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## The Church Amendment: In Search of Enforcement

Nathaniel James

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# The Church Amendment: In Search of Enforcement

Nathaniel James\*

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## *I. Introduction*

On July 7, 2009, Catherina Cenzon-DeCarlo (Cenzon-DeCarlo), a nurse for Mount Sinai Hospital (the Hospital) in New York, filed a lawsuit in the United States District Court for the Eastern District of New York alleging that she had been unlawfully compelled to assist in the performance of a late second trimester abortion over her moral and

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\* Candidate for J.D., Washington and Lee University School of Law, May 2011. I would like to extend my sincere thanks to Prof. Robin Wilson who advised me on this project and offered helpful critique and guidance throughout; to Patrick Rowe for helping me polish the many drafts; to my parents for their ceaseless support; and to my wife Mallory, who provided much needed encouragement while graciously enduring my many late nights in the library.

religious objections.<sup>1</sup> Mrs. Cenzon-DeCarlo alleged violations of 42 U.S.C. § 300a-7(c) (Church Amendment)<sup>2</sup> and requested declaratory and injunctive relief along with compensatory and punitive damages.<sup>3</sup> Because the resolution of Cenzon-DeCarlo's claim came on a summary judgment motion brought by the Hospital, ultimately affirmed by the Second Circuit, this Note addresses the facts as alleged in the complaint.<sup>4</sup> The resolution of Cenzon-DeCarlo's case exposes a gaping hole in the effectiveness of federal protections for individuals who object to participating in abortion procedures on religious, moral, or conscientious grounds.

## II. *The Facts of the Cenzon-DeCarlo Case*

In August of 2004, Catherina Cenzon-DeCarlo began employment at Mount Sinai Hospital in New York.<sup>5</sup> During her initial interviews with the Hospital, Cenzon-DeCarlo was asked about her willingness to assist in abortions. She responded that she had objections, based on her religious views, and would not be comfortable assisting in the abortion of a living child.<sup>6</sup> The hiring officials did not express any concern to Cenzon-DeCarlo about her position on abortion.<sup>7</sup> Indeed the hospital had a written policy allowing employees to formally object to assisting in abortions without

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1. See Complaint at 11–12, 21–22, *Cenzon-DeCarlo v. Mount Sinai Hosp.*, No. 09 CV 3120(RJD), 2010 WL 169485 (E.D.N.Y. Jan. 15, 2010) (describing the facts surrounding the hospital's refusal to honor Cenzon-DeCarlo's expressed unwillingness to participate in abortions as well as the alleged violations of law resulting from that event).

2. See 42 U.S.C. § 300a-7(c) (2006) ("No entity [receiving certain federal funding] may discriminate [against] any physician or other health care personnel . . . because he refused to . . . assist in the performance of [an abortion] . . . because of his religious beliefs or moral convictions . . .").

3. See Complaint, *supra* note 1, at 1–2 (detailing Cenzon-DeCarlo's claims including compensatory and punitive damages for psychological harms resulting from her participation as well as the request for injunctive and declaratory relief to prevent the hospital from forcing employees to participate in abortions over their objection).

4. See *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 699 (2d Cir. 2010) (affirming the judgment of the district court and holding that 42 U.S.C. 300a-7(c) does not imply a private right of action); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 325 (1991) (setting forth the standard of review for cases rising on a Rule 12(b)(6) summary judgment motion saying that the Court "must assume the truth of the material facts as alleged in the complaint").

5. Complaint, *supra* note 1, at 5.

6. *Id.* at 6.

7. *Id.*

penalty.<sup>8</sup> In keeping with this policy, Cenzone-DeCarlo filled out the form recording her objection.<sup>9</sup>

Between 2004 and May of 2009, the Hospital abided by the policy and avoided assigning Cenzone-DeCarlo to abortion cases.<sup>10</sup> On one occasion, she was assigned to an abortion case and later removed after she reminded her supervisors that she was only willing to assist with miscarriages.<sup>11</sup> During an on-call shift on May 24, 2009, Cenzone-DeCarlo was told that she had been assigned to a dilation and curettage (D&C) procedure which is commonly performed in the case of miscarriage.<sup>12</sup> After examining the charts in the operation room and observing the instruments being readied, Cenzone-DeCarlo became concerned that the procedure scheduled was an abortion.<sup>13</sup> After calling the resident assigned to the case, Cenzone-DeCarlo discovered that the procedure to be performed was actually a second-trimester abortion at twenty-two weeks of gestation.<sup>14</sup> After informing the resident that she would not participate in the abortion, she contacted her nursing supervisor and requested to be removed from the case.<sup>15</sup> The supervisor instructed Cenzone-DeCarlo to find out if another nurse could cover for her and told her that she would contact a senior hospital official to ask whether she could be excused.<sup>16</sup> When the supervisor called her back, Cenzone-DeCarlo was told that a senior hospital official had insisted that she assist in the case and had instructed the supervisor not to attempt to seek a replacement.<sup>17</sup>

During her efforts to be removed from the case, Cenzone-DeCarlo was told by her supervisor that the mother could die if the procedure was not immediately performed.<sup>18</sup> This claim contradicted the information she had received when speaking with the resident in charge of the case who had

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8. *Id.*

9. *Id.* at 7.

10. *See id.* at 9 (describing the Hospital's usual practice of assigning nurses other than Cenzone-DeCarlo when such cases arose).

11. *Id.*

12. *See id.* at 8, 10 (describing the purposes of D&C as a common procedure to remove a miscarried fetus from the uterus and detailing Cenzone-DeCarlo's receipt of her assignment on May 24).

13. *Id.* at 10.

14. *Id.* at 11.

15. *Id.*

16. *Id.*

17. *Id.* at 12.

18. *Id.*

revealed that the patient was not receiving the treatment that would be necessary for someone suffering critically from preeclampsia.<sup>19</sup> Furthermore, the case was classified as a Category II priority which required the surgery to be performed within a six hour window.<sup>20</sup> This classification indicated that there was more than adequate time to search for and find a replacement nurse.<sup>21</sup> Although it is not a requirement of the Church Amendment that there be other individuals willing to assist, it is worth noting that even the supervisor on duty was qualified and able to assist in the procedure and could have stepped in without causing any significant delay.<sup>22</sup> Finally, the supervisor told Cenzone-DeCarlo that she would face charges of insubordination and patient abandonment if she failed to comply.<sup>23</sup>

Realizing that such charges could cause her to lose her nursing license and career, Cenzone-DeCarlo made her last protest by informing her supervisor that her religious views led her to believe that the procedure amounted to "killing [] a 22-week-old child" and offered to get her priest on the phone to verify the sincerity of her belief.<sup>24</sup> This offer was rejected and Cenzone-DeCarlo was forced to assist in and observe the performance of a second-trimester dilation and evacuation<sup>25</sup> abortion described by Cenzone-

19. *See id.* (detailing Cenzone-DeCarlo's conversation with the resident and the discovery that the patient was not receiving magnesium therapy which is a necessity for a patient in critical condition suffering from preeclampsia).

20. *Compare id.* at 14 (describing the priority given to Category II cases), *with id.* (discussing the higher priority of Category I patients "requiring immediate surgical intervention for life or limb threatening conditions").

21. *Id.*

22. *Id.* at 12; *see also* Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401, 87 Stat. 91, 95-96 (codified as amended at 42 U.S.C. § 300a-7 (2006)) [hereinafter Church Amendment] (protecting healthcare workers from discrimination without any limitations as to the availability of other willing and able participants).

23. *Id.*

24. *Id.* at 13.

25. *See id.* at 8 (describing the dilation and evacuation method of abortion). The complaint set forth the details of the procedure:

In a dilation and evacuation (D&E) abortion, the mother's cervix is dilated, and after sufficient dilation the mother is placed under anesthesia or sedation. The doctor then inserts grasping forceps through the mother's cervix and into the uterus. The doctor grips a part of the preborn child with the forceps and pulls it back through the cervix and vagina even after meeting resistance from the cervix. That friction causes the preborn child to tear apart. The process of evacuating the preborn child piece by piece continues until the child has been completely removed.

