10-556

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CATHERINA LORENA CENZON-DECARLO,

Plaintiff-Appellant,

v.

MOUNT SINAI HOSPITAL, a New York Not-for-Profit Corporation,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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INTRODUCTION

Plaintiff/Appellant Mrs. Cathy DeCarlo is a nurse employed by Defendant/Appellee Mount Sinai Hospital. Mrs. DeCarlo brought this case against Mount Sinai for compelling her, under threats against her job and her nursing license, to assist in a lethal abortion of a 22-week-old preborn child. Mount Sinai knowingly forced Mrs. DeCarlo to violate her religious beliefs against assisting abortion, and therefore it violated the plain language of 42 U.S.C. § 300a-7(c). Mount Sinai voluntarily subjects itself to § 300a-7(c) by receiving about $200 million in federal health grants every year. Congress explicitly declared that in § 300a-7(c) it was creating "Individual Rights" for employees like Cathy DeCarlo. The Supreme Court and the Second Circuit recognize implied private rights of action for victims of such illegal discrimination. All of the statutory characteristics of § 300a-7(c) make it similar to statutes that possess implied rights of action, and dissimilar to statutes that lack implied rights of action. This Court should reverse the District Court's decision and remand.

JURISDICTIONAL STATEMENT

This appeal raises a jurisdictional issue. The Court has jurisdiction over Mrs. DeCarlo's claim if Congress implied a private right of action under 42 U.S.C. § 300a-7(c). This Court has jurisdiction to determine its own jurisdiction. *Kuhali v. Reno*, 266 F.3d 93, 100 (2d Cir. 2001). If § 300a-7(c) implies a private cause of

action for Mrs. DeCarlo, federal question jurisdiction exists over this claim pursuant to Title 28 U.S.C. § 1331 as an action arising under the laws of the United States. *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 312 (2005). Jurisdiction for declaratory and other relief would exist pursuant to 28 U.S.C. §§ 2201–02, and jurisdiction over pendent state law claims under 28 U.S.C. § 1367.

Appellate jurisdiction exists under 28 U.S.C. § 1291. Mrs. DeCarlo's notice of appeal was timely filed on February 11, 2010, less than 30 days after the District Court's final order. She appeals a final order that the District Court issued on January 15, 2010 (with the judgment issued January 19) which dismissed her one federal claim for lack of jurisdiction and all of her remaining, state-law claims without prejudice by declining to exercise discretionary supplemental jurisdiction. Thus Mrs. DeCarlo is appealing from a final order and judgment disposing of all claims in the case.

STATEMENT OF THE ISSUES

Congress enacted 42 U.S.C. § 300a-7(c) in the early 1970s to guarantee protection for "individual rights." The statute's language creates a traditional and personal protection against discrimination with an intent to guarantee individual rights. And the statute omits statutory elements that the Supreme Court has said contraindicate an implied right of action. Do victims of unlawful discrimination

under § 300a-7(c) such as Mrs. DeCarlo therefore possess an implied right of action to bring their claims?

STATEMENT OF THE CASE

Plaintiff Mrs. DeCarlo filed this case on July 21, 2009 in the United States District Court for the Eastern District of New York, seeking an injunction and damages against Defendant Mount Sinai's illegal discrimination against her under 42 U.S.C. § 300a-7(c). JA 9–65. Defendant Mount Sinai served its motion to dismiss on September 18, 2009, in accordance with the District Court's scheduling order. Its motion alleged that Mrs. DeCarlo lacked a private right of action under § 300a-7(c). Mrs. DeCarlo filed a first amended complaint on November 30, 2009 (JA 66–131), not changing her one federal claim which was the subject of the motion to dismiss, but adding several state law claims (JA 130). The District Court heard oral argument on the motion to dismiss on December 4, 2009.

On January 15, 2010, Chief Judge Raymond J. Dearie granted Mount Sinai's motion to dismiss, concluding that no private right of action exists under § 300a-7(c). *Cenzon-DeCarlo v. Mount Sinai Hosp.*, No. 09-cv-3120, 2010 WL 169485 (E.D.N.Y. Jan. 15, 2010) (JA 133–40). Chief Judge Dearie dismissed Mrs. DeCarlo's federal claim for lack of jurisdiction, and her state-law claims without prejudice by declining to exercise discretionary supplemental jurisdiction over them.

STATEMENT OF THE FACTS[1]

Mount Sinai broke the law. Its officials forced Cathy DeCarlo, a nurse well-respected by doctors and peers at Mount Sinai, to assist in a "D&E" abortion of a 22-week-old child.[2] *Compl.* ¶¶ 34–36 (JA 71–72), 61 (JA 74), 88–107 (JA 77–79). Mount Sinai officials threatened Mrs. DeCarlo's job and career with charges of insubordination and patient abandonment if she did not immediately assist. *Compl.* ¶¶ 101–03 (JA 79). Mount Sinai engaged in this compulsion despite having known since she was hired Mrs. DeCarlo's religious objection to participating in abortion,

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[1] The facts summarized here are set forth more fully in Mrs. DeCarlo's First Amended Verified Complaint, Joint Appendix ("JA") 66–131.

[2] The Supreme Court described the "D&E" abortion procedure as follows:

> A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. . . . After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. 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. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed.

Gonzales v. Carhart, 550 U.S. 124, 135–36 (2007); *see also Compl.* ¶ 61 (JA 74).

and despite her tearful pleas on the day of the incident. *Compl.* ¶¶ 41–43 (72–73), 86–89 (JA 77).

Mrs. DeCarlo's involvement in the abortion was unnecessary. Neither Mount Sinai, nor the patient's health, would have been prejudiced if Mrs. DeCarlo's religious rights had been honored. *Compl.* ¶ 99 (JA 78). Other nurses were available to assist, including the supervisors who forced her to help. *Compl.* ¶¶ 62 (JA 74), 65 (JA 75), 92–100 (JA 78). Because Mrs. DeCarlo promptly reiterated to Mount Sinai her long-known objection, the hospital had ample time to find another nurse. *Compl.* ¶¶ 86–88 (JA 77), 92–100 (JA 78), 122 (JA 81). The D&E abortion procedure, though gynecological, is itself simple enough for any of Mount Sinai's operating room nurses to assist (which Mount Sinai's policy allows). *Compl.* ¶¶ 62 (JA 74), 65 (JA 75). But Mount Sinai did not even try to call other nurses. *Compl.* ¶ 95 (JA 78).

Not only was Mrs. DeCarlo's assistance not needed, the abortion itself was neither an emergency nor urgent. No Mount Sinai official categorized the case as requiring immediate surgery, and the woman was not actually in crisis. *Compl.* ¶¶ 98 (JA 78), 117–28 (JA 80–81). The doctor omitted most if not all of the care that women having severe preeclampsia are given in a true crisis, and the condition is one that doctors regularly and safely treat without abortion. *Id.* Moreover, there was no need to use treatment that directly killed the child. Mount Sinai could have

chosen a delivery method that tried to save rather than end the life of the viable child, but instead it elected a lethal procedure and forced Mrs. DeCarlo to assist. *Compl.* ¶¶ 24 (JA 70), 124 (JA 81).

After the incident, Mrs. DeCarlo properly followed internal procedures to complain about Mount Sinai's coercion. *Compl.* ¶¶ 133–34 (JA 82). The hospital did not apologize; it did not pledge to follow the law; rather, it acquiesced in its managers' compulsion of Mrs. DeCarlo and declared that she could be compelled similarly again. *Compl.* ¶¶ 135 (JA 82), 143–46 (JA 83), 157 (JA 84), 168 (JA 85). Moreover, Mount Sinai retaliated against Mrs. DeCarlo: it apparently took her off on-call shifts for August, and it specially subjected her to a bullying session aimed at forcing her to sign away her religious beliefs. *Compl.* ¶¶ 139–41 (JA 82–83), 148–57 (JA 83–84).

Mount Sinai's policy of compulsion and its retaliation violate 42 U.S.C. § 300a-7(c), which gives to Mrs. DeCarlo and similar employees an individual right against discrimination in the terms and privileges of their employment. Mount Sinai receives over $200 million in federal health dollars every year, whereby it obliges itself to comply with § 300a-7(c). *Compl.* ¶¶ 159–63 (JA 85–86). The statute does not allow Mount Sinai to compel employees to assist in abortions in some circumstances, or according to the hospital's own discretion.

