y. Pub. Interest Research Group*, 516 F.2d at 351-52).

Here, a significant component of the authority for Mrs. DeCarlo's pending investigation is threatened to be undermined. She could be subject to Mount Sinai Hospital's continuing illegal policy of forcing employees to assist abortions in violation of federal statute and the Implementing Regulation. This will cause emotional as well as economic injury by means of the hospital's already stated threat to her job and nursing license for objecting to perform abortions. Her practical ability to enforce her rights vis-à-vis Mount Sinai would be fundamentally changed by this case.

Mrs. DeCarlo is squarely among the class of individuals that the legislative branch sought to protect with the underlying conscience statutes and that the executive branch sought to protect with the Implementing Regulation. *Lockyer*, 450 F.3d at 441; Implementing Regulation at § 88.1, 73 Fed. Reg. at 78,096. As the *Lockyer* court stated, it was clear that the proposed intervenors had a sufficient interest to warrant intervention because it “seem[ed] beyond dispute[] that Congress passed the Weldon Amendment,” *i.e.*, an underlying statute implemented by the Implementing Regulation, “to protect health care providers like those represented by the proposed intervenors.” *Lockyer*, 450 F.3d at 441. Mrs. DeCarlo is specifically protected by the Implementing Regulation from discrimination by federal grant recipients such as her employer, and by local governments including the Plaintiffs, because she objects to participating in abortion. Implementing Regulation at § 88.2. As the Plaintiff States candidly assert, the challenged Regulation “purports to protect a broad group of health care providers, including hospitals, health insurers, pharmacies, and individuals from ‘discrimination on the basis that the health care entity does not provide, pay for, provider coverage of, or refer for, abortion.’” States Compl. ¶ 2 (quoting Implementing Regulation at § 88.4(b)(1), 73 Fed. Reg. at 78,908). It is self-evident that Mrs. DeCarlo’s interests in the conscience protections provided by the Implementing Regulation would suffer severe blows should this Court grant Plaintiffs the relief they seek. *Lockyer*, 450 F.3d at 441.²

² Mrs. DeCarlo also satisfies the interest test because the order sought by Plaintiffs could compromise her First Amendment free exercise and free speech and state and federal statutory rights, even leaving her subject to criminal penalties should she refuse to perform, participate in or refer for abortions. Mrs. DeCarlo lives in the State of New York, which is an intervening Plaintiff in this case. “[I]f a regulation that protects conscience “is declared unconstitutional or substantially narrowed as a consequence of this litigation,” then medical professionals “will be more likely to be forced to choose between adhering to their beliefs and losing their professional licenses.” *Lockyer*, 450 F.3d at 441. Plaintiffs contend that the Implementing Regulation infringes on the sovereign interests of Plaintiffs because it requires Plaintiffs to respect the rights

C. Mrs. DeCarlo's Interests in the Implementing Regulation and Her Pending Investigation There under Will Be Impaired by the Relief Sought by Plaintiffs.

In light of the clear interest that a medical professional like Mrs. DeCarlo has in an action challenging the validity of a Regulation under which she has a pending investigation to protect her rights, the remedies sought by Plaintiffs are likely to impair or impede her rights. The Second Circuit stated, "We think it likewise is clear that the pharmacists and the association are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect their interests." *N.Y. Pub. Interest Research Group*, 516 F.2d at 352; *see also Lockyer*, 450 F.3d at 442 ("Having found that appellants have a significant protectable interest,

of conscience of protected persons like Mrs. DeCarlo when they exercise their police powers. States Compl. ¶ 20. Plaintiffs' contentions to the contrary, Mrs. DeCarlo possesses First Amendment rights against compelled speech and to the free exercise of her religious beliefs that prohibit Plaintiff New York from forcing her to provide abortions, refer for abortions, assist in abortions, or to train for abortions against her religious, moral, and ethical objections. Hence, as the Clinton Administration recognized, the Church Amendment has for decades forbidden Title X clinics from requiring staff to perform abortion counseling or to make abortion referrals. See 65 Fed. Reg. 41273-41275 (Secretary Shalala noting that the Church Amendment has always prohibited Title X grantees from requiring their employees to provide abortion counseling and referrals); *NFPRHA v. Gonzales*, 468 F.3d 826, 829 (D.C. Cir. 2006) (making this same point).

