UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., Defendants.	:	No. 1:19-cv-4676 (PAE) No. 1:19-cv-5433 (PAE) No. 1:19-cv-5435 (PAE)

PROPOSED INTERVENORS
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REPLY IN SUPPORT OF MOTION TO INTERVENE

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I. PRELIMINARY STATEMENT

The Department of Health & Human Services ("HHS" or the "Department") promulgated the Conscience Rule to enforce existing federal laws that protect the conscience rights of CMDA's members, including Dr. Frost, and ensure that religious healthcare professionals are not forced to leave their chosen professions or violate their religious beliefs. Proposed Intervenors are thus the *beneficiaries* of the Rule with the most to lose if Plaintiffs' challenge were to succeed. Nonetheless, Plaintiffs oppose Dr. Frost's and CMDA's motion to intervene on the ground that Proposed Intervenors' interest in this litigation is too "speculative"—even though Plaintiffs are seeking to set aside a rule for which CMDA vigorously advocated and which provides robust conscience protections for CMDA's nearly 20,000 members. Opp. 5. Contrary to Plaintiffs' assertion, Proposed Intervenors have a concrete and substantial interest in this litigation.

Plaintiffs also oppose intervention on the ground that the Federal Defendants—who recently declined to oppose Plaintiffs' motions for preliminary injunction and instead stipulated with Plaintiffs to effectively grant a four-month injunction—will adequately represent Proposed Intervenors' interests. To state that argument is to refute it. The Federal Defendants do not share Proposed Intervenors' interests in being able to provide compassionate healthcare without violating their core religious beliefs. The Federal Defendants are tasked with *enforcing* the Rule, the State Plaintiffs are *subject* to the Rule, and the Non-governmental Plaintiffs are *opposed* to the Rule. The Proposed Intervenors alone are the *protected beneficiaries* of the Rule. Intervention is warranted because none of the existing parties will adequately represent Proposed Intervenors' interests.

II. ARGUMENT

A. Intervention is appropriate under Federal Rule of Civil Procedure 24(a).

This litigation threatens to impair Proposed Intervenors' interests in ensuring that the conscience protections Congress provided through the Church, Coats-Snowe, and Weldon Amendments are effective and enforceable—making this an easy case for intervention under Rule 24(a). Plaintiffs contend, however, that intervention is unwarranted because Proposed Intervenors' interest is overly "speculative," and that any interest they have will be adequately represented by the government. Opp. 5, 7. Both arguments are meritless.

1. Proposed Intervenors have direct, legally protectable interests in this action.

The Second Circuit has long held that parties "ha[v]e a sufficient interest to permit [them] to intervene" if "the validity of a regulation from which its members benefit is challenged." *N.Y. Pub. Interest Research Grp., Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975). Dr. Frost and CMDA's nearly 20,000 members are the direct beneficiaries of the Conscience Rule. The vast majority of CMDA's members, including Dr. Frost, object on religious grounds to performing, assisting, or facilitating certain procedures, such as abortion and euthanasia. *See* Stevens Decl. ¶¶ 17-19; Frost Decl. ¶ 8. Many of CMDA's members have been pressured to violate their religious beliefs or disciplined by their employers for refusing to do so. *See Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 84 Fed. Reg. 23,170, 23,175 (May 21, 2019) ("Conscience Rule," or "Rule"). The Department promulgated the Conscience Rule to protect the very interests that this litigation threatens—preventing religious healthcare professionals, including CMDA's members, from having to choose between "acting in conformity with their beliefs" or "los[ing] [their] livelihood." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006).

Instead of addressing that standard, Plaintiffs contend that Proposed Intervenors have not demonstrated a sufficient interest in upholding the Conscience Rule because Dr. Stevens' declaration does not explain how the Rule "would prevent an exodus of CMDA members from the practice of medicine." Opp. 6. But intervention isn't limited to anti-exodus interests. The Conscience Rule itself explains in detail how it protects religious healthcare professionals. 84 Fed. Reg. at 23,170-80. Dr. Stevens' declaration establishes that CMDA's members are among the class of individuals the Rule was designed to protect. Stevens Decl. ¶¶ 6, 9, 17-19.

