IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
HARTFORD DIVISION

PLANNED PARENTHOOD OF AMERICA, INC., and PLANNED PARENTHOOD OF CONNECTICUT, INC.,	)	CIVIL ACTION NO. 3:09-CV-057-RNC
Plaintiffs,	)	BRIEF IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS
vs.	)	January 22, 2009
MICHAEL O. LEAVITT, Secretary of the United States Department of Health and Human Services, in his official capacity,	)	ORAL ARGUMENT REQUESTED
Defendants,	)	
and	)	
CHRISTIAN MEDICAL ASSOCIATION, on behalf of its members, and	)	
AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS, on behalf of its members, and	)	
CATHOLIC MEDICAL ASSOCIATION, on behalf of its members,	)	
Proposed Defendant-Intervenors.	)	

BRIEF IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

COME NOW Proposed Defendant-Intervenors the Catholic Medical Association ("Catholic Medical") the Christian Medical Association ("Christian Medical") and American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG") (collectively the "proposed defendant-intervenors" or "applicants"), and submit this Brief in Support of Motion to Intervene as Defendants in the above-captioned case.

CORPORATE DISCLOSURE STATEMENT

The Catholic Medical Association, the Christian Medical Association and the American Association of Pro-Life Obstetricians and Gynecologists are each non-profit professional membership organizations and there are no parent companies, subsidiaries, or affiliates of the above non-profit organizations that have any outstanding securities in the hands of the public.

STATEMENT REGARDING ORAL ARGUMENT

Applicants request oral argument in this case. This case presents important issues of broad public importance regarding the ability of public interest groups to intervene to defend federal statutes which protect the constitutional and statutory rights of their members and for which the organizations have advocated. 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 Applicants' interests and the complexity of the legal issues present in this case, Applicants believe that oral argument will be necessary to address these matters thoroughly. Accordingly, Applicants respectfully request that this Court set this motion for oral argument.

INTRODUCTION

Applicants seek to intervene in this case to defend their members' rights of conscience under the rule, Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, and their rights under the First Amendment and state and federal employment nondiscrimination provisions. They seek to defend their members' right not to be forced by the federal government and certain federal grantees to provide, assist in, refer for, or train for abortions; against their sincere religious, conscientious, and ethical objections to this practice. Should the Court declare the Implementing Regulation unconstitutional and/or enjoin its implementation and enforcement, Applicants' members would be subjected to the imminent threat of being compelled to provide, assist in, refer for, or train for abortions; ordered by governmental or other federally funded employers and licensing and credentialing bodies. Applicants' only recourse to protect its members' paramount interests is through intervention in this 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) (to be codified at 45 C.F.R. p. 88), 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, Planned Parenthood Federation of America and its Connecticut chapter, brought the instant action against 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. PPFA Compl. ¶ 4. Planned Parenthood Plaintiffs claim that the Implementing Regulation suffers from a number of deficiencies, including that it violated the APA because HHS failed to respond adequately to comments in making this rule and because the underlying statutes do not authorize this rule, that HHS failed to conduct an adequate cost-benefit analysis, that the rule's requirement of religious accommodation violates the First Amendment, that the vagueness of the rule violates due process, and that the rule interferes with patients' right to abortion. PPFA Compl. ¶¶ 110-19.

INTERVENORS' INTERESTS

THE CATHOLIC MEDICAL ASSOCIATION

The Catholic Medical Association is a nonprofit national organization of Catholic physicians and allied healthcare professionals with over 1,100 members. Decl. of Louis Breschi, ¶ 3. In addition to Catholic Medical's physician members, it also has associate members from a number of allied healthcare professions, including nurses and physician assistants. *Id.* at ¶ 3. Some Catholic Medical members are employed by, licensed by, or hold credentials with government or other agencies, institutions and organizations which receive federal funding from the Department of Health and Human Services, as well as from the Departments of Labor and/or Education. *Id.* at ¶ 4. As such, these agencies, institutions, and organizations are prohibited by federal law, including the Church Amendments, the Public Health Service Act, and the Weldon Amendment, from discriminating against Catholic Medical's members because they refuse to

provide or refer for abortions, and would be required by 45 C.F.R. Part 88 to certify compliance with the above statutes. *Id.* at ¶ 4. Catholic Medical is opposed to the practice of abortion as contrary to the teaching and tradition of the Catholic Church, to respect for the sanctity of human life, to traditional Judeo-Christian medical ethics, and to the good of patients. *Id.* at ¶ 5. Catholic Medical's members are committed to the sanctity of human life and it would violate their consciences to participate in or refer for abortions. *Id.* at ¶ 6. It is likely that if Catholic Medical's members are forced or coerced to perform or assist in abortions or other unethical actions in violation of their consciences, they would leave the profession or relocate from those jurisdictions compelling them to do so instead of performing or referring for abortions. *Id.* at ¶ 6. Many Catholic Medical members are providers in rural or remote areas. *Id.* Forcing such persons from those areas or out of the medical profession altogether would leave these populations unserved or underserved. *Id.* Catholic Medical has actively sought conscience protections for its members and other healthcare professionals who might otherwise be forced by state and local laws or regulations or by their employers to provide or refer for abortions by, among other things, providing public comment to the Department of Health and Human Services prior to its issuance of the new provider conscience rule now found in 45 C.F.R. Part 88. *Id.* at ¶ 7. Catholic Medical will continue to be an advocate for rights of conscience for its own members and all medical professionals in courts and legislatures both at the state and federal levels. *Id.*

THE CHRISTIAN MEDICAL ASSOCIATION

The Christian Medical Association is a nonprofit national organization of Christian physicians and allied healthcare professionals with over 16,000 members. Decl. of David Stevens, ¶ 3. Some Christian Medical members are employed by, licensed by, or hold

credentials with government or other agencies, institutions and organizations who receive federal funding from the Department of Health and Human Services, as well as from the Departments of Labor and/or Education. *Id.* at ¶ 4. As such, these agencies, institutions, and organizations are prohibited by federal law, including the Church Amendments, the Public Health Service Act, and the Weldon Amendment from discriminating against Christian Medical's members because they refuse to provide or refer for abortions, and would be required by 45 C.F.R. Part 88 to certify compliance with the above statutes. *Id.* In addition to Christian Medical's physician members, it also has associate members from a number of allied healthcare professions, including nurses and physician assistants. *Id.*

Christian Medical is opposed to the practice of abortion as contrary to Scripture, a respect for the sanctity of human life, and traditional, historical and Judeo-Christian medical ethics. *Id.* at ¶ 5. Christian Medical's members are committed to the sanctity of human life and that it would violate their consciences to participate in or refer for abortions. *Id.* at ¶ 6. It is likely that if Christian Medical's members are forced or coerced to perform or assist in abortions in violation of their consciences, they would leave the profession or relocate from those jurisdictions compelling them to do so instead of performing or referring for abortions. *Id.* Many Christian Medical members are providers in rural or remote areas. *Id.* Forcing such persons from those areas or out of the medical profession altogether would leave these populations unserved or underserved. *Id.* Christian Medical has actively sought conscience protections, including 45 C.F.R. Part 88, for its members and other healthcare professionals who might otherwise be forced by state and local laws or regulations or by their employers to provide or refer for abortions. *Id.* at 7.

THE AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS

The American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG") is one of the largest special interest groups within the American College of Obstetricians and Gynecologists, Decl. of Donna Harrison, ¶ 3, with at least six hundred (600) dues-paying members and over fifteen hundred (1,500) doctors associated with the organization. *Id.* at ¶ 5. AAPLOG members affirm the following Mission Statement:

> a. That we, as physicians, are responsible for the care and well being of both our pregnant woman patient and her unborn child.
>
> b. That the unborn child is a human being from the time of fertilization.
>
> c. That elective disruption/abortion of human life at any time from fertilization onward constitutes the willful destruction of an innocent human being, and that this procedure will have no place in our practice of the healing arts.
>
> d. That we are committed to educate abortion-vulnerable patients, the general public, pregnancy center counselors, and our medical colleagues regarding the medical and psychological complications associated with induced abortion, as evidenced in the scientific literature.
>
> e. That we are deeply concerned about the profound, adverse effects that elective abortion imposes, not just on the women, but also on the entire involved family, and on our society at large.

Id. at ¶ 4.

AAPLOG and its members oppose the practice of abortion for a variety of reasons, including religious and moral beliefs and the belief that the practice of abortion is inconsistent with professional medical ethics. *Id.* at ¶ 5. One of AAPLOG's primary purposes is to reaffirm the unique value and dignity of individual human life in all states of its development and subsequent course from the moment of conception. *Id.* at ¶ 6. To this end, AAPLOG sponsors and conducts research and educational programs consistent with this purpose. *Id.* AAPLOG is also deeply committed to defending the right of conscience of doctors, including its members,

not to perform, refer for or to otherwise assist in the practice of abortion. *Id.* at 7. Because government licensing and federal funding (including funding from the Department of Health and Human Services, as well as from the Departments of Labor and/or Education) are ubiquitous in the practice of medicine, virtually all AAPLOG members who practice obstetrics and gynecology hold credentials with government entities and/or work for or hold credentials from public or private entities that receive federal funds. *Id.* at 8. Federal law – including the Church Amendments, the Public Health Service Act, and the Weldon Amendment – prohibits licensing entities, accrediting entities, and employers that receive federal funds from discriminating against AAPLOG's members for refusing to provide or to refer for abortions. *Id.* The foregoing public and private entities would be required by 45 C.F.R. Part 88 to certify compliance with the above statutes. *Id.* AAPLOG's members are committed to the sanctity of human life and that it would violate their consciences to participate in or refer for abortions. *Id.* at ¶ 9. It is likely that if AAPLOG members are forced or coerced to perform or assist in abortions in violation of their consciences, they would leave the profession or relocate from those jurisdictions compelling them to do so instead of performing or referring for abortions. *Id.* at ¶ 9. Many AAPLOG members are providers in rural or remote areas. Forcing such persons from those areas or out of the medical profession altogether would leave these populations unserved or underserved. *Id.* at ¶ 9. AAPLOG has actively sought conscience protections, including 45 C.F.R. Part 88, for its members and other healthcare professionals who might otherwise be forced by state and local laws or regulations or by their employers to provide or refer for abortions. *Id.* at ¶ 10.

Both Christian Medical and AAPLOG have previously been granted intervention as of right to defend one of the underlying regulations in this case, the Weldon Amendment, in two separate facial challenges to the constitutionality of that statute. *California ex. rel. Lockyer v.*

United States, 450 F.3d 436, 445 (9th Cir. 2006); *Nat'l Family Planning & Reproductive Health Ass'n v. Gonzales*, 468 F.3d 826, 827 (D.C. Cir. 2006) (listing Christian Medical and AAPLOG as appellees); *Nat'l Family Planning & Reproductive Health Ass'n*, No. 04-02148 (D. D.C. Sept. 28, 2005) (order granting motion of Christian Medical and AAPLOG to intervene as of right).

ARGUMENT

I. PROPOSED DEFENDANT-INTERVENORS ARE NOT REQUIRED TO SHOW STANDING; HOWEVER, THEY HAVE ASSOCIATIONAL STANDING TO INTERVENE AS DEFENDANTS.

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 Applicants to show that they have standing to intervene as defendants, Applicants readily satisfy the requirements of associational standing for the reasons stated below.