*Id.* at 8.

DeCarlo as "the killing of a 22-week-old preborn child by dismemberment."<sup>26</sup> As a part of her duties, she was required to transport the dismembered fetus to the specimen room.<sup>27</sup> As a result, Cenzone-DeCarlo experienced "extreme emotional, psychological, and spiritual suffering" including nightmares, loss of sleep, and damage "in her personal and religious relationships."<sup>28</sup> She later had to receive treatment from her physician to manage the psychological harms.<sup>29</sup> In addition, the Hospital drastically cut the number of her on-call assignments on which she was financially dependent.<sup>30</sup>

Prior to filing suit, Cenzone-DeCarlo exhausted the Hospital's available complaint procedures. One scheduled meeting to discuss her right to refuse participation in abortions was cancelled by the Hospital because they refused to meet with her attorney present.<sup>31</sup> On the same day the meeting was cancelled, Cenzone-DeCarlo was told that her ability to work future on-call shifts depended upon her signing an agreement that she would assist in performing abortions that the Hospital deemed to be emergencies requiring her assistance.<sup>32</sup> Even after facing intense pressure, Cenzone-DeCarlo refused to sign the statement and reminded the Hospital of the form she signed upon employment recognizing her objection to assisting in abortions.<sup>33</sup>

After these events, Cenzone-DeCarlo filed suit in the Eastern District of New York alleging violations of the Church Amendment.<sup>34</sup> Mount Sinai Hospital is subject to the provisions of the Church Amendment by virtue of their receipt of millions of dollars in Health and Human Services (HHS) grants authorized by the Public Health Service Act.<sup>35</sup> Although the facts

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26. *Id.* at 14.

27. *Id.*

28. *Id.* at 15.

29. *Id.*

30. *See id.* at 5 (discussing her family's financial dependence on her work schedule which, prior to the incident alleged, included eight to nine on-call shifts per month); *id.* at 16 (saying that for August 2009 the number of her on-call assignments had been reduced from their prior levels of eight to nine down to one).

31. *Id.* at 17.

32. *Id.*

33. *Id.*

34. *Id.* at 1–2.

35. *See* Church Amendment, Pub. L. No. 93-45, § 401(c), 87 Stat. 91, 95–96 (codified as amended at 42 U.S.C. § 300a-7) (showing that receipt of funds authorized by the Public Health Service Act brings the receiving entity under the anti-discrimination provisions of the Church Amendment); Complaint, *supra* note 1, at 18–19 (describing the various grants

concerning whether the procedure was a true emergency would likely have been in dispute, the Church Amendment contains no provision containing any sort of emergency or necessity exception.<sup>36</sup> Cenzon-DeCarlo had, therefore, a persuasive case that her legally protected interests under the Church Amendment had been violated. The Hospital, however, filed a motion to dismiss on the basis that the Church Amendment does not provide for a private right of action to enforce its terms.<sup>37</sup> The District Court, in a decision affirmed by the Second Circuit, agreed with the Hospital.<sup>38</sup> Cenzon-DeCarlo's claim was, therefore, dismissed.<sup>39</sup>

The resolution of Cenzon-DeCarlo's case exposes a potential hole in federal statutory protections for the conscience rights of workers in the healthcare industry. This gap is the product of congressional failure to explicitly provide for private enforcement of conscience laws combined with a late twentieth century shift in Supreme Court precedent that fundamentally altered the way federal courts consider the provision of remedies under federal law.<sup>40</sup> The damaging effect of these two factors falls most directly on litigants, like Cenzon-DeCarlo, who seek protection under statutes passed just prior to the Supreme Court shift, a time when Congress had no reason to know that an explicit remedial provision would later be required by the courts. This suggests that the courts should more carefully consider the propriety of implying a private remedy under statutes passed during this transition period rather than applying strict, formalistic requirements which are appropriate only for statutes passed after the courts abandoned the remedial approach.<sup>41</sup> The Church Amendment, passed prior to this judicial departure from the remedial role, merits a more

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received by the Hospital which trigger the applicability of the Church Amendment).

36. See Complaint, *supra* note 1, at 21 ("There is no 'medical necessity' exception to section (c) of the Church Amendment."). See generally Church Amendment, § 401(c) (containing no exceptions for medical necessity or emergency).

37. See *Cenzon-DeCarlo v. Mount Sinai Hosp.*, No. 09 CV 3120(RJD), 2010 WL 169485, at \*1 (E.D.N.Y. Jan. 15, 2010), *aff'd* 626 F.3d 695 (2d Cir. 2010) ("Defendant moves for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.").

38. See *id.* at \*4 (granting defendant's motion to dismiss).

39. *Id.*

40. See *infra* notes 71–80 and accompanying text (demonstrating the shift in Court precedent regarding implication of private remedies under federal law).

41. See *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Curran*, 456 U.S. 353, 378 (1982) (beginning the Court's analysis of the propriety of implying a right of action by saying that it is necessary to consider the state of the law at the time the statute under question was enacted).

comprehensive approach to deciding the propriety of implying a private right of action.

### III. *The Church Amendment*

Responding to fears that *Roe v. Wade*<sup>42</sup> might be used by federal courts as a justification for requiring individuals and institutions to provide abortions against their will, Congress passed the Church Amendment which protects the conscience rights of workers and institutions in the healthcare industry.<sup>43</sup> The Amendment reads:

(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

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42. See *Roe v. Wade*, 410 U.S. 113, 162–64 (1973) (holding that the right to privacy includes a woman's right to obtain a pre-viability abortion).

43. See 119 CONG. REC. 9595 (1973) (statement of Sen. Church) ("Given this state of the law [resulting from *Roe v. Wade*], I can well understand the deep concern being expressed by hospital administrators, clergymen, and physicians whose religious beliefs prohibit abortions and/or sterilization in most cases."); Suzanne Davis & Paul Lansing, *When Two Fundamental Rights Collide at the Pharmacy: The Struggle to Balance Consumer's Rights to Access Contraception and the Pharmacist's Right of Conscience*, 12 DEPAUL J. HEALTH CARE L. 67, 76 (2009) (explaining that Congress responded to the moral tension surrounding *Roe* with the Church Amendment which "made it clear that individuals or entities [receiving] federal funds or assistance could not be required . . . to perform or assist in an abortion if contrary to religious beliefs or moral convictions"); 119 CONG. REC. at 9595 (statement of Sen. Church) (expressing concern about the actions of a district court which had issued a preliminary injunction ordering a Catholic hospital to make its facilities available for the performance of a sterilization procedure).



or abortion if the performance or assistance in the performance of such procedures or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

(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 June 18, 1973, 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.<sup>44</sup>

The amendment's protections are seen to be comprehensive. At the individual level, the statute prohibits any government authority from requiring participation in abortion or sterilization procedures contrary to one's religious or moral convictions, and it further prohibits potential discrimination against either participating or nonparticipating individuals by institutions that receive specified federal funding.<sup>45</sup> At the entity level, the amendment prohibits the federal government from requiring entities that receive designated funds to make their facilities available for abortion or to provide personnel for such procedures.<sup>46</sup>

Very little can be gleaned concerning Congress's intended method of enforcement from the text of the statute alone.<sup>47</sup> Although some suggestion was made in floor debate that federal funds could be withheld from noncompliant entities, the legislative history also contains ambiguities concerning enforcement.<sup>48</sup> The Senators debating the amendment cast

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44. Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401, 87 Stat. 91, 95-96 (codified as amended at 42 U.S.C. § 300a-7(c) (2006)).

45. *Id.* § 401(b)(1), (c).

46. *Id.* § 401(b)(2).

47. *See generally id.* (making no mention of the enforcement of the Church Amendment's anti-discrimination provisions).

