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September 25, 2008

Secretary Mike Leavitt
Department of Health & Human Services
200 Independence Ave., S.W.
Washington, D.C. 20201

Re: Provider Conscience Regulation, 73 Fed. Reg. 50274-50285 (August 26, 2008)
Comment of the Christian Legal Society and the Fellowship of Christian Physician Assistants.

Dear Secretary Leavitt:

Thank you for the opportunity to comment on these critical regulations protecting the rights of conscience of medical professionals. I write on behalf of the Christian Legal Society (CLS), a network of over three thousand Christian attorneys, law students, law professors, and judges, and the Fellowship of Christian Physician Assistants (FCPA), a national fellowship of over 600 Christian physician assistants and a recognized caucus of the American Academy of Physician Assistants. Both CLS and FCPA are pro-life and have advocated in the courts, legislatures, and media for medical professionals' rights of conscience.

You have requested comments concerning the "general knowledge or lack thereof of the protections established by [existing] nondiscrimination provisions ... within the healthcare industry and educational institutions." 73 Fed. Reg. 50279 (August 26, 2008). We can best demonstrate this lack of knowledge of the existing federal conscience protections through the arguments advanced by the National Family Planning and Reproductive Health Association, the State of California, Planned Parenthood of California and the California Medical Association in two lawsuits challenging the constitutionality of the Weldon Amendment, *National Family Planning and Reproductive Health Association (NFPRHA) v. Gonzales,* 468 F.3d 826 (2006) and *California v. United States,* 2008 WL 744840 (N.D. Cal. 2008). The Christian Legal Society's Center for Law & Religious Freedom represented three organizations of pro-life medical professionals, including FCPA, as intervenors defending the Weldon Amendment in both cases. The arguments of NFPRHA and the State of California in these cases showed a basic lack of understanding of the existing federal conscience protections applicable to them as federal grantees. As two large recipients of HHS funding, their lack of knowledge of the existing protections for medical professionals' rights of conscience — and their own obligations under those laws — illustrates the necessity of the proposed regulations.

***National Family Planning and Reproductive Health Ass'n v. Gonzales*:**

On December 13, 2004, just five days after the Weldon Amendment was signed into law, the National Family Planning and Reproductive Health Association filed a lawsuit against then Secretary Thompson and others seeking to enjoin its enforcement. "NFPRHA's membership comprises virtually all of the domestic family planning field including clinicians, administrators, researchers, educators, advocates and consumers." NFPRHA Complaint, ¶ 5, App. 3. These NFPRHA members include "approximately 4000 entities that receive Title X funds and are located throughout the United States. They are comprised of State health and social service departments, family planning councils, hospital-based clinics, and independent clinics and providers." App. 4-5, ¶ 18. In addition to funding under Title X, NFPRHA's members also receive funding from, *inter alia*, "public insurance (e.g. Medicaid), and from other federal and state grant programs." App. 5.

NFPRHA argued that the five-day-old Weldon Amendment threatened, for the first time, to prevent its members from forcing medical professionals to provide abortion referrals in violation of their consciences. NFPRHA candidly admitted in its court filings that "health care professionals on [its members'] staff[s] who will not refer will almost certainly be discriminated against." NFPRHA's Motion for TRO, 15, App. 15. NFPRHA even argued that its members' doctors have a First Amendment right to compel their staff members to give abortion referrals in violation of their consciences. NFPRHA's Appeal Brief, 19 n.7, App. 22; NFPRHA's Motion for TRO, 18, App. 16 (arguing that it is "inconceivable" that in enacting the Weldon Amendment Congress "intended to prevent health care entities such as clinics and doctors' offices from having control over their staffs"); NFPRHA's Complaint, ¶ 39, App. 8. See also Brief of Intervenor Defendants-Appellees, 13-15, App. 44-46 (explaining that NFPRHA's members and doctors they employ have no constitutional right to force others to speak for them).

This argument demonstrates NFPRHA's lack of understanding of the Church and Coats-Snowe Amendments (much less Title VII of the Civil Rights Act, and the First Amendment to the U.S. Constitution) and the restrictions these place on its members' ability to exert "control over their staffs" by "discriminat[ing] against" healthcare workers who object to providing abortion referrals. App. 15. The plain text of the Coats-Snowe Amendment, applicable to NFPRHA's members as Title X grantees, has prohibited since 1996 discrimination against medical professionals that will not provide abortion referrals. 42 U.S.C. § 238n. Thus, as to individual medical professionals' rights of conscience it is virtually identical to the Weldon Amendment.

Moreover, for over three decades the Church Amendment has expressly prohibited grantees under any HHS program from requiring anyone to participate, in conjunction with the program, in any activity "contrary to his religious beliefs or moral convictions." 42 U.S.C. 300a-7(d). In 2000, Secretary Shalala confirmed that the Church Amendment forbids recipients of Title X funds, like NFPRHA's members, from compelling their staff to provide abortion referrals or counseling. 65 Fed. Reg. 41274-75 (July 3, 2000). Yet, NFPRHA has never challenged these laws. The D.C. Circuit thus rejected NFPRHA's Weldon Amendment challenge, noting its pre-existing obligations under Church and Coats-Snowe and holding that, as to individual medical

professionals' conscience rights, the Weldon Amendment produced no "material change ... in terms of [NFPRHA] members' obligations to respect individual views on abortion." *NFPRHA v. Gonzales*, 468 F.3d 826, 830 (D.C. Cir. 2006).

NFPRHA also argued that the Weldon Amendment's prohibition on discrimination against healthcare workers who refused to perform or refer for abortions was too ambiguous to give their members notice of what was required of them. Professing ignorance as to whether "NFPRHA members that insist on their personnel providing a referral for an abortion at a patient's request violate Weldon," App. 19, NFPRHA blamed the department for a lack of regulations answering this question. App. 18. The proposed regulations should help answer that question, removing any doubt for NFPRHA and its members that they may not compel their staff to provide abortion referrals against their conscience. However, NFPRHA's argument further demonstrates that its members were unaware of their obligations under the 1996 Coats-Snowe Amendment, which used language identical to the Weldon Amendment in protecting medical professionals' rights of conscience, as well as the similar protections of the Church Amendment.

The unmistakable lesson from NFPRHA's unsuccessful lawsuit against the Weldon Amendment was that the organization lacked knowledge of its obligations under pre-existing federal law. This lack of knowledge led NFPRHA to see the Weldon Amendment as a sea change when many if not all of the actions it claimed the Weldon Amendment would prohibit it from taking had already been prohibited for years — even decades. That NFPRHA, a major recipient of Title X funding — and whose members include state and local government entities — was so unaware of its pre-Weldon legal obligations to protect the conscience rights of its employees demonstrates the need for the proposed regulations.

California v. United States:

In January 2005, just a little over a month after the Weldon Amendment was signed into law, the State of California also sued the federal government seeking to block its enforcement. In 2005 California received over twenty-eight billion dollars from the Department of Health and Human Services. Dec. of Tim Muscat, ¶ 3, Ex. A (Supplemental Response of Defendant Michael Leavitt to Interrogatory 13), App. 54-65. California receives more funding from the Department than any other state. Thus, one should expect California, of any state, to investigate and understand its obligations.

In *California v. U.S.*, the state argued that the Weldon Amendment interfered with California's "sovereign right" to enforce a California law requiring medical professionals to perform or refer for some abortions. 2008 WL 744840, 1 (N.D. Cal. 2008). See also, California's Memorandum in Support of MSJ, p. 9-10, App. 67-68; Dec. of Bill Lockyer (then California Attorney General), ¶¶ 8-9, App. 75 (stating that the Attorney General could not understand California's obligations under the Weldon Amendment and that Weldon would force California to forego enforcement of its laws requiring medical professionals to perform or refer for some abortions). The California law at issue, Cal. Health & Safety Code § 1317, would have authorized the state to criminally prosecute medical professionals who did not perform or refer for an abortion against their conscience in virtually any circumstance – so long as the state believed that the abortion was needed to protect a woman's emotional or familial "health." Brief

of Defendant-Intervenors, 22-24, App. 104-106 (explaining the necessarily broad scope of California's abortion mandate where a woman's "health" may be affected). See also, California Complaint, ¶¶ 23, 26, App. 110 (affirming that California law authorizes its state agencies to take disciplinary action against medical professionals who will not provide abortion related services in some circumstances).

In challenging the Weldon Amendment, California demonstrated its lack of understanding of the Church and Coats-Snowe Amendments, arguing, like NFPRHA, that the Weldon Amendment alone prevented it from mandating abortions and abortion referrals. California claimed, "[w]ere it not for the Weldon Amendment," the state could enforce its state law and require medical professionals to perform or refer for any abortion it deemed medically necessary. California's Memorandum in Support of MSJ, 24, App. 72. The state claimed that the newly enacted Weldon Amendment would force it to choose between enforcing this state law to compel doctors to perform and refer for abortions or forego some federal funding, including that from the Department of Health and Human Services. App. 70 (Weldon Amendment would leave California with "no choice but to refrain from enforcing" the state law mandating abortions be provided in some cases.) This argument ignored that for over three decades prior to the Weldon Amendment federal law already forbade California from requiring medical professionals to perform or refer for abortions. California neither challenged nor even acknowledged the existence of the Church and Coats-Snowe Amendments in *California v. United States*.

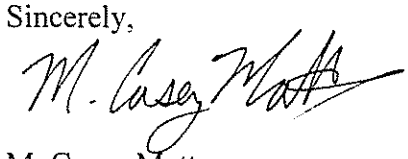
As with NFPRHA, both Coats-Snowe and Church would have also prohibited California from discriminating against medical professionals who would not perform or refer for abortions. Although the Weldon Amendment provides additional protections for healthcare institutions and insurance providers, its prohibition on discrimination against individual medical professionals who will not perform or refer for abortions is identical to that in the 1996 Coats-Snowe Amendment. 42 U.S.C. 238n. The Church Amendment also has prohibited such compelled participation in an act in violation of one's conscience for over thirty years. 42 U.S.C. 300a-7(d); 65 Fed. Reg. 41275 (July 3, 2000). Yet, the State of California argued that the Weldon Amendment had changed the law and, for the first time, prevented it from criminally punishing a doctor that would not perform an abortion. App. 72.

Nor can California's failure to address the Church and Coats-Snowe Amendments be dismissed as simple litigation strategy. These amendments would have continued to prevent the state, as an HHS grantee, from mandating that medical professionals perform or assist in abortions even had the Court enjoined enforcement of the Weldon Amendment. See Brief of Defendant-Intervenors, 9-17, App. 91-99. Thus, California's alleged injury from the Weldon Amendment was not redressible by the Court since California would have remained subject to these other federal laws even if it had prevailed. California's failure to address the Church and Coats-Snowe Amendments must be understood then not as a tactical plan but as a mistake borne of a lack of knowledge. As California was unaware of the requirements of the Church and Coats-Snowe Amendments, it cannot be presumed that other smaller federal grantees are aware of these laws and understand that as recipients of HHS funding they may not discriminate against medical professionals who do not perform or refer for abortions.

Additionally, the California Medical Association and Planned Parenthood of California jointly filed an amicus brief in *California v. United States* advocating for the state's right to criminally prosecute medical professionals that would not perform or refer for some abortions. The Weldon Amendment, they argued, would unconstitutionally force California to choose between enforcing this law and its federal funding. Brief of Amici Curiae California Medical Association and Planned Parenthood Affiliates of California, 7-8, App. 112-113. But, as explained above, the Church and Coats-Snowe Amendments already prohibited California from requiring individual medical professionals to perform or refer for abortions against their conscience. Like that of California itself, the *amici*'s glaring omission of any acknowledgement that the Church and Coats-Snowe Amendments, prior to and in addition to the Weldon Amendment, also protect medical professionals from being discriminated against because of their refusal to perform or assist in abortions illustrates their lack of understanding of these laws.

The pending regulations do not impose any new substantive obligations on HHS grantees. Rather, they simply require grantees to certify that they comply with the existing protections for medical professionals' rights of conscience. But as the above illustrates, holding HHS grantees responsible for legal requirements that they have ignored for decades is no small thing. The unfortunate fact is that while federal law explicitly protects medical professionals from being forced to perform or refer for abortions against their conscience, in practice HHS grantees have been unaware of or ignored these laws. The pending regulations are a necessary and important insurance that HHS grantees will not use federal taxpayers' money to compel persons to perform abortions or provide abortion referrals in violation of their consciences. Please issue these regulations at the earliest possible date.

Sincerely,



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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FAMILY PLANNING
AND REPRODUCTIVE HEALTH
ASSOCIATION, INC.,
1627 K Street, N.W., 12th Floor
Washington, D.C. 20006,

Plaintiff,

v.

JOHN ASHCROFT,
ATTORNEY GENERAL OF THE UNITED
STATES, U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
in his official capacity,

TOMMY G. THOMPSON, SECRETARY,
United States Department of Health and
Human Services,
200 Independence Avenue, S.W.
Washington, D.C. 20201
in his official capacity,

ELAINE L. CHAO, SECRETARY
United States Department of Labor
Frances Perkins Building
200 Constitution Avenue, N.W.
Washington, D.C. 20210
in her official capacity,

and

ROD PAIGE, SECRETARY
Office of the Secretary
United States Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202
in his official capacity,

Defendants.

Civil Action No.:

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action for declaratory and injunctive relief regarding a recently-enacted provision of appropriations law commonly referred to as the Weldon Amendment. The Weldon Amendment prohibits recipients of the FY 2005 appropriation for the Departments of Health and Human Services ("HHS"), Education ("DOE"), and Labor ("DOL") from subjecting any "health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." The term "health care entity" is defined to include all individual health professionals. This provision will cause severe harm to plaintiff National Family Planning and Reproductive Health Association's ("NFPRHA") members (and a great many others), which as a result of the Amendment, will at least face a loss of funds and possible civil and criminal sanctions.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331, § 1346, and § 1361. Plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. §§ 2201– 02 and related equitable relief pursuant to 28 U.S.C. § 1651. Venue is proper under 28 U.S.C. § 1391(e). The United States has waived sovereign immunity pursuant to 5 U.S.C. § 702.

THE PARTIES

Plaintiff

3. The National Family Planning and Reproductive Health Association ("NFPRHA") is a nonprofit membership organization organized under the laws of the District of

Columbia, with offices and its principal place of business in the District of Columbia.

4. NFPRHA was established to improve and expand the delivery of voluntary, comprehensive, and culturally sensitive family planning and reproductive health care services throughout the United States and to support reproductive freedom.

5. NFPRHA's membership comprises virtually all of the domestic family planning field including clinicians, administrators, researchers, educators, advocates and consumers. NFPRHA is the only national family planning organization that brings together among its membership: private nonprofit clinics, State, county, and local health departments, "umbrella" family planning councils, independent, free-standing family planning clinics, hospital-based clinics, and other family planning organizations and providers A large part of NFPRHA's membership administers and/or provides direct services using Title X funds.

Defendants

6. Defendant, Attorney General John Ashcroft is charged with the responsibility for prosecuting False Claims Act ("FCA"), 31 U.S.C. §§ 3729 - 31, violations on behalf of the United States through the Department of Justice as well as for bringing criminal sanctions against federal funds recipients for their violations of federal criminal law. He is sued in his official capacity.

7. Defendant Tommy G. Thompson is the Secretary of HHS which administers the Title X, Medicaid, Medicare, Maternal/Child Health Block Grant, the Ryan White HIV/AIDS, and many other programs. HHS is one of the agencies to which the Weldon Amendment applies. Secretary Thompson is sued in his official capacity.

prescribing contraceptives, advising on natural family planning, counseling and referring patients to other provides of medical services, and testing for pregnancy.

14. Clinics receiving Title X funds must provide an array of confidential preventative services including contraceptive services, pelvic exams, pregnancy testing, testing for cervical and breast cancer, screening for high blood pressure and anemia, screening for sexually transmitted diseases, including HIV, basic infertility services, health education and other health and social services.

15. Clinics receiving Title X funds not only provide critical health services, they also save the federal Government money. Title X clinic services prevent pregnancies, reduce the need for abortion, lower rates of sexually transmitted disease, including HIV, detect breast and cervical cancer at its earliest stages, and generally improve women's overall health. Money spent on publicly- funded family planning saves much more in terms of pregnancy-related and newborn care under Medicaid.

16. The vast majority of Title X clients are uninsured and do not qualify for Medicaid. However, anyone regardless of income can receive services at a Title X funded clinic. Approximately sixty-five percent of Title X clients have incomes below the federal poverty level (earning less than $15,260 per year for a family of three) and receive services at no cost. Ninety-two percent have incomes below 200% of the federal poverty level and receive services at a discounted rate. Seventy percent of women receiving subsidized family planning services are age 20 or over and approximately 63% are white.

17. For federal fiscal year 2004, Title X was funded at approximately $265 million.

18. NFPRHA's membership includes approximately 4000 entities that receive Title X

funds and are located throughout the United States. They are comprised of State health and social service departments, County local health and social service departments, family planning councils, hospital-based clinics, and independent clinics and providers. Title X funding is typically provided through grants to Statewide or regional agencies and organizations which, in turn, enter into "subgrants" with other agencies and organizations to provide Title X services, although some provide services as well as act as funding intermediaries. Most of the actual services are delivered by nonprofit organizations that are either dedicated to family planning activities (the majority) or provide a broader range of ambulatory health services (the minority). These clinics receive funds not only from Title X, but also from patient fees, private and public insurance (*e.g.*, Medicaid) and from other federal and State grant programs.

19. The numbers of these clinics are more than 4,600 nationwide. State, county and local health departments run the majority (approximately 57%) of clinics that receive Title X funds.

20. Because Title X is limited to pre-conceptional services, the program does not furnish services related to childbirth. Only in the context of a pregnancy diagnosis and a referral out of the Title X program is a pregnant woman given transitional information.

21. The Title X statute prohibits the use of program funds to pay for abortions. 42 U.S.C. § 300a-6. However, in keeping with established medical ethics, a woman is entitled to receive non-directive counseling and referrals upon request regarding all of her available options including prenatal care and delivery, infant care, foster care or adoption, and termination.

22. Regulations implementing Title X (at 42 C.F.R. Part 59) require that a Title X recipient of grant funds:

8, 2004.

INJURIES

34. Recipients of Title X funds must sign and submit to the Secretary of HHS at their peril assurances of compliance. As a consequence, such recipients are exposed to a number of sanctions including, but not limited to, the following:

(a) Civil and criminal penalties for filing a false claim with HHS. Enforcement of these penalties is by the Attorney General and the U.S. Department of Justice. In one instance, the False Claims Act, 31 U.S.C. §§ 3729 - 31, enforcement can be through individual citizens, not federal officials, i.e, through a *qui tam* lawsuit. Title X programs are subject to intense scrutiny and the potential for *qui tam* lawsuits is great.

(b) Any refusal to sign the assurance verbatim will lead to termination of Title X funding. Thus, recipients are unable to condition or qualify their assurance in any way.

(c) A violation of the assurance can also produce a range of HHS-imposed sanctions including grant suspension or termination, a "voiding" of the grant (with the recipient) obligated to repay all funds received since the date of the assurance), and debarment from all federal program, including the Medicaid program on which Title X recipients rely.

35. State and local governments receiving Title X funds make the same assurances concerning Title X funding and are also responsible for ensuring their subrecipients' compliance

with Title X compliance. State and local governments that receive sources of funding other than Title X will sustain injuries to those programs as well. State and local governments' use of their own funding to provide abortions or programs that allow women access to obtain an abortion would disqualify those State and local governments from receiving funds under the FY 2005 appropriations law from HHS, DOE, and DOL.

36. The threat of imposition of these sanctions arises from the Amendment's language, the vagueness of the language, and the inability of affected parties to discern an underlying rationale for the Amendment. Title X programs are subject to intense scrutiny by several organizations and a large number of individuals that/who object to abortions or any related activity in support of abortions. These organizations and individuals have been known to monitor those projects' activities and can be expected to engage intensively in monitoring compliance with the Weldon Amendment. These same organizations and individuals can be expected to avail themselves of any third party rights of action they may have to enforce the Amendment's terms either against Title X recipients or State or local programs dealing with such recipients.

37. The Weldon Amendment's anti-discrimination provision appears to runs directly counter to the Title X requirement contained in 42 C.F.R. § 59.5 that grantees and subgrantees of Title X are required to refer patients for an abortion if the patient so requests. Thus, Title X grantees are operating under a requirement to take actions that the Weldon Amendment might bar.

38. Typically, if a physician is requested by a patient to make a referral for abortion and the physician in applying his/her medical judgment believes it is either medically-indicated

or otherwise appropriate to provide such a referral, the function of actually providing the referral and associated information is often delegated to a nurse, physician assistant or other paraprofessional who works under the physician's supervision.