Mount Sinai's actions resulted in Mrs. DeCarlo's involvement in a procedure that was severely troubling to her conscientious beliefs about human life (see footnote 2), and therefore they caused Mrs. DeCarlo intense emotional harm and damages. *Compl.* ¶¶ 130–32 (JA 81–82), 153–56 (JA 84), 158 (JA 85), 174–76 (JA 88–89). Mount Sinai's past and continuing refusal to comply with § 300a-7(c) constitutes irreparable harm to Mrs. DeCarlo, necessitating injunctive relief. *Compl.* ¶ 176 (JA 89). Mount Sinai's posture in this case further demonstrates its intention to continue flouting its duties under § 300a-7(c).

SUMMARY OF ARGUMENT

If § 300a-7(c) contains no implied right of action, then no statute contains one. Congress declared that this statute creates "individual rights," which it intended to guarantee, and for which Congress gave no indication that an implied right of action was lacking.

Implied rights of action continue to be recognized if Congress intends to guarantee individual rights. In contrast, all cases finding no implied remedy do so because of statutory elements wholly absent in § 300a-7(c): such as when statutes are mere criminal prohibitions, or Congress created administrative or other non-private remedies, or laws are explicitly directed toward government regulators rather than protecting individual rights. All of the Supreme Court and Second Circuit cases recognizing implied rights of action have involved laws like § 300a-

7(c), while all of the cases refusing to recognize such a remedy did so for laws with markedly different characteristics from § 300a-7(c).

The Second Circuit recognizes that while the Supreme Court will not extend implied rights of action beyond plausible boundaries, the Supreme Court continues to place statutes that create individual rights on firm jurisprudential footing so as not to render such statutory rights illusory. Consistent with such precedent, this Court has recognized the availability of injunctive relief in statutes that are even less individually-protective than § 300a-7(c). *See Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 286 F.3d 613, 619 (2d Cir. 2002); *cf. Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979).

This Court should not effectively overrule *Hallwood* by denying Mrs. DeCarlo the right to seek even injunctive relief. Mrs. DeCarlo respectfully asks this Court to reverse the District Court's dismissal of her complaint and remand.

STANDARD OF REVIEW

This case raises a pure legal issue of federal statutory interpretation, and therefore the Court's standard of review is *de novo*. *City of Syracuse v. Onondaga County*, 464 F.3d 297, 300 (2d Cir. 2006). As a review of Mount Sinai's motion to dismiss, facts from the complaint must be taken as true and inferences drawn in Mrs. DeCarlo's favor. *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 124–25 (2d Cir. 2009).

APPELLANT'S CONTENTIONS

I. The Supreme Court Infers Private Rights of Action When Congress Creates and Intends to Guarantee Individual Rights

Many statutes contain an implied right of action even without an explicit one. To determine whether a federal statute contains an implied private right of action, the Supreme Court engages in a two-step analysis: (1) does the statute create a *right* for the plaintiff; and (2) does it imply a *remedy* (which, combined, are referred to throughout this brief as a "right of action" or a "cause of action"). *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283–86 (2002).

As explained below, the right in § 300a-7(c) is not merely implied but explicit. And Supreme Court case law shows that § 300a-7(c) is similar to statutes containing implied remedies, but it lacks the statutory characteristics that have been used to show the absence of an implied remedy.

A *right* exists if (a) the statutory text is phrased in terms of the persons benefited; (b) the right is not so vague and amorphous that its enforcement would strain judicial competence; and (c) the statute unambiguously imposes a binding obligation. *Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 149–50 (2d Cir. 2006) (quotation marks omitted; quoting *Gonzaga*, 536 U.S. at 284, *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997), and other cases). These three elements are sometimes referred to as the "*Blessing* factors."

The Court recognizes an implied *remedy* based on a similar exploration of the statute. The Court first announced these considerations generally as follows:

> (1) Whether the plaintiff is one of the class for whose special benefit the statute was enacted;
>
> (2) Whether there is explicit or implicit legislative intent to create or to deny such a remedy;
>
> (3) Whether the right of action would be consistent with the purposes of the legislative scheme; and
>
> (4) Whether the cause of action is inappropriate for federal law because it is traditionally a concern of the States.

Cort v. Ash, 422 U.S. 66, 78 (1975) (quotation marks and citations omitted).

Recent precedent has not rendered any of these individual *Cort* factors irrelevant to the analysis, but it has placed primary emphasis on factor (2), legislative intent. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). The other factors remain relevant and are considered in light of their implications for legislative intent. So, for example, a statute's possession of an explicit remedy that is not a private right of action would be relevant under factor (3), the "legislative scheme," as a possible indicator of Congress' intent to enforce the statute by means other than a right of action. Legislative intent, however, is not the same as legislative history; the latter is one component of the former, but history may be silent or inconclusive and yet an intent can still exist to imply a remedy. *See, e.g.,*

Thompson v. Thompson, 484 U.S. 174, 179 (1988); *see also Dewakuku v. Martinez*, 271 F.3d 1031, 1037–38 (Fed. Cir. 2001).

Although the right and remedy inquiries are distinct, they overlap in substance. A statement cited in *Gonzaga* and *Loyal Tire* summarizes what is still true today, that "[n]ot surprisingly, the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action." *Cannon v. U. of Chicago*, 441 U.S. 677, 690 n.13 (1979). Thus, statutes creating rights have been found to imply rights of action, while cases where the Court found no right of action did so largely based on factors also showing that the statute never created an individual right. *Id.*

II. The History of 42 U.S.C. § 300a-7(c) Shows That Congress Intended to Guarantee Individual Rights

Congress did not construct a dead letter in § 300a-7(c). Congress intended to create and guarantee individual rights of health care personnel like Mrs. DeCarlo.

Congress urgently believed in the need to guarantee these rights. When the Supreme Court declared a constitutional right to abortion in *Roe v. Wade,* 410 U.S. 113, 163 (1973) and *Doe v. Bolton*, 410 U.S. 179, 197–98 (1973), Justice Blackmun emphasized the centrality of the medical provider's own judgment in the abortion decision. *See id.* But courts and advocates began debating whether the right to abortion also required health care entities to assist. Several Catholic

hospitals came under pressure to participate in abortions, and a federal district court in Montana ordered a Catholic hospital to perform a tubal ligation. *Taylor v. St. Vincent's Hospital,* 523 F.2d 75, 76 (9th Cir. 1975); *see also Chrisman v. Sisters of St. Joseph of Peace,* 506 F.2d 308 (9th Cir. 1974); *Watkins v. Mercy Medical Center,* 364 F. Supp. 799 (D. Idaho 1973); *Doe v. Bellin Memorial Hospital,*479 F.2d 756 (7th Cir. 1973).

Congress, alarmed at this growing threat to freedom of conscience, introduced early drafts of § 300a-7 just a few months after *Roe*. At first, the provision emphasized protection for health care institutions. But Congress decided it wanted to guarantee protection for individuals as well. Part (c)(1) of § 300a-7 was added in the House on May 31, 1973 by Rep. H. John Heinz III. The text he introduced is the same language that can be found in § 300a-7(c)(1) today:

> No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act after [June 18, 1973], may—
>
> > [A] discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or
> >
> > [B] discriminate in the extension of staff or other privileges to any physician or other health care personnel,
>
> because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the

> procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

119 Congr. Rec. 17462 (1973) (attached to this brief as Addendum 1). On the House floor, Rep. Heinz immediately expressed the purpose of his amendment:

> Mr. Chairman, freedom of conscience is one of the most sacred, inviolable rights that all men hold dear. With the Supreme Court decision legalizing abortion under certain circumstances, the House must now assure people who work in hospitals, clinics, and other such health institutions that they will never be forced to engage in any procedure that they regard as morally abhorrent.
>
> . . . [In addition to protecting institutions from being forced to perform abortions,] we must also guarantee that that no hospital will discharge, or suspend the staff privileges of, any person because he or she either cooperates or refuses to cooperate in the performance of a lawful abortion or sterilization because of moral convictions. . . .
>
> Congress must clearly state that it will not tolerate discrimination of any kind against health personnel because of their beliefs or actions with regard to abortions or sterilizations. I ask, therefore, that the House approve my amendment . . . .

Id. at 17462–63. Without further discussion, the House promptly passed the amendment and the bill 372–1. *Id.* Thus, although § 300a-7 is sometimes generally referred to as the "Church Amendment" (after Senator Frank Church who introduced the language protecting Catholic hospitals, now contained as § 300a-7(b)), it would be more precise to call the individual-rights provision at issue, § 300a-7(c), the "Heinz Amendment."

