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

STATE OF CALIFORNIA, Ex Rel. BILL LOCKYER, In His Official Capacity as Attorney General of the State of California; and JACK O'CONNELL, In His Official Capacity as the State Superintendent Of Public Instruction, Plaintiffs, *vs.* UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF LABOR; ELAINE CHAO, In Her Official Capacity as	Civil Action No.: C-05-00328 JSW NOTICE OF MOTION AND MOTION TO INTERVENE AS PARTY DEFENDANTS; MEMORANDUM OF POINTS AND AUTHORITIES Date: October 14, 2005 Time: 9:00 a.m. Hon. Jeffrey S. White Complaint Filed: January 25, 2005

the Secretary of Labor; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; TOMMY G. THOMPSON, In His Official Capacity as the Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF EDUCATION; and MARGARET SPELLINGS, In Her Official Capacity as the Secretary of Education,

Defendants,

and

CHRISTIAN MEDICAL ASSOCIATION, a Non-Profit Medical Association, On Behalf of Its Individual Members; AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLO-GISTS, a Non-Profit Medical Association, on Behalf of Its Members; and FELLOWSHIP OF CHRISTIAN PHYSICIAN ASSISTANTS, a Non-Profit Professional Membership Association, on Behalf of Its Members,

Proposed Defendant-Intervenors.

TO ALL PARTIES AND THEIR COUNSEL:

PLEASE TAKE NOTICE THAT, on October 14, 2005, at 9:00 a.m. or as soon thereafter as the matter may be heard, at the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, 17th Floor, Courtroom 2, before the Honorable Jeffrey S. White, Proposed Defendant-Intervenors CHRISTIAN MEDICAL ASSOCIATION ("CMA"), AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS ("AAPLOG"), and FELLOWSHIP OF CHRISTIAN PHYSICIAN ASSISTANTS ("FCPA") will move this Honorable Court for leave to intervene in this case as party Defendants.

Applicants' Motion is based on this Notice of Motion and Motion; the Memorandum of Points and Authorities; the Declarations of David Stevens, M.D., M.A., Joe DeCook, M.D., and

Wayne VonSeggen, PA-C in Support of the Motion to Intervene; all pleadings and other documents filed in this case; and any and all arguments of counsel.

DATED: June 16, 2005.

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MOTION TO INTERVENE

COME NOW, Proposed Defendant-Intervenors CHRISTIAN MEDICAL ASSOCIATION ("CMA"), AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS ("AAPLOG"), and FELLOWSHIP OF CHRISTIAN PHYSICIAN ASSISTANTS ("FCPA"), pursuant to FED. R. CIV. P. 24(a) and (b) and LOCAL CIVIL RULE 7-2 of this Court, and hereby move for leave to intervene as party Defendants in the above-captioned case. In support of this motion, Applicants rely on the accompanying points and authorities, argument and attached declarations and exhibits.

MEMORANDUM OF POINTS AND AUTHORITIES

Applicants are nonprofit membership associations of health care professionals whose members, individual physicians, nurses, and other healthcare professionals are among the class of beneficiaries whose right of conscience the United States Congress intended to protect by enacting the Weldon Amendment, the statute which is the subject of this action. Sec. 508(d) of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2005 (herein the "Act" or the "Weldon Amendment"). Thus, the Applicants have an interest in defending the Act's conscience protections against the present facial attack and are consequently intervenors as of right pursuant to FED. R. CIV. P. 24(a)(2). The disposition of this action may, as a practical matter, impair or impede Applicants' ability to protect these interests. FED. R. CIV. P. 24(a)(2). Moreover, Applicants' interests may not be adequately represented by existing parties to this case. *Id*.

In the alternative, Applicants seek permissive intervention pursuant to FED. R. CIV. P. 24(b)(2). Applicants' defenses and the present action share common questions of law and fact; their participation will not delay or prejudice the adjudication of the rights of the parties; and this motion to intervene is timely. FED. R. CIV. P. 24(b)(2).