Plaintiffs also fault Dr. Stevens for failing to allege that any "exodus" from the profession actually occurred "in the decades" before the Rule. Opp. 6. As the Rule explains, however, hostility to conscience rights escalated at the state and local level in the years after the 2011 Rule repealed the protections provided in the 2008 Rule. 84 Fed. Reg. at 23,175-79. Complaints filed with OCR alleging violations of federal law have also increased significantly since 2016. 84 Fed. Reg. at 23,175. The Rule describes numerous recent cases in which religious healthcare professionals have been targeted for their beliefs or disciplined for refusing to perform or assist in the performance of procedures that violate their consciences. *See* 84 Fed. Reg. at 23,176-77.[1] Certain advocacy organizations, including some involved here, have even taken advantage of the lack of robust conscience protections and sought *to compel* religious healthcare professionals to perform

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[1] *See, e.g.*, *Roman Catholic Diocese of Albany v. Vullo*, No. 02070-16 (N.Y. Albany County S. Ct. May 4, 2016) (challenging New York's abortion mandate as applied to religious institutions); *Mendoza v. Martell*, No. 2016–6–160 (Ill. 17th Jud. Cir. June 8, 2016); *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695 (2d Cir. 2010) (plaintiff alleged hospital forced her to assist in an abortion over her religious objections); *Hellwege v. Tampa Family Health Ctrs.*, 103 F. Supp. 3d 1303, 1306 (M.D. Fla. 2015) (CMDA member alleged she was denied a nursing position due to her objection to prescribing abortifacients); Compl., *Danquah v. Univ. of Medicine and Dentistry of New Jersey*, No. 2:11-cv-6377 (D.N.J. Oct. 31, 2011) (twelve nurses in New Jersey sued hospital for demanding they assist in abortions).

abortions and sterilizations.[2] In sum, there is ample evidence demonstrating that CMDA has a "significant stake in the outcome of this lawsuit." *Miller v. Silbermann*, 832 F. Supp. 663, 671 (S.D.N.Y. 1993).

Plaintiffs cite *Floyd v. City of New York*, 770 F.3d 1051 (2d Cir. 2014), Opp. 7, but in that case the Second Circuit denied intervention to police unions because there was no evidence in the record that the litigation—which involved a challenge to the constitutionality of the department's stop-and-frisk procedures—would have any "practical impact" on the "unions' interest in protecting their collective bargaining rights." *Id.* at 1061. As the Second Circuit explained, "[t]o the extent any provision of the settlement agreement" between the parties "might be said to affect collective bargaining rights, no provision in the agreement prevents the unions from collectively bargaining." *Id.* at 1061-62; *see id.* at 1062.

Here, by contrast, Proposed Intervenors have asserted a legally protectable interest in ensuring that federal conscience protections are enforceable and effective—which is the exact interest this litigation seeks to undermine. This interest is not speculative—CMDA's members have indicated repeatedly that without a robust conscience rule many of them would likely be forced to leave the medical field or limit the scope of their practice. *See* 84 Fed. Reg. at 23,175, 23,181 n.46, 23,247. Indeed, some religious healthcare providers have already "le[ft] the profession" because of "coercion or discrimination based on [their] religious beliefs or moral convictions."

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[2] *See Means v. U.S. Conf. of Catholic Bishops*, 2015 WL 3970046 (W.D. Mich. June 30, 2015) (suit against Catholic hospital for negligence for alleged improper treatment related to miscarriage); *ACLU v. Trinity Health Corp.*, 178 F. Supp. 3d 614 (E.D. Mich. 2016) (suit against Catholic hospital for allegedly violating EMTALA by refusing to provide abortions); *Chamorro v. Dignity Health*, No. 15-549626 (Cal. Super. Ct. Dec. 28, 2015) (suit against Catholic hospital for refusing to perform tubal ligation); *Minton v. Dignity Health*, No. 17-558259 (Cal. Super. Ct. Apr. 19, 2017) (suit against hospital for alleged denial of hysterectomy based on transgender status); *Coffey v. Pub. Hosp. Dist. No. 1,* 20–15–2–00217–4 (Wash. Super. Ct. May 7, 2015).