A few months later, Congress explicitly identified Rep. Heinz's § 300a-7(c) non-discrimination language as protecting "individual rights." Part (c) of § 300a-7 has two parallel subsections, (1) and (2). They use identical language to impose a duty on entities like Mount Sinai not to discriminate against individual health personnel. Both declare that "No entity which receives [certain federal funds] may discriminate in the employment[, etc., of] any physician or other health care personnel, because he performed . . . or refused to perform" medical procedures. They differ only in the types of grants that trigger them, and the types of procedures that can be refused. Their non-discrimination language is the same.

Subsections (1) and (2) of part (c) were passed at slightly different times. Congress first created what is now part (c)(1) in 1973, in what became Public Law 93-45. A few months later, in what became Public Law 93-348, Congress copied Rep. Heinz's rights-creating language of (c)(1) verbatim to add a new companion section, (c)(2), while amending the enumeration of section (c)(1). National Research Act, Pub. L. No. 93-348, § 214, 88 Stat. 342 (1974).

And in § 214(A) of Public Law 93-348, Congress looked back at the nondiscrimination language which it had created in (c)(1) and which it was using again in (c)(2), and placed on that language the label "Individual Rights." *Id.* Notably, the U.S. Code omits this "Individual Rights" heading. But the heading is

in Public Law 93-348, § 214.[3] The actual law that Congress enacted is Public Law 93-348, not its recital in the U.S. Code. *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 121 n.7 (2d Cir. 2007) (the Statutes at Large listed in the Public Laws are evidence of the law, not the U.S. Code) (citing *United States Nat'l Bank of Ore. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 & n.3 (1993)); *see also* 1 U.S.C. § 112; *Schmitt v. City of Detroit*, 395 F.3d 327, 330 (6th Cir. 2005) ("even

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[3] The relevant section of Public Law 93-348 § 214 reads as follows:

Individual Rights

> Sec. 214. (a) Subsection (c) of section 401 of the health programs extension act of 1973 //87 stat. 95, 42 USC 300a-7.// is amended (1) by inserting "(1)" after "(c)", (2) by redesignating paragraphs (1) and (2) as subparagraphs (a) and (b), respectively, and (3) by adding at the end the following new paragraph:
>
> "(2) No entity which receives after the date of enactment of this paragraph a grant or contract for biomedical or behavioral research under any program administered by the secretary of health, education, and welfare may—,
>
> > "(a) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or
> >
> > "(b) discriminate in the extension of staff or other privileges to any physician or other health care personnel,
>
> because he performed or assisted in the performance of any lawful health service or research activity, because he refused to perform or assist in the performance of any such service or activity on the 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."

if a portion of [the Public Law] were omitted from the United States Code, it would retain the force of law").

In creating § 300a-7(c), therefore, Congress explicitly declared that its language prohibiting discrimination by entities was creating "individual rights." Rep. Heinz's own uncontradicted comments, leading to near unanimous approval of his amendment, further expressed the purpose of such language as not only creating but "guarantee[ing]" those individual rights.

III. Congress Created Individual Rights in § 300a-7(c)

Congress affirmatively labeled the nondiscrimination language of § 300a-7(c) as "individual rights." Congress declared that by its § 300a-7(c) phraseology, "No entity which receives [certain federal funds] may . . . discriminate in the employment[, etc., of] any physician or other health care personnel, because he performed . . . or refused to perform" medical procedures, it was creating and protecting "individual rights." Pub. L. No. 93-348, § 214, 88 Stat. 342 (1974). These facts establish the first prong of the private right of action analysis—whether the statute creates a *right*—because the Supreme Court emphasizes expressed legislative intent as the central analytical factor. *Sandoval*, 532 U.S. at 286.

This is the point on which the District Court's analysis faltered. The court ruled that § 300a-7(c) "lacks the classic individual rights-creating language." *Cenzon-Decarlo*, 2010 WL 169485 at *4. The court then quoted *Cannon* for the

idea that the statute does not benefit individuals. *Id.* (quoting *Cannon*, 441 U.S. at 690–93). But *Cannon* was discussing *Cort*'s individual rights factor: whether "the statute was enacted for the benefit of a special class of which the plaintiff is a member." *Cannon*, 441 U.S. at 689–93. In this case, Public Law 93-348 explicitly satisfies the individual rights factor. Congress did not "writ[e] [§ 300a-7(c)] *simply* as a ban on discriminatory conduct by recipients of federal funds." *Cannon*, 441 U.S. at 690–93 (emphasis added). Congress *also* wrote, in Public Law 93-348, that its nondiscriminatory language creates "individual rights."

Congress is free to explicitly declare it is creating "individual rights" even in a statute that involves funding. *Cannon* itself and other Supreme Court cases recognize individual rights in statutes that relate to funding. *See, e.g., Cannon*, 441 U.S. at 681–82; *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 502 (1990). Funding is often simply the jurisdictional hook by which Congress chooses to act; the funding context does not inherently prevent Congress from engaging in rights-creation as distinct from mere funding allocation. In cases like *Gonzaga*, the reason the Court found no individual right was because the statute did not focus on discrimination—it merely said "no funds shall be made available," which *Gonzaga* said *was* a mere restriction on funding as referenced in *Cannon*. *Gonzaga*, 536 U.S. at 287. In contrast, § 300a-7(c) does not speak *to the federal agency* as in

Gonzaga; rather, it imposes a duty upon a regulated entity, and the duty explicitly protects "individual rights" against discrimination.

Supreme Court precedent deals with two kinds of statutory language imposing nondiscrimination duties on federally funded entities: (a) the kind used in cases like *Cannon*, where the Court recognizes rights-creation because the statute says "No person shall . . . be subjected to discrimination"; and (b) the kind used in cases like *Gonzaga*, where the Court decided no right exists because the statute speaks to the federal agency by saying "no funds shall be made available." Here, the statute sounds in the former category by declaring that "No entity [receiving funding] may discriminate," which Congress labeled as creating individual rights. On that difference alone, § 300a-7(c)(1) & (2) are distinguishable from every Supreme Court and Second Circuit case finding the absence of a right of action.[4]

The District Court seems to suggest that *Cannon* creates a third, intermediate category: statutes that merely speak to the entity regulated and that do not create

[4] There are no grounds for treating part (c)(1) differently from part (c)(2) with respect to whether they create individual rights. Congress cut-and-pasted the functional nondiscrimination language of (c)(1) into its distinct funding context of (c)(2), and declared that language as creating "individual rights." Congress inserted the language into the same subsection of the same statute, it amended (c)(1)'s enumeration to link them together, and it did so mere months after creating (c)(1). Congress' enactment of Public Law 93-348 therefore represents its imprimatur on the two parallel non-discrimination mechanisms as being the kind of language creating individual rights. It would be anomalous to conclude, for example, that (c)(2) creates individual rights while (c)(1) does not. In any event, Mrs. DeCarlo asserts her claim under both. JA 86–87.

individual rights. *See also Sandoval*, 532 U.S. at 289. But this reasoning does not apply to § 300a-7(c) for several reasons. First, as mentioned, § 300a-7(c) does not "simply" ban discrimination, but also contains Congress's "individual rights" declaration. This takes § 300a-7(c) out of the potentially mushy middle between *Gonzaga* and the District Court's extension of *Cannon*. Instead, § 300a-7(c) implicates *Cannon*'s forceful proclamation that "this Court has *never* refused to imply a *cause of action* where the language of the statute explicitly conferred a *right* directly on a class of persons that included the plaintiff in the case." *Cannon*, 441 U.S. at 690 n.13 (emphasis added).

Second, *Cannon* need not be read as creating a third category of statute that does not create individual rights even though it prohibits discrimination and does not speak to federal agencies. Instead *Cannon* was likely referring to the kind of non-individually focused statute found in *Gonzaga*, which speaks directly to the federal agency about funding. No other Supreme Court case labels a statute as being in a third, intermediate category. Individual rights of action have been denied only in the second category of *Gonzaga*-like statutes. There is no reason to lump § 300a-7(c) with non-individual-rights creating statutes.