As the Second Circuit has stated, an association

> has standing as an association to bring suit in its own name on behalf of its members if: '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'

Bldg. and Constr. Trades Council of Buffalo, N.Y. and Vicinity v. Downtown Dev., 448 F.3d 138, 144 (2d Cir. 2006) (quoting *Hunt v. Wash. State Apple Adver. Com'n,* 432 U.S. 333, 343 (1977)). First, for the reasons discussed below, the individual physicians, nurses, physician assistants and other healthcare professionals who are Applicants' members are entitled to intervene in the instant action to defend their rights under the Implementing Regulation as well as to prevent the impairment of their First Amendment and federal and state statutory rights that might be compromised by the disposition of this action. Second, the interests the Applicants seek to advance are the protection of the rights of conscience of their members not to be discriminated against because they refuse to provide abortion, refer for abortion, assist in abortion, or to train for abortion. Applicants have long advocated for conscience protections like that at stake in this case, and thus the issues in this case lie at the heart of the Applicants' purposes. Breschi Decl. ¶ 7; Harrison Decl. ¶ 10; Stevens Decl. ¶ 7. *See, e.g.,* The Linacre Institute of the Catholic Medical Association, Bioethical Principles of Medical Practice, http://www.cathmed.org/publications/bioethical.htm (last visited Jan. 20, 2009) ("The patient's autonomy does not supersede the conscience of the physician. Therefore, the physician must be free to refuse to participate in immoral procedures, and free to refuse to refer to other providers who might be willing to perform such procedures."); Christian Medical & Dental Associations, Healthcare Right of Conscience, http://www.cmda.org/AM/Template.cfm?Section=Right_of_Conscience (last visited Jan. 20, 2009) ("Issues of conscience arise when some aspect of medical care is in conflict with the personal beliefs and values of the patient or the healthcare professional. CMDA believes that in such circumstances the Rights of Conscience have priority."); AAPLOG, Physician Conscience Rights, http://www.aaplog.org/rightofconscience.aspx (last visited Jan. 20, 2009) ("AAPLOG is

committed to the individual right of conscience for each physician, especially in decisions involving moral values.”). Third, the defense of the Applicants’ members’ rights does not require the members’ actual personal participation. Thus, the Applicants have associational standing to assert the interests of their individual members in this action.

II. APPLICANTS ARE 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, Applicants readily satisfy this test.

A. Applicants’ Motion is Timely Because It Was Promptly Filed Before Any Substantive Motions Were Granted or Responsive Pleadings Were Due.

Applicants’ 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). Applicants have promptly filed their motion to intervene a few days after Plaintiffs filed their complaint, before any substantive motions have been filed in this case, and before any responsive pleading has been submitted by or is even due from Defendants. Applicants do not intend to seek any delay in the case. Thus, this motion will cause neither prejudice to the existing parties or any delay in these proceedings. Moreover, denial of the motion will prejudice Applicants 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. Applicants Have Sufficient Interests Relating to the Subject Matter of this Action Because A Grant of Relief to Plaintiffs Threatens Their Rights of Conscience.

In a closely analogous case, the Second Circuit has ruled that a professional medical association has intervention of right in a legal challenge to a medical regulation affecting its members. *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] h[e]ld that it 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 (citations omitted), and are "sufficient to support intervention of right." *Id.* (citing *N.Y. Pub. Interest Research Group*, 516 F.2d at 351-52).

Likewise, should Plaintiffs succeed here, there would be substantial changes in the medical professions and the way medical professionals "conduct their business," including elimination or weakening of protections for medical professionals' rights not to be compelled to perform, refer for, or assist in abortions. *Id.* Further, Applicants' members have substantial economic interests at stake because they may be forced to relocate to jurisdictions that respect

their rights or to leave the profession altogether should they be compelled to perform, refer for, assist in, or train for abortions as Plaintiffs desire. Stevens Decl. ¶ 6; Harrison Decl. ¶ 9; Breschi Decl. ¶ 6. Since many of Applicants' members are providers in rural or remote areas, their absence from those areas or from the profession altogether would leave those populations unserved or underserved. Stevens Decl. ¶ 6; Harrison Decl. ¶ 9; Breschi Decl. ¶ 6. Applicants assert an interest in ensuring their members are permitted to serve these populations free of infringements on their consciences.

Applicants also have a sufficient interest because they are among the class of individuals the legislative branch sought to protect with the underlying statutes and 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, i.e. the Applicants in the instant case, 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 Regulations, "to protect health care providers like those represented by the proposed intervenors." *Lockyer*, 450 F.3d at 441. Applicants' individual members, physicians (including obstetricians and gynecologists) physician-assistants, nurses, and other health care professionals, are specifically protected by the Implementing Regulation from discrimination by federal agencies or programs or state and local governments, including some of Plaintiffs' members, because they refuse to provide abortion, refer for abortion, assist in abortion, or to train for abortion. *Id.* at § 88.2. As Planned Parenthood Plaintiffs candidly state, the regulation "allows a broadly defined group of individuals and entities to refuse to provide health care services and information." Planned Parenthood Plaintiffs Compl. ¶ 90. It is self-evident that the Applicants' members' interests in

the conscience protections provided by the Implementing Regulation would be eliminated should this Court grant Plaintiffs the relief they seek. *Lockyer*, 450 F.3d at 441.

Applicants also satisfy the interest test because the order sought by Plaintiffs could compromise their members' First Amendment free exercise and free speech and state and federal statutory rights, even leaving them subject to criminal penalties should they refuse to perform, participate in or refer for abortions. Applicants have a "sufficient" interest in protecting themselves from employment discrimination because of adherence to their consciences, since "if 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 astonishingly contend that the Implementing Regulations violate the First Amendment rights of Plaintiffs because it requires Plaintiffs' members to respect the rights of conscience of Applicant's members. PPFA Compl. ¶ 119. Plaintiffs' contentions to the contrary, Applicants' members possess First Amendment rights against compelled speech and to the free exercise of their religious beliefs that prohibit Plaintiffs' members from forcing them to provide abortions, refer for abortions, assist in abortions, or to train for abortions against their 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).

Plaintiffs have no First Amendment right to force others to speak on their behalf, but the Applicants do have First Amendment rights against compelled speech – particularly where it would violate their conscience. These rights are protected by the underlying statutes as well as the challenged Implementing Regulation. Moreover, as to both public and many private employers, including some of Plaintiffs' members, Applicants' members are protected by Title VII of the Civil Rights Act of 1964 and corollary state employment nondiscrimination statutes from adverse employment practices on the basis of their religious beliefs, and are entitled to reasonable accommodations 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 Implementing Regulations 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.

Applicants also have an interest in the Implementing Regulations 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. PPFA Compl. ¶¶ 3, 51-53, 70, 91, 97. These allegations are directed towards medical professionals including Applicants' members. Applicants should be permitted to intervene to respond to these allegations and fully develop the factual record concerning the exercise of conscience by medical professionals.

Lastly, "[a]n organization . . . has a sufficient interest to support intervention by right where the underlying action concerns legislation previously supported by the organization" where "the personal interests of its members" that are represented by the organization "would be threatened," e.g. by plaintiffs, "if the [law] is found to be invalid or unconstitutional." *Great Atlantic & Pac. Tea Co. v. Town of East Hampton*, 178 F.R.D. 39, 42 (E.D.N.Y. 1998). Applicants have consistently asserted their interest in the protection of conscience via the promulgation of the Implementing Regulation both in public statements circulated generally as well as in comments formally submitted to HHS during rulemaking. Catholic Medical, Comment on FR Doc # N/A, HHS-OS-2008-0011-4571 (Sept. 25, 2008), http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900006480722ad2 (last visited Jan. 20, 2009); Board Members of AAPLOG, Letter to OBGYN Residents, (updated Dec. 2008) http://www.aaplog.org/letter.aspx (last visited Jan. __, 2009) ("We are strongly supportive of the U.S. Dept of HHS's proposed new regulations (August, 2008) to insure conscience protection for medical professionals."); Family Research Council, Comment on FR Doc # N/A, HHS-OS-2008-0011-4924.1 (Sept. 25, 2008) http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900006480724dcb (AAPLOG is signatory) ("The health care industry urgently needs HHS to promulgate its final regulations not only to assist and ensure compliance by regulated entities but also to protect the beneficiaries' fundamental rights of religious belief and moral conviction."); Christian Medical Association, CMA Physicians Laud HHS Regulations to Protect Choice in Healthcare "Jungle of Coercion" (Aug. 21, 2008), http://www.cmda.org/AM/Template.cfm?Section=CMDA_News_Releases&Template=/CM/HTMLDisplay.cfm&ContentID=16914 ("These regulations are desperately needed to protect First

Amendment rights and implement federal law in what is becoming a jungle of coercion in healthcare."); Christian Medical, Comment on FR Doc # E8-19744, HHS-OS-2008-0011-4254.1 (Sept. 12, 2008), http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&d=HHS-OS-2008-0011-4254.1 (transcript of physicians' testimony presented to President's Council on Bioethics which "strongly support the regulation"); Christian Medical, Comment on FR Doc # E8-19744, HHS-OS-2008-0011-1498.1 (Sept. 18, 2008), http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=090000648070e1a2 (memo supporting regulation and commenting on public's lack of knowledge of conscience law); Christian Medical, Comment on FR Doc # E8-19744, HHS-OS-2008-0011-1529.1 (Sept. 19, 2008), http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=090000648070f8d8 (memo supporting regulation and commenting on educating public on conscience protections). Moreover, as stated above, Christian Medical and AAPLOG Applicants previously intervened to defend the Weldon Amendment, which is one of the underlying statutes implemented by the Implementing Regulations, in two facial challenge brought by the entities that are plaintiffs in the two cases parallel to this case.

C. The Applicants' Interests May Be Impaired By this Litigation Because Their Ability to Protect Their Rights of Conscience Will Be Impeded.

In light of the clear interest that a professional medical association has in an action challenging the validity of a medical regulation, 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, we have little difficulty concluding that the disposition of this case may, as a practical matter, affect it."). 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).

Applicants easily satisfy the impairment of interests test because their members' interests in their rights under the Implementing Regulation might be impaired and their 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, Applicants' protection from discrimination by Plaintiffs' members and others would be diminished because they would be deprived of the protections provided by the Implementing Regulation, which 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. PPFA Compl. p. 29. Such relief, if granted by this Court, would eliminate the conscience protections for Applicants' members contained in the Implementing Regulation,

subjecting them to the imminent threat of being forced by Plaintiffs, in the exercise of their police powers, to perform abortions, assist in abortions, train for abortions, and refer individuals for abortions despite their 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 state enforcement of laws infringing on conscience is certainly sufficient to show that the disposition of this case in favor of Plaintiffs will practically affect Applicants. *Lockyer*, F.3d 450 at 442. Such relief, if granted by this Court, would eliminate the conscience protections for Applicants' members contained in the Implementing Regulation, subjecting them to the imminent threat of being forced by Plaintiffs' members and others to perform abortions, assist in abortions, train for abortions, and refer individuals for abortions despite their religious, moral, and ethical objections to the practice of abortion in part due to of the lack of awareness of the conscience protections on the part of the regulated health entities and noncompliance with the protections. Implementing Regulation, 73 Fed. Reg. at 78,078. Such irregularities in compliance with the statutory protections are precisely what the Implementing Regulation aims to remedy. The potential reduction of effective implementation of the underlying statutes due to the potential increase in prohibited discrimination by government and other federal grantees against Applicants' members easily satisfies the impairment of interest requirement of Rule 24(a)(2).