84 Fed. Reg. at 23,247; *see also* Frost Decl. ¶ 9. CMDA's survey has also indicated that conscience issues are affecting medical and nursing students' decisions about their careers. 84 Fed. Reg. at 23,175.

If Plaintiffs succeed in vacating the Conscience Rule, that result "might well lead to significant changes in the profession and the way [healthcare professionals] conduct their business." *N.Y Pub. Interest Research*, 516 F.2d at 352 (holding that pharmacists could intervene as of right in an action challenging the legality of a regulation prohibiting advertising the price of prescription drugs); *see also Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 132 (2d Cir. 2001) (allowing intervention as of right where action threatened to impair seniority rights of certain employees); *Pennsylvania v. President United States of Am.*, 888 F.3d 52, 58 (3d Cir. 2018) (granting Little Sisters intervention because their interest in preserving a "religious exemption" regulation was "concrete and capable of definition").

This case is on all fours with *California ex rel. Lockyer v. United States*, 450 F.3d 436 (9th Cir. 2006), which Plaintiffs ignore. There, doctors sought to intervene in a challenge to the "constitutionality" of the Weldon Amendment—one of the statutes the Conscience Rule implements. *Id.* at 439. In *Lockyer*, California filed a declaratory action seeking a ruling that the statute was unconstitutional, and certain healthcare entities with religious objections to abortion sought to intervene. *Id.* at 439-40. As the government conceded in that case, "Congress passed the Weldon Amendment to protect healthcare providers like those represented by the proposed intervenors." *Id.* at 441. Because proposed intervenors were the "intended beneficiaries of this law," which used "Congress's spending power to try and protect their conscience rights," the court concluded the intervenors' interest was "neither 'undifferentiated' nor 'generalized.'" *Id.* As the court explained,

"[i]f the Weldon Amendment is declared unconstitutional or substantially narrowed as a consequence of this litigation, [intervenors] will be more likely to be forced to choose between adhering to their beliefs and losing their professional licenses." *Id.* "Such an interest is sufficiently 'direct, non-contingent, [and] substantial.'" *Id.* (citation omitted).

CMDA and Dr. Frost have a similar interest here, as they are the intended beneficiaries of the Conscience Rule and are more likely to be faced with a difficult choice between "acting in conformity with their beliefs" or "los[ing] [their] livelihood" if the Rule is invalidated. *Id.* Indeed, the "fact that [Plaintiffs] brought this lawsuit seeking to invalidate the [Conscience Rule], or restrict its sweep, is proof in itself of the efficacy of this [Rule] and its significance to the proposed intervenors." *Id.* at 442.

Because Dr. Frost and CMDA have a "significant protectable interest," the Court should have "little difficulty concluding that the disposition of this case may, as a practical matter, affect it." *Id.*; *see also Home Ins. Co. v. Liberty Mut. Ins. Co.*, 1990 WL 188925, at *5 (S.D.N.Y. Nov. 20, 1990) (applicant "need not demonstrate that a substantial impairment of its interest *will* result"—only that it *may* result).

2. The Federal Defendants will not adequately represent Proposed Intervenors' interests.

None of the existing parties will adequately represent Proposed Intervenors' interests. The Federal Defendants *enforce* the Rule, the State Plaintiffs are *subject* to the Rule, and the Non-governmental Plaintiffs *oppose* the Rule—but the Proposed Intervenors alone are the *protected beneficiaries* of the Rule. Accordingly, they "offer[] a necessary element to the proceedings that would be neglected" absent intervention. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983); *see also N.Y. Pub. Interest Research Grp.*, 516 F.2d at 352 (granting intervention because intervenors would "make a more vigorous presentation of the economic side of the

argument than would the [defendants]").

