UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT, et al.,	:	
Plaintiffs,	:	
-and-	:	
STATE OF NEW YORK; RICHARD F. DAINES, in his official capacity as the Health Commissioner of the State of New York, by and through ANDREW M. CUOMO, Attorney General of the State of New York,	:	CIVIL ACTION NO. 09-CV-54 (RNC)
[Proposed] Plaintiffs-Intervenors,	:	
v.	:	
UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; MICHAEL O. LEAVITT, in his official capacity as Secretary of Health and Human Services,	:	
Defendants.	:	January 16, 2009

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This nation's movement to secure legal access to contraception began in New York State almost a century with a nurse named Margaret Sanger, who began educating women about birth control in the early 20th century and opened the nation's first birth control clinic in Brooklyn, New York in 1916. The clinic was shut down nine days later by the police, who arrested and imprisoned Sanger. She continued her fight to ensure that women were informed about contraception and fought her conviction to the United States Supreme Court, where she lost. Sanger's advocacy for access to contraception continued, however, and in 1921 she founded what is now known as the Planned Parenthood Federation of America. Through her struggles and perseverance, this native New Yorker laid the groundwork for the Supreme Court's historic decisions recognizing the constitutional right to use contraception without impermissible interference from the government, rights that have been in place for at least the last forty-four years. See Griswold v. Connecticut, 381 U.S. 479 (1965) and Eisenstadt v. Baird, 405 U.S. 438 (1972).

2. However, on December 19, 2008, just weeks before the transfer of power to a new presidential administration, the United States Department of Health and Human Services ("HHS") promulgated a "midnight" regulation that threatens to undermine these fundamental rights.

3. The HHS regulation at issue purports to protect a broad group of health care providers, including hospitals, health insurers, pharmacies and individuals from "discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for, abortion." See 73 Fed. Reg. 78,098 (Dec. 19, 2008), 45 C.F.R. § 88.4(b)(1) [hereinafter, the "Regulation," publicly available at http://edocket.access.gpo.gov/2008/E8-30134.htm]. The

Regulation seeks to achieve these ends by authorizing HHS to terminate and/or compel the return of all HHS funds from states and local governments that violate its prohibition against such "discrimination." See 73 Fed. Reg. 78,074. For New York, the loss would total billions of dollars annually.

4. The Regulation, however, is a ruse and an assault on the rights and health of the nation's citizens.

5. Laws allowing doctors to refuse to perform abortions have been on the books for years. Many states, including New York, have existing laws that carefully balance the healthcare rights, including more broadly the health and privacy rights of all citizens, with the right of healthcare providers to abstain from performing certain medical procedures, including abortion, they find objectionable for moral, ethical, religious or other reasons.

6. Under the guise of implementing federal laws that allow doctors to refuse to perform abortions, the Regulation, as written, could permit anyone working or volunteering with a health care entity to refuse to provide services other than abortion, including refusing even to advise rape victims of their legal right to emergency contraception services to protect their health in a timely manner or to stabilize women with ectopic pregnancies of all of their medical options to safeguard their health.

7. This is because the Regulation fails to define the term "abortion" and leaves its scope so vague and ambiguous as to permit it to encompass virtually all forms of contraception, including emergency contraception. Despite comments explicitly seeking clarification of the scope of this definition and expressing concern that the ambiguity of scope would have a chilling effect on state enforcement of validly passed laws protecting access to contraception and family planning services, HHS declined to clarify this definition. Through its intentional vagueness,

HHS is allowing and empowering individuals to employ their own definition of abortion on an ad hoc basis, without providing advance notice to the State, their employer or their patients.

8. In addition to this chilling effect, the Regulation will also directly impede the enforcement of contraception laws, because HHS has also stated that the Regulation permits an individual health care provider to refuse to participate in virtually any medical procedure reasonably connected to an "abortion" without even informing a patient or employer that he or she is doing so. See 73 Fed. Reg. 78,083. HHS has also concluded that the Regulation protects individuals not only from performing certain services, but also from providing patients with referrals for such services. See 73 Fed. Reg. 78,084. Thus, under the Regulation, a female victim of sexual assault seeking treatment at a licensed emergency health care facility may never learn that an individual physician has deprived her of her rights to receive factual and objective information about, and access to, emergency contraception under applicable state laws. In addition to the obvious consequences such a rule would have for female sexual assault victims, under such circumstances neither the Plaintiffs-Intervenors nor a licensed healthcare facility will even know that such a facility has violated emergency contraception laws.