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Statement of Facts

In support of their Motion to Intervene, Applicants allege and aver as follows:

1. Applicant Christian Medical Association ("CMA") is a national organization of Christian physicians, with over 16,000 members. The CMA also has associate members who are members of allied healthcare professions, including nurses and physician assistants. The Christian Medical Association is opposed to the practice of abortion as contrary to scripture and traditional, historical, and Judeo-Christian medical ethics. CMA has advocated strongly for conscience protections for healthcare professionals who refuse to provide or refer for abortions. A number of CMA's members practice medicine within the State of California, and are protected by the Weldon Amendment from discrimination because they refuse to provide abortions or abortion referrals in most circumstances. Declaration of David Stevens, M.D., M.A., ¶¶ 3–5.

2. Applicant American Association of Pro Life Obstetricians and Gynecologists ("AAPLOG") is a national organization of over 2,000 obstetricians and gynecologists who reaffirm the unique value and dignity of individual human life in all stages of growth and development from conception (*i.e.*, fertilization) onward. AAPLOG is opposed to the practice of abortion and has advocated for conscience protections for physicians who oppose the practice of abortion. A number of AAPLOG's members practice medicine within the State of California, and are protected by the Weldon Amendment from discrimination because they refuse to provide abortions or abortion referrals in most circumstances. Declaration of Joe DeCook, M.D., ¶¶ 4–7.

3. Applicant Fellowship of Christian Physician Assistants ("FCPA") is a national fellowship of Christian physician assistants with over 600 members, and is a recognized caucus of the American Academy of Physician Assistants. FCPA is opposed to the practice of abortion. A number of FCPA's members practice medicine under the supervision of licensed physicians

within the State of California, and are protected by the Weldon Amendment from discrimination because they refuse to provide abortions or abortion referrals. Declaration of Wayne VonSeggen, PA-C, ¶¶ 4–6.

4. The State of California's Reproductive Privacy Act provides that "The state may not deny or interfere with a woman's right to choose or obtain an abortion prior to viability of the fetus, or when the abortion is necessary to protect the life or health of the woman." Reproductive Privacy Act, CA. HEALTH & SAFETY CODE § 123466. *See also id.*, Secs. 123462(b) ("Every woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion, except as specifically limited by this article."); and 123462(c) ("The state shall not deny or interfere with a woman's fundamental right to choose to bear a child or to choose to obtain an abortion, except as specifically permitted by this article.").

5. Pursuant to the Reproductive Privacy Act, California places no restrictions upon the availability of abortion prior to viability, except that an abortion must be performed and/or assisted by a health care provider authorized to do so pursuant to CA. BUSINESS & PROFESSIONS CODE § 2253. *See generally* CA. HEALTH & SAFETY CODE § 123460 *et seq.*; *id.*, Secs. 123466 ("The state may not deny or interfere with a woman's right to choose or obtain an abortion prior to viability of the fetus…."); and 123468(a) (abortion unauthorized if not performed or assisted by authorized health care provider).

6. After viability, the Reproductive Privacy Act permits surgical abortion by an "authorized" health care provider through full term, under two circumstances. *See* CA. HEALTH & SAFETY CODE § 123460 *et seq*. First, a post-viability abortion is authorized where the physician lacked a good faith medical judgment that the fetus was viable, *i.e.*, the physician did not know the fetus was viable. *Id.*, Sec. 123468(b)(1). Second, where the physician knew the

fetus was viable, an abortion is nonetheless authorized if the physician lacked a good faith medical judgment that "continuation of the pregnancy posed *no risk* to life or health of the pregnant woman." *Id.*, Sec. 123468(b)(2) (emphasis added).

7. Medical authorities agree that *some* risk to the life or health of the mother inevitably accompanies the carrying and/or delivery of a fetus from the stage of viability through full term. Therefore, a physician can virtually always certify that continuation of a pregnancy poses *some* risk to the mother's life or health. Moreover, California defers to the good faith judgment of a woman's treating physician in determining whether a post-viability abortion is "necessary to protect the life or health" of the mother. *Id.* (requiring "good faith medical judgment"). Accordingly, even in circumstances in which the physician knew that the fetus was viable, the Reproductive Privacy Act places no real limit on the availability of abortion.

8. By permitting State interference with abortion after viability only in circumstances when "the abortion is necessary to protect the life or health of the woman," *id.*, Sec. 123466, and predicating the legality of all post-viability abortions upon the existence of *some* risk (however quantified) to the mother's life or health, *id.*, Sec. 123468(b), the State of California has effectively characterized all legal post-viability abortions as "medically necessary" abortions. *Cf. People v. Belous*, 71 Cal.2d 954, 458 P.2d 194 (1969) ("If the fact of ill health or the mere 'possibility' of suicide is sufficient to meet the test of 'necessary to preserve her life,' it is clear that a showing of immediacy or certainty of death is not essential for a lawful abortion.").

