IN THE UNITED STATES DISTRICT COURT
FOR THE 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. 19-cv-4676 (PAE) (lead) (consolidated with Nos. 19-cv-5433 (PAE), 19-cv-5435 (PAE))

PLAINTIFFS' JOINT MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO INTERVENE BY DR. REGINA FROST AND CHRISTIAN MEDICAL AND DENTAL ASSOCIATIONS

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Plaintiffs the State of New York, on behalf of twenty-two other states and additional local governments ("State and Local Government Plaintiffs"); Planned Parenthood Federation of America, on behalf of its member-affiliates, including Plaintiff Planned Parenthood Northern New England; National Family Planning and Reproductive Health Association ("NFPRHA"); and Public Health Solutions (collectively, "Plaintiffs"), respectfully submit this Joint Memorandum of Law in opposition to the motion to intervene submitted by the Christian Medical and Dental Associations, and its member, Dr. Regina Frost (collectively, "Proposed Intervenors" or "CMDA"), pursuant to Federal Rule of Civil Procedure 24(a)(2) or 24(b) ("Motion").[1]

PRELIMINARY STATEMENT

The Court should deny Proposed Intervenors' Motion because intervention is neither warranted as of right under Rule 24(a)(2) nor warranted permissively under Rule 24(b).

Proposed Intervenors fail to satisfy the requisite elements for intervening as of right, which ensure that intervention does not encumber litigation with a multiplicity of parties whose participation is unnecessary to protect and promote their interests, and would instead impede efficient and effective adjudication of the action. First, Proposed Intervenors have not shown that they have such a direct and non-speculative interest in the Final Rule that they should be permitted to intervene as of right. Second, even if they did, Proposed Intervenors have not come close to rebutting the strong presumption that the federal government adequately represents the public interests it is charged by law with representing. Proposed Intervenors themselves concede the federal government shares their ultimate goal of upholding the Refusal of Care Rule, and their

[1] In the interest of economy, Plaintiffs in these three consolidated actions are jointly filing this opposition to the motion to intervene, but note that the governmental plaintiffs and organizational plaintiffs intend to file separate memoranda of law in future briefing on their motions for preliminary injunction or cross-motions for summary judgment.

arguments as to why the federal government is not adequately representing their purported interests do not withstand scrutiny. For either of these reasons, the Court should deny Proposed Intervenors request to intervene as of right.

Permissive intervention is similarly inappropriate. Proposed Intervenors' intervention would not meaningfully advance their interests because the federal government already sufficiently represents those interests. The Court should also deny permissive intervention because Proposed Intervenors have alleged no claim or defense in common with this action, and because their participation as a party in this litigation will unnecessarily prejudice and delay the proceedings in this case, impeding Rule 24(b)'s purpose of promoting judicial economy and efficiency.

BACKGROUND

These actions challenge a final rule issued by the U.S. Department of Health and Human Services ("HHS" or the "Department"), entitled Protecting Statutory Conscience Rights in Health Care, 84 Fed. Reg. 23,170 (May 21, 2019) (to be codified at 45 C.F.R. pt. 88) (the "Refusal of Care Rule" or the "Final Rule"). The Final Rule—in an unprecedented and unlawful expansion of nearly thirty federal statutory provisions—would allow health care providers the right to deny lawful and medically necessary treatment, services, and information to patients, based on a provider's own personal views, without any regard for the harm to individual patients or public health.

On May 21, 2019, State and Local Government Plaintiffs brought an action in the Southern District of New York to vacate the Final Rule and enjoin its implementation. *See* Compl. for Declaratory & Injunctive Relief, ECF No. 3, *New York v. U.S. Dep't of Health & Human Servs.*, Case No. 19-cv-4676-PAE (S.D.N.Y. May 21, 2019) ("NY Action"). On June 11, 2019, Planned Parenthood and NFPRHA Plaintiffs also brought actions against the Final Rule in the Southern

District of New York. *See* Compl. for Declaratory & Injunctive Relief, ECF No. 1, *Planned Parenthood v. Azar,* Case No. 19-cv-5433-PAE (S.D.N.Y. June 11, 2019) ("PPFA Action"); Compl. for Declaratory & Injunctive Relief, ECF No. 1, *Nat'l Family Planning & Reproductive Health Ass'n v. Azar,* Case No. 19-cv-5435-PAE (S.D.N.Y. June 11, 2019) ("NFPRHA Action"). On June 14, State and Local Government Plaintiffs filed a motion for a preliminary injunction and accompanying memorandum (*see* Mem. of Law in Supp. of Pls.' Mot. for Prelim. Inj., ECF No. 45, NY Action), and on June 17, Planned Parenthood and NFPRHA Plaintiffs filed a joint memorandum of law in support of their motion for a preliminary injunction (*see* J. Mem. of Law in Supp. of Pls.' Mot. for Prelim. Inj., ECF No. 20, PPFA Action; J. Mem. of Law in Supp. of Pls.' Mot. for Prelim. Inj., ECF No. 26, NFPRHA Action). Thereafter, the Court consolidated all three cases, noting that each case involved the same federal agency defendant and largely the same facts, including the identical administrative record, and that plaintiffs in each case challenged the same rule under the Administrative Procedure Act as arbitrary and capricious and contrary to law. *See* Order, ECF No. 70 (June 27, 2019), NY Action.