48. *See* 119 CONG. REC. 9604 (statement of Sen. Javits) ("[I]t qualifies the benefit by

some doubt on the possibility of a funding penalty when Senator Javits, responding to the question of whether there was a penalty for violations, said, "I hope so. I do not know if it will be so adjudicated by the administrator, but it is there."<sup>49</sup> However, two other Senators, including Senator Church who sponsored the amendment, suggested that funds would not be withheld in the event of noncompliance.<sup>50</sup> The Senators never made mention of private remedies, so very little can be gleaned from the legislative history to either affirm or negate the possibility of private enforcement.<sup>51</sup> However, every court to consider whether this legislative history supports a private right of action has responded in the negative.<sup>52</sup> Due to the silence of Congress on the question, these findings are hardly surprising. However, the District of New York, in a decision affirmed by the Second Circuit, ruled that the Church Amendment not only fails to provide a private right of action but that it does not confer individual rights at all.<sup>53</sup>

#### IV. *The Cenzon-DeCarlo Decision*

In its examination of the propriety of implying a private right of action in the Church Amendment, the Eastern District of New York confined its inquiry to the issue of legislative intent to either create or deny a private remedy.<sup>54</sup> To make this determination, the court addressed and dismissed

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saying that if they do discriminate against the doctor who is in their hospital because he has done something they do not approve of . . . we have the authority to deprive them of that benefit.").

49. *Id.*

50. *See id.* (Statements of Senators Church and Jackson) (answering questions posed by Senator Pastore concerning the possibility of a penalty by suggesting that there would be no funding penalty in the event of noncompliance).

51. *See* Leora Eisendstadt, *Separation of Church and Hospital: Strategies to Protect Pro-Choice Physicians in Religiously Affiliated Hospitals*, 15 YALE J.L. & FEMINISM 135, 160 (2003) (suggesting that the legislative history of the Church Amendment "is sparse on the question of congressional intent with respect to a private right of action").

52. *See, e.g.,* Nead v. Board of Trs. of E. Ill. Univ., No. 05-2137, 2006 WL 1582454, at \*5 (C.D. Ill. June 6, 2006) (dismissing the plaintiff's Church Amendment claim due to lack of support from the legislative history for implying a right of action).

53. *See* Cenzon-DeCarlo v. Mount Sinai Hosp., No. 09 CV 3120(RJD), 2010 WL 169485, at \*4 (E.D.N.Y. Jan. 15, 2010), *aff'd*, 626 F.3d 695 (2d Cir. 2010) (saying that the language of the Church Amendment does not support the inference that Congress intended to create a private right).

54. *See id.* at \*3 ("[T]his Court must examine whether Congress intended to create a private remedy. If not, 'a cause of action does not exist and courts may not create one, no

the plaintiff's argument that the Church Amendment contained the kind of "rights-creating language" necessary to support a finding of congressional intent to create a private remedy.<sup>55</sup> The court reasoned that since that the statute addresses the entities regulated rather than the individuals protected, no private remedy was intended.<sup>56</sup> Ultimately, the court concluded that neither the language of the statute nor its legislative history suggested that Congress intended to create a private remedy.<sup>57</sup> The court proceeded to dismiss *Cenzon-DeCarlo*'s complaint saying that it found "no basis for implying a private right of action under the Church Amendment."<sup>58</sup>

By deciding *Cenzon-DeCarlo* on the grounds that the Church Amendment did not contain the necessary rights-creating language to provide evidence that a right of action was intended, the Eastern District of New York avoided some of the more complicated questions concerning other methods of proving congressional intent.<sup>59</sup> If, for instance, the court had found the text and structure of the statute to be ambiguous concerning congressional intent, it might have been pressed to consider other methods of determining intent such as Congress's expectations in light of the legal context in which the statute was passed.<sup>60</sup> Rather than independently examining congressional intent concerning the creation of a private right,

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matter how desirable that might be as a policy matter, or how compatible with the statute.'" (citing *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001)).

55. *See id.* at \*4 (setting forth the plaintiff's argument that the text and structure of 42 U.S.C. § 300a-7(c) support the implication of a private remedy because it contains rights-creating language not present in other similar statutes where the courts have failed to find a private remedy).

56. *See id.* ("[T]he Church Amendment lacks the classic individual rights-creating language of Title VI and Title IX ('No person . . . shall . . . be subjected to discrimination') under which implied private rights of action have been found." (citations omitted)).

57. *See id.* (saying that the Church Amendment "lacks the focus on individuals" necessary to infer congressional intent to create a private remedy and that the legislative history similarly fails to demonstrate such intent).

58. *Id.*

59. *See id.* at \*3 (stating that statutes which "grant[] no private rights to any identifiable class" will not be found to contain an implied right of action (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283–84 (2002))); *id.* at \*4 (holding that the Church Amendment fails the test set forth in *Gonzaga* and that a private right of action, therefore, cannot be implied).

60. *See Alexander v. Sandoval*, 532 U.S. 275, 288 (2001) (stating that contemporary legal context is relevant where the text is ambiguous as to Congress's intent to create a private remedy), *see also Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Curran*, 456 U.S. 353, 378 (1982) ("In determining whether a private cause of action is implicit in a federal statutory scheme . . . the initial focus must be on the state of the law at the time the legislation was enacted.").

the court confined its inquiry to a narrow comparison of the text of the Church Amendment with the text of Titles VI and IX.<sup>61</sup> The court then effectively concluded that the failure of the Church Amendment to mirror the "classic rights-creating language" of these statutes indicates that no private right was intended.<sup>62</sup>

Although the Second Circuit expanded the inquiry beyond a comparison to the language of Titles VI and IX, it similarly found a lack of evidence that Congress intended to create a private remedy.<sup>63</sup> While acknowledging the existence of some evidence of congressional intent to create a private right, the Second Circuit emphasized the distinction between intent to create a private right and intent to confer a private right of action.<sup>64</sup> The result, according to the Second Circuit, is that "Section 300 may be a statute in which Congress conferred an individual right without an accompanying right of action."<sup>65</sup> Under the Second Circuit's analysis, it is unnecessary to determine whether the Church Amendment confers individual rights because there is not sufficient evidence of congressional intent to create a right of action to enforce them.

This Note will argue that the district court's requirement of strict adherence to the structure of Title VI is an imprecise means of statutory interpretation that precludes the consideration of other meaningful indicators of Congress's intent respecting the Church Amendment.<sup>66</sup> It will advance the argument that the Second Circuit's analysis, while an improvement, similarly fails to adequately consider other pertinent sources

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61. See *Cenzon-DeCarlo v. Mount Sinai Hosp.*, No. 09 CV 3120(RJD), 2010 WL 169485, at \*4 (E.D.N.Y. Jan. 15, 2010) (comparing the text of the Church Amendment to Title VI and IX's "no person shall" language and concluding that the Church Amendment does not similarly indicate intent to confer private rights).

62. See *id.* ("Plaintiff's efforts to distinguish the Church Amendment, however, are unpersuasive. Like FERPA, the Church Amendment lacks the classic individual rights-creating language of Title VI and Title IX ('No person . . . shall . . . be subjected to discrimination') under which implied private rights of action have been found." (citations omitted)).

63. *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 698 (2d Cir. 2010) ("While there may be some colorable evidence of intent to confer or recognize an individual right, there is no evidence that Congress intended to create a right of action.").

64. See *id.* ("We are mindful of a more recent instruction from the High Court that '[t]he judicial task is to . . . determine whether [a statute] displays an intent to create *not just* a private right *but also* a private remedy.'" (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001))).

65. *Id.* at 698–99.

66. See *infra* notes 193–224 and accompanying text (criticizing the district court's treatment of the Church Amendment and setting forth an argument for the propriety of finding a right of action under the statute).

of evidence regarding congressional intent. This failure to properly account for other indicators of congressional intent leaves the Church Amendment plaintiff wrestling with the troubling notion set forth by the Second Circuit—that Congress may have intended to create a private right without an accompanying remedy.<sup>67</sup> This Note will argue that such a result is untenable and that private enforcement is necessary to achieve Congress's goal of protecting individuals from discrimination on the basis of their religious and moral views respecting abortion.<sup>68</sup> However, considering the reluctance of the modern Court to find implied rights of action and the troubles faced in the courts by Church Amendment plaintiffs thus far, it may be necessary for Congress to revisit this topic and explicitly provide for private enforcement in abortion discrimination and coercion cases.

