IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION, on behalf of its members, and AMERICAN CIVIL LIBERTIES UNION of MICHIGAN, on behalf of its members, Plaintiffs, vs. TRINITY HEALTH CORPORATION, an Indiana corporation, and TRINITY HEALTH – MICHIGAN, a Michigan corporation, Defendants, and CATHOLIC MEDICAL ASSOCIATION, on behalf of its members CHRISTIAN MEDICAL AND DENTAL ASSOCIATION, behalf of its members, AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS, on behalf of its members, and CONCERNED WOMEN FOR AMERICA, on behalf of its members, Proposed Defendant-Intervenors.	Hon. Gershwin A. Drain Case No. 15-cv-12611 PROPOSED INTERVENORS' PROPOSED MOTION TO DISMISS

COME NOW Proposed Defendant-Intervenors CATHOLIC MEDICAL ASSOCIATION ("Catholic Medical"), CHRISTIAN MEDICAL AND DENTAL ASSOCIATION ("Christian Medical"), AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS ("AAPLOG"), and CONCERNED WOMEN FOR AMERICA ("CWA") (collectively, hereinafter, the "Intervenors"), pursuant to Fed. R. Civ. P. 12(b)(1) & (b)(6) and Loc. R. Civ. P. 7.1 of this Court, and hereby move to dismiss Defendants' amended complaint in the above-captioned case, because the Court lacks subject matter jurisdiction over Plaintiffs' claims and Plaintiffs fail to state a claim upon which relief can be granted. In support of this motion, Trinity relies on the accompanying brief.

Pursuant to Local Rule LR 7.1, the Intervenors' counsel sought concurrence of Plaintiffs' counsel in the relief requested in this motion on December 10, 2015. Plaintiffs' counsel declined to consent to such relief.

Therefore, and for the reasons stated in the accompanying brief, the Intervenors respectfully request dismissal of plaintiffs' amended complaint.

Respectfully submitted this 16th day of December 2015,

Counsel for PROPOSED DEFENDANT-INTERVENORS: CATHOLIC MEDICAL ASSOCIATION, CHRISTIAN MEDICAL AND DENTAL ASSOCIATION, AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS and CONCERNED WOMEN FOR AMERICA.

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IN THE UNITED STATES DISTRICT COURT
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AMERICAN CIVIL LIBERTIES UNION, on behalf of its members, and AMERICAN CIVIL LIBERTIES UNION of MICHIGAN, on behalf of its members, Plaintiffs, vs. TRINITY HEALTH CORPORATION, an Indiana corporation, and TRINITY HEALTH – MICHIGAN, a Michigan corporation, Defendants, and CATHOLIC MEDICAL ASSOCIATION, on behalf of its members, CHRISTIAN MEDICAL and DENTAL ASSOCIATION, on behalf of its members, AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS, on behalf of its members, and CONCERNED WOMEN FOR AMERICA, on behalf of its members, Proposed Defendant-Intervenors.	Hon. Gershwin A. Drain Case No. 15-cv-12611 BRIEF IN SUPPORT OF PROPOSED INTERVENORS' PROPOSED MOTION TO DISMISS

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COME NOW Proposed Defendant-Intervenors the Catholic Medical Association ("Catholic Medical"), Christian Medical and Dental Association ("Christian Medical"), American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG"), and Concerned Women for America ("CWA") (collectively, hereinafter the "Intervenors"), and submit this Brief in Support of their Motion to Dismiss Plaintiffs' amended complaint in the above-captioned case.

CONCISE STATEMENT OF THE ISSUE PRESENTED

Do Plaintiffs have sufficiently concrete standing when they merely speculate about their members' future possible desire to require Defendant hospitals to perform abortions for them, or the need for such abortions when no details can be known about their hypothetical circumstances?

Does EMTALA or the Rehabilitation Act require Defendant hospitals or any health care provider to perform abortions when EMTALA explicitly requires protection of the unborn child, other federal laws explicitly ban requiring health providers to perform abortions, and the federal Religious Freedom Restoration Act explicitly requires those statutes to satisfy the compelling interest test in particular circumstances of a religious objection?