On June 28, 2019, the parties filed a stipulated request to postpone the Final Rule's effective date until November 22, 2019 pursuant to 5 U.S.C. § 705. *See* Stipulated Request for an Order to Postpone Rule's Effective Date; to Suspend Defs.' Deadline to Respond to Pls.' Prelim. Inj. Mots.; & to Vacate the Current Briefing Schedule & Hr'g Date ¶ 4, ECF No. 87-1, NY Action. Defendants stipulated to this postponement because they believed this was "the most efficient way to adjudicate the Final Rule on the merits." *Id.* ¶ 2. On July 1, the Court issued the agreed-upon order proposed by the parties, postponing the effective date of the Final Rule pursuant to 5 U.S.C. § 705 until November 22, 2019 and vacating the preliminary injunction briefing schedule. *See* Order, ECF No. 91 (July 1, 2019), NY Action. The Court requested that the parties meet and confer

to propose an alternative preliminary injunction briefing schedule, and, if possible, propose an accelerated summary judgment schedule (advocated by Defendants) that would allow the legality of the Final Rule to be decided by November 22, 2019. *See id.*

Meanwhile, on June 26, 2019, Proposed Intervenors filed a motion to intervene in this action as defendants under Federal Rule of Civil Procedure 24(a), or, alternatively, Federal Rule of Civil Procedure 24(b). *See* Mem. of Law of Proposed Intervenors Dr. Regina Frost & Christian Med. & Dental Ass'ns in Supp. of Mot. to Intervene ("CMDA Br."), ECF No. 65, NY Action. That same day, the Court set the current briefing schedule for this Motion and invited Proposed Intervenors to file a brief as amicus curiae in support of Defendants' opposition to Plaintiffs' motion for a preliminary injunction (*see* Order, ECF No. 73 (June 26, 2019), NY Action), which Proposed Intervenors filed on June 28 (*see* Notice of Mot., ECF No. 88, NY Action).

ARGUMENT

I. Proposed Intervenors Are Not Entitled to Intervene as a Matter of Right Under Rule 24(a)(2)

To intervene as of right under Rule 24(a)(2), a proposed intervenor must (1) file a timely motion; (2) "assert[] an interest relating to the property or transaction that is the subject of the action"; (3) demonstrate that "without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest"; and (4) show that its "interest is not adequately represented by the other parties." *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 389 (2d Cir. 2006); *see Del. Tr. Co. v. Wilmington Tr., N.A.*, 534 B.R. 500, 508 (S.D.N.Y. 2015). "Failure to satisfy *any one* of these four requirements is a sufficient ground to deny the application." *Floyd v. City of N.Y.*, 770 F.3d 1051, 1057 (2d Cir. 2014) (quoting *"R" Best Produce, Inc. v. Shulman-Rabin Mktg. Corp.*, 467 F.3d 238, 241 (2d Cir. 2006)); *see Authors Guild v. Google, Inc.*, No. 05-cv-8136, 2009 WL 3617732, at *1 (S.D.N.Y. Nov. 4, 2009).

"In seeking intervention under this Rule, the proposed intervenor bears the burden of demonstrating that it meets the requirements for intervention." *Kamdem-Ouaffo v. Pepsico, Inc.*, 314 F.R.D. 130, 134 (S.D.N.Y. 2016); *see also Floyd v. City of N.Y.*, 302 F.R.D. 69, 100 (S.D.N.Y. 2014) ("The burden to demonstrate a right to intervene, including a cognizable interest, is at all times on the applicant."), *aff'd in part, appeal dismissed in part*, 770 F.3d 1051 (2d Cir. 2014).

Proposed Intervenors have no direct, non-speculative interest in this litigation that might be impaired absent its intervention, but even if they did, those interests would be adequately represented by the federal government. Accordingly, Proposed Intervenors' request to intervene as of right should be denied.

A. Proposed Intervenors Have No Direct, Non-Speculative Interest in This Litigation that Might Be Impaired Absent Intervention

The Second Circuit has "made it clear that, for an interest to be 'cognizable' under Rule 24, it must be 'direct, substantial, and legally protectable.'" *Floyd*, 770 F.3d at 1060 (quoting *Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469, 473 (2d Cir. 2010)). "An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule." *Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990) (citing *H.L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc.*, 797 F.2d 85, 88 (2d Cir. 1986)).