Mrs. DeCarlo's cognizable interests in protecting the rights of conscience specifically extended to her by the legislative and executive branches through the Implementing Regulation and its underlying statutes, and in defending their First Amendment and statutory rights, which would be harmed by this Court's grant of the full measure of relief requested by Plaintiffs, are cognizable legal interests sufficient to satisfy the requirements of Rule 24(a)(2). Indeed, "[t]he fact that [the Plaintiffs] brought this lawsuit seeking to invalidate the Amendment, or restrict its sweep, is proof in itself of the efficacy of this congressional enactment and its significance to the proposed intervenors." *Lockyer*, 450 F.3d at 442.

Mrs. DeCarlo also has an interest in the Implementing Regulation in light of Plaintiffs' baseless allegations that medical professionals exercising their conscience place women at risk of serious injury and even death by failing to render necessary services during medical emergencies. States Compl. ¶ 56, 77. These allegations are directed towards medical professionals including Mrs. DeCarlo. Mrs. DeCarlo should be permitted to intervene to respond to these allegations and fully develop the factual record concerning the exercise of conscience by medical professionals.

we have little difficulty concluding that the disposition of this case may, as a practical matter, affect it.”).³

Mrs. DeCarlo easily satisfies the impairment of interests test because her rights under the Implementing Regulation and the investigation pending on her behalf might be impaired, and her First Amendment and Title VII and state statutory rights could be impeded by the Court’s disposition of this action. Should the Court order the relief sought by Plaintiffs in this action, Mrs. DeCarlo’s protection from discrimination would be diminished because she would be deprived of the protections provided by the Implementing Regulation, which specifically authorizes the pending investigation, and otherwise implements the protections of underlying statutes by defining applicable terms, requiring grant recipients, including Plaintiffs, to provide written certification of compliance, and tasking the HHS Office of Civil Rights and other HHS program offices with handling complaints and performing investigations of discrimination.

Plaintiffs ultimately seek a declaratory judgment that the Implementing Regulation is unconstitutional and injunctive relief prohibiting its implementation and enforcement. States’ Compl. p. 35-36. Such relief, if granted by this Court, would eliminate the conscience protections for Mrs. DeCarlo contained in the Implementing Regulation, subjecting her to the imminent threat of being forced by her employer, and even potentially by the Plaintiff the State of New York in the exercise of its police powers, to perform abortions, assist in abortions, train

³ The court rejected “the contention of plaintiffs that the pharmacists may protect their interests after an adverse decision in the instant case by attacking any new regulation on constitutional . . . grounds” because this “contention ignore[d] the possible stare decisis effect of an adverse decision.” *Id.*; see also *Oneida Indian Nation of Wisc. v. New York*, 732 F.2d 261, 265 (2d Cir. 1984) (citing *N.Y. Pub. Interest Research Group*, 516 F.2d at 352); see also *Ionian Shipping v. British Law Ins.*, 426 F.2d 186 (2d Cir. 1970) (the “likelihood that novel issues of law will be determined that will have the effect of stare decisis,” is “an element which at least one court has found sufficient to require intervention of right.”) (citing with *see* signal *Atlantis Dev. v. United States*, 379 F.2d 818 (5th Cir. 1967); see *Atlantis Dev.*, 379 F.2d at 829; see also *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967)).

for abortions, or refer individuals for abortions despite her religious, moral, and ethical objections to the practice of abortion. States Compl. ¶ 20 (alleging sovereign interest in exercise of police power to enforce laws on healthcare).

The imminent threat of being subject to violations of federal law by her employer absent the Implementing Regulation's shield of protection is certainly sufficient to show that the disposition of this case in favor of Plaintiffs will practically affect Mrs. DeCarlo. *See Lockyer*, F.3d 450 at 442. Noncompliance with statutory conscience protections, such as is being perpetrated by Mrs. DeCarlo's employer, is precisely what the Implementing Regulation aims to remedy. Implementing Regulation, 73 Fed. Reg. at 78,078. The harm to Mrs. DeCarlo's pending investigation will undermine what might be Mrs. DeCarlo's only recourse for enforcing her rights under the federal conscience statutes that the Implementing Regulation was designed to protect. This concrete impairment easily satisfies Rule 24(a)(2). "If an [applicant] would be substantially affected in a practical sense by the determination made in an action, [the applicant] should, as a general rule, be entitled to intervene." Fed. R. Civ. P. 24(a)(2), Advisory Committee Note.

D. Mrs. DeCarlo Satisfies the Requirement of Showing Inadequate Representation by Defendants Because Her Situation, Legal Arguments, and Contribution to the Factual Record Warrants Intervention.

