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5 **Pro hac vice admission pending*

6 *Attorneys for Amici Curiae American Association*
of Pro-Life Obstetricians & Gynecologists,
7 *American College of Pediatricians, Catholic Medical Association,*
and National Catholic Bioethics Center
8

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11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE SOUTHERN DISTRICT OF NEW YORK**

13 STATE OF NEW YORK, et al.,

14 Plaintiffs,

15
16 v.

17 UNITED STATES DEPARTMENT OF
18 HEALTH AND HUMAN SERVICES, et al.,

19 Defendants.
20

Case Nos.:

19 Civ. 4676 (PAE)

19 Civ. 5433 (PAE)

19 Civ. 5435 (PAE)

**UNOPPOSED MOTION FOR LEAVE
TO FILE AMICI CURIAE BRIEF IN
SUPPORT OF DEFENDANTS**

The Honorable Paul A. Engelmayer

Date: October 18, 2019

Time: 9:30 a.m.
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1 Pursuant to this Court’s Order setting forth the briefing schedule for these consolidated
2 cases, Dkt. No. 121, and by analogy to Federal Rule of Appellate Procedure 29(b), amici curiae
3 American Association of Pro-Life Obstetricians & Gynecologists, American College of
4 Pediatricians, Catholic Medical Association, and National Catholic Bioethics Center hereby
5 submit this Motion for Leave to File an Amici Curiae Brief in support of Defendants’ Motion for
6 Summary Judgment and Opposition to Plaintiffs’ Motion for Preliminary Injunction.

7 **INTEREST OF AMICUS CURIAE**

8 American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG) is a non-
9 profit professional medical organization comprising more than 4,000 obstetrician–gynecologist
10 members and associates. AAPLOG held the title of “special interest group” within the American
11 College/Congress of Obstetricians and Gynecologists (ACOG) from 1973 to 2013, until this
12 designation was discontinued by ACOG. AAPLOG is concerned about the quality of care
13 provided to pregnant women and the potential long-term adverse consequences of abortion on
14 women’s health. Accordingly, AAPLOG explores data from around the world regarding
15 abortion-associated complications, such as depression, substance abuse, suicide, subsequent
16 preterm birth, and *placenta previa*, in order to provide the general public, medical colleagues,
17 and others with a realistic understanding of abortion-related health risks.

18 American College of Pediatricians (ACPeds) is a national non-profit organization of
19 pediatricians and other healthcare professionals, formed in 2002 and dedicated to the health and
20 well-being of children. ACPeds’s mission is to enable all children to reach their optimal physical
21 and emotional health and well-being. To this end, ACPeds has written a number of position
22 statements on matters unique to children and continues to produce sound policy based upon the
23 best available research to assist parents and society in caring for children. Membership is open
24 to qualifying healthcare professionals who share the ACPeds’ mission, vision, and values.
25 ACPeds currently has members in forty-seven states, as well as in several countries outside of
26 the United States.

27 The Catholic Medical Association (CMA) is a national, physician-led community of
28 healthcare professionals that informs, organizes, and inspires its members, in steadfast fidelity to

1 the teachings of the Catholic Church, to uphold the principles of the Catholic faith in the science
2 and practice of medicine.

3 The National Catholic Bioethics Center (NCBC) is a non-profit research and educational
4 institute committed to applying the moral teachings of the Catholic Church to ethical issues
5 arising in health care and the life sciences. NCBC administers a certification program in
6 bioethics in collaboration with two graduate programs providing graduate degrees to our dually
7 enrolled students concentrating in bioethics. It also provides consultations to institutions and
8 individuals seeking its opinion on the appropriate application of Catholic moral teachings to
9 these ethical issues, impacting human rights of vulnerable populations and conscience rights of
10 their providers. NCBC has 2,500 members (many of whom are institutional members
11 representing thousands of persons) throughout the United States. Increasingly, NCBC is
12 contacted by members and non-members alike seeking consultation on the increasing coercion to
13 violate deeply held religious beliefs or moral values in the delivery of health care.

14 **REASONS WHY THE MOTION SHOULD BE GRANTED**

15 “Ordinarily, the purpose of an amicus brief is to assist the court in resolving issues of law
16 by explaining or amplifying the issues the parties raised.” *United States v. Yaroshenko*, 86 F.
17 Supp. 3d 289, 290 (S.D.N.Y. 2015) (citation omitted). “District courts have broad discretion to
18 permit ... amici curiae in a given case.” *United States v. Ahmed*, 788 F. Supp. 196, 198 n.1
19 (S.D.N.Y. 1992), *aff’d*, 980 F.2d 161 (2d Cir. 1992). An amicus brief should “serve a useful
20 purpose,” *Yaroshenko*, 86 F. Supp. 3d at 290, such as bringing to the Court’s attention relevant
21 information and “shedding light on ... aspects of the case,” *Weininger v. Castro*, 418 F. Supp. 2d
22 553, 555 (S.D.N.Y. 2006). This Court has accepted amicus briefs to assist the Court in deciding
23 important cases with complex issues. *See, e.g., Allstate Ins. Co. v. Serio*, No. 97-CIV-
24 0670(RCC), 2000 WL 554221, at *1 n.1 (S.D.N.Y. May 5, 2000) (“permit[ing]” and “carefully
25 consider[ing]” amicus curiae brief in support of defendant’s motion for summary judgment);
26 *Gen. Motors Corp. v. Abrams*, 703 F. Supp. 1103, 1106 (S.D.N.Y. 1989), *rev’d on other*
27 *grounds*, 897 F.2d 34 (2d Cir. 1990) (the Court is “grateful for, and will consider, the
28 contributions of both [amici]”).