Similarly, should Plaintiffs succeed in persuading this Court that its members and their employees who wish to provide abortions have a First Amendment right to require Applicants' members to provide abortion referrals on their behalf, Applicants' members would suffer an impairment of their First Amendment rights against compelled speech and of the free exercise of their religious beliefs as well as their Title VII and corollary state statutory rights of reasonable

accommodation of their religious practices. Even assuming that such an unfavorable precedent might be remedied in future litigation, a decision by this Court would substantially and detrimentally impact the Applicants' members' First Amendment and statutory rights because of the stare decisis effect of a decision invalidating the Implementing Regulation in whole or in part. *N.Y. Pub. Interest Research Group*, 516 F.2d at 352. Thus, the impairment of Applicants' interest clearly satisfies the liberal test provided by this rule, since "[i]f 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. Applicants Satisfy the Requirement of Showing Inadequate Representation by Defendants Because Their Unique Legal Arguments and Contribution to the Factual Record Warrant 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, Applicants lack adequate representation and intervention as of right is warranted because it will allow Applicants to assert their unique legal arguments and to ensure full factual development of the record.

First, it is clear that the Plaintiffs do not adequately represent the Applicants' interests. Plaintiffs seek to invalidate a federal anti-discrimination regulation specifically promulgated to

protect the Applicants' members. Moreover, Plaintiffs assert a First Amendment right for its members to force Applicants' members to provide abortions; assist in, refer for, or train for abortions, even where such activities violates the Applicants' religious, moral or ethical beliefs. Parenthood Compl. ¶ 119.

Secondly, Defendants do not adequately represent Applicants' interests. The Second Circuit found that the "likelihood" that a professional medical association "would make a more vigorous presentation of the economic side of the argument than would" the existing defendants is 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 a professional medical association diverge from those of government defendants. *Id.* Indeed, in two previous cases defending the Weldon Amendment, Christian Medical and AAPLOG 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 associations, i.e. two of the Applicants in this case, because the United States defended a narrow reading of the challenged regulation while the medical associations 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 associations 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, Applicants, as professional medical associations, are likely to advance arguments that are illuminative of the private sector health care professional perspective, in contrast to Defendant, which represents governmental interests in this regulation. As associations that are dedicated to representing the interests of pro-life healthcare professionals, Applicants are uniquely suited to give primacy to arguments that emphasize the concerns regarding conscience that make the Implementing Regulations necessary. Furthermore, in support of these arguments, Applicants have and will introduce significant factual evidence that government defendants are likely unable to produce attesting to their members' exercise of professional conscience and the impact of

granting relief to Plaintiffs' members. Stevens Decl. ¶¶ 4-7; Harrison Decl. ¶¶ 4-10; Breschi Decl. ¶¶ 4-7.

The potential that Applicants' interests will not be adequately represented is heightened by the change in administrations. *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 Applicants' interests will be inadequately represented because of President Barack Obama's consistent and vocal stance against the Implementing Regulations. Recently, President Obama's officials have stated that he intends to rescind the Implementing Regulations. Robert Pear, *Protests Over a Bush Rule To Protect Health Providers*, N.Y. Times (Nov. 18, 2008), http://query.nytimes.com/gst/fullpage.html?res=9400E4DD1338F93BA25752C1A96E9C8B63&sec=&spon=&pagewanted=all ("Aides and advisers to [President] Obama said he would try to rescind [the Implementing Regulation]."); Laura Meckler, *Bush-Era Abortion Rules Face Possible Reversal, Obama Team Looks at Regulation Set to Be Finalized This Week Letting Medical Staff Refuse to Take Part in Practices They Oppose*, Wall Street Journal, A5 (Dec. 17, 2008) http://online.wsj.com/article/SB122947155578512197.html ("Officials close to the transition have signaled that they intend to begin the regulatory process anew," i.e. to rescind the Implementing Regulation).

Then-Senator Obama expressed his consistent opposition to the Implementing Regulation on at least three other occasions. First at the close of the public comment period on the Implementing Regulation, he was a signatory to a letter submitted to the Secretary of HHS that stated, "We are writing to strongly object to [the Implementing Regulation] proposed on August

26, 2008 by the Department of [HHS] . . . . [W]e urge you to halt all efforts to move it forward." Statement, Letter from Sen. Hillary Rodham Clinton & Sen. Patty Murray to Sec. Michael O. Leavitt, (Sept. 25, 2008), http://clinton.senate.gov/news/statements/details.cfm?id=303642&& (last visited Jan. 20, 2009).

Second, Senator Obama expressed his consistent opposition to the Implementing Regulation when it was formally proposed:

> U.S. Senator Barack Obama (D-IL) today criticized the Department of Health and Human Services' decision to propose a rule that would limit the rights of patients to receive complete and accurate health information and services, particularly access to contraceptives.
>
> 'In the waning days of his administration, President Bush continues to issue policies and proposals that put politics ahead of common sense solutions that help middle class Americans in their daily lives.'
>
> 'This proposed regulation complicates, rather than clarifies the law. It raises troubling issues about access to basic health care for women, particularly access to contraceptives. We need to restore integrity to our public health programs, not create backdoor efforts to weaken them. I am committed to ensuring that the health and reproductive rights of women are protected.'

Press Release, Sen. Barack Obama, Statement of Sen. Barack Obama on Proposed HHS Rule Changes (Aug. 22, 2008), http://74.125.47.132/search?q=cache:http://obama.senate.gov/press/080822-statement_of_se_59/ (last updated Jan. 6, 2009).[1]

Third, Senator Obama promptly expressed his opposition to the Implementing Regulations even before it was formally proposed, when a draft of the Implementing Regulations was leaked to the public, when he was signatory to a letter to the Secretary of HHS which stated, "We are writing today to urge you to abandon plans to promulgate [the Implementing

[1] The website http://obama.senate.gov appears to be permanently shut down. The press release was obtained from Google Cache. *See* Note, Michael Fagan, *"Can You Do a Wayback on That?" The Legal Community's Use of Cached Web Pages in and out of Trial*, 13 B.U. J. Sci. & Tech. L. 46, 52 (2007) (Google Cache allows "searchers [to] gain access to a page through a search engine even after it had been removed from the Internet") .

Regulation]." Letter from Sen. Hillary Rodham Clinton & Sen. Patty Murray to Sec. Michael O Leavitt (July 23, 2008), http://clinton.senate.gov/news/statements/details.cfm?id=301177&& (last visited Jan. 20, 2009). Given this highly unfavorable view of the Implementing Regulation on the part of the new President, the interest of Defendants and Applicants cannot be said to be identical; indeed they appear adverse, because the views of Defendants are now more closely aligned with Plaintiffs, creating the potential for collusion. Thus, in light of President Obama's consistent and vocal opposition to the Implementing Regulations and reports of his intent to seek the rescission of the same, it is reasonable to believe that the new administration will not adequately represent the interests of Applicants.

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).

Applicants satisfy the requirements for permissive intervention. As demonstrated above, the application for intervention is timely, filed only a few days after the initiation of this action and well in advance of any decisions 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 Plaintiff's members and others, Applicants will seek to defend the Implementing Regulation's constitutionality against Plaintiff's claims, arguing that it was authorized by underlying statutes, properly promulgated under the APA, and valid under the

Constitution. Applicants also intend to assert their own First Amendment and Title VII rights in response to Plaintiff's contentions that its members have a First Amendment right to force Applicants' members to provide abortions; assist in, refer for, or train for abortions. PPFA Compl. ¶ 119. These defenses arise directly from Plaintiffs' assertions in their Complaint. *Id.* Furthermore, the Applicants' members' knowledge of their own religious and ethical views concerning abortion 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 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.

Respectfully submitted,

DATED: This 22nd day of January, 2009.

PROPOSED DEFENDANT- INTERVENORS,
CHRISTIAN MEDICAL ASSOCIATION
AMERICAN ASSOCIATION OF PRO-
LIFE OBSTETRICIANS AND
GYNECOLOGISTS, and
CATHOLIC MEDICAL ASSOCIATION

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* *Pro Hac Vice Admission Pending*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
NEW HAVEN DIVISION

NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, INC. and FAIR HAVEN COMMUNITY HEALTH CLINIC, INC.,	)	CIVIL ACTION NO. 3:09-CV-055-CFD
	)	BRIEF IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS
Plaintiffs,	)	
vs.	)	January 22, 2009
MICHAEL O. LEAVITT, Secretary of the United States Department of Health and Human Services, in his official capacity,	)	ORAL ARGUMENT REQUESTED
Defendants,	)	
and	)	
CHRISTIAN MEDICAL ASSOCIATION, on behalf of its members, and	)	
AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS, on behalf of its members, and	)	
CATHOLIC MEDICAL ASSOCIATION, on behalf of its members,	)	
Proposed Defendant-Intervenors.		

BRIEF IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

COME NOW Proposed Defendant-Intervenors the Christian Medical Association ("Christian Medical"), Catholic Medical Association ("Catholic Medical"), and American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG") (collectively the "proposed defendant-intervenors" or "applicants"), and submit this Brief in Support of Motion to Intervene as Defendants in the above-captioned case.

CORPORATE DISCLOSURE STATEMENT

The Catholic Medical Association, the Christian Medical Association and the American Association of Pro-Life Obstetricians and Gynecologists are each non-profit professional membership organizations and there are no parent companies, subsidiaries, or affiliates of the above non-profit organizations that have any outstanding securities in the hands of the public.

STATEMENT REGARDING ORAL ARGUMENT

Applicants request oral argument on this motion. This motion presents important issues of broad public importance regarding the ability of public interest groups to intervene to defend federal statutes which protect the constitutional and statutory rights of their members and for which the organizations have advocated. 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 Applicants' interests and the complexity of the legal issues present in this case, Applicants believe that oral argument will be necessary to address these matters thoroughly. Accordingly, Applicants respectfully request that this Court set this motion for oral argument.

INTRODUCTION

Applicants seek to intervene in this case to defend their members' rights of conscience under the rule, Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, and their rights under the First Amendment and state and federal employment nondiscrimination provisions. They seek to defend their members' right not to be forced by the federal government and certain federal grantees to provide, assist in, refer for, or train for abortions; against their sincere

religious, conscientious, and ethical objections to this practice. Should the Court declare the Implementing Regulation unconstitutional and/or enjoin its implementation and enforcement, Applicants' members would be subjected to the imminent threat of being compelled to provide, assist in, refer for, or train for abortions; ordered by governmental or other federally funded employers and licensing and credentialing bodies. Applicants' only recourse to protect its members' paramount interests is through intervention in this 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) (to be codified at 45 C.F.R. p. 88), 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 National Family Planning and Reproductive Health Association ("NFPRHA") and a Connecticut NFPRHA member health clinic, brought the instant action against 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. NFPRHA Compl. ¶ 8. NFPRHA Plaintiffs claim that the Implementing Regulation suffers from a number of deficiencies, including that it violated the APA because HHS failed to respond adequately to comments in

making this rule and because the underlying statutes do not authorize this rule, that HHS failed to conduct an adequate cost-benefit analysis, that the rule's requirement of religious accommodation violates the Establishment Clause, that the vagueness of the rule violates due process, and that the rule interferes with patients' right to abortion. NFPRHA Compl. ¶¶ 122-35.