39. The health care providers at the clinics who determine it is medically-indicated or otherwise appropriate to provide such referrals and who may have their referrals impeded by a individual who does not wish to provide patients with referrals will sustain injuries to their rights to speech protected under the First Amendment. Patients who do not receive the referrals that their physicians intended them to receive may also sustain life-threatening injuries. In many instances, the physician may never learn that the referral was never provided, or may come by that information after some time has passed.

COUNT I

40. Paragraphs 1 through 39 are incorporated by reference as if fully realleged herein.

41. The Weldon Amendment is unconstitutional for, among others, the reasons set forth below.

42. The Weldon Amendment violates the due process protections and separation of powers principles of the Constitution in that it is so vague as to be unenforceable.

43. The Weldon Amendment impedes the rights of Title X clinics and their phsyicians to provide referral services. Physicians who intend that a patient receive a referral for an abortion as part of the patient's health care will have their First Amendment rights to speech impaired by an individual who refuses to provide such a referral. Patients whose physicians have intended that they receive such referrals will have their privacy rights violated if other individuals do not provide them with the referral they were meant to receive.

44. The Weldon Amendment imposes unconstitutional obligations on State and all other funding to which it applies and is an unconstitutional exercise of spending power..

PRAYER FOR RELIEF

45. WHEREFORE, plaintiff prays that the Court:

(A) Declare that the provisions of the Weldon Amendment relating to subjecting a health care entity to "discrimination" are unconstitutionally vague and overbroad;

(B) Issue a permanent injunction against implementation and enforcement of the Weldon Amendment's anti-discrimination requirements with respect to plaintiff's members;

(C) Award plaintiff its reasonable attorneys' fees and costs for bringing this action; and

(D) Order such other and further relief as the Court may deem just and proper.

Respectfully submitted,

James L. Feldesman (D.C. Bar No. 023796)
Kathy S. Ghiladi (D.C. Bar No. 435484)
Robert A. Graham (D.C. Bar No. 450345)
Grace B. Culley (D.C. Bar No. 486713)*
(* admission to District Court pending)

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Attorneys for Plaintiff

Date: December 13, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION,	)	
Plaintiff,	)	
v.	)	
	)	Case No._____
JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice, *et al.,*	)	
Defendants.	)	

MOTION FOR TEMPORARY RESTRAINING ORDER

Pursuant to Fed. R. Civ. P. 65(b), plaintiff, the National Family Planning and Reproductive Health Association ("NFPRHA"), on behalf of its members, asks the Court to issue a temporary restraining order to prevent defendants from enforcement of Division F, Title V, Section 508(d) of the Consolidated Appropriations Act, 2005, P.L. No. 108-44, 118 Stat. 2809 (the "Weldon Amendment"). For the reasons stated in the accompanying memorandum of points and authorities, a temporary restraining order is warranted. A proposed Order also accompanies this Motion. A hearing at the earliest possible opportunity is respectfully requested.

Respectfully submitted,

James L. Feldesman (023796)
Kathy S. Ghiladi (435484)
Robert A. Graham (450345)
Grace B. Culley (486713)*
(* District Court admission pending)

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CERTIFICATE OF COUNSEL

Pursuant to Local Rule 65.1(a), counsel for plaintiffs certify that immediately after receiving the summons, stamped by the Clerk of the Court, counsel will hand-deliver the foregoing Motion for Temporary Restraining Order to United States Attorney Kenneth L. Wainstain and will send the foregoing via certified mail, return receipt requested to the defendants.

James L. Feldesman

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF

Plaintiff National Family Planning and Reproductive Health Association ("NFPRHA") submits the following memorandum of points and authorities in support of its motions for temporary and preliminary injunctive relief. NFPRHA specifically requests that the Court enter an order enjoining the implementation of Section 508(d) of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2005.[1]

As set forth in greater detail below, the Weldon Amendment is facially unconstitutional. Its language is also so vague that NFPRHA's members cannot discern how to conform their conduct to their legal obligations as recipients and subrecipients of federal monies, and State and local governments cannot determine how to protect themselves from a violation of the Amendment by a NFPRHA member under funding provided by such governments. The traditional tools of statutory interpretation cannot cure the infirmities in the statute, as their application would yield the unconscionable result of preventing a woman requiring life-saving

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[1] The Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2005, was enacted as part of the Consolidated Appropriations Act, 2005, Pub. L. No. 108-447 (Dec. 8, 2004). The Departments of Labor, Health and Human Services, and Education are referred herein as DOL, HHS, and DOE, respectively. Section 508(d) appears at Title V of Division F of the Consolidated Appropriations Act, and provides as follows:

> (1) None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.
> (2) In this subsection, the term 'health care entity' includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization or plan.

It was introduced by Congressman David Weldon (Fla. 15th Dist.) and is referred to throughout this memorandum as "the Weldon Amendment," "the Amendment," or "Weldon."

In this respect, health care professionals on the staff who will not refer will almost certainly be discriminated against. Because such professionals will not refer for abortions, they cannot be given the same responsibilities of counseling and referring pregnant women as professionals who will refer. However, any reassignment of responsibilities based on this refusal to refer amounts to the kind of discrimination Weldon appears to prevent.

Further complicating the Title X program's situation under Weldon is the fact that many Title X subawards are now being made with *last year's* (FY 2004) funding. Exhibit 1, DeSarno Decl. at ¶ 19. Because Title X grants are made annually by HHS (42 C.F.R.§59.8(b)) and, as is typical with most Government grant-type programs, a disproportionate number of awards are made in the final months of the fiscal year, Title X intermediaries are currently discriminating in making subawards and will discriminate for some extended period in FY 2005.

It is not just NFPRHA members' rights to receive and/or spend their Title X grant funding that has animated this case and the protections NFPRHA here seeks for its members. As previously explained, because Title X grantees are obligated to conduct activities supported by Medicaid and other State and local government programs in accordance with Title X requirements, a State or local government that grants or contracts its funds for family planning to a Title X recipient exposes itself to the charge that *it* is subjecting an entity or health professional to Weldon-banned discrimination. State and local governments will, of course, be fearful of just such a problem and will be likely to de-fund Title X recipients or condition their funding on Weldon's requirements, a condition which Title X recipients legally will be unable to accept.[8] Exhibit 1, DeSarno Decl. at ¶ 22.

[8] NFPRHA's membership includes a relatively small number of family planning clinics that do not receive Title X funds but nevertheless, as a matter of their own medical and ethical judgments, adhere to Title X's policies of non-directive counseling and referral. States and

d. Efforts to Interpret Weldon Yield "Absurd Results."

Relying on language in laws *in pari materia* with Weldon, "discrimination" within the meaning of the Amendment would consist of the full panoply of practices through which a recipient or subrecipient of federal financial assistance might accord different treatment to another entity or individual on prohibited grounds.

Title VI generally defines "discrimination" as exclusion from participation in, denial of the benefits of, or otherwise subjecting to discrimination under any "program" receiving federal financial assistance. 42 U.S.C. § 2000d. The specific acts, policies, and practices comprising "discrimination" under Title VI include, but are not limited to: (1) the denial of services, aid, or benefits; (2) disparate treatment in the provision of services, aid, or benefits; (3) imposition of disparate conditions on the receipt of services, aid, or benefits; (4) denial of participation/opportunity to participate in any aspect of a program on prohibited grounds; and (5) utilization of "criteria or methods of administration which have the effect of subjecting individuals to discrimination" on prohibited grounds. *See, e.g.*, 45 C.F.R. § 80.3(b) (U.S. Department of Health and Human Services regulation implementing Title VI).

Because Weldon does not limit the forms of discrimination that it covers, it must encompass more than discrimination "in the employment, promotion, or termination of employment" of a health care provider, or "in the extension of staff or other privileges." To construe the Weldon Amendment to bar personnel actions already prohibited by law would be contrary to the canons of statutory construction. Indeed, the absence of any limits on discrimination when compared to other anti-discrimination laws such as Title VI, which

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localities caught up in the frenzy Weldon is certain to produce once its potential impact is understood will have no reason to apply different standards to these clinics. Thus, these NFPRHA members are equally vulnerable to Weldon's impact on their State and local funding. The relief NFPRHA here seeks extends to these members as well.

carefully describe what acts of discrimination are prohibited, forces the conclusion that Weldon covers *all* forms of discrimination. Any distinctions drawn based on what Weldon protects would violate the terms of the Amendment.

The problem with simply assuming that Weldon's anti-discrimination language bars any distinctions whatsoever is that such an interpretation inevitably produces absurd and unconstitutional results.[9] The "absurd results" doctrine is the exception to the general rule that courts should interpret statutes according to their plain meaning, and requires that courts construe statutes so as to avoid unreasonable or absurd results. *See Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) ("confronted here with a statute, which interpreted literally, produces an absurd, and perhaps unconstitutional, result, [o]ur task is to give some alternative meaning [to the words of the statute] that avoids that consequence.") (Scalia, J., concurring). Thus, "[i]f a literal construction of the words of a statute be absurd, the act must be so construed as to avoid

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[9] Such a meaning would, of course, also be unconstitutional. It is well-settled that "if a law 'impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.'" *Harris v. McRae*, 448 U.S. 297, 312 (1980) (citing *Mobile v. Bolden*, 446 U.S. 55, 76 (1980)). Congress does not impinge on constitutional rights by merely deciding not to fund activities or programs that promote the exercise of such rights, or selectively funding, and thus favoring, certain protected rights over others. *See Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983) ("a legislature's decision not to subsidize the exercise of a fundamental right does not infringe on the right."); see also *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."). The distinction lies between a decision by Congress not to fund a protected right versus placing a "governmental obstacle" in the way of exercising a fundamental right. *See Maher v. Roe*, 432 U.S. 464, 475 (1977) ("There is a basic difference between direct [governmental] interference with a protected activity and [governmental] encouragement of an alternative activity consonant with legislative policy."). Weldon falls within the latter category because to the extent a woman requires an abortion because of medical necessity (or indeed who, for other reasons, decides she wants one) is denied that right because the staff member who is counseling her refuses to refer her to one, her constitutional liberty to decide whether to terminate her pregnancy -- a liberty upheld in *Roe v. Wade* -- has been impinged. 410 U.S. 113 (1973).

the absurdity." *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998). *See also United States v. Ron Pair Enterprises*, 489 U.S. 235, 243 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare circumstances [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" (citing *Griffen v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982))).

It seems inconceivable that, through Weldon, Congress intended to prevent health care entities such as clinics and doctors' offices from having control over their staffs, much less control in a situation where a patient needs to be referred for an abortion to prevent her from dying or being seriously impaired for the rest of her life, as is often the case. *See* Declarations of Dr. Mark Evans and Dr. Ellen Landsberger (Exhibits 2 and 3, respectively) at ¶¶ 8-11 (Dr. Evans) and ¶¶ 7-10 (Dr. Landsberger). Similarly, it is ridiculous to imagine that Congress just passed an annual HHS appropriation that cannot be spent because HHS, through its Title X regulations, subjects health care entities and providers to discrimination. In the ordinary course, this Court would be obligated to fashion an interpretation of Weldon that avoids all such obvious absurdities. However, for the reasons presented in the discussion below, the Court is constitutionally impeded from doing so, because, it is impossible to ascertain what it was that Congress actually sought to achieve by the Amendment.

e. **The Amendment is Too Vague to Enforce.**

As the attached declarations of the two doctors (Exhibit 2 at ¶¶ 6, 12-17 and Exhibit 3 at ¶¶ 5, 12-16) show, Weldon on its face is unimplementable. States, localities, hospitals, clinics and doctors obviously cannot and will not jeopardize their patients' lives or health by accepting the 2005 funds to which Weldon applies if Weldon actually means that they cannot ever "discriminate" against someone on their staffs or in their offices who will not refer a patient for

No. 05-5406

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION, INC.,

Plaintiff/Appellant,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, *et al.*

Defendants/Appellees.

On appeal from the United States District Court
for the District of Columbia

BRIEF OF APPELLANT (CORRECTED)

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District Court treated the parties' briefs as cross-motions for summary judgment. JA 177, Memorandum Op. at 2, *citing Purepac Pharm Co. v. Thompson,* 238 F. Supp. 2d 191, 192 (D.D.C. 2002); *Ass'n of Flight Attendants, AFL-CIO v. USAir, Inc.*, 807 F. Supp. 827, 829 (D.D.C. 1992). The standard of review applicable to summary judgment motions is *de novo*. *Consumer Fed'n of Am. And Public Citizen v. U.S. Dep't of Health and Human Servs.*, 83 F.3d 1497, 1501 (D.C. Cir., 1996).

B. The Statute Is Too Vague To Implement

In its memorandum submitted to the district court, NFPRHA posed eight series of questions about what Weldon might require of its members. JA 39-40. None was answered in the governments' memoranda or at the hearing on preliminary injunction/summary judgment. The excuse at the time (the ink was not yet dry on the statute) long ago ran its course. Despite this, there is, as yet, no regulation, guideline, informal counsel or any other communication from any one of the relevant agencies that would provide NFPRHA members or other affected parties with guidance on the obligations the Federal Government believes Weldon imposes on them. Accordingly, NFPRHA's eight sets of questions continue to remain unanswered by the government and are worth repeating here because they are precisely what Title X recipients and subrecipients must have the answers to in order to be certain that they, as well as the federal, State and local officials who

provide them funding, are able to comply with Weldon's terms (and do so without overreacting and unnecessarily curtailing funding to NFPRHA's members).

(1) Will State and local governments be subject to Weldon violations if one of our members violates Weldon's terms with the State/local government's own funding? How about federal funding such as Title X or Medicaid?

(2) What actions, short of de-funding NFPRHA members, can State and local governments take to protect themselves from being responsible for a NFPRHA member's violation of Weldon with the State/local government's funds?

(3) Will NFPRHA members that insist on their personnel providing a referral for an abortion at a patient's request violate Weldon? Suppose they re-assign any staff person who will not refer or refuse to hire people who will not refer? Does the re-assignment or refusal to hire constitute "discrimination" proscribed by Weldon?

(4) Will NFPRHA members that insist on their personnel providing a referral in the case where a patient's life is in danger (and re-assign or not hire staff that refuse) violate Weldon? How about a patient's health? Assuming the answers to the foregoing is "no," who decides about life or health endangerment?

(5) Will NFPHRA members and/or doctors working for those members be subject to medical malpractice actions as the declarations of the two doctors suggest (Exhibit 2 at ¶ 16; Exhibit 3 at ¶ 15 to NFPHRA's December 18, 2004 Memorandum in Support of Motion for Temporary and Preliminary Injunctive Relief) if Weldon means what it appears to mean and lawsuits are brought by or on behalf of patients whose lives were lost or health was impaired by a staffer's refusal to refer for an abortion? If the answer is yes, where will those members or doctors (or anyone in a similar situation) be able to secure medical malpractice insurance?

(6) Regarding NFPRHA's governmental members, does their implementation of Title X's referral requirement, either in making awards only to entities that will refer or by "discriminating" against health care professionals in their clinics or hospitals by re-assigning those who will not refer, jeopardize their 2005 and 2006 HHS, DOE, or DOL funding? If so, can a State or locality avoid Weldon by legally canceling its prior Title X award from HHS, including its legal responsibility over its subgrantees under that prior award?

(7) How can NFPRHA members administering Title X funds comply with both the Title X regulations requiring referrals for an abortion

and Weldon? What legal jeopardy are they now in because of the inconsistency?

(8) Even if the answers to all of the above questions are such as to impose none of the responsibilities the questions are aimed at (in other words NFPRHA members have nothing to worry about, at least insofar as those questions are concerned), what assurance is there that NFPRHA members or State or local governments will not be exposed to civil rights or whistleblower actions based on the conduct described in these questions? Or that other independent parties such as medical malpractice insurers will not think otherwise and take protective action (for insurers, withdraw their coverage)? Will the Government commit to intervene in such actions and provide courts with the assurance that NFPRHA members or State or local governments have not violated Weldon?[3]

[3] Because of the government's argument below that Weldon may not even apply to Title X recipients, we now ask one further question -- Does Weldon even apply to the Title X projects NFPHRA members now administer?

abortion),[6] may the project, without committing an act of discrimination barred by Weldon, reassign that person to duties other than counseling or substitute another counselor for that person who is willing to counsel and refer for an abortion as Title X regulations require?[7]

C. The District Court Erred in Holding that Weldon Does Not Constitute an Improper Exercise of Congress' Spending Power

The current "Grant Application" form used by applicants for Title X and other Department of Health and Human Services ("HHS") grant program funding requires all such applicants to make certain binding "assurances" (*see* NFPRHA's Motion for Preliminary Injunction, Ex. 1A at "Assurances"; "Certifications"). To make such assurances, a representative of the applying entity "certif(ies) that the applicant:

* * *

> "6. Will comply with *all* Federal statutes *relating to nondiscrimination*.

* * *

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[6] Perhaps even worse, the counselor may decide not to advise the project that s/he will not make an abortion referral.

[7] It is in this regard, by the way, that First Amendment rights become implicated. In the modern world of medicine, physicians typically assign medical duties to professional staff (*e.g.*, nurse practitioners, physician assistants, social workers) who follow that physician's standing orders. The problem posed by our second situation is that the professional staff person directed by the physician to conduct pregnancy counseling and referrals in concert with Title X regulations, *may*, depending on how Weldon is interpreted, be able to thumb his or her nose at the physician and not refer despite instructions to do so. Clearly, such an interpretation would give rise to significant speech and physician-patient rights issues. A quick run-through of *Rust v. Sullivan*, 500 U.S. 173 (1991), is all that is required to demonstrate the existence of such significant Constitutional issues.

No. 05-5406

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Plaintiff/Appellant,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, *et al.*

Defendants/Appellees,

and

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

Intervenor Defendants-Appellees.

On appeal from the United States District Court
for the District of Columbia

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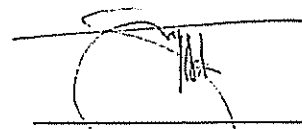
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. **Parties and Amici.** All parties, intervenors and amici appearing before the district court and in this court are listed in the Brief of Appellant, except the Fellowship of Christian Physician Assistants will also join the amicus brief filed by the Amici Members of Congress.

B. **Rulings Under Review.** References to the ruling at issue appear in the Brief of Appellant.

C. **Related Cases.** There are no related cases within the meaning of D.C. Cir. R.28(a)(1)(C).

Respectfully submitted,



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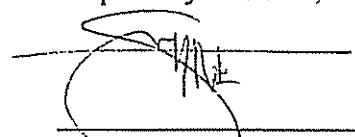
DATED: May 26, 2006

Counsel for Intervenor Defendants-Appellees

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Appellees, Christian Medical Association and American Association of Pro-Life Obstetricians and Gynecologists, are non-profit organizations. They have no debt or other securities held by the public, nor does any publicly-traded company have an interest in Appellees.

Respectfully submitted,



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STATEMENT REGARDING ORAL ARGUMENT

Appellees respectfully request that this Court order oral argument in this matter should the Court deem it necessary or helpful to the resolution of this appeal.

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TABLE OF AUTHORITIES

Cases

U.S. Constitution

Statutes

Regulations

*Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

American Association of Pro-Life Obstetricians and Gynecologists	AAPLOG
Christian Medical Association	CMA
Joint Appendix	J.A.
National Family Planning and Reproductive Health Association, Inc.	NFPRHA
Title X of the Public Health Service Act, 42 U.S.C. § 300	Title X
United States Department of Health & Human Services	HHS

I. COUNTER STATEMENT REGARDING JURISDICTION

For the reasons explained in part VI(C) of this brief, this Court lacks jurisdiction to order the relief now requested *for the first time on appeal* by NFPRHA, specifically an injunction mandating the Secretary of Health and Human Services to issue guidance concerning the Weldon Amendment. NFPRHA did not file with the Secretary a "petition for the issuance, amendment, or repeal of a rule" pursuant to 5 U.S.C. § 553(e), Administrative Procedures Act. NFPRHA has not informed the Court that it has done so and this Court therefore lacks jurisdiction to award the relief NFPRHA now seeks. *Schuck v. Butz*, 500 F.2d 810, 811-12 (D.C. Cir. 1974); *National Wrestling Coaches Ass'n v. United States Dep't of Educ.*, 263 F.Supp. 2d 82, 128 (D. D.C. 2003).

II. STATEMENT OF THE ISSUES

In addition to the questions presented by NFPRHA in its brief, Intervenors identify an additional question presented to this Court:

1. Whether this Court has jurisdiction to enjoin enforcement of the Weldon Amendment and order the Secretary of Health and Human Services to issue guidance concerning NFPRHA's obligations under the Weldon Amendment despite NFPRHA's failure to avail itself of the procedure for petitioning the Secretary to issue such guidance set out in 5 U.S.C. § 553(e), the Administrative Procedures Act.