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Respectfully submitted this the 21st day of August, 2019.

By: *s/Denise M. Harle*

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2019, I electronically filed the foregoing paper with the Clerk of Court using the ECF system which will send notification of such filing to all attorneys of record.

s/Denise M. Harle
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**AMICI CURIAE BRIEF OF
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GYNECOLOGISTS, AMERICAN
COLLEGE OF PEDIATRICIANS,
CATHOLIC MEDICAL
ASSOCIATION, AND NATIONAL
CATHOLIC BIOETHICS CENTER, IN
SUPPORT OF DEFENDANTS**

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Identity and Interest of Amici

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6 contacted by members and non-members alike seeking consultation on the increasing coercion to
7 violate deeply held religious beliefs or moral values in the delivery of health care.

8 **Introduction and Summary**

9 Rights of conscience are at the core of constitutional freedoms and are, in the words of
10 James Madison, “unalienable.”¹ Conscience is also at the heart of what motivates many who
11 enter the medical field, a profession full of individuals who dedicate their lives to healing and
12 doing no harm. When these conscience rights clash (as they sometimes do) with various rights
13 asserted by others, the individual conscience—“the most sacred of all property”²—must not be
14 sacrificed in the name of business interests, political goals, or the convenience of others.

15 Despite clear constitutional principles assuring the sanctity of conscience, political
16 interest groups lobby to prevent the exercise of conscience rights by people holding certain
17 disfavored religious or moral beliefs. Federal and state legislation have provided specific
18 protections for medical conscience rights, but those have proven weak or ignored.

19 Conscience rights are not limited based on one’s professional status. Plaintiffs’ argument
20 that too many health care workers’ consciences would be protected under the HHS Conscience
21 Rule shows a misunderstanding of the fundamental rights we have historically protected—
22 beginning with the guarantees of the First Amendment. Individual conscience rights are
23 paramount, regardless of a person’s job title or role. Decades of Supreme Court caselaw teach
24 that complicity in an act creates an unconstitutional conscience burden.

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27 ¹ James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in
28 *SELECTED WRITINGS OF JAMES MADISON* 21–27 (Ralph Ketcham ed. 2006).

² James Madison, *Property* (1792), in *MADISON*, supra note 1, at 223.

1 Nor are conscience rights limited to particular aspects of health care. Plaintiffs’
2 suggestion that conscientious objections have been largely limited to “abortion and sterilization,”
3 *see* PFFA Compl. ¶ 36, ignores a serious reason the Rule is necessary: there are many significant
4 controversial aspects of medicine that implicate ethical quandaries. The government may not
5 pick and choose which particular views or topics deserve protection.³

6 The purpose and effect of the Rule is to meaningfully effectuate the laws that Plaintiffs
7 claim they adhere to. Specific examples show that existing legal protections for medical
8 conscience rights have not been enough to prevent egregious violations or to stave off efforts to
9 force moral conformity. Millions of American health care workers will have their rights
10 safeguarded by the fortified protections of the Conscience Rule.

11 **I. Longstanding foundational constitutional principles support the legality of the Rule.**

12 The Conscience Rule is a straightforward application of the basic conscience rights that
13 have been secured since the inception of this nation. The American Republic was established to
14 be a refuge for conscience;⁴ as Samuel Adams put it, “freedom of thought and the right of private
15 judgment in matters of conscience direct their course to this happy country as their last asylum.”⁵
16 Thomas Jefferson agreed that conscience “could not [be] submit[ted]” to governmental oversight
17 or authority.⁶

18 Liberty of conscience was the cornerstone of the Constitution. As Jefferson put it, “[n]o
19 provision in our Constitution ought to be dearer to man than that which protects the rights of
20 conscience against the enterprises of the civil authority.”⁷ Government infringement on
21

22 ³ Besides, Plaintiffs seek to have the Rule invalidated as to *all* conscience-based objections, even
23 like abortion and sterilization they concede are protected under multiple existing laws.

24 ⁴ Lynn D. Wardle, “*Conscience Exemptions*,” 14 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS
25 77, 78–79 (2013) (explaining that protecting “conscience was one of the essential purposes for
26 the founding of the United States of America and one of the great motivations for the drafting of
27 the Bill of Rights”).

28 ⁵ Samuel Adams, “American Independence,” Speech in Philadelphia (Aug. 1, 1776),
https://en.wikisource.org/wiki/American_Independence.

⁶ Thomas Jefferson, Notes on the State of Virginia 169 (1782),
<https://docsouth.unc.edu/southlit/jefferson/jefferson.html>.