INTERVENORS' INTERESTS

THE CATHOLIC MEDICAL ASSOCIATION

The Catholic Medical Association is a nonprofit national organization of Catholic physicians and allied healthcare professionals with over 1,100 members. Decl. of Louis Breschi, ¶ 3. In addition to Catholic Medical's physician members, it also has associate members from a number of allied healthcare professions, including nurses and physician assistants. *Id.* at ¶ 3. Some Catholic Medical members are employed by, licensed by, or hold credentials with government or other agencies, institutions and organizations which receive federal funding from the Department of Health and Human Services, as well as from the Departments of Labor and/or Education. *Id.* at ¶ 4. As such, these agencies, institutions, and organizations are prohibited by federal law, including the Church Amendments, the Public Health Service Act, and the Weldon Amendment, from discriminating against Catholic Medical's members because they refuse to provide or refer for abortions, and would be required by 45 C.F.R. Part 88 to certify compliance with the above statutes. *Id.* at ¶ 4. Catholic Medical is opposed to the practice of abortion as contrary to the teaching and tradition of the Catholic Church, to respect for the sanctity of human life, to traditional Judeo-Christian medical ethics, and to the good of patients. *Id.* at ¶ 5. Catholic Medical's members are committed to the sanctity of human life and it would violate their consciences to participate in or refer for abortions. *Id.* at ¶ 6. It is likely that if Catholic Medical's members are forced or coerced to perform or assist in abortions or other unethical

actions in violation of their consciences, they would leave the profession or relocate from those jurisdictions compelling them to do so instead of performing or referring for abortions. *Id.* at ¶ 6. Many Catholic Medical members are providers in rural or remote areas. *Id.* Forcing such persons from those areas or out of the medical profession altogether would leave these populations unserved or underserved. *Id.* Catholic Medical has actively sought conscience protections for its members and other healthcare professionals who might otherwise be forced by state and local laws or regulations or by their employers to provide or refer for abortions by, among other things, providing public comment to the Department of Health and Human Services prior to its issuance of the new provider conscience rule now found in 45 C.F.R. Part 88. *Id.* at ¶ 7. Catholic Medical will continue to be an advocate for rights of conscience for its own members and all medical professionals in courts and legislatures both at the state and federal levels. *Id.*

THE CHRISTIAN MEDICAL ASSOCIATION

The Christian Medical Association is a nonprofit national organization of Christian physicians and allied healthcare professionals with over 16,000 members. Decl. of David Stevens, ¶ 3. Some Christian Medical members are employed by, licensed by, or hold credentials with government or other agencies, institutions and organizations who receive federal funding from the Department of Health and Human Services, as well as from the Departments of Labor and/or Education. *Id.* at ¶ 4. As such, these agencies, institutions, and organizations are prohibited by federal law, including the Church Amendments, the Public Health Service Act, and the Weldon Amendment from discriminating against Christian Medical's members because they refuse to provide or refer for abortions, and would be required by 45 C.F.R. Part 88 to certify compliance with the above statutes. *Id.* In addition to Christian Medical's physician members, it

also has associate members from a number of allied healthcare professions, including nurses and physician assistants. *Id.*

Christian Medical is opposed to the practice of abortion as contrary to Scripture, a respect for the sanctity of human life, and traditional, historical and Judeo-Christian medical ethics. *Id.* at ¶ 5. Christian Medical's members are committed to the sanctity of human life and that it would violate their consciences to participate in or refer for abortions. *Id.* at ¶ 6. It is likely that if Christian Medical's members are forced or coerced to perform or assist in abortions in violation of their consciences, they would leave the profession or relocate from those jurisdictions compelling them to do so instead of performing or referring for abortions. *Id.* Many Christian Medical members are providers in rural or remote areas. *Id.* Forcing such persons from those areas or out of the medical profession altogether would leave these populations unserved or underserved. *Id.* Christian Medical has actively sought conscience protections, including 45 C.F.R. Part 88, for its members and other healthcare professionals who might otherwise be forced by state and local laws or regulations or by their employers to provide or refer for abortions. *Id.* at 7.

THE AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS

The American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG") is one of the largest special interest groups within the American College of Obstetricians and Gynecologists, Decl. of Donna Harrison, ¶ 3, with at least six hundred (600) dues-paying members and over fifteen hundred (1,500) doctors associated with the organization. *Id.* at ¶ 5. AAPLOG members affirm the following Mission Statement:

a. That we, as physicians, are responsible for the care and well being of both our pregnant woman patient and her unborn child.

b. That the unborn child is a human being from the time of fertilization.

c. That elective disruption/abortion of human life at any time from fertilization onward constitutes the willful destruction of an innocent human being, and that this procedure will have no place in our practice of the healing arts.

d. That we are committed to educate abortion-vulnerable patients, the general public, pregnancy center counselors, and our medical colleagues regarding the medical and psychological complications associated with induced abortion, as evidenced in the scientific literature.

e. That we are deeply concerned about the profound, adverse effects that elective abortion imposes, not just on the women, but also on the entire involved family, and on our society at large.

Id. at ¶ 4.

AAPLOG and its members oppose the practice of abortion for a variety of reasons, including religious and moral beliefs and the belief that the practice of abortion is inconsistent with professional medical ethics. *Id.* at ¶ 5. One of AAPLOG's primary purposes is to reaffirm the unique value and dignity of individual human life in all states of its development and subsequent course from the moment of conception. *Id.* at ¶ 6. To this end, AAPLOG sponsors and conducts research and educational programs consistent with this purpose. *Id.* AAPLOG is also deeply committed to defending the right of conscience of doctors, including its members, not to perform, refer for or to otherwise assist in the practice of abortion. *Id.* at 7. Because government licensing and federal funding (including funding from the Department of Health and Human Services, as well as from the Departments of Labor and/or Education) are ubiquitous in the practice of medicine, virtually all AAPLOG members who practice obstetrics and gynecology hold credentials with government entities and/or work for or hold credentials from public or private entities that receive federal funds. *Id.* at 8. Federal law – including the Church Amendments, the Public Health Service Act, and the Weldon Amendment – prohibits licensing entities, accrediting entities, and employers that receive federal funds from discriminating

against AAPLOG's members for refusing to provide or to refer for abortions. *Id.* The foregoing public and private entities would be required by 45 C.F.R. Part 88 to certify compliance with the above statutes. *Id.* AAPLOG's members are committed to the sanctity of human life and that it would violate their consciences to participate in or refer for abortions. *Id.* at ¶ 9. It is likely that if AAPLOG members are forced or coerced to perform or assist in abortions in violation of their consciences, they would leave the profession or relocate from those jurisdictions compelling them to do so instead of performing or referring for abortions. *Id.* at ¶ 9. Many AAPLOG members are providers in rural or remote areas. Forcing such persons from those areas or out of the medical profession altogether would leave these populations unserved or underserved. *Id.* at ¶ 9. AAPLOG has actively sought conscience protections, including 45 C.F.R. Part 88, for its members and other healthcare professionals who might otherwise be forced by state and local laws or regulations or by their employers to provide or refer for abortions. *Id.* at ¶ 10.

Both Christian Medical and AAPLOG have previously been granted intervention as of right to defend one of the underlying regulations in this case, the Weldon Amendment, in two separate facial challenges to the constitutionality of that statute. *California ex. rel. Lockyer v. United States*, 450 F.3d 436, 445 (9th Cir. 2006); *Nat'l Family Planning & Reproductive Health Ass'n v. Gonzales*, 468 F.3d 826, 827 (D.C. Cir. 2006) (listing Christian Medical and AAPLOG as appellees); *Nat'l Family Planning & Reproductive Health Ass'n*, No. 04-02148 (D. D.C. Sept. 28, 2005) (order granting motion of Christian Medical and AAPLOG to intervene as of right).

ARGUMENT

I. PROPOSED DEFENDANT-INTERVENORS ARE NOT REQUIRED TO SHOW STANDING; HOWEVER, THEY HAVE ASSOCIATIONAL STANDING TO INTERVENE AS DEFENDANTS.

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 Applicants to show that they have standing to intervene as defendants, Applicants readily satisfy the requirements of associational standing for the reasons stated below.

As the Second Circuit has stated, an association

> has standing as an association to bring suit in its own name on behalf of its members if: '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'

Bldg. and Constr. Trades Council of Buffalo, N.Y. and Vicinity v. Downtown Dev., 448 F.3d 138, 144 (2d Cir. 2006) (quoting *Hunt v. Wash. State Apple Adver. Com'n,* 432 U.S. 333, 343 (1977)). First, for the reasons discussed below, the individual physicians, nurses, physician assistants and other healthcare professionals who are Applicants' members are entitled to intervene in the instant action to defend their rights under the Implementing Regulation as well as to prevent the impairment of their First Amendment and federal and state statutory rights that might be compromised by the disposition of this action. Second, the interests the Applicants seek to advance are the protection of the rights of conscience of their members not to be discriminated against because they refuse to provide abortion, refer for abortion, assist in abortion, or to train

for abortion. Applicants have long advocated for conscience protections like that at stake in this case, and thus the issues in this case lie at the heart of the Applicants' purposes. Breschi Decl. ¶ 7; Harrison Decl. ¶ 10; Stevens Decl. ¶ 7. *See, e.g.,* The Linacre Institute of the Catholic Medical Association, Bioethical Principles of Medical Practice, http://www.cathmed.org/publications/bioethical.htm (last visited Jan. 20, 2009) ("The patient's autonomy does not supersede the conscience of the physician. Therefore, the physician must be free to refuse to participate in immoral procedures, and free to refuse to refer to other providers who might be willing to perform such procedures."); Christian Medical & Dental Associations, Healthcare Right of Conscience, http://www.cmda.org/AM/Template.cfm?Section=Right_of_Conscience (last visited Jan. 20, 2009) ("Issues of conscience arise when some aspect of medical care is in conflict with the personal beliefs and values of the patient or the healthcare professional. CMDA believes that in such circumstances the Rights of Conscience have priority."); AAPLOG, Physician Conscience Rights, http://www.aaplog.org/rightofconscience.aspx (last visited Jan. 20, 2009) ("AAPLOG is committed to the individual right of conscience for each physician, especially in decisions involving moral values."). Third, the defense of the Applicants' members' rights does not require the members' actual personal participation. Thus, the Applicants have associational standing to assert the interests of their individual members in this action.

II. APPLICANTS ARE 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, Applicants readily satisfy this test.

A. Applicants' Motion is Timely Because It Was Promptly Filed Before Any Substantive Motions Were Granted or Responsive Pleadings Were Due.

Applicants' 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). Applicants have promptly filed their motion to intervene a few days after Plaintiffs filed their complaint, before any substantive motions have been filed in this case, and before any responsive pleading has been submitted by or is even due from Defendants. Applicants do not intend to seek any delay in the case. Thus, this motion will cause neither prejudice to the existing parties or any delay in these proceedings. Moreover, denial of the motion will prejudice Applicants 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. Applicants Have Sufficient Interests Relating to the Subject Matter of this Action Because A Grant of Relief to Plaintiffs Threatens Their Rights of Conscience.

In a closely analogous case, the Second Circuit has ruled that a professional medical association has intervention of right in a legal challenge to a medical regulation affecting its members. *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] h[e]ld that it 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 (citations omitted), and are "sufficient to support intervention of right." *Id.* (citing *N.Y. Pub. Interest Research Group*, 516 F.2d at 351-52).