III. STATUTES AND REGULATIONS

5 U.S.C. § 553(e):

> Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Except for the above and those statutes and regulations set out below in the Statement of the Case, all applicable statutes and regulations are contained in the Brief of Appellant.

IV. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND[1]

1. The Weldon Amendment

On December 8, 2004, Congress enacted the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2005 as Division F of the Consolidated Appropriations Act, 2005, Pub. L. 108-447, 118 Stat. 2809. Title V, § 508(d) of the Act is known as the Weldon Amendment (after its principal sponsor Congressman David Weldon, M.D. (R-FL)). The Appropriations Act, including the Weldon Amendment, was signed into law the same day. The Weldon Amendment provides that:

> (1) None of the funds made available in [the 2005 Labor, Health, and Education Appropriations Act] may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.
>
> (2) In this subsection, the term "health care entity" includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.

The language above was re-enacted for fiscal year 2006 in the appropriations act applicable to these same three agencies. Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-149 § 508(d)(1) (2005).

2. Other Conscience Protections in Federal Law

Congressional concern for and enactment of legislation to protect the rights of conscience of healthcare workers dates to the immediate aftermath of the *Roe v. Wade* decision itself. 410 U.S. 113 (1973). In addition to already-existing protections under the First Amendment of the United States Constitution applicable to government agencies and employers, Congress has enacted several specific protections for the rights of conscience of healthcare workers, forbidding

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[1]The factual recitation of the Government Defendants in Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a Preliminary Injunction, J.A., 62-66, is informative and, though supplemented, is largely repeated here for the Court's convenience.

discrimination against them for their refusal to participate or assist in various aspects of the provision of abortion services. The first of these provisions of federal law was enacted over three decades ago. In 1973, Congress enacted 42 U.S.C. § 300a-7(c)(1) which states:

> No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act,[2] the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act after June 18, 1973, may --
> (A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or
> (B) discriminate in the extension of staff or other privileges to any physician or other health care personnel, because he refused to perform or assist in the performance of ... [an] abortion on the grounds that his performance or assistance in the performance of the procedure of abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting ... abortions.

In 1974, Congress enacted a similar right of conscience protection with regard to grants or contracts for biomedical or behavioral research programs administered by the Department of Health and Human Services. National Research Act, Pub. L. No. 93-348, § 214, 88 Stat. 353 (1974) (prohibiting discrimination in the employment of or extension of staff privileges to any health care professional "because he refused to perform or assist in the performance of 'any lawful health service' on grounds of religious belief or moral conviction"). That same year, Congress enacted 42 U.S.C. § 300a-7(d), which provides that "[n]o individual [may] be required to perform or assist in the performance of any part of a health service program ... funded in whole or in part under a program administered by the Secretary of Health and Human Services" if doing so "would be contrary to his religious beliefs or moral convictions."

In 1996, Congress codified another prohibition on discrimination against pro-life healthcare workers at 42 U.S.C. § 238n(a), commonly referred to as the Coats-Snowe Amendment after its principal sponsors Senators Dan Coats (R-IN) and Olympia Snowe (R-ME), which states:

> The Federal Government, and any State or local government that receives Federal financial assistance, may not subject any health care entity to discrimination on the basis that –

---

[2]Title X of the Public Health Services Act is the "Title X" implicated in this action.

1. the entity refuses to ... perform ... abortions, or to provide referrals for ... such abortions.
2. the entity refuses to make arrangements for any of the activities specified in paragraph (1)...

The Coats-Snowe Amendment defines a "health-care entity" to include "an individual physician." 42 U.S.C. § 238n(c)(2).

3. **Title X of the Public Health Services Act**

Title X of the Public Health Services Act (the "PHSA"), 42 U.S.C. §§ 300 to 300a-6, enacted in 1970, authorizes the Secretary of Health and Human Services "to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." 42 U.S.C. § 300(a). "Grants and contracts made under [Title X] [must] be made in accordance with such regulations as the Secretary may promulgate." *Id.*, at § 300a-6. However, no funds appropriated for purposes of Title X "shall be used in programs where abortion is a method of family planning." *Id.*, § 300a-6.

In 1988, the Secretary promulgated a Title X regulation, commonly referred to as the "gag rule," specifying that a "Title X project [could] not provide counseling concerning the use of abortion ... or provide referral for abortion as a method of family planning," even upon specific request, but must refer pregnant clients "for appropriate prenatal and/or social services...." *Rust v. Sullivan*, 500 U.S. 173, 179-80 (1991). The Supreme Court upheld this rule, specifically holding that it did not violate the First Amendment right of the clinic and its staff to provide abortion referrals. *Id.* at 192-200. On January 22, 1993, two days after his inauguration, President Clinton suspended the "gag rule" and ordered the Secretary to initiate new rulemaking procedures. Presidential Memorandum of January 22, 1993, published at 58 Fed. Reg. 7455 (Feb. 5, 1993). Over seven years later, on July 3, 2000, Secretary of Health and Human Services Donna Shalala issued new final rules applicable to Title X grantees, revoking the "gag rule" and replacing it with a requirement that a Title X project must

> [o]ffer pregnant women the opportunity to be provided information and counseling regarding each of the following options:
>
> (A) Prenatal care and delivery;
> (B) Infant care, foster care, or adoption; and
> (C) Pregnancy termination.
>
> If requested to provide such information and counseling, [a Title X project must] provide neutral, factual information and nondirective counseling on each of the options, and *referral upon request*, except with respect to any option(s) about which the pregnant woman indicates she does not wish to receive such information and counseling.

42 C.F.R. § 59.5(a)(5) (emphasis added).

4. The Christian Medical Association and the American Association of Pro-Life Obstetricians and Gynecologists

The Christian Medical Association ("CMA") is a nonprofit national organization of over 16,000 Christian physicians and other allied healthcare professionals. Decl. of David Stevens, ¶ 3. Some CMA members are employed by governmental or other employers, including Plaintiff's members, who are prohibited by the Weldon Amendment from discriminating against CMA's members because they refuse to provide or refer for abortions. *Id.*, ¶ 4. The American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG") is a national nonprofit medical professional pro-life organization whose membership includes hundreds of physicians opposed to the practice of abortion for a variety of reasons, including religious and moral beliefs as well as the conviction that the practice of abortion is inconsistent with the exercise of professional medical ethics. Decl. of Joe DeCook, ¶¶ 3-5. As the District Court recognized, the invalidation of the Weldon Amendment would have "material consequences" for the pro-life physicians and other healthcare professionals who make up CMA's and AAPLOG's membership. Order Granting Intervention, at 2.

B. PROCEEDINGS BELOW

On December 13, 2004, five calendar days (three business days) after the appropriations act that included the Weldon Amendment was signed into law, Appellant NFPRHA brought the instant lawsuit against the Attorney General and the Secretaries of Health and Human Services, Labor, and Education. Complaint for Declaratory and Injunctive Relief, dated December 13, 2004 (the "Complaint"), ¶¶ 1, 3-9,

18; J.A. 7. The Complaint sought a declaration that the Weldon Amendment is "unconstitutionally vague and overbroad," and an injunction prohibiting "the Weldon Amendment's anti-discrimination requirements with respect to plaintiff's members." Complaint, ¶ 45, J.A. 20. On the same date, NFPRHA filed a motion for a temporary restraining order and preliminary injunction. The District Court denied the motion for a temporary restraining order on December 20, 2004. The Government Defendants filed a response to NFPRHA's motion for preliminary injunction on December 23, 2004.

On January 4, 2005, the Christian Medical Association and the American Association of Pro-Life Obstetricians and Gynecologists sought leave to intervene as party defendants. The District Court granted this motion concurrent with its judgment for Defendants on September 28, 2005.

On January 5, 2005, the District Court held a hearing on the motion for preliminary injunction at which the Government Defendants and NFPRHA agreed to consolidate the preliminary injunction hearing with the hearing on the merits. Transcript of Motion for Preliminary Injunction/Hearing on the Merits, 2-3; J.A., 110-111. NFPRHA, the Government Defendants, and CMA/AAPLOG filed supplemental briefs subsequent to the hearing.

On September 28, 2005, the District Court entered judgment for Defendants, issuing a Memorandum Opinion. NFPRHA filed a timely appeal.

V. SUMMARY OF THE ARGUMENT

The Weldon Amendment is clear in its prohibition of discrimination against healthcare workers and institutions who have moral or religious objections to providing abortion referrals and the obligations the Weldon Amendment imposes upon NFPRHA's members are requirements that have been imposed upon them for over three decades by other federal conscience protections. NFPRHA's arguments in this case ignore these long-standing and independent obligations not to compel employees to provide abortion referrals against their conscience and all but concede that NFPRHA's members have not and are not complying with their obligations under these other federal conscience protections that they do not challenge in this action. Further, NFPRHA's physician members and clinic physicians have no constitutional right whatsoever to compel their subordinates or anyone else to provide abortion referrals

on their behalf in gross violation of their conscience. Additionally, the remedy sought by NFPRHA for the first time on appeal, a mandatory injunction requiring the Secretary of Health and Human Services to provide regulatory guidance concerning the Weldon Amendment, is unprecedented and entirely unnecessary as NFPRHA is free to petition the Secretary for such regulations itself pursuant to the Administrative Procedures Act. Nor is there a need for an injunction prohibiting enforcement of the Weldon Amendment on vagueness grounds because, even assuming that the Weldon Amendment is unconstitutionally vague, the appropriate remedy is for a future court to prevent Congress from penalizing NFPRHA's members for their failure to adhere to the allegedly vague condition, not for a federal court to issue an injunction prohibiting the executive branch from enforcing this condition against NFPRHA's members in all cases. Finally, even if there were a conflict between the Weldon Amendment and a pre-existing regulation promulgated under another statute by the Secretary of Health and Human Services such that one of the two must be enjoined, the regulation, not the Act of Congress, must bow.

VI. ARGUMENT

A. THE WELDON AMENDMENT'S PROHIBITION ON DISCRIMINATION AGAINST HEALTHCARE WORKERS AND INSTITUTIONS WHO HAVE MORAL OR RELIGIOUS OBJECTIONS TO PROVIDING ABORTION REFERRALS IS CLEAR AND UNAMBIGUOUS.

The sole theory advanced by NFPRHA on appeal that the Weldon Amendment violates Congress's authority under Art. I, Sec. 8 of the Constitution is its claim that Weldon is too vague to place its members on notice of their obligations. NFPRHA's Brief, p. 21-22.[3] In *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981), the Supreme Court held that in exercising its spending authority, Congress must be clear enough in the conditions placed on the funding that a recipient may "ascertain what is expected of it." However, Article I, Sec. 8 does not require that Congress "specifically identif[y] and proscribe[e] in advance" all actions that would violate the terms of the condition. *Bennett v.*

[3]NFPRHA had advanced a coercion theory in the District Court, but makes no attempt here to argue that the Weldon Amendment is unduly coercive in violation of Art. I, Sec. 8, making only one passing mention that the doctrine exists without any argument that the Weldon Amendment's condition is "coercive." NFPRHA Brief, 22. *See also*, Memorandum Opinion, 9-10, Joint App., 184-85 (rejecting NFPRHA's coercion argument). NFPRHA has also abandoned its due process and nondelegation doctrine claims on appeal.

Kentucky Dep't of Educ., 470 U.S. 656, 665-66 (1985). *See also, Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004) (same). The District Court properly held that Congress satisfies its minimal obligation under *Pennhurst*'s "clear statement" rule.

1. **The Weldon Amendment's Prohibition on Discrimination is Abundantly Clear.**

NFPRHA makes no serious argument that the Weldon Amendment, by its terms, does not apprise its members of what is expected of them. NFPRHA poses a few extraordinarily speculative questions raising the specter of life or death situations and then compounds the several layers of implausibility that underlie this objection by hypothesizing that doctors may even face malpractice actions arising from their compliance with Weldon in a life or death circumstance, and complain that Weldon does not direct them to find malpractice insurance. However, NFPRHA has not identified any occurrence of these events in the over three decades that its members have been prohibited from requiring employees to provide abortion counseling and referrals against their conscience. Further, these concerns are not directed at any ambiguity in the *terms* of the Weldon Amendment itself, but simply reflect exceptions and amendments NFPRHA would prefer to see in the Amendment to govern hypothetical cases that, for all appearances, have never actually occurred; yet there is no ambiguity about whether the Weldon Amendment contains such exceptions on its face and NFPRHA has abandoned any constitutional argument that the Weldon Amendment is facially unconstitutional because of the lack of any such qualifiers.

The only actual Weldon Amendment term to which NFPRHA raises a vagueness objection is the term "discrimination." But it does not explain why this term, used in a myriad of federal laws for decades, fails to place NFPRHA's members on notice of what is expected of them. Nor does NFPRHA offer any explanation for how its governmental members have been ostensibly able to comply with, for example, the Coats-Snowe's prohibition on discrimination against physicians who refuse to perform or provide referrals for abortions. 42 U.S.C. § 238n. NFPRHA's own arguments in this case about its members' discriminatory practices and intended practices notwithstanding, they have been and remain subject to the Coats-Snowe Amendment and the lack of a challenge to this discrimination prohibition belies the claim that NFPRHA does not understand what is expected of its members under the Weldon

Amendment. Further, as the Eleventh Circuit has held, this argument is foreclosed by Supreme Court precedent. "The Supreme Court has explained that so long as a spending condition has a clear and actionable prohibition of discrimination, it does not matter that the manner of that discrimination can vary widely." *Benning*, 391 F.3d at 1306. In short, in enacting the Weldon Amendment Congress was perfectly clear about what it expects of NFPRHA's members: nondiscrimination against employees and institutions who do not provide abortion referrals for moral, religious or ethical reasons.

a. **The Secretary Has Already Provided the Answer to NFPRHA's Central Question Concerning the "Conflict" Between Weldon's Nondiscrimination Rule and the Title X Referral Mandate.**

The gravamen of NFPRHA's argument that the Weldon Amendment is unconstitutionally vague is its claim that the Weldon Amendment's prohibition on discrimination against those who refuse to provide abortion referrals conflicts with a pre-existing Title X regulation requiring that the institutional recipient of Title X funds provide such referrals "upon request." As to individual employees who object to providing abortion referrals, NFPRHA's members have already been forbidden from discriminating against such persons for over three decades without any apparent occurrences of the events in NFPRHA's parade of horribles. The Weldon Amendment is one of several federal statutes that prohibits discrimination by NFPRHA's members against employees who exercise their right of conscience. In addition to more general protections afforded by the First Amendment and Title VII of the Civil Rights Act, 42 U.S.C. 2000(e) as well as numerous state statutory conscience protections, Title X recipients are subject to 42 U.S.C. § 300a-7(d), which states:

> No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.

The Secretary has already explained to Title X recipients how to balance their nondiscrimination requirements with their Title X referral obligations. During the notice and comment period on the Title X referral mandate, 42 C.F.R. § 59.5(a)(5), the Secretary received comments suggesting an exception from the abortion counseling and referral mandates for

individual employees of a grantee who object to providing such counseling or referrals on moral or religious grounds. 65 Fed. Reg. 41273 & 41274 (July 3, 2000). Secretary Shalala rejected this suggestion, explaining:

> [S]uch a requirement is not necessary: under 42 U.S.C. 300a-7(d), *grantees may not require individual employees who have such objections to provide such counseling.* However, in such cases the grantees must make other arrangements to ensure that the service is available to Title X clients who desire it.

Id. at 41274 (emphasis added). The Secretary also rejected the necessity of a conscience exception from the abortion referral mandate "for the same reasons it objected to the same suggestion with respect to counseling." 65 Fed. Reg. 41275 (July 3, 2000). Thus, the Weldon Amendment's protections for the rights of conscience of individual employees is not a new requirement placed on NFPRHA's members, but has rather been incumbent upon them at least since 1974. As the Secretary explained, the much more recently imposed referral mandate does not countenance discrimination against objecting employees of a Title X clinic, but merely requires NFPRHA's members to "make other arrangements to ensure that the service is available to Title X clients who desire it." *Id.* at 41274.

Additionally, NFPRHA's governmental members are also subject to the Coats-Snowe Amendment, 42 U.S.C. § 238n(a), which prohibits them from discriminating against an individual physician who will not provide an abortion referral. As NFPRHA has explained the referral process in a Title X clinic, a *physician* refers patients for abortions by ordering her staff to do so. Complaint, ¶¶ 38-39; J.A., 18-19. Thus, it would seem that it would be more complicated for a Title X clinic to accommodate a physician who objects to providing abortion referrals than to accommodate members of her staff. Yet, although NFPRHA's governmental members have been bound by the Coats-Snowe Amendment since 1996 not to discriminate against *doctors* who will not provide abortion referrals, and all of NFPRHA's members have been prohibited since 1974 from discriminating against any employee who refuses to provide abortion counseling or abortion referrals (42 U.S.C. 300a-7(d)), NFPRHA has not

identified a single instance in which these accommodation requirements have led to any single scenario in their parade of horribles.[4]

The alternative, of course, is that NFPRHA's members are conceding in this litigation that they have not and will not comply with 42 U.S.C. 300a-7(d), the Coats-Snowe Amendment, and other conscience protections just as they seek to have this Court relieve them of their obligations to comply with the Weldon Amendment. NFPRHA has continued to insist in this litigation that the Weldon Amendment interferes with a doctor's supposed First Amendment right to require his staff to provide abortion referrals at his command. NFPRHA Brief, 19, at n.7; NFPRHA's PI Memo, 18, J. A., 38 (arguing that it is "inconceivable" that Congress "intended to prevent health care entities such as clinics and doctors' offices from having control over their staffs"). NFPRHA has even candidly admitted that "health care professionals on [its members'] staff[s] who will not refer will almost certainly be discriminated against." NFPRHA's PI Memo, 15; J. A., 35. NFPRHA's arguments in this case that its members have and will, in the absence of the Weldon Amendment, require their individual employees to provide abortion referrals in violation of their conscience are difficult to square with NFPRHA's obligations under other conscience protection statutes applicable to its members.

More perplexing still, NFPRHA argued in the District Court that the Weldon Amendment must be read to expand existing conscience protections, acknowledging existing prohibitions on discrimination "in the employment, promotion, or termination of a employment" of employees. NFPRHA's PI Memo, 16; J. A., 36. Yet, as NFPRHA's own arguments to the District Court and this Court reveal, while giving lip service to these conscience protections, NFPRHA nevertheless asserts a right to "control their staff," by requiring that they provide abortion referrals against their conscience and even assert a doctor's *right* to compel staff to provide such referrals. *Id.*, 18; J.A., 38; *Id.*, 22, J.A. 42; Complaint, ¶ 39, J.A., 19.

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[4]NFPRHA argued in the District Court and continues to insist here that it is unclear whether the Weldon Amendment applies to its purely private members. While Intervenors continue to insist that the appropriate reading of the Weldon Amendment is that NFPRHA's non-governmental members, as recipients of funds in a federal program, are bound by the Weldon Amendment, these organizations, at least in the performance of their Title X responsibilities, are clearly bound by 42 U.S.C. 300(a)7-d which prohibits the same discrimination the Weldon Amendment prohibits in any program "funded in whole or in part under a program administered by the Secretary of Health and Human Services."

NFPRHA now seeks this Court's protection for its desire to flaunt these obligations. NFPRHA's representations and arguments in this litigation are abundant evidence that despite the existence of other conscience protection statutes, the Weldon Amendment is vitally necessary to ensure that these rights of conscience are taken seriously.

b. **The Weldon Amendment is Also Clear in Its Prohibition of Discrimination Against Institutions Which Object to Providing Abortion Referrals.**

The Weldon Amendment is no less clear in its prohibition on discrimination against institutions, including applicants for Title X grants, which object to providing abortion referrals for religious, ethical, or moral reasons. However, NFPRHA has identified no actual threat that this apparent tension between the Weldon Amendment and the Title X referral mandate is now or is likely to become a live controversy, and thus the question is not properly before this Court.

In response to public comments suggesting that a specific exception be made in the abortion referral mandate for organizations that will not provide abortion counseling or referrals for religious or moral reasons, Secretary Shalala stated on July 3, 2000, that she was "unaware of any current grantees that object to the requirement for nondirective options counseling, so this suggestion appears to be based on more of a hypothetical than an actual concern." 65 Fed. Reg. 41273 (rejecting explicit exception from counseling mandate). See also 65 Fed. Reg. 41275 (rejecting explicit exception from the referral mandate "for the same reasons"). NFPRHA has identified no change in these facts. Thus, this Court must assume that there is still no organization seeking Title X funding or currently receiving Title X funding that objects on moral, religious or ethical grounds to providing abortion counseling and/or referrals.