Proposed Intervenors explain in their memorandum of law that their "interest [is] in upholding the [Final] Rule," without which "many CMDA members may be compelled to leave the practice of medicine." CMDA Br. at 14, 15. But the declarations submitted by Proposed Intervenors hardly support this proposition. Dr. Stevens, the CEO of CMDA, states that "CMDA has long advocated for legislative and regulatory action to protect conscience rights," but he *does not even discuss* the Final Rule challenged in this case, including, most critically, how the Final

Rule would prevent an exodus of CMDA members from the practice of medicine. *See* Decl. of David Stevens, M.D., M.A., in Supp. of Mot. to Intervene ¶ 9 ("Stevens Decl."), ECF No. 67, NY Action (merely describing CMDA's beliefs). Indeed, Proposed Intervenors do not allege that any such exodus occurred in the decades in which the federal government enforced the underlying refusal statutes without the Final Rule in effect. Dr. Stevens' declaration simply states that "[s]ome of CMDA's members have religious objections to [certain] procedures," *id.* ¶ 19, but this statement alone does not provide a sufficient connection to the Final Rule. Dr. Frost's vague assertions of potential harm also fail to support finding a "direct, substantial and legally protectable" interest. *Floyd*, 770 F.3d at 1060. While Dr. Frost claims that without the Final Rule she "would likely be subject to discrimination or termination," Decl. of Regina Renee Frost, M.D., in Supp. of Mot. to Intervene ("Frost Decl.") ¶ 9, ECF No. 66, NY Action, her declaration does not allege that she has ever been subject to discrimination or termination in her fifteen years of medical practice—all during a time in which the Final Rule was not in effect. And Dr. Frost's "concern[] that one day" she "could be pressured to perform a medical procedure that [she] find[s] morally objectionable," *id.* ¶ 9, must be viewed in light of the fact that her employer—the Ascension Medical Group, *see id.* ¶ 4—is a "faith-based healthcare organization" and "ministry of the Catholic Church" that "adheres to Catholic moral teaching" and that commented in support of the proposed Rule challenged here,[2] *see* Ascension, Comment Letter on Proposed Rule at 1, 2 (Mar. 27, 2018) ("Ascension Comment Letter"), https://www.regulations.gov/document?D=HHS-OCR-2018-0002-68575. All that leaves is Dr. Frost's statement that she "ha[s] heard from several physicians who have been terminated or faced significant opposition because of their religious beliefs," Frost

[2] That Dr. Frost's home state of Michigan is a plaintiff in this action (*see* Frost Decl. ¶ 9) is immaterial to any risk of future moral pressure from her actual employer, a faith-based healthcare organization that shares Dr. Frost's moral and religious views.

Decl. ¶ 9, but even this statement fails to explain how vacatur of the Final Rule or any other relief Plaintiffs seek would harm the "several physicians" she has "heard from," *id.*, especially given the fact that the underlying Coats, Weldon, and Church Amendments would remain in effect.

For these reasons, Proposed Intervenors' interest is "too speculative and remote to justify intervention." *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 132 (2d Cir. 2001). In short, Dr. Stevens fails to explain how invalidation of the Rule would affect CMDA, and "any harm" to Dr. Frost that may result from the outcome of this litigation is "contingent upon the occurrence of a sequence of events" and does "not satisfy the rule [24(a)(2)]." *Wash. Elec. Coop.*, 922 F.2d at 97.

Indeed, in *Floyd*, the Second Circuit held that the district court had properly found the police unions' interest to be "too 'remote from the subject matter of the proceeding'" because "the unions had submitted no evidence to substantiate their claims of reputational harm. Aside from their own assertions, there was no evidence in the record showing that the union members' careers had been tarnished, that their safety was in jeopardy, or that they had been adversely affected in any tangible way." 770 F.3d at 1061 (quoting *Brennan*, 260 F.3d at 129). Here, too, where Proposed Intervenors have failed to submit evidence to substantiate their claims of harm, and to tie those vague and speculative allegations of harm to the Final Rule, intervention should be denied. *See Wash. Elec. Coop.*, 922 F.2d at 97.

B. Defendants Adequately Represent Any Interest that Proposed Intervenors May Have in This Litigation

The district court should also deny intervention of right for the independent reason that any interest the Proposed Intervenors may have is adequately represented by Defendants. This reason alone is sufficient to deny intervention as of right.

Proposed Intervenors present the wrong standard for judging whether any interest they may have in this litigation is adequately represented by the existing parties. Proposed Intervenors state

that "[a]n applicant seeking intervention need only show that the 'representation of [its] interest "*may be*" inadequate'" and that the "burden of making that showing should be treated as minimal." CMDA Br. at 16 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). Although that standard governs certain motions to intervene, it does not apply to the one submitted by Proposed Intervenors.