CONTROLLING OR MOST APPROPRIATE AUTHORITY FOR RELIEF SOUGHT

From the comprehensive listing of cases cited in this brief and included in the Table of Authorities, the most directly applicable authorities are as follows:

Clapper v. Amnesty International, USA, 133 S. Ct. 1138 (2013)

42 U.S.C. § 238n ("Coats-Snowe Amendment")(1996)

42 U.S.C. § 1395dd(c)(1)(A)(ii) & (c)(2)(A)

INTRODUCTION

The Plaintiffs present purely speculative facts to support specious interpretations of federal statutes to force health providers to perform abortions. They hypothesize that perhaps in the future one of their members might get pregnant, need an abortion rather than other stabilizing care, and only be able to obtain it from one of Defendants' hospitals. This fails to establish either constitutional or prudential standing under Article III of the United States Constitution, and therefore the Court lacks subject matter jurisdiction.

Even if Plaintiffs had standing, the federal laws underlying their claims do not and cannot require health providers to perform abortions. No language in EMTALA, 42 U.S.C. § 1395dd, or the Rehabilitation Act, 29 U.S.C. § 794, says abortions must be performed. On the contrary, EMTALA insists that the "unborn child" be stabilized. Other federal laws also prevent interpreting those statutes as requiring abortions, such as 42 U.S.C. § 238n. The Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 200bb-1, et seq., likewise restricts (mis)interpreting these laws to force a Catholic hospital to perform an abortion against its beliefs.

The Intervenors have an immense stake in dismissal of the complaint. If the law is twisted to require performing abortions, it will negate rights guaranteed under federal statute so that health care providers can practice medicine that does not kill and patients can choose a doctor that shares their life-affirming values.

ARGUMENT

I. The Claims Are Speculative, Lacking Subject Matter Jurisdiction.

As Defendants point out in their motion to dismiss, Plaintiffs' claims rest entirely on layers of speculation and hypothesis about future activity. Such assertions fail to establish injury in fact, causation, or redressability under the case and controversy requirement of Article III of the Constitution. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Additional legal authorities further demonstrate the Court's lack of subject matter jurisdiction over Plaintiffs' claims. In *Kardules v. City of Columbus*, 95 F.3d 1335, 1349 (6th Cir. 1996), the Sixth Circuit held that no injury-in-fact existed where the plaintiff asserted a "highly conjectural" theory that his municipal vote would be diluted by the City Defendant, which had made it so that his fellow citizens' utility bills would go up significantly unless they voted the opposite way plaintiff desired to vote. The court considered the different levels of separation and contingency between the City's actions and the alleged injury, *id.* at 1350, as exist here with unknown persons and unknown future health conditions going to unknown hospitals. The court also observed that the City the plaintiff sought to enjoin had legitimate reasons for its financial utility decisions and those reasons led the court to decline to fill in the gaps in the plaintiffs' conjectural claim of injury. *Id.* at 1351–52. The same longstanding legal and constitutional

justifications that protect religious hospitals in their right to oppose abortion and refrain from performing it should lead this Court to decline to consider as concrete the Plaintiffs' inherently speculative claims of injury.

The Supreme Court deemed a much more concrete injury than the Plaintiffs allege here insufficient to establish standing in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). In that case the plaintiff actually experienced a chokehold by police, but the court ruled he could not obtain injunctive relief against future chokeholds on his own person. *Id.* at 105. The Court considered the request for relief too speculative for the same kind of multi-level lack of certainty that exists here: it was conjectural that all police would inflict unconstitutional chokeholds, or that the plaintiff would find himself in the specific kind of circumstances to experience one, and then the plaintiff would actually suffer one. *Id.* at 105–09. Here the injury is even more speculative than in *Lyons* because the Plaintiffs failed to present an actual specific person who suffered injury in particular circumstances that show a violation of EMTALA or the Rehabilitation Act that caused cognizable injury. And Plaintiffs present claims more hypothetical than in *Lyons* because there is no specific basis to believe that any of Plaintiffs' members in particular or in general will be pregnant, have a condition that needs an abortion, have that condition at one of Defendant hospitals, and have it in circumstances where it is somehow required under EMTALA or the Rehabilitation Act.