#### V. *The Historical Trend Away from Judicial Implication of Private Remedies*

To understand the *Cenzon-DeCarlo* decision, it is necessary to understand the evolution of the federal judiciary's approach to deciding implication questions. To the casual observer and particularly to plaintiffs like Mrs. Cenzon-DeCarlo whose federally protected interests have been violated, the idea that there may be no means to enforce those protected interests may be confusing indeed.<sup>69</sup> When a court determines that Congress did not intend for a private remedy to accompany the protections provided, plaintiffs are left with a frustrating and seemingly odd result. In some circumstances, these individuals are left without a means to vindicate their rights.<sup>70</sup> Cenzon-DeCarlo, for instance, faces the choice to either continue working as a nurse with little assurance that she will not again be

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67. See *Cenzon-DeCarlo*, 626 F.3d at 698–99 ("Section 300 may be a statute in which Congress conferred an individual right without an accompanying right of action.").

68. See *infra* notes 236–63 and accompanying text (arguing that the effective implementation of Congress's oft-expressed prohibition of discriminatory action against individuals on the basis of their religious or moral views on participating in abortions depends upon private enforcement).

69. See Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 903 (1996) ("When a person suffers injury at the hands of another person whose injury-causing actions are in violation of law, our intuitive sense is that the injured party should have a meaningful remedy.").

70. See *id.* at 904 (describing the occurrence of events which leave an aggrieved party without a meaningful remedy and arguing that the courts should be more willing to imply a cause of action in cases where such an occurrence is likely).

faced with coercive or discriminatory measures or else she must look for alternative employment. To better understand this troubling result, we now turn to a brief history of the Supreme Court's approach to resolving implication questions.

Over the past several decades, the federal judiciary, following the lead of several key Supreme Court decisions, has become increasingly hesitant to imply private rights of action from federal laws.<sup>71</sup> During this time, the once prevailing view that every legal wrong should be met with a remedy lost ground in the courts and was replaced with strong deference indications of congressional intent and purpose.<sup>72</sup> Although the courts were implying rights of action with less frequency, it was not until the seminal decision in *Cort v. Ash*<sup>73</sup> that federal courts were given an analytic framework for how to decide implication questions.<sup>74</sup> In *Cort*, the Supreme Court applied a

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71. See *id.* at 865 (showing that a more "restrictive notion of when to imply private causes of action" developed during the twentieth century in response to increases in federal legislation).

72. See *id.* at 864–65 (pointing to the fact that the courts shifted away from the early view that they should imply a remedy for all statutory wrongs where they were not expressly granted in favor of the view that congressional intent should control the question of whether a remedy should be provided); see also Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV 67, 68–69 (2001) (describing the role of the Supreme Court in spurring the shift from the traditional view that courts should imply remedies for wrongs where legislatures had failed to do so); *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Curran*, 456 U.S. 353, 374–75 (1982) (discussing the once common practice of implying private rights of action, saying that "the judiciary normally recognized a remedy for members of that class. Under this approach, federal courts . . . regarded the denial of a remedy as the exception rather than the rule"). The Court, in *Merrill Lynch*, suggested that this break from the remedial approach to implication questions was motivated in part by increases in the volume and complexity of federal statutes. See *id.* at 377 ("The increased complexity of federal legislation and the increased volume of federal litigation strongly supported the desirability of a more careful scrutiny of legislative intent than *Rigsby* had required.").

73. See *Cort v. Ash*, 422 U.S. 66, 85 (1975) (declining to imply a private right of action under a federal criminal statute making it a crime for corporations to make contributions or expenditures in connection with Presidential elections). In *Cort*, a stockholder in a Delaware corporation brought an action for damages against the corporation for alleged violations of 18 U.S.C. § 610, which prohibits corporations from making contributions or expenditures in connection with certain federal elections. *Id.* at 71–72. The Court addressed the question of whether a private cause of action for damages should be implied under § 610. *Id.* at 68. Announcing and applying a new four-part test to determine whether a private right of action should be implied, the Court determined that it should not. *Id.* at 78–85. The Court found that the implication of a private right of action was not supported by the legislative history, would not further the main purpose of § 610, and would intrude into an area of law traditionally left to the states. *Id.* at 69, 85.

74. See *Stabile*, *supra* note 69, at 867 (saying that *Cort v. Ash* "had a significant impact on the implied cause of action doctrine" by introducing a "new method of analyzing

comprehensive four factor test to be used when deciding whether to imply a right of action from a federal statute.<sup>75</sup> The Court stated:

In determining whether a private remedy is implicit in a statute . . . several factors are relevant. First, . . . does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law . . . so that it would be inappropriate to infer a cause of action based solely on federal law?<sup>76</sup>

By focusing largely on statutory construction and purpose, this formulation marks a stark departure from the earlier remedial analytic framework towards a more focused inquiry into legislative intent.<sup>77</sup>

This shift towards a focus on legislative intent was solidified in 1979 when the Court announced that legislative intent was the "central inquiry" in deciding whether to infer a private right of action from federal law.<sup>78</sup> The Court distanced itself from the framework established in *Cort v. Ash* by downplaying the importance of those factors that did not relate most directly to congressional intent.<sup>79</sup> Although some courts still "speak in terms of a *Cort* analysis, the notion since 1979 has been that congressional intent controls."<sup>80</sup>

Since congressional intent is the controlling consideration in whether or not to infer a private right of action from a federal law, the question of

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implication questions").

75. See *Cort*, 422 U.S. at 78 (explaining the decision of whether to imply a right of action depends upon the plaintiff's status as an intended beneficiary, legislative intent to create a right of action, consistency with the legislative scheme, and consideration of whether it is an area of law traditionally left to the states).

76. *Id.* (citations omitted).

77. See *Stabile*, *supra* note 69, at 867 (showing that the first two *Cort* factors focus largely on legislative intent); see also *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575–76 (1979) ("[T]he first three factors discussed in *Cort* . . . are ones traditionally relied upon in determining legislative intent.").

78. See *Touche Ross*, 442 U.S. at 575 ("The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action."); see also *Cannon v. Univ. of Chi.*, 441 U.S. 677, 688 (1979) (saying that the *Cort* factors are to be used as means of discovering legislative intent).

79. See *Touche Ross*, 442 U.S. at 575 ("It is true that in *Cort v. Ash*, the Court set forth four factors that it considered 'relevant' in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight.").

80. *Stabile*, *supra* note 69, at 870.

how to interpret that intent is of vast importance. Determining legislative intent from the bench can be an incredibly difficult task considering the unavoidable ambiguities present in congressional statutes.<sup>81</sup> Beyond the text of the statute itself, the most logical starting place is the legislative history; however, legislative history may itself produce equally inconclusive results.<sup>82</sup> The legislative history of the Church Amendment, for instance, suggests that the Senators themselves were confused about the possibility of a sanction for violations.<sup>83</sup> They did not even mention private enforcement.<sup>84</sup> Acknowledging the commonality of such ambiguities, the Supreme Court has alluded to the fact that legislative history is neither the only nor last indicia of legislative intent.<sup>85</sup>

Although the Court has not clearly provided an analytic framework for discovering legislative intent beyond the confines of text and legislative history, a couple of approaches can, nonetheless, be distilled from Court precedent.<sup>86</sup> For instance, the Court has, in the past, taken notice of the legislative and judicial context in which a law was enacted in order to infer congressional intent to create or deny a right of action.<sup>87</sup> This approach considers Congress's possible reliance on the formerly common judicial

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81. See Brian G. Slocum, *Overlooked Temporal Issues in Statutory Interpretation*, 81 *TEMPLE L. REV.* 635, 639 (2008) ("The rules of interpretation are most important when courts use them to resolve statutory ambiguities, and modern statutes are often unclear. Congress inevitably leaves ambiguities in the statutes it enacts because it is unable and frequently unwilling to legislate without ambiguities.").

82. See *Cannon*, 441 U.S. at 694 ("We must recognize, however, that the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question.").