Third, even apart from Public Law 93-348, the language of § 300a-7(c) meets all of the *Blessing* factors indicating the creation of individual rights. *See Blessing,* 520 U.S. at 340–41. The statute imposes a binding obligation on specific

entities to specific protected individuals, the "physicians and other health care personnel" whom it benefits. The obligation is neither vague, amorphous, nor unenforceable. It speaks in terms similar to employment law cases handled by courts every day. In this respect, a useful comparison can be made between § 300a-7(c) and Title VII. In 42 U.S.C. § 2000e-2, Title VII affords employees a "right" not to suffer discrimination. *United States v. City of New York*, 359 F.3d 83, 95 (2d Cir. 2004). Section 2000e-2 uses language exactly parallel to § 300a-7(c), declaring it unlawful for any, "employer . . . to discriminate against any individual with respect to his . . . employment, because of" various factors. *Id.* In other words, § 300a-7(c) creates an individual right by the same linguistic mechanism that § 2000e-2 uses to create an individual right. There is no precedent holding that such language is insufficiently "individual" to create a right.

Fourth, *Cannon* held that the language "No person shall . . . be subjected to discrimination" created individual rights, even though that language only applied to funding recipients. No difference exists between that language and § 300a-7(c)'s "No entity . . . may discriminate," except for the choice of a verb that is active instead of a passive. Perhaps one might speculate that in 1973 and 1974, years before *Cannon* and decades before *Gonzaga*, Congress was actually intending not to create a right of action merely by its choice of the active voice "discriminate" instead of the passive voice "shall be subjected to discrimination."

But thankfully, Congress did not leave us with such a difficult semantic conundrum. Public Law 93-348 shows that Congress did intend to create individual rights by use of its nondiscrimination language in § 300a-7(c), despite (or perhaps because of) its grammatically proper active verb construction.

Cases finding a lack of individual-beneficiary focus all involved statutes with language fundamentally different from § 300a-7(c). *Gonzaga*'s statute commanded the agency not to fund, rather than commanding the entity not to discriminate. 536 U.S. at 287. *Sandoval*'s statute was a mere directive to the agency to regulate and enforce. 532 U.S. at 288. *Thompson*'s statute enacted full faith and credit rules, not protections for specific aggrieved plaintiffs. 484 U.S. at 182–83. *Sierra Club*'s statute prohibited obstructions to navigable waters but didn't identify any intended beneficiaries. *California v. Sierra Club*, 451 U.S. 287, 294–95 (1981). *Touche Ross*'s statute required brokerage firms to keep certain records, but did not reference protection of the plaintiff-customers. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979). *Northwest Airlines*'s plaintiffs were employers suing for contribution under statutes written to benefit *employees*. *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 92 (1981). *Cort*'s law "was nothing more than a bare criminal statute." 422 U.S. at 79–80. *Loyal Tire* involved a federal law restricting state and local governments from imposing burdens on commerce, without identifying intended

rights-beneficiaries. 445 F.3d at 149. *Olmsted*'s statute restricted the behavior of insurance companies without referencing the investor-plaintiffs seeking to sue. *Olmsted v. Pruco Life Ins. Co. of New Jersey*, 283 F.3d 429, 432-33 (2d Cir. 2002). *Salahuddin*'s statute was a criminal law that did not *create* rights or duties but merely provided a mechanism for enforcing previously existing rights. *Alaji Salahuddin v. Alaji*, 232 F.3d 305, 309 (2d Cir. 2000). The statutes in *Bellikoff* made no mention of individuals who were allegedly protected. *Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 116–17 (2d Cir. 2007). And the laws in *Diversified* and *O'Hara* merely funded relief efforts without creating rights or duties towards businesses that had contracted to do relief work. *Diversified Carting, Inc. v. City of New York*, 423 F. Supp. 2d 85, 95 (S.D.N.Y. 2005); *State of New York v. O'Hara*, 595 F. Supp. 1101, 1102 (W.D.N.Y. 1984).

Just last year, the U.S. District Court in Arizona recognized not only a private right of action under § 300a-7(c), but also punitive damages. *Carey v. Maricopa County*, 602 F. Supp. 2d 1132, 1144 (D. Ariz. 2009). Although the decision and briefing is somewhat sparse in discussing this issue, the *Carey* defendants did object to the availability of punitive damages for the § 300a-7(c) claim because punitive damages were not available to plaintiff under 42 U.S.C. § 1983. Therefore the District Court, by denying summary judgment on plaintiff's punitive damage claim and sending it to trial, necessarily ruled that § 300a-7(c)

included a private right of action. No other basis existed for allowing the punitive damages claim against those defendants, and the Court would not have had jurisdiction to send the claim to trial unless a private right of action existed.[5]

IV. Where Congress Intends to Guarantee Rights, the Supreme Court Infers a Private Remedy

From the time that § 300a-7(c) was enacted to the present, the Supreme Court has recognized implied private rights of action in numerous statutes whose purposes were to guarantee individual rights. Among many examples is an implied private right of action in the Voting Rights Act of 1965. *Allen v. State Bd. of Elections*, 393 U.S. 544, 556 (1969). When following *Allen* in 1979, the Supreme Court observed what is still true today: "this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right

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[5] Two unpublished cases from Illinois finding no right under § 300a-7(c) are not persuasive. Both of those courts, like the District Court in this case, did not mention Congress' explicit statement that § 300a-7(c) protects "Individual Rights," or Rep. Heinz's expression that the purpose of § 300a-7(c) is to "guarantee" individual rights. *See Nead v. Bd. of Trustees of Eastern Ill. Univ.*, No. 05-2137, 2006 WL 1582454, at *5 (C.D. Ill. June 6, 2006); *Moncivaiz v. DeKalb County*, 2004 WL 539994 (N.D. Ill. Mar. 12, 2004). *Moncivaiz* contains almost no discussion, and *Nead* acknowledges only the statute's purpose of funding health services. But it was not the purpose of § 300a-7 (because that clause does not fund anything), and *Cannon* shows that just because a statute addresses funding does not mean there must be no implied right of action. Neither case analyzes the statutory language to see whether it confers individual rights, and both seem to equate legislative *purpose* with legislative *history*, therefore failing to recognize that the latter is not absolutely necessary to show the former. The Supreme Court and this Circuit require a different analysis than *Nead* and *Moncivaiz* offer.

directly on a class of persons that included the plaintiff in the case." *Cannon*, 441 U.S. at n.13. *Cannon* lists a catalog of decisions recognizing such implied rights of action, and those decisions constitute the legal context of Congress' enactment of § 300a-7(c). *Id.*

Every Supreme Court or Second Circuit case exploring legislative purpose considers what else the statute does and does not do as indicators of that intent. These relevant statutory characteristics can be quantified, listed, and compared to § 300a-7(c).

A survey of these cases shows that every case finding *against* an implied private right of action involved statutes that, unlike Title VI or § 300a-7(c), have one or more of the following characteristics which contraindicate the idea of an implied private remedy:

- If a statute speaks its directive to federal agencies, such as by telling them to enforce the statute or to deny funding, rather than obliging regulated entities, such as by commanding them not to discriminate, it implies no private right of action. *Gonzaga*, 536 U.S. at 287; *Sandoval*, 532 U.S. at 288.

- If a statute fails to specify the plaintiffs as protected beneficiaries, it indicates that Congress did not intend to imply a right of action to protect those persons. *Thompson*, 484 U.S. at 182–83, *California v. Sierra Club*, 451 U.S. 294 (1981); *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77 (1981);

Bellikoff v. Eaton Vance Corp., 481 F.3d 110 (2d Cir. 2007); *Olmsted v. Pruco Life Ins. Co. of New Jersey*, 283 F.3d 429, 432-33 (2d Cir. 2002); *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 286 F.3d 613, 619 (2d Cir. 2002).

- If a statute orders regulated entities to act but does so without reference to personal or individual beneficiaries, it therefore indicates that no right of action is implied. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568–71 (1979).

- If a statute targets bad actions in the aggregate, or in the common rather than individual good (like criminal statutes), it indicates the absence of a right of action. *Blessing*, 520 U.S. at 343; *Loyal Tire*, 445 F.3d at 149; *Cort*, 422 U.S. at 79–80.