9. Plaintiffs-Intervenors seek declaratory and injunctive relief preventing HHS from circumventing women's fundamental right to reproductive freedom and illegally usurping New York's sovereign powers to promote the general health and welfare of its citizens. HHS has improperly sought to extend the scope of the statutes these regulations purport to implement and to achieve certain policy objectives to inhibit access to contraception through the rulemaking process that it could not achieve through Congressional action. By failing to define abortion and essentially delegating that crucial function to individuals and health care entities, HHS has clearly exceeded the scope of its statutory authority and undermined New York's ability to

enforce its laws, including those requiring healthcare entities to provide information about, and access to, contraception. Because the Regulation violates the Administrative Procedures Act, 5 U.S.C. § 706 ("APA") and the Spending Clause of the United States Constitution, Article I, section 8, it should be declared unconstitutional and unlawful and the Secretary should be preliminarily and permanently enjoined from enforcing it.

JURISDICTION AND VENUE

10. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 because this case involves a civil action arising under the Constitution of the United States, specifically Article I, section 8, clause 1 (the Spending Clause), and pursuant to 5 U.S.C. § 703. Jurisdiction is also proper under section 2201 of title 28 of the United States Code because Plaintiffs-Intervenors seek a declaration of the rights of the parties to this action as set forth more fully below.

11. The Court may grant declaratory relief, injunctive relief, and any additional relief available, pursuant to 28 U.S.C. §§ 2201 and 2202, and 5 U.S.C. §§ 705 and 706. HHS's promulgation of a final rule on December 19, 2008 is a final agency action within the meaning of the APA, 5 U.S.C. §§ 702, 704 and the Regulations are therefore judicially reviewable within the meaning of that statute. See id. § 706. Each of the Plaintiffs-Intervenors is a "person" within the meaning of 5 U.S.C. § 551(2), and is authorized to bring suit under the APA to challenge unlawful agency action. See 5 U.S.C. § 702.

12. Pursuant to 28 U.S.C. § 1391(e)(1)&(3), venue is proper in this district because this is a civil action brought against an agency of the United States and officers and employees of the United States acting in their official capacities under color of legal authority, no specific real property is involved in this action and the State of New York, as well as women residing in the

State of New York, will be adversely affected by the Regulation. Further, common questions of law and fact exist with the existing action.

PARTIES

13. Plaintiff State of New York is a sovereign state in the United States of America. New York is aggrieved by the actions of the Defendants and has standing to bring this action because of the injury to its sovereignty caused by the Regulation. Each year, the State of New York receives billions of dollars in federal funds from HHS. If New York fails to comply with the Regulation, it would be subject to termination of HHS funding and return of HHS funds paid out in violation of health care conscience protection provisions under 45 C.F.R. Parts 74, 92, and 96, as applicable.

14. The sovereign interests of New York are further aggrieved because the Regulation attempts to interfere with New York's exercise of its police powers. Specifically, the Regulation could deter and impede New York from enforcing its own laws regulating the delivery of health care and the practice of medicine regarding contraception.

15. Plaintiff Richard F. Daines is the New York State Health Commissioner. The Health Commissioner is charged with enforcing the public health law, as well protecting the health and life of the people of the state. See N.Y. Pub. Health Law § 206. He is aggrieved by the actions of the Defendants because the Regulation empowers individuals to refuse to perform services or make referrals for emergency contraception without informing anyone, including their patients or employers. As a result, the Regulation will interfere with the Health Commissioner's ability to: (a) provide complete and accurate information, referral and assistance to individuals about health services, including information about, and access to, emergency contraception; (b) pursue administrative remedies on behalf of New Yorkers; and (c) monitor the

implementation of state laws, regulations and policies relating to health, such as N.Y. Pub. Health Law § 2805-p. The Health Commissioner is also aggrieved by the Regulation because he is authorized under New York law to apply for and accept federal funds and grants made available for public health purposes, including HHS funds. See N.Y. Pub. Health Law §§ 201(1)(p), 206(1)(1).