83. See *supra* notes 47–51 and accompanying text (discussing the legislative history of the Church Amendment and revealing the inconclusive nature of the Senate's consideration of penalties for statutory violations).

84. See 119 *CONG. REC.* 9598–9605 (Senate debates over the Church Amendment) (making no mention of private enforcement).

85. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694 (1979) ("[When] it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." (quoting *Cort v. Ash*, 422 U.S. 66, 82 (1975))); see also *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979) ("This Court has held that the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available.").

86. See *Stabile*, *supra* note 69, at 888–93, 899–901 (pointing to legislative and judicial context, the possible necessity of implication, and consistency with Congress's purpose as indicia used by the Court at various times to determine legislative intent).

87. See *id.* at 888–90 (discussing the ramifications of the Court's consideration of context in deciphering legislative intent).



practice of implying causes of action from statutes that do not expressly provide them.<sup>88</sup>

The 1979 decision in *Cannon v. University of Chicago*<sup>89</sup> provides a useful example of how contextual considerations can help determine legislative intent concerning the provision of private rights of action. In *Cannon*, the Court devoted considerable attention to the fact that Congress likely relied upon the then prevailing practice of the courts implying private rights of action under similar statutes like Title VI.<sup>90</sup> Noting the similarity between the provisions of Title VI and Title IX,<sup>91</sup> the Court said that although Congress did not directly address the question of a private cause of action, the fact that they considered the enforcement mechanisms of Title VI raises a presumption that they expected Title IX to be treated similarly by the courts.<sup>92</sup> Although the *Cannon* Court did not ultimately rely upon this analysis directly, citing ample additional evidence from the text and legislative history from which to infer intent, its consideration of

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88. *See id.* at 888 ("Context includes the then-prevailing understanding of substantive law, as well as the then-prevailing view of courts as to when implication of a private cause of action is appropriate and as to the role of the federal courts in the creation of federal common law.").

89. *See Cannon*, 441 U.S. at 717 (holding that a private cause of action is implied under Title IX "despite the absence of any express authorization for it in the statute"). In *Cannon*, petitioner brought a lawsuit under Title IX against the University of Chicago alleging that the University failed to admit her to the medical school because she was a woman. *Id.* at 680. The Court considered the question of whether Title IX, which did not explicitly authorize a private right of action, provides for a private cause of action by implication. *Id.* at 688. Upon consideration of legislative intent, the Court concluded that a private cause of action was indeed implicitly created under Title IX. *Id.* at 717. In arriving at this conclusion, the Court considered not only the text and legislative history of the statute but also the larger context in which the law was passed. *Id.* at 696.

90. *See id.* at 697–98 ("[W]e are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.").

91. *Compare* Title VI of the 1964 Civil Rights Act § 601, 42 U.S.C. § 2000d (2006) (providing generally that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"), *with* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2006) (providing that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance").

92. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 696 (1979) (saying that Congress's consideration of Title VI's enforcement mechanisms demonstrates their assumption "that it would be interpreted and applied as Title VI had been during the preceding eight years").

Congress's likely reliance on judicial practices demonstrates the applicability of contextual considerations in determining legislative intent.<sup>93</sup>

In *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Curran*,<sup>94</sup> the Court expanded on the contextual approach to inferring intent by saying that the starting point for deciding implication questions is an examination of the legal context in which the law was adopted.<sup>95</sup> In this case, the Court found the prior implication of a remedy under the pre-amended version of the Commodities Exchange Act to be strong evidence of congressional intent to retain similar enforcement provisions in the amended version.<sup>96</sup> Although this case involved the amendment of a statute under which a private right of action had previously been implied, the Court gives no indication that their analysis of the legal context is limited to such cases. To the contrary, the Court spoke of context as being the starting point for all implication questions and said that evaluating Congress's perception of the state of the law is necessary whether they are "shaping or reshaping" legislation.<sup>97</sup>

Despite these prior recognitions that contextual considerations are instrumental in the determination of congressional intent, the 2001 decision in *Alexander v. Sandoval*<sup>98</sup> casts some doubt on the continued viability of

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93. *See id.* at 699 (stating that "[i]t is not . . . necessary to rely on these presumptions" due to textual and historical evidence that Congress understood Title IX to create a private cause of action).

94. *See Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Curran*, 456 U.S. 353, 388 (1982) (holding that a private right of action was intended and therefore available under the 1974 amendments to the Commodities Exchange Act [CEA]).

95. *See id.* at 378 ("In determining whether a private cause of action is implicit in a federal statutory scheme . . . the initial focus must be on the state of the law at the time the legislation was enacted.").

96. *See id.* at 381–82 ("[T]he fact that a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy.").

97. *Id.* at 378.

98. *See Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding that no private right of action exists under § 602 of Title VI). In *Sandoval*, the Court considered whether a private right of action was implied under § 602 of the Civil Rights Act of 1964. *Id.* at 279. Rejecting the notion that this question had already been answered affirmatively in prior Court decisions finding a right of action under § 601, Justice Scalia, speaking for the Court, said that the "right must come, if at all, from the independent force of § 602." *Id.* at 286. After echoing the well-established rule that congressional intent controls such determinations, the Court found no such intent to create a private right of action under § 602. *Id.* at 289. In so doing, the Court addressed the applicability of contextual considerations to the question saying that "legal context matters only to the extent that it clarifies text." *Id.* at 288.

contextual arguments in implication cases.<sup>99</sup> Addressing the importance of contextual considerations, the Court disagreed with the notion that "cases interpreting statutes enacted prior to *Cort v. Ash* have given dispositive weight to the expectations that the enacting Congress had formed in light of the contemporary legal context."<sup>100</sup> The Court then continued to downplay the relevance of legal context in favor of an isolated analysis of the text and structure.<sup>101</sup> Finding no textual or structural evidence of congressional intent to create a right of action, the Court held that a right of action would not lie under § 602 of Title VI.<sup>102</sup>

While *Sandoval* does suggest that extra-textual considerations will be accorded less consideration than a more liberal reading of past precedent would permit, the Court does not completely rule out contextual considerations where the text of the statute leaves open the possibility of a private remedy.<sup>103</sup> The Court makes much of the fact that the text under consideration in *Sandoval* had a regulatory, rather than a rights-creating, focus.<sup>104</sup> Therefore, the Court's hesitancy to consider the contemporary legal context in *Sandoval* is supported by the fact that the text itself suggests a private remedy was not intended.<sup>105</sup> Where a statute contains rights-creating language found in other statutes where private remedies

99. *See id.* ("In determining whether statutes create private rights of action, as in interpreting statutes generally, legal context matters only to the extent it clarifies text." (citations omitted)).

100. *Id.* at 287–88 (internal quotation marks omitted).

101. *See id.* (reading past decisions that incorporated contextual analysis narrowly by saying that two such cases involved the use of "verbatim statutory text that courts had previously interpreted to create a private right of action" while a third pertained to a statutory text that "independently supported" a private right of action).

102. *See id.* at 289, 293 (finding no evidence of congressional intent to create a private right of action and holding, therefore, that no such right exists).

103. *See id.* at 288 ("We have never accorded dispositive weight to context shorn of text."). *Compare id.* (saying that contextual considerations attain relevance only where they buttress or clarify the text), *with* *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Curran*, 456 U.S. 353, 378 (1982) ("In determining whether a private cause of action is implicit in a federal statutory scheme . . . the initial focus must be on the state of the law at the time the legislation was enacted.").

104. *See* *Alexander v. Sandoval*, 532 U.S. 275, 288–89 (2001) ("It is immediately clear that the 'rights-creating' language so critical to the Court's analysis in *Cannon* of § 601 is completely absent from § 602 . . . . Far from displaying congressional intent to create new rights, § 602 limits agencies to 'effectuating' rights already created by § 601." (citations omitted)).