Recent Supreme Court precedent also demonstrates the lack of imminence in Plaintiffs' claims. "Imminent" in this context is defined as "certainly impending," a standard that is not met by mere "allegations of *possible* future injury." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis in original)). It is difficult to imagine claims that better fit the unacceptable standard "allegations of *possible* future injury" than Plaintiffs' claims here. They reference no particular person who may be injured, and even if such person exists, Plaintiffs admit she is not presently in circumstances that will put her in Defendants' hospital, that will require Defendants to perform an abortion as opposed to offering alternative stabilizing treatment, and that the refusal to perform an abortion will be injurious. *Clapper* involved advocacy organizations who speculated that the government may decide to conduct surveillance on people with whom they communicate, may invoke unconstitutional authority to do so, may receive court approval, may actually intercept such a communication, and the plaintiffs may be a party to it. Just as here, where Plaintiffs present a hypothetical string of contingent future events involving unknown persons, the court in *Clapper* held that plaintiffs' "theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending." *Id.* at 1148.

These cases demonstrate Plaintiffs' failure to establish standing to sue.

II. Plaintiffs Failed to State Claims under EMTALA or the Rehabilitation Act.

Plaintiffs failed to state a claim for relief under either EMTALA or the Rehabilitation Act. Other federal laws preclude misinterpreting either to require abortion because they protect Defendants and others from compelled abortion performance. Moreover, neither statute requires abortion, and instead both offer protection to the unborn child.

A. Federal Laws Protect Defendants and Others from Forced Performance of Abortions, and Therefore Preclude Plaintiffs' Statutory Interpretation.

Multiple federal laws preclude courts from construing EMTALA or the Rehabilitation Act as requiring abortions, because they specifically protect Defendants and others from being required to perform abortions.

"[I]t is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384–85 (1992) (citing *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)). No provision of EMTALA or the Rehabilitation Act require abortion or mention it as something to be required. But multiple federal laws require the federal government *not to* compel a health care entity to perform abortions.

The Coats-Snowe Amendment, 42 U.S.C. § 238n (1996), declares that "[t]he Federal Government . . . may not subject any physician or health care entity to discrimination on the basis that" the entity "refuses to" "perform" "induced

abortions," and "refuses to make arrangements for" performing induced abortions. Likewise the Weldon Amendment attached to annual appropriations statutes since 2004[1] prohibits the federal government from discriminating against a health care entity or individual due to their objection to performing or otherwise being involved in abortions. The Church Amendments, 42 U.S.C. § 300a-7 (1973 and years thereafter), contain multiple protections for those who object to abortions, including protections for a health care "entity" that objects "to (A) mak[ing] its facilities available for the performance of any sterilization procedure or abortion" or "(B) provid[ing] any personnel for the performance or assistance in the performance of any sterilization procedure or abortion."

If EMTALA or the Rehabilitation Act were interpreted to require Defendant hospitals to perform abortions, the penalties involved in coercing that performance would constitute adverse actions undertaken by federal law against health care entities for refusing to perform abortions. This would be illegal under federal laws protecting the conscience of health care entities and individuals that object to abortions. Such an interpretation would violate a basic canon of statutory construction, by disregarding these more specific conscience laws in service of

[1] *See, e.g.,* Sec. 507 (d) of Title V of Division F (Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act) of the Consolidated Appropriations Act, 2012, Pub. L. No. 112-74.

imposing more general statutes—EMTALA and the Rehabilitation Act—even though they nowhere mention that abortion is required.

The federal government under the present administration directly rejected the incorrect allegation that conscience protection laws cannot be enforced because EMTALA sometimes requires abortions. It declared, "These statutes strike a careful balance between the rights of patients to access needed health care, and the conscience rights of health care providers. The conscience laws and the other federal statues have operated side by side often for many decades." 76 Fed. Reg. 9,968-02, 9,973 (Feb. 23, 2011). "The Department supports clear and strong conscience protections for health care providers who are opposed to performing abortions." *Id.* at 9,969. Never in these "decades" in which abortion conscience statutes have existed "side by side" with EMTALA or the Rehabilitation Act have they been officially interpreted, much less enforced, to require a hospital or health care professional to perform abortions.