Nevertheless, should such an applicant seek Title X funding, neither HHS nor any state or local government may deny it funding because it refuses to provide abortion referrals for religious, ethical or moral reasons. This conclusion is compelled not only by the text of the Weldon Amendment itself, but by other explicit statutory prohibitions on such discrimination that NFPRHA does not challenge. The Coats-Snowe Amendment, 42 U.S.C. § 238n(a), prohibits NFPRHA's governmental members from discriminating against organizations that refuse to provide abortion referrals. Yet, NFPRHA has not

challenged this provision and does not explain how its governmental members have synthesized its commands with those of the more recently promulgated regulatory referral mandate. Having challenged only the Weldon Amendment and not the other statutory conscience protections that also prohibit discrimination against individuals and institutions that do not refer for abortions, NFPRHA does not explain why the Weldon Amendment is vague and yet these statutes are apparently clear enough for its members to follow (assuming of course they are in compliance with them).

The Weldon Amendment permits NFPRHA's members to "ascertain what is expected of [them]." *Pennhurst*, 451 U.S. at 17. That NFPRHA's members do not like what is expected of them under the Weldon Amendment (and perhaps numerous other unchallenged conscience protections in state and federal law) or can invent far-fetched hypotheticals for which Congress chose not to provide exceptions in the Weldon Amendment does not render the Amendment an invalid exercise of Congress's Spending Power. Further, as discussed in part VI(C)(2) below, to the extent that the HHS regulatory referral mandate conflicts with at least two Acts of Congress (the Weldon and Coats-Snowe Amendments), the statutes control.

B. THE WELDON AMENDMENT DOES NOT VIOLATE NFPRHA'S MEMBERS' FIRST AMENDMENT RIGHTS.

NFPRHA makes a passing mention in a footnote that "First Amendment rights" are "implicated" by the Weldon Amendment. NFPRHA Brief, 19, at n.7. NFPRHA made no independent First Amendment argument in the District Court, and thus to the extent it attempts to do so here that argument may not be raised for the first time on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), *Doe v. DiGenova*, 779 F.2d 74, 89 (D.C. Cir. 1985). Instead, it raised its First Amendment argument there as part of its Due Process void for vagueness argument, NFPRHA's PI Memo, 21-22; J.A. ¶¶38-39, and the District Court treated this argument as part of NFPRHA's Due Process argument. Memo. Op, 11; J.A. 186. Addressing for this purpose whether the Weldon Amendment "reaches a substantial amount of constitutionally protected conduct" the District Court held that "it is unclear how Weldon's mandate violates the free speech rights of NFPRHA members." *Id.* NFPRHA now concedes that a "void for

vagueness argument at this point is premature." NFPRHA Brief, 26. Thus, it is unclear what is the purpose of NFPRHA's passing mention of "First Amendment rights" of doctors to order their staff members to provide abortion referrals. In any event, such a "right" is simply non-existent.

1. NFPRHA's Members Have No Constitutional Right to Discriminate Against Employees Because of Their Refusal on Moral, Ethical, or Religious Grounds to Provide Abortion Referrals.

As the District Court explained, the Weldon Amendment does not prohibit NFPRHA's members from "*permitting* individuals to discuss abortion with their patients or make referrals for such medical services." Memo. Op., 11; J.A., 186. (emphasis in Opinion). NFPRHA's members remain free to discuss abortion options with patients and refer them for abortions upon request. Weldon, like other applicable conscience protections, simply prohibits NFPRHA's members from discriminating against staff members who do not themselves wish to provide such referrals. This necessarily means that NFPRHA's members, under multiple conscience protections including the Weldon Amendment, may not threaten the employment of a staff member that has a conscientious objection to providing such a referral.

2. Even Doctors Lack a Constitutional Right to Force Others to Speak on Their Behalf.

The only authority NFPRHA cites for its startling and condescending proposition that a doctor has a First Amendment right to compel his staff to provide abortion referrals *for him* is *Rust v. Sullivan*, 500 U.S. 173 (1991). NFPRHA does not direct the Court to anything in *Rust* that supports such a proposition, but instead generally cites the entire thirty-page decision and invites a "quick run-through" that it says will "demonstrate the existence of such significant Constitutional issues." NFPRHA Brief, 19 at n.7. *Rust* is singularly unhelpful to NFPRHA's argument.

In *Rust*, the Supreme Court held that a regulation that *prohibited* Title X clinics and their employees from providing abortion counseling and referrals (the predecessor to the current referral mandate at issue here) did *not* violate the First Amendment. 500 U.S. at 198-99. The Supreme Court in *Rust* likewise rejected the claim that the prohibition on abortion referrals significantly interfered with the doctor-patient relationship. *Id.* at 200. Given these central holdings of *Rust*, it is puzzling that NFPRHA

relies exclusively on this case for the proposition that the Weldon Amendment's far less onerous requirement that a Title X grantee merely not discriminate against individual employees who object to providing abortion referrals somehow "give[s] rise to significant speech and physician-patient rights issues." NFPRHA Brief, 19, at n.7. NFPRHA cites no authority that even comes close to supporting its argument that any individual has a First Amendment right to force others to speak for them. Nor does NFPRHA attempt to explain why a doctor faced with such an objecting staff member could not break from the typical practice and either provide the abortion referral herself or ask another staff member to do so in such circumstances. Doctors, no more than lawyers, teachers, or construction workers, have no *constitutional right* to order others to give life to their edicts.

C. THIS COURT LACKS JURISDICTION TO AWARD THE UNPRECEDENTED AND UNNECESSARY RELIEF NFPRHA SEEKS

In addition to the fundamental flaws on the merits in NFPRHA's attack on the Weldon Amendment, NFPRHA's requested remedy, an injunction prohibiting the enforcement of the Weldon Amendment against its members and a mandatory injunction requiring the Secretary to provide guidance on the Weldon Amendment's requirements, is inappropriate and unprecedented.

In the District Court, NFPRHA sought a declaration that the Weldon Amendment is "unconstitutionally vague and overbroad" and an injunction "against implementation and enforcement of the Weldon Amendment's anti-discrimination requirements with respect to [NFPRHA]'s members." Complaint, ¶ 45, J.A, 20; NFPRHA's PI Memo, 7; J.A., 27. It has now conceded that the declaratory relief it sought was premature. NFPRHA Brief, 26. Yet it continues to demand an injunction prohibiting enforcement of the Weldon Amendment against its members, and adds a new claim for relief not raised in the District Court, a demand for a mandatory injunction from this Court ordering "the Government ... to produce the guidance for which it is responsible." *Id.* The mandatory relief NFPRHA seeks is not properly presented to this Court for the first time on appeal, *Singleton,* 428 U.S. at 120, *DiGenova,* 779 F.2d at 89, and would nevertheless be improper.

1. **NFPRHA Failed To Exhaust Its Administrative Remedies Prior to Filing This Action in Federal Court.**

NFPRHA filed this action five days – three business days – after the Weldon Amendment was signed into law, complaining of various uncertainties that it believes the Weldon Amendment places on its members. It asked the District Court to enjoin enforcement of the Weldon Amendment "until guidance on the law's meaning from a source on which all parties affected by the law can rely is forthcoming." NFPRHA's PI Memo, 29; J.A., 49. It now asks this Court to order "the Government," apparently the Secretary of Health and Human Services, to "produce the guidance for which it is responsible." NFPRHA Brief, 26. But if NFPRHA ever asked the Secretary for the guidance that it now asks this Court to compel from the Secretary, it has failed to show the Court that it did so.[6]

The Administrative Procedures Act ("APA") 5 U.S.C. § 553(e), provides that each agency must "give an interested person the right to petition for the issuance, amendment, or repeal of a rule." Nothing in the record indicates that NFPRHA petitioned the Secretary to initiate rulemaking proceedings pursuant to 5 U.S.C. § 553(e) before filing this action in the District Court or since then. In a case squarely on all fours with this one, this Court has held that where a party seeks guidance from an administrative agency, it must first petition the Secretary to initiate rulemaking proceedings before it may avail itself of the Court's authority to require such proceedings. *Schuck v. Butz*, 500 F.2d 810, 811-12 (D.C. Cir. 1974). In *Schuck*, a party sought an order requiring the Secretary of Agriculture to repeal regulations authorizing the use of nitrates in meat products. Having lost in the District Court, the party appealed to this Court, recognizing on appeal "for the first time that the relief sought by them at the administrative and trial court levels ... is legally available only through a rulemaking proceeding, held in accordance with 5 U.S.C. §

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[6]NFPRHA states in its brief that it has "brought to the government's attention" the supposed ambiguities it complains of, NFPRHA's Brief, 23, but it does not state whether it actually complied with the procedure available to it pursuant to 5 U.S.C. § 553(e) or is simply claiming that its Complaint in this case, filed five days after the Weldon Amendment became law, was its vehicle for informing the government of its concerns. If NFPRHA has or ever does avail itself of the procedure for seeking regulatory guidance under the APA, and the Secretary rejects this request, NFPRHA would be entitled to appeal from that decision. *National Wrestling Coaches Ass'n*, 263 F. Supp. 2d 82, 126 (D. D.C. 2003). But NFPRHA may not circumvent the APA and immediately resort to litigation before the agency has acted or ever been properly requested to act.

553." *Id.*, at 811. Appellants therefore "modified their request for relief to ask only that the Secretary be required to hold a rulemaking proceeding under the Administrative Procedure Act ... and [issue] his own regulations ... with regard to the matters raised in the petition." *Id.* at 812. Noting that "[t]he Department has not been asked to consider the advisability of a rule-making proceeding, and neither the Department's decision nor the administrative record has been shaped by reference to such a request," this Court held that *"[t]he Department, rather than this court, must be given the first opportunity to evaluate the need for a rule-making proceeding."* *Id.* (emphasis added). *Accord, Brown v. Secretary of Health and Human Services,* 46 F.3d 102, 113-14 (1st Cir. 1995) ("Where as here plaintiffs seek to raise a host of factual and policy issues ... it was patently appropriate, and in many cases could be essential for plaintiffs to have petitioned the agency before seeking judicial redress."); *National Wrestling Coaches Ass'n v. United States Dept. of Educ.*, 263 F.Supp. 2d at 128 (D. D.C. 2003) (court lacked jurisdiction to enter an "Order of this Court requiring the defendant to embark on a new rulemaking process" where plaintiff had not petitioned the agency to initiate rulemaking pursuant to 5 U.S.C. § 553(e)).

NFPRHA's failure to comply with the APA's procedure for initiating the rulemaking it now seeks to obtain by this Court's order is fatal to this Court's jurisdiction to award such relief, and the Court should therefore affirm. Should NFPRHA wish to petition the Secretary for rulemaking concerning the Weldon Amendment it would remain free to do so. *Schuck,* at 812 (affirmance of summary judgment, "a disposition that leaves appellants free to petition the Secretary for a rule making proceeding"). Until such time as NFPRHA actually petitions the Secretary to initiate rulemaking proceedings in accordance with the APA, it cannot be heard to complain to the judiciary that such proceedings have been "unlawfully withheld or unreasonably delayed." NFPRHA Brief, 25, at n.9.

2. Even If the Weldon Amendment and the Title X Referral Mandate Imposed Unconstitutionally Conflicting Requirements on NFPRHA's Members, the Appropriate Remedy Would be to Enjoin the Regulation, Not the Act of Congress.

Much of NFPRHA's argument that the Weldon Amendment is unconstitutional derives from the possible conflicts between the Weldon Amendment and 42 C.F.R. § 59.5(a)(5), the Title X referral mandate. Due to this supposed conflict, NFPRHA asks this Court to enjoin the Weldon Amendment. It

cites no authority, however, for the proposition that where a statute (in this case several statutes) conflicts with an agency regulation, the statute should be enjoined while the regulation remains in full force and effect. "It is a fundamental principle of American law that legislative statutes take precedence over conflicting administrative regulations." *Furlow v. U.S.*, 55 F.Supp. 2d 360, 364 (D. Md. 1999). "Statutes trump conflicting regulations." *Caldera v. J.S. Alberici Const. Co.*, 153 F.3d 1381, 1383, n.1 (Fed. Cir. 1998). Thus, to the extent that NFPRHA's members are aggrieved by conflicting requirements imposed upon them by the Weldon Amendment and the Title X referral mandate, the appropriate remedy, if any, would be to enjoin the enforcement of 42 C.F.R. § 59.5(a)(5) against NFPRHA's members.

3. **Where Unclear Requirements Are Placed Upon a Party to a Government Contract, Injunctive Relief is Unwarranted Since the Contractor Has No Liability for Failing to Satisfy the Unclear Requirements.**

Insisting that its members will remain subject to "an ambiguous obligation," NFPRHA requests an injunction prohibiting the enforcement of the Weldon Amendment against its members until the Secretary answers all of its questions about the Amendment – pursuant to the mandatory injunction it asks this Court to enter requiring such answers. NFPRHA cites no authority supporting such a remedy. If, as NFPRHA argues, the Weldon Amendment is ambiguous and fails to place NFPRHA's members on notice of what is required of them, NFPRHA's members would be not be subject to liability for their unintentional failure to comply with its ambiguous commands. *See Franklin v. Gwinnett Cty. Public Schools*, 503 U.S. 60, 74-75 (1992) (explaining that under *Pennhurst* remedies for violations of terms of spending clause legislation were limited to intentional violations, and intentional violations could only occur where a party was put on notice of its obligations and liability). Thus, while Intervenors contend that the District Court correctly held that the Weldon Amendment places NFPRHA's members on notice of what is expected of them as required by the Spending Clause, if the Court (or a future Court) agrees with NFPRHA that the Weldon Amendment does not do so, NFPRHA's members would simply have no liability when an enforcement action is brought. Therefore, an injunction prohibiting the enforcement of the Weldon Amendment against NFPRHA's members is completely unnecessary.

4. **Enjoining the Weldon Amendment Would Not Provide Effective Relief for NFPRHA's Members, Who Would Still Be Bound By Other Conscience Clause Protections for Their Objecting Employees.**

NFPRHA seeks an injunction preventing any enforcement action pursuant to the Weldon Amendment. Yet, the discriminatory conduct of NFPRHA's members proscribed by the Weldon Amendment is also proscribed by numerous other state and federal statutory and constitutional conscience protections not challenged by NFPRHA. The injunctive relief NFPRHA seeks would be of little or no value to it, as even were this Court to enjoin enforcement of the Weldon Amendment against NFPRHA's members, they would still be prohibited by numerous federal and state laws from discriminating against individual employees, including doctors, who refuse to provide abortion referrals. NFPRHA's governmental members would also continue to be prohibited by the Coats-Snowe Amendment from discriminating against organizations which do not provide abortion referrals. "If the court cannot relieve the harm of which a plaintiff complains, the court should not take the case; in the absence of an effective remedy its decision can amount to nothing more than an advisory opinion." *Wymbs v. Republican State Executive Committee of Florida,* 719 F.2d 1072, 1082 (11th Cir. 1983). Because the requested injunction prohibiting the enforcement of only the Weldon Amendment against NFPRHA's members would leave them exposed to other conscience protection laws that impose identical obligations on NFPRHA's members, little or nothing would be accomplished by the requested injunction. This Court should refrain from ordering such futile and advisory relief.

VII. CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the District Court.

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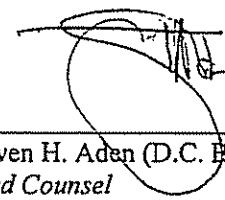
CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), CR (a)(1) and CR (a)(3)(C) for Case No. 05-5406, that the foregoing Brief of Intervenor Defendants-Appellees is proportionately spaced, has a type face of 11 points or more and contains no more than 6,607 words.



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I, Steven H. Aden, certify that I caused two (2) true and correct copies of the Brief of Intervenor Defendants-Appellees to be served via US Mail this 26th day of May 2006, on the following counsel of record:

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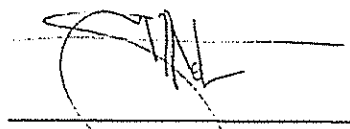

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, ex rel. BILL LOCKYER, in his official capacity as Attorney General of the State of California; and JACK O'CONNELL, in his official capacity as the State Superintendent of Public Instruction,

Plaintiffs,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF LABOR; ELAINE CHAO, in her official capacity as the Secretary of Labor; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; TOMMY G. THOMPSON, in his official capacity as the Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF EDUCATION; and ROD PAIGE, in his official capacity as the Secretary of Education,

Defendants.

CASE NO. C 05 00328 JSW

DECLARATION OF TIM MUSCAT IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Date: June 23, 2006
Time: 9:00 a.m.
Courtroom No. 2, 17th Floor
Judge: Hon. Jeffrey S. White

I, Tim Muscat, declare:

1. I am a Deputy Attorney General in the California Attorney General's Office, and I am one of the attorneys assigned to represent the plaintiffs in this action.

2. I have personal knowledge of the information set forth below and if called to testify, I could and would testify competently to the facts contained in this declaration.

3. On January 11, 2006, defendants Department of Health and Human Services and Michael O. Leavitt, Secretary of Health and Human Services, filed a supplemental response to plaintiffs' interrogatory number 13. This interrogatory asked these defendants the following question: "If the answer to Interrogatory 12 is 'yes,' please estimate the maximum amount of federal funds that the Department of Health and Human Services would deny to California because it disciplined a doctor, pursuant to California Health and Safety Code section 1317, for failing or refusing to perform an emergency abortion that the doctor was qualified and equipped to perform." A true and correct copy of defendants' supplemental response to this interrogatory is attached to this declaration as Exhibit "A." As the response indicates, these defendants estimated that the funds flowing to California from the Department of Health and Human Services in 2005 totaled approximately $28,365,264,653.

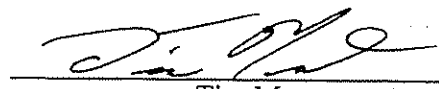
4. On January 11, 2006, defendants Department of Education and Margaret Spellings, Secretary of Education, filed a supplemental response to plaintiffs' interrogatory number 13. This interrogatory asked these defendants the following question: "If the answer to Interrogatory 12 is 'yes,' please estimate the maximum amount of federal funds that the Department of Education would deny to California because it disciplined a doctor, pursuant to California Health and Safety Code section 1317, for failing or refusing to perform an emergency abortion that the doctor was qualified and equipped to perform." A true and correct copy of defendants' supplemental response to this interrogatory is attached to this declaration as Exhibit "B." As the response indicates, these defendants estimated that the funds flowing to California from the Department of Education in 2005 totaled approximately $8,163,449,580.

5. On January 18, 2006, defendants Department of Labor and Elaine Chao, Secretary of Labor, filed a supplemental response to plaintiffs' interrogatory number 13. This interrogatory asked these defendants the following question: "If the answer to Interrogatory 12 is 'yes,' please estimate the maximum amount of federal funds that the Department of Labor would deny to California because it disciplined a doctor, pursuant to California Health and Safety Code section

1317, for failing or refusing to perform an emergency abortion that the doctor was qualified and equipped to perform." A true and correct copy of defendants' supplemental response to this interrogatory is attached to this declaration as Exhibit "C." As the response indicates, these defendants estimated that the funds flowing to California from the Department of Labor in 2005 totaled approximately $1,187,767,972.

I declare under penalty of perjury under the laws of the State of California that all of the foregoing is true and correct.

Executed this 14 day of April, 2006, at Sacramento, California.



Tim Muscat

EXHIBIT "A"

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(San Francisco Division)

STATE OF CALIFORNIA, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Case No. C-05-00328 JSW **SUPPLEMENTAL RESPONSE OF DEFENDANTS DEPARTMENT OF HEALTH AND HUMAN SERVICES AND MICHAEL O. LEAVITT, SECRETARY OF HEALTH AND HUMAN SERVICES, TO INTERROGATORY NO. 13 OF PLAINTIFFS' INTERROGATORIES (SET NO. ONE)**

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, defendants United States Department of Health and Human Services, and Michael O. Leavitt, in his official capacity as Secretary of Health and Human Services (referred to herein together as the Department of Health and Human Services, or as defendants), provide the following supplemental response to Interrogatory No. 13 of Plaintiffs' Interrogatories to Defendants United States Department of Health and Human Services and Michael O. Leavitt, in his official capacity as Secretary of Health and Human Services, Set No. One, dated July 12, 2005.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 13

INTERROGATORY NO. 13: If the answer to Interrogatory No. 12 is "yes," please estimate the maximum amount of federal funding that the Department of Health and Human Services would deny to California because it disciplined a doctor, pursuant to California Health and Safety Code section 1317, for failing or refusing to perform an emergency abortion that the doctor was qualified and equipped to perform.