The Second Circuit "ha[s] demanded a more rigorous showing of inadequacy in cases where the putative intervenor and a named party have the same ultimate objective." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001). When a proposed intervenor and a current party share "an identity of interest," the proposed intervenor "must rebut the presumption of adequate representation by the party already in the action." *Id*. at 179–80. This presumption is particularly compelling—indeed, it is the "controlling principle," 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1909 & nn.24–27 (3d ed. 2007 & supp. 2019)—in cases where, as here, the government represents the public interest: "[t]he proponent of intervention must make a particularly strong showing of inadequacy in a case where the government is acting as *parens patriae*." *United States v. City of N.Y.*, 198 F.3d 360, 367 (2d Cir. 1999) (citing *United States v. Hooker Chems. & Plastics Corp*., 749 F.2d 968, 985 (2d Cir. 1984)); *see also* 7C Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 1909 (3d ed. 2007) ("The rare cases in which a member of the public is allowed to intervene in an action in which the United States, or some other governmental agency, represents the public interest are cases in which a very strong showing of inadequate representation has been made.").

Here, the federal government and Proposed Intervenors share the same ultimate goal: upholding the Refusal of Care Rule. Additionally, Proposed Intervenors concede that they "expect the federal defendants . . . to defend the legality of the [Final] Rule." CMDA Br. at 16; *see also id.*

at 15 (describing CMDA's "interest in upholding the [Final] Rule"). Thus, the "controlling principle" that proposed intervenors' interests are adequately protected applies here. To demonstrate inadequacy in this case, Proposed Intervenors "may offer, for example, 'evidence of collusion, adversity of interest, nonfeasance, or incompetence' by the named party sharing the same interest." *New York SMSA Ltd. P'ship v. Vill. of Nelsonville*, No. 18-cv-5932 (VB), 2019 WL 1877335, at *2 (S.D.N.Y. Apr. 26, 2019) (quoting *Butler*, 250 F.3d at 180). But Proposed Intervenors have made no such showing, nor could they.

The federal government has fought vigorously for the Refusal of Care Rule from its inception. On January 18, 2018, the day before the annual "March for Life" was scheduled, HHS announced the creation of a new "Conscience and Religious Freedom Division" within OCR charged with protecting health care providers who refuse to provide health care.[3] The next day (the day of the March for Life), the Office of Information and Regulatory Affairs ("OIRA") in the White House Office of Management and Budget concluded review on the proposed Refusal of Care Rule,[4] and HHS released the proposed Rule to the public that same day, before it was even published in the Federal Register.[5] Although the proposed Rule was hundreds of pages long, it cleared OIRA review in just one week—far faster than usual. *See* Exec. Order 12,866, § 6(b)(2)(B), Regulatory Planning and Review, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (presumptive ninety-day

[3] HHS Announces New Conscience and Religious Freedom Division, HHS Office for Civil Rights (Jan. 18, 2018), https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom- division.html (last visited July 9, 2019).

[4] OIRA Conclusion of E.O. 12866 Regulatory Review, Ensuring Compliance with Certain Statutory Provisions in Health Care; Delegations of Authority. HHS/OCR. RIN: 0945-ZA03. Received date: 01/12/18. Concluded date: 01/19/18, https://www.reginfo.gov/public/do/eoDetails?rrid=127838 (last visited July 9, 2019).

[5] *See* U.S. Dep't of Health & Human Servs., Press Release, *HHS Takes Major Actions to Protect Conscience Rights and Life* (Jan. 19, 2018), https://www.hhs.gov/about/news/2018/01/19/hhs-takes-major-actions-protect-conscience-rights-and-life.html (last visited July 9, 2019).

period for OIRA to conclude review of agency notices of proposed rulemaking). On May 1, 2019, the day before the National Day of Prayer, OCR revised its website to include a new mission statement, abandoning OCR's long-held mission to "improve the health and well-being of people across the nation" and "to ensure that people have equal access to and the opportunity to participate in and receive services from HHS programs without facing unlawful discrimination." OCR's new mission statement declares that OCR intends to operate as a "law enforcement agency" that prioritizes enforcing the federal refusal statutes, as well as civil rights laws and privacy and security laws.[6] HHS posted a nearly final version of the Refusal of Care Rule on OCR's website on May 2, 2019, to coincide with the National Day of Prayer.[7] The Final Rule went beyond even the 2008 Rule, expanding definitions of the statutory and regulatory terms in order to inject new meaning into defined statutory terms and stretch undefined terms beyond their plain meaning.

Proposed Intervenors present three primary arguments as to why they should be allowed to intervene, but none come close to overcoming the presumption of adequate representation necessary to grant intervention as of right. First, Proposed Intervenors argue that they are "uniquely situated to provide the Court with the perspective of physicians and medical professionals who advocated for the [Final] Rule and rely on it to protect their conscience rights," CMDA Br. at 16,

[6] Dep't of Health & Human Servs., OCR Mission and Vision, https://www.hhs.gov/ocr/about-us/leadership/index.html (last visited June 10, 2019) (listing as one of three OCR priorities "Ensuring that HHS, state and local governments, health care providers, health plans, and others comply with federal laws that guarantee the protection of conscience and free exercise of religion and prohibit coercion and religious discrimination in HHS- conducted or funded programs.").