Many additional conscience laws, listed below, fill the United States Code to protect health care entities from performing or being involved in abortions. These laws serve to protect not just entities like Defendants, but individual health care professionals and women such as are members of the Intervening groups. Because of these laws patients and doctors still have the choice of medicine that unconditionally values human life both in the womb and outside of it. If these

specific laws are negated by the Plaintiffs' misconstrual of generic statutes such as EMTALA and the Rehabilitation Act, it will transform the entire health care field into one in which there are no pro-life doctors that follow the Hippocratic Oath's traditional promise not to destroy life in the womb. All pregnant women will be forced to put the lives of their unborn children into the hands of hospitals and doctors that also kill some unborn babies intentionally. That would violate these conscience laws and the access to health care that millions of pro-life Americans are choosing today. Additional conscience laws include:

- 42 U.S.C. § 2996f(b) (1974), prohibiting the use of certain funds to compel a person or entity to assist abortions against "religious beliefs or moral convictions";

- Title III of Division I (Department of State, Foreign Operations, and Related Programs Appropriations Act) of the Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, which has been approved in appropriations bills since 1986, prohibiting discrimination in the provision of family planning funds against applicants due to their "religious or conscientious commitment to offer only natural family planning";

- 20 U.S.C. §1688 (1988), blocking a federal sex discrimination law from forcing anyone to participate in an abortion for any reason;

- 18 U.S.C. § 3597 (1994), protecting the "moral or religious convictions" of persons who object to participating in federal executions or prosecutions;

- 8 U.S.C. § 1182(g) (1996), protecting aliens who object to vaccinations based on "religious beliefs or moral convictions";

- 42 U.S.C. § 1396u-2(b)(3) (1997), protects Medicaid managed care plans from being forced to provide counseling or referral services if they have "moral or religious grounds" for objecting;

- 42 U.S.C. § 1395w-22(j)(3)(B) (1997), protects Medicare Choice managed care plans from being forced to provide counseling or referral services if they have "moral or religious grounds" for objecting;

- 48 C.F.R. § 1609.7001(c)(7) (1998), protects providers, health care workers, and health plan sponsoring organizations from being required to discuss treatment options if it violates their "professional judgment or ethical, moral or religious beliefs";

- Sec. 727 of Title VII of Division C (Financial Services and General Government Appropriations Act) of the Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, which has been approved in appropriations bills since 1999, protects religious health plans in the federal employees' health benefits program from being forced to provide contraceptive coverage, and prohibits any plan in the program from discriminating against individuals who refuse to provide for contraceptives if it is contrary to the individual's "religious beliefs or moral convictions";

- Sec. 808 of Title VIII of Division C (Financial Services and General Government Appropriations Act) of the Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, which has been approved in appropriations bills since 2000, affirming that the District of Columbia must respect the "religious beliefs and moral convictions" of those who object to providing contraceptive coverage in health plans;

- 22 U.S.C. §7631(d) (2003), protects recipients of funds to combat HIV/AIDS from being required to do so in ways that are contrary to their "religious or moral objection"; and

- 42 U.S.C. § 18023, the Patient Protection and Affordable Care Act, protects health insurance providers from covering abortion and states from running health exchanges that cover abortion.

The federal Religious Freedom Restoration Act (RFRA) also precludes Plaintiffs' attempt to require abortions under EMTALA and the Rehabilitation Act when it would violate a hospital's religious beliefs. RFRA declares that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 200bb-1. RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C § 2000bb-3.

The compelling interest test under RFRA "is the most demanding test known to constitutional law. If '"compelling interest" really means what it says . . . many laws will not meet the test.'" *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (quoting *Employment Division v. Smith*, 494 U.S. 872, 888 (1990)). The test "requires us to 'loo[k] beyond broadly formulated interests' and to 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants.'" *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) (holding that businesses cannot be required to pay for abortion coverage in health insurance) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)).

Plaintiffs' claims in this case cannot satisfy RFRA. Because decades worth of federal laws protect health care entities from being forced to perform abortions, no compelling interest can be asserted in forcing such performance. And Plaintiffs cannot satisfy the individualized inquiry necessary to meet the test required by RFRA. Plaintiffs' general interests in "public health" for women are disconnected from any of the necessarily more focused, situation-specific questions that RFRA requires before a person or entity could be required to perform abortions in violation of their religious beliefs. *See id.* at 2779. An actual medical case would need to be examined before the court could rule that RFRA's test is satisfied.