- If a statute explicitly provides alternate remedies, or penalties, or specifically directs enforcement of its protections to parties such as government officials or agencies, it suggests that Congress's omission of a private remedy may have been intentional. *Gonzaga*, 536 U.S. at 287; *Sandoval*, 532 U.S. at 288; *Touche Ross*, 442 U.S. at 568–71; *Cort*, 422 U.S. at 79–80; *National R. R. Passenger Corp. v. National Ass'n of R. R. Passengers [Amtrak]*, 414 U.S. 453 (1974); *Alaji Salahuddin v. Alaji*, 232 F.3d 305, 308–12 (2d Cir. 2000); *Olmsted*, 283 F.3d at 432–33; *Hallwood*, 286 F.3d at 619–20; *Health Care Plan, Inc. v. Aetna Life Ins. Co.*, 966 F.2d at 741; *Barnes v. Glennon*, 2006 WL 2811821 at *6 (N.D.N.Y. 2006); *Diversified Carting, Inc. v. City of New York*, 423 F. Supp. 2d 85 (S.D.N.Y. 2005) (citing *State of*

New York v. O'Hara, 595 F. Supp. 1101, 1102 (W.D.N.Y. 1984) (relying on the existence of civil and criminal penalties); *Hayden v. Pataki*, 2004 WL 1335921 at *5 (S.D.N.Y. 2004); *Gilmore v. Amityville Union Free School Dist.*, 305 F. Supp. 2d 271, 279 (E.D.N.Y. 2004).

- If a statute's known purpose is actually harmed by a private remedy, this indicates that Congress intended not to imply one. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

Furthermore, as discussed in the next section, every case *recognizing* an implied right of action involves statutes whose characteristics compare favorably to § 300a-7(c). Table A, on the next page, illustrates this stark contrast.

Table A

		Factors Indicating Private ROA			*Factors Contra-Indicating Private ROA*		
	Implied Private Right/ Remedy	Congress' Purpose to Protect Rights	Protects Specific Plaintiffs as Beneficiaries	Imposes on Def. a Duty re: Plaintiff	No Focus to Create Benefit in Individuals	Protects Aggregate, Vaguely, or the Public	Admin. or Other Remedies in Statute
42 U.S.C. § 300a-7(c)	(Yes)	X	X	X			
Allen, 393 U.S. 544	Yes	X	X	X			X
Cannon, 441 U.S. 677	Yes	X	X	X			X
Wilder, 496 U.S. 498	Yes	X	X	X			X
Wright, 479 U.S. 418	Yes	X	X	X			X
***Transamerica* (eq. relief)**, 444 U.S. 11	Yes	X	X	X			X
Sullivan, 396 U.S. 229	Yes	X	X	X			
***Hallwood* (inj. relief)**, 286 F.3d 613	Yes	X		X			X
***Gonzaga*, 536 U.S. 273**	No				X	X	X
***Sandoval*, 532 U.S. 275**	No				X		X
***Thompson*, 484 U.S. 174**	No				X		X
***Blessing*, 520 U.S. 329**	No				X	X	X
***Sierra Club*, 451 U.S. 294**	No				X	X	X
***Touche Ross*, 442 U.S. 560**	No				X		X
***Northwest Airlines*, 451 U.S. 77**	No				X		
***Cort*, 422 U.S. 66**	No				X	X	X
***Amtrak*, 414 U.S. 453**	No					X	X
***Loyal Tire*, 445 F.3d 136**	No				X	X	
***Olmsted*, 283 F.3d 429**	No				X		X
***Salahuddin*, 232 F.3d 305**	No				X		X
***Bellikoff*, 481 F.3d 110**	No				X		X
***Diversified*, 423 F. Supp. 2d 85**	No				X		X
***O'Hara*, 595 F. Supp. 1101**	No				X		X
***Anspach*, 630 F. Supp. 2d 488**	No				X		X
***Santa Clara Pueblo*, 436 U.S. 49**	No	Tribal sovereignty purpose = no ROA					X

V. Congress Implied a Private Remedy for Victims like Mrs. DeCarlo

The statute in this case evinces an intent to create a private remedy. Congress said that no entity like Mount Sinai may discriminate against health care personnel like Mrs. DeCarlo, and the Congress promptly declared that its statutory language created individual rights. In *Allen*, the Court explained that an implied action existed because Congress "drafted [the Act] to make the guarantees of the Fifteenth Amendment finally a reality for all citizens." *Allen v. State Bd. of Elections*, 393 U.S. 544, 556 (1969). This purpose is strikingly similar to Rep. Heinz's description of § 300a-7(c) as "assur[ing]" and "guarantee[ing]" individuals the right to "never be forced," and to "clearly state[s]" that Congress "will not tolerate" such discrimination. 119 Congr. Rec. at 17462–63.

Cannon, in a section favorably cited in *Sandoval* (532 U.S. at 288) and *Gonzaga* (536 U.S. at 284 & n.3), universally declares that the Supreme Court has never failed to recognize an implied right of action in a statute whose purpose is to guarantee individual rights. *Cannon*, 441 U.S. at 690 n.13.[6]

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[6] The one exception, *Cannon* notes, was where Congress' known purpose in support of Indian tribal sovereignty overrode protected rights that tribal remedies also protected. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). But here, a private right of action is perfectly consistent with Congress' purpose, which the language of § 300a-7(c) shows was to prevent discrimination against individuals such as Mrs. DeCarlo. Enforcement of discrimination rights is an area fully appropriate for federal jurisdiction, where employment claims are often adjudicated. Likewise, the issue is federal rather than exclusively state-law related,

As discussed above, § 300a-7(c) has no other purpose than to guarantee individual rights. Its functional language, its "individual rights" label, and Rep. Heinz's expression of intent show that Congress' purpose was to directly protect individuals from discrimination, and to "guarantee" and "assure" that hospitals such as Mount Sinai will "never" require nurses such as Mrs. DeCarlo to participate in abortions such as it did on May 24, 2009. *See* 119 Congr. Rec. at 17462. The language guaranteeing this individual right in such direct terms implies that protected individuals such as Mrs. DeCarlo have the ability to seek relief to protect themselves from unlawful discrimination.

This statute's guarantee of individual protection is of the same kind found in the protection of voting rights in Title VI, *Allen*, 393 U.S. at 544. It is of the same kind found for Title IX civil rights protections in *Cannon*, which built off *Allen*. *Cannon*, 441 U.S. at 690. Like § 300a-7(c), Titles VI and IX use individually-focused language in order to protect a specific class of individuals from discrimination. In fact, unlike § 300a-7(c), Titles VI and IX both contain express remedies allowing the government to enforce their rights (a factor arguably counseling against implied private remedies), yet the Supreme Court still recognized an implied right of action.

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because § 300a-7(c) creates individual rights of conscience in a uniquely specific form, and in the context of federal programs.

This case is also similar to *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). In *Transamerica*, the statute prohibited fraudulent practices by investment advisors committed against their clients, and it voided contracts that violated the law. *Id.* at 16–17. The statute lacked an express private right of action, its legislative history on the issue was "entirely silent," and it expressly contained criminal penalties, and it gave the government an express right to pursue injunctive relief. Yet despite all these factors, the Court determined that the statute "necessarily contemplates that the issue of voidness under its criteria may be litigated" by a private cause of action. *Id.* 18–20.

The Second Circuit similarly recognized private access to equitable remedies in *Hallwood*, 286 F.3d at 620–21, and *Health Care Plan, Inc.,* 966 F.2d 738, 741 (2d Cir. 1992). Since Mrs. DeCarlo faces continued discrimination by an entity violating her rights and its legal obligations, the language of § 300a-7(c) giving her individual rights against discrimination "necessarily contemplates" that she can seek any kind of relief in court to protect herself and her rights. *Transamerica*, 444 U.S. at 18–20. As discussed below, this remedy should at least include injunctive relief as approved in *Hallwood* and *Transamerica*.

All of the cases finding that legislative purpose was insufficient to imply a right of action involved statutes with characteristics suggesting Congress' intent did not include such a remedy. Most of these cases involve statutes that undermine

an implied a private right of action by providing alternative remedies in the forms of administrative review, or rights of action by the government, or criminal sanctions.

Gonzaga's statute told the Secretary of Education to enforce its provisions. 536 U.S. at 278–79. *Sandoval*'s statute simply commanded the agency to effectuate rights protections. 532 U.S. at 288–89. *Thompson*'s statute was itself a directive for adjudication of rights in *state* court. 484 U.S. at 183. The statute in *Blessing* explicitly created an entire office within the Department of Health and Human Services to enforce and oversee child support requirements. 520 U.S. at 335. *Sierra Club*'s statute provided criminal penalties and enforcement by the Department of Justice. 451 U.S. at 295 n.6. *Touche Ross*'s statute was on its face a requirement for records to be filed with the Securities and Exchange Commission, which would enforce the requirement. 442 U.S. at 569. *Cort*'s law was enforced criminally. 422 U.S. at 79–80. In *Amtrak*, the statute specifically conferred authority to seek equitable relief on the Attorney General, and provided a private remedy for labor disputes but not for the requesting plaintiffs. 414 U.S. at 458. Both *Olmsted* and *Bellikoff* emphasized that their statutes provided for enforcement by the SEC, and gave a private right of derivative action to other individuals. 283 F.3d at 433; 481 F.3d at 116. *Salahuddin*'s statute imposed criminal penalties and was written in terms of having enforcement occur in *state*

courts. 232 F.3d at 310. The laws in *Diversified* and *O'Hara* provided civil and criminal penalties, while the plaintiffs' claims of breach of contract were areas traditionally protected by state law. 423 F. Supp. 2d 8at 96; 595 F. Supp. at 1102.