[7] That same day, President Trump held a "National Day of Prayer Service" and press conference at the White House. In his remarks, President Trump confirmed that the Administration's intent in promulgating the Refusal of Care Rule was to expand existing federal refusal laws: "[J]ust today, we finalized new protections of conscience rights for physicians, pharmacists, nurses, teachers, students, and faith- based charities. . . . Together, we are building a culture that cherishes the dignity and worth of human life. Every child, born and unborn, is a sacred gift from God."

and that they could "provide additional information about the current challenges facing religious health professionals and the harmful consequences of under-enforcing conscience protections," *id.* at 18. However, none of these purported justifications rise to the level of a "rigorous showing of inadequacy." *Butler*, 250 F.3d at 179. Indeed, as Proposed Intervenors themselves must acknowledge, their perspective—namely, that of physicians and medical professionals who advocated for the Refusal of Care Rule—is already part of the administrative record in this case because, as Proposed Intervenors concede, *see* CMDA Br. at 9, they submitted comments in support of the proposed Rule.

Equally important, 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—absent an exception to the record rule—could not be considered. *See, e.g.*, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); 5 U.S.C. § 706 ("[T]he court shall review the whole record"). The question under the Administrative Procedure Act ("APA") is whether the agency's action is reasonable and reasonably justified in light of the Administrative Record, *see* 5 U.S.C. § 706; if Defendants did not adequately support their reliance on the CMDA surveys in the Final Rule—or if Defendants did not adequately describe the information they considered regarding the "challenges facing religious health professionals," CMDA Br. at 18—then post hoc explanations from Proposed Intervenors will not provide any lawful basis for supporting the agency's decision. For this reason, Proposed Intervenors' contention that they are "in the best position to address Plaintiffs' criticisms of the 2009 and 2011 CMDA surveys," *id.*, is legally irrelevant. Because Defendant HHS promulgated the Final Rule and relied on the CMDA surveys as part of its

reasoning, in an APA challenge to the agency's rulemaking, it is the *agency* that is in the best position to respond to Plaintiffs' critiques.[8]

Thus, the Proposed Intervenors do not "offer a necessary element to the proceedings." *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (allowing intervention because "the intervenor offer[ed] a perspective which *differ[ed] materially* from that of the present parties to this litigation," and noting that the present Secretary of the Interior was previously head of the organization that represented plaintiffs (emphasis added)).[9] In support of their argument, Proposed Intervenors also cite *N.Y. Pub. Interest Research Grp., Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975), but that case is similarly inapposite. In *New York Public Interest Research Group*, the defendants "acknowledge[d] that the [proposed intervenors] should have an opportunity to make their own arguments to protect their own interests . . . since, as the [defendants] admit, their interests 'may significantly differ' from those of the [proposed intervenors]." 516 F.2d at 352. Here, by contrast, the federal government has made no such

[8] As discussed further below, *see infra* Part II.B, to the extent Proposed Intervenors seek to present the Court with additional information, they would "contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention." *British Airways Bd. v. Port Auth. of N.Y. & N.J.*, 71 F.R.D. 583, 585 (S.D.N.Y.), *aff'd*, 556 F.2d 554 (2d Cir. 1976).

[9] To the extent that *Sagebrush* suggests that the lower standard in *Trbovich* applies to motions to intervene even when the government is a party, *see* 713 F.2d at 528, the Ninth Circuit later made clear that "[t]here is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents. In the absence of a very compelling showing to the contrary, it will be presumed that a state adequately represents its citizens when the applicant shares the same interest." *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006) (quoting *Arakaki v, Cayetano*, 324 F.3d 107, 108 (9th Cir. 2003)). In any event, this Circuit has been clear that "[t]he proponent of intervention must make a particularly strong showing of inadequacy in a case where the government is acting as *parens patriae*." *City of N.Y.*, 198 F.3d at 367 (2d Cir. 1999) (citing *Hooker Chems.*, 749 F.2d at 985 (2d Cir. 1984)).

acknowledgement or admission, nor could they, as Proposed Intervenors "have the same ultimate objective" as the federal government. *Butler*, 250 F.3d at 179.