Plaintiffs nevertheless contend that the Federal Defendants will adequately represent Proposed Intervenors' interests. Opp. 8. It is unclear whether the Federal Defendants share that view, because although they did not consent to intervention under Rule 24(a) (they took no position on intervention under Rule 24(b)), they declined to convey their reasons for declining consent. Nor did they file an opposition brief to the intervention motion. Plaintiffs' self-serving claim that the Federal Defendants—their opponents in this litigation—will adequately represent the interests of CMDA and Dr. Frost is dubious, to say the least.

Plaintiffs contend that a more rigorous showing of inadequacy is required when a proposed intervenor and a current party share the same ultimate objective. Opp. 8 (citing *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001)). Even if that were true, the Court need look no further than its own docket for such a showing. As evidenced by the 46-page brief Proposed Intervenors filed on June 28, 2019, opposing Plaintiffs' motions for preliminary injunction, *see* ECF No. 88-1, CMDA and Dr. Frost had a substantial interest in ensuring that the Rule would go into effect on July 22, 2019, *see* 84 Fed. Reg. at 23,170. To that end, Proposed Intervenors devoted significant time to drafting an opposition brief explaining that Plaintiffs' claims of irreparable harm were impermissibly speculative, that a preliminary injunction would harm the beneficiaries of the Rule, and that Plaintiffs were unlikely to succeed on the merits because the Rule does not violate the Administrative Procedure Act, any federal statute, or the Constitution. ECF No. 88-1.

The Federal Defendants did not join Proposed Intervenors in opposing the meritless motion for a preliminary injunction. Instead, the Federal Defendants repeatedly asked this Court to extend the briefing schedule, ECF Nos. 79, 83, and when this Court refused those requests, it stipulated

with the Plaintiffs to ask this Court to delay the effective date of the Rule. ECF No. 87-1. The Federal Defendants thus sided with Plaintiffs in effectively stipulating to a preliminary injunction of the Conscience Rule.

Plaintiffs nevertheless contend that intervention should be denied because Proposed Intervenors and the Federal Defendants have the same ultimate objective—to uphold the Rule. But that does not defeat intervention. In *New York Public Interest Research Group*, the Second Circuit allowed intervention to defend a regulation, even though the defendants shared that ultimate objective, because "there [wa]s a *likelihood* that the pharmacists w[ould] make a more vigorous presentation" of one argument that most concerned them. 516 F.2d at 352 (emphasis added).[3] The Supreme Court has recognized that specific, non-governmental interests may become lost in the thicket of government policies. *Trbovich v. United Mine Workers of Am*., 404 U.S. 528, 538-39 (1972).[4] Here, CMDA has a strong interest in defending the Rule's reliance on CMDA's surveys, which illustrate the pressures faced by religious healthcare providers and the need for enforceable conscience protections.[5]

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[3] Plaintiffs contend that *New York Public Interest Research Group* is "inapposite" because the defendants in that case did not oppose intervention, Opp. 12. But Defendants have not opposed Proposed Intervenors' motion here either.

[4] *See also Pennsylvania v. President United States of Am.*, 888 F.3d 52, 61 (3d Cir. 2018) (granting Little Sisters intervention because "the government must defend numerous complex and conflicting interests, including the rights of nonprofit and for-profit religious objectors, moral objectors, and women seeking access to contraceptive services"); *Texas v. United States*, 805 F.3d 653, 663 (5th Cir. 2015) ("[T]he Government's interests … in securing an expansive interpretation of executive authority, efficiently enforcing the immigration laws, and maintaining its working relationship with the States" diverged with intervenors' concerns "to remain in … Texas, to retain custody of their U.S. citizen children, and to obtain work authorization, driver's licenses, and lawful employment[.]").