As the Supreme Court has stated, "[t]he requirement of the Rule [providing for intervention as of right] is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (cited by *LaRouche v. FBI*, 677 F.2d 256, 258 (2d Cir. 1982)). An applicant "ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee." *United States v.*

American Tel. & Tel. Co., 642 F.2d 1285, 1293 (D.C. Cir. 1980). For the reasons below, Mrs. DeCarlo lacks adequate representation and intervention as of right is warranted because it will allow Mrs. DeCarlo to assert her unique legal arguments and to ensure full factual development of the record.

First, Mrs. DeCarlo brings a unique perspective not represented in this case. None of the original parties are persons who have actually been forced to assist abortions in violation of their rights under the Implementing Regulation and federal statutes. Upon information and belief, no one besides Mrs. DeCarlo has ever been the subject of an investigation specifically authorized under the Implementing Regulation. Mrs. DeCarlo can provide unique information about the extent to which Defendants are actually enforcing the Implementing Regulation while this lawsuit is pending, and therefore why a stay is inappropriate. Mrs. DeCarlo can provide facts about how an actual federal grantee violated and continues to violate the rights protected in the Implementing Regulation and its underlying statutes, and about the Implementing Regulation and those statutes are designed to protect such interests. Her perspective on whether the Implementing Regulation should be struck down on Plaintiffs' request, or rescinded by Defendants, is unique and essential to this lawsuit.

It seems clear that the Plaintiffs do not adequately represent Mrs. DeCarlo's interests. Plaintiffs seek to invalidate a federal anti-discrimination Regulation specifically promulgated to protect Mrs. DeCarlo. Moreover, State Plaintiffs assert sovereign police power to enforce laws forcing persons such as Mrs. DeCarlo to provide abortions; assist in, refer for, or train for abortions, even where such activities violates Mrs. DeCarlo's religious, moral, or ethical beliefs. States Compl. ¶ 20.

Defendants, in turn, also do not adequately represent Mrs. DeCarlo's interests. While Defendants have issued an investigation on Mrs. DeCarlo's behalf under the Implementing Regulation, Defendants are proposing to rescind the very Regulation that they claim provides at least part of the authority for that investigation. Defendants in HHS OCR do not even list the statutes underlying the Implementing Regulation as statutes which they have authority to enforce. It is not clear whether Defendants will continue to investigate Mrs. DeCarlo's complaint if the Implementing Regulation is struck down or rescinded, but it is clear that Defendants claim that the investigation is based in significant part on the Implementing Regulation. It is also not clear whether Defendants are enforcing the Implementing Regulation in other ways, for example by requiring grantees to certify compliance with federal conscience protecting statutes, but the fact that they are enforcing the Implementing Regulation in part suggests they may be enforcing it in other ways and counsels in favor of lifting the stay.

The Second Circuit found that the "likelihood" that medical professionals "would make a more vigorous presentation of the economic side of the argument than would" the existing defendants was sufficient to show a lack of adequate representation. *N.Y. Pub. Interest Research Group*, 516 F.2d at 352. The Second Circuit also acknowledged that the interests of medical professionals diverge from those of government defendants. *Id.* Indeed, in two previous cases defending the Weldon Amendment, medical professionals intervened and demonstrated that they make different arguments and their interests diverge from those of the federal government defendants.

The *Lockyer* court specifically held that the federal government defendants would not adequately represent proposed intervenor medical professionals, because the United States defended a narrow reading of the challenged regulation while the medical professionals

advanced a broad reading of the regulation, revealing the divergent interests of the avoidance of constitutional infirmity and the protection of conscience. *Lockyer*, 450 F.3d at 444. Additionally, “[b]y making the strident argument that [a California statute] is irreconcilably in conflict with the [challenged conscience regulation], the proposed intervenors [brought] a point of view to the litigation not presented by either the plaintiffs or the defendants. *Id.* at 445. In *NFPRHA*, the federal government defendants argued on appeal that NFPRHA lacked standing to sue and argued that it had waived its First Amendment claims. Brief of Appellees, *NFPRHA*, at 19, 34, 2006 WL 1662404, No. 05-5406 (D.C. Cir. May 30, 2006). The intervenor medical professionals made two arguments that the federal government defendants did not make: that plaintiff’s First Amendment claims were meritless and that the court lacked jurisdiction to grant the relief that plaintiff requested. Brief of Intervenor Defendants-Appellees, *NFPRHA*, at 13, 15, 2006 WL 1546745, No. 05-5406 (D.C. Cir. May 26, 2006).