Second, Proposed Intervenors suggest that intervention is appropriate because while "HHS has an interest in implementing federal statutes that protect conscience rights, it must balance that interest with others that may be adverse to the Proposed Intervenors." CMDA Br. at 16. But Proposed Intervenors do not specify what, exactly, those adverse interests may be. *See British Airways Bd. v. Port Auth. of N.Y. & N.J.*, 71 F.R.D. 583, 585 (S.D.N.Y. 1976) ("While there may be an adversity of interests between the Port Authority and the proposed intervenors in some contexts, it is simply speculation to suppose that any such divergence in viewpoint is applicable on the facts of this case."), *aff'd*, 556 F.2d 554 (2d Cir. 1976). By contrast, in *Trbovich*, cited by Proposed Intervenors, the statute in question "plainly impose[d] on the Secretary the duty to serve two distinct interests," only one of which aligned with the proposed intervenor's interest. 404 U.S. at 538. The Secretary's two interests—protecting an individual union member's rights against the union on the one hand, and assuring free and democratic union elections on the other—were "related, but not identical," and so "may not [have] always dictate[d] precisely the same approach to the conduct of the litigation." *Id.* at 538–39; *see also Commonwealth of Pennsylvania v. President United States of Am.*, 888 F.3d 52, 61 (3d Cir. 2018) (finding intervention appropriate because "the Little Sisters' situation is similar to *Trbovich*"). Here, Proposed Intervenors' vague allusion to "other[] [interests] that may be adverse," CMDA Br. at 16, cannot suffice to warrant intervention.

The remaining cases cited by Proposed Intervenors for this point, *see* CMDA Br. at 17 & n.4, fare no better. Proposed Intervenors cite these cases for the proposition that government interests are not always coterminous with a proposed intervenor's interests. But, again, Proposed

Intervenors do not explain how their interests diverge from the federal government's in this case.[10] In *Farmland Dairies v. Commissioner of New York State Department of Agriculture and Markets*, 847 F.2d 1038 (2d Cir. 1988), for example, New Jersey dairy companies contested as violative of the Constitution's interstate commerce clause a decision by the New York Department of Agriculture and Markets preventing them from distributing milk in certain New York counties. After the district court ruled in favor of the New Jersey dairy companies, the parties settled, and certain New York dairy companies sought leave to intervene to appeal the district court's judgment. Upholding the district court's denial of the motion as untimely, the Second Circuit explained that the proposed intervenors "should certainly have been aware . . . that the interests represented by the Attorney General are not coterminous with their own." 847 F.2d at 1044. Unlike the instant case, the New York milk producers in *Farmland Dairies* were more interested in competing with their New Jersey counterparts than in ensuring state laws were being adequately enforced. The interests of the federal government and Proposed Intervenors in this matter, by contrast, are entirely congruent, and Proposed Intervenors make no arguments to the contrary.[11]

Third, Proposed Intervenors argue that they should be allowed to intervene to defend the Final Rule should there be "any future shifts in agency position." CMDA Br. at 18. Proposed Intervenors cite the "agency's inconsistent position on the need for conscience protections" between 2008 and 2019 as evidence that "HHS may again weaken or alter its position during the course of this litigation, especially if there is a change in administration before this case is finally resolved." *Id*. at 17. But "[f]ear of future divergence of interests is insufficient to establish

[10] Proposed Intervenors suggest their interests *might* diverge from the federal government's in the future, but this does not warrant intervention, as discussed *infra*.

[11] The remaining cases cited by Proposed Intervenors, *see* CMDA Br. at 17 n.4, are distinguishable on this basis as well.

inadequate representation in the absence of a current conflict." *Deutschman v. Beneficial Corp.*, 132 F.R.D. 359, 381 (D. Del. 1990); *see also Eashoo v. Iovate Health Scis. U.S.A., Inc.*, No. 15-cv-01726 BRO (PJWX), 2015 WL 12696036, at *8 (C.D. Cal. May 26, 2015) ("Intervenor's speculative fears do not demonstrate Plaintiff's inadequacy."); *Etters v. Bennett*, No. 5:09-CT-3187-D, 2011 WL 3320489, at *2 (E.D.N.C. Aug. 1, 2011) (citing *Deutschman*, 132 F.R.D. at 381). The potential for a future change in administration cannot be the basis for intervention under Rule 24(a)(2); if it were, then the strong presumption of adequacy of representation in cases defended by the federal government would make no sense, as the potential for future change in administration happens every four years. *See, e.g.*, *Sagebrush*, 713 F.2d at 528 ("In allowing intervention in this case we are mindful that the mere change from one presidential administration to another, a recurrent event in our system of government, should not give rise to intervention as of right in ongoing lawsuits."); *United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 403 (9th Cir. 2002) ("[P]erceived philosophic differences without more specific objective evidence in the record are insufficient by themselves to demonstrate adversity of interest. Thus, the mere change of administration is insufficient to alter the conclusion that the interests of the Community Interveners are adequately protected by the United States.").[12]

[12] The cases cited by Proposed Intervenors, *see* CMDA Br. at 18, are not to the contrary. In *Brennan v. N.Y.C. Board of Education*, the Second Circuit vacated the district court's decision to deny intervention by white, male employees who believed their employment rights would be negatively affected by the settlement of a Title VII action. This case, however, did not concern any potential *future* changes in a party's interests; to the contrary, the court in *Brennan* considered "whether the [litigating party's] interests were so similar to those of [proposed intervenors] that adequacy of representation was assured" at the time of the suit, "find[ing] no such congruence of interests." 260 F.3d at 133. And in *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964 (3d Cir. 1998), the Third Circuit noted that "[t]he reality is that [National Environmental Policy Act] cases frequently pit private, state, and federal interests against each other," *id*. at 971; in such matters, "the government represents numerous complex and conflicting interests" and so it is "not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts,"