⁷ Letter from Thomas Jefferson to Richard Douglas, February 4, 1809,
<https://founders.archives.gov/documents/Jefferson/99-01-02-9714>

1 conscience was intolerable and inconceivable to the Founders. Shortly before the Bill of Rights
2 was adopted, George Washington insisted that if the “Government might ever be so administered
3 as to render the liberty of conscience insecure,” he would be the first “to establish effectual
4 barriers against the horrors of spiritual tyranny and every species of religious persecution.”⁸ John
5 Jay, the first Chief Justice of the Supreme Court, agreed that conscience protections are a
6 constitutional guarantee: “Adequate security [under our Constitution] is given to the rights of
7 conscience and private judgment. They are by nature subject to no control but that of Deity.”
8 And Joseph Story, one of our nation’s most prominent Supreme Court justices, said that “rights
9 of conscience are ... beyond the just reach of any human power. They ... [must] not be
10 encroached upon by human authority.”⁹

11 The First Amendment itself protects a cluster of rights that depend on freedom of mind.
12 Freedom of speech, freedom of religious exercise, and freedom of assembly are concerned with
13 guaranteeing that individuals can live consistently with their own thoughts and beliefs. This same
14 right of conscience has also been essential to the practice of medicine for millennia, as evidenced
15 by the Hippocratic Oath’s reverence for human life, and medicine’s status as an autonomous
16 profession concerned with doing right and avoiding wrong.¹⁰

17 In the context of health care, the U.S. Supreme Court has repeatedly acknowledged the
18 sanctity of medical conscience rights. In *Roe v. Wade*, for example, the Supreme Court cited a
19 resolution of the American Medical Association confirming that “no party to the procedure
20 should be required to violate personally held moral principles. ... Neither physician, hospital,
21 nor hospital personnel shall be required to perform any act violative of personally-held moral
22

23 ⁸ George Washington to the United Baptist Churches of Virginia, May 1789 (New York)
24 <https://founders.archives.gov/documents/Washington/05-02-02-0309>

25 ⁹ Joseph Story, *Commentaries on the Constitution of the United States* § 1870 (1833).

26 ¹⁰ Edmund D. Pellegrino, *Toward a Reconstruction of Medical Morality*, *AM. J. OF BIOETHICS*,
27 6(2):65–71, 2006 (“[m]edicine is a moral enterprise ... conducted in accordance with a definite
28 set of beliefs about what is right and wrong”). “The physician, therefore, cannot be expected to
lay aside or ignore his deeper personal beliefs, values, or religious commitments. Edmund D.
Pellegrino, *Patient and Physician Autonomy: Conflicting Rights and Obligations in the
Physician-Patient Relationship*, 10 *J. CONTEMP. HEALTH L. & POLICY* 47, 52 (1994).

1 principles.” 410 U.S. 113, 143 n.38 (1973). The same day, the Supreme Court decided a
2 companion case, *Doe v. Bolton*, and noted with approval that the statute at issue expressly
3 protected conscience, allowing “a physician or any other employee ... the right to refrain, for
4 moral or religious reasons, from participating in the abortion procedure.” 410 U.S. 179, 197–98
5 (1973). This, the Court said, “afford[ed] appropriate protection to the individual and to the
6 denominational hospital.” *Id.* at 198.

7 The Supreme Court was soon confronted with problems stemming from conscience and
8 the doors *Roe v. Wade* opened. Cases like *Maher v. Roe* and *Harris v. McRae* confirmed that
9 individuals may, through the states, effect policies reflecting “a value judgment favoring
10 childbirth over abortion,” *Maher*, 432 U.S. 464, 474 (1977), and be free from forced
11 subsidization of abortion through taxpayer dollars, *McRae*, 448 U.S. 297, 318 (1980).

12 The Court in *McRae* gave careful consideration to conscience concerns, and even the
13 plaintiffs—a group of women wanting the government to fund their abortions—acknowledged
14 that whether to have an abortion “is a determination which must be ultimately and absolutely
15 entrusted to the conscience of the individual before God.” 448 U.S. at 321. Surely the same is
16 true for whether to assist in an abortion.

17 In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), conscience issues came up again.
18 The plurality opinion began with a reminder that what was decided in *Roe* as a legal matter is in
19 fact a much bigger question of conscience that cannot be settled or ignored:

20 “Men and women of good conscience can disagree, and we suppose some always
21 shall disagree, about the profound moral and spiritual implications of terminating
22 a pregnancy, even in its earliest stage. Some of us as individuals find abortion
23 offensive to our most basic principles of morality.”

24 *Id.* at 850 (plurality op.).

25 The Court explained that “the abortion decision originate[s] within the zone of
26 conscience and belief.” *Id.* at 852. Then the Court highlighted serious questions of conscience *for*
27 *all Americans* implicated by abortion: “Abortion is a unique act. It is an act *fraught with*
28 *consequences for others*: for the woman who must live with the implications of her decision; for
the persons who *perform and assist in* the procedure; for the spouse, family, and society which

1 must confront the knowledge that these procedures exist, procedures some deem nothing short of
2 an act of violence against innocent human life; and, depending on one’s beliefs, consequences
3 for the life or potential life that is aborted.” *Id.* at 852.

4 It is critical for the law to be clear about what happens in these moral, ethical, religious,
5 and philosophical dilemmas. The Rule does just that.