Likewise, should Plaintiffs succeed here, there would be substantial changes in the medical professions and the way medical professionals "conduct their business," including elimination or weakening of protections for medical professionals' rights not to be compelled to perform, refer for, or assist in abortions. *Id.* Further, Applicants' members have substantial economic interests at stake because they may be forced to relocate to jurisdictions that respect their rights or to leave the profession altogether should they be compelled to perform, refer for, assist in, or train for abortions as Plaintiffs desire. Stevens Decl. ¶ 6; Harrison Decl. ¶ 9; Breschi Decl. ¶ 6. Since many of Applicants' members are providers in rural or remote areas, their absence from those areas or from the profession altogether would leave those populations unserved or underserved. Stevens Decl. ¶ 6; Harrison Decl. ¶ 9; Breschi Decl. ¶ 6. Applicants assert an interest in ensuring their members are permitted to serve these populations free of infringements on their consciences.

Applicants also have a sufficient interest because they are among the class of individuals the legislative branch sought to protect with the underlying statutes and 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, i.e. the Applicants in the instant case, 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 Regulations, "to protect health care providers like those represented by the proposed intervenors." *Lockyer*, 450 F.3d at 441. Applicants' individual members, physicians (including obstetricians and gynecologists) physician-assistants, nurses, and other health care professionals, are specifically protected by the Implementing Regulation from discrimination by federal agencies or programs or state and local governments, including some of Plaintiffs' members, because they refuse to provide abortion, refer for abortion, assist in abortion, or to train for abortion. *Id.* at § 88.2As NFPRHA Plaintiffs recognize, the regulation purports to protect a broad group of health care providers including both individuals and institutions. NFPRHA Compl. ¶ 54. It is self-evident that the Applicants' members' interests in the conscience protections provided by the Implementing Regulation would be eliminated should this Court grant Plaintiffs the relief they seek. *Lockyer*, 450 F.3d at 441.

Applicants also satisfy the interest test because the order sought by Plaintiffs could compromise their members' First Amendment free exercise and free speech and state and federal statutory rights, even leaving them subject to criminal penalties in some jurisdictions should they refuse to perform, participate in or refer for abortions. *See Lockyer*, 450 F.3d at 443 (criminal prosecution under California law for refusal to perform abortions a possibility if Weldon

Amendment struck down). Applicants have a "sufficient" interest in protecting themselves from employment discrimination because of adherence to their consciences, since "if 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 insinuate that they must discriminate against healthcare workers who exercise their conscience, and even that this is required by Title X of the Public Health Services Act. NFPRHA Compl. ¶ 115. Plaintiffs' contentions to the contrary, Applicants' members possess First Amendment rights against compelled speech and to the free exercise of their religious beliefs that prohibit Plaintiffs' members from forcing them to provide abortions, refer for abortions, assist in abortions, or to train for abortions against their 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). That NFPRHA continues to make this argument, in the face of court decisions against it and HHS clarifications dating to the Clinton era about the Church Amendment's protections of conscience rights for NFPRHA members' employees demonstrates the need for the challenged regulation.

Plaintiffs have no right to force others to speak on their behalf, but the Applicants do have First Amendment rights against compelled speech – particularly where it would violate their conscience. These rights are protected by the underlying statutes as well as the challenged

Implementing Regulation. Moreover, as to both public and many private employers, including some of Plaintiffs' members, Applicants' members are protected by Title VII of the Civil Rights Act of 1964 and corollary state employment nondiscrimination statutes from adverse employment practices on the basis of their religious beliefs, and are entitled to reasonable accommodations 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 Implementing Regulations 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.

Applicants also have an interest in the Implementing Regulations 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. NFPRHA Compl. ¶¶ 70-71, 96, 117-18. These allegations are directed towards medical professionals including Applicants' members. Applicants should be permitted to intervene to respond to these allegations and fully develop the factual record concerning the exercise of conscience by medical professionals.

Lastly, "[a]n organization . . . has a sufficient interest to support intervention by right where the underlying action concerns legislation previously supported by the organization" where "the personal interests of its members" that are represented by the organization "would be

threatened," e.g. by plaintiffs, "if the [law] is found to be invalid or unconstitutional." *Great Atlantic & Pac. Tea Co. v. Town of East Hampton*, 178 F.R.D. 39, 42 (E.D.N.Y. 1998). Applicants have consistently asserted their interest in the protection of conscience via the promulgation of the Implementing Regulation both in public statements circulated generally as well as in comments formally submitted to HHS during rulemaking. Catholic Medical, Comment on FR Doc # N/A, HHS-OS-2008-0011-4571 (Sept. 25, 2008), http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900006480722ad2 (last visited Jan. 20, 2009); Board Members of AAPLOG, Letter to OBGYN Residents, (updated Dec. 2008) http://www.aaplog.org/letter.aspx (last visited Jan. 20, 2009) ("We are strongly supportive of the U.S. Dept of HHS's proposed new regulations (August, 2008) to insure conscience protection for medical professionals."); Family Research Council, Comment on FR Doc # N/A, HHS-OS-2008-0011-4924.1 (Sept. 25, 2008) http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900006480724dcb (AAPLOG is signatory) ("The health care industry urgently needs HHS to promulgate its final regulations not only to assist and ensure compliance by regulated entities but also to protect the beneficiaries' fundamental rights of religious belief and moral conviction."); Christian Medical Association, CMA Physicians Laud HHS Regulations to Protect Choice in Healthcare "Jungle of Coercion" (Aug. 21, 2008), http://www.cmda.org/AM/Template.cfm?Section=CMDA_News_Releases&Template=/CM/HTMLDisplay.cfm&ContentID=16914 ("These regulations are desperately needed to protect First Amendment rights and implement federal law in what is becoming a jungle of coercion in healthcare."); Christian Medical, Comment on FR Doc # E8-19744, HHS-OS-2008-0011-4254.1 (Sept. 12, 2008), http://www.regulations.gov/fdmspublic/component/main?main=Document

Detail&d=HHS-OS-2008-0011-4254.1 (transcript of physicians' testimony presented to President's Council on Bioethics which "strongly support the regulation"); Christian Medical, Comment on FR Doc # E8-19744, HHS-OS-2008-0011-1498.1 (Sept. 18, 2008), http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=090000648070e1a2 (memo supporting regulation and commenting on public's lack of knowledge of conscience law); Christian Medical, Comment on FR Doc # E8-19744, HHS-OS-2008-0011-1529.1 (Sept. 19, 2008), http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=090000648070f8d8 (memo supporting regulation and commenting on educating public on conscience protections). Moreover, as stated above, Applicants previously intervened to defend the Weldon Amendment, which is one of the underlying statutes implemented by the Implementing Regulations, a facial challenge brought by Plaintiff NFPRHA, as well as a facial challenge brought by California, which is a Plaintiff in a parallel action.

C. The Applicants' Interests May Be Impaired By this Litigation Because Their Ability to Protect Their Rights of Conscience Will Be Impeded.

In light of the clear interest that a professional medical association has in an action challenging the validity of a medical regulation, 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, we have little difficulty concluding that the disposition of this case may, as a practical matter, affect it."). 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).

Applicants easily satisfy the impairment of interests test because their members' interests in their rights under the Implementing Regulation might be impaired and their 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, Applicants' protection from discrimination by Plaintiffs' members and others would be diminished because they would be deprived of the protections provided by the Implementing Regulation, which 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. NFPRHA Compl. p. 35. Such relief, if granted by this Court, would eliminate the conscience protections for Applicants' members contained in the Implementing Regulation, subjecting them to the imminent threat of being forced by Plaintiffs, in the exercise of their police powers, to perform abortions, assist in abortions, train for abortions, and refer individuals

for abortions despite their 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 state enforcement of laws infringing on conscience is certainly sufficient to show that the disposition of this case in favor of Plaintiffs will practically affect Applicants. *Lockyer*, F.3d 450 at 442. Such relief, if granted by this Court, would eliminate the conscience protections for Applicants' members contained in the Implementing Regulation, subjecting them to the imminent threat of being forced by Plaintiffs' members and others to perform abortions, assist in abortions, train for abortions, and refer individuals for abortions despite their religious, moral, and ethical objections to the practice of abortion in part due to of the lack of awareness of the conscience protections on the part of the regulated health entities and noncompliance with the protections. Implementing Regulation, 73 Fed. Reg. at 78,078. Such irregularities in compliance with the statutory protections are precisely what the Implementing Regulation aims to remedy. The potential reduction of effective implementation of the underlying statutes due to the potential increase in prohibited discrimination by government and other federal grantees against Applicants' members easily satisfies the impairment of interest requirement of Rule 24(a)(2).

Similarly, should Plaintiffs succeed in persuading this Court that its members and their employees who wish to provide abortions have a First Amendment right to require Applicants' members to provide abortion referrals on their behalf, Applicants' members would suffer an impairment of their First Amendment rights against compelled speech and of the free exercise of their religious beliefs as well as their Title VII and corollary state statutory rights of reasonable accommodation of their religious practices. Even assuming that such an unfavorable precedent might be remedied in future litigation, a decision by this Court would substantially and

detrimentally impact the Applicants' members' First Amendment and statutory rights because of the stare decisis effect of a decision invalidating the Implementing Regulation in whole or in part. *N.Y. Pub. Interest Research Group*, 516 F.2d at 352. Thus, the impairment of Applicants' interest clearly satisfies the liberal test provided by this rule, since "[i]f 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. Applicants Satisfy the Requirement of Showing Inadequate Representation by Defendants Because Their Unique Legal Arguments and Contribution to the Factual Record Warrant 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, Applicants lack adequate representation and intervention as of right is warranted because it will allow Applicants to assert their unique legal arguments and to ensure full factual development of the record.

First, it is clear that the Plaintiffs do not adequately represent the Applicants' interests. Plaintiffs seek to invalidate a federal anti-discrimination regulation specifically promulgated to protect the Applicants' members. Moreover, Plaintiffs assert a right, and even an obligation under other federal laws, to force Applicants' members to provide abortions; assist in, refer for,

or train for abortions, even where such activities violates the Applicants' religious, moral or ethical beliefs. NFPRHA Compl. ¶ 115

Secondly, Defendants do not adequately represent Applicants' interests. The Second Circuit found that the "likelihood" that a professional medical association "would make a more vigorous presentation of the economic side of the argument than would" the existing defendants is 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 a professional medical association diverge from those of government defendants. *Id.* Indeed, in two previous cases defending the Weldon Amendment, Christian Medical and AAPLOG 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 associations, i.e. two of the Applicants in this case, because the United States defended a narrow reading of the challenged regulation while the medical associations 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 associations 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, Applicants, as professional medical associations, are likely to advance arguments that are illuminative of the private sector health care professional perspective, in contrast to Defendant, which represents governmental interests in this regulation. As associations that are dedicated to representing the interests of pro-life healthcare professionals, Applicants are uniquely suited to give primacy to arguments that emphasize the concerns regarding conscience that make the Implementing Regulations necessary. Furthermore, in support of these arguments, Applicants have and will introduce significant factual evidence that government defendants are likely unable to produce attesting to their members' exercise of professional conscience and the impact of granting relief to Plaintiffs' members. Stevens Decl. ¶¶ 4-7; Harrison Decl. ¶¶ 4-10; Breschi Decl. ¶¶ 4-7.