To the extent that Proposed Intervenors suggest intervention should be granted because Proposed Intervenors would litigate the case differently, this argument also fails. "A putative intervenor does not have an interest not adequately represented by a party to a lawsuit simply because it has a motive to litigate that is different from the motive of an existing party. So long as the party has demonstrated sufficient motivation to litigate vigorously and to present all colorable contentions," as the federal government has here, "a district judge does not exceed the bounds of discretion by concluding that the interests of the intervenor are adequately represented." *Nat. Res. Def. Council, Inc. v. N.Y. State Dep't of Envtl. Conservation*, 834 F.2d 60, 61–62 (2d Cir. 1987). Representation is not inadequate simply because "the applicant would insist on more elaborate pre-trial or pre-settlement procedures or press for more drastic relief," *Hooker Chems.*, 749 F.2d at 985, or "where the applicant and the existing party have different views on the facts, the applicable law, or the likelihood of success of a particular litigation strategy," *City of New York*, 198 F.3d at 367; *see also* 7C Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 1909 (3d ed. 2007) ("A mere difference of opinion concerning the tactics with which the litigation should be handled does not make inadequate the representation of those whose interests are identical with that of an existing party . . . ."). The federal government shares Proposed Intervenors' interest in enforcement of the Refusal of Care Rule, and its representation "is not inadequate simply because [it may] have different ideas about how best to achieve these goals." *City of New York*, 198 F.3d at 367.

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id. at 973, 974. But "the relaxed standard [in *Kleissler*] is only appropriate where a conflict exists 'between the intervenors' direct economic interests and the government's shifting public policy interests.'" *Pa. Gen. Energy Co., LLC v. Grant Twp.*, No. CA 14-209, 2015 WL 6002163, at *4 (W.D. Pa. Oct. 14, 2015) (quoting *United States v. Territory of V.I.*, 748 F.3d 514, 521 (3d Cir. 2014)), *aff'd*, 658 F. App'x 37 (3d Cir. 2016).

For all these reasons, Proposed Intervenors cannot make the required showing that the federal government's representation of their interests is not adequate.

II. Permissive Intervention Under Rule 24(b) Is Unwarranted

This Court should also deny Proposed Intervenors' motion for permissive intervention. Rule 24(b) allows the Court to permit intervention by one who "has a claim or defense that shares with the main action a common question of law or fact," subject to the Court's consideration of "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(1)(B), (b)(3).[13] The district court has "broad discretion" to deny permissive intervention, *Catanzano by Catanzano v. Wing*, 103 F.3d 223, 234 (2d Cir. 1996), and a "denial of permissive intervention has virtually never been reversed." *AT&T Corp. v. Sprint Corp.*, 407 F.3d 560, 561 (2d Cir. 2005) (quoting *Hooker Chems.*, 749 F.2d at 990 n.19).

As an initial matter, the Court should deny the motion for permissive intervention for the same reasons that intervention of right is unwarranted. *See Menominee Indian Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996) ("When intervention of right is denied for the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears."). And applying the factors identified in Rule 24(b), the Court should deny permissive intervention because Proposed Intervenors have alleged no claim or defense in common with this action, and because their participation as a party in this litigation will cause undue delay and prejudice to Plaintiffs.

[13] Proposed Intervenors do not claim that they are "given a conditional right to intervene by a federal statute" per Rule 24(b)(1)(A), and no such statute would authorize permissive intervention in this instance.

A. Proposed Intervenors Have Alleged No Claim or Defense that Shares a Common Question of Law or Fact with This Action

Proposed Intervenors have failed to establish the basic criteria for permissive intervention—a common question of law or fact with this action. Fed. R. Civ. P. 24(b)(1)(B). Proposed Intervenors' sole argument on this score is that they would present legal arguments "in common with the main action" regarding whether the Final Rule violates the APA, the Establishment Clause, or the Spending Clause. CMDA Br. at 19. But Proposed Intervenors' interest in presenting those legal arguments is not the same as possessing a "defense that shares . . . a common question of law" as required by Rule 24(b)(1)(B), because Plaintiffs' claims for relief under the APA and Constitution do not in any way seek to regulate Proposed Intervenors. That Proposed Intervenors believe they have good arguments why Plaintiffs' APA claims, for example, should fail is not the same as presenting a claim or defense—the Administrative Procedure Act does not authorize a cause of action for parties seeking to *sustain* an agency rulemaking. 5 U.S.C. §§ 701–706.