Furthermore, the D.C. Circuit also recently held that a government agency’s representation of the applicant’s interests was inadequate even though both the federal defendants and the applicant agreed that the subject rules and practices were lawful. Recognizing that the federal defendants might not give the applicant’s concerns “the kind of primacy” that the applicant would give them, the D.C. Circuit concluded that “[i]t is ... not hard to imagine how the interests of the [applicant] and those of the [federal defendants] might diverge during the course of litigation.” *Fund for Animals v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003). “For just these reasons,” the D.C. Circuit observed, “we have *often* concluded that governmental entities do not adequately represent the interests of aspiring intervenors.” *Id.* (emphasis added).

In this case, Mrs. DeCarlo is likely to advance arguments that illuminate the perspective of someone whose rights under the Implementing Regulation were actually violated, and who is

the subject of actual enforcement of the Implementing Regulation. Defendants, in contrast, represent governmental interests in this Regulation. Mrs. DeCarlo is uniquely suited to give primacy to arguments that emphasize the concerns regarding conscience that make the Implementing Regulation necessary. Furthermore, in support of these arguments, Mrs. DeCarlo will introduce significant factual evidence that government Defendants are likely unable to produce, attesting to the way in which a specific federal grantee violates conscience laws against a specific victim.

The potential that Mrs. DeCarlo's interests will not be adequately represented is heightened by the fact that the administration that passed the Implementing Regulation is not the administration that is presently the Defendant in this case. *Great Atlantic & Pacific Tea Co.*, 178 F.R.D. 39 at 42-43 (citing cases from First, Second, Third, Fourth, Fifth, and Sixth Circuits) ("collusion, nonfeasance, adversity of interest, or incompetence" on the part of the existing party whose side intervenor wishes to join may warrant intervention). There is substantial reason to believe that Mrs. DeCarlo's interests will be inadequately represented because of Defendants' stance against the Implementing Regulation in their wish to rescind it, and in their cooperation with Plaintiffs to stay the present action as if the Implementing Regulation had not necessarily been in force (Mrs. DeCarlo's investigation shows it has been in force at least in part). Given Defendants' stated desire and continuing effort to actually rescind the Implementing Regulation, the interests of Defendants and Mrs. DeCarlo cannot be said to be identical; indeed they appear adverse, because the views of Defendants are now more closely aligned with Plaintiffs, creating potentials for collusion that have arguably already been seen in this case. Thus Mrs. DeCarlo's interests are not adequately represented by any party to this case.

III. IN THE ALTERNATIVE, APPLICANT SHOULD BE GRANTED PERMISSION TO INTERVENE UNDER FED. R. CIV. P. 24(B).

Federal Rule of Civil Procedure 24(b)(2) provides, “[o]n timely motion, 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.” Furthermore, “[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. Civ. R. P. 24(c).

Mrs. DeCarlo satisfies the requirements for permissive intervention. As demonstrated above, the application for intervention is timely, filed well in advance of any decisions on the merits. Mrs. DeCarlo will also raise common questions of law and fact with those asserted by the original parties. Specifically, as a member of the class of persons the legislative and executive branches intended to protect from discrimination, and as someone with a pending investigation under the Implementing Regulation, Mrs. DeCarlo will seek to defend the Implementing Regulation’s constitutionality against Plaintiffs’ claims, arguing that it was authorized by underlying statutes, properly promulgated under the APA, and valid under the Constitution. Mrs. DeCarlo also intends to assert her own First Amendment rights in response to Plaintiffs’ contentions they have the sovereign police power to force persons such as Mrs. DeCarlo to provide abortions; assist in, refer for, or train for abortions. States’ Compl. ¶ 20. These defenses arise directly from Plaintiffs’ assertions in their Complaint. *Id.* Furthermore, Mrs. DeCarlo’s knowledge of her own experience of having her rights under the Implementing Regulation and its underlying statutes blatantly violated would provide this Court a perspective it might not otherwise hear, and might aid the Court in the disposition of this case. Thus, should the Court not grant Mrs. DeCarlo’s motion for intervention as of right, Mrs. DeCarlo respectfully requests that

the Court exercise its discretion to grant her permissive intervention pursuant to Fed. R. Civ. P. 24(b).

CONCLUSION

For the foregoing reasons, the Court should grant Mrs. DeCarlo's motion to intervene as of right, or in the alternative grant her motion for permissive intervention.

DATED: This 10th day of December, 2010.

PROPOSED DEFENDANT- INTERVENOR,
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by and through counsel.

s/ Andrew S. Knott

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