16. The United States of America is named as a defendant in this action pursuant to section 702 of title 5 of the United States Code.

17. Defendant Michael O. Leavitt, Secretary of Health and Human Services, is named in his official capacity as the Secretary of the Department of Health and Human Services, pursuant to section 702 of title 5 of the United States Code. Defendant Department of Health and Human Services is an executive department of the United States of America, pursuant to section 101 of title 5 of the United States Code and a federal agency within the meaning of section 2671 of title 28 of the United States Code. As such, it engages in agency action, within the meaning of section 702 of title 5 of the United States Code and is named as a defendant in this action pursuant to section 702 of title 5 of the United States Code.

BACKGROUND FACTS

New York Laws and Regulations

18. New York has enacted several important laws and regulations that balance the health care rights and needs of its residents with the rights of healthcare providers to opt out of activities that violate their moral or religious beliefs. The Regulation could effectively undermine New York's legislative scheme and strip its citizens of rights and protections they currently enjoy.

19. New York law provides broad protections for individuals who are unwilling to perform certain job duties that violate their conscience or religious beliefs, providing that "[i]t shall be an unlawful discriminatory practice for any employer, or any employee or agent thereof, to impose upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require such person to violate or forego a sincerely held practice or his or her religion. . . ." N.Y. Exec. Law § 296(10)(a) (Consol. 2008). New York courts have recognized that this provision applies to objections based both on employees' moral and religious beliefs and practices. See Larson v. Albany Med. Ctr., 676 N.Y.S.2d 293, 296 (App. Div. 1998).

20. Moreover, New York law specifically protects the conscience rights of medical providers, providing that "[w]hen the performing of an abortion on a human being or assisting thereat is contrary to the conscience or religious beliefs of any person, [that person] may refuse to perform or assist in such abortion by filing a prior written refusal setting forth the reasons therefore with the appropriate and responsible hospital, person, firm, corporation or association, and no such hospital, person, firm, corporation or association shall discriminate against the person so refusing to act." N.Y. Civ. Rights Law § 79-i (Consol. 2008).

21. Thus, while New York law already protects against discrimination based on conscience, the Regulation could eliminate the significant state requirement for a prior written declaration of conscience, rendering it impossible for employers to make contingency staffing plans to ensure that health services are provided in accordance with the law and upsetting New York's careful balance between the conscience of providers and patients.

22. New York also has laws addressing with the right of access to contraception, including emergency contraception, that could be undermined by the Regulation. The Women's Health and Wellness Act (WHWA), one of the first contraceptive equity statutes in the country, requires employers who offer insurance coverage for prescription drugs to offer coverage for contraception. See N.Y. Ins. Law § 3221(1)(16) (Consol. 2008). The New York Court of Appeals has upheld the statute against a constitutional challenge alleging that it unreasonably interfered with certain institutions' religious exercise. See Catholic Charities of the Diocese of Albany v. Serio, 7 N.Y.3d 510, 518 (2006), cert. denied, Catholic Charities v. Dinallo, 128 S. Ct. 97 (2007). The Regulation could effectively interfere with New York's well-established public policy of promoting equality of prescription drug coverage and broad access to legal contraceptive services.

23. New York law also protects the rights of rape survivors by ensuring that victims receive accurate information about emergency contraception and its availability, use, and efficacy. See N.Y. Pub. Health Law § 2805-p. The law requires that a hospital providing emergency treatment to a rape survivor furnish her with this information regarding her rights and health care options and further requires that the hospital provide emergency contraception to the victim upon her request. The Regulation could render this statute unenforceable and render New York unable to adequately protect the rights of, and provide adequate care to, sexual assault survivors.

24. If New York were to remain steadfast in its enforcement of these statutes in furtherance of its public policy and the well-being of its citizens, it could face a catastrophic loss of federal funding were this enforcement deemed unlawful under the Regulation.