The potential that Applicants' interests will not be adequately represented is heightened by the change in administrations. *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 Applicants' interests will be inadequately represented because of President Obama's consistent and vocal stance against the Implementing Regulations. Recently, President Obama's officials have stated that he intends to rescind the Implementing Regulations. Robert Pear, *Protests Over a Bush Rule To Protect Health Providers*, N.Y. Times (Nov. 18, 2008), http://query.nytimes.com/gst/fullpage.html?res=9400E4DD1338F93BA25752C1A96E9C8B63&sec=&spon=&pagewanted=all ("Aides and advisers to [President] Obama said he would try to rescind [the Implementing Regulation]."); Laura Meckler, *Bush-Era Abortion Rules Face Possible Reversal, Obama Team Looks at Regulation Set to Be Finalized This Week Letting Medical Staff Refuse to Take Part in Practices They Oppose*, Wall Street Journal, A5 (Dec. 17, 2008) http://online.wsj.com/article/SB122947155578512197.html ("Officials close to the transition have signaled that they intend to begin the regulatory process anew," i.e. to rescind the Implementing Regulation).

Then-Senator Obama expressed his consistent opposition to the Implementing Regulation on at least three other occasions. First at the close of the public comment period on the Implementing Regulation, he was a signatory to a letter submitted to the Secretary of HHS that stated, "We are writing to strongly object to [the Implementing Regulation] proposed on August 26, 2008 by the Department of [HHS] . . . . [W]e urge you to halt all efforts to move it forward." Statement, Letter from Sen. Hillary Rodham Clinton & Sen. Patty Murray to Sec. Michael O.

Leavitt, (Sept. 25, 2008), http://clinton.senate.gov/news/statements/details.cfm?id=303642&& (last visited Jan. 20, 2009).

Second, Senator Obama expressed his consistent opposition to the Implementing Regulation when it was formally proposed:

> U.S. Senator Barack Obama (D-IL) today criticized the Department of Health and Human Services' decision to propose a rule that would limit the rights of patients to receive complete and accurate health information and services, particularly access to contraceptives.
>
> 'In the waning days of his administration, President Bush continues to issue policies and proposals that put politics ahead of common sense solutions that help middle class Americans in their daily lives.'
>
> 'This proposed regulation complicates, rather than clarifies the law. It raises troubling issues about access to basic health care for women, particularly access to contraceptives. We need to restore integrity to our public health programs, not create backdoor efforts to weaken them. I am committed to ensuring that the health and reproductive rights of women are protected.'

Press Release, Sen. Barack Obama, Statement of Sen. Barack Obama on Proposed HHS Rule Changes (Aug. 22, 2008), http://74.125.47.132/search?q=cache:http://obama.senate.gov/press/080822-statement_of_se_59/ (last updated Jan. 6, 2009).[1]

Third, Senator Obama promptly expressed his opposition to the Implementing Regulations even before it was formally proposed, when a draft of the Implementing Regulations was leaked to the public, when he was signatory to a letter to the Secretary of HHS which stated, "We are writing today to urge you to abandon plans to promulgate [the Implementing Regulation]." Letter from Sen. Hillary Rodham Clinton & Sen. Patty Murray to Sec. Michael O Leavitt (July 23, 2008), http://clinton.senate.gov/news/statements/details.cfm?id=301177&&

[1] The website http://obama.senate.gov appears to be permanently shut down. The press release was obtained from Google Cache. *See* Note, Michael Fagan, *"Can You Do a Wayback on That?" The Legal Community's Use of Cached Web Pages in and out of Trial*, 13 B.U. J. Sci. & Tech. L. 46, 52 (2007) (Google Cache allows "searchers [to] gain access to a page through a search engine even after it had been removed from the Internet") .

(last visited Jan. 20, 2009). Plaintiffs have acknowledged this fact in their Complaint. NFPRHA Compl. ¶ 60(e). Given this highly unfavorable view of the Implementing Regulation on the part of the new President, the interest of Defendants and Applicants cannot be said to be identical; indeed they appear adverse, because the views of Defendants are now more closely aligned with Plaintiffs, creating the potential for collusion. Thus, in light of President Obama's consistent and vocal opposition to the Implementing Regulations and reports of his intent to seek the rescission of the same, it is reasonable to believe that the new administration will not adequately represent the interests of Applicants.

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).

Applicants satisfy the requirements for permissive intervention. As demonstrated above, the application for intervention is timely, filed only a few days after the initiation of this action and well in advance of any decisions 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 Plaintiff's members and others, Applicants will seek to defend the Implementing Regulation's constitutionality against Plaintiff's claims, arguing that it was authorized by underlying statutes, properly promulgated under the APA, and valid under the Constitution. Applicants also intend to assert their own First Amendment and Title VII rights in

response to Plaintiff's contentions that its members have a right and obligation to force Applicants' members to provide abortions; assist in, refer for, or train for abortions. NFPRHA Compl. ¶ 115. These defenses arise directly from Plaintiffs' assertions in their Complaint. *Id.* Furthermore, the Applicants' members' knowledge of their own religious and ethical views concerning abortion 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 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.

DATED: This 22nd day of January, 2009.

Proposed Defendant- Intervenors,

CHRISTIAN MEDICAL ASSOCIATION;
AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS; and
CATHOLIC MEDICAL ASSOCIATION

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** Pro Hac Vice Admission Pending*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
HARTFORD DIVISION

STATE OF CONNECTICUT, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
UNITED STATES OF AMERICA, et al.,	)	CIVIL ACTION NO. 3:09-CV-054-RNC
	)	
Defendants,	)	
	)	January 22, 2009
and	)	
	)	
CHRISTIAN MEDICAL ASSOCIATION, On behalf of its individual members;	)	BRIEF IN SUPPORT OFMOTION TO INTERVENE AS DEFENDANTS
	)	
AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS, On behalf of its individual members; and	)	
	)	
CATHOLIC MEDICAL ASSOCIATION, On behalf of its individual members,	)	
	)	
Proposed Defendant-Intervenors.	)	

BRIEF IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

COME NOW Proposed Defendant-Intervenors the Catholic Medical Association ("Catholic Medical") the Christian Medical Association ("Christian Medical") and American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG") (collectively the "proposed defendant-intervenors" or "applicants"), and submit this Brief in Support of Motion to Intervene as Defendants in the above-captioned case.

CORPORATE DISCLOSURE STATEMENT

The Catholic Medical Association, the Christian Medical Association and the American Association of Pro-Life Obstetricians and Gynecologists are each non-profit professional membership organizations and there are no parent companies, subsidiaries, or affiliates of the above non-profit organizations that have any outstanding securities in the hands of the public.

STATEMENT REGARDING ORAL ARGUMENT

Applicants request oral argument in this case. This case presents important issues of broad public importance regarding the ability of public interest groups to intervene to defend federal statutes which protect the constitutional and statutory rights of their members and for which the organizations have advocated. 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 Applicants' interests and the complexity of the legal issues present in this case, Applicants believe that oral argument will be necessary to address these matters thoroughly. Accordingly, Applicants respectfully request that this Court set this motion for oral argument.

INTRODUCTION

Applicants seek to intervene in this case to defend their members' rights of conscience under the rule, *Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law*, and their rights under the First Amendment and state and federal employment nondiscrimination provisions. They seek to defend their members' right not to be forced by the federal government and certain federal grantees to provide, assist in, refer for, or train for abortions against their sincere religious, conscientious, and ethical objections to this practice. Should the Court declare the Implementing Regulation unconstitutional and/or enjoin its implementation and enforcement, Applicants' members would be subjected to the imminent threat of being compelled to provide, assist in, refer for, or train for abortions ordered by governmental or other federally funded employers and licensing and credentialing bodies. Applicants' only recourse to protect its members' paramount interests is through intervention in this 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.

INTERVENORS' INTERESTS

THE AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS

The American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG") is one of the largest special interest groups within the American College of Obstetricians and Gynecologists, Decl. of Donna Harrison, ¶ 3, with at least six hundred (600) dues-paying members and over fifteen hundred (1,500) doctors associated with the organization. *Id.* at ¶ 5. AAPLOG members affirm the following Mission Statement:

a. That we, as physicians, are responsible for the care and well being of both our pregnant woman patient and her unborn child.

b. That the unborn child is a human being from the time of fertilization.

c. That elective disruption/abortion of human life at any time from fertilization onward constitutes the willful destruction of an innocent human being, and that this procedure will have no place in our practice of the healing arts.

d. That we are committed to educate abortion-vulnerable patients, the general public, pregnancy center counselors, and our medical colleagues regarding the medical and psychological complications associated with induced abortion, as evidenced in the scientific literature.

e. That we are deeply concerned about the profound, adverse effects that elective abortion imposes, not just on the women, but also on the entire involved family, and on our society at large.

Id. at ¶ 4.

AAPLOG and its members oppose the practice of abortion for a variety of reasons, including religious and moral beliefs and the belief that the practice of abortion is inconsistent with professional medical ethics. *Id.* at ¶ 5. One of AAPLOG's primary purposes is to reaffirm the unique value and dignity of individual human life in all states of its development and subsequent course from the moment of conception. *Id.* at ¶ 6. To this end, AAPLOG sponsors and conducts research and educational programs consistent with this purpose. *Id.* AAPLOG is also deeply committed to defending the right of conscience of doctors, including its members, not to perform, refer for or to otherwise assist in the practice of abortion. *Id.* at 7. Because government licensing and federal funding (including funding from the Department of Health and Human Services, as well as from the Departments of Labor and/or Education) are ubiquitous in the practice of medicine, virtually all AAPLOG members who practice obstetrics and gynecology hold credentials with government entities and/or work for or hold credentials from public or private entities that receive federal funds. *Id.* at 8. Federal law – including the Church Amendments, the Public Health Service Act, and the Weldon Amendment – prohibits licensing entities, accrediting entities, and employers that receive federal funds from discriminating

against AAPLOG's members for refusing to provide or to refer for abortions. *Id.* The foregoing public and private entities would be required by 45 C.F.R. Part 88 to certify compliance with the above statutes. *Id.* AAPLOG's members are committed to the sanctity of human life and it would violate their consciences to participate in or refer for abortions. *Id.* at ¶ 9. It is likely that if AAPLOG members are forced or coerced to perform or assist in abortions in violation of their consciences, they would leave the profession or relocate from those jurisdictions compelling them to do so instead of performing or referring for abortions. *Id.* at ¶ 9. Many AAPLOG members are providers in rural or remote areas. Forcing such persons from those areas or out of the medical profession altogether would leave these populations unserved or underserved. *Id.* at ¶ 9. AAPLOG has actively sought conscience protections, including 45 C.F.R. Part 88, for its members and other healthcare professionals who might otherwise be forced by state and local laws or regulations or by their employers to provide or refer for abortions. *Id.* at ¶ 10.