In contrast, § 300a-7(c) expresses no alternative remedy or enforcement mechanism whatsoever.[7] This statute is therefore even more appropriate for recognition of a private right of action than statutes containing alternative enforcement, remedies and penalties, but for which courts have nonetheless found

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[7] In arguing before the District Court, Mount Sinai contended that agency regulations enacted in 2009 have some import on the meaning of Congress' language in 1973. Congress legislated no administrative remedy in § 300a-7(c). But for two months in 2009 the Department of Health and Human Services, unprompted by Congress, expressed the desire to enforce § 300a-7(c) in a non-exclusive manner, without suggesting any opinion one way or another whether § 300a-7(c) contains an implied right of action. Then, the new federal administration in 2009 issued notice to totally rescind that regulation, also expressing no view on the issue in this case. Tellingly, the Department of Health and Human Services Office for Civil Rights provides a comprehensive list of *all* the laws, regulations, and standards that it enforces, and § 300a-7(c) is not included. *See* U.S. Dept. of Health & Human Servs., "OCR Nondiscrimination Laws, Regulations, and Standards," *available at* http://www.hhs.gov/ocr/civilrights/resources/laws/index.html (last viewed May 4, 2010).

It is not clear what meaning a Court could glean from these two contradictory agency regulations, even if it wanted to. (Does the regulation's enactment suggest no implied remedy, while its repeal indicates the existence of one?) But the issue does not appear to be relevant to the Court's analysis. The Court's inquiry is to determine Congress' intent when it enacted the statute. Even statutes containing express administrative remedies have often not precluded private rights of action when those remedies were not exclusive. Here Congress provided no express alternate remedy. On-again, off-again administrative remedies passed by HHS 35 years later are not instructive.

an implied right of action: *Allen*, 393 U.S. at 556; *Cannon*, 441 U.S. at 683–84; *Wilder*, 496 U.S. at 512; *Wright v. City of Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 424 (1987); *Transamerica*, 444 U.S. at 20; *Hallwood*, 286 F.3d at 619–20.

The meaning of § 300a-7(c)'s rights-creating language is illuminated by the legal context at the time. "A fundamental canon of statutory construction" is that Congress' intent is interpreted according to the meaning of its words as understood "at the time Congress enacted the statute." *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Carcieri v. Salazar*, 129 S. Ct. 1058, 1059 (2009). Contemporary legal context, like a contemporary dictionary, is insightful and sometimes dispositive in determining the meaning of language used by Congress, even when today's legal standard is different.[8] *Cf. Cannon*, 441 U.S. at 698–99.

[8] Considering the legal context of the time does not mean the Court should *apply the legal standard* from 1973. Instead the Court's *current* legal standard, which emphasizes Congress' text and intent, necessarily incorporates the universal maxim that legislative intent and meaning exist at the time of a statute's enactment and are informed by contemporary contexts. The Court in *Sandoval* directs courts not to give legal context "dispositive" weight, *Sandoval*, 532 U.S. at 288, but it does not say not to give context any weight at all. Instead the Court explicitly recognizes that a statute's purpose and context, including legal context, continues to be relevant "to the extent it clarifies text." *Id.* Text is informed by context and purpose. In the same way, *Bellikoff* excluded consideration of legal context only when it had decided that "the text and structure . . . unambiguously express an intent *not* to imply a private right of action," because that statute contained several characteristics that § 300a-7(c) lacks. 481 F.3d at 117 (emphasis added).

When Congress created and guaranteed individual rights in § 300a-7(c), its language would have been understood as implying a private right of action. In 1969, *Allen* recognized a remedy in Title VI on the strength of the individual right to vote expressed in that statute. 393 U.S. at 556. Around the same time, the Court recognized equitable remedies based on the right to property in 42 U.S.C. § 1982. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238 (1969); *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 414–15 (1968). *Cannon* cites numerous similar cases from that era. 441 U.S. at 690 n.13.

VI. Modern Second Circuit Case Law Requires, at Minimum, that Mrs. DeCarlo Be Allowed to Pursue Injunctive Relief

Second Circuit precedent should protect Mrs. DeCarlo's right to seek injunctive relief even if this Court concludes that a private remedy for damages is not available. The Second Circuit recognizes the implication of private injunctive remedies to enforce statutes whose language and purpose is to ensure protection for civil rights of individuals specified in the statute. After expressly considering the Supreme Court's modern case law on this issue, this Court vindicated a plaintiff's ability to seek injunctive relief to protect his individual rights even where it found no implied right to damages. *Hallwood*, 286 F.3d at 620–21.

The court in *Hallwood* discussed *Sandoval* and yet confirmed as valid precedent its decision in *GAF Corp. v. Milstein*, 453 F.2d 709, 720 (2d Cir. 1971).

Together *GAF* and *Hallwood* recognize that a company's stock issuer could seek injunctive relief to enforce § 13(d) of the Securities Exchange Act, which merely required certain purchasers of stock shares to disclose information such as whether their purchase is a bid for control. *Hallwood* rejected allowing issuers the ability to seek damages under the Act, and yet affirmed the continued ability of issuers to seek injunctive relief. The court so ruled even though § 13(d) lacks focus on or even a mention of the plaintiffs who sought such relief, and even though Congress expressly provided an alternative remedy for enforcing the law. *See also Health Care Plan*, 966 F.2d at 741 (rejecting a right of action but suggesting equitable remedies might have been available because, "[i]f an implied right of action emerges from this analysis, then, at step two, we presume—absent clear congressional direction to the contrary—that the federal courts have the power to award any appropriate relief" (quotation marks and citations omitted)). Under the restrictive view of Supreme Court case law proposed by Mount Sinai, no implied right of action would have existed in *Hallwood* or *Health Care Plan*, even for injunctive relief.

If an implied injunctive remedy exists in this Circuit under statutes like § 13(d), then it exists under § 300a-7(c). The statute here contains explicit language protecting individual rights from unlawful discrimination, yet Congress gave it no administrative remedy, much less one that could be interpreted as being

exclusive. If § 13(d) supports injunctive relief without even naming the victim, then injunctive relief is available for Mrs. DeCarlo to seek to enforce the civil rights that Congress explicitly created to protect her against being coerced by Mount Sinai to assist an abortion procedure in violation of her deeply felt conscientious beliefs.

SHORT CONCLUSION

Because § 300a-7(c) implies a private right of action, Mrs. DeCarlo respectfully requests that the Court reverse the District Court's dismissal of her complaint and remand for further proceedings.

Dated: Washington, D.C.
May 5, 2010

Respectfully submitted,

s/Matthew S. Bowman
Matthew S. Bowman
Steven H. Aden
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801 G Street N.W., Suite 509
Washington, D.C. 20001
(202) 393-8690

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the undersigned certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word count provided by Microsoft Word 2007, and in accordance with provisions of Federal Rule of Appellate Procedure 32(a)(7)(B)(3)(iii), this brief contains 8,991 words.

s/Matthew S. Bowman
Matthew S. Bowman

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief and Joint Appendix have been served via electronic filing (and by regular first class mail) on the following persons on this the 5th day of May, 2010:

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s/Matthew S. Bowman
Matthew S. Bowman

ADDENDUM 1

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inserting after "1973" the following: "; and $6,000,000 for the fiscal year ending June 30, 1974".

(d) Section 794A(b) is amended (1) by striking out "and" after "1972;", and (2) by inserting after "1973" the following: "; and $100,000 for the fiscal year ending June 30, 1974".

REGIONAL MEDICAL PROGRAMS

SEC. 110. Section 901(a) is amended (1) by striking out "and" after "1972,", and (2) by inserting after "1973" the following: ", and $159,000,000 for the fiscal year ending June 30, 1974,".

POPULATION RESEARCH AND FAMILY PLANNING

SEC. 111. (a) Section 1001(c) is amended (1) by striking out "and" after "1972;", and (2) by inserting after "1973" the following: ", and $111,500,000 for the fiscal year ending June 30, 1974".