SUPPLEMENTAL RESPONSE: Subject to defendants' previously stated general and specific objections in the Response of Defendants Department of Health and Human Services and Michael O. Leavitt, Secretary of Health and Human Services, to Plaintiffs' Interrogatories (Set No. One), dated September 1, 2005, and without waiving those objections, defendants provide under Rule 33(d) of the Federal Rules of Civil Procedure the attached compilation of fiscal year 2005 Department of Health and Human Services funds flowing to the State of California.

Dated: January 11, 2006

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Senior Attorneys

United States Department of
Health and Human Services

Funds to State of California
U.S. Department of Health and Human Services

Catalog of Federal Domestic Assistance Program	FY 2005 Estimate
ACF	
Compassion Capital Fund	$750,000
Community-Based Abstinence Education (CBAE)	$459,974
Transitional Living Program	$1,152,091
Abandoned Infants	$1,175,000
Promoting Safe and Stable Families	$43,424,375
Street Outreach Program	$100,000
TANF	$3,693,923,450
CSE	$478,103,376
Refugee and Entrant Assistance_State Administered Programs	$15,206,817
LIHEAP	$94,411,370
CSBG	$56,499,723
Urban Rural Economic Development	$770,000
Community Services Block Grant Discretionary	$516,160
Refugee and Entrant Assistance_Discretionary Grants	$3,586,030
Early Learning Opportunities Act	$1,588,299
TAP; TAG	$4,850,033
State Court Improvement Program	$1,226,900
COMMUNITY-BASED CHILD ABUSE PREVENTION GRANTS	$4,011,936
Child Care and Development Fund (CCDF)	$511,589,888
Grants to States for Access and Visitation Programs	$988,710
Chafee Vouchers	$8,547,517
Head Start	$533,529,129
Child Support Enforcement Demonstrations and Special Project	$200,000
Child Welfare Research and Demonstration	$649,760
Mentoring Children of Prisoners	$270,000
Election Assistance for Individuals with Disabilities (EAID)	$987,918
Voting Access for Individuals with Disabilities	$349,292
BASIC CENTER GRANT	$700,497
State Councils on Developmental Disabilities and Protection	$9,903,849
Developmental Disabilities Projects of National	$99,997
University Centers	$500,000

Children's Justice Grants to States	$1,980,215
Child Welfare Services_State Grants	$33,061,365
Social Services Research and Demonstration	$1,419,575
Child Welfare Services Training Grants	$599,939
Adoption Opportunities	$349,999
Foster Care: Title IV-E	$1,081,924,410
Adoption Assistance	$291,220,931
SSBG	$206,275,556
Child Abuse and Neglect State Grants	$3,367,810
Child Abuse and Neglect Discretionary Activities	$1,394,016
Family Violence Prevention and Services/Grants for	$7,378,819
Chafee Foster Care Independence Program	$25,012,729
AHRQ	
National Research Service Awards, Health Services Research	$883,650
Research on Healthcare Costs, Quality and Outcomes	$3,902,137
AOA	
State Grants for Long-term Care Ombudsman Services	$1,928,797
Special Programs for the Aging_Title III, Part C_Nutrition	$106,426,697
Special Programs for the Aging_Title VI, Part A, Indian	$240,700
Special Programs for the Aging_Title IV_Training, Research	$234,720
Alzheimer's Demonstration Program	$297,992
National Family Caregiver Support Program	$58,880
NUTRITION SERVICES INCENTIVE PROGRAM	$11,086,561
CDC	
INNOVATIONS IN APPLIED PUBLIC HEALTH RESEARCH	$351,498
CENTERS FOR GENOMICS AND PUBLIC HEALTH	$323,949
Prevention Research Centers	$4,368,037
Injury Prevention and Control Research	$2,879,227
Immunization Research, Demonstration, Public Information	$299,995
Occupational Safety and Health Program	$2,688,200
Centers for Disease Control and Prevention_Investigations	$4,741,352
State Cardiovascular Health Programs (CVH), Arthritis State	$1,081,583
Program Not Listed in the CFDA	$897,812
CMS	
CHIP	$5,850,116,919
Ticket-To-Work Infrastructure Grants	$712,956
Medicaid; Title XIX	$13,069,088,034

CMS RESEARCH	$4,498,949
DHHS/OS	
State and Territorial Minority HIV/AIDS Demonstration Prog	$420,415
MEDICAL RESERVE CORPS SMALL GRANT PROGRAM	$200,000
heart health care for high risk women	$149,985
Ambassadors for Change Program	$25,000
Community Programs to Improve Minority Health Grant Program	$200,000
National Health Promotion	$225,000
AFL	$887,567
HRSA	
MODEL AHEC	$908,457
Special Projects of Regional and National Significance	$4,336,089
Preventive Medicine	$157,191
Nurse Anesthetist Traineeships	$41,381
EMS for Children	$1,046,723
Primary Care Services Resource Coordination and Development	$235,000
AIDS Education and Training Centers	$7,500,859
Coordinated HIV Services and Access to Research	$3,082,674
Geriatric Fellowships	$1,000,444
COEs	$2,355,791
Grants To States for Loan Repayment Program	$452,098
Disadvantaged Assistance	$250,398
National Research Service Award in Primary Care Medicine	$884,968
HETC	$503,312
Allied Health Project Grants	$175,924
Consolidated Health Centers	$24,632,415
Residency Training Grants	$99,622
State Rural Hospital Flexibility Program	$345,000
Advanced Education Nursing Grant Program	$1,875,254
Public Health Training Centers	$366,315
Universal Newborn Hearing Screening	$163,858
Healthy Communities Access Program	$404,128
Poison Control Centers	$2,235,509
Rural Access to AEDs	$160,758
STATE GRANTS FOR PROTECTION AND ADVOCACY SERVICES	$118,664
NCHWA	$250,000
Small Rural Hospital Improvement Grant Program	$448,320

Advanced Education Nursing Traineeships	$1,089,773
BNEP	$2,158,258
HCOP	$1,930,709
Grants for Training in Primary Care Medicine and Dentistry	$6,868,752
Renovation or Construction Projects	$8,026,949
SPECIALLY SELECTED HEALTH PROJECTS	$1,302,877
NATIONAL BIOTERRORISM HOSPITAL PREPAREDNESS PROGRAM	$39,203,268
Rural Health Outreach and Rural Network Development Program	$200,000
Grants to States for Operation of Offices of Rural Health	$150,000
HIV Emergency Relief Project Grants	$61,885,727
HIV Care Formula Grants	$121,734,064
Grants to Provide Outpatient Early Intervention Services	$6,230,382
Scholarships for Disadvantaged Students; SDS	$4,322,460
Healthy Start	$3,049,736
SPNS	$1,974,986
Trauma Care Systems Planning and Development	$40,000
Health Administration Traineeships Program	$40,425
Public Health Traineeships	$70,363
GEC's	$750,159
MCH Block Grants	$47,947,194
Bioterrorism Training and Curriculum Development Program	$1,599,970
IHS	
Indian Health	$938,351
NIH	
Biological Response to Environmental Health Hazards	$23,192,793
Bioassay of Chemicals and Test Development	$2,156,375
Biometry and Risk Estimation_Health Risks from	$5,858,633
Oral Diseases and Disorders Research	$23,332,675
Human Genome Research	$11,927,277
Research Related to Deafness and Communication Disorders	$22,923,802
National Center for Complementary and Alternative Medicine	$5,763,784
National Center on Sleep Disorders Research	$3,882,772
Mental Health Research Grants	$95,159,136
Research Career ("K") Awards	$480,319
NRSA Program	$1,035,889
Alcohol Research Programs	$12,823,222
Career Development ("K") Awards	$1,120,898

NRSA	$42,068
Drug Abuse and Addiction Research Programs	$42,119,012
Research Career/Scientist Development ("K" Series) Awards	$8,148,033
NRSA Program	$1,176,560
DISCOVERY AND APPLIED RESEARCH	$24,126,756
MINORITY HEALTH AND HEALTH DISPARITIES RESEARCH	$7,057,874
Nursing Research	$8,844,174
BTR, SIG, SBIR, STTR	$42,068
(RCMI, RCRII, RIMI, Science Education Program, IDEA, Constru	$68,502,531
Academic Research Enhancement Award (AREA)	$4,393,884
Cancer Cause and Prevention Research	$50,025,964
Cancer Detection and Diagnosis Research	$13,546,570
Cancer Treatment Research	$30,872,755
Cancer Biology Research	$35,714,830
CCSG	$39,341,209
Cancer Research Manpower	$12,199,251
Cancer Control	$13,668,195
Abandoned Infants	$962,766
Job Opportunities and Basic Skills Training	$444,261
Family Violence Prevention and Services/Grants for	$42,068
Heart and Vascular Diseases Research	$69,730,967
Lung Diseases Research	$37,595,526
Blood Diseases and Resources Research	$19,039,652
Arthritis, Musculoskeletal and Skin Diseases Research	$25,771,233
Diabetes, Endocrinology and Metabolism Research	$44,836,307
Digestive Diseases and Nutrition Research	$24,958,142
Kidney Diseases, Urology and Hematology Research	$15,473,399
Extramural Research Programs in the Neurosciences and Neurol	$108,794,404
Allergy, Immunology and Transplantation Research	$34,556,442
Microbiology and Infectious Diseases Research	$77,481,907
Pharmacology, Physiology, and Biological Chemistry	$153,337,813
Genetics and Developmental Biology Research and Research Tra	$228,750
Population Research	$1,349,845
DEVELOPMENT EXT	$51,376,629
Aging Research	$79,046,955
Vision Research	$49,709,976
Medical Library Assistance	$2,435,489

Alcohol Research Center Grants	$1,943,962
Core Centers and Research Training Program	$2,994,506
CMRR	$461,439
Demonstration Grants to States for Community Scholarships	$81,292
Demonstration Grants to States with Respect to Alzheimer's	$128,055
Senior International Fellowships	$2,015,835
Multiple Programs	$65,362,896
SAMHSA	
CMHS Child Mental Health Service Initiative	$9,025,800
Protection and Advocacy for Individuals with Mental Illness	$3,018,683
PATH	$7,509,000
Consolidated Knowledge Development and Application (KD&A) Pr	$3,033,466
PRNS	$26,421,804
RECOVER	$7,575,685
Drug-Free Community Grants	$899,934
CMHS Block Grant	$54,955,073
Prevention and Treatment (SAPT) Block Grant	$252,450,447
Mental Health Disaster Assistance	$1,915,314
Total	$[illegible]

Notes:

Figures are estimates of all Department of HHS funds flowing to the State of California, as of December 7, 2005. More recent data is not reasonably available at this time.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, ex rel. BILL LOCKYER, in his official capacity as Attorney General of the State of California; and JACK O'CONNELL, in his official capacity as the State Superintendent of Public Instruction,

Plaintiffs,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF LABOR; ELAINE CHAO, in her official capacity as the Secretary of Labor; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; TOMMY G. THOMPSON, in his official capacity as the Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF EDUCATION; and ROD PAIGE, in his official capacity as the Secretary of Education,

Defendants.

CASE NO. C 05 00328 JSW

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Date: June 23, 2006
Time: 9:00 a.m.
Courtroom No. 2, 17th Floor
Judge: Hon. Jeffrey S. White

31. With these child support enforcement and family support program funds, the California Employment Development Department provides employment, location and income data to governmental entities to help identify the assets and location of parents who are delinquent in child support obligations. In addition, the Department intercepts unemployment insurance benefits and disability insurance payments intended for delinquent parents and diverts those payments to California's 58 counties to help meet child support obligations. Dec. of Frank Collins, p. 5, ¶ 14.

H. The Weldon Amendment's Injury to California's Sovereign Right to Enforce its Own Health Care Laws

32. Similar to the Weldon Amendment, California law also provides an accommodation to medical professionals who object to participating in abortions. Cal. Health & Safety Code § 123420(a).

33. However, unlike the Weldon Amendment, California's abortion accommodation statute does not apply to "medical emergency situations and spontaneous abortions." Cal. Health & Safety Code § 123420(d).

34. The California Attorney General is the chief law officer of the State of California. Cal. Const., art. V, § 13.

35. The California Attorney General is responsible for protecting California's sovereign interests, including the sovereign interest in enforcing California law. He also has a duty to see that the laws of the State are uniformly and adequately enforced. Cal. Const., art V, § 13.

36. The California Attorney General cannot determine with any reasonable degree of certainty what will or will not constitute "discrimination" within the meaning of the Weldon Amendment and, thus, what actions would trigger the loss to California of billions of dollars in federal funding. Dec. of Bill Lockyer, p. 1, ¶ 6.

37. The Weldon Amendment forces the California Attorney General to either forgo enforcement of state laws, such as that requiring health care entities to provide emergency abortion services, or to enforce such law at the risk of causing California to lose billions of dollars in federal funds. Dec. of Bill Lockyer, p. 2, ¶ 8.

38. As a consequence of the Weldon Amendment's unreasonably vague and severe funding restriction and in the absence of a judicial interpretation to the contrary, the California Attorney General will have no choice but to refrain from exercising his authority to enforce California's police powers to protect public health and save lives. Dec. of Bill Lockyer, p. 2, ¶ 9.

SUMMARY OF ARGUMENT

California seeks summary judgment on four of the claims pled in its Complaint. The first three claims assert that the Weldon Amendment violates different limitations on Congress' spending power that were recognized by the United States Supreme Court in *South Dakota v. Dole* ("*Dole*"), 483 U.S. 203 (1987). In *Dole*, the Supreme Court outlined the constitutional constraints that check the scope of the federal spending power as follows. First, federal conditions on grants to the States are unconstitutional if the conditions are "unrelated 'to the federal interest in particular national projects or programs.'" *Id.* at 207 (internal citations omitted). Second, federal grants "might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 211 (internal citations omitted). Third, when Congress acts to impose conditions on the States' ability to receive federal funds, Congress "'must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* at 207 (internal citations omitted).

The Weldon Amendment fails these three Spending Clause tests. The Weldon Amendment's healthcare restriction on the provision of emergency abortion medical services is not reasonably calculated to address the problems that Congress intended to address by funding various educational and employment programs in California and, therefore, fails *Dole's* relatedness test. The Weldon Amendment fails *Dole's* coerciveness test because the potential loss of $37.3 billion in federal funds that California faces is so severe that California is left with no real choice but to comply with the restriction. Lastly, under *Dole's* vagueness test, the Weldon Amendment is unconstitutional because it does not provide California with any way of determining what actions it may take and which of its laws it may enforce without engaging in the prohibited "discrimination."

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California also seeks summary judgment on its claim that the Weldon Amendment violates a woman's right to an abortion because it does not contain an exception for situations where the abortion is necessary to protect her life or health and because it constitutes undue government interference with her right to seek an abortion.

ARGUMENT

I. SUMMARY JUDGMENT IS PROPER IN THIS CASE

Summary Judgment is appropriate when there exists no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In this case, California requests this Court to declare the Weldon Amendment unconstitutional on its face because it exceeds Congress' spending power and violates the Tenth Amendment to the United States Constitution. In a challenge to a legislative act's facial validity, "the challenger must establish that no set of circumstances exists under which the act would be valid." *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). The challenging party bears the burden of proving the act's invalidity. *Tombs v. Citizens' Bank of Waynesboro*, 281 U.S. 643, 647 (1930). Furthermore, any doubt as to the validity of the legislative act is to be resolved in favor of validity. *Id.* "If the plain language of the statute does not conclusively determine [its] meaning, [the court] must presume that the legislature both intended to and did in fact act constitutionally, and indulge in any reasonable construction that can save the statute from invalidity[;]" however, the court may not "rewrite the statute to save it." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 925 (9th Cir. 2004) (internal citations omitted).

Even under the above-described deferential standard for adjudicating facial attacks on the constitutionality of statutes, the Weldon Amendment does not survive review under the Spending Clause and Tenth Amendment. As California sets forth below, the Weldon Amendment violates three separate Spending Clause tests that have been established by the United States Supreme Court. Further, the Weldon Amendment violates a woman's constitutional right of access to an abortion. Accordingly, this Court should declare the Weldon Amendment unconstitutional.

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Moreover, the broad scope of the $37.3 billion in federal cuts would be unprecedented in the history of "coercion" litigation following *Dole*. Unlike the facts in *Dole* or *Nevada*, which involved federal conditions that were narrowly focused on a single area of spending (highway funds), the Weldon Amendment's fiscal sledge hammer threatens a vast range of health, education, and employment programs. For example, the Weldon Amendment targets poor children and their low income parents for punishment if California refuses to surrender its ability to enforce State healthcare law. Specifically, 130,534 California families would lose their child care and development services, and many of these working parents would be unable to work without these child care subsidies. Dec. of Michael Jett, p. 3, ¶ 8 (a). For those parents who can somehow afford to continue paying for their child care, their children's safety would be jeopardized because California would lose $1.2 million in federal funding that is used to screen license-exempt child care providers for criminal and child abuse records. Dec. of Michael Jett, p. 3, ¶ 8 (e). Further, the quality of subsidized child-care would be further harmed due to the loss of millions of dollars for infant/toddler care and school readiness programs. Dec. of Michael Jett, p. 3, ¶ 8 (f). Finally, working parents struggling to find jobs would also be threatened with the loss of unemployment insurance, and employment service programs. Dec. of Frank Collins, pp. 4-5, ¶ 13.

Clearly, the undisputed record in this case demonstrates that Congress' coercive use of the Spending Clause through the Weldon Amendment is unprecedented. The Weldon Amendment's attempt to coercively impose a restriction on the delivery of health care services is particularly troubling because the regulation of medical care is an area of law that is traditionally reserved to the states. *Oregon v. Ashcroft*, 368 F.3d 1118, 1125 (9th Cir. 2004), *aff'd by Gonzalez v. Oregon*, 126 S.Ct. 904 (2006). This devastating and intrusive funding "condition" leaves California with no choice but to refrain from enforcing the State's public health law. Dec. of Bill Lockyer, p. 2, ¶ 9. While California can willingly transfer some portion of its reserved powers, basic principles of federalism and the Tenth Amendment constitutionally prevent Congress from coercing such a transfer through the threat of losing $37.3 billion in federal funds. If this Court rules otherwise, then Congress's ability to coerce states through the Spending Clause is truly unlimited.

comply with a vague spending condition that lacks a clear statutory expression of congressional intention. Thus, similar to the vague condition at issue in *Riley*, because the Weldon Amendment's plain language fails to include any "unequivocal condition" for California to not enforce its existing health and safety codes, no such condition can be enforced.

V. THE WELDON AMENDMENT IMPOSES AN UNDUE BURDEN ON A WOMAN'S CONSTITUTIONAL RIGHT TO AN ABORTION

Ever since *Roe v. Wade*, 410 U.S. 113 (1973), the courts have recognized that whatever the limits may be on a woman's right to an abortion, she cannot be denied the right to an abortion necessary to avoid serious risk to her health or life. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Steinberg v. Carhart*, 530 U.S. 914 (2000). A law or regulation that restricts a woman's access to abortion care is unconstitutional if it does not contain an exception for abortions necessary to protect a woman's life or health. *Ayotte v. Planned Parenthood,* 126 S. Ct. 961, 967 (2006). Thus, any prohibition on providing abortions, even after viability, must contain this exception for abortions necessary to protect the life or health of the woman. *Roe v. Wade*, 410 U.S. at 163-164; *Ayotte,* 126 S. Ct. at 967. This clearly would apply to emergency medical situations.

Yet the Weldon Amendment contains no such exception. Rather, the Weldon Amendment, if enforced in California, would turn the established jurisprudence of abortion on its head. Instead of recognizing that access to emergency abortions is a constitutional right, the Weldon Amendment effectively prohibits the states from protecting access to such abortions as they would access to any other emergency medical procedure. Through this misuse of its Spending Clause authority, Congress effectively forces California to single out abortion as the one emergency medical procedure that health care professionals and entities cannot be forced to provide. It forces California to single out pregnant women needing emergency abortion-related medical care as the one group it cannot protect. In doing this, the Weldon Amendment imposes substantial obstacles in the path of women trying to obtain emergency abortion-related medical

care by denying them the assistance of the state in ensuring access to such care.[4/]

Congress may not impose such a burden on the exercise of a woman's right of access to an abortion necessary to protect her health or life, even in furtherance of some other valid purpose. Thus, for example, Congress may use its spending authority to promote live births over abortions so long as it "'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy . . . .'" *Rust v. Sullivan*, 500 U.S. 173, 201 (1991). A "state-created obstacle need not be absolute to be impermissible" and is unconstitutional if it "unduly burdens the right to seek an abortion." *Maher v. Roe*, 432 U.S. 464, 473, (1977). This is so because there is a "constitutionally protected interest 'in making certain kinds of important decisions' free from governmental compulsion. [Citation omitted.]." *Maher*, 432 U.S. at 473.