The Federal Regulation

25. On December 19, 2008, HHS took final agency action when it caused the Regulation to be published as a final rule in the Federal Register. In promulgating the Regulation, HHS purportedly sought to implement and enforce, pursuant to 5 U.S.C. § 301, three separate federal laws passed by Congress pursuant to its authority under the Spending Clause: the "Church Amendments," 42 U.S.C. § 300a-7; the "Public Health Service ('PHS') Act," 42 U.S.C. § 238n; and the "Weldon Amendment," Consolidated Appropriations Act, 2008, Public Law 110-161, Div. G, § 508(d), 121 Stat. 1844, 2209. See 73 Fed. Reg. 78,072-78,074; 78,087.

26. Section 88.3(b) of the Regulation provides that "[a]ny State or local government that receives federal funds appropriated through the appropriations act for the Department of Health and Human Services is required to comply with §§ 88.4(b)(1) and 88.5 of this part." 45 C.F.R. § 88.3(b). Because the State of New York receives such federal funds, Section 88.3(b) requires it to comply with Section 88.4(b)(1) of the Regulation.

27. Section 88.4(b)(1) of the Regulation, in turn, provides that "[a]ny entity to whom this paragraph (b)(1) applies shall not subject any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for, abortion." 45 C.F.R. § 88.4(b)(1) (Emphasis added).

28. The Regulation defines a "Health Care Entity" as including "an individual physician or other health care professional, health care personnel, a participant in a program of training in the health professions, an applicant for training or study in the health professions, a post graduate physician training program, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, laboratory or any other kind of health care

organization or facility. *It may also include components of State or local governments.*" 45 C.F.R. § 88.2. (Emphasis added).

29. Thus, by its terms, the Regulation purports to prohibit states from subjecting any "hospital," "health insurance plan" or "other kind of health care organization or facility" to "discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for, abortion." The Regulation further provides that failure by HHS recipients to comply with the Regulation will result in termination of HHS funding and compel the return of HHS funds paid out in violation of health care conscience protection provisions under 45 C.F.R. Parts 74, 92, and 96, as applicable. See 73 Fed. Reg. 78,074. For the State New York, the loss would be in the billions annually.

30. Significantly, the Regulation does not define "abortion." Section 88.1 of the Regulation, however, provides that its provisions "are to be interpreted and implemented broadly to effectuate their protective purposes." 45 C.F.R. § 88.1. Moreover, during the rulemaking process, some comments noted that the Proposed Rule failed to define the term "abortion" and that, as a result, it was unclear whether the Proposed Rule would prohibit recipients of HHS funds from taking appropriate administrative or actions to ensure the availability of contraception. Indeed, comments submitted to HHS specifically cited emergency contraception laws as an example of the kinds of laws that required clarification from HHS.

31. HHS expressly acknowledged receiving comments seeking clarification of "whether certain contraceptive methods or services that have the potential to terminate a fertilized egg after conception but before implantation" constitute as "abortion," see 73 Fed. Reg. 78,077, but "decline[d] to add a definition of abortion to the rule." Id. While also acknowledging that the meaning of the term "abortion" is "highly controversial and strongly

debated," see id., HHS nevertheless asserted, without explanation, that it can enforce the Regulation without defining "abortion." Id.

32. HHS acknowledged that "several comments expressed concern that the proposed rule would limit access to emergency procedures, such as emergency contraception for rape victims, surgery for ectopic pregnancies, and other services." See 73 Fed. Reg. 78,080. However, HHS again refused to clarify whether the Proposed Rule applied to contraception. Id. at 78,080-78,081.

33. HHS also noted that "[s]ome comments expressed concern that this rule could interfere with existing state laws that regulate contraceptive coverage mandates in insurance policies, access to emergency contraception, and access to birth control at pharmacies. Commenters expressed concerned that this regulation would impact a state's ability to enforce these laws and upset the balance that state and federal laws already strike between the religious freedom of healthcare providers and a patient's need to access health care services." 73 Fed. Reg. 78,088. In response, HHS specifically noted that it "is aware that some States may have laws that, if enforced, depending on the factual circumstances, might violate [the Regulation]. . ." id., but again refused to clarify the Proposed Rule.