(b) Section 1003(b) is amended (1) by striking out "and" after "1972", and (2) by inserting after "1973" the following: "; and $3,000,000 for the fiscal year ending June 30, 1974".

(c) Section 1004(b) is amended (1) by striking out "and" after "1972;", and (2) by inserting after "1973" the following: "; and $2,615,000 for the fiscal year ending June 30, 1974".

(d) Section 1005(b) is amended (1) by striking out "and" after "1972"; and (2) by inserting after "1973" the following: "; and $909,000 for the fiscal year ending June 30, 1974".

TITLE II—AMENDMENTS TO THE COMMUNITY MENTAL HEALTH CENTERS ACT

REFERENCES TO ACT

SEC. 201. Whenever in this title an amendment is expressed in terms of an amendment to a section or other provision, the reference shall be considered to be made to a section or other provision of the Community Mental Health Centers Act.

CONSTRUCTION ASSISTANCE FOR MENTAL HEALTH CENTERS

SEC. 202. (a) Section 201(a) is amended (1) by striking out "and" after "1972,", and (2) by inserting after "1973" the following: ", and $20,000,000 for the fiscal year ending June 30, 1974".

(b) Section 207 is amended by striking out "1973" and inserting in lieu thereof "1974".

STAFFING ASSISTANCE FOR MENTAL HEALTH CENTERS

SEC. 203. (a) Section 221(b) is amended by striking out "1973" each place it occurs and inserting in lieu thereof "1974".

(b) Section 224(a) is amended (1) by striking out "and" after "1972,", (2) by inserting after "1973" the following: ", and $49,131,000 for the fiscal year ending June 30, 1974", and (3) by striking out "thirteen succeeding years" and inserting in lieu thereof "fourteen succeeding years".

ALCOHOLISM PROGRAMS

SEC. 204. (a) Section 246 is amended by striking out "1973" and inserting in lieu thereof "1974".

(b) Section 247(d) is amended by striking out "for the fiscal year ending June 30, 1973" and inserting in lieu thereof "for each of the fiscal years ending June 30, 1973, and June 30, 1974".

DRUG ABUSE PROGRAMS

SEC. 205. (a) Section 252 is amended by striking out "1973" and inserting in lieu thereof "1974".

(b) Section 253(d) is amended (1) by striking out "and" after "1972,", and (2) by inserting after "1973" the following: ", and $1,700,000 for the fiscal year ending June 30, 1974".

(c) Section 256(e) is amended by striking out "$75,000,000" and inserting in lieu thereof "$60,000,000".

OTHER AUTHORIZATIONS FOR ALCOHOLISM AND DRUG ABUSE PROGRAMS

SEC. 206. (a) Section 261(a) is amended (1) by striking out "and" after "1972,", and (2) by inserting after "1973" the following: ", and $36,774,000 for the fiscal year ending June 30, 1974".

(b) Section 261(b) is amended (1) by striking out "nine fiscal years" and inserting in lieu thereof "ten fiscal years", and (2) by striking out "1973" and inserting in lieu thereof "1974".

MENTAL HEALTH OF CHILDREN

SEC. 207. (a) Section 271(d)(1) is amended (1) by striking out "and" after "1972,", and (2) by inserting after "1973" the following: ", and $16,515,000 for the fiscal year ending June 30, 1974".

(b) Section 271(d)(2) is amended (A) by striking out "eight fiscal years" and inserting in lieu thereof "nine fiscal years", and (B) by striking out "1973" and inserting in lieu thereof "1974".

TITLE III—AMENDMENTS TO THE DEVELOPMENTAL DISABILITIES SERVICES AND FACILITIES CONSTRUCTION ACT

AUTHORIZATION OF APPROPRIATIONS FOR SERVICES AND PLANNING

SEC. 301. (a) Section 122(b) of the Developmental Disabilities Services and Facilities Construction Act is amended (1) by striking out "and" after "1972;", and (2) by inserting after "1973" the following: "; and $9,250,000 for the fiscal year ending June 30, 1974".

(b) Section 131 of such Act is amended (1) by striking out "and" after "1972,", and (2) by inserting after "1973" the following: ", and $32,500,000 for the fiscal year ending June 30, 1974".

(c) Section 137(b)(1) is amended by striking out "the fiscal year ending June 30, 1973" and inserting in lieu thereof "each of the fiscal years ending June 30, 1973, and June 30, 1974".

TITLE IV—MISCELLANEOUS

MISCELLANEOUS

SEC. 401. (a) Section 601 of the Medical Facilities Construction and Modernization Amendments of 1970 is amended by striking out "1973" and inserting in lieu thereof "1974".

(b) The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other public authority to require—

(1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or

(2) such entity to—

(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or

(B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedure or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

Mr. STAGGERS (during the reading). Mr. Chairman, I ask unanimous consent that the bill be considered as read, printed in the RECORD, and open to amendment at any point.

The CHAIRMAN. Is there objection to the request of the gentleman from West Virginia?

There was no objection.

COMMITTEE AMENDMENT

The CHAIRMAN. The Clerk will report the committee amendment.

The Clerk read as follows:

Committee amendment: Page 4, strike out lines 4 through 21 and insert in lieu thereof the following:

(5) Section 314(e) is amended (A) by striking out "and" after "1972,", (B) by inserting "and $230,700,000 for the fiscal year ending June 30, 1974," after "1973,", and (C) by adding at the end thereof the following: "No grant may be made under this subsection for the fiscal year ending June 30, 1974, to cover the cost of services described in clause (1) or (2) of the first sentence if a grant or contract to cover the cost of such services may be made or entered into from funds authorized to be appropriated for such fiscal year under an authorization of appropriations in any provision of this Act (other than this subsection) amended by title I of the Health Programs Extension Act of 1973."

The committee amendment was agreed to.

AMENDMENT OFFERED BY MR. HEINZ

Mr. HEINZ. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. HEINZ: Page 13, insert after line 24, the following:

(c) No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act after the date of enactment of this Act may—

(1) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(2) discriminate in the extension of staff or other privileges to any physician or other health care personnel,

because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

Mr. HEINZ. Mr. Chairman, freedom of conscience is one of the most sacred, inviolable rights that all men hold dear. With the Supreme Court decision legalizing abortion under certain circumstances, the House must now assure people who work in hospitals, clinics, and other such health institutions that they will never be forced to engage in any procedure that they regard as morally abhorrent.

Under the present language, H.R. 7806 assures that no hospital or health care institution would be forced to perform abortions or sterilizations contrary to its religious or moral code simply because it had received Federal funds under one of the health acts treated in this bill. But we must also guarantee that no hospital will discharge, or suspend the staff privileges of, any person because he or she either cooperates or refuses to cooperate in the performance of a lawful abortion or sterilization because of moral convictions.

The amendment that I offer to H.R. 7806 simply states that hospitals or other health care institutions receiving funds under the Federal programs treated in

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this bill may not discriminate against those who on the basis of their religious or moral convictions, either participate in or refuse to participate in lawful abortions and sterilizations. I also wish to reassure my colleagues, and make crystal clear at the outset, that it is not the intent or the effect of this amendment to in any way compel health care entities to make available any facilities for sterilization or abortion procedures against their moral or religious convictions. This point was raised prior to my offering this amendment by the gentlewoman from Massachusetts (Mrs. HECKLER), and I believe she is in agreement with my amendment.

I wish to stipulate two other aspects of the amendment:

It is germane—it treats only legislation in the jurisdiction of the committee, that is, the three health acts mentioned in H.R. 7806.

It applies only to entities who receive Federal funds under these programs after the date of enactment of this proposal. We would not, therefore, be attaching a new condition to Federal assistance received 5, 10, or even 20 years ago.

It in no way prevents hospital action against personnel who perorm unlawful abortions or sterilizations.

Congress must clearly state that it will not tolerate discrimination of any kind against health personnel because of their beliefs or actions with regard to abortions or sterilizations. I ask, therefore, that the House approve my amendment to title IV, section 401.

Mr. STAGGERS. Mr. Chairman, will the gentleman yield?

Mr. HEINZ. I am happy to yield to the gentleman from West Virginia.

Mr. STAGGERS. Mr. Chairman, I have read the amendment, and I am in agreement with the gentleman on his amendment to the bill. I agree to it, and I believe the committee would, too.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Pennsylvania (Mr. HEINZ).

The amendment was agreed to.

The CHAIRMAN. Under the rule, the Committee rises.