[5] Plaintiffs claim that "any additional information or evidence in defense of the Final Rule the Proposed Intervenors seek to put before the Court falls outside of that record and … could not be considered." Opp. 11. But as Proposed Intervenors noted, they primarily seek not to proffer additional evidence but instead to highlight and explain evidence *already in the record*—namely their comment on the rulemaking and the 2009 and 2011 CMDA surveys explaining

Plaintiffs assert that the Federal Defendants will assuredly represent Proposed Intervenors' interests adequately given HHS' purported eagerness to promulgate the Conscience Rule. Opp. 9-10. But HHS has not always shared Proposed Intervenors' interest in robust conscience protections, and Plaintiffs themselves argue that HHS should be focused instead on facilitating access to abortion. ECF No. 45 at 30. Contrary to Plaintiffs' suggestion, Proposed Intervenors are not seeking intervention based on a speculative fear that a future administration might take a different view on conscience rights, *see* Opp. 15—they are seeking to intervene because HHS has changed its views on this very issue *twice* in the past decade. *See Crossroads Grassroots Policy Strategies v. F.E.C.*, 788 F.3d 312, 383 (D.C. Cir. 2015) ("doubtful friends may provide dubious representation").

Because the Federal Defendants will not adequately represent Dr. Frost and CMDA's interests in upholding the Conscience Rule—and, thus far, *have not* represented those interests at all—Proposed Intervenors are entitled to intervene as of right.

B. Proposed Intervenors also satisfy the requirements for permissive intervention.

Although Proposed Intervenors satisfy the requirements for intervention under Rule 24(a), and thus satisfy the Rule 24(b) requirements as well, Plaintiffs contend that permissive intervention is inappropriate because Proposed Intervenors' defense of the Conscience Rule does not share common questions of law with the main action. Opp. 18. That is nonsense.

Proposed Intervenors' defense of the Rule has many common questions of law with the main action—namely, whether the rule violates the APA, the Establishment Clause, or the Spending Clause. Plaintiffs contend that an "interest in presenting those legal arguments is not the same as possessing a 'defense that shares ... a common question of law.'" Opp. 18. But they do not cite

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the necessity of the Conscience Rule. This record evidence is anything but "legally irrelevant" as it provided a strong basis for the promulgation of the Rule.

a single case for that astonishing proposition. And courts have held that "[t]he words 'claim or defense' are not 'read in a technical sense, but only require some interest on the part of the applicant.'" *United States v. N.Y. City Housing Authority*, 326 F.R.D. 411, 418 (S.D.N.Y. 2018) (granting permissive intervention).[6] In *League of Women Voters of Michigan v. Johnson*, 902 F.3d 572 (6th Cir. 2018), for example, the court reversed a denial of permissive intervention because the intervening Congressmen—who sought to defend Michigan's electoral apportionment scheme—presented "the same argument that [Defendant] had previously raised in her own motion to dismiss." *Id.* at 577. Because Proposed Intervenors seek to defend the lawfulness of the Conscience Rule, their defense shares common questions of law and fact with the Federal Defendants.

Plaintiffs also urge the Court to deny intervention because it would supposedly cause delay and inconvenience to the parties. That is a surprising argument considering that Proposed Intervenors prepared an opposition to Plaintiffs' preliminary injunction motion in the time set by the Court even though the Federal Defendants did not. Because Proposed Intervenors will abide by this Court's scheduling orders, granting intervention will not "clutter and prolong the litigation unnecessarily." Opp. 19. On the contrary, it will sharpen the arguments for the Court.[7]

III. CONCLUSION

For the foregoing reasons, Proposed Intervenors' motion to intervene should be granted.

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[6] *See also Pike Co., Inc. v. Universal Concrete Prod., Inc.*, 284 F. Supp. 3d 376, 396 (W.D.N.Y. 2018) (same); *Louis Berger Grp., Inc. v. State Bank of India*, 802 F. Supp. 2d 482, 488 (S.D.N.Y. 2011) (same).

[7] Plaintiffs' concern about facing multiple briefs is also ironic given that they "intend to file separate memoranda of law in future briefing on their motions for preliminary injunction or cross-motions for summary judgment." Opp. 1 n.1. Plaintiffs suggest that Proposed Intervenors should simply participate as *amicus curiae*, Opp. 20, but a party should not be relegated to the status of *amicus* when it "ha[s] its own particular interests in the outcome of the litigation." *Long Island Soundkeeper Fund, Inc. v. New York Athletic Club of City of New York*, No. 94 CIV. 0436 (RPP), 1995 WL 358777, at *1 (S.D.N.Y. June 14, 1995).

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