9. Plaintiff Lockyer is the chief law officer of the State of California. Complaint for Declaratory and Injunctive Relief, at 4, ¶ 5. The Attorney General alleges in his Complaint that "The Weldon Amendment contains no express exception for situations where the life or health of the woman is *at risk*," *id.*, at 6, ¶ 13, closely tracking the "some risk" standard of CAL.

HEALTH & SAFETY CODE § 123468(b)(2) and equating the presence of any risk in carrying a fetus to term with "necessary" abortions. *Cf.* Complaint, at 6, ¶ 13 ("the Amendment represents an illegitimate attempt to deter states from protecting the constitutional right of women to choose to obtain abortions that are necessary to protect their lives or health"); *id*., at 12, ¶ 19 (same).

10. Plaintiff Lockyer alleges that "Unless this court finds that the Weldon Amendment impliedly contains the medical emergency exception that exists under California law, the amendment will coerce California to refrain from taking disciplinary action, pursuant to the State's police powers, against a … health care professional who refuses to provide medically necessary emergency abortion services." Complaint, at 2.

11. Upon information and belief, and based upon the Attorney General's representations in this litigation, the State of California reserves the right to seek disciplinary action against any qualified health care worker, including proposed Intervenors' members, who refuses to provide abortion services or abortion referrals for any abortion that the maternal patient's physician certifies is "medically necessary."

12. As the Attorney General notes, California law provides that "No employer or other person shall require a physician, a registered nurse, a licensed vocational nurse, or any other person employed or with staff privileges at a hospital, facility, or clinic to directly participate in the induction or performance of an abortion" if the individual has filed a written statement indicating their refusal, Complaint, at 13, ¶ 22 (quoting CAL. HEALTH & SAFETY CODE § 123420(a)); however, this right of refusal "shall not apply to medical emergency situations…." *Id*., quoting CAL. HEALTH & SAFETY CODE § 123420(a).

13. CAL. HEALTH & SAFETY CODE § 1317 provides, *inter alia*, that "Emergency services and care shall be provided to any person requesting the services… for any condition in which the

person is in danger of loss of life, or serious injury or illness, at any health facility licensed under this chapter that maintains and operates an emergency department to provide emergency services to the public when the health facility has appropriate facilities and qualified personnel available to provide the services or care." Sec. 1317(a). If a health facility does not maintain an emergency department, the Act requires its employees to "exercise reasonable care to determine whether an emergency exists and … direct the persons seeking emergency care to a nearby facility which can render the needed services, and … assist the persons seeking emergency care in obtaining the services, including transportation services, in every way reasonable under the circumstances." Sec. 1317(e). Proposed Intervenors' members include California physicians, surgeons, nursing professionals and other health care workers who are "qualified personnel" to provide emergency medical care or transfer services within the meaning and scope of Secs. 1317(a) and 1317(e), *infra*.

14. CAL. HEALTH & SAFETY CODE § 1317.1(a)(1) defines "emergency services and care" to include medical screening, examination and evaluation by a physician or lawfully authorized personnel to determine if an "emergency medical condition or active labor" exists, and if so, "the care, treatment, and surgery by a physician necessary to relieve or eliminate the emergency medical condition…."

15. CAL. HEALTH & SAFETY CODE § 1317.1(b) defines "emergency medical condition" to mean "a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in any of the following…."

> (1) Placing the patient's health in serious jeopardy.
> (2) Serious impairment to bodily functions.
> (3) Serious dysfunction of any bodily organ or part.

Thus, the definition of "emergency services and care" contained within Secs. 1317 and 1317.1 contemplates only acute physical conditions that imminently jeopardize a patient's life or health.