THE CHRISTIAN MEDICAL ASSOCIATION

The Christian Medical Association is a nonprofit national organization of Christian physicians and allied healthcare professionals with over 16,000 members. Decl. of David Stevens, ¶ 3. Some Christian Medical members are employed by, licensed by, or hold credentials with government or other agencies, institutions and organizations who receive federal funding from the Department of Health and Human Services, as well as from the Departments of Labor and/or Education. *Id.* at ¶ 4. As such, these agencies, institutions, and organizations are prohibited by federal law, including the Church Amendments, the Public Health Service Act, and the Weldon Amendment from discriminating against Christian Medical's members because they refuse to provide or refer for abortions, and would be required by 45 C.F.R. Part 88 to certify compliance with the above statutes. *Id.* In addition to Christian Medical's physician members, it

also has associate members from a number of allied healthcare professions, including nurses and physician assistants. *Id.*

Christian Medical is opposed to the practice of abortion as contrary to Scripture, a respect for the sanctity of human life, and traditional, historical and Judeo-Christian medical ethics. *Id.* at ¶ 5. Christian Medical's members are committed to the sanctity of human life and it would violate their consciences to participate in or refer for abortions. *Id.* at ¶ 6. It is likely that if Christian Medical's members are forced or coerced to perform or assist in abortions in violation of their consciences, they would leave the profession or relocate from those jurisdictions compelling them to do so instead of performing or referring for abortions. *Id.* Many Christian Medical members are providers in rural or remote areas. *Id.* Forcing such persons from those areas or out of the medical profession altogether would leave these populations unserved or underserved. *Id.* Christian Medical has actively sought conscience protections, including 45 C.F.R. Part 88, for its members and other healthcare professionals who might otherwise be forced by state and local laws or regulations or by their employers to provide or refer for abortions. *Id.* at 7.

THE CATHOLIC MEDICAL ASSOCIATION

The Catholic Medical Association is a nonprofit national organization of Catholic physicians and allied healthcare professionals with over 1,100 members. Decl. of Louis Breschi, ¶ 3. In addition to Catholic Medical's physician members, it also has associate members from a number of allied healthcare professions, including nurses and physician assistants. *Id.* at ¶ 3. Some Catholic Medical members are employed by, licensed by, or hold credentials with government or other agencies, institutions and organizations which receive federal funding from the Department of Health and Human Services, as well as from the Departments of Labor and/or

Education. *Id.* at ¶ 4. As such, these agencies, institutions, and organizations are prohibited by federal law, including the Church Amendments, the Public Health Service Act, and the Weldon Amendment, from discriminating against Catholic Medical's members because they refuse to provide or refer for abortions, and would be required by 45 C.F.R. Part 88 to certify compliance with the above statutes. *Id.* at ¶ 4. Catholic Medical is opposed to the practice of abortion as contrary to the teaching and tradition of the Catholic Church, to respect for the sanctity of human life, to traditional Judeo-Christian medical ethics, and to the good of patients. *Id.* at ¶ 5. Catholic Medical's members are committed to the sanctity of human life and it would violate their consciences to participate in or refer for abortions. *Id.* at ¶ 6. It is likely that if Catholic Medical's members are forced or coerced to perform or assist in abortions or other unethical actions in violation of their consciences, they would leave the profession or relocate from those jurisdictions compelling them to do so instead of performing or referring for abortions. *Id.* at ¶ 6. Many Catholic Medical members are providers in rural or remote areas. *Id.* Forcing such persons from those areas or out of the medical profession altogether would leave these populations unserved or underserved. *Id.* Catholic Medical has actively sought conscience protections for its members and other healthcare professionals who might otherwise be forced by state and local laws or regulations or by their employers to provide or refer for abortions by, among other things, providing public comment to the Department of Health and Human Services prior to its issuance of the new provider conscience rule now found in 45 C.F.R. Part 88. *Id.* at ¶ 7. Catholic Medical will continue to be an advocate for rights of conscience for its own members and all medical professionals in courts and legislatures both at the state and federal levels. *Id.*

Both Christian Medical and AAPLOG have previously been granted intervention as of right to defend one of the underlying regulations in this case, the Weldon Amendment, in two separate facial challenges to the constitutionality of that statute. *California ex. rel. Lockyer v. United States*, 450 F.3d 436, 445 (9th Cir. 2006); *Nat'l Family Planning & Reproductive Health Ass'n v. Gonzales*, 468 F.3d 826, 827 (D.C. Cir. 2006) (listing Christian Medical and AAPLOG as appellees); *Nat'l Family Planning & Reproductive Health Ass'n*, No. 04-02148 (D. D.C. Sept. 28, 2005) (order granting motion of Christian Medical and AAPLOG to intervene as of right).

ARGUMENT

I. PROPOSED DEFENDANT-INTERVENORS ARE NOT REQUIRED TO SHOW STANDING; HOWEVER, THEY HAVE ASSOCIATIONAL STANDING TO INTERVENE AS DEFENDANTS.

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 Applicants to show that they have standing to intervene as defendants, Applicants readily satisfy the requirements of associational standing for the reasons stated below.

As the Second Circuit has stated, an association

> has standing as an association to bring suit in its own name on behalf of its members if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

Bldg. and Constr. Trades Council of Buffalo, N.Y. and Vicinity v. Downtown Dev., 448 F.3d 138, 144 (2d Cir. 2006) (quoting *Hunt v. Wash. State Apple Adver. Com'n,* 432 U.S. 333, 343 (1977)). First, for the reasons discussed below, the individual physicians, nurses, physician assistants and other healthcare professionals who are Applicants' members are entitled to intervene in the instant action to defend their rights under the Implementing Regulation as well as to prevent the impairment of their First Amendment and federal and state statutory rights that might be compromised by the disposition of this action. Second, the interests the Applicants seek to advance are the protection of the rights of conscience of their members not to be discriminated against because they refuse to provide abortion, refer for abortion, assist in abortion, or to train for abortion. Applicants have long advocated for conscience protections like that at stake in this case, and thus the issues in this case lie at the heart of the Applicants' purposes. Breschi Decl. ¶ 7; Harrison Decl. ¶ 10; Stevens Decl. ¶ 7. *See, e.g.,* The Linacre Institute of the Catholic Medical Association, Bioethical Principles of Medical Practice, http://www.cathmed.org/publications/bioethical.htm (last visited Jan. 20, 2009) ("The patient's autonomy does not supersede the conscience of the physician. Therefore, the physician must be free to refuse to participate in immoral procedures, and free to refuse to refer to other providers who might be willing to perform such procedures."); Christian Medical & Dental Associations, Healthcare Right of Conscience, http://www.cmda.org/AM/Template.cfm?Section=Right_of_Conscience (last visited Jan. 20, 2009) ("Issues of conscience arise when some aspect of medical

care is in conflict with the personal beliefs and values of the patient or the healthcare professional. CMDA believes that in such circumstances the Rights of Conscience have priority."); AAPLOG, Physician Conscience Rights, http://www.aaplog.org/rightofconscience.aspx (last visited Jan. 20, 2009) ("AAPLOG is committed to the individual right of conscience for each physician, especially in decisions involving moral values."). Third, the defense of the Applicants' members' rights does not require the members' actual personal participation. Thus, the Applicants have associational standing to assert the interests of their individual members in this action.

II. APPLICANTS ARE 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, Applicants readily satisfy this test.

A. Applicants' Motion is Timely Because It Was Promptly Filed Before Any Substantive Motions Were Granted or Responsive Pleadings Were Due.

Applicants' 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). Applicants have promptly filed their motion to intervene a few days after Plaintiffs filed their complaint, before any substantive motions have been filed in this case, and before any responsive

pleading has been submitted by or is even due from Defendants. Applicants do not intend to seek any delay in the case. Thus, this motion will cause neither prejudice to the existing parties or any delay in these proceedings. Moreover, denial of the motion will prejudice Applicants 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. Applicants Have Sufficient Interests Relating to the Subject Matter of this Action Because a Grant of Relief to Plaintiffs Threatens Their Rights of Conscience.

In a closely analogous case, the Second Circuit has ruled that a professional medical association has intervention of right in a legal challenge to a medical regulation affecting its members. *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] h[e]ld that it 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).

Likewise, should Plaintiffs succeed here, there would be substantial changes in the medical professions and the way medical professionals "conduct their business," including elimination or weakening of protections for medical professionals' rights not to be compelled to perform, refer for, or assist in abortions. *Id.* Further, Applicants' members have substantial economic interests at stake because they may be forced to relocate to jurisdictions that respect their rights or to leave the profession altogether should they be compelled to perform, refer for, assist in, or train for abortions as Plaintiffs desire. Stevens Decl. ¶ 6; Harrison Decl. ¶ 9; Breschi Decl. ¶ 6. Since many of Applicants' members are providers in rural or remote areas, their absence from those areas or from the profession altogether would leave those populations unserved or underserved. Stevens Decl. ¶ 6; Harrison Decl. ¶ 9; Breschi Decl. ¶ 6. Applicants assert an interest in ensuring their members are permitted to serve these populations free of infringements on their consciences.

Applicants also have a sufficient interest because they are among the class of individuals the legislative branch sought to protect with the underlying statutes and 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, i.e. the Applicants in the instant case, 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 Regulations, "to protect health care providers like those represented by the proposed intervenors." *Lockyer*, 450 F.3d at 441. Applicants' individual members, physicians (including obstetricians and gynecologists) physician-assistants, nurses, and other health care professionals, are specifically protected by the Implementing Regulation from discrimination by federal agencies or programs

or state and local governments, including the Plaintiffs, , because they refuse to provide abortion, refer for abortion, assist in abortion, or to train for abortion. *Id.* at § 88.2. As States candidly state, 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 the Applicants' members' interests in the conscience protections provided by the Implementing Regulation would be eliminated should this Court grant Plaintiffs the relief they seek. *Lockyer*, 450 F.3d at 441.

Applicants also satisfy the interest test because the order sought by Plaintiffs could compromise their members' First Amendment free exercise and free speech and state and federal statutory rights, even leaving them subject to criminal penalties should they refuse to perform, participate in or refer for abortions. Applicants have a "sufficient" interest in protecting themselves from employment discrimination because of adherence to their consciences, since "if 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 of conscience of Applicants' members when they exercise their police powers. States Compl. ¶ 20. Plaintiffs' contentions to the contrary, Applicants' members possess First Amendment rights against compelled speech and to the free exercise of their religious beliefs that prohibit Plaintiffs' members from forcing them to provide abortions, refer for abortions, assist in abortions, or to

train for abortions against their 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).

Plaintiffs have no First Amendment right to force others to speak on their behalf, but the Applicants do have First Amendment rights against compelled speech – particularly where it would violate their conscience. These rights are protected by the underlying statutes as well as the challenged Implementing Regulation. Moreover, as to both public and many private employers, Applicants' members are protected by Title VII of the Civil Rights Act of 1964 and corollary state employment nondiscrimination statutes from adverse employment practices on the basis of their religious beliefs, and are entitled to reasonable accommodations 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 Implementing Regulations 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.

Applicants also have an interest in the Implementing Regulations 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 Applicants' members. Applicants should be permitted to intervene to respond to these allegations and fully develop the factual record concerning the exercise of conscience by medical professionals.