To the extent Proposed Intervenors rely on the declarations from Dr. David Stevens and Dr. Regina Frost in support of their request for permissive intervention, these declarations similarly fail to meet the requirement of Rule 24(b)(1)(B). As an initial matter, as discussed above, Dr. Stevens does not even discuss the Final Rule and its impact on CMDA. *See generally* Stevens Decl. While Dr. Frost explained that she believes she should be a defendant in this litigation because she is "concerned that one day I too could be pressured to perform a medical procedure that I find morally objectionable, especially given that my home state of Michigan is a plaintiff in this lawsuit," Frost Decl. ¶ 9, this speculative fear of future conduct by Dr. Frost's employer cannot be the basis for permissive intervention for several reasons. First, "an inchoate fear" of future enforcement by a party to the action (let alone a non-party) does not satisfy the Rule 24(b)(1)(B)

requirement. *Eddystone Rail Co., LLC v. Jamex Transfer Servs., LLC*, 289 F. Supp. 3d 582, 595 (S.D.N.Y. 2018). Second, as noted above, *see supra* Part I.A, Dr. Frost faces no future moral pressure from her employer, a "faith-based healthcare organization" that commented in support of the Final Rule.

B. Proposed Intervenors' Participation as a Party in This Litigation Will Cause Undue Delay and Prejudice to Plaintiffs

In addition, the Court should deny Proposed Intervenors' motion because "intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

A key consideration in determining whether intervention will cause delay or prejudice is whether the "potential intervenor will essentially repeat the same sort of testimony given by existing parties," in which case "intervention is counterproductive because it will only clutter and prolong the litigation unnecessarily." 6 Moore's Federal Practice § 24.10[2][b] at 72–73 & n.24 (citing cases). Here, Proposed Intervenors concede that they intend to brief the same legal issues under the APA and Constitution that Defendants will brief, *see* CMDA Br. at 19; and further concede that they have no reason to believe that Defendants will not defend the legality of the Final Rule, *see id.* at 16. This duplication will clutter and prolong the litigation unnecessarily. *See, e.g.*, *Hoots v. Commonwealth of Pa.*, 672 F.3d 1133, 1135–36 (3d Cir. 1982) ("[T]he district court is well within its discretion in deciding that the applicant's contributions to the proceedings would be superfluous and that any resulting delay would be 'undue.'").

Proposed Intervenors contend that their participation will nonetheless add a "unique perspective" based on their "longstanding advocacy for conscience rights." CMDA Br. at 19. To the extent Proposed Intervenors intend by this reference to proffer that as a party, they would be "in the best position to address Plaintiffs' criticisms of the 2009 and 2011 CMDA surveys," and

to "provide additional information about the current challenges facing religious health professionals and the harmful consequences of under-enforcing conscience protections," *id.* at 18, these arguments only *increase* the certainty of undue delay and prejudice. As noted above, absent some exception to the record rule in APA litigation—which Proposed Intervenors have not identified—any new evidence or defense regarding the 2009 and 2011 CMDA surveys that is not already in the Administrative Record would be impermissible extra-record evidence. *See, e.g.*, *Fla. Power & Light*, 470 U.S. at 744.

If the Court nevertheless believes it may benefit from Proposed Intervenors' perspective (*see* Order, ECF No. 73 (June 26, 2019), NY Action), Proposed Intervenors should be permitted to offer their views as *amicus curiae*, not as a party. *See, e.g.*, *Battle v. City of N.Y.*, No. 11-cv-3599, 2012 WL 112242, at *7 (S.D.N.Y. Jan. 12, 2012) ("To the extent that Taxi Federation members may have had relevant experiences with TRIP . . . the Taxi Federation may request to participate as an amicus curiae."); *British Airways Bd.*, 71 F.R.D. at 585; *see also Bush v. Viterna*, 740 F.2d 350, 359 (5th Cir. 1984) ("Additional parties always take additional time. . . . Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention." (quoting *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D. Mass. 1943))); *Cigar Ass'n of Am. v. U.S. Food & Drug Admin.*, 323 F.R.D. 54, 66 (D.D.C. 2017) (denying permissive intervention to public health organizations that sought to defend agency rulemaking in a challenge by cigar manufacturers, where the proposed intervenors "have not given the court sufficient reason to believe that Defendants will not defend those requirements to the fullest," and where intervenors could "join these proceedings as amicus curiae"); *cf. Favors v. Cuomo*, 881 F. Supp. 2d 356, 375 (E.D.N.Y. 2012) (denying permissive intervention and noting that "[t]o the extent [proposed

intervenor] maintains that he brings an 'important perspective' to this case, he has been able to provide that perspective to this Court as a witness for the" defendants (citations omitted)).

The Court should exercise its discretion to deny the motion for permissive intervention.

CONCLUSION

For the reasons set forth above, Proposed Intervenors' motion to intervene, either as of right or permissively, should be denied.

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Respectfully submitted,

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