6 **II. The Conscience Rule buttresses legal protections long established by Congress as the**
7 **will of the people but not always effectively enforced.**

8 Congress has repeatedly passed laws demonstrating a bipartisan intent that health care
9 professionals not be coerced into violating their beliefs. The potential threat to conscience rights
10 triggered by *Roe* set off a chain of federal and state laws enacted to protect individuals and
11 institutions that objected to participating in abortion. The first of these laws, the Church
12 Amendments, 42 U.S.C. § 300a–7 et seq., were enacted in the 1970s to provide protections for
13 health care professionals who object to performing abortions, sterilizations, and other procedures
14 based on their moral convictions or religious beliefs.¹¹

15 But despite the Supreme Court’s pronouncements and the protections of the Church
16 Amendments, public medical schools began pressuring students to undergo mandatory abortion
17 training. In 1996, a bipartisan Congress again defended conscience rights with the Coats–Snowe
18 Amendments, 42 U.S.C. § 238n, prohibiting the federal government and any state or local
19 government receiving federal funds from discriminating against health care professionals based
20 on a conscientious refusal to participate in abortions, abortion training, or abortion referrals.

21 But as attacks on conscience continued, a bipartisan Congress again saw a need to
22 intervene, passing the 2004 Weldon Amendment, Pub. L. No. 108–447, an appropriations rider

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24 ¹¹ The PPFA Plaintiffs are wrong when they claim that the Rule greatly expands the range of health
25 care activities protected by existing conscience laws. As other Plaintiffs concede, NFPRHA Comp.
26 at ¶¶ 105, 132, the Church Amendments, for example, expressly prohibit discrimination based on
27 participation in or refusal to participate in “*any* lawful health service or research activity . . . on the
28 grounds that his performance or assistance in the performance of such service or activity would be
contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral
convictions respecting any such service or activity,” 42 U.S.C. § 300a–7(c)(2)(B) (emphasis
supplied).

1 prohibiting funds from the Departments of Health, Labor, or Education from flowing to any
2 federal, state, or local government or program that discriminates against individual or
3 institutional health care providers for their refusal to “provide, pay for, provide coverage for, or
4 refer for abortions.” *Id.* at Tit. V, § 508(d)(1). This conscience protection was met with great
5 resistance and lawsuits by abortion advocates, but courts rejected the challenges, and the Weldon
6 Amendment has been renewed in each subsequent budget bill.

7 During the past four decades, most states have enacted their own conscience protections,
8 modeled primarily after the Church Amendment but varied in terms of who and what is covered.
9 Enforcement, however, has been inconsistent, in part because of deficient legal enforcement
10 mechanisms.

11 Taken together, these laws show that at both the state and national level, the legislative
12 intent is to protect medical professionals’ conscience rights. But these laws are missing
13 something the Conscience Rule provides: clear methods to ensure that they are enforced. *See*
14 *infra* Section V. If, as the State Plaintiffs claim, it “could cost [them] billions of dollars” to
15 comply with the Rule, States Compl. ¶ 86, including “unduly burdensome ... increase[d]
16 expenditures on salaries to ensure there is sufficient staff to comply,” *id.* ¶ 130, then it is a
17 wonder how they are ensuring compliance with the underlying laws now—or whether they are
18 doing so at all. Hence the need for the Rule.

19 **III. Recent attacks on certain beliefs show that conscience rights are still very much under**
20 **siege.**

21 Unfortunately, threats persist. Professional organizations have taken aim at health care
22 professionals whose exercise of conscience do not “conform[] to their own agenda.”¹² Opponents
23 to conscience in medicine, such as Plaintiffs, claim it “obstruct[s] access to goods and
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27 ¹² Stephen J. Genuis & Chris Lipp, *Ethical Diversity and the Role of Conscience in Clinical*
28 *Medicine* at 6, INT’L J. FAMILY MED., VOL. 2013 (Article ID 587541),
<https://www.hindawi.com/journals/ijfm/2013/587541/>

1 services,”¹³ and constitutes an abdication of the medical practitioner’s duty.¹⁴ Some argue that
2 physicians with moral objections to certain procedures should simply avoid practicing in a field
3 that implicates their objections.¹⁵ Others conclude that “health care professionals should be
4 admonished that conscientious objections based on personal beliefs, as opposed to professional
5 ethics, will entail consequences.”¹⁶ A group of philosophers and bioethicists recently went
6 further, proposing that medical practitioners who exercise freedom of conscience “should be
7 required to compensate society and the health system for their failure to fulfil their professional
8 obligations.”¹⁷ Still others have claimed that “[a] doctor’s conscience has little place in the
9 delivery of modern medical care.”¹⁸

10 Perhaps most alarming, even professional medical associations now question the role of
11 conscience in the provision of medical care. The Committee on Ethics of the American College
12 of Obstetricians and Gynecologists has opined that physicians have a duty to either refer for
13 abortion and other related procedures or, in the alternative, when such referral is not feasible,
14 “provide medically indicated and requested care regardless of the provider’s personal moral
15 objections.”¹⁹ After the Bush Administration sought to bolster federal medical conscience
16 protections in 2008, the American Medical Association and other professional groups submitted
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21 ¹³ Douglas Nejaime, Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in*
Religion and Politics, 124 YALE L.J. 2516, 2566 (2015).