Accordingly the Committee rose; and the Speaker having resumed the chair, Mr. CHARLES H. WILSON of California, Chairman of the Committee of the Whole House on the State of the Union, reported that that Committee having had under consideration the bill (H.R. 7806) to extend through fiscal year 1974 certain expiring appropriations authorizations in the Public Health Service Act, the Community Mental Health Centers Act, and the Developmental Disabilities Services and Facilities Construction Act, and for other purposes, pursuant to House Resolution 418, he reported the bill back to the House with sundry amendments adopted by the Committee of the Whole.

The SPEAKER. Under the rule, the previous question is ordered.

Is a separate vote demanded on any amendment? If not, the Chair will put them en gros.

The amendments were agreed to.

The SPEAKER. The question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed and read a third time, and was read the third time.

The SPEAKER. The question is on the passage of the bill.

The question was taken; and the Speaker announced that the ayes appeared to have it.

Mr. WYDLER. Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

The SPEAKER. Evidently a quorum is not present.

The Sergeant at Arms will notify absent Members.

The vote was taken by electronic device, and there were—yeas 372, nays 1, not voting 59, as follows:

[Roll No. 169]

YEAS—372

Abdnor
Abzug
Addabbo
Alexander
Anderson, Calif.
Anderson, Ill.
Andrews, N.C.
Andrews, N. Dak.
Archer
Arends
Armstrong
Ashley
Aspin
Bafalis
Baker
Barrett
Bell
Bennett
Bergland
Bevill
Biester
Bingham
Boggs
Boland
Bolling
Bowen
Brademas
Brasco
Breaux
Breckinridge
Brinkley
Brooks
Broomfield
Brotzman
Brown, Calif.
Brown, Mich.
Brown, Ohio
Broyhill, N.C.
Broyhill, Va.
Buchanan
Burgener
Burke, Fla.
Burke, Mass.
Burleson, Tex.
Burlison, Mo.
Burton
Butler
Byron
Carey, N.Y.
Casey, Tex.
Cederberg
Chamberlain
Chappell
Chisholm
Clancy
Clark
Clausen, Don H.
Clawson, Del
Clay
Cleveland
Cochran
Cohen
Collier
Collins
Conable
Conlan
Conte
Conyers
Corman
Cotter
Culver
Daniel, Dan
Daniel, Robert W., Jr.
Daniels, Dominick V.
Danielson
Davis, S.C.
Davis, Wis.
Delaney
Dellenback
Dellums
Denholm
Dennis
Dent
Derwinski
Devine
Donohue
Dorn
Downing
Drinan
Dulski
Duncan
du Pont
Eckhardt
Edwards, Ala.
Edwards, Calif.
Eilberg
Erlenborn
Eshleman
Evans, Colo.
Fascell
Findley
Fish
Flood
Flowers
Foley
Ford, Gerald R.
Ford, William D.
Forsythe
Fountain
Frelinghuysen
Frenzel
Frey
Froehlich
Fulton
Gaydos
Gettys
Giaimo
Gibbons
Gilman
Ginn
Gonzalez
Goodling
Grasso
Gray
Green, Oreg.
Green, Pa.
Griffiths
Gross
Grover
Gude
Gunter
Guyer
Haley
Hamilton
Hammerschmidt
Hanley
Hanna
Hanrahan
Hansen, Idaho
Hansen, Wash.
Harrington
Harsha
Hastings
Hawkins
Hays
Hébert
Hechler, W. Va.
Heckler, Mass.
Heinz
Helstoski
Henderson
Hicks
Hillis
Hinshaw
Hogan
Holifield
Holt
Holtzman
Horton
Hosmer
Howard
Huber
Hudnut
Hungate
Hutchinson
Jarman
Johnson, Calif.
Johnson, Colo.
Johnson, Pa.
Jones, Ala.
Jones, Okla.
Jones, Tenn.
Jordan
Karth
Kastenmeier
Kazen
Keating
Kemp
King
Kluczynski
Koch
Kuykendall
Kyros
Landgrebe
Latta
Lehman
Lent
Litton
Long, La.
Long, Md.
Lott
Lujan
McClory
McCloskey
McCollister
McDade
McEwen
McFall
McKay
McKinney
McSpadden
Macdonald
Madigan
Mahon
Mailliard
Mallary
Mann
Maraziti
Martin, N.C.
Mathias, Calif.
Mathis, Ga.
Matsunaga
Mayne
Mazzoli
Meeds
Metcalfe
Mezvinsky
Michel
Miller
Mills, Ark.
Minish
Mink
Mitchell, Md.
Mitchell, N.Y.
Mizell
Moakley
Montgomery
Moorhead, Calif.
Moorhead, Pa.
Morgan
Mosher
Moss
Murphy, Ill.
Myers
Natcher
Nedzi
Nelsen
Nichols
Nix
Obey
O'Brien
O'Hara
Parris
Passman
Patman
Patten
Pepper
Perkins
Pettis
Peyser
Pickle
Pike
Poage
Podell
Preyer
Price, Tex.
Pritchard
Quie
Quillen
Railsback
Rangel
Rees
Regula
Reid
Reuss
Rhodes
Riegle
Rinaldo
Roberts
Robinson, Va.
Robison, N.Y.
Rodino
Roe
Rogers
Roncalio, Wyo.
Roncallo, N.Y.
Rooney, Pa.
Rose
Rosenthal
Rostenkowski
Roush
Rousselot
Roy
Roybal
Runnels
Ruppe
Ruth
Ryan
St Germain
Sarasin
Sarbanes
Satterfield
Saylor
Scherle
Schneebeli
Schroeder
Sebelius
Seiberling
Shipley
Shoup
Shriver
Shuster
Sikes
Sisk
Skubitz
Slack
Smith, Iowa
Smith, N.Y.
Snyder
Staggers
Stanton, J. William
Stanton, James V.
Stark
Steed
Steele
Steelman
Steiger, Ariz.
Steiger, Wis.
Stephens
Stokes
Stubblefield
Stuckey
Studds
Symington
Symms
Talcott
Taylor, Mo.
Taylor, N.C.
Teague, Calif.
Thompson, N.J.
Thomson, Wis.
Thone
Thornton
Tiernan
Towell, Nev.
Treen
Ullman
Van Deerlin
Vander Jagt
Vanik
Veysey
Vigorito
Waggonner
Waldie
Walsh
Wampler
Ware
Whalen
Whitehurst
Whitten
Widnall
Wiggins
Williams
Wilson, Bob
Wilson, Charles H., Calif.
Wolff
Wright
Wyatt
Wydler
Wylie
Wyman
Yates
Yatron
Young, Alaska
Young, Fla.
Young, Ga.
Young, Ill.
Young, S.C.
Young, Tex.
Zablocki
Zion
Zwach

NAYS—1

Crane

NOT VOTING—59

Adams
Annunzio
Ashbrook
Badillo
Beard
Biaggi
Blackburn
Blatnik
Bray
Burke, Calif.
Camp
Carney, Ohio
Carter
Coughlin
Cronin
Davis, Ga.
de la Garza
Dickinson
Diggs
Dingell
Esch
Evins, Tenn.
Fisher
Flynt
Fraser
Fuqua
Goldwater
Gubser
Harvey
Hunt
Ichord
Jones, N.C.
Ketchum
Landrum
Leggett
McCormack
Madden
Martin, Nebr.
Melcher
Milford
Minshall, Ohio
Mollohan
Murphy, N.Y.
O'Neill
Owens
Powell, Ohio
Price, Ill.
Randall
Rarick
Rooney, N.Y.
Sandman
Spence
Stratton
Sullivan
Teague, Tex.
Udall
White
Wilson, Charles, Tex.
Winn

So the bill was passed.

The Clerk announced the following pairs:

Mr. Annunzio with Mr. Winn.
Mr. Rooney of New York with Mr. Hunt.
Mr. Teague of Texas with Mr. Ashbrook.
Mr. Fuqua with Mr. Camp.
Mrs. Burke of California with Mr. Goldwater.
Mr. de la Garza with Mr. Powell of Ohio.
Mrs. Sullivan with Mr. Bray.
Mr. O'Neill with Mr. Cronin.
Mr. Murphy of New York with Mr. Coughlin.
Mr. Mollohan with Mr. Beard.
Mr. Blatnik with Mr. Gubser.
Mr. Carney of Ohio with Mr. Harvey.
Mr. Davis of Georgia with Mr. Blackburn.
Mr. Diggs with Mr. Udall.
Mr. Charles Wilson of Texas with Mr. Dickinson.