The Weldon Amendment, by depriving the states of their ability to protect a pregnant woman's access to emergency abortion-related medical services needed to protect her health or life, impermissibly interferes with women's freedom to terminate a pregnancy. Were it not for the Weldon Amendment, a pregnant woman needing emergency abortion-related medical services would have California as an ally in her effort to obtain such services. The Weldon Amendment effectively denies her that most important ally. Therefore, the Weldon Amendment impermissibly restricts women's rights to choose and have access to emergency, abortion-related medical care in violation of the right to privacy, life, and liberty, guaranteed by the Due Process Clause.

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4. The cruel irony of this regulation is that women needing emergency abortions have little choice in the matter. By definition, they are in a situation in which their lives or health would be jeopardized if they did not have an immediate abortion. There is no reason to believe that these women would voluntarily choose to terminate their pregnancies were they not forced to by medical necessity. In fact, it is reasonable to assume that any woman who preferred to terminate her pregnancy rather than give birth would not wait for a medical emergency to precipitate such action.

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, ex rel. BILL LOCKYER, in his official capacity as Attorney General of the State of California; and JACK O'CONNELL, in his official capacity as the State Superintendent of Public Instruction,

Plaintiffs,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF LABOR; ELAINE CHAO, in her official capacity as the Secretary of Labor; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; MICHAEL O. LEAVITT, in his official capacity as the Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF EDUCATION; and MARGARET SPELLINGS, in her official capacity as the Secretary of Education,

Defendants.

CASE NO. C 05 00328 JSW

DECLARATION OF BILL LOCKYER IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Date: June 23, 2006
Time: 9:00 a.m.
Cttm: No. 2, 17th Floor
Judge: Hon. Jeffrey S. White

I, Bill Lockyer , declare:

1. I am the Attorney General of the State of California, elected pursuant to Article V, section 11 of the California Constitution. As Attorney General, I am the chief law officer of the State of California. (Cal. Const., Art. V, § 13; Cal. Gov. Code, § 12500, et seq.)

2. As the Attorney General for the State of California, I am responsible for protecting California's sovereign interests, including the sovereign interest in enforcing California law. I also have a duty to see that the laws of the State are uniformly and adequately enforced.

3. I am aware of the provisions of section 508(d) of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2005 (the Weldon Amendment). The appropriations act provided the State of California with at least $37.3 billion in federal funding in 2005.

4. I am informed and believe that pursuant to the Weldon Amendment, the federal government may withhold these federal funds if it determines that the State of California, or any of its departments or agencies, have engaged in conduct deemed "discrimination" within the meaning of the Act. The Weldon Amendment would deny federal funds to any State or local government that "subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." This provision was re-enacted verbatim in the 2006 federal budget. (Public Law 109-149 (Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006).)

5. The Weldon Amendment contains no definition of the term "discrimination" and its meaning in the context of this provision is extremely unclear. The State of California has received no information from the federal government as to the meaning of the Weldon Amendment or its requirements or prohibitions. Likewise, the federal government has provided no guidance regarding compliance with the Weldon Amendment.

6. Consequently, I cannot determine with any reasonable degree of certainty what will or will not constitute "discrimination" within the meaning of the Weldon Amendment and, thus, what actions would trigger the loss to California of billions of dollars in federal funding.

7. Nonetheless, the federal government has professed that it will comply with the Weldon Amendment should it become aware that California has subjected any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.

8. The Weldon Amendment forces me to either forgo enforcement of state laws, such as that requiring health care entities to provide emergency abortion services, or to enforce such law at the risk of causing California to lose billions of dollars in federal funds. Those federal funds would include funds for education and labor programs that bear no relationship to abortion or health care.

9. The regulation of health care and the practice of medicine is generally reserved to the States in the sound exercise of their police powers. However, because of the Weldon Amendment, I cannot enforce California's own laws regulating the delivery of health care and the practice of medicine regarding emergency abortions without risking the devastating loss to the State of billions of dollars in federal funds. As a consequence of the Weldon Amendment's unreasonably vague and severe funding restriction and in the absence of a judicial interpretation to the contrary, I will have no choice but to refrain from exercising my authority to enforce California's police powers to protect public health and save lives.

I declare under penalty of perjury under the laws of the State of California that all of the foregoing is true and correct.

Executed this 13th day of April, 2006, at Sacramento, California.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, et al,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants,

and

CHRISTIAN MEDICAL ASSOCIATION, AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS, and FELLOWSHIP OF CHRISTIAN PHYSICIAN

Civil Action No.: C-05-00328 JSW

Hon. Jeffrey S. White
Complaint Filed: January 25, 2005

Date: January 12, 2007
Time: 9:00 a.m.
Courtroom: No. 2, 17th Floor
Judge: Hon. Jeffrey S. White

ASSISTANTS,

Defendants-Intervenors,

and

THE ALLIANCE OF CATHOLIC HEALTH CARE, a Non-Profit Healthcare Association, On Behalf of Its Individual Members;

Defendant-Intervenors.

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STATEMENT OF THE CASE

As the Court is well aware, Plaintiffs and the Federal Government Defendants have already briefed cross-motions for summary judgment in this case. Subsequent to the briefing on cross-motions for summary judgment, and in response to discovery requests by the Defendants-Intervenors, Plaintiffs revealed that the California Department of Health Services had investigated the incidents Plaintiffs cited to the Court as denials of "emergency abortion-related medical services"[1] and determined that these denials *did not* violate §1317. Ex. B to Mattox Declaration, Letter from Donna Loza to A. Cordero dated July 20, 2006. Additionally, citing the lack of a specific policy concerning "inevitable abortions," the Department approved as an "acceptable Plan of Correction" Scripps-Mercy's adoption of a policy titled "Adherence to Catholic Healthcare Directives in the Care of Obstetrical Patients." *Id.*, Statement of Deficiencies and Plan of Correction, 1. This policy requires all hospital and medical staff to abide by the "Ethical and Religious Directives for Catholic Health Care Services published by the United States Conference of Catholic Bishops." *Id.* This policy provides, in part, "Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted." *Id.* The Medical Groups join the Government Defendants' Motion for Summary Judgment and supplement the arguments herein.

SUMMARY OF THE ARGUMENT

There is no actual controversy in this case. Rather, Plaintiffs ask this Court for a pre-emptive advisory ruling authorizing California to punish medical professionals who do not perform abortions. The requested relief is "pre-emptive" because the state law Plaintiffs cite does not conflict with the Weldon Amendment on its face or in its historical application. The novelty of Plaintiffs' interpretation of state law in order to manufacture a controversy is demonstrated by the fact that although the state law that Plaintiffs rely upon has been in force for over two decades, Plaintiffs cannot identify even a single instance of its application in the manner they urge. The requested relief is "advisory" because even if the Court were to award the full relief Plaintiffs request, by declaring the

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[1] Plaintiffs' Combined Opposition to Defendants' MSJ & Reply in Support of MSJ, 6,

Weldon Amendment unconstitutional, California would still be bound by the United States Constitution and several provisions of federal law not to enforce the provisions of California law at issue here in the manner in which they seek to enforce them. Thus, the relief Plaintiffs request would not redress the *theoretical* harm Plaintiffs allege, but would instead require physicians to err on the side of performing abortions in order to avoid criminal prosecution and civil punishment by the state.

I. PLAINTIFFS LACK STANDING AND THEIR CLAIMS ARE NOT RIPE BECAUSE CAL. HEALTH AND SAFETY CODE §1317 DOES NOT REQUIRE MEDICAL PROFESSIONALS TO PROVIDE ABORTION SERVICES.

The Government Defendants have effectively refuted Plaintiffs' claims on their merits. However, the Medical Groups agree with the Government Defendants that the Court lacks jurisdiction even to reach these arguments because the Plaintiffs lack standing and their claims are not ripe. In *Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1139 (9th Cir. 2000) (*en banc*), the Ninth Circuit established three factors to guide the determination whether a pre-enforcement challenge to a statute arose from a genuine "threat of prosecution" sufficient to satisfy the "case or controversy" requirement of Article III of the United States Constitution:

> [1] whether the plaintiffs have articulated a concrete plan to violate the law in question; [2] whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and [3] the history of past prosecution or enforcement under the challenged statute.

Similarly, for a claim to be ripe for judicial review, a litigant must "assert[] an injury that is real and concrete rather than speculative and hypothetical," a requirement that "coincides squarely with standing's injury in fact prong." *Id.* at 1139. Plaintiffs fail to demonstrate a concrete injury to their purported interests that could be redressed by the remedy they seek.

A. There Is No Actual Conflict Between California Law and the Weldon Amendment Because §1317 Does Not Require Healthcare Professionals to Perform Abortions.

Plaintiffs' Spending Clause argument is premised on an alleged conflict between Cal. Health and Safety Code §1317 and the Weldon Amendment. Plaintiffs' Memo in Support of MSJ, 14 ("The conflict between the Weldon Amendment and the California Health and Safety Code in regard to emergency abortions provides California with standing to pursue its constitutional challenge to the

Weldon Amendment.") Because the statutes do not actually conflict, there is no controversy.

1. The Weldon Amendment.

Contrary to Plaintiffs' rhetoric, the Weldon Amendment is not an abortion restriction at all. As the Federal Government Defendants have ably explained, the Weldon Amendment is a protection for the rights of conscience of healthcare workers and institutions. It is a federal statute that simply prohibits recipients of federal funding from discriminating against medical professionals and institutions who do not perform abortions. The Weldon Amendment is not unique in its protection of the rights of individuals and institutions not to perform or refer for abortions. See Part II, *infra*; Defendants' Memorandum of Points and Authorities in Support of MTD at 2-3. Although different in some important respects from these other conscience laws, they share the same ultimate purpose, the protection of healthcare workers from government efforts to compel them to perform abortions.

2. California Health & Safety Code §1317.

Section 1317 is a California law regulating the provision of medical care in licensed health facilities that maintain emergency departments. Hospitals are subject to fines of up to $25,000 for violating the statute or the applicable regulations. §1317.6(a). They may also have their emergency medical service permit revoked or suspended. §1317.6(g). Individual physicians and surgeons are subject to $5,000 fines. §1317.6(c). Criminal liability also attaches, since "any administrative or medical personnel who knowingly and intentionally violates any provision of this article, may be charged by the local district attorney with a misdemeanor." §1317.6(h). Such a conviction would be punishable by up to six months imprisonment and an additional $1,000 fine. CAL. PENAL CODE §19. The statute also provides a private right of action by which anyone "personal[ly] harm[ed]" and hospitals who receive patients transferred in violation of §1317 may bring a civil action for damages, attorney's fees, and "other appropriate relief." §1317.6(j). In fact, "any person *potentially* harmed by a violation of [§1317], or the local district attorney or the Attorney General, may bring a civil action against the responsible hospital or administrative or medical personnel, to enjoin the violation, and if the injunction issues, the court shall award reasonable attorney's fees." *Id.* (italics added). Thus, if Plaintiffs' interpretation of §1317 is adopted, it may permit any woman of childbearing age, local

district attorneys and the Attorney General to bring actions for injunctive relief against any hospital, physician, physician assistant, and nurse in the state that objects to performing abortions and abortion referrals in any circumstance that might fall within the scope of the statute, collecting attorney's fees from the hospitals and medical professionals.

Nothing in the express language of §1317 requires a medical professional or institution to intentionally perform an abortion. Rather, this statute requires medical professionals and institutions, in certain circumstances, to provide "*emergency services and care … necessary* to relieve or eliminate the emergency medical condition, *within the capability of the facility*." CAL. HEALTH & SAFETY CODE §1317.1(a)(1). (italics added) As the final clause indicates, §1317 does not require every emergency department in the state to perform every conceivable service that might be called for in a given rare emergency. The statute specifies, "'Within the capability of the facility' means those capabilities which the hospital is required to have as a condition of its emergency medical services permit and services specified on Services Inventory Form 7041 filed by the hospital with the Office of Statewide Health Planning and Development." §1317.1(h).

The California regulations governing Comprehensive Emergency Medical Services at General Acute Care Hospitals may be found at CAL. ADMIN. CODE TITLE 22, §§70451-70459. Although the regulations provide a list of various services a hospital's emergency services unit must provide, the regulations do not state that a hospital must perform abortions. *See* CAL. ADMIN. CODE TITLE 22, §70453(m)-(q). Even the general requirement that "Surgical services shall be immediately available for life-threatening situations," does not encompass the threat to the undefined "health" situations that Plaintiffs claim §1317 covers. CAL. ADMIN. CODE TITLE 22, §70453(p). Insofar as California law does not even require an emergency department to have a general surgeon immediately available in non-life-threatening situations, California law cannot be read, as Plaintiffs contend, to require that abortions be performed in the non-life-threatening situations contemplated by §1317(b). Plaintiffs' argument that the Weldon Amendment "forces California to single out abortion as the one emergency medical procedure that health care professionals and entities cannot be forced to provide" is simply unsupported by the plain language of §1317 and the regulations governing emergency departments.

Plaintiff's Memo in Support of MSJ, at 23. Because there is no abortion requirement in California's regulations governing emergency medical services, the only conceivable way in which §1317 may be interpreted to require an emergency department to perform abortions is if a hospital volunteers that it will provide abortion services on its Form 7041. *See* §1317.1(h).

The results of the investigations of a Scripps-Mercy Hospital earlier this year confirm that California does not require hospitals with emergency services departments to perform abortions. In response to a complaint by counsel for Plaintiffs, officials for the California Department of Health Services investigated Scripps Mercy Hospital and determined that it was *not* in violation of §1317. Ex. B to Mattox Declaration, Letter from Donna Loza to A. Cordero dated July 20, 2006; Ex. A to Mattox Dec., Plaintiffs' Response to Defendant-Intervenors First Request for Answers to Interrogatories, Responses Nos 3-6 (No identified additional instances before or since the Scripps Mercy complaints). Moreover, independently finding that the hospital lacked a specific policy, adequately communicated to staff, concerning "inevitable abortions," the officials accepted as Scripps-Mercy's "Plan of Correction" the adoption of a policy entitled "Adherence to Catholic Healthcare Directives in the Care of Obstetrical Patients." *Id.* Ex. B to Mattox Dec., Summary Statement of Deficiencies and Plan of Correction, at 1. This policy states, "All hospital and medical staff shall abide by the Ethical and Religious Directives for Catholic Health Care Services published by the United States Conference of Catholic Bishops." Ex. C to Mattox Dec., Adherence to Catholic Healthcare Directives in the Care of Obstetrical Patients. Among these Directives, incorporated specifically in the Scripps-Mercy hospital policy, is the following:

> ***"Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted.*** Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion…."

Id; Ex. D to Mattox Dec., Ethical and Religious Directives, p. 19, Directive 45 (emphases added).

It is quite sensible that California would not mandate that every emergency department and professional in the state perform abortions since it is prohibited by federal law from imposing that stricture. As discussed in more detail below, California, like every state receiving federal health-

related financial assistance as well as the federal government itself, has been explicitly forbidden for over ten years by another federal law (commonly called the "Coats-Snowe Amendment") from requiring medical professionals or institutions to undergo training in the performance of abortions. 42 U.S.C. §238n(a)(1) (prohibiting state and local governments receiving health-related federal funding from discriminating against an individual because they refused training in the performance of abortions). The vast majority of the funds at issue in this case under the Weldon Amendment are health-related funds provided to California by the United States Department of Health & Human Services and thus also covered by the Coats-Snowe Amendment. Declaration of Tim Muscat in Support of Plaintiffs' MSJ, ¶3 & Ex. A. Since §1317 requires only the provision of services that are "within the capability of the facility" Plaintiffs' apparent interpretation of it to require that medical professionals that have no training in the provision of abortions must nevertheless perform these intrusive procedures defies logic, expose objecting medical professionals and institutions to the risk of malpractice liability, and *endanger* women's lives and health.

Further, §1317, by its terms, is satisfied whenever services are provided that are "necessary to relieve or eliminate the emergency medical condition." §1317.1(a)(1). Thus, a healthcare institution's or professional's responsibilities under §1317 are satisfied by providing services sufficient to stabilize the patient's emergency condition even if the underlying cause of the condition remains. Cal. Health & Safety Code §1317 merely mirrors the same requirement in its federal counterpart, the Emergency Medical Transfer And Labor Act ("EMTALA"), 42 U.S.C. §1395dd(b). *Jackson v. East Bay Hospital,* 980 F. Supp. 1341, 1350 (N.D. Cal. 1997) (describing §1317 as a "state law version of EMTALA"), *affirmed,* 246 F.3d 1248, 1258 (9th Cir. 2001) ("California Health & Safety Code §1317 is California's version of [EMTALA]"). *See also* §1317.6(e)-(g) (fines imposed pursuant to §1317 offset by fines under EMTALA, reported to HHS for crediting against EMTALA fines). If the medical professional is not equipped or trained to provide an abortion, or if in the professional's judgment emergency medical treatment other than an abortion may be provided that will stabilize the patient's condition, such stabilizing treatment satisfies the express requirements of §1317. *Brooker v. Desert Hospital Corp.,* 947 F. 2d 412, 415 (9th Cir. 1991) (EMTALA "did not

require [the] hospital to alleviate completely Booker's emergency condition;" provision of angioplasty to stabilize patient's condition satisfied EMTALA although bypass was ultimately necessary); §1317.1(h) ("stabilization" occurs "when, in the opinion of the treating provider, the patient's medical condition is such that, within reasonable medical probability, no material deterioration of the patient's condition is likely to result from, or occur during, a transfer of the patient….).

Perhaps because of the very fact that the statute does not require it, §1317 has never been applied to criminally or civilly sanction a healthcare institution or professional that refused to provide an abortion or abortion referral, and the only complaint Plaintiffs could identify of such a violation of §1317 was a complaint filed by Plaintiffs' counsel during this litigation which resulted in the agency concluding there was no violation of §1317. There is no actual conflict between §1317 and the Weldon Amendment, and hence Plaintiffs lack standing to complain that the Weldon Amendment interferes with any sovereign right of California to enforce the statute.

B. Plaintiffs' Manufactured Conflict Between §1317 and the Weldon Amendment Does Not Amount to an Actual Threat of Enforcement Sufficient to Confer Standing on Plaintiffs and Render Their Claims Ripe.

Because by its express terms §1317 does not require healthcare providers to perform abortions or provide abortion referrals, the "conflict" between this California law and the Weldon Amendment results not from the text or history of application of the statute, but Attorney General Lockyer's unexplained statement in his declaration that the Weldon Amendment prevents him from enforcing "state laws, such as that requiring health care entities to provide emergency abortion services." Declaration of Bill Lockyer in Support of Plaintiffs' MSJ, ¶8. This bare statement, unsupported by the text or historical enforcement of the statute, the implementing regulations, or any judicial decision applying it, is plainly insufficient to demonstrate the concrete injury necessary to confer standing on Plaintiffs to challenge the Weldon Amendment as conflicting with the enforcement of §1317 or to create a ripe controversy fit for judicial review. *See Thorning v. Hollister Sch. Dist.,* 11 Cal. App. 4th 1598, 1604 (1992) (even an "official interpretation of a statute by the Attorney General is not controlling"); *See Stenberg v. Carhart,* 530 U.S. 914, 942 (2000) (rejecting state attorney general's interpretation of statute where it conflicted with statute's language).

Nevertheless, even taking Plaintiffs' interpretation of §1317 to be correct, in order for an actual conflict to arise between California's obligations under the Weldon Amendment and California's desire to enforce §1317 by criminally or civilly sanctioning a medical professional for her failure to perform an abortion, at least the following whirlwind of unlikely circumstances would have to occur:

> (1) A pregnant woman would have to have a "medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in … (1) placing the patient's health in serious jeopardy, (2) serious impairment to bodily functions, or (3) serious disfunction of any bodily organ or part." Cal. Health & Safety Code §1317.1(b) (defining "emergency medical condition."
>
> (2) This woman would have to present to a licensed healthcare facility "that maintains and operates an emergency department to provide emergency services to the public." §1317(a).
>
> (3) A physician at the hospital would have to reach the medical determination that the woman had an "emergency medical condition" within the meaning of Cal. Health & Safety Code §1317.1(b), and that the sole[2] necessary and medically indicated means of treating that condition was the intentional abortion of her unborn child. §1317.1(c) (no liability for reasonable determination that individual does not suffer from an emergency condition or hospital lacks available facilities and personnel to render such services).
>
> (4) The hospital would have to be equipped to provide an abortion and would have had to indicate this on its Services Inventory Form 7041, *volunteering* that it provides abortion services. §1317.1(h); CAL. ADMIN. CODE TITLE 22, §70453(m)-(q) (no requirement that an emergency department provide abortions); *Jackson v. East Bay Hospital*, 246 F.3d at 1259 (affirming this Court's holding that §1317 "precludes liability for the failure to provide a particular service if the hospital does not have the appropriate facilities and personnel to provide that service."); *Brooker v. Desert Hosp. Corp.,* 947 F. 2d at 416 (holding that hospital that provided angioplasty to relieve emergency, but not ultimately necessary bypass did not violate §1317 because "Section 1317(c) indicates that the California legislature determined that a health facility may sometimes lack appropriate personnel and thus may reasonably refuse to render certain emergency care.")
>
> (5) The physician would have had to be sufficiently trained in the performance of abortion procedures to make herself qualified to provide the abortion despite the fact that she was specifically protected by federal law from being required to undergo such training. 42 U.S.C. §238n(a)(1) (prohibiting any state receiving federal financial assistance from requiring a healthcare institution or professional to undergo training in providing abortions).