22 ¹⁴ E.g., Julian Savulescu, *Conscientious Objection in Medicine*, BMJ 294, 294 (2006)
23 (“Conscience ... can be an excuse ... invoked to avoid doing one’s duty”).

24 ¹⁵ Julie Cantor, *Conscientious Objection Gone Awry — Restoring Selfless Professionalism in*
Medicine, 360 NEW ENG. J. MED. 1484, 1485 (2009) (“Qualms about abortion, sterilization, and
25 birth control? Do not practice women’s health.”).

26 ¹⁶ Martha S. Swartz, “*Conscience Clauses*,” 6 YALE J. HEALTH POL’Y, L. & ETHICS at 277.

27 ¹⁷ *Consensus Statement on Conscientious Objection in Healthcare*, PRACTICAL ETHICS (Aug. 29,
28 2016), <http://blog.practicaethics.ox.ac.uk/2016/08/consensus-statement-on-conscientious-objection-in-healthcare/>.

¹⁸ Julian Savulescu, *Conscientious Objection in Medicine*, BMJ 294, 294 (2006).

¹⁹ American College of Obstetricians and Gynecologists, Committee on Ethics, *The Limits of*
Conscientious Refusal in Reproductive Medicine at 5 (Nov. 2007).

1 comments in opposition, claiming that “[d]octors who follow their consciences might violate
2 their ‘paramount responsibility and commitment to serving the needs of their patients.’”²⁰

3 States too have shown disregard for protecting the conscience rights of medical
4 practitioners. In response to a prior federal attempt to shore up conscience protections, thirteen
5 state attorneys general signed a letter denouncing the regulations,²¹ and seven states later filed
6 suit to block them.²² More recently, Illinois amended its Healthcare Right of Conscience Act to
7 require medical practitioners and institutions to provide abortion referrals.²³ Vermont regulatory
8 agencies attempted to construe Act 39, the state’s recently enacted assisted-suicide law, to
9 *require* medical professionals to counsel (or refer for counseling) their terminal patients for
10 physician-assisted suicide.²⁴ And California passed AB 775, requiring faith-based licensed
11 medical centers offering free services to pregnant women to post signs advertising that California
12 provides free or low-cost abortions.²⁵

13 Extant federal conscience protections have proven incapable of combatting this
14 pernicious trend, principally because, unlike the Rule, they lack meaningful enforcement
15 mechanisms and frequently cover only a limited range of procedures and health care personnel.

16 **IV. The Rule could have prevented many recent violations.**

17 The travails of individual medical practitioners show that federal conscience protections,
18 although many in number and often long on the statute books, have been inadequate to protect

20 ²⁰ William L. Saunders & Michael A. Fragoso, *Conscience Protection in Health and Human*
21 *Services*, 10 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS, July 2009, at 117 (quoting AMA
22 comments, available at http://www.plannedparenthood.org/files/AMA_et_al_Comments.pdf).

23 ²¹ See Saunders and Fragoso, *Conscience Protection* at 117 (citing Press Release, Terry Goddard
24 Urges Proposed Abortion Rule Be Withdrawn (Sept. 24, 2008), [https://www.azag.gov/press-
25 release/terry-goddard-urges-proposed-abortion-rule-be-withdrawn](https://www.azag.gov/press-release/terry-goddard-urges-proposed-abortion-rule-be-withdrawn)) (criticizing the legal
26 protections as “single-minded focus on protecting a health care provider’s right to claim a
27 personal moral or religious belief”).

28 ²² *Id.* (describing complaint allegations).

²³ Complaint, *Pregnancy Care Center of Rockford v. Rauner*, (17th Jud. Cir. Ill.), No.
2016MR000741 (August 5, 2016).

²⁴ Complaint, *Vermont Alliance for Ethical Healthcare v. Hoser*, No. 16-cv-00205 (D. Vt. Jul.
19, 2016).

²⁵ *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. ____ (2018) (concluding
that the law was likely unconstitutional viewpoint discrimination).

1 the very rights to conscience they were crafted to vindicate. Had the Conscience Rule been in
2 place, it is likely that few of these gut-wrenching dilemmas, much less the burdensome litigation,
3 would have occurred.

4 **A. Cathy Cenzone-DeCarlo was forced to participate in abortion.**

5 Cathy Cenzone-DeCarlo is a devout Catholic and a surgical nurse at Mount Sinai Hospital
6 in New York City.²⁶ Because of her religious belief that abortion is the unwarranted taking of a
7 human life, DeCarlo told Mount Sinai that she is unwilling to participate in abortion, and
8 completed paperwork to that effect upon hiring. That agreement was ignored when hospital
9 officials compelled DeCarlo to assist in the abortion of a 22-week-old preborn baby. Hospital
10 officials threatened DeCarlo with charges of “insubordination and patient abandonment” if she
11 did not immediately assist in the abortion, even though the case did not involve emergency
12 circumstances.²⁷ Despite federal protections designed precisely to protect her in this situation,
13 DeCarlo was unable to convince her supervisors to relent. Faced with losing her job or her
14 nursing license, DeCarlo was compelled to assist in the abortion. When she filed suit against the
15 hospital, the action was dismissed because the court found that she had no private right of
16 action.²⁸ DeCarlo was instead beholden to the federal bureaucracy to pursue the complaint her
17 attorneys filed with HHS, which finally investigated the incident after a delay but did not
ultimately resolve it.

