UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SHARON L. DANQUAH; BERYL OTIENO-NGOJE; JACQUELINE DESEO; MARITES LINAAC; MILAGROS MANANQUIL; JULITA T. CHING; CRISTINA ABAD; LORNA JOSE-MENDOZA; VIRNA BALASA; OSSIE TAYLOR; RONETTA HABARADAS; and FE ESPERANZA R. VINOYA;

Plaintiffs,

v.

UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY ("UMDNJ"); BOARD OF TRUSTEES OF UMDNJ, and its members, in their official and individual capacities; JAMES GONZALEZ, in his individual and his official capacity as Acting President and CEO of UMDNJ; SUZANNE ATKIN, in her individual and her official capacity as Chief Medical Officer of UMDNJ; MICHAEL JAKER, in his individual and his official capacity as the Cochair of UMDNJ's Bioethics Committee; PATRICIA MURPHY, in her individual and her official capacity as the Cochair of UMDNJ's Bioethics Committee; THERESA REJRAT, in her individual and her official capacity as Vice President of Patient Care Services and Chief Nursing Officer of UMDNJ; PHYLLIS LIPTACK, in her individual and her official capacity as Director of Perioperative Services at UMDNJ; MAGALE ARRIAGA, in her

Civil Case No:
2:11-cv-06377-JLL-MAH

REPLY IN SUPPORT OF PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

individual and her official capacity as Same Day Surgery Nurse Manager at UMDNJ; TAMMY LUDWIG, in her individual and her official capacity as Same Day Surgery Assistant Nurse Manager at UMDNJ;

Defendants.

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I. Introduction

UMDNJ admits that it is breaking the law. It simply asks this Court to let it do so. UMDNJ concedes that it proposes a total ban on pro-life nurses from outpatient, elective surgery care (and from any area of the hospital that *might* interact with abortions). It proposes this discriminatory ban even though, for years, UMDNJ has used only willing nurses on abortion cases. Such discrimination is no more licit than if UMDNJ banned all nurses of one race from a department.

UMDNJ is trampling upon the "Individual Rights" that Congress explicitly vested in the Plaintiff Nurses in Public Law 93-348, § 214 (42 U.S.C. § 300a-7(c)), and that UMDNJ falsely promises to follow when it accepts millions of federal health dollars annually. In 42 U.S.C. § 1983, Congress authorized lawsuits against UMDNJ to remedy the violation of federal rights. UMDNJ asks this Court to contradict Congress' express language "Individual Rights." But the Supreme Court says a statute's text controls. UMDNJ improperly points to *implied* caselaw, or the lack of *remedies*. The rights here are explicit, and the § 1983 remedy is not in question. Congress' words cannot be dismissively rejected as a "header." HHS itself says that § 300a-7(c) "created" "rights." 76 Fed. Reg. 9968-02, at 9971.

UMDNJ incorrectly contends that § 300a-7(c)(2) does not apply, even though the Nurses vigorously assert religious and moral objections to performing or assisting health services in this case. UMDNJ denies that it is forcing

"assistance" during abortions, even though the nurses were told they must catch or cover up the baby's body. UMDNJ implausibly claims that "assist" excludes "pre" and "post" abortion activities, even though those activities immediately surround and are necessary to the abortion. Such line drawing is arbitrary and inconsistent with § 300a-7(c)(1) and N.J. Stat. § 2A:65A-1.

UMDNJ raises the irrelevant specter of emergencies. All abortions at issue in this case are elective, routine, scheduled outpatient procedures. The Third Circuit insists that EMTALA does not apply at all to outpatients. UMDNJ defines any delivery involving bleeding as being an emergency, which would include all abortions. But in years of not coercing nurses, UMDNJ can cite no case where a woman was harmed, and only two cases where a willing nurse successfully obtained help, and where UMDNJ refuses to describe the nature of the "crisis."

UMDNJ should not be permitted to break the law and defraud the public of $60 million by promising it will comply with § 300a-7(c). Congress' creation of individual rights renders UMDNJ subject to this lawsuit to protect the Nurses.[1]

[1] UMDNJ's irrelevant, *ad hominem* attacks on the Nurses' attorneys are merely attempts to distract the Court from UMDNJ's illegal activity. UMDNJ would have the Court believe that nearly the entire Same Day Surgery Unit concocted this story, perjured themselves, and risked their careers for no apparent benefit to themselves (especially when they seek no damages in the complaint). UMDNJ's personal attacks on counsel will not be otherwise addressed in this reply.

II. The Nurses Need Injunctive Relief from UMDNJ's Illegal Activity.

UMDNJ is subject to suit under § 1983, Congress created rights for the Nurses under § 300a-7(c), and UMDNJ is violating those rights by banning nurses from outpatient surgery solely due to their objections protected by § 300a-7(c).

A. Conscience rights are the medical standard for nurses, not abortion.

Throughout UMDNJ's brief it assumes that abortion is like any other medical procedure such as an appendectomy, meaning it is part of standard medical duties and opting out is an aberration. But as the Editorial Board of the Newark Star Ledger recently stated, "these patients aren't undergoing 'other surgical procedures.' They're undergoing an abortion — an emotionally and morally charged procedure. This isn't a tonsillectomy. Objecting nurses shouldn't be forced to participate — on any level."[2]

Abortion law concurs. From *Roe v. Wade* to *Gonzalez v. Carhart*, the Supreme Court has made abortion only conditionally legal. Unlike other health services, abortion is subordinate to a host of prerequisites such as waiting periods, gestational restrictions, technique bans and funding limits. One of the most ancient of these prerequisites is conscience protection.

Roe and *Doe* specify that their declarations of a "right" to abortion exclude contexts where people are forced to cooperate. *Roe* emphasized existing rules that

[2] *Available at* http://blog.nj.com/njv_editorial_page/2011/11/umdnj_should_not_compel _nurses.html (Nov. 18, 2011).

UMDNJ rejects: "no physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment [or] any act violative of personally-held moral principles." *Roe v. Wade*, 410 U.S. 113, 143–44 & n.38 (1973). The Court declared it appropriate that "a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure." *Doe v. Bolton*, 410 U.S. 179, 198 (1973).

Thus the federal and state conscience laws at issue in this case are not exceptions to a general medical standard requiring participation. Conscience rights are preconditions to UMDNJ's abortion practice in the first place. The right to opt out is not a deviation, which UMDNJ can compromise by "accommodations." It is a prerequisite to the underlying medical standard for abortion. This is why Congress and the State of New Jersey did *not* subject the conscience statutes at issue here to the "reasonable accommodation" exception in Title VII.

B. UMDNJ rejects Congress' explicit creation of "Individual Rights."

The question of whether a "private right of action" exists is a two-part inquiry. The Court's job is to ask (1) did Congress create a "right"; and (2) did Congress create a "remedy"? *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). When each part of this test is considered distinctly here, Congress' explicit answer is "yes." Congress explicitly created a remedy in § 1983 against UMDNJ. *See*

Gonzaga University v. Doe, 536 U.S. 273, 284 (2002) ("Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy.")[3]

The only remaining question for the Court, therefore, is whether Congress's explicit declaration that § 300a-7(c) creates "Individual Rights," means in fact that § 300a-7(c) creates "Individual Rights." The question is a tautology. But to rebut UMDNJ's denial that 1 + 1 = 2, the Nurses offer the following.

C. Congress' explicit language creating "Individual Rights" controls.

The Supreme Court's central and repeated principle on this question is that Congress' express language controls. The Court's inquiry is "whether Congress intended to create, *either expressly* or by implication, a private cause of action." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979) (emphasis added). The first question is whether "this congressional intent can be inferred from the *language* of the statute." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 (1981) (emphasis added). And again, "*[s]tatutory* intent on this latter point is determinative." *Sandoval*, 532 U.S. at 286. Therefore, just as it is impermissible for a Court to infer a Congressionally created right when the language does not contain one, *id.* at 286–87, it is impermissible to refuse to

[3] No "specific evidence from the statute itself" forecloses the § 1983 remedy, *id.* at 284 n.4, or creates a comprehensive, alternative enforcement scheme. The statute creates and implies no enforcement scheme at all. HHS's recent enforcement scheme does not claim to be exclusive and acknowledges that Congress called for no enforcement regulations. 76 Fed. Reg. 9968-02, at 9975 (Feb. 23, 2011).

recognize a Congressionally created right when the language declares one. Congress' words are king. Where a federal statute confers an individual right, it does trigger the § 1983 remedy. "[V]iolations of rights . . . give rise to § 1983 actions." *Gonzaga*, 536 U.S. at 283 (citation omitted). "§ 1983 . . . *provides a mechanism* for enforcing individual rights 'secured' elsewhere." *Id.* at 285 (emphasis added). This Court must explore the statutory text for "rights-creating language," and if it finds such words the search is over. *Sandoval*, 532 U.S. at 288.

Congress' words in § 300a-7(c) directly declare the individual rights looked for by the Supreme Court. Congress called the requirements of § 300a-7(c) "Individual Rights." Public Law 93-348, § 214 (1974). There is no way for Congress to more "unambiguously" declare a statute to confer individual rights than for Congress to *explicitly say* that it constitutes "Individual Rights."[4] This is the veritable Platonic form of "rights creating language." There is nothing else Congress could mean by "Individual Rights." And HHS' recent regulations regarding § 300a-7(c) declare that the protections therein are "rights . . . created by" the statute. 76 Fed. Reg. 9968-02, at 9971 (Feb. 23, 2011).[5]

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[4] This language necessarily meets even the more vague test used to infer rights, because the word "individual" in the phrase "Individual Rights" is necessarily phrased in terms of the persons benefited: namely, the "individual."

[5] Thus, even if "Individual Rights" in § 300a-7(c) could be considered ambiguous, this Court must defer under *Chevron* to HHS's interpretation that it creates rights, because that interpretation is reasonable and consistent with the "Individual Rights" language. *See, e.g., Fei Mei Cheng v. Attorney Gen. of U.S.*, 623 F.3d 175,

Where *Gonzaga* held that FERPA conferred mere benefits and not rights, it did so because "the text and structure of a statute provide no indication that Congress intends to create new individual rights." *Gonzaga*, 536 U.S. at 286. Here it is impossible to say Congress provided "no indication" of individual rights: Congress did the opposite, explicitly declaring the existence of "Individual Rights." And if after *Sandoval*, Congress decided to amend that statute (§ 602 of Title VI of the Civil Rights Act) with the label "Individual Rights," there would then be no doubt that § 602 creates individual rights, regardless of the fact that the operative requirements of the statute still do not *impliedly* create them.

UMDNJ's discussion of caselaw is permeated with two basic errors: it uses cases that found no *remedy* exists, not that no right exists; and it relies on cases that used a complex analysis to *infer or imply* whether right exists in a statute that doesn't say "individual rights." Neither set of cases apply here. UMDNJ simply misrepresents the *Mount Sinai* case to this Court, by declaring the Second Circuit "held that the heading clearly did not amount to an explicit conferral of rights." UMDNJ Brief at 22. To the exact contrary: the Second Circuit declared "Section 300 *may be* a statute in which Congress conferred an individual right without an accompanying right of action [meaning, remedy]." *Cenzon-DeCarlo v. Mount*

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187 (3d Cir. 2010). This Court *cannot* abstain from its jurisdiction caused by § 300a-7(c)'s rights-creation, no matter how much UMDNJ claims that HHS' discretionary, unappealable complaint process is somehow adequate. *Hochman v. Board of Ed. of City of Newark*, 534 F.2d 1094, 1097 (3d Cir. 1976).

Sinai Hosp., 626 F.3d 695, 698-99 (2nd Cir. 2010) (emphasis added). The Court then abstained on the "rights" issue and *held* only that § 300a-7(c) implies no private remedy for a private defendant. But the present case is neither about implied interpretation, nor is it about remedies.[6]

UMDNJ additionally proposes that this Court wholly dismiss the express language of Congress merely because it exists in a heading. But "heading" caselaw does not propose to negate the express language of Congress. A statutory requirement explicitly labeled "Individual Rights" can't be interpreted as not creating individual rights, because there is nothing else that the language could mean. The phrase lends itself to no alternative or ambiguous meanings, and UMDNJ proposes nothing else it *could* mean. If Congress said a statute constitutes "Individual Rights" it could not intend otherwise.

The words "Individual Rights" in are not descriptive, they are operative: they create themselves. The rights are there if Congress says so, *because* Congress said so. The language here is the quintessential way Congress creates individual rights. It is hard to conceive a more direct method. To agree with UMDNJ, this

[6] UMDNJ also relies on the inapplicable case *Anspach v. City of Philadelphia*, 630 F. Supp. 2d 488 (E.D. Pa. 2008). *Anspach* had nothing to do with the Church Amendments in § 300a-7(c), but applied only to Title X family planning funding authorized in § 300. There is no connection between whether rights can be implied in § 300, and whether Congress' explicit declaration of "Individual Rights" in § 300a-7(c) means what it says. Proximity alone establishes nothing: *Sandoval* held that individual rights exist under Title VI § 601 *but not* under § 602, even though they are joint provisions of the same legislative action. 532 U.S. at 285-86.

Court would need to contradict the express declaration of Congress. Nothing in § 300a-7(c)(1) or (2) contradicts Congress' declaration of "Individual Rights." UMDNJ's cases discussing whether individual rights can be *implied* are simply not applicable when the statute *explicitly* declares rights. No case holds that Congress' explicit declaration "Individual Rights" means *not* individual rights.[7] It is also not true that funding statutes do not create rights: several Supreme Court cases recognize rights in funding statutes when the Court *merely inferred* therein.[8]

Three other district court cases have considered the Church Amendment without engaging in in-depth analysis, and without observing that Congress explicitly declared "Individual Rights" in its enactment. *Carey*, despite Defendants' agnosticism about the case, did explicitly include an abortion provider's claim for "punitive damages . . . under 42 U.S.C. § 300a-7." *Carey v. Maricopa County*, 602 F. Supp. 2d 1132, 1144 (D. Ariz. 2009). Judge Silver could

[7] Likewise inapplicable is dicta about whether to "infer a private remedy" in *Cannon v. U. of Chicago*, 441 U.S. 677, 691–93 (1979). Section 300a-7(c) has explicit, not "inferred," individual rights; we're not discerning a "remedy"; and it explicitly declares "Individual Rights" rather than "simply" relating to funding This Court "is bound by holdings, not language." *Sandoval*, 532 U.S. at 278.

[8] *See, e.g., Cannon*, 441 U.S. at 681 (rights inferred from Title IX education protection merely prohibiting discrimination by funding recipients); *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 426 (1987) (rights inferred from HUD condition merely imposing rent ceiling on state recipients of funds) and *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 522-23 (1990) (rights inferred from reimbursement standards for states participating in the Medicaid Act). These statutes also all included explicit statutory enforcement mechanisms, whereas here § 300a-7(c) neither creates nor mentions any alternative remedy that might be an *exclusive* alternative to § 1983.

not have sent that claim to trial without individual rights under the statute. In contrast, neither of the two unpublished Illinois decisions on this issue observed Congress' explicit "Individual Rights" language, and so neither should persuade this Court to ignore and contradict that explicit Congressional declaration.

D. UMDNJ Is Blatantly Violating § 300a-7(c).

UMDNJ essentially admits that it is violating § 300a-7(c). It concedes that nurses must assist on "routine," "elective" abortion cases, by performing "pre-operative and post-operative care" (as defined, or left open-ended, by UMDNJ). See, e.g., UMDNJ Brief at 1.[9] UMDNJ does not argue that these required activities are not "health services" under § 300a-7(c)(2), or that it is not subject to both § 300a-7(c)(1) and (2) due to its receipt of requisite funding. The Nurses religiously or morally object to assisting not just "abortions" but any services on abortion cases. VC ¶¶ 30, 45, 54, 75. At minimum, therefore, UMDNJ violates the Nurses' right of "refus[al] to perform or assist in the performance of any such [lawful health] service or activity on the grounds . . . contrary to ["or because of" her] religious beliefs or moral convictions." § 300a-7(c)(2).

[9] *See also* Ludwig Aff. at 4 ("Unit nurses are expected to perform all of these [general pre-operative and post-operative duties identified in the preceding paragraph] for all surgical patients," including "TOP [termination of pregnancy] patients."). In the meetings that UMDNJ compelled Plaintiffs to undergo on November 23, UMDNJ's Human Resources Vice-President Gerard Garcia similarly admitted "Your solution is, 'I just want to remain on the unit and not perform these [abortion case] duties.' From the University's perspective that is not a reasonable accommodation." Vinoya Aff. ¶ 8.

UMDNJ makes four basic defenses to its admitted violations of § 300a-7(c)(2). First, UMDNJ argues that it is not "discriminating" against the nurses. But multiple plaintiffs have already been forced to assist abortion cases on specific days in October before the TRO. VC ¶¶ 47-50. On October 28, Defendant Ludwig told Sharon Danquah that she must assist that morning, even though she explicitly expressed her religious objection.[10] VC ¶¶ 48-49. Even after this case was filed, counsel for the Nurses asked counsel for UMDNJ not to force Ms. Mendoza and Ms. Ching to assist abortion cases on November 4, and counsel for UMDNJ refused. Exh. 5, Bowman Aff. ¶¶ 2-3. Not until Plaintiffs sought a temporary restraining order did Defendants agree, temporarily, not to compel Plaintiffs' assistance, and now UMDNJ is asking that order to be lifted.[11] Actual compulsion of several of the Nurses, and UMDNJ's admission that they require the Nurses to participate, amply demonstrates ripeness and irreparable harm.

UMDNJ's requirement is itself discrimination, because it compels the Nurses to participate in activities against their rights. This is the very definition of

[10] It is no defense for UMDNJ to say the nurses who succumbed to its illegal threats weren't *additionally* penalized. Illegal coercion is itself a penalty. If a boss imposes a sexual ultimatum on an employee, no one could claim it is "not discrimination" just because the employee succumbed to the coercion.

[11] Likewise, this case would have been dismissed promptly if UMDNJ's position was that the Nurses can continue without adverse consequences. Counsel for the Nurses has made multiple offers to dismiss if UMDNJ would simply assure the Nurses that it will comply with § 300a-7(c) and not force them to assist components of abortion cases. Bowman Aff. ¶¶ 2, 4. UMDNJ has refused.

quid pro quo discrimination. In such discrimination, the plaintiff merely needs to show that the employer conditioned employment on acquiescence to a particular action she had a right not to perform. *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1054 (9th Cir. 2007).

> To prove actionable harassment under a quid pro quo or "tangible employment action" theory, [the plaintiff] must show that [the defendant] "explicitly or implicitly condition[ed] a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of [discriminatory religious] conduct."

Id. Religious discrimination can take the form of "quid pro quo" harassment, which applies to religious discrimination claims in a way parallel to the way it functions for sexual discrimination claims. *Venters v. City of Delphi*, 123 F.3d 956, 975 (7th Cir. 1997). UMDNJ has likewise imposed a discriminatory hostile work environment in the form of an altered, mandatory, and intolerable job condition that all outpatient nurses assist abortion cases. *See, e.g.*, *Weston v. Pennsylvania*, 251 F.3d 420, 425-26 (3d Cir. 2001). UMDNJ admits it has imposed abortion-case participation as a job condition. UMDNJ's written policy, too, declares that religious objections *do not apply* to any "pre- and post- procedure care"; that nurses "must" participate while objections are "considered"; that UMDNJ can reject objections due to "staffing" or any hospital "condition;" that "transfer" is *not guaranteed* (thus threatening termination); and that transfers can be "revoked or revised at any time." Exh. 6, UMDNJ Policy at 1-2.

UMDNJ claims that it is not engaging in discrimination because it proposes "a *reasonable accommodation* (which *may be* a transfer to a Hospital Unit where they will have no interaction with TOP patients)." UMDNJ Brief at 4 (emphasis added). Notably, the Nurses contend that a similar transfer notion was presented to them, and in the same breath Defendants emphasized that it was not a real option, but that termination would be the actual result if they inquired. VC ¶¶ 39-40. UMDNJ's written policy boasts that the transfer option is tenuous and revocable.

UMDNJ's blanket transfer policy is inherently discriminatory. Transferring all abortion-objecting nurses out of all outpatient surgery (and out of *any* "department that does [] treat TOP patients," UMDNJ Brief at 3), solely because those nurses object under § 300a-7(c) and New Jersey statute, is by definition discrimination because it denies entire fields of medicine to personnel *solely* on the basis of their statutorily-protected category as objectors. UMDNJ could not similarly demand transfer of all African Americans, or of all women, out of all outpatient surgery, Ob/Gyn, and emergency medicine. The United States and the State of New Jersey passed conscience laws to ensure that abortion-objectors were not forced out of entire fields of medicine, *particularly* those departments in which abortion might occur (because the protection is not needed anywhere else). The United States declared long ago that "separate but equal" is not equal. Anti-discrimination laws were written to stop the segregation UMDNJ proposes.

Although UMDNJ never describes any details to the Court about its transfers or other alleged solutions, it unfailingly calls them "reasonable accommodations" under Title VII. This case, however, *is not a Title VII case*, as much as UMDNJ desires it to be. The statutes here wholly omit Title VII's "reasonable accommodation" clause, which is explicitly set forth in 42 U.S.C. § 2000e(j).[12] In § 300a-7(c)(1) and (2), Congress explicitly refrained from imposing such compromises on abortion-opposed employees, so that abortion would not be used marginalize them from places like UMDNJ. Since § 300a-7(c) was passed after Title VII, it would render § 300a-7(c) superfluous to hold that § 300a-7(c) provides no more protection than Title VII.[13]

UMDNJ's self-framed "reasonable accommodations" are categorically discriminatory since they are exceptions and compromises to anti-discrimination law, allowing the hospital to offer adverse options to employees. *Sheldon* itself

[12] Likewise it is not true that UMDNJ's mandated meeting with Plaintiffs was "required by Title VII" in any sense relevant to this case. UMDNJ Brief at 46. Even if such a meeting is a prerequisite *to pursue Title VII remedies*, it is not objectively required and has no effect on their rights under § 300a-7(c). In any event, UMDNJ falsely jumped to the accusation in its brief that the Nurses did not conduct those meetings. Instead all 12 responded, and did so within the deadline specified by UMDNJ. Vinoya Aff. ¶ 2; Danquah Aff. ¶ 2; Linaac Aff. ¶ 2.

[13] UMDNJ also incorrectly suggests that part (c)(2) cannot be read more broadly than part (c)(1), ignoring the fact that the language of (c)(2) is on its face broader, applying to any health service, and not just to abortion and sterilization. UMDNJ's brief frequently claims that Plaintiffs cite "no authority" for a proposition that is plain in the text of a statute. UMDNJ Brief at 22, 30, 44. Perhaps UMDNJ does not consider statutory text to be an "authority," but the Supreme Court does.

defines UMDNJ's "reasonable accommodation" as being "burdens" on the employee: it "need not be the 'most' reasonable one (in the employee's view), it need not be the one the employee suggests or prefers . . . . [T]he employer satisfies its Title VII religious accommodation obligation when it offers any reasonable accommodation."[14] *Sheldon v. University of Medicine & Dentistry of New Jersey*, 223 F.3d 220, 225 (3d Cir. 2000). UMDNJ's written policy further shows that the entire transfer concept is tenuous and can be revoked at whim. Exh 6.

UMDNJ's second defense to the fact that it is violating the nurses' rights is its contention that Nurses don't actually have "religious beliefs or moral convictions" against assisting or performing "pre" and "post" activities on abortion cases. *See* UMDNJ Brief at 30. This is a strange position. The Nurses have stated they do have "religious beliefs or moral convictions" against assisting any service on part of an abortion case.[15] VC ¶¶ 30, 45, 54, 75; Vinoya Aff ¶ 21; Danquah Aff ¶ 7. UMDNJ's response, "no you don't," is wholly inadequate.

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[14] Likewise in the aforementioned accommodation meetings on November 23, UMDNJ's Human Resources Vice-President Gerard Garcia admitted that in the eyes of UMDNJ, "Accommodation means considering what is viable."

[15] UMDNJ also claims that some (not all) of the Nurses have occasionally assisted some unspecified parts of abortion cases (almost completely "post"). This assertion does not undermine the Nurses' objections, for several reasons. First, four Plaintiffs never even allegedly did so. Second, because Defendant Ludwig's statement is vague, like much of her affidavit, it could mean (from her own list of "post" activities) that nurses merely "ensur[ed] the patient has a ride home." UMDNJ Brief at 8. Ludwig's allegations unreliably they fail to specify the dates or times of such alleged "post" assistance, or to supply the alleged "unit records"

UMDNJ justifies this view by too-cleverly claiming that § 300a-7(c) covers no objections at all unless the objector objects to the *inherent nature* of a procedure.[16] But the text of § 300a-7(c) contains no such distinction. The section doesn't even apply, as UMDNJ contends, to objections to the "procedure." It explicitly applies to "perform[ing]" or "assist[ing]" a service. The statute therefore protects objections to *verbs*, not *nouns*. Moreover Congress wrote repetitive and overlapping language into the statute to maximize the kinds of belief-based objections covered. It addresses "assisting" and "performing," "moral" as well as "religious" beliefs, and also participation that is either "contrary to" beliefs or even

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showing the same. Ms. Vinoya explains that before October when UMDNJ forced no one to assist abortion cases, no Plaintiff would have had any occasion to assist anything until final check out because recovery happened elsewhere; and she herself never did more. Vinoya Aff. ¶¶ 17-19. Third and more fundamentally, conscience statutes give employees the right to decide for themselves what their beliefs are, and to reexamine or change those beliefs. (Deciding your own religious beliefs is what conscience *means*.) In a pre-litigation letter seeking to resolve the situation, several nurses strongly expressed their objections but said that assisting "post" during final check out was not objectionable. *Id.* ¶ 20. UMDNJ responded by forcing Plaintiffs to assist throughout abortion cases. Presently the Nurses religiously and morally oppose assisting any health service on an abortion case. VC ¶¶ 30, 45, 54, 75; Vinoya Aff. ¶ ; Danquah Aff. ¶ 7. UMDNJ has not impeached those affirmations of belief.

[16] UMDNJ verges on deception by stating in public that it doesn't even force nurses to perform any procedure they religiously object to. *See, e.g.*, http://www.wpix.com/news/wpix-nurses-say-umdnj-forced-them-to-train-for-abortions,0,5835421.story ("No nurse is compelled to have direct involvement in, and/or attendance in the room at the time of, a procedure to which she or he objects based on his/her cultural values, ethics and/or religious beliefs. . . . Statements in the media by an attorney identified as representing the interests of nurses employed by UMDNJ are not accurate.")

when the objection is merely "because of" beliefs. Nowhere does § 300a-7(c) state that only objections to the *inherent essence* of a service count; it coves objections based on beliefs *about* performing or assisting a service. Philosophical distinctions between essence and accidents are not cognizable in this statute.[17]

UMDNJ's existential musings also make no medical sense. Abortion itself is performed by a variety of procedures that are completely morally neutral. Exh. 4, Harrison Aff ¶ 7. Cytotec has non-objectionable uses, as do methods such as dilation and curettage, when done not to kill the unborn child. No one objects to participating in abortion procedures because they believe Cytotec the drug is created by conjuring it up in a demonic séance. *Cf. id.* They object because of what the procedure does to a child in a particular circumstance. UMDNJ's Orwellian interpretation of § 300a-7 would mean that sections (c)(1) and (c)(2) don't cover any objections at all, because all medical services are circumstantial.

Third, UMDNJ argues that required "pre" and "post" operative activities do not "assist" the abortion at all. This is false for several reasons. UMDNJ's parsing of the word "assist" ignores the non-abortion specific requirements of subsection

[17] It is incorrect, and calumnious, for UMDNJ to claim that the Nurses object to the *patients*. The Nurses' objection has nothing to do with any characteristic of the patient. The Nurses object only to *services* furthering an abortion; they have no objection to helping these patients if the process were for something other than an abortion. Nor is their objection based on the women's pregnancy or medical condition; on the contrary, the Nurses favor pregnancy. The Nurses' objection is solely to the abortion-*goal* of the services.

(c)(2), which apply regardless of what "assist" and "abortion" mean. Moreover, as the Nurses have declared, Defendants' denials of requiring assistance during abortions are false.[18] Defendant Ludwig told Ms. Vinoya that part of the Nurses' required assistance was to "catch the baby's head. Don't worry, it's already dead." Exh. 1, Vinoya Aff. ¶ 11. Ludwig similarly told Ms. Danquah, while compelling her to assist abortion cases on October 28, that that if Ms. Danquah was to leave a patient who had just delivered, "I would write you up" on charges, and "you can cover the fetus with a chux [absorbent pad] and wait with her until the doctor comes. No girl should be left alone." Danquah Aff. ¶ 6. Ludwig told Ms. Linaac, "cover [the fetus] with chuck pads. . . . If you refuse TOP there are lots of nurses that are waiting for your job." Exh. 3, Linaac Aff. ¶ 6.

Furthermore, UMDNJ's undefined designations of what counts as "assisting," "abortion," "pre" and "post" are self-serving, and are incompatible with medicine. There is no bright medical line between the "abortion" and "pre" and "post" activities. They all further the abortion and under the standard of care are necessary thereto: meaning, they all "assist" the abortion. Harrison Aff. ¶ 5-6. UMDNJ essentially contends that nursing duties don't help or further the abortion, even when given to a patient present for an elective abortion and immediately

[18] Defendant Ludwig says that all abortions are performed in the operating room, but the Nurses testify that many patients are left in Same Day Surgery to deliver with the Nurses on hand, particularly Cytotec patients. Vinoya Aff. ¶ 14.

preparatory to or following her delivery. If that is true, UMDNJ could save its money by not having nurses engage in unnecessary activities in the first place.

It is not possible to distinguish "abortion" from what UMDNJ calls "pre" or "post" activities. *See id.* In a Cytotec abortion, the Cytotec *is* the abortion. It causes fetal death and delivery over a period of hours. But UMDNJ admits that it requires the Nurses to assist *during* the time after Cytotec is administered, that is, during *the abortion*. Presumably UMDNJ defines the "abortion" as merely the delivery of the dead child, and everything before and after the same is "pre" or "post." But by this definition, other activities that directly deliver death in abortion processes would *not* be an abortion, such as the lethal injection of potassium chloride into a baby's heart, which causes death but which is not followed by delivery for many hours. Can personnel be forced to perform or assist lethal injections for that reason? If not, why is "abortion" by Cytotec *only* the delivery? And when does "post" begin? If it begins immediately after delivery, does "post" include collection, examination of and disposal of the aborted child's body, perhaps one of the most traumatic aspects of coerced-assistance in abortion? If not, why not, according to UMDNJ's anything-that-isn't-"directly"-the-abortion-is-pre-or-post view? UMDNJ's line-drawing is arbitrary and unscientific, and serves only to maximize what it can illegally force personnel to do.

The United States and New Jersey did not pass laws promptly upon the legalization of abortion, to broadly protect personnel from being compelled to "assist" as well as perform abortions, *while allowing* the same abortion-committing employers to force those same objecting personnel to bring women right up to the brink of the "abortion" and then to return promptly and engage in a full range of activities because the "abortion" is over. It strains credulity to suggest that those legislators left it to abortion providers to unilaterally impose on pro-life personnel the definition of when pre-operative care ends and the "abortion" begins, and when an abortion "ends" and post-operative care begins. Federal and state laws protecting the Nurses in this case are civil rights laws, and therefore are to be "broadly construed." *Singleton v. City of New York*, 632 F.2d 185, 205 (2d Cir. 1980). UMDNJ's position would instead render meaningless the words "or assist" in conscience laws. UMDNJ also contravenes other federal regulations that interpret assisting abortion broadly. HHS has authoritatively interpreted Medicaid's ban on funding "abortion" to include a ban on funding anything necessary to the abortion, including, *inter alia*, "pre and post operative care and visits related to" it, and any associated hospital care.[19]

[19] See HHS State Medicaid Manual, Chapter 4 "Services," *available at* http://www.cms.gov/manuals/downloads/P45_04.zip . HHS' recent regulations enforcing conscience statutes do not undermine this conclusion, since the current regulations do not interpret "assist" or even discuss its scope specifically.

Whatever the outer-boundaries of "assistance" in abortion might be, they are not raised here. This case only involves health services on a woman present for a scheduled, elective, outpatient abortion, that the nurse is helping cause *now*, by that are necessary to the medical standard of care. Their services plainly "assist" the abortion within the ordinary meaning of that term as contemplated by 42 U.S.C. § 300a-7(c)(1) and N.J. Stat. § 2A:65A-1. UMDNJ's mandate that the Nurses deliver those services is a mandate that they assist abortions.

Fourth, in defense against the facts showing they are violating the Nurses' conscience rights, UMDNJ contends that it *must* force the nurses to assist "emergencies," and such compulsion is not discrimination.[20] This contention again exceeds the rational use of language. First, as a practical matter, if UMDNJ simply staffs abortion cases with willing nurses as it has done for years, then necessarily there will be willing nurses on hand to handle any complications that arise. This is exactly what happened in the two cases UMDNJ vaguely addresses: a willing nurse and a willing supervisor intervened.[21] In addition, UMDNJ's fear-mongering

[20] Notably, by its "emergency" assertion UMDNJ concedes that it does not limit the Nurses to assisting only "pre" and "post." *Anything* UMDNJ calls an "emergency," because there is bleeding, requires the Nurses' continual presence.

[21] UMDNJ's alleged two emergency examples omit all details of what the problem really was, and even so the examples demonstrate no need for UMDNJ to break the law. In both cases the patients received full and appropriate care. A willing nurse was on each case. If she couldn't handle the "emergency," other identically-trained pro-life nurses would be in no better position to help. A true emergency

is disingenuous because all cases in the Same Day Surgery Unit are elective, scheduled, outpatient surgeries. Emergencies go to the emergency room.

UMDNJ claims that EMTALA forces it to violate the Nurses' rights under § 300a-7(c), but the Third Circuit cannot have stated it more clearly: "Outpatients Do Not Trigger EMTALA Coverage." *Torretti v. Main Line Hospitals, Inc.*, 580 F.3d 168, 174 (3d Cir. 2009). EMTALA only applies to patients who present themselves to the emergency room, or with an emergency condition; it does **not** apply to patients who are already outpatients, *even if* an emergency develops. *Id.* at 175-77.[22] No patient in Same Day Surgery is admitted through the emergency room, or presents with an emergency. Vinoya Aff. ¶ 16.

UMDNJ implicitly admits that it views all elective abortions as emergencies, because all that needs to occur is "hemorrhaging." UMDNJ Brief at 15. But every delivery or abortion involves hemorrhaging to some extent. This is exactly what Defendant Ludwig said to the Nurses to explain why all elective abortions are emergencies they must assist with: "it is an emergency when the mom starts bleeding while giving birth because she is losing blood. We have to be in the room to monitor the patient." Vinoya Aff. ¶ 12. UMDNJ's interpretation of

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would require a code team, a doctor, or a transfer to the ER. UMDNJ's inability to offer actual emergency examples shows that its alarmist rhetoric is unsupported.

[22] Ironically, if UMDNJ is right about EMTALA, then *the Same Day Surgery Unit may be the "safest" place to put a pro-life nurse* because EMTALA never applies to those patients. Instead UMDNJ wants to transfer all the Nurses elsewhere.

"emergency" would render nearly all surgeries emergencies, because when you're halfway finished with a surgery, it *must* be completed. Judicially legislating UMDNJ's emergency exception into conscience laws would swallow the rule.

EMTALA does not "trump" § 300a-7(c), as UMDNJ contends from an unpublished decision of a federal court in California. That case interpreted the Weldon Amendment, a separate statute enacted after EMTALA and 30 years after § 300a-7(c). The Court simply held that the plaintiffs had failed to demonstrate any circumstance in the two decades of the California law's existence when any conflict had occurred, just as UMDNJ here has mentioned only two patients with unspecified needs, both of whom were favorably treated. Moreover, EMTALA is a requirement on hospitals, not individuals. Section 300a-7(c)'s individual rights are harmonized with EMTALA because EMTALA doesn't require the institution to force any *particular* individual to assist. Nothing in EMTALA justifies judicially legislating an emergency exception into § 300a-7(c) where none exists. This is especially true here where EMTALA does not even apply, and where UMDNJ has staffed abortion cases willingly for years.

E. N.J. Stat. § 2A:65A-1 applies to UMDNJ; no case says otherwise.

UMDNJ incorrectly claims that N.J. Stat. § 2A:65A-1 does not apply. UMDNJ failed to inform this Court that a different and separate statute was at issue in *Doe v. Bridgeton Hospital Ass'n, Inc.*, 71 N.J. 478 (1976). That case

restricted itself, in "the limited context of this case," *id.* at 490, to whether a public *hospital* could refrain from abortions under the *institutional* conscience rights statute N.J. Stat. § 2A:65A-**2**. It did not deal at all with the *individual* rights statute § 2A:65A-**1**, much less did it say UMDNJ is exempt. This latter statute necessarily applies to UMDNJ because its text applies to everyone. Notably, UMDNJ does not argue that the Nurses cannot sue under § 2A:65A-1 if it applies.

F. The Nurses' constitutional claim has no exhaustion requirement.

Despite UMDNJ's odd assertion to the contrary, "[w]hen federal jurisdiction is invoked under section 1983 on the ground of fourteenth amendment violations, a plaintiff is not required to first exhaust his remedies elsewhere." *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589, 601-02 (3d Cir. 1979).[23]

G. An injunction will not harm UMDNJ or the public.

UMDNJ is incorrect that an injunction would harm UMDNJ or the public simply by requiring it to comply with conscience laws it already is bound to obey. *UMDNJ has been staffing abortion cases for years without forcing unwilling nurses to assist.* It is absurd to suggest that suddenly they would be harmed by continuing to do so; they have pointed to no new or explosive cause for such harm. The "$280,000" that UMDNJ says it would cost to continue such staffing is apparently no different than what it has been spending for years. More

[23] UMDNJ cites procedural due process cases to argue otherwise, apparently not knowing the difference between procedural and substantive due process.

importantly, that amount is dwarfed by the $60 million it receives in federal funding yearly *by promising to follow § 300a-7(c)*. An injunction requiring nothing more than that UMDNJ keep that promise is still a windfall for UMDNJ in the magnitude of $59+ million annually. If UMDNJ is not enjoined, however, it will begin defrauding the public by $60 million every year.

UMDNJ cites not a single instance where a woman was harmed by its years of complying with conscience laws (and for both patients it cites to, willing staff intervened). The Same Day Surgery Unit addresses routine, elective, *non-emergency* cases only. UMDNJ further errs in contending that the alternative "solution" of transfer would eliminate harm to the Nurses. As explained above, the Nurses contend that UMDNJ's segregating of all pro-life Nurses out of outpatient surgery and other departments is itself discriminatory.[24] The only thing UMDNJ has specified to this Court regarding the details of such transfers is that they are all "reasonable accommodations," meaning they are discriminatory exceptions that allow harm to be inflicted on an employee under Title VII. UMDNJ's written policy (Exh. 6) specifies that transfer is not assured and can be revoked at whim.

This Court should grant Plaintiffs' injunction request due to UMDNJ's plainly illegal activity and Congress' explicit declaration of the Nurses' rights.

[24] UMDNJ vaguely alleges wrongdoing by the Nurses, such as by Defendant Ludwig's assertion that "one of the plaintiffs" made a scene in front of an abortion patient. Ludwig Aff. ¶ 27. This is inexcusably vague. Which Plaintiff? When? Such an unreliable assertion cannot possibly, and need not, be rebutted.

DATED: December 1, 2011,

Fair Lawn, New Jersey

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2011, the foregoing document was filed with the Clerk of the Court, and served in accordance with the Federal Rules of Civil Procedure, and/or the District's Local Rules and procedures, upon Defendants by means of ECF.

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