105. *See id.* at 289 ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer private rights on a particular class of persons.'" (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981))); *id.* at 288 (saying that "legal context matters only to the extent it clarifies text").

have been implied, a different result with respect to consideration of legal context could, and arguably should, be reached.<sup>106</sup>

The language of the Church Amendment fits somewhere between the pure rights-creating language of provisions such as § 601 of Title VI and the clearly regulatory language of § 602 of Title VI.<sup>107</sup> Although the Church Amendment is aimed at the entities receiving appropriations under the Act rather than the persons protected, it does recognize individual, protected interests previously unknown to the law.<sup>108</sup> The Church Amendment must, therefore, be distinguished from § 602 of Title VI under which the Court found no textual evidence of Congressional intent to create a right of action.<sup>109</sup> Statutory language of this sort, arguably creating new rights by language somewhat dissimilar from other provisions found to create private rights of action, seems to justify the kind of clarifying exploration into contemporary legal context suggested by the Court in *Sandoval*.<sup>110</sup> Therefore, *Sandoval* should not prevent litigants who make well-crafted arguments which emphasize the Church Amendment's focus

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106. *See id.* at 313 (Stevens, J., dissenting) (arguing that the majority reached the wrong conclusion concerning whether § 602 should be read independently from Title VI as a whole, which has been held to "benefit a particular class of individuals," and that the majority, therefore, improperly refused to consider contextual evidence).

107. *Compare* Title VI of the 1964 Civil Rights Act § 601, 42 U.S.C. § 2000d (2006) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (emphasis added)), *and id.* § 602, 42 U.S.C. § 2000d-1 ("Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of Section 2000d . . . by issuing rules, regulations, or orders of general applicability . . . ." (emphasis added)), *with* Church Amendment, 42 U.S.C. § 300a-7(c) ("No entity which receives [appropriations under this act] . . . may discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel . . . ." (emphasis added)).

108. *But see* *Cenzon-DeCarlo v. Mount Sinai Hosp.*, No. 09 CV 3120(RJD), 2010 WL 169485, at \*4 (E.D.N.Y. Jan. 15, 2010), *aff'd*, 626 F.3d 695 (2d Cir. 2010) (concluding that the absence of "classic individual rights creating language of Title VI and Title IX" suggests that the Church Amendment did not create individual rights that could be enforced in court).

109. *Compare* 42 U.S.C. § 300a-7(c) (creating new individual protections not present elsewhere in the statute or code), *with Sandoval*, 532 U.S. at 289 ("Far from displaying congressional intent to create new rights, § 602 limits agencies to 'effectuating' rights already created by § 601." (citing Title VI of the 1964 Civil Rights Act § 602, 42 U.S.C. § 2000d-1)).

110. *See Alexander v. Sandoval*, 532 U.S. 275, 288 (2001) ("In determining whether statutes create private rights of action, as in interpreting statutes generally, legal context matters only to the extent it clarifies text.").

on the individuals protected from offering contextual evidence to demonstrate congressional intent to create a private remedy.<sup>111</sup>

*Sandoval* does, however, place another obstacle before litigants bringing suit under the Church Amendment because it represents a significant step in the Court's gradual departure from the pre-*Cort* remedial approach to implication questions.<sup>112</sup> Considering the respondent's arguments to be a request to consider Title VI under that remedial framework, which was prevalent at the time of Title VI's adoption, the Court said, "[h]aving sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink."<sup>113</sup> Instead, the Court emphasized that its own role was merely to determine whether Congress intended to create a private remedy to seek redress for violations of the private right recognized in the statute.<sup>114</sup> Although this language does not, on its own, dictate the conclusion that *Sandoval* represents a heightened standard for proving the existence of private rights of action, the strength of the language does suggest, as noted by the dissent, certain distaste for implied rights of action by the majority.<sup>115</sup>

This distaste for implied rights of action was demonstrated once again in the 2008 decision in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta*<sup>116</sup> in which the Court refused to expand the scope of the existing

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111. *See id.* (explaining that "rights-creating" language is "critical" to a successful showing of congressional intent to create a right of action). *But see id.* at 289 ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981))).

112. *See id.* at 287 (saying that the Court had abandoned the pre-*Cort* remedial approach which had emphasized the courts' duty to "be alert to provide such remedies as are necessary to make effective" Congress's purposes in enacting a statute (quoting *J.I. Case Co. v. Bork*, 377 U.S. 426, 433 (1964))).

113. *Id.*

114. *See id.* at 286–87 ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy . . . . Without [statutory intent], a cause of action does not exist and courts may not create one . . . ." (citations omitted)).

115. *See id.* at 315 (Stevens, J., dissenting) (saying that the majority's rejection of a private right of action under § 602 demonstrates an "evident antipathy toward implied rights of action").

116. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008) (holding that the § 10b private right of action should not be extended because it was determined to be contrary to congressional intent). In *Stoneridge*, the petitioner filed suit under § 10b of the Securities Exchange Act of 1934 alleging fraudulent behavior on behalf of customers and suppliers of Charter Communications, in which they held stock. *Id.* at 152–53. The Court considered whether the implied right of action previously recognized by the Court under § 10b should be extended to cover aiders and abettors. *Id.* at 157–58. The

right of action under § 10b of the Securities Exchange Act of 1934.<sup>117</sup> Although *Stoneridge* was a case in which strong evidence of congressional intent to deny the extension of the right of action was present, it nonetheless indicates a strengthening of the Court's presumption against implied rights of action.<sup>118</sup>

#### VI. Past Judicial Treatment of an Implied Right of Action Under the Church Amendment

The federal courts have had relatively few occasions to address the question of the existence of a right of action under the Church Amendment. In the time between its enactment and the *Cenzon-DeCarlo* case, the courts have only addressed the question, either directly or indirectly, on four separate occasions.<sup>119</sup> The question first came up, albeit tangentially, in the 1973 case *Watkins v. Mercy Medical Center*.<sup>120</sup> There, the plaintiff filed a

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Court found that Congress had made an affirmative choice not to extend the scope of Section 10b to such actors. *Id.* at 158. Therefore, the Court reasoned, to expand the scope of the right of action would "undermine Congress' determination that this class of defendants should be pursued by the SEC . . . ." *Id.* at 163. In so ruling, the Court reemphasized the oft-stated proposition that a private right of action would not be found where congressional intent to do so is found lacking. *Id.* at 164.

117. *See id.* at 165 ("Though it remains the law, the § 10b private right should not be extended beyond its present boundaries.")

118. *See id.* at 158, 166 (finding evidence that Congress had affirmatively rejected an extension of the right of action under Section 10b); *id.* at 179–80 (Stevens, J., dissenting) (criticizing the majority's conclusion that "Congress did not impliedly authorize [the] private cause of action" and arguing that the decision "cuts back further on Congress' intended remedy"); *id.* at 175–76 ("The Court's current view of implied causes of action is that they are merely a 'relic' of our prior 'heady days.'" (quoting *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61, 75 (2001))).

119. *See Carey v. Maricopa County*, 602 F. Supp. 2d 1132, 1144 (D. Ariz. Mar. 12, 2009) (ruling that the plaintiff had the right to bring a claim for damages against Maricopa County defendants under 28 U.S.C. § 300a-7(c)); *Nead v. Bd. of Trs. of E. Ill. Univ.*, No. 05-2137, 2006 WL 1582454, at \*5 (C.D. Ill. June 6, 2006) (holding that the Church Amendment does not contain an implied private right of action); *Moncivaiz v. Dekalb County*, No. 03 C 50226, 2004 WL 539994, at \*3 (N.D. Ill. Mar. 12, 2004) (holding that no private right of action exists under the Church Amendment); *Watkins v. Mercy Med. Ctr.*, 364 F. Supp. 799, 803 (D. Idaho 1973) (holding that the Church Amendment required the reinstatement of a doctor who had been released because of his failure to endorse the hospital's ethical and religious directives).

120. *See Watkins*, 364 F. Supp. at 803 (holding that the Church Amendment required the reinstatement of a doctor who had been released because of his failure to endorse the hospital's ethical and religious directives). In *Watkins*, the plaintiff filed a § 1983 suit against his employer hospital which had refused to extend staff privileges to him because of his failure to abide by the hospital's ethical guidelines concerning abortion and sterilization.

§ 1983<sup>121</sup> action against his employer hospital for its alleged failure to extend his staff privileges because of his refusal to abide by the hospital's ethical guidelines concerning abortion and sterilization.<sup>122</sup> The court addressed the question of whether the receipt of Hill-Burton Act funds sufficiently colored the hospital with state action so as to give rise to a § 1983 claim.<sup>123</sup> The court concluded the receipt of federal funding did not give rise to a finding that the hospital's hiring decisions were colored with state action.<sup>124</sup> However, the court did find that the Church Amendment prevented the hospital from requiring "its staff to adhere to the religious or moral beliefs which support the hospital's policy as a condition of employment or extension of privileges."<sup>125</sup>

Although the question was not directly before the court, the fact that the court recognized the enforceability of the Church Amendment's protections certainly supports the argument for implying a cause of action.<sup>126</sup> On appeal, the Ninth Circuit affirmed and made specific reference to the trial court's order of reinstatement as being a part of the judgment rather than mere dicta.<sup>127</sup> Watkins was denied damages for his

*Id.* at 800. The court's narrow inquiry was whether the receipt of Hill-Burton funding made the hospital a state actor for the purposes of evaluating § 1983 liability. *Id.* at 801. The court concluded that it did not. *Id.* at 802. The court did state, however, that the Church Amendment prevented the hospital from requiring "its staff to adhere to the religious or moral beliefs" underpinning the hospital's policies as a condition of employment. *Id.* at 803.

121. *See* 42 U.S.C. § 1983 (2006) (providing a private right of action for individuals against state actors or individuals and entities acting under color of state law for redress of violations of federal constitutional or statutory protections).

122. *See Watkins*, 364 F. Supp. at 800 ("The plaintiff brought this action . . . contending that he had been denied medical staff privileges for failure to agree to, or abide by, the ethical or religious directives under the Code of Ethics for Catholic Hospitals . . .").

123. *See id.* at 801 ("In order to state a claim for relief under 42 U.S.C. § 1983, it must be shown that Mercy Medical Center and its Board of Directors were acting under color of State law when they denied Dr. Watkins staff privileges.").

124. *See id.* at 802 ("Since hospital policy is not and has not been affected by the benefits bestowed upon it by the state, defendants were not acting under color of state law . . .").

125. *Id.* at 803; *see also Watkins v. Mercy Med. Ctr.*, 520 F.2d 894, 895–96 (9th Cir. 1975) ("[T]he court found that appellee had violated 42 U.S.C. § 300a-7 . . . . The judgment provided for the restoration of Dr. Watkins to staff privileges on condition that he not perform abortions or sterilizations contrary to the hospital's rules.").

126. *See Eisendstadt*, *supra* note 51, at 154 (suggesting that the court's treatment of the Church Amendment was largely dicta).

127. *See Watkins*, 520 F.2d at 896 (saying that "[t]he judgment provided for the restoration of Dr. Watkins to staff privileges"). *But see Eisendstadt*, *supra* note 51, at 154 (suggesting that the district court's language regarding the reinstatement of Dr. Watkins was "in dicta").

§ 1983 claim because the hospital's receipt of federal funding was deemed to be insufficient to color their employment and ethical policies with state action.<sup>128</sup> It is not clear how the courts might have responded had Watkins sought damages directly under the Church Amendment.<sup>129</sup> However, the fact that the Ninth Circuit took no issue with the District Court's order of reinstatement, a private remedy, suggests that they might have responded favorably had the plaintiff effectively made out a case for damages.

After *Watkins*, many years passed before the courts had occasion to address the existence of a private remedy under the Church Amendment. During this roughly thirty-year gap, the judiciary's approach to implication questions underwent significant change.<sup>130</sup> The existence of this gap between cases addressing the existence of a right of action under the Church Amendment thus poses a great difficulty as courts must now choose how to properly apply newly created interpretive rules to outdated legislation.<sup>131</sup> An inflexible application of current implication doctrine in cases involving dated statutes such as the Church Amendment might thwart, rather than preserve, congressional intent.<sup>132</sup> However, stepping back in time by attempting to understand congressional intent through the lens of context is a difficult and time-consuming task that must be far less appealing than more readily accessible indicators of intent such as legislative history. The following cases suggest that Church Amendment plaintiffs will face the difficult task of convincing the courts to move

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128. See *Watkins*, 520 F.2d at 896 ("The mere receipt of Hill-Burton funds . . . is not sufficient connection between the state and the private activity of which appellant complains to make out state action . . . ." (quoting *Ascherman v. Presbyterian Hosp. of Pac. Med. Ctr.*, 507 F.2d 1103, 1105 (9th Cir. 1974))).

129. See *Eisendstadt*, *supra* note 51, at 154 (explaining that the Ninth Circuit applied the Church Amendment without providing any discussion of its "constitutionality or the appropriate means of reliance on it").

130. See *supra* notes 71–118 and accompanying text (describing the development of the Supreme Court's approach to implication questions throughout the twentieth century with a particular emphasis on the years since 1975).

131. See *Stabile*, *supra* note 69, at 889–90 (arguing that modern courts, deciding whether to imply a right of action under an older statute, must take into account how the then existing courts dealt with implication questions and how Congress understood implication at that time).

132. Cf. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 698–99 (1979) (saying that even where the Court has adopted a more stringent interpretive approach for implication questions, it must still evaluate congressional action in light of "its contemporary legal context").



beyond an isolated analysis of legislative history in their search for congressional intent.<sup>133</sup>

In 2004, the Northern District of Illinois heard the case of *Moncivaiz v. Dekalb County*<sup>134</sup> and denied private relief under the Church Amendment.<sup>135</sup> In *Moncivaiz*, the plaintiff, a part-time secretary, alleged that she had been denied employment as a full-time secretary with Dekalb County's Women, Infants, and Children (WIC) program because of her expressed opposition to abortion.<sup>136</sup> The plaintiff was further told that as an employee of the Health Department, she would be expected to "uphold the views of the department even outside of the facility."<sup>137</sup> Upon receiving this information, the plaintiff resigned her part-time position and filed suit citing numerous violations of federal statutory and constitutional law.<sup>138</sup>

In granting the defendant's motion to dismiss the Church Amendment claim, the court relied upon Seventh Circuit precedent and the oft-quoted maxim that a strong presumption exists against the implication of private rights of action.<sup>139</sup> In the court's view, this presumption could not be overcome in the absence of proof from the legislative history that Congress intended to grant a private remedy.<sup>140</sup> Due to the court's brief treatment of the Church Amendment claim, it is difficult to determine exactly why it was denied. From the language used it seems that the lack of evidence from the legislative history was the decisive point.<sup>141</sup> The Northern District

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133. See *Moncivaiz v. Dekalb Cnty.*, No. 03 C 50226, 2004 WL 539994, at \*3 (N.D. Ill. Mar. 12, 2004) (determining congressional intent with regards to a private right of action under the Church Amendment by means of analyzing only the legislative history); *Nead v. Bd. of Trs. of E. Ill. Univ.*, No. 05-2137, 2006 WL 1582454, at \*5 (C.D. Ill. June 6, 2006) (same).

134. See *Moncivaiz*, 2004 WL 539994, at \*3 (holding that the Church Amendment does not support the implication of a private right of action).

135. See *id.* (dismissing the plaintiff's claim under 42 U.S.C. § 300a-7).

136. See *id.* at \*1 (describing how the plaintiff was told she was not hired for the position because of her views concerning abortion in spite of her qualifications for the job).

137. *Id.*

138. See *id.* (listing the plaintiff's many claims brought under 42 U.S.C. § 1983, Title VII, 42 U.S.C. § 300a-7, and the Illinois Health Care Right of Conscience Act).

139. See *id.* at \*3 ("The statute does not create an express private right of action and a strong presumption exists against creation of an implied right of action." (citing *Endsley v. City of Chi.*, 230 F.3d 276, 281 (7th Cir. 2000))).

140. See *id.* ("Plaintiff does not cite any legislative history to suggest a private right of action was intended. Absent such a suggestion, the court 'will not imply a private right of action where none appears in the statute.'" (quoting *Endsley*, 230 F.3d at 281)).