34. Other HHS responses to comments suggest that the Regulation could severely impair New York's ability to enforce its contraception laws. In response to comments seeking the adoption of guidelines for the communication of a provider's individual conscience objections to employers and patients, as is required under New York law, HHS refused, dubiously citing the "vast array of circumstances and settings in which communications regarding conscience are likely to take place." 73 Fed. Reg. 78,083. In response to other comments arguing that providers who object to certain services should be required to provide a

patient with a referral for that service, HHS asserted without support that it could not enforce such a referral requirement without violating certain provisions of the Weldon Amendment and PHS Act § 245. See 73 Fed. Reg. 78,084.

35. The HHS responses strongly suggest that individuals will be able to refuse to perform virtually any medical procedure they find personally objectionable, including the provision of information about, or the actual administration of, contraception, without even informing their employers or patients that they are exercising their supposed rights under the Regulation. A female victim of sexual assault seeking treatment at a licensed New York emergency health care facility may, therefore, never learn that an individual physician has deprived her of her right under applicable state laws to receive factual and objective information about, and access to, emergency contraception. In addition, a licensed healthcare facility seeking to comply with applicable state laws may be unable to detect instances in which an individual physician is causing the facility to violate New York law. Thus, even if the Plaintiffs-Intervenors elected to enforce New York's contraception laws, and thereby risk losing billions of dollars in federal funding, the Regulation would severely undermine their ability to do so.

36. The State of New York expects to receive billions of dollars in federal funding for the fiscal years 2009-2011 under the HHS appropriation act. These funds could be withheld if HHS officials deem that New York has subjected any individual or institutional health care entity to "discrimination" on the basis that the health care entity does not provide, pay for, provide coverage for, or refer for, abortion by enforcing its validly enacted public health laws. See 45 C.F.R. § 88.4(b)(1); 73 Fed. Reg. 78,098.

37. As a result of the Regulation, before enforcing its emergency contraception law, New York must consider the threat of massive cuts in federal funding and the destruction of vital

public health and safety programs, creating a chilling effect on enforcement of these contraception laws and potentially encouraging certain licensed health care entities to violate applicable New York laws enacted to protect the fundamental constitutional right of women, including female sexual assault victims, to use contraception.

FIRST COUNT

VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT

(Final Agency Action Exceeding Congressional Delegation of Authority)

38. The allegations of paragraphs 1-37 are incorporated into this count as though fully set forth.

39. In promulgating the Regulation, HHS purportedly acted pursuant to the "Church Amendments," 42 U.S.C. § 300a-7; the "Public Health Service ('PHS') Act," 42 U.S.C. § 238n; and the "Weldon Amendment," Consolidated Appropriations Act, 2008, Public Law 110-161, Div. G, § 508(d), 121 Stat. 1844, 2209. See 73 Fed. Reg. 78,072-78,074; 78,087.

40. None of these laws authorizes HHS to withhold federal funds from a State that subjects "any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for," see 45 C.F.R. § 88.4(b)(1), anything other than "abortion." Id.

41. Nothing in the language of these laws or their legislative history authorizes HHS to withdraw or withhold federal funds from States because they mandate the availability of contraception, including emergency contraception. These statutes' legislative histories do not support such an interpretation and, in fact, contravene the expansive interpretation of "abortion" this Regulation now authorizes.

42. Therefore, HHS has exceeded its statutory authority by threatening to withhold federal HHS funds from states, including New York, for subjecting health care entities to "discrimination," based on those entities' refusal to provide, pay for, provide coverage of, or refer for contraception, as opposed to "abortions."

43. HHS's promulgation of the Regulation was, therefore, arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of HHS's statutory authority and jurisdiction, and contrary to the Plaintiffs-Intervenors' constitutional rights, powers, privileges and immunities, all in violation of the APA. See 5 U.S.C. § 706(2)(A),(B)&(C).

44. The State of New York will be irreparably harmed if enforcement of the Regulation is not enjoined because it will be deterred from exercising its sovereign police powers to enforce its laws regulating the use and availability of contraception to its citizens. Specifically, it will be deterred from enforcing its laws through the loss of billions of dollars in HHS funds otherwise appropriated for programs unrelated to abortion or this Regulation. In addition, New York's enforcement efforts will be directly undermined because HHS has stated that the Regulation seemingly empowers individuals to refuse to provide information about, access to, and referrals for, contraception without informing their patients or employers that they are so refusing.