16. The proposed Intervenors' members do not object to providing emergency services and care in circumstances involving cases of "emergency medical conditions," as that term is defined in CAL. HEALTH & SAFETY CODE § 1317.1, or in cases of truly "medically necessary abortions," as that term is defined in, for example, CAL. PENAL CODE § 187(b)(2) (a "medically necessary abortion" is one performed by a licensed surgeon in a case where childbirth would at least more likely than not lead to the death of the mother). *Cf. Wheeler v. Barker*, 92 Cal.App.2d 776, 785 (1949); 60 OPS. CAL. ATTY. GEN. 382 (1977), quoting *Wheeler, id.,* ("[a] medical emergency has been defined as an 'unforeseen combination of circumstances which calls for immediate action"). However, Defendant-Intervenors' members possess a conscientious objection to providing abortions or abortion referrals for therapeutic abortions recommended by a physician under the authority of the Reproductive Privacy Act to preserve the "life or health" of the mother from any degree of "risk" to her, however quantified.

17. The Attorney General notes that "The State of California, through its state agencies, has the discretion under state law to take disciplinary action against… health care professionals who refuse to provide abortion related services in emergency situations *where such services are necessary to protect the life or health of a woman*." Complaint, at 15, ¶ 26 (emphasis added). Consequently, General Lockyer has affirmed the State's intention to consider regulatory action against health care professionals such as Defendant-Intervenors' members if they refuse to provide abortion services when such services are deemed "necessary to protect the life or health of a woman," as the State interprets that phrase. *Id*.

18. The Attorney General has thus placed Defendant-Intervenor's members and other similarly situated health care workers in the position of either declining to provide emergency services and care or transfer services to women seeking therapeutic abortions and thereby risking regulatory or criminal action against them, or foregoing their constitutional, statutory and ethical rights to decline participation in procedures that violate their conscience.

19. Applicants seek to intervene in this case to defend their members' rights of conscience under the Weldon Amendment and their rights under federal and state constitutions and statutes not to be forced by Plaintiff's members to provide abortions or abortion referrals against their sincere religious, conscientious, and ethical objections to this practice. Should the Court declare the Weldon Amendment unconstitutional and/or enjoin its implementation and enforcement, Applicants' members would be subjected to the imminent threat of being compelled to provide abortions or abortion referrals in all circumstances in which a treating physician certified that the abortion was "medically necessary" under the Reproductive Privacy Act. Applicants' only recourse to protect their members' interests is through intervention in this case.

SUMMARY OF ARGUMENT

The Applicants' Motion to Intervene should be granted as of right. As health care workers whose rights of conscience are protected by the subject federal statute, Applicants' members undeniably "claim an interest" in the outcome of this litigation. FED. R. CIV. PROC. 24(a). This interest would certainly be nullified, not merely "impaired," if the Court should grant the relief the Plaintiffs seek, that of enjoining enforcement of the Weldon Amendment. The Defendants' interest potentially diverge from those of Applicants', and Applicants bring to the Court their own unique perspective on the importance of the Weldon Amendment to preserving important federal and state constitutional and statutory rights. Intervention is timely,

as it is sought before the Court's determination on Defendants' motion to dismiss and should be heard by the Court before initiation of discovery. *See United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004);

Intervention is also appropriate by permission of the Court, as the Intervenors' members have claims and defenses herein that are common to those of Plaintiffs and Defendants, and the motion is timely. FED. R. CIV. PROC. 24(b)(2). *See Southern California Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002).

ARGUMENT

I. APPLICANTS ARE ENTITLED TO INTERVENE AS OF RIGHT PURSUANT TO FED. R. CIV. P. 24(A).

Federal Rule of Civil Procedure 24(a) provides that, "[u]pon timely application," a court shall permit intervention of right where "The applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." FED. R. CIV. P. 24(a)(2). Rule 24(a) is construed broadly in favor of potential intervenors. *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004); *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002). Applicants readily satisfy this test.

A. The Applicants Possess an Interest Relating to the Subject Matter of this Action.

"The requirement of a significantly protectable interest is generally satisfied when the 'interest is protectable under some law, and … there is a relationship between the protected interest and the claim at issue.'" *Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir.), *cert. denied*, 540 U.S. 1017 (2003), *quoting Sierra Club v. United States EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993). The Ninth Circuit has held that a protectable interest exists where organizational

intervenors sought to defend the constitutionality of state action that protected the interests of the organization's members. *See, e.g., Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983) (finding protectable interest by national wildlife organization in suit against the Department of the Interior challenging the creation of a wildlife habitat area); *Idaho Farm Bureau Fed. v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995) (finding protectable interest by conservation group in case brought against Fish and Wildlife Service challenging rule listing snail as endangered species).