141. See *id.* (suggesting that legislative history is the only acceptable source of proof that an implied private right of action should be found).

of Illinois did not make reference to any other indicia of legislative intent.<sup>142</sup> As was the case here in *Moncivaiz*, an exclusive focus on legislative history to determine whether a private right of action was intended under the Church Amendment will result in the quick resolution of motions to dismiss in favor of defendants.

The question of whether a private right of action exists under the Church Amendment was next raised two years later in the neighboring Central District of Illinois.<sup>143</sup> As with *Moncivaiz*, the plaintiff in *Nead v. Board of Trustees of Eastern Illinois University*<sup>144</sup> similarly claimed that she was passed over for a promotion due to her expression of opposition to abortion and the use of emergency contraception during an interview.<sup>145</sup> The plaintiff's Church Amendment claim, based on 42 U.S.C. § 300a-7(b)–(d), consisted primarily of the argument that the hospital had discriminated against her in their promotion decisions because she had refused to participate in the dispensing of Emergency Contraception (EC) on the basis of her religious and moral beliefs.<sup>146</sup> However, as in *Moncivaiz*, the court did not reach the merits of the plaintiff's claim but rather granted the defendants' motion to dismiss upon finding that the Church Amendment did not grant a private right of action.<sup>147</sup>

The court in *Nead* relied heavily on the precedent set by the Northern District of Illinois in *Moncivaiz*.<sup>148</sup> The court echoed the same language used by the *Moncivaiz* Court saying again that "a strong presumption exists

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142. *See id.* (mentioning only legislative history as a possible indicator of legislative intent to provide a private right of action).

143. *See Nead v. Bd. of Trs. of E. Ill. Univ.*, No. 05-2137, 2006 WL 1582454, at \*5 (C.D. Ill. June 6, 2006) (granting defendant's motion to dismiss the plaintiff's claim brought under the Church Amendment).

144. *See id.* (holding that the Church Amendment did not support the finding of an implied right of action).

145. *See id.* at \*1 (outlining the details of the plaintiff's interview including her response to the question of whether she would be willing to dispense emergency contraception).

146. *See id.* at \*5 (describing the formulation of the plaintiff's claim under the Church Amendment); *see also* 42 U.S.C. § 300a-7(b)–(d) (2006) ("No entity [receiving certain federal funding] may discriminate [against] health care personnel . . . because he refused to . . . assist in the performance of [abortion] . . . because of his religious beliefs or moral convictions . . .").

147. *See id.* ("The plaintiff makes an ardent but unavailing argument for reading a private right of action into the statute . . . . The motion to dismiss Count V is granted.").

148. *See id.* (saying that the existence of an implied right of action under the Church Amendment had already been answered in the negative by the *Moncivaiz* court).

against the creation of an implied right of action."<sup>149</sup> The court also incorporated, by quotation, the suggestion from *Moncivaiz* that evidence from the legislative history is necessary to establish a suggestion that Congress intended to provide a private right of action.<sup>150</sup> The final disposition of the claim reinforces this position since it was dismissed for lack of evidence from the legislative history to support the implication of a right of action.<sup>151</sup> The *Nead* case solidifies the implication raised by *Moncivaiz* that exclusive reliance on legislative history as the indicator of congressional intent will result in the dismissal of claims brought under the Church Amendment.<sup>152</sup>

*Moncivaiz* and *Nead* both relied on the Seventh Circuit case *Endsley v. City of Chicago*<sup>153</sup> in their determination that a private right of action was not implicit in the Church Amendment.<sup>154</sup> The *Moncivaiz* decision suggests that the court was relying on *Endsley* for the proposition that evidence from the legislative history is necessary to demonstrate congressional intent to create a right of action. While *Endsley*'s "strong presumption" language certainly suggests that implication questions will more often than not be answered in the negative, it does not, however, seem to demand narrowing the inquiry to the legislative history alone.<sup>155</sup> In *Endsley*, the Seventh

149. *Id.* (quoting *Moncivaiz v. Dekalb Cnty.*, No. 03 C 50226, 2004 WL 539994, at \*3 (N.D. Ill. Mar. 12, 2004)).

150. *See id.* ("Plaintiff does not cite any legislative history to suggest a private right of action was intended. Absent such a suggestion, the court, will not imply a private right of action where none appears in the statute." (quoting *Moncivaiz*, 2004 WL 539994, at \*3)).

151. *See id.* ("[C]ounsel provides no legislative history to support *Nead*'s claim. In fact, a cursory review of the legislation as a whole suggests the main purpose was to appropriate funds for health care services. The motion to dismiss . . . is granted.").

152. *See id.* (dismissing the plaintiff's Church Amendment claim due to lack of evidence from legislative history); *see also Moncivaiz*, 2004 WL 539994, at \*3 (same).

153. *Endsley v. City of Chi.*, 230 F.3d 276, 280 (7th Cir. 2000) (upholding the district court's dismissal of the plaintiff's claims against the City of Chicago which alleged violations of the Commerce Clause, the Sherman Act, and a federal transportation statute limiting the taking of tolls on federally funded roadways). In *Endsley*, the plaintiff filed suit challenging the city's appropriation of tolls taken on the Chicago Skyway. *Id.* at 278. One of the claims, which was based on a federal transportation statute, was dismissed by the district court because it found no private right of action under the statute. *Id.* at 280. The Seventh Circuit affirmed, saying that an implied right of action could not be found after a consideration of the statute's language, structure, legislative history, and intended beneficiaries evidenced no congressional intent to create one. *Id.*

154. *See Moncivaiz*, 2004 WL 539994 at \*3 (citing *Endsley* for the proposition that there is a heavy presumption against implying a right of action in a federal statute); *Nead v. Bd. of Trs. of E. Ill. Univ.*, No. 05-2137, 2006 WL 1582454, at \*5 (C.D. Ill. June 6, 2006) (same).

155. *See Endsley*, 230 F.3d at 280 (looking to the express language of the statute in

Circuit focused on more than just the presence of evidence in the legislative history to make its determination that a private right of action should not be implied under a certain federal transportation statute. Instead of focusing solely on the legislative record, the *Endsley* Court evaluated the statute's text, language, overall structure, as well as its intended beneficiaries before determining that a right of action should not be implied.<sup>156</sup> Whereas the federal transportation statute at issue in *Endsley* did not include the plaintiffs as intended beneficiaries, the Church Amendment most certainly includes individuals like the plaintiff in *Moncivaiz* as beneficiaries of its protections.<sup>157</sup> Neither *Nead* nor *Moncivaiz* suggest that considerations such as this were weighed in conjunction with considerations of legislative history.<sup>158</sup> Had they been considered, it is possible, although still uncertain, that a different conclusion might have been reached. Due to the silence of the legislative history of the Church Amendment on the existence of a private right of action, if plaintiffs seeking relief under this statute want to survive a motion to dismiss they must persuade the courts to take a more comprehensive look at factors indicative of legislative intent rather than merely relying on legislative history.<sup>159</sup>

Prior to *Cenzon-DeCarlo*, the most recent opportunity for a federal court to address the question of the existence of a private remedy under the Church Amendment came in 2009 in *Carey v. Maricopa County*.<sup>160</sup> In *Carey*, the plaintiff brought a series of claims against Maricopa County

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addition to its structure, legislative history, and intended beneficiaries).

156. *See id.* (evaluating statutory text, structure, legislative history, and the question of whether the statute was written for a particular class of intended beneficiaries prior to concluding that a right of action should not be implied).

157. *Compare* 23 U.S.C. § 129(a)(3) (2006) (generally setting forth the requirements for public authorities wishing to operate toll roads including an agreement with the Secretary of Transportation on a plan for properly allocating the toll proceed to the payment of debts and maintenance of the road), *with* Church Amendment, 42 U.S.C. § 300a-7(c) (2006) (providing that no entity receiving specified federal funds may discriminate against individuals because of their refusal to participate in abortion procedures due to religious or moral convictions).

158. *See* *Moncivaiz v. Dekalb Cnty.*, No. 03 C 