SECOND COUNT

VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT

(Failure to Adequately Respond to Significant Public Comments)

45. The allegations of Paragraphs 1-44 are incorporated into this count as though fully set forth.

46. It is well settled that the APA requires agencies promulgating regulations to address with precision the major comments it receives from the public during the formal rulemaking process. See 5 U.S.C. § 553(c).

47. In publishing the final Regulation, HHS failed to adequately address comments requesting a clear definition of the term "abortion" or, at a minimum, to clarify that contraception did not fall within the definition. This is particularly problematic in the circumstances of this case because, prior to the time the Proposed Rule was published, a Draft Regulation provided a definition of "abortion" that expressly included contraception.

48. Rather than adequately addressing the comments, HHS's responses caused greater uncertainty as to whether the Regulation purports to prohibit states like New York from enforcing their laws and regulations governing contraception.

49. As set forth more fully above, HHS: (1) expressly acknowledged receiving comments seeking clarification of "whether certain contraceptive methods or services that have the potential to terminate a fertilized egg after conception but before implantation" constitute "abortion," see 73 Fed. Reg. 78,077, but "decline[d] to add a definition of abortion to the rule." Id.; (2) noted that "several comments expressed concern that the proposed rule would limit access to emergency procedures, such as emergency contraception for rape victims, surgery for ectopic pregnancies, and other services," see 73 Fed. Reg. 78,080, but again refused to clarify its scope, see id. at 78,080-78,081; and (3) not only refused to clarify whether the Proposed Rule covered contraception, but specifically noted that it was "aware that some States may have laws that, if enforced, depending on the factual circumstances, might violate these federally protected rights. . . ." Id. at 78,088.

50. Therefore, HHS's promulgation of the Regulation was arbitrary, capricious, an abuse of discretion, not in accordance with law, and contrary to the Plaintiffs-Intervenors' constitutional rights, powers, privileges and immunities, all in violation of the APA. See 5 U.S.C. §§ 553 and 706(2)(A)(B)&(D).

51. The State of New York will be irreparably harmed if enforcement of the Regulation is not enjoined because it will be deterred from exercising its sovereign police power to enforce its laws regulating the use by and availability of contraception to its citizens by the threat of losing billions of dollars in HHS funds otherwise appropriated to them for programs unrelated to abortion or this Regulation. In addition, New York's enforcement efforts could be directly affected because HHS has stated that the Regulation empowers individuals to refuse to provide information about, access to, and referrals for, contraception without informing their patients or employers that they are so refusing.

THIRD COUNT

VIOLATION OF THE SPENDING CLAUSE

(Vagueness)

52. The allegations of paragraphs 1-37 and 46-51 above are incorporated into this count as though fully set forth.

53. When "Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" South Dakota v. Dole, 483 U.S. 203, 207 (1987).

54. To the extent that the Church Amendments, the PHS Act and/or the Weldon Amendment authorized HHS to promulgate this Regulation, those laws, as interpreted and implemented by the Regulation, violate the Spending Clause because the Regulation is

impermissibly vague and does not provide New York with adequate notice of what action or conduct, if engaged in by the State, will result in the withholding of federal funds. Consequently, New York cannot make a knowing choice about whether to comply with the Regulation or risk foregoing federal funding.

55. Because New York is unable to determine with any reasonable level of certainty whether enforcement of its laws would constitute a violation of the Regulation's conditions, it cannot make a knowing choice about whether to forego enforcement. Additionally, because of the potential loss of HHS funds to the State and the uncertainty about what is meant by "abortion" or "discrimination," the Regulation creates a severe chilling effect on State officials' willingness to take action against health care entities that refuse to comply with these state laws.

56. New York will be irreparably harmed if enforcement of the Regulation is not enjoined because it will be deterred from exercising its sovereign police power to enforce its laws regulating the use and availability of contraception to its citizens by the threat of losing billions of dollars in HHS funds otherwise appropriated to them for programs unrelated to abortion or this Regulation. In addition, New York's enforcement efforts could be directly undermined because HHS has stated that the Regulation empowers individuals to refuse to provide information about, access to, and referrals for, contraception without informing their patients or employers that they are so refusing.