Applicants satisfy the interest test because they are among the class of individuals the legislative and executive branches sought to protect by the enactment of the Weldon Amendment. The Applicants' individual members, physicians (including obstetricians and gynecologists), physician assistants, nurses, and other health care professionals, are specifically protected by the Weldon Amendment from discrimination imposed by state and local governments, such as the State of California and its municipal subdivisions, because they refuse to provide abortion services or referrals. It is evident that the applicants' members' interests in the conscience protections provided by the Weldon Amendment would be eliminated should this Court grant Plaintiffs the relief they seek.

Applicants also satisfy the interest test because Applicants' members possess First Amendment rights and California constitutional and statutory rights against compelled speech and to the free exercise of their religious beliefs that prohibit the Plaintiffs and their officers and employees from forcing them to provide abortion services or referrals against their religious, moral and ethical objections. Moreover, Applicants' members are protected by Title VII of the Civil Rights Act of 1964 and California state law from adverse employment practices on the basis of their religious beliefs against abortion, and are entitled to reasonable accommodation for

their religious beliefs. The Applicants' cognizable interests in protecting the rights of conscience specifically extended to them by the legislative and executive branches through the Weldon Amendment and in defending their First Amendment and Title VII 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).

B. The Applicants' Interests May Be Impaired as a Result of the Litigation

The Applicant need merely show that the disposition of the action "may as a practical matter impair or impede [its] ability to protect [its] interest." FED. R. CIV. P. 24(a)(2). This requirement also is to be construed liberally. "If any 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. *United States v. City of Los Angeles*, 288 F.3d 391, 399 (9th Cir. 2002) ("Whether an applicant's interest would be impaired by disposition of a lawsuit depends on the range of dispositions open to a court about which an applicant is entitled to be concerned, not the specific disposition the original parties are seeking to have a court approve."), quoting *Brennan v. Conn. State UAW Cmty. Action Program Council*, 60 F.R.D. 626, 631 (D.Conn. 1973); *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) ("We follow the guidance of Rule 24 advisory committee notes that state that '[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene."), quoting FED. R. CIV. P. 24(a)(2), Advisory Committee Note.

The Ninth Circuit has found an impairment of interest in similar situations. *See, e.g., Sagebrush Rebellion*, 713 F.2d at 525 (finding potential impairment of interest by national wildlife organization seeking to intervene as defendants in a suit brought against the Department

of the Interior challenging the creation of a wildlife habitat area); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995) (finding potential impairment of interest by environmental group seeking to intervene as defendants in a suit brought by companies against Fish & Wildlife Service challenging its categorization of a certain snail as an endangered species).

Applicants easily satisfy the impairment of interests test because their members' interests in their rights under the Weldon Amendment might be eliminated and their constitutional and statutory rights impeded by the Court's disposition of this action. Plaintiff seeks a declaratory judgment that the Weldon Amendment is unconstitutional and injunctive relief prohibiting its implementation and enforcement. Complaint, at 21-22. Should the Court order the relief sought by Plaintiffs in this action, Applicants' Weldon Amendment protections from discrimination perpetrated or permitted by the State of California or its municipal subdivisions would be nullified, subjecting them to the imminent threat of being forced to provide abortions or abortion referrals despite their religious, moral, and ethical objections to the practice of abortion. This potential elimination of the Weldon Amendment's prohibition on discrimination satisfies the impairment of interest requirement of Rule 24(a)(2).

C. The Applicant's Interests are Not Adequately Represented

Three factors must be considered in determining the adequacy of representation in the context of a motion to intervene: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki*, 324 F.3d at 1086, citing *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986). Although the Applicants share some interests with the existing Defendants, the divergence in