Lastly, "[a]n organization . . . has a sufficient interest to support intervention by right where the underlying action concerns legislation previously supported by the organization" where "the personal interests of its members" that are represented by the organization "would be threatened," *e.g.*, by Plaintiffs, "if the [law] is found to be invalid or unconstitutional." *Great Atlantic & Pac. Tea Co. v. Town of East Hampton*, 178 F.R.D. 39, 42 (E.D.N.Y. 1998). Applicants have consistently asserted their interest in the protection of conscience via the promulgation of the Implementing Regulation both in public statements circulated generally as well as in comments formally submitted to HHS during rulemaking. Catholic Medical, Comment on FR Doc # N/A, HHS-OS-2008-0011-4571 (Sept. 25, 2008), http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900006480722ad2 (last visited Jan. 20, 2009); Board Members of AAPLOG, Letter to OBGYN Residents, (updated Dec. 2008) http://www.aaplog.org/letter.aspx (last visited Jan. 20, 2009) ("We are strongly supportive of the U.S. Dept of HHS's proposed new regulations (August, 2008) to insure conscience protection for medical professionals."); Family Research Council, Comment on FR Doc # N/A, HHS-OS-2008-0011-4924.1 (Sept. 25, 2008) http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900006480724dcb (AAPLOG is signatory) ("The health care industry urgently needs HHS to promulgate its final regulations not only to assist and ensure compliance by regulated entities but also to

protect the beneficiaries' fundamental rights of religious belief and moral conviction."); Christian Medical Association, CMA Physicians Laud HHS Regulations to Protect Choice in Healthcare "Jungle of Coercion" (Aug. 21, 2008), http://www.cmda.org/AM/Template.cfm?Section=CMDA_News_Releases&Template=/CM/HTMLDisplay.cfm&ContentID=16914 ("These regulations are desperately needed to protect First Amendment rights and implement federal law in what is becoming a jungle of coercion in healthcare."); Christian Medical, Comment on FR Doc # E8-19744, HHS-OS-2008-0011-4254.1 (Sept. 12, 2008), http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&d=HHS-OS-2008-0011-4254.1 (transcript of physicians' testimony presented to President's Council on Bioethics which "strongly support the regulation"); Christian Medical, Comment on FR Doc # E8-19744, HHS-OS-2008-0011-1498.1 (Sept. 18, 2008), http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=090000648070e1a2 (memo supporting regulation and commenting on public's lack of knowledge of conscience law); Christian Medical, Comment on FR Doc # E8-19744, HHS-OS-2008-0011-1529.1 (Sept. 19, 2008), http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=090000648070f8d8 (memo supporting regulation and commenting on educating public on conscience protections). Moreover, as stated above, Applicants previously intervened to defend the Weldon Amendment, which is one of the underlying statutes implemented by the Implementing Regulations, in a facial challenge brought by Plaintiff California, as well as a facial challenge brought by NFPRHA, which is a Plaintiff in a parallel action.

C. The Applicants' Interests May Be Impaired By this Litigation Because Their Ability to Protect Their Rights of Conscience Will Be Impeded.

In light of the clear interest that a professional medical association has in an action challenging the validity of a medical regulation, 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, we have little difficulty concluding that the disposition of this case may, as a practical matter, affect it."). 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)).

Applicants easily satisfy the impairment of interests test because their members' interests in their rights under the Implementing Regulation might be impaired and their 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, Applicants' protection from discrimination by Plaintiffs and others would be diminished because they would be deprived of

the protections provided by the Implementing Regulation, which 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 Applicants' members contained in the Implementing Regulation, subjecting them to the imminent threat of being forced by Plaintiffs, in the exercise of their police powers, to perform abortions, assist in abortions, train for abortions, and refer individuals for abortions despite their 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 state enforcement of laws infringing on conscience is certainly sufficient to show that the disposition of this case in favor of Plaintiffs will practically affect Applicants. *Lockyer*, F.3d 450 at 442. Such relief, if granted by this Court, would eliminate the conscience protections for Applicants' members contained in the Implementing Regulation, subjecting them to the imminent threat of being forced by Plaintiffs' members and others to perform abortions, assist in abortions, train for abortions, and refer individuals for abortions despite their religious, moral, and ethical objections to the practice of abortion in part due to of the lack of awareness of the conscience protections on the part of the regulated health entities and noncompliance with the protections. Implementing Regulation, 73 Fed. Reg. at 78,078. Such irregularities in compliance with the statutory protections are precisely what the Implementing Regulation aims to remedy. The potential reduction of

effective implementation of the underlying statutes due to the potential increase in prohibited discrimination by government and other federal grantees against Applicants' members easily satisfies the impairment of interest requirement of Rule 24(a)(2).

Similarly, should Plaintiffs succeed in persuading this Court that its members and their employees who wish to provide abortions have a First Amendment right to require Applicants' members to provide abortion referrals on their behalf, Applicants' members would suffer an impairment of their First Amendment rights against compelled speech and of the free exercise of their religious beliefs as well as their Title VII and corollary state statutory rights of reasonable accommodation of their religious practices. Even assuming that such an unfavorable precedent might be remedied in future litigation, a decision by this Court would substantially and detrimentally impact the Applicants' members' First Amendment and statutory rights because of the stare decisis effect of a decision invalidating the Implementing Regulation in whole or in part. *N.Y. Pub. Interest Research Group*, 516 F.2d at 352. Thus, the impairment of Applicants' interest clearly satisfies the liberal test provided by this rule, since "[i]f 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. Applicants Satisfy the Requirement of Showing Inadequate Representation by Defendants Because Their Unique Legal Arguments and Contribution to the Factual Record Warrant 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, Applicants lack adequate representation and intervention as of right is warranted because it will allow Applicants to assert their unique legal arguments and to ensure full factual development of the record.

First, it is clear that the Plaintiffs do not adequately represent the Applicants' interests. Plaintiffs seek to invalidate a federal anti-discrimination regulation specifically promulgated to protect the Applicants' members. Moreover, Plaintiffs assert sovereign police power to enforce laws forcing Applicants' members to provide abortions; assist in, refer for, or train for abortions, even where such activities violates the Applicants' religious, moral or ethical beliefs. States Compl. ¶20.

Secondly, Defendants do not adequately represent Applicants' interests. The Second Circuit found that the "likelihood" that a professional medical association "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 a professional medical association diverge from those of government defendants. *Id.* Indeed, in two previous cases defending the Weldon Amendment, Christian Medical and AAPLOG 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 associations, *i.e.*, two of the Applicants in this case, because the United States defended a narrow reading of the

challenged regulation while the medical associations 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 associations 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, Applicants, as professional medical associations, are likely to advance arguments that are

illuminative of the private sector health care professional perspective, in contrast to Defendant, which represents governmental interests in this regulation. As associations that are dedicated to representing the interests of pro-life healthcare professionals, Applicants are uniquely suited to give primacy to arguments that emphasize the concerns regarding conscience that make the Implementing Regulations necessary. Furthermore, in support of these arguments, Applicants have and will introduce significant factual evidence that government defendants are likely unable to produce attesting to their members' exercise of professional conscience and the impact of granting relief to Plaintiffs' members. Stevens Decl. ¶¶ 4-7; Harrison Decl. ¶¶ 4-10; Breschi Decl. ¶¶ 4-7.

The potential that Applicants' interests will not be adequately represented is heightened by the change in administrations. *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 Applicants' interests will be inadequately represented because of President Barack Obama's consistent and vocal stance against the Implementing Regulations. Recently, President Obama's officials have stated that he intends to rescind the Implementing Regulations. Robert Pear, *Protests Over a Bush Rule To Protect Health Providers*, N.Y. Times (Nov. 18, 2008), http://query.nytimes.com/gst/fullpage.html?res=9400E4DD1338F93BA25752C1A96E9C8B63&sec=&spon=&pagewanted=all ("Aides and advisers to [President] Obama said he would try to rescind [the Implementing Regulation]."); Laura Meckler, *Bush-Era Abortion Rules Face Possible Reversal, Obama Team Looks at Regulation Set to Be Finalized This Week Letting Medical Staff Refuse to Take Part in Practices They Oppose*, Wall Street Journal, A5 (Dec. 17,

2008) http://online.wsj.com/article/SB122947155578512197.html ("Officials close to the transition have signaled that they intend to begin the regulatory process anew," *i.e*., to rescind the Implementing Regulation).

Then-Senator Obama expressed his consistent opposition to the Implementing Regulation on at least three other occasions. First at the close of the public comment period on the Implementing Regulation, he was a signatory to a letter submitted to the Secretary of HHS that stated, "We are writing to strongly object to [the Implementing Regulation] proposed on August 26, 2008 by the Department of [HHS] . . . . [W]e urge you to halt all efforts to move it forward." Statement, Letter from Sen. Hillary Rodham Clinton & Sen. Patty Murray to Sec. Michael O. Leavitt, (Sept. 25, 2008), http://clinton.senate.gov/news/statements/details.cfm?id=303642&& (last visited Jan. 20, 2009).

Second, Senator Obama expressed his consistent opposition to the Implementing Regulation when it was formally proposed:

> U.S. Senator Barack Obama (D-IL) today criticized the Department of Health and Human Services' decision to propose a rule that would limit the rights of patients to receive complete and accurate health information and services, particularly access to contraceptives.
>
> 'In the waning days of his administration, President Bush continues to issue policies and proposals that put politics ahead of common sense solutions that help middle class Americans in their daily lives.'
>
> 'This proposed regulation complicates, rather than clarifies the law. It raises troubling issues about access to basic health care for women, particularly access to contraceptives. We need to restore integrity to our public health programs, not create backdoor efforts to weaken them. I am committed to ensuring that the health and reproductive rights of women are protected.'

Press Release, Sen. Barack Obama, Statement of Sen. Barack Obama on Proposed HHS Rule Changes (Aug. 22, 2008), http://74.125.47.132/search?q=cache:http://obama.senate.gov/press/080822-statement_of_se_59/ (last updated Jan. 6, 2009).[1]

Third, Senator Obama promptly expressed his opposition to the Implementing Regulation even before it was formally proposed, when a draft of the Implementing Regulations was leaked to the public, when he was signatory to a letter to the Secretary of HHS which stated, "We are writing today to urge you to abandon plans to promulgate [the Implementing Regulation]." Letter from Sen. Hillary Rodham Clinton & Sen. Patty Murray to Sec. Michael O Leavitt (July 23, 2008), http://clinton.senate.gov/news/statements/details.cfm?id=301177&& (last visited Jan. 20, 2009). Given this highly unfavorable view of the Implementing Regulation on the part of the new President, the interest of Defendants and Applicants cannot be said to be identical; indeed they appear adverse, because the views of Defendants are now more closely aligned with Plaintiffs, creating the potential for collusion. Thus, in light of President Obama's consistent and vocal opposition to the Implementing Regulations and reports of his intent to seek the rescission of the same, it is reasonable to believe that the new administration will not adequately represent the interests of Applicants.

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

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[1] The website http://obama.senate.gov appears to be permanently shut down. The press release was obtained from Google Cache. *See* Note, Michael Fagan, *"Can You Do a Wayback on That?" The Legal Community's Use of Cached Web Pages in and out of Trial*, 13 B.U. J. Sci. & Tech. L. 46, 52 (2007) (Google Cache allows "searchers [to] gain access to a page through a search engine even after it had been removed from the Internet") .

consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. Civ. R. P. 24(c).

Applicants satisfy the requirements for permissive intervention. As demonstrated above, the application for intervention is timely, filed only a few days after the initiation of this action and well in advance of any decisions 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 Plaintiff's members and others, Applicants will seek to defend the Implementing Regulation's constitutionality against Plaintiff's claims, arguing that it was authorized by underlying statutes, properly promulgated under the APA, and valid under the Constitution. Applicants also intend to assert their own First Amendment and Title VII rights in response to Plaintiffs' contentions they have the sovereign police power to force Applicants' members 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, the Applicants' members' knowledge of their own religious and ethical views concerning abortion 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 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.

DATED: This 22nd day of January, 2009.

PROPOSED DEFENDANT- INTERVENORS,
CHRISTIAN MEDICAL ASSOCIATION
AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND
GYNECOLOGISTS, and
CATHOLIC MEDICAL ASSOCIATION

_*s/ Andrew S. Knott*_________________

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* *Pro Hac Vice Admission Pending*