Finally, as Defendants indicate in their brief, Michigan law also protects health care providers (hospitals and individuals both) from being forced to perform abortions, and reading an abortion requirement into EMTALA or the Rehabilitation Act would violate the rights and interests protected by those laws. M.C.L.A. §333.20181. This is likewise true in most of the other states where Defendants have hospitals. See 24 Del. Code § 1791; Fla. Stat. § 390.0111; Ga. Code § 16-12-142; Idaho Code § 18-612; 745 Ill. Compiled Stat. 70/1—70/14; Ind. Code § 16-34-1-3; Iowa Code §§ 146.1, 146.2; Md. Code, Health—Gen., § 20-214; Mass. Gen. L. CH. 112, § 12I; CH. 272, § 21B; N.J. Stat. §§ 2A:65A-1, 2A:65A-2; NY McKinney's Civil R. L. § 79-I (N.Y.) (individuals); Ohio Rev. Code § 4731.91; Oregon Rev. Stat. §§ 435.475, 435.485; and 43 Penn. Stat. §

955.2, 18 Penn. Stat. § 3213; 16 Penn. Stat. §§ 51.1–51.61; *see also* Ala. Const. Amend. No. 622 (religious freedom constitutional amendment subjecting state laws to compelling interest test). Conflict between all of these state laws and EMTALA and the Rehabilitation Act should be avoided by not reading into those statutes an unwritten requirement that abortions be performed.

B. EMTALA and the Rehabilitation Act Do Not Require Abortions, but Actually Protect the Preborn Child.

EMTALA and the Rehabilitation Act cannot be interpreted to require abortion. Nowhere in either statute is abortion mentioned as a requirement. EMTALA merely requires "stabilization" of a patient and transfer, but does not specify that abortion is sometimes a required.

On the contrary, EMTALA specifically requires hospitals to protect the unborn child involved in any pregnancy that is at risk. EMTALA declares that the hospital must obtain a physician's assurance of "the medical benefits [and] the increased risks to the individual and, in the case of labor, to the unborn child," and ensure that the hospital's response "minimizes the risks to the individual's health and, in the case of a woman in labor, the health of the unborn child." 42 U.S.C.A. § 1395dd(c)(1)(A)(ii) & (c)(2)(A). But abortion directly destroys the child. For example, as the Supreme Court explained in *Gonzales v. Carhart*, "the usual abortion method" in the second trimester of pregnancy (12–24 weeks) is a "dilation and evacuation," in which the doctor

> grips a fetal part with the forceps and pulls it back through the cervix and vagina . . . . The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed.

550 U.S. 124, 135–36 (2007). It is impossible to read into EMTALA a requirement that Defendant hospitals must engage in such practices towards "the unborn child" whose health EMTALA explicitly orders it to stabilize and refrain from risking.

The Rehabilitation Act, too, protects unborn children in addition to mothers, if the pregnancy itself is causing complications giving rise to disability. Disability is "a physical or mental impairment that substantially limits one or more major life activities of [an] individual," 29 U.S.C. §705(20) (citing, 42 U.S.C. §12102(1)). "Physical impairments" include "any physiological disorder" affecting any bodily system, 28 C.F.R. § 36.104, and "major life activities" include such things as "eating," "breathing," and "the operation of a major bodily function," 29 C.F.R. § 1630.2(i). The same pregnancy condition postulated by Plaintiffs, that is so serious the mother's major life activities are limited and the pregnancy is threatened so that an abortion is indicated, would by definition be a physiological disorder substantially limiting the child's ability to survive, let alone continue its major bodily functions of breathing and receiving sustenance from the mother through the placenta. It would be inappropriate to misconstrue the Rehabilitation Act in a way that requires destruction of an unborn child who has a disability.

CONCLUSION

For the foregoing reasons, the Court should dismiss the complaint.

DATED: This 16th day of December, 2015.

Proposed Defendant- Intervenors,

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will serve notification of such filing on the following:

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