18 Although Mount Sinai eventually revised its policies to respect conscience rights,
19 DeCarlo’s ordeal inflicted emotional and psychological trauma that have left lasting scars. Her
20 crisis shows that federal conscience protections—even when clearly applicable—will do little to
21 prevent abuses, without meaningful enforcement mechanisms and a knowledge on the part of
22 health care facilities that HHS will enforce regulations swiftly and consistently.

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27 ²⁶ Complaint, *Cenzone-DeCarlo v. Mt. Sinai Hospital*, No. 09-cv-3120 (E.D.N.Y. Jul. 21, 2009).

28 ²⁷ *Id.* at ¶¶ 97–123.

²⁸ *Cenzone-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 698–99 (2d Cir. 2010).

1 **B. The Stormans were required to distribute abortion-causing drugs.**

2 The Stormans family owns and operates Ralph’s Thriftway, a fourth-generation grocery
3 and pharmacy in Olympia, Washington.²⁹ As Christians, they object to destroying human life.
4 They refrain from stocking abortifacient drugs in their pharmacy, because such medications can
5 kill an embryo. If the Stormans receive a request for abortifacients, they typically refer customers
6 to nearby pharmacies that regularly stock and dispense them—all within five miles of Ralph’s.
7 Such referrals are commonplace in the pharmacy practice.

8 In 2007, the Washington State Pharmacy Commission, stacked with abortion advocates,
9 enacted a rule prohibiting conscience-based referrals. The Stormans had to sue to protect their
10 conscience rights, and after years of litigation, a federal district court ruled that the new state
11 regulations violated the Free Exercise Clause.³⁰ But the Ninth Circuit reversed the trial court, and
12 the United States Supreme Court declined to hear the appeal, letting stand the nation’s only state
13 ban on conscience referrals by pharmacists.³¹

14 This case signals that states, along with advocacy groups and even medical associations,
15 will sacrifice conscience in exchange for perceived political gain. It also shows that prior federal
16 protections did not protect such abuses, even where intended to. The Rule prevents coercion to
17 violate one’s conscience by referring for any lawful procedure.

18 **C. Trinity Health was sued for not performing abortions.**

19 Trinity Health operates more than 200 facilities throughout the U.S., and is particularly
20 dedicated to serving impoverished communities.³² It provides health care in accordance with
21 Roman Catholic teaching, hewing to the Ethical and Religious Directives issued by the United
22 States Conference of Catholic Bishops.³³ Those directives state that “[a]bortion (that is, the

23 ²⁹ See *Stormans, Inc. et al., v Selecky*, No. 07-cv-05374-RBL, Findings of Fact and Conclusions
24 of Law at ¶ 1–2, 11–12 (W.D. Wash. 07-cv-05374-RBL, Feb. 22, 2012).

25 ³⁰ *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245 (W.D. Wash. 2007), *vacated and remanded*,
586 F.3d 1109 (9th Cir. 2009).

26 ³¹ See *Stormans v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015); *Stormans v. Wiesman*, 136 S. Ct.
27 2433 (June 28, 2016) (J. Alito, dissenting) (stating that the case “is an ominous sign” because
28 “[i]f this is . . . how religious liberty claims will be treated in the years ahead, those who value
religious freedom have cause for great concern”).

³² *About Us*, TRINITY HEALTH, <http://www.trinity-health.org/about-us>.

³³ *Id.*

1 directly intended termination of pregnancy before viability or the directly intended destruction of
2 a viable fetus) is never permitted.”³⁴ The same directives permit Catholic hospitals to take steps
3 to save the life of the mother, even if such steps may unintentionally and indirectly result in harm
4 to her unborn baby.³⁵

5 The ACLU sued Trinity Health, claiming that these convictions present a threat to
6 women who might—for “health reasons”—need an abortion and might only have access to a
7 Trinity facility. The ACLU alleged that Trinity Health’s refusal to intentionally perform
8 abortions violated the Emergency Medical Treatment and Active Labor Act and the
9 Rehabilitation Act, and sought to compel Trinity Health to reject its Catholic beliefs by
10 performing abortions.³⁶ A federal district court dismissed the case for lack of standing, but
11 attacks on institutions like Trinity Health would likely continue unabated absent stronger
12 conscience protections, like the Rule provides. The Conscience Rule’s penalties for
13 noncompliance should prevent frivolous claims like the one against Trinity Health from
14 detracting from the saving work of these institutions going forward.

14 **D. The need for the Rule is widespread and increasing.**

15 These incidents are not isolated. Gallup and Pew polling consistently show that
16 somewhere between 38–53% of Americans believe abortion should be illegal in most or all
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19 ³⁴ See U.S. Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health*
20 *Care Services*, ¶ 45, available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-sixth-edition-2018.pdf>.

21 ³⁵ *Id.* at ¶ 47.