FOURTH COUNT

VIOLATION OF THE SPENDING CLAUSE

(Unrelatedness)

57. The allegations of paragraphs 1-56 are incorporated into this count as though fully set forth.

58. To be valid under the Spending Clause, federal funding conditions must be rationally related to the federal interest in the particular program that receives federal funds.

59. State programs receive billions of dollars in funding under the HHS appropriations act, and there is no rational relationship between the Regulation and the federal interest in most of these programs.

60. To the extent that the Regulation effectively prevents the State of New York from enforcing laws and regulations protecting the reproductive rights of women, including requirements that victims of sexual assault receive information about, and access to, emergency contraception, the Regulation is even further removed from the goals and federal interests in most of these programs.

61. Therefore, to the extent that the Church Amendments, the PHS Act and/or the Weldon Amendment authorized HHS to promulgate the Regulation as it did, those laws, as interpreted and implemented by the Regulation, violate the Spending Clause because the restrictions they impose are not rationally related to the affected projects or programs.

62. New York will be irreparably harmed if enforcement of the Regulation is not enjoined because it will be deterred from exercising its sovereign police power to enforce its laws regulating the use and availability of contraception to its citizens by the threat of losing billions of dollars in HHS funds otherwise appropriated to it for programs unrelated to abortion or this Regulation. In addition, New York's enforcement efforts could be directly undermined because HHS has stated that the Regulation empowers individuals to refuse to provide information about, access to, and referrals for, contraception without informing their patients or employers that they are so refusing.

FIFTH COUNT

VIOLATION OF THE SPENDING CLAUSE

(Coercion)

63. The allegations of paragraphs 1-62 of the fourth count are incorporated into this count as though fully set forth.

64. Under the Spending Clause, Congress may not condition the receipt of federal funds in such a way as to leave the States with no practical alternative but to comply with the federal restrictions. Thus, Congress may not offer financial inducements that are so coercive as to pass from pressure to compulsion.

65. To the extent that the Church Amendments, the PHS Act and/or the Weldon Amendment authorized HHS to promulgate the Regulation as it did, those laws, as interpreted and implemented by the Regulation, violate the Spending Clause because they force Plaintiffs-Intervenors to either forego enforcement of state laws or to enforce such laws at the risk of causing the State of New York to lose billions of dollars in federal funds during one of the worst ever fiscal crises. Moreover, the Regulation forces the State of New York to surrender its sovereign police powers. The Regulation imposes this risk on the State of New York even though the regulation of health care and the practice of medicine are generally reserved to the States in the sound exercise of their police powers. The Regulation's funding restriction is so broad and severe as to leave the Plaintiffs-Intervenors with no choice but to accede to HHS's dictates and surrender to the federal government the exercise of New York's police powers in this important area of public health.

66. The Regulation's coercive restriction is beyond the scope of Congress's or HHS's enumerated powers. Because no provision of the United States Constitution vests Congress or

HHS with the power to directly enact the restrictions in the Regulation as law, the Regulation violates the Spending Clause of the United States Constitution.

67. The States will be irreparably harmed if enforcement of the Regulation is not enjoined because they will be deterred from exercising their sovereign police power to enforce their laws, described above, regulating the use and availability of contraception to its citizens. Specifically, the States will be deterred from enforcing their laws through the loss of billions of dollars in HHS funds otherwise appropriated to them for programs unrelated to abortion or this Regulation. In addition, the States' enforcement efforts will be directly undermined because HHS has stated that the Regulation empowers individuals to refuse to provide information about, access to, and referrals for, contraception without informing their patients or employers that they are so refusing.

SIXTH COUNT

DECLARATORY RELIEF (IN THE ALTERNATIVE)

68. The allegations of paragraphs 1-67 of the sixth count are incorporated into this count as though fully set forth.

69. An actual controversy exists in that the State of New York asserts that if the enforcement of facially neutral laws designed to protect the health and welfare of its residents were deemed to constitute a violation of the Regulation, the Regulation would be unconstitutional and a violation of the APA. The Regulation does not explicitly define "abortion," but was promulgated in such a way that it could apply to certain forms of contraception. Because the Regulation expressly authorized HHS to withhold federal funds from states for violations of the Regulation, New York faces the imminent threat of losing federal HHS funds under the Regulation if it enforces these laws.