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[2] Where more than one medically indicated course of treatment is possible, reading the statute to hold medical professionals liable for choosing *an* indicated course of treatment that would have also protected the patient's unborn child because that treatment failed to "relieve or eliminate the emergency medical condition" would subject emergency medical professionals to strict liability.

(6) This physician, who had undergone abortion training and stayed current on how to perform the abortion procedure called for in the circumstances such that she was qualified to render the service, would have to refuse to provide the abortion. PUB. L. NO. 109-149, §508(d), 119 stat. 2833, 2879-80 (2005) (Weldon Amendment).

(7) All other physicians at the hospital would have to either be unable to provide the abortion or refuse to do so. *See* §1317(a) (requires services to be provided at certain health facilities with emergency departments, not by individual physicians at those facilities).

Even setting aside any potential uncertainties about the Federal Government's response to California's punishment of a physician in the above circumstances, Plaintiffs have not demonstrated an actual realistic threat of enforcement of the Weldon Amendment against them as a result of their possible enforcement of §1317. They therefore lack standing to challenge the Weldon Amendment's constitutionality and their claims are not ripe. *Thomas,* 220 F.3d at 1139.

II. PLAINTIFFS LACK STANDING BECAUSE CALIFORNIA HAS NO SOVEREIGN RIGHT TO DISCRIMINATE AGAINST MEDICAL PROFESSIONALS WHO DO NOT PERFORM OR REFER FOR ABORTIONS.

Even were Attorney General Lockyer's interpretation of §1317 accurate as a matter of statutory interpretation, his interpretation would place California on a collision course with the Free Exercise Clause of the First Amendment and Title VII of the Civil Rights Act of 1964, and would conflict with California's obligation under the Coats-Snowe Amendment, 42 U.S.C. §238n, not to discriminate against healthcare workers or institutions that refuse to provide abortions or abortion referrals. Because California has no sovereign right to enforce §1317 in this manner, it cannot possess standing to challenge the Weldon Amendment as a violation of its sovereign prerogative.[3]

A. The Free Exercise Clause Prohibits California From Forcing Medical Professionals to Perform Abortions Against Their Religious Beliefs.

The Free Exercise Clause of the First Amendment to the United States Constitution has been incorporated via the Fourteenth Amendment to apply to the states. *Cantwell v. Connecticut,* 310 U.S.

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[3] Plaintiffs concede that even as to their Due Process claim, they only have standing if the state's "'sovereign or quasi-sovereign interests are implicated….'" Plaintiffs' Opp. to Cross-Motion for Summ. Judg. & Reply, at 18, *quoting Pennsylvania v. New Jersey,* 426 U.S. 660, 665 (1976)

296, 303 (1940). Because Plaintiffs would be prohibited by the Free Exercise Clause from requiring, on pain of criminal and civil punishment, healthcare professionals and facilities to perform abortions or abortion referrals in violation of their religious beliefs, California cannot claim a sovereign right to do so and lacks standing to violate the federal constitution in this manner.

The roots of this critical right of a medical professional not to be compelled to provide abortions against their religious beliefs and conscience are in the very cases that created the abortion right in the first place. The Supreme Court's decision in *Doe v. Bolton*, 410 U.S. 179 (1973), was issued concurrently with its decision in *Roe v. Wade,* and the Court stated that the two "are to be read together." *Roe v. Wade,* 410 U.S. 113, 165 (1971). In *Doe,* the Court was confronted with a state statute prohibiting abortions unless they were approved as "necessary" by a committee of doctors. 410 U.S. at 184. The statute also contained a separate provision "giving any physician and any hospital employee or staff member the right, on moral or religious grounds not to participate in the procedure." *Id.* The Court held that a committee approval requirement was unconstitutional, in significant part because of the fact that the separate conscience protection preserved the right of the hospital and its employees not to participate in the abortion:

> [T]he hospital itself is otherwise fully protected. Under § 26-1202(e) [of the Georgia law], the hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee. *Further a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital.* Section 26-1202(e) affords adequate protection to the hospital….

Doe, at 197-98. (italics added). Nothing in *Roe* and *Doe,* nor their progeny, suggests that a woman has a constitutional right to compel a physician or hospital to perform an abortion against their religious convictions or moral conscience.

Quoting the above language from *Doe*, the Ninth Circuit has observed that the Supreme Court recognized the necessity for protections of "the freedom of religion of those with religious or moral scruples against … abortions." *Chrisman v. Sisters of St. Joseph of Peace,* 506 F.2d 308, 311-12 (9th Cir. 1974) (upholding constitutionality of a provision of a federal statute prohibiting courts from using

receipt of certain federal funds as basis for compelling individual or hospital to perform abortions in violation of their religious beliefs or moral convictions). In *Taylor v. St. Vincent's Hospital,* the Ninth Circuit explained and reaffirmed its holding in *Chrisman*: "If the hospital's refusal to perform [an abortion] infringes upon any constitutionally cognizable right to privacy, such infringement is outweighed by the need to protect the freedom of religion of denominational hospitals 'with religious or moral scruples against sterilizations and abortions.'" 523 F.2d 75, 77 (9th Cir. 1975), *quoting Chrisman,* at 312. *See also Watkins v. Mercy Medical Center,* 364 F. Supp. 799, 803 (D. Idaho 1973) ("[T]he Court feels it must emphasize that [the hospital] has the right to adhere to its own religious beliefs and not be forced to make its facilities available for services which it finds repugnant to those beliefs.... To hold otherwise would violate the religious rights of the hospital."), *quoted with approval in Chrisman,* at 312; *Doe v. Bellin,* 479 F.2d 756, 759-60 (7th Cir. 1973) ("There is no constitutional objection to the decision by a purely private hospital that it will not permit its facilities to be used for the performance of abortions."), *quoted with approval in Chrisman,* at 312.

The Free Exercise problems inherent in sanctioning medical professionals and institutions for their religious or moral objection to providing abortion services are particularly pronounced here, where Plaintiffs' interpretation of §1317 would render it neither neutral with respect to religion nor generally applicable. Even in the wake of *Employment Div. v. Smith*, 494 U.S. 872, 883 (1990), the Supreme Court has reiterated that laws burdening religious exercise will be subject to strict scrutiny if they are not neutral and generally applicable. *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 533 (1993). In *Lukumi,* the Court clearly delineated several principles to be applied in determining whether a law is neutral and generally applicable, including: (1) Facial neutrality of a law is not determinative, *id.,* at 534; (2) "[A]part from the text, the effect of a law in its real operation is strong evidence of its object," *id.,* at 535; and (3) Government officials' exemption of certain activities from the law's scope while denying religious exemptions is evidence of a lack of neutrality, *id.,* at 537-38. Further, with respect to the general applicability of a law, the Court held that a law that is "underinclusive," leaving unproscribed non-religiously motivated conduct that endangers the interests the state claims to protect at least as much as that which it prohibits, is not generally applicable and

thus subject to strict scrutiny. *Id.,* at 543. *See also Menges v. Blagojevich,* __ F. Supp. 2d ___ (C.D. Ill. 2006), 2006 WL 2579719*7-8 (state law requiring pharmacies that stock contraceptives -- but not emergency rooms or pharmacies that do not stock contraceptives – to dispense Plan B, and prohibiting pharmacies from delaying dispensing Plan B because of the pharmacist's moral or religious beliefs, but not for other reasons, was potentially underinclusive and subject to strict scrutiny).

As discussed above, §1317 simply does not, by its express terms, require a hospital or medical professional working in a hospital to provide every service that might theoretically be required in a medical emergency. A discrete set of required services is set out under CAL. ADMIN. CODE TITLE 22, § 70453(m)-(q), but that list does not include abortion services, and certainly not in non-life-threatening situations. Further, the California Department of Health Services' approval of Scripps-Mercy Hospital's policy prohibiting the performance of abortions reveals that this is not an actual requirement. Hence, a hospital would only be required to perform an abortion if it volunteered that it did so "on Services Inventory Form 7041 filed by the hospital with the Office of Statewide Health Planning and Development." §1317.1(h). In other words, a hospital would remain free to decline to perform any number of specific medical services not mandated as a requirement for its emergency medical services permit, declining to provide such services, including abortions, on any number of grounds, including the fact that it chose not to purchase necessary equipment or establish necessary facilities for abortions, or that its physicians chose not to undergo training in the practice. Hospitals and professionals that choose not to provide other services that might be necessary in a given emergency situation would not be subject to sanction under §1317. However, Plaintiffs argue that a hospital or professional that does not provide "emergency" abortions for religious or moral reasons, would be subject to sanction under §1317. *See, e.g.,* Plaintiff's Memo in Support of MSJ, 13.

California law does not uniformly require hospitals and medical professionals to provide all services that might be necessary in a given, albeit unlikely, "medical emergency," requiring them to purchase all necessary equipment and make available physicians trained in any potential emergency procedure. That the State permits hospitals to decline to provide, *inter alia*, abortion services for some reasons other than religious or conscientious objections, is evidence that the law, as Attorney

General Lockyer interprets it is neither neutral nor generally applicable, and hence subject to strict scrutiny. "It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest of the highest order … when it leaves appreciable damage to that supposedly vital interest uninhibited." *Lukumi,* at 546-47, *quoting Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989). *See also, Blackhawk v. Commonwealth of Pennsylvania,* 381 F. 3d 202, 208 (3rd Cir. 2004) (Alito, J.) ("A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated.") In order to satisfy strict scrutiny, Plaintiffs would have to demonstrate not just a general compelling interest, but a compelling interest in specifically refusing a religious exemption to their mandate that every hospital and medical professional perform abortions. *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal,* 126 S.Ct. 1211, 1220 (2006). Plaintiffs cannot establish that the application of §1317 to force medical professionals that declined to provide an abortion on religious or conscientious grounds, rather than simply because their hospital chose not to provide the necessary facilities and equipment, would satisfy strict scrutiny. Thus, California has no sovereign interest in enforcing §1317 to this effect and lacks standing to complain of the Weldon Amendment's interference with its unconstitutional enforcement of state law.

B. Title VII of the Civil Rights Act of 1964 Prohibits California From Interfering With an Employer's Obligation to Accommodate an Employee's Religious Objection to Performing or Referring for Abortions.

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's … religion." 42 U.S.C. §2000e-2(a)(1). Religion includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate … an employee's … religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* §2000e(j). Hence, Title VII places a duty on employers to reasonably accommodate the religious practices of their employees unless such accommodation would

cause undue hardship to the employer's business. *Ansonia Bd. Of Educ. v. Philbrook,* 479 U.S. 60, 63 (1986); *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 74 (1977).

Section 708 of Title VII provides that any "law which purports to require or permit the doing of an act which would be an unlawful employment practice under this title" is preempted by Title VII and therefore unenforceable. 42 U.S.C. §2000e-7. Similarly, §1104 of Title XI, applicable to all titles of the Civil Rights Act, provides that no provision of the Act shall "be construed as invalidating any provision of State law *unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."* 42 U.S.C. § 2000h-4 (emphasis supplied). *See also California Federal Savings & Loan Ass'n. v. Guerra,* 479 U.S. 272, 281 (1987) (holding that state law is preempted by Title VII if the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress). Therefore, as a constitutional matter, any state law violating or conflicting with Title VII is invalid under the Supremacy Clause of Article VI of the U.S. Constitution. *Rosenfeld v. Southern Pacific Company,* 444 F.2d 1219, 1225-26 (9th Cir. 1971) (California labor laws prohibiting employers from imposing certain conditions on female laborers were "contrary to the general objectives of Title VII of the Civil Rights Act of 1964, … and are therefore, by virtue of the Supremacy Clause, supplanted by Title VII."); *Homemakers, Inc. of Los Angeles v. Division of Industrial Welfare,* 356 F.Supp. 1111, 1112 (N.D. Cal. 1973) (California laws providing for overtime pay for certain female employees conflicted with and were thus preempted by Title VII).

In *Menges v. Blagojevich,* a federal district court in Illinois recently held that religious pharmacists and their employer, Walgreens,[4] stated a claim that a state law that had the effect of requiring pharmacies to order pharmacists to fill prescriptions for "Plan B" over their religious objections was preempted by Title VII's mandate that employers reasonably accommodate the religious beliefs of their employees. 2006 WL 2579719, at 9-10. The court recognized that "[a] rule that mandates religious discrimination [in this case by refusal to accommodate] by employers would conflict with

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[4] Walgreens intervened in *Menges v. Blagojevich,* arguing that the Illinois rule was preempted by Title VII and subjected Walgreens to civil suits by employees (under Title VII) for complying with the rule. *Menges,* at *1.

Title VII and would be preempted." *Id.* at 9. Similarly, hospitals in California are required to reasonably accommodate the religious beliefs of their individual physicians and other medical professionals who object to performing or referring for abortions. The interpretation of §1317 Plaintiffs urge would unavoidably disturb the delicate balance of accommodation Congress set up when it created Title VII. In fact, the interference with Title VII rights is even more direct in this case than in *Menges.* While the government officials in *Menges* insisted that pharmacies might accommodate their pharmacists' religious objections, insisting that the state law required only pharmacies, not each individual pharmacist, to fill "Plan B" prescriptions, *Menges,* at *10, Plaintiffs here have specifically objected to the Weldon Amendment because they claim that it "single[s] out abortion as the one emergency medical procedure that health care *professionals* and entities cannot be *forced to provide*." Plaintiffs' Memo in Support of MSJ, 23. Moreover, §1317.6(c) provides for civil fines against individual physicians and surgeons that violate §1317 and §1317.6(h) states that "any administrative or medical personnel who knowingly and intentionally violates any provision of this article may be charged by the local district attorney with a misdemeanor." Thus, §1317, as interpreted by Plaintiffs to provide criminal and civil sanctions for both hospitals and professionals who do not provide abortions and abortion referrals, would directly interfere with hospitals' obligations and employees' rights under Title VII.

At least where the accommodation of a medical professional's religious objections to providing abortions or abortion referrals would not be an undue hardship on the hospital employer – for example, where others are available and willing to provide the service -- Plaintiffs' interpretation of §1317 to punish individual medical professionals and require them to provide abortions or abortion referrals would interfere with a medical professional's rights and the hospital's obligations under Title VII of the Civil Rights Act of 1964. California has no sovereign right to interfere with accommodations of religious objections pursuant to Title VII.

C. California Has Voluntarily Submitted to the Coats-Snowe Amendment, Prohibiting it From Requiring Medical Professionals and Hospitals to Provide Abortions or Abortion Referrals in Violation of Their Conscience.

In addition to First Amendment and Title VII proscriptions on California's application of §1317 to compel hospitals and medical professionals to provide abortions and abortion referrals, California has also chosen to subject itself to another federal statute that prohibits it from enforcing §1317 to compel hospitals or medical professionals to provide abortions or abortion referrals. The Coats-Snowe Amendment, 42 U.S.C. §238n, provides:

> (a) The Federal Government, and any State or local government that receives ["health-related" per 42 U.S.C. § 238n(c)(1)] Federal financial assistance, may not subject any health care entity to discrimination on the basis that –
> (1) the entity refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions;
> (2) the entity refuses to make arrangements for any of the activities specified in paragraph (1) …

The statute defines a "health care entity" to include "an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions." 42 U.S.C. §238n(c)(2).

In 2005 California received approximately $28,365,264,653 from the United States Department of Health & Human Services for a number of health-related programs. Dec. of Tim Muscat, ¶3 & Exhibit A to same (Supplemental Response of Defendant Michael Leavitt to Interrogatory 13. This represents over 75% of the funding at issue in this case. Muscat Dec., ¶¶3-5 ($8,163,449,580 in Education funding, $1,187,767,972 in Labor funding). These health-related funds would be clearly subject to the Coats-Snowe Amendment. *See* 42 U.S.C. §238n(c)(1) (defining "Federal financial assistance" for Amendment's purposes as those that are "health-related.") Yet Plaintiffs do not challenge the constitutionality of this law. Nor have Plaintiffs evinced any intent by California to forego any funding that triggers the application of the Coats-Snowe Amendment should they prevail in this action. Hence, whatever the Court's decision with regard to the constitutionality of the Weldon Amendment, California would remain subject to the Coats-Snowe Amendment, prohibiting California from discriminating against healthcare workers who refuse to be trained in the performance of abortions, to perform abortions or to provide referrals for abortions. 42 U.S.C. §238n(a)(1). Plaintiffs cannot have standing to vindicate California's alleged "sovereign right" to enforce §1317 to punish

medical professionals who do not provide abortions or abortion referrals while California simultaneously voluntarily subjects itself to another federal law that prohibits it from enforcing §1317 in this same manner.[5]

III. PLAINTIFFS LACK STANDING BECAUSE EVEN IF THIS COURT GRANTS THE RELIEF THEY SEEK, CALIFORNIA WOULD REMAIN SUBJECT TO FEDERAL CONSTITUTIONAL AND STATUTORY PROHIBITIONS ON THE APPLICATION OF §1317 TO CRIMINALLY PROSECUTE AND CIVILLY PUNISH HEALTHCARE PROFESSIONALS WHO DO NOT PERFORM ABORTIONS.

A Plaintiff lacks standing to invoke the jurisdiction of a federal court if the injury it complains of is not "likely to be redressed by the requested relief." *Allen v. Wright,* 468 U.S. 737, 751 (1984). "'The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement.'" *Allen,* 468 U.S. at 766, *quoting Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 39 (1976) (holding that Plaintiff lacked standing where there was no "substantial likelihood" that ordering federal agency to reinstate rule requiring nonprofit hospitals to treat indigents in certain circumstances "would result in respondents' receiving the hospital treatment they desire."); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) (Standing requires that "it must be likely as opposed to merely speculative, that the injury will be redressed by a favorable decision."); *Pritkin v. Dep't of Energy,* 254 F.3d 791, 799 (9th Cir. 2001) (redressability requires that "a decision in [Plaintiffs'] favor will produce tangible, meaningful results in the real world.") "Absent

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[5] In addition to the Coats-Snowe Amendment, 42 U.S.C. § 300a-7(d) provides:

> No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.

In 2000, Department of Health and Human Services Secretary Donna Shalala confirmed that this statute prohibits requiring individuals to provide abortion counseling and referrals in violation of their religious beliefs or conscience. 65 Fed. Reg. 41273-74. Thus, under this statute, in effect for over thirty years, where medical emergency services subject to §1317 are funded in whole or in part by HHS (for example, where the patient's care is paid for by Medicare), individuals may not be required to perform abortions.

such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." *Simon,* 426 U.S. at 38.

Plaintiffs seek a declaration that the Weldon Amendment is unconstitutional in its entirety. Plaintiffs argue that "[w]ere it not for the Weldon Amendment, a pregnant woman needing emergency abortion-related medical services would have California as an ally in her effort to obtain such services." Plaintiff's Memo in Support of MSJ, at 24. Setting aside the fact that no California law actually requires hospitals or medical professionals to perform abortions, this proposition is also incorrect in that California would remain subject to federal constitutional and statutory provisions that would prohibit it from enforcing §1317 to compel hospitals and medical professionals to provide abortions or abortion referrals against their religious beliefs or conscience. The remedy Plaintiffs seek would not relieve them of any of these other federal constitutional or statutory obligations.

The Free Exercise Clause of the First Amendment would continue to prevent California from criminally prosecuting or civilly sanctioning a healthcare professional who holds a religious or conscientious objection to performing abortions. Title VII of the Civil Rights Act would still prevent California from forcing a hospital to violate its employees' right to a reasonable accommodation of their religious convictions concerning performing abortions. Further, with respect to the Coats-Snowe Amendment, 42 U.S.C. § 238n, California has never suggested that it would choose to forego its funding from the Department of Health & Human Services in order to relieve itself of the obligations of that law. Over $28 billion of the $37 billion (approximately 75%) in federal funding California receives that is subject to the Weldon Amendment is also subject to the Coats-Snowe Amendment. Dec. of Tim Muscat in Support of Plaintiffs' MSJ, ¶3, and Exhibit A, Defendant Leavitt's Supplemental Response to Plaintiff's Interrogatory 13. Hence, it would be difficult to square a decision by California to forego its HHS funding (to which the Coats-Snowe condition attaches) with its position in this litigation that the amount of funds subject to the Weldon Amendment coerces it to accept Weldon's conditions.