22 ³⁶ Amended Complaint, *ACLU v. Trinity Health Corporation*, No. 15-CV-12611(GAD-RSW)
23 (E.D. Mich. Oct. 1, 2015). Separately, the ACLU also sued Dignity Health—the nation’s fifth
24 largest health care provider—because one of its hospitals refused to perform a requested tubal
25 ligation on a patient following a C-section delivery and another hospital refused to perform a
26 hysterectomy on a biological woman who identifies as transgender. *Judge: California Hospital*
27 *Doesn’t Have To Do Tubal Ligation*, NBC NEWS (Jan. 14, 2016), www.nbcnews.com/news/us-news/fight-over-tubal-ligation-heads-court-california-n496516 (detailing one of ACLU’s suit
28 against Dignity Health and Mercy Medical Center); *Transgender patient sues Dignity Health for*
discrimination over hysterectomy denial, THE SACRAMENTO BEE (Apr. 20, 2017),
<https://www.sacbee.com/news/local/health-and-medicine/article145477264.html> (detailing the
other). In both cases, the procedure sought—elective sterilization on healthy organs—was not in
keeping with Catholic doctrine. *About Us*, DIGNITY HEALTH, www.dignityhealth.org/about-us.

1 circumstances.³⁷ These individuals do not want to facilitate something that they believe should
2 be outlawed. They may well agree with Amici that “[p]regnancy is not a disease, and the killing
3 of human beings in utero is not medical care.”³⁸

4 Other polling shows that 6 in 10 U.S. adults profess a belief in the Bible,³⁹ which states
5 that humans are created as one of two sexes: male or female.⁴⁰ These individuals are likely to
6 find it morally unacceptable to, for example, inject puberty blockers and cross-sex hormones into
7 adolescents as a way to “treat” gender dysphoria.⁴¹ In fact, a group of Christian health care
8 providers recently had to seek and obtain relief in federal court when a new regulation
9 “require[d] them to perform ... gender transitions ..., regardless of their contrary religious
10 beliefs or medical judgment.” *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 670 (N.D.
11 Tex. 2016). Those providers, like Amici and many health care professionals, “believe[] that a
12 person’s sex is ascertained biologically, and not by one’s beliefs, desires, or feelings,” and they
13 therefore “do[] not believe transition-related procedures are ever in the best interests of ...
14 patients.” *Id.* Indeed, the Hippocratic obligation “[t]o act only for the benefit of a patient”⁴²
15 precludes its oath takers from mutilating healthy organs, causing sterility, or otherwise assisting
16 in gender transitions, which have been shown to significantly increase suicide, suicide attempts,
17 and psychiatric hospitalization among patients.⁴³

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19 ³⁷ *Abortion*, GALLUP, <https://news.gallup.com/poll/1576/abortion.aspx>; *Views about Abortion by*
20 *State*, PEW RESEARCH CENTER, [https://www.pewforum.org/religious-landscape-](https://www.pewforum.org/religious-landscape-study/compare/views-about-abortion/by/state/)
21 [study/compare/views-about-abortion/by/state/](https://www.pewforum.org/religious-landscape-study/compare/views-about-abortion/by/state/).

22 ³⁸ AAPLOG Comm. Op. 1: Hippocratic Objection to Killing Human Beings in Medical Practice
23 at 8 (May 8, 2017), [https://aaplog.org/wp-content/uploads/2017/05/AAPLOG-CO-1.-Hippocratic-](https://aaplog.org/wp-content/uploads/2017/05/AAPLOG-CO-1.-Hippocratic-Objection-to-Killing-Human-Beings-in-Medical-Practice.pdf)
24 [Objection-to-Killing-Human-Beings-in-Medical-Practice.pdf](https://aaplog.org/wp-content/uploads/2017/05/AAPLOG-CO-1.-Hippocratic-Objection-to-Killing-Human-Beings-in-Medical-Practice.pdf).

25 ³⁹ *Research Releases in Faith & Christianity*, BARNA (Jul. 10, 2018),
26 <https://www.barna.com/research/state-of-the-bible-2018-seven-top-findings/>.

27 ⁴⁰ See Genesis 1:27, 5:2; Matthew 19:4; Mark 10:6.

28 ⁴¹ E.g., Christian Medical & Dental Ass’ns, *CMDA Position Statement on Transgender*
29 *Identification*, D.2. (“Hormones prescribed to a previously biologically healthy child for the
30 purpose of blocking puberty inhibit normal growth and fertility”),
31 <https://cmda.org/article/transgender-identification/>

32 ⁴² AAPLOG Comm. Op. 1, *supra* note 38, at 2.

33 ⁴³ See, e.g., Cecilia Dhejne, Paul Lichtenstein, et al., *Long-Term Follow-Up of Transsexual*
34 *Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden* (Feb. 22, 2011),
35 <https://doi.org/10.1371/journal.pone.0016885>.

1 With roughly 20 million people in the U.S. health care workforce,⁴⁴ there are necessarily
 2 millions of individuals who share pro-life and biblical views, and do not want to be forced into a
 3 decision between violating their convictions or keeping their jobs. They may conscientiously
 4 refuse to “participate in or perform the killing of their patients” through euthanasia, abortion, or
 5 assisted suicide.⁴⁵ After all, many nurses, doctors, midwives, and support staff go into health care
 6 because they want to *heal*.