70. A determination of the meaning of the Regulation is necessary so that the Plaintiffs-Intervenors will know what actions state officials may undertake without subjecting themselves and their state agencies to the potential loss of billions of dollars in HHS funding. A declaration of the rights of the parties and the lawfulness of the Regulation is appropriate pursuant to 28 U.S.C. § 2201.

71. Plaintiffs-Intervenors are entitled to a declaration that the Regulation does not empower HHS to withhold HHS funds from state agencies merely because the Plaintiffs-Intervenors enforce facially-neutral laws designed to protect the health and welfare of New York residents, or any other law requiring health care entities to provide information about, and access to, contraception.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs-Intervenors State of New York and Richard F. Daines, in his official capacity as the Health Commissioner of the State of New York, pray for judgment against each of the Defendants as follows:

1. As to the first count, for a declaration that the Regulation is arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of HHS's statutory authority and jurisdiction, and contrary to the Plaintiffs-Intervenors' constitutional rights, powers, privileges and immunities, all in violation of the APA, see 5 U.S.C. § 706(2)(A),(B)&(C), because HHS exceeded its Congressional delegation of authority by not clearly excluding contraception from the definition of "abortion" in the Regulation and permitting individuals to determine the definition of abortion on an ad hoc basis;

2. As to the second count, for a declaration that the Regulation is arbitrary, capricious, an abuse of discretion, not in accordance with law, and contrary to the Plaintiffs-

Intervenors' constitutional rights, powers, privileges and immunities, all in violation of the Administrative Procedures Act, see 5 U.S.C. § 706(2)(A)&(B), because HHS failed to respond adequately to the public comments it received seeking clarification of the meaning of the term "abortion," including whether the Regulation purports to prohibit states from enforcing laws governing contraception, such as N.Y. Pub. Health Law § 2805-p and N.Y. Ins. L. § 3221(1)(16);

3. As to the third count, for a declaration that the Regulation is unconstitutional and violates the Spending Clause because it is so vague as to fail to give the State of New York adequate notice as to what conduct it purports to prohibit. This ambiguity prevents the State of New York and its constitutional officers and other officials charged with enforcement of state laws from making a knowing choice whether to comply with the Regulation's restrictions or to forego federal funding;

4. As to the fourth count, for a declaration that the Regulation is unconstitutional and violates the Spending Clause because it is not rationally related to the federal purpose for which the funds in the HHS appropriations act are appropriated;

5. As to the fifth count for a declaration that the Regulation is unconstitutional and violates the Spending Clause because the scope of the potential loss of federal funds is so great as to leave states with no choice but to comply with federal restrictions; as such, the Regulation is unconstitutionally coercive;

6. As to all counts for preliminary and permanent injunctive relief enjoining the Defendants, and any persons acting on their behalf, from enforcing the provisions of the Regulation or from withholding federal funds appropriated under the HHS appropriations act from any state entity because of any alleged violations of the Regulation arising out of New

York's enforcement of its contraception laws, including N.Y. Pub. Health Law § 2805-p and N.Y. Ins. L. § 3221(1)(16);

7. In the alternative, as to the fifth count, for a declaration that the enforcement of facially-neutral laws designed to protect the health and welfare of the residents of the State of New York, including but not limited to N.Y. Pub. Health Law § 2805-p and N.Y. Ins. L. § 3221(1)(16), does not constitute a violation of the Regulation;

8. For costs of this suit; and

9. For such other and further relief as the Court deems just and proper, including remand to HHS for further proceedings.

Dated: New York, New York
January 16, 2009

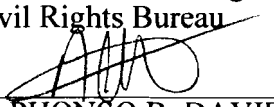
Respectfully submitted,

Plaintiffs-Intervenors
STATE OF NEW YORK;
RICHARD F. DAINES, in his official capacity as the Health Commissioner of the State of New York, by and through

ANDREW CUOMO
NEW YORK STATE ATTORNEY GENERAL

By:

SPENCER FREEDMAN
Counsel for Civil Rights
Civil Rights Bureau



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