There is *no* likelihood that the requested relief, a declaration that the Weldon Amendment is unconstitutional, will remedy the harm Plaintiffs allege, the inability to apply §1317 to criminally

prosecute and civilly sanction medical professionals and institutions that do not provide abortion services. Thus, Plaintiffs' alleged injury is not redressable in this action and this Court lacks jurisdiction to enter the gratuitous relief they request. *Simon,* 426 U.S. at 38.

IV. THE WELDON AMENDMENT DOES NOT INTERFERE WITH ACCESS TO NECESSARY EMERGENCY MEDICAL SERVICES.

The Weldon Amendment is not a curb on abortion services and in no way prevents a woman from receiving emergency medical services, even including abortions in a theoretical circumstance where they are necessary. It simply supplements a long-standing body of federal and state law protecting the rights of individual healthcare institutions and professionals not to participate in providing abortions. *See* Government Defendants' Response to Brief of *Amici Curiae*, 2-6. That a woman may have a constitutionally protected right to procure an abortion does not require California to ensure that other private individuals and institutions set aside their own constitutional rights and perform that abortion. Even the *amici* do not argue for such a constitutional obligation on private hospitals or individual professionals at public or private facilities. *See* Brief of *Amici Curiae,* 12-13. Nor does *Roe* and its progeny authorize the state – as §1317 would do if interpreted as Plaintiffs urge -- to prosecute, fine, or provide for legal actions by the Attorney General and/or any woman of child-bearing age to force medical professionals to perform abortions (and collect their attorney's fees from the medical professional). Plaintiffs and *amici* simply invent a threat where none exists. In the theoretical circumstance where the sole indicated necessary treatment option to save a woman's life or protect her from serious injury might cause the death of a woman's unborn child, there is no reason to believe that the Medical Groups' members or any ethical physician would fail to ensure that the necessary treatment was provided.

However, the existence of a circumstance in which a physician in an emergency department will have no medically indicated option short of immediately performing an abortion in order to prevent serious harm to the mother is speculative at best. Plaintiffs do not provide expert testimony or any other evidence that situations exist in which an abortion is the sole indicated immediately necessary treatment of an emergency medical condition. After the cross-motions for summary judgment had

been briefed, however, the *amici* purported to demonstrate such situations.[6] The conditions they identify, however, are either (1) situations in which there is no chance that the pregnancy could possibly result in a live birth and thus there would be no basis for a religious or moral objection to providing the services required to protect the woman, or (2) situations in which the an immediate abortion is *contraindicated*, or at least where other treatments are also medically indicated, including delivery of the child.

The *amici*'s first example, "inevitable" and "incomplete" miscarriages, are circumstances where, by definition, the pregnancy cannot result in a live birth. There would, therefore, be no basis for objecting to the provision of any immediately necessary treatment which a professional was trained and able to provide to protect the woman, and there is no reason to believe a woman would ever be denied treatment in such circumstances. However, with respect to a "threatened" miscarriage, abortion is *not* necessarily medically indicated. Even the *amici* only insist that an abortion would be indicated in that context "where the woman wants to terminate the pregnancy." Brief *Amici Curiae,* 4. Such a choice by the woman is irrelevant to whether an abortion is necessary on an emergency basis such that a physician can be punished for choosing another treatment option. *See* Plaintiffs' Memo in Support of MSJ, 24 n 4 (no reason to believe women needing emergency abortions would voluntarily choose to terminate their pregnancies). Like inevitable and incomplete miscarriages, ectopic pregnancies are also circumstances in which there is no likelihood of a successful delivery, and hence there would be no objection to procedures to protect a woman in this circumstance.

A woman experiencing premature rupture of the membranes surrounding her unborn child is at risk of an infection called chorioamnionitis, resulting from bacteria in the cervical and vaginal flora. MEDICAL COMPLICATIONS DURING PREGNANCY, Gerald N. Burrow, et al., eds., Elsevier Saunders (6th

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[6] As *amici*, not expert witnesses, the information they provide is not subject to the typical standards for expert witness testimony and should not be given such weight. In this respect, Plaintiffs' reliance upon *Planned Parenthood of Idaho v. Wasden* is misplaced since in that case the Plaintiff actually presented medical evidence which the Defendants chose not to dispute. 376 F.3d 908, 924.

ed. 2004), at 314. The indicated treatment for premature rupture, however, which *amici* recognize may manifest as late as 37 weeks of gestation, *Brief of Amici Curiae,* 4, is prompt administration of intravenous antibiotics, monitoring for signs of infection, fluid support, and *delivery*. MEDICAL COMPLICATIONS DURING PREGNANCY, at 315.

With respect to hypertensive disorders like pre-eclampsia, eclampsia, and HELLP syndrome, *amici* carefully do not state that the medically indicated procedure is abortion, instead noting that these conditions may require "termination of the pregnancy." *Brief of Amici Curiae,* 5. This is because pre-eclampsia, the earliest of these conditions, does not manifest, by definition, until after the 20th week of gestation. MEDICAL COMPLICATIONS DURING PREGNANCY, at 45-47. Optimal treatment consists of bed rest, blood pressure monitoring and control, regulation of fluid intake and output, close hospital monitoring and medication for neurologic indications. MEDICAL COMPLICATIONS DURING PREGNANCY, at 54-56; CRITICAL CARE OBSTETRICS, Gary A. Dildy III, *et al.,* eds., The McGraw-Hill Companies, Inc., New York (2003), at 438. Newer hypertensive medications have improved treatment and control of these conditions. CRITICAL CARE OBSTETRICS, at 441-444. If the condition worsens *after* attempts at medical control, early delivery is the indicated treatment. *Id.,* at 438 ("When severe pre-eclampsia is diagnosed, *immediate delivery*, regardless of gestational age, has generally been recommended") (italics added).

In cases of *placenta abruptio*, the *amici* do not state that abortion is indicated, recognizing that in some cases "immediate delivery" may be required. *Brief Amici Curiae,* 6. In cases of *placenta previa* where there is vaginal blood loss, the appropriate treatment includes bed rest, close hospital monitoring, fluid resuscitation, and transfusion if necessary. CRITICAL CARE OBSTETRICS, at 298. If the mother's condition permits, ultrasound evaluation and testing for viability may be considered. However, the appropriate treatment is *not* abortion, since "prompt delivery prevents further decompensation of both mother and fetus." *Id.* "If the fetus is alive and of viable gestational age at presentation, urgent delivery by caesarean section is indicated unless vaginal delivery is imminent." *Id.*

Contrary to *amici's* assertions, abortion is also not the necessary indication in women with certain rare cardiac conditions. Cardiac surgery is not absolutely contraindicated during pregnancy, but should be optimized as to time, place, gestation and level of care. MEDICAL KNOWLEDGE SELF-ASSESSMENT PROGRAM, (Paul E. Epstein, *et al*., eds., 2003), 96-97. On the other hand, abortion as a treatment for serious cardiac problems like congestive heart failure is recognized to carry serious inherent risks:

> *For the patient who is not in cardiac failure there is no need to terminate* and if she is in failure termination is next door to manslaughter … *On no account may obstetrical intervention be undertaken until the patient's cardiac failure is under control,* although the situation may seem so grim that one may be tempted to interfere. To do so would simply seal the patient's fate. *Once failure has been controlled, however, the need to intervene in the pregnancy has passed.*

PRACTICAL OBSTETRICAL PROBLEMS, Donald, I., (5th ed. 1979), 169-170 (emphases added). Treatments other than abortion are also typically indicated in cases of Marfan's syndrome, a genetic disease that carries a risk of aortic dissection and other cardiovascular complications. Despite *amici's* claim that "an immediate abortion must be performed," *Brief of Amici Curiae,* at 7, medical authorities state that "[i]deal monitoring includes blood pressure analysis and serial echocardiographic studies. If there is progressive aortic root dilation or if the aortic root diameter exceeds 5.5 cm, *necessary surgical repair can be carried out during pregnancy with good outcomes*." MEDICAL COMPLICATIONS DURING PREGNANCY, at 112, *citing* Elkayam, U*., et al., Cardiovascular Problems in Pregnant Women with the Marfan Syndrome,* 123 ANN. INTERN. MED. 117 (1995). In certain circumstances, caesarean section may be advised in these cases. *Id.*

Nevertheless, as the above demonstrates, whether treatment options other than emergency abortion are available in a given circumstance may not be uniformly agreed upon. Further, §1317 threatens sanctions whenever services are not performed and, *inter alia,* the "patient's health [is] in serious jeopardy." §1317.1(b)(1). The term "health" is undefined, but must be read to mean something lesser than a threat of "serious impairment of bodily functions," §1317.1(b)(2), or "serious dysfunction of any bodily organ or part" §1317.1(b)(3) in order to give the term any effect. Moreover, "health" exceptions to abortion *restrictions* have usually been broadly interpreted. *Bolton,* 410 U.S. at 192

("physical, emotional, psychological, [and] familial," …. All these factors may relate to health."); *American Academy of Pediatrics v. Lungren,* 16 Cal. App. 4th 307, 356 (1997) (both physical and "mental risk" to minor avoided by judicial bypass for abortions); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 996, n4 (2003) ("Because of the 'health' exception to abortion regulation in the last trimester, the mother may choose abortion for essentially any personal, family or emotional reason.") The Medical Groups' members and undoubtedly many other physicians would certainly object to performing abortions in such circumstances. Further, under the California Reproductive Privacy Act, a physician may not be criminally liable for an illegal abortion even on a viable fetus if he believes there is *any risk* to the woman's "health." CAL. HEALTH & SAFETY CODE §123468(b)(2). While the scope of "health" exceptions are typically at issue in cases in which a woman *wants* an abortion late in her pregnancy, here Plaintiffs turn this issue on its head and would impose upon physicians criminal and civil liability for not performing an abortion in these undefined circumstances. Whereas broad interpretations of health exceptions usually permit women leeway in making the abortion decision and free physicians from criminal prosecution for illegal abortions, a broad interpretation of the term "health" in this case would have the exact opposite effect, subjecting physicians to criminal and civil liability for *not* performing abortions where it would be "reasonabl[e]" to believe not doing so might affect her "health." §1317.1(b).

Requiring physicians to perform abortions in such a context or face the threat of prosecution or civil sanctions would force a physician to err on the side of performing abortions in fear that the state might second-guess – and even criminally prosecute her for -- her decision to pursue other treatment options that she believed could protect both the woman and her unborn child. *See Stenberg*, 530 U.S. at 945 (declaring state partial-birth abortion law unconstitutional where it was susceptible to different interpretations and "[a]ll those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment.") Particularly where because of her medical condition the woman cannot participate in the decision to have an abortion necessary to protect some aspect of her

"health" this would not only violate the constitutional and statutory rights of the treating medical professionals, but would ignore the woman's right to bear a child.

V. EVEN IF THE WELDON AMENDMENT WERE UNCONSTITUTIONAL IN SOME HYPOTHETICAL APPLICATIONS, THIS WOULD NOT JUSTIFY A DECLARATION THAT IT IS UNCONSTITUTIONAL *IN TOTO*.

Arguing that the Weldon Amendment interferes with a woman's procurement of an abortion in a "medical emergency," Plaintiffs ask this Court to declare the Weldon Amendment unconstitutional *in toto*. Plaintiffs' Memo in Support of MSJ, 25; Proposed Order, 9. Even if the Court finds that Plaintiffs have demonstrated circumstances in which the Weldon Amendment would unconstitutionally interfere with California's valid enforcement of §1317 and the relief Plaintiffs seek would remedy this alleged harm, the Supreme Court has held that courts should enjoin such statutes only in their unconstitutional applications, at least where legislative intent would not counsel that the statute should be stricken in its entirety rather than enjoined in those applications. *Ayotte v. Planned Parenthood of Northern New England,* 126 S.Ct. 961, 969 (2006). *See also Planned Parenthood Federation of America v. Gonzales,* 435 F.3d 1163, 1185 (9th Cir. 2006) (because court held Federal Partial Birth Abortion Ban Act unconstitutional on vagueness grounds as well as for lack of a health exception, court could not craft a more narrow injunction, but had it been merely unconstitutional for lack of a health exception a more narrow remedy may have been called for). The possibility for an actual conflict between the Weldon Amendment and §1317 – even as Plaintiffs interpret it -- is remote at best. Thus, should the Court determine that the Weldon Amendment would unconstitutionally prevent Plaintiffs from enforcing §1317 in these narrow theoretical circumstances, it should enjoin its application there only, leaving it effective in the vast majority of its applications.[7]

VI. PLAINTIFFS ARE FREE TO SEEK CLARIFICATION OF THE TERMS OF THE WELDON AMENDMENT FROM THE FEDERAL AGENCIES RESPONSIBLE FOR ITS INTERPRETATION AND ENFORCEMENT.

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[7] Even if it enjoined the application of the Weldon Amendment in cases of an "emergency medical condition" under §1317, the Court must define and limit the term "health" in such a manner as to provide medical professionals with notice of the circumstances in which they might be criminally and civilly liable for not performing an abortion.

Plaintiffs argue that the Weldon Amendment is vague and leaves them uncertain as to whether certain applications of California law would violate its terms. *See, e.g.,* Plaintiffs' Memo in Support of MSJ, 22-23; Lockyer Declaration, ¶5-6. ("[t]he State of California has received no information from the federal government as to the meaning of the Weldon Amendment or its requirements or prohibitions. Likewise, the federal government has provided no guidance regarding compliance with the Weldon Amendment.") However, Plaintiffs do not state whether they have ever sought this guidance or clarification as federal law permits them to do. The Administrative Procedures Act ("APA") 5 U.S.C. § 553(e), provides that each agency must "give an interested person the right to petition for the issuance, amendment, or repeal of a rule." Plaintiffs filed this lawsuit mere weeks after the Weldon Amendment was signed into law. They have offered no evidence that they petitioned the Secretary to initiate rulemaking proceedings pursuant to 5 U.S.C. § 553(e) before filing this action in the District Court or in the two years since. *See, Brown v. Secretary of Health and Human Services,* 46 F.3d 102, 113-14 (1st Cir. 1995) ("Where as here plaintiffs seek to raise a host of factual and policy issues … it was patently appropriate, and in many cases could be essential for plaintiffs to have petitioned the agency before seeking judicial redress."). To the extent that California seeks, and its concerns may be assuaged by, clarification of the Weldon Amendment's terms, it would remain free to do so even if this Court grants summary judgment to Defendants. *Schuck v. Butz,* 500 F.2d 810, 812 (D.C. Cir. 1974) (affirmance of summary judgment, "a disposition that leaves appellants free to petition the Secretary for a rule making proceeding").

CONCLUSION

Plaintiffs seek to manufacture a conflict where none exists. For the reasons above as well as those explained by the Government Defendants, the Court should deny Plaintiffs' motion for summary judgment and grant summary judgment in favor of Defendants. 75

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Respectfully submitted,

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JSW

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

C 05 00328

STATE OF CALIFORNIA, ex rel. BILL LOCKYER, in his official capacity as Attorney General of the State of California; and JACK O'CONNELL, in his official capacity as the State Superintendent of Public Instruction

Plaintiffs,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF LABOR; ELAINE CHAO, in her official capacity as the Secretary of Labor; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; TOMMY G. THOMPSON, in his official capacity as the Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF EDUCATION; and MARGARET SPELLINGS, in her official capacity as the Secretary of Education

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

association or individual person to perform or to permit the performance of such medical procedures shall not be the basis for any disciplinary or other recriminatory action against such corporations, unincorporated associations, or individuals. Any such facility or clinic that does not permit the performance of abortions on its premises shall post notice of that proscription in an area of the facility or clinic that is open to patients and prospective admittees.

(d) This section shall not apply to medical emergency situations and spontaneous abortions.

Any violation of this section is a misdemeanor.

23. Read together and with the California Constitution and other requirements of California law, the foregoing provisions of the Health and Safety Code require California health care facilities equipped to do so to provide abortions in a medical emergency without exception.

24. The California Attorney General, pursuant to Article V, section 13 of the California Constitution, has the duty to see that the laws of the State are uniformly and adequately enforced.

25. In addition, pursuant to Business and Professions Code, section 17200, et seq., the California Attorney General has the authority to bring an action for civil penalties and injunctive relief to redress any unlawful, unfair or fraudulent business act or practice. Any business practice that is in violation of any state or federal law, including any violation of Health and Safety Code section 1317, constitutes an unlawful business practice under Business and Professions Code section 17200 et seq. Consequently, the California Attorney General has the authority to bring an action to enforce the provisions of any state law, including but not limited to Health and Safety Code section 1317.

26. The State of California, through its state agencies, has the discretion under state law to take disciplinary action against health care entities and health care professionals who refuse to provide abortion related services in emergency situations where such services are necessary to protect the life or health of a woman.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

No. Civil Case No.: C-05-00328 JSW

BRIEF OF AMICI CURIAE CALIFORNIA MEDICAL ASSOCIATION AND PLANNED PARENTHOOD AFFILIATES OF CALIFORNIA

Yamada et al., *Case Report: Two Cases of Placenta Previa Terminated at 18 Weeks' Gestation*, 49 Kobe J. Med. Sci., 51, 51-54 (2003). When cases of central or total previa occur, the risk of severe hemorrhage rises and "may become life-threatening in as little as 15 min[utes]." *See* L.G. Johnson et al., *The Relationship of Placenta Previa and History of Induced Abortion*, 81 Int'l J. Gynec. & Obstet. 191 (2003). While most cases of placenta previa do not require pregnancy termination, in some cases, severe hemorrhage from placenta previa will necessitate an immediate abortion. *See* Yamada et al., *supra*, at 51-54.

F. Chronic Medical Conditions

Some women suffer from chronic medical conditions that make it difficult to sustain a pregnancy. When these women are pregnant, the condition may sometimes deteriorate, making an emergency abortion necessary to save their health or lives. For example, a woman with leukemia may try to carry a pregnancy to term, but prior to viability, she could start bleeding and an immediate abortion may be necessary. *See generally Wasden*, 376 F.3d at 928. Similarly, women with certain cardiac conditions may reach a point where a pregnancy must be immediately terminated to protect their health or lives. For example, a pregnant patient with a condition related to the connective tissue called Marfan's syndrome, has an increased risk of suffering a dissection of the aorta. If that occurs, it could be lethal and an immediate abortion must be performed. *See id.*

II. THE WELDON AMENDMENT COULD PREVENT CALIFORNIA FROM ENSURING THAT PREGNANT WOMEN RECEIVE LIFESAVING CARE IN EMERGENCIES.

As part of its commitment to protecting patients, California ensures that women suffering from the conditions discussed above receive effective medical care in the case of a life or health-threatening emergency. But the Amendment's prohibition against "discrimination" puts California to a choice no state should have to make. If it disobeys the Amendment, the State would imperil its citizens who depend on tens of billions of dollars in federal funds that help prevent child abuse, promote literacy, and even protect public schools from terrorism. *See* Pls.'

Mem. at 4-9. But if it complies with the Amendment, California may be unable to protect pregnant women for whom access to emergency abortion is a matter of life and death.

A. California Requires Doctors To Treat Patients in Emergencies.

Doctors and hospitals in California must treat any condition that presents the "danger of loss of life, or serious injury or illness." *See* Cal. Health & Safety Code § 1317. Health facilities without emergency departments, moreover, must "direct the [patient] seeking emergency care to a nearby facility which can render the needed services, and shall assist the [patient] seeking emergency care in obtaining the services, including transportation services." *Id.* § 1317(e). A health care provider that unlawfully fails to provide emergency care may face civil penalties or other disciplinary action. *See id.* § 1317.6.

When it comes to abortions, California accommodates doctors' personal beliefs—to the extent that those beliefs do not imperil the health or life of patients. The State excuses a provider from providing abortions if she has "filed a written statement with the employer or the hospital, facility, or clinic indicating a moral, ethical, or religious basis for refusal to participate in the abortion." *Id.* § 123420(a). This exception does not apply, however, "to medical emergency situations and spontaneous abortions." *Id.* § 123420(d).

California's regime reflects the policies of the American Medical Association. If treating a patient requires a doctor "to perform an act violative of . . . personally held moral principles," the doctor may "withdraw from the case[—]*so long as the withdrawal is consistent with good medical practice*." Am. Med. Ass'n, *H-5.993: Right to Privacy in Termination of Pregnancy* (emphasis added).[1] Likewise, though a doctor generally is "free to choose whom to

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[1] *Available at* http://www.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=policyfiles/HnE/H-5.993.HTM (last accessed May 16, 2006).