7 Plaintiff Planned Parenthood’s claim that the laws underlying the Rule “are narrowly
 8 targeted and focus primarily on abortion, sterilization, and research,” PPFA Compl. ¶ 104,
 9 misses the key point that conscience rights are not limited to particular topics. It is also incorrect.
 10 *See supra* note 11. The State Plaintiffs’ assertion that existing laws “balance accommodation of
 11 employees’ religious or moral beliefs with employers’ obligations to patients, their business, and
 12 other employees,” States Compl. ¶ 112, misses the point that conscience rights should not give
 13 way to business interests.

14 The State Plaintiffs also object that the Rule expands current conscience protections to
 15 include “‘health care personnel,’ pharmacists, pharmacies, medical laboratories, and research
 16 facilities.” States Compl. ¶ 75. But conscience rights have never been limited to people holding
 17 certain job titles. *But see* States Compl. ¶ 77 (suggesting with disdain that “customer service
 18 representatives” and “data entry clerks” would have their “personal beliefs” protected by the
 19 Rule). Anyone working in the medical field may have conscientious objections to facilitating
 20 certain acts they believe are morally wrong. An individual’s moral beliefs are just as sacred
 21 regardless of whether they are a considered a “professional.”

22 The Rule assures the proper breath of legal protections, so that certain viewpoints or
 23 individuals are not left vulnerable to attacks on their constitutional rights.

24 **V. The Rule provides clear mechanisms for compliance and enforcement that are
 25 lacking in existing law.**

26 The Conscience Rule fills in gaps where other conscience-protecting laws are silent. Its
 27 compliance and enforcement mechanisms are critical to ensuring that conscience rights are

28 ⁴⁴ *Industries at a Glance—Health Care and Social Assistance*, BUREAU OF LABOR STATISTICS
<https://www.bls.gov/iag/tgs/iag62.htm#workforce>.

⁴⁵ AAPLOG Comm. Op. 1, *supra* note 38, at 1.

1 adequately protected, even where other laws purport to do so. While Plaintiffs' approach would
2 drive good-faith, skilled health care workers from the profession and enshrine barriers to entry,
3 the Rule has the opposite effect, keeping doors open for a wider range of individuals who are
4 willing to serve in the field of medicine. The Rule's "outreach, investigation, compliance,
5 technical assistance, and enforcement practices," Final Rule at p. 44, provide a multi-faceted
6 legal structure for medical practitioners.

7 The Rule's specific provisions are appropriate measures to guarantee effectiveness. It
8 contains protections like those in the Civil Rights Act, allowing increased oversight through
9 written assurances, notice to employees, and certificates of compliance. These voluntary
10 compliance mechanisms help to avoid unnecessary disputes and litigation. The Rule also
11 provides for outreach and education to ensure that conscience rights are known, understood, and
12 respected. And the Rule provides for investigations into alleged violations and vigorous
13 enforcement of the laws. These are the teeth that have long been needed to ensure that the crucial
14 bark of conscience laws is no longer ignored.

14 **Conclusion**

15 For these reasons and those submitted by Defendants, this Court should grant Defendants'
16 motion for summary judgment.

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18 Respectfully submitted this the 21st day of August, 2019.

19
20 By: *s/Denise M. Harle*

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25 **Pro hac vice admission pending*

26 *Attorneys for Amici Curiae American*
27 *Association of Pro-Life Obstetricians &*
28 *Gynecologists, American College of*
Pediatricians, Catholic Medical Association,
and National Catholic Bioethics Center

CERTIFICATE OF SERVICE

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I hereby certify that on August 21, 2019, I electronically filed the foregoing paper with the Clerk of Court using the ECF system which will send notification of such filing to all counsel of record.

s/Denise M. Harle
Denise M. Harle

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5 **Pro hac vice admission pending*

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of Pro-Life Obstetricians & Gynecologists,
7 American College of Pediatricians, Catholic Medical Association,
and National Catholic Bioethics Center
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11 **IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

12 STATE OF NEW YORK, et al.,
13 Plaintiffs,

14
15 v.

16 UNITED STATES DEPARTMENT OF
17 HEALTH AND HUMAN SERVICES, et al.,
18 Defendants.

Case Nos.:
19 Civ. 4676 (PAE)
19 Civ. 5433 (PAE)
19 Civ. 5435 (PAE)

**[PROPOSED ORDER] GRANTING
UNOPPOSED MOTION FOR LEAVE
TO FILE AMICI CURIAE BRIEF IN
SUPPORT OF DEFENDANTS**

The Honorable Paul A. Engelmayer
Date: October 18, 2019
Time: 9:30 a.m.

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1 On August 21, 2019, Alliance Defending Freedom filed a Motion for Leave to File an
2 *Amicus Curiae* brief on behalf of American Association of Pro-Life Obstetricians &
3 Gynecologists, American College of Pediatricians, Catholic Medical Association, and National
4 Catholic Bioethics Center in Support of Defendants’ Motion for Summary Judgment. Having
5 considered the papers and pleadings on file, the Court GRANTS the Motion and ORDERS that
6 the *amicus curiae* brief submitted by Alliance Defending Freedom be filed.

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9 **IT IS SO ORDERED**

10
11 Dated: _____, 2019

HONORABLE PAUL A. ENGELMAYER
JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK