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

AMERICAN CIVIL LIBERTIES
UNION, on b45 TD0 –o9VISIAMERICAN CIVIL LIBERTIES

DEFENDANTS' MOTION TO DISMISS
OR IN THE ALTERNATIVE STAY CASE

Defendants Trinity Health Corporation and Trinity Health-Michigan Corporation ("Trinity"), by their undersigned attorneys, move to dismiss plaintiffs' amended complaint under Rule 12(b)(1), Fed.R.Civ.P. and Rule 12(b)(6), Fed.R.Civ.P., because plaintiffs do not have subject matter jurisdiction and also fail to state any claim upon which relief can be granted. Alternatively, Trinity moves to stay this case pending an adjudication of the appeal of *Means v. U.S. Conference of Catholic Bishops*, 2015 WL 3970046 (W.D. Mich. 6/30/15). In support of this motion, Trinity relies on the accompanying brief.

Under E.D. Mich. LR 7.1, Trinity's counsel sought concurrence of plaintiffs' counsel in the relief requested in this motion. Concurrence was not forthcoming.

WHEREFORE, for the reasons stated in the accompanying brief, Trinity respectfully requests dismissal of plaintiffs' amended complaint.

Respectfully submitted,

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November 6, 2015

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

AMERICAN CIVIL LIBERTIES UNION, on behalf of its members, and AMERICAN CIVIL LIBERTIES UNION of MICHIGAN, on behalf of its members,

Plaintiffs,

v.

TRINITY HEALTH CORPORATION, an Indiana corporation, and TRINITY HEALTH – MICHIGAN, a Michigan corporation,

Defendants.

______________________________/

Case No. 15-cv-12611
Hon. Gershwin A. Drain

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BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE STAY CASE

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STATEMENT OF ISSUES PRESENTED

A. Whether plaintiffs have standing to sue on behalf of their members when they do not allege a particular injury to any member and instead rely only upon a speculative future injury?

Defendants Answer: No.

B. Whether plaintiffs stated a claim under the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. §1395dd, when they have not identified any individual harmed, participating hospital, or specific violation, and nonetheless seek broad declaratory and injunctive relief?

Defendants Answer: No.

C. Whether plaintiffs stated a claim under the Rehabilitation Act, 29 U.S.C. §794, when they have not identified any disabled individual or specific disability as required by the Act.

Defendants Answer: No.

D. Do federal and state statutes that protect religious conscience bar plaintiffs' claims?

Defendants Answer: Yes.

E. Whether the First Amendment bars the Defendants Answer : No.

F. Whether, in the alternative, this case should be stayed pending the appeal of *Means v. U.S. Conference of Catholic Bishops*, 2015 WL 3970046 (W.D.

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INTRODUCTION

Plaintiffs' amended complaint offers a web of hypotheticals to revisit an issue they recently lost in

pregnancy complications create a “disability” under the Rehabilitation Act, 29 U.S.C. §794, and that at least one (unidentified) member suffers from an (unidentified) “disability,” and was “dis

members nation-wide. **Exhibit C**, Amended Complaint, ¶¶7-8. Defendants, Trinity Health Corporation and Trinity Health – Michigan (collectively, "Trinity"), are part of a non-profit health care delivery system. **Exhibit D**, Restated and Amended Articles of Incorporation of Trinity Health. Trinity Health Corporation is the parent of the health system that supports the work of its affiliate hospitals and other entities that provide health care services. Trinity Health Corporation carries a long history of service provided by the founding Catholic religious congregations that have assisted the sick and infirm for more than 125 years. Among the purposes of Trinity Health Corporation is to "carry out the healthcare mission of Catholic Health Ministries on behalf of and as an integral part of the Roman Catholic Church in the United States." Id., Article II.A and II.B. Catholic

authoritative guidance on certain moral issues that face Catholic health care today." **Exhibit B**, p. 4. The Directives express "moral teachings" of the Catholic Church that "flow principally from the natural law, understood in the light of the revelation Christ has entrusted to his church." Id. They "do not cover in detail all of the complex issues that confront Catholic health care today." Id. Trinity adheres to the Directives. See, **Exhibit C**, ¶12; **Exhibit D**

abortion. Id., ¶¶52-53 and 117. She alleged that the defendants were negligent for adopting the Directives as policy for Trinity affiliated hospitals. Id.

The Trinity directors filed a motion to dismiss under Rule 12(b)(6), Fed.R.Civ.P. The Honorable Robert Holmes Bell found that the Directives are a statement of Catholic theology and any determination of liability would necessarily implicate Catholic doctrine. See, **Exhibit A**, pp. 21-24; 2015 WL 3970046, *12-

complaint to survive a Rule 12(b)(6) motion. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). Rule 12(b)(6) "requires more than labels and conclusions[] and a formulaic recitation of the elements of a cause of action * * *." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). A complaint must set forth facts beyond mere speculation that, when considered as a whole, serve as "facially plausible" support for the imposition of liability on a particular defendant. Id.[3]

B. Plaintiffs Have No Standing.

"Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' or 'Controversies,'" and "[t]he doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Susan B. Anthony List v. Driehaus*, __ U.S. __, 134 S.Ct. 2334, 2341 (2014). If plaintiffs lack standing, there is no subject matter jurisdiction and the complaint must be dismissed. See, *Klein v. Dep't of Energy*, 753 F.3d 576, 579 (6th Cir. 2014).

Here, plaintiffs assert claims on behalf of their 500,000 members. See, **Exhibit C**, ¶¶7-8. However, an organization has standing to sue on behalf of its members **only** "when its members would otherwise have standing to sue in their

[3] In deciding a Rule 12(b)(6) motion, documents referred to in the complaint may be considered even if not attached to the complaint. *Amini v. Oberlin College*, 259 F.3d 493, 502 (6th Cir. 2001). Documents integral to a complaint may be relied upon in adjudicating a motion to dismiss under Rule 12(b)(6). *Ouwinga v. Benistar*, 694 F.3d 783, 797 (6th Cir. 2012).

own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Evt'l Servs. (TOC) Inc.*, 528 U.S. 167, 181 (2000).

Theoretically, one of plaintiffs' members could sue in her own right if she can establish three things. **First**, she must establish an "an injury-in-fact." *Klein*, 753 F.3d at 579. "An injury sufficient to satisfy Article III must be concrete and particularized and actual or imminent, not conjectural or hypothetical." *Susan B. Anthony List*, 134 S.Ct. at 2341. **Second**, there must be "a causal connection" between the alleged injury and the defendants' conduct – that "the injury * * * [is] fairly traceable to the challenged action * * * and not the result of the independent action of some third party not before the court." *Klein*, 753 F.3d at 579, <u>quoting</u>, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). **Third**, the injury is redressable, meaning the injury will "be redressed by a favorable decision." <u>Id</u>. "The party invoking jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

i. **<u>No injury-in-fact</u>**. The amended complaint does not identify a "concrete and particularized and actual or imminent" injury to any member. *Susan B. Anthony List*, 134 S.Ct. at 2341. The injury-in-fact requirement mandates that "the injuries being alleged must be described as precisely and unambiguously as

possible." *A.C.L.U. v. N.S.A.*, 493 F.3d 644, 653 (6th Cir. 2007). Here, the amended complaint does not identify any individual that suffered an injury, what that injury was, where or when the injury occurred, or how EMTALA and/or the Rehabilitation Act were violated. See, *Lee v. Bd. of Governors of the Fed. Reserve Sys.*, 118 F.3d 905, 912 (2d Cir. 1997).

Nor have plaintiffs identified any individual who is in imminent danger of such an injury-in-fact. Instead, plaintiffs speculate that one of their 500,000 members encompassing 17 states **may** get pregnant, suffer complications, be forced to visit "one of Defendants' hospitals," require an abortion for stabilization, but that hospital will refuse to perform an abortion **solely** because of the Directives. See, **Exhibit C**, ¶¶7, 8, 10, 41, 42. And, as a result of this highly attenuated chain of speculation, one unidentified member "suffers from mental anguish and distress." Id., ¶¶43, 66. "[T]here is no proof" that this abstract harm might (let alone will) ever happen, and thus it "is neither imminent nor concrete – it is hypothetical, conjectural, or speculative." *N.S.A.*, 493 F.3d at 656; see, also, *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982) (finding that plaintiff lacked standing by failing to assert an injury "other than psychological consequences").

ii. No causal connection. To establish a necessary causal connection, plaintiffs "must allege some threatened or actual injury **resulting from the**

in part, because its members would suffer "ongoing injuries to their aesthetic and recreational interests." Id., p. 967. The

Inc. v. City of Brentwood, 485 F.3d 343, 349 (6th Cir. 2007), quoting, *Warth*, 422 U.S. at 500. Plaintiffs must meet all three elements of prudential standing. **First**, they must "assert [their] own legal rights and interests, and cannot

approximately 160 million women in the United States. If any woman is harmed by a physician's failure to provide a "stabilizing abortion," and that failure violates an applicable standard of care, her remedy would be to directly sue the hospital or physician involved. Moreover, plaintiffs claim they represent over 500,000 members in 17 states that might someday be admitted to a Trinity affiliated hospital. **Exhibit C**, ¶7. If in the future any one of those members does not receive proper medical care, they likewise can sue the hospital or physician directly. "These additional restrictions enforce the principle that, 'as a prudential matter, the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted.'" *Coal Operators*¸ 291 F.3d at 916, quoting, *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 576 (6th Cir. 1991).

D. Plaintiffs Failed To State A Claim Under EMTALA.

EMTALA is intended "to prevent hospitals from dumping patients who suffered from an emergency medical condition because they lacked insurance to pay the medical bills." *Estate of Lacko v. Mercy Hospital*, 829 F.Supp.2d 543, 548 (E.D. Mich. 2011). EMTALA "was not designed or intended to establish guidelines or standards for patient care, provide a suit for medical negligence, or substitute for a medical malpractice claim." Id. In other words, "EMTALA is a limited 'anti-dumping' statute, not a federal malpractice statute." *Bryan v. Rectors & Visitors of Univ. of Va.*, 95 F.3d 349, 351 (4th Cir. 1996).

EMTALA imposes two requirements on hospitals: "(1) to administer an appropriate medical screening, and (2) stabilize emergency medical conditions." *Estate of Lacko*, 829 F.Supp.2d at 548. Plaintiffs' EMTALA claim is based solely on Trinity's alleged failure to provide "stabilizing abortions." See, **Exhibit C**, ¶37.

Plaintiffs do not meet any of the required conditions for a private right of action under EMTALA. Section 1395dd(d)(2)(A) of EMTALA states:

> "**Any individual** who suffers **personal harm** as a **direct result** of a **participating hospital's violation** of a requirement of this secti

determine whether plaintiffs meet EMTALA's statute of limitations. See, 42 U.S.C. §1395dd(d)(2)(C).

Also, plaintiffs did not adequately allege a violation of EMTALA. "If the patient has an 'emergency medical condition' as defined under the statute, the hospital must **either** further examine the patient and provide appropriate treatment to 'stabilize the medical condition,' **or** it must provide for transfer of the patient to another medical facility." *Grant v. Trinity Health-Michigan*, 390 F.Supp.2d 643, 654 (E.D. Mich. 2005), quoting, 42 U.S.C. §1395dd(b)(1)(A)-(B); emphasis added. Plaintiffs only allege that Trinity "denied stabilizing treatment." **Exhibit C**, ¶37. They do not allege the other required condition for an EMTALA claim – whether Trinity could have, but did not, transfer a patient to another medical facility. 42 U.S.C. §1395dd(b)(1)(B).

Finally, EMTALA does not authorize injunctive relief on behalf of third parties. "EMTALA's language limits equitable relief to remedy the personal harm the plaintiff **herself** sustained as a consequence of a violation." *Morin v. E. Main Med. Ctr.*, 779 F.Supp.2d 166, 181 (D. Me. 2011); emphasis added. See, also, *Hart v. Riverside Hosp.*, 899 F. Supp. 264, 267-68 (E.D. Va. 1995). Granting plaintiffs'

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> implemented internal policies and procedures required under EMTALA. It would have to assure itself that [Trinity affiliated hospitals were] conducting orientation and training for new personnel regarding these policies. It would have to undertake exhaustive review to ensure that [Trinity affiliated hospitals were] complying with such policies. And so on." *Hart*, 899 F. Supp. at 266.

EMTALA does not authorize such expansive judicial oversight. Instead, it authorizes the Secretary of Health and Human Services to carry out that function. Id.; see, 42 U.S.C. §1395dd(d)(1)(A).

E. Plaintiffs Failed To State A Claim Under The Rehabilitation Act.

Like their EMTALA claim, plaintiffs' Rehabilitation Act claim also fails to meet threshold requirements. The first element of a *prima facie* case is to identify a "disabled" person. See, *Karlik v. Colvin*, 15 F.Supp.3d 700, 707-706 (E.D. Mich. 2014). Plaintiffs' amended complaint does not identify any person who suffers from a "disability."

Plaintiffs declare that pregnancy complications are a "disability," and that the Directives prohibit Trinity affiliated hospitals from offering "reasonable accommodations" (*i.e.*, abortions) to "disabled individuals." See, **Exhibit C**, ¶¶54-57. "Disability" is defined as "a physical or mental impairment that substantially limits one or more major life activities of [an] individual." 29 U.S.C. §705(20); citing, 42 U.S.C. §12102(1). To meet this standard, courts decide: "(1) whether the plaintiff's condition is a physical or mental impairment; (2) whether that

impairment affects a major life activity; and (3) whether the major life activity is substantially limited by the impairment." *Pacourek v. Insland Steel Co.*, 858 F.Supp. 1393, 1404 (N.D. Ill. 1994).

"It is clearly established that pregnancy *per se* does not constitute a disability under federal law." *Ferrell v. Time Serv., Inc.*, 178 F.Supp.2d 1295, 1298 (N.D. Ga. 2001). Only under "particular circumstances" have courts found that a "pregnancy related condition can constitute a disability." *Cerrato v. Dunham*, 941 F.Supp. 388, 392 (S.D. N.Y. 1996). Here, plaintiffs do not identify **any** individual suffering from pregnancy complications, let alone "particular circumstances" that establish the existence of a disability. **Exhibit C**, ¶48. Instead, they generally (and hypothetically) describe how pregnancy complications **may** potentially require a "stabilizing abortion." **Exhibit C**, ¶¶52-56. Without identifying a "disabled individual," this Court cannot even begin an inquiry under the Act. See, *Keene v. Thompson*, 232 F.Supp.2d 574, 583 (M.D. N.C. 2002) ("Without making an attempt to identify his disability, or at least describing the effect the claimed disability has on his life, Plaintiff cannot satisfy the elements of his *prima facie* case under the Rehabilitation Act").

F. Federal And State Statutes For The Protection Of Religious Conscience Bar Plaintiffs' Claims.

Plaintiffs' claims are also barred by 42 U.S.C. §300a-7, entitled "Sterilization or abortion." This federal statute prohibits any requirement that an

"entity * * * make its facilities available for the performance of any sterilization procedure or abortion procedure if performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions." 42 U.S.C. §300a-7(b)(2)(A). Plaintiffs seek injunctive and declaratory relief requiring Trinity to perform abortions even though such procedures are "prohibited by the entity on the basis of religious beliefs." See, **Exhibit C**, p. 16. Accordingly, 42 U.S.C. §300a-7 precludes such relief.

Michigan's statute for protection of religious conscience similarly immunizes Trinity from liability. M.C.L.A. §333.20181, entitled, "Abortions; refusal to admit patient for performance; immunity," states:

> "A **hospital, clinic, institution, teaching institution, or other health facility** or a physician, member, or associate of the staff, or **other person connected therewith**, **may refuse to perform, participate in, or allow to be performed on its premises an abortion**. **The refusal shall be with immunity from any civil or criminal liability or penalty**." See, **Exhibit F**; emphasis added.

The law is clear: a hospital, health facility, or any "**other person connected therewith**," is immune from **any** civil liability for **refusing to perform**, **participate in**, or **allow an abortion to be performed** on hospital or health facility premises. M.C.L.A. §333.20181; emphasis added. Taking the amended complaint as true, Trinity is connected with a health facility, it refuses to allow abortions to be performed on hospital premises, and such refusal "shall be with

immunity from any civil or criminal liability or penalty." See, **Exhibit C**, ¶¶11-12; M.C.L.A. §333.20181. Plaintiffs' amended complaint should be dismissed for that reason as well.