their interests is more than sufficient to satisfy Rule 24(a)(2)'s requirement that the Applicants' interests might not be adequately represented in this litigation. The government defendants in this case are charged with protecting a broader public interest that might not be consistent with the Applicants' interests. For instance, the Defendants may have an interest in minimizing the impact of the Weldon Amendment on California's interests, either by arguing that the Amendment contains an implicit exception for "medical emergencies" as the State of California defines that term, or because enforcement under certain circumstances is not contemplated. Defendant-Intervenors' interest, on the other hand, is in ensuring that the Court and parties clarify the meaning of Plaintiffs' terms relating to "medical emergencies" in such a way as to preserve Applicants' members' right not to participate in therapeutic abortions, as opposed to abortions that are truly medically necessary. In *Sagebrush Rebellion*, *supra*, the court held that although the Department of the Interior and the Audobon Society maintained the same ultimate interest in the preservation of a wildlife conservation area, the Department did not adequately represent the Audobon Society's interests because it did not offer the same "perspective." *Id*., at 528. Likewise, in this action, the Defendants certainly approach the defense of the Weldon Amendment from a different "perspective" than that of Applicants, and intervention accordingly should be granted.

D. The Applicants' Motion is Timely

The Ninth Circuit has instructed that the Court must consider three factors in determining whether a motion to intervene is timely: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Alisal Water Corp*., 370 F.3d at 921, quoting *California Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc*., 309 F.3d 1113, 1119 (9th Cir. 2002). However,

"timeliness is a flexible concept" and "its determination is left to the district court's discretion." *Alisal Water Corp.*, 370 F.3d at 921, citing *Dilks v. Aloha Airlines*, 642 F.2d 1155, 1156 (9th Cir. 1981).

Applicants seek to intervene in this action as early as would be non-prejudicial to the original parties in order to represent the federal constitutional and statutory rights of their members and are ready and willing to participate as a party defendant in the hearing on Defendants' Motion to Dismiss set for Friday, June 24, 2005. *Nikon Corp v. ASM Lithography B.V.*, 222 F.R.D. 647, 649 (N. D. Cal. 2004) (finding a motion to intervene timely where the motion "comes during the discovery phase of this protracted litigation, a period well before the court has addressed any of the parties' many anticipated dispositive motions"). The Ninth Circuit has held intervention permitted after much longer periods. *See, e.g., United States v. Carpenter*, 298 F.3d 1122 (9th Cir. 2002) (allowing intervention where motion filed 18 months after complaint); *Dilks, supra*, 642 F.2d at 1156 (motion filed 18 months after complaint deemed timely). Thus, because Applicants' intervention would require no delay in the proceedings before the Court, and because the major issues in this case are still to be determined, intervention would not be prejudicial to the existing parties.

II. ALTERNATIVELY, APPLICANTS SHOULD BE GRANTED LEAVE TO INTERVENE PURSUANT TO FED. R. CIV. P. 24(B).

Federal Rule of Civil Procedure 24(b)(2) provides for permissive intervention, upon timely motion, "when an applicant's claim or defense and the main action have a question of law or fact in common." In exercising its discretion to permit a party to intervene under this rule, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." FED. R. CIV. P. 24(b)(2); *cf. Southern California Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002), quoting *City of Los Angeles*, 288 F.3d at 403

(permissive intervention allowed where potential intervenor shows "(1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common"). A significant protectable interest is not required by Rule 24(b). Rather, the Court need only find that the intervenor's "claim or defense and the main action have a question of law or fact in common." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1107 n.7 (9th Cir. 2002).

Applicants satisfy the requirements for permissive intervention. As demonstrated above, the application for intervention is timely, filed shortly before the hearing on Defendants Motion to Dismiss and the preliminary Case Management Conference, both set for June 24, 2005, and well before the initiation of discovery and any decision on the merits. The Applicants will also raise common questions of law and fact with those asserted by the original parties. Specifically, as members of the class of persons the legislative and executive branches intended to protect from discrimination by state and local government entities, Applicants will seek to defend its constitutionality against Plaintiffs' claims, arguing that the Weldon Amendment is not an unconstitutional exercise of Congress' Spending Clause authority. Applicants also intend to assert their own constitutional and statutory rights of conscience in response to Plaintiffs' apparent position that its members' rights not to participate in abortion must yield whenever a physician certifies that an abortion is a "medical necessity." Thus, should the Court not grant Applicants' motion for intervention as of right, Applicants respectfully request that the Court exercise its discretion to grant them permissive intervention pursuant to FED. R. CIV. P. 24(b).

CONCLUSION

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

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion to Intervene was served via the electronic case filing system on the following persons:

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This 16th day of June, 2005.

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