G. The First Amendment Bars Adjudication Of Plaintiffs' Claims.

Courts are forbidden from interpreting and deciding whether religious beliefs are reasonable or appropriate. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*

teachings of the Roman Catholic Church in such diverse areas of liturgy, doctrine, education, family and life, healthcare, social welfare, immigration, civil rights, criminal justice and the economy." **Exhibit G**, Affidavit of Linda Hunt, Associate General Secretary of the USCCB, ¶¶3, 16. The Directives are a statement of the Roman Catholic Church's moral and religious postures as it relates to health care issues. Id., ¶41; see, **Exhibit B**, pp. 3-5. To decide this case would necessarily require interpretation of the Directives, a determination whether they are reasonable guidelines for Catholic health care institutions, and whether they prevented (or will prevent) plaintiffs' members from receiving a "stabilizing" abortion. For example, adjudication of plaintiffs' claims would require a comparison of Directive 45 (disallowing "direct" abortions) with Directive 47 (allowing stabilizing treatments "even if they result in the death of the unborn child"). **Exhibit B**, p. 26 (Directive Nos. 45, 47).

Plaintiffs may argue (as they did in *Means*) that this case involves medical care and not the inner workings of the church. However, adjudicating the reasonableness of the Directives is inescapable because their claims are based **solely** on the Directives. See, **Exhibit C**, ¶38. Adjudication "concerns government interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, __ U.S. __, 132 S.Ct. 694, 707 (2012). "The very process of

inquiry leading to findings and conclusions" implicates Catholicism and violates the First Amendment. *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979).

This same issue was decided in *Means v. U.S. Conference of Catholic Bishops*, *supra*. **Exhibit A**. In *Means*, the plaintiff alleged that "she should have received, or at least been advised of the option to receive, an abortion * * [h]owever, [she] could not receive an abortion because Directive 45 directly forbids abortion services." Id., p. 5; 2015 WL 3970046, *3. The court recognized the Directives as a statement of Roman Catholic theology, and held that any attempt at adjudicating the dispute would violate the First Amendment:

> "Directive 45 clearly prohibits direct abortions, defined as 'the directly intended termination of a pregnancy before viability.' Do procedures that directly intend to treat a serious pathologic condition of the mother (such as acute chorioamnionitis and funisitis), and indirectly result in termination of the pregnancy, constitute a direct abortion? (*See* Directive 47.) When do medical procedures that augment—rather than induce—labor constitute a direct abortion? (*See* Directive 49.) Must the procedure satisfy the Catholic principle of double-effect to be permissible under the [Directives]? (*See* Directive 45's discussion of 'sole immediate effect' and 'material cooperation.') Can the treating doctor exercise independent judgment or is she required to consult a Catholic ethicist before providing emergency care? (*See* Directive 37.) Does the ethicist have an obligation to consult the local bishop in his moral and theological analysis of the medical treatment options? (*See* General Introduction; Directive 37.)"

H. In The Alternative, This Case Should Be Stayed Pending Appeal Of *Means v. U.S. Conference of Catholic Bishops*, 2015 WL 3970046 (W.D. Mich. 6/30/2015).

"'[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *Gray v. Bush*, 628 F.3d 779, 785 (6th Cir. 2010), quoting, *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (Cardozo, J.). "The decision to stay proceedings rests with the sound

First Amendment bars courts from interpreting the Directives. If the Sixth Circuit agrees with the *Means* decision, plaintiffs' claims must fail as a matter of law.

CONCLUSION

As much as plaintiffs would like to make this case a judicial referendum on the wisdom of the Directives, they cannot bring a claim without standing. Even if they somehow had standing, plaintiffs have failed to state a claim under EMTALA or the Rehabiliation Act. Further, the First Amendment precludes adjudication of a claim premised on the Directives. Trinity respectfully requests that plaintiffs' amended complaint be dismissed under Rule 12(b)(1) and (b)(6), or in the alternative, this case be stayed until the Sixth Circuit decides the appeal in *Means v. U.S. Conference of Catholic Bishops*.

Respectfully submitted,

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November 6, 2015

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2015, I electronically filed the foregoing document with the Clerk of the Court via the ECF system which will give notification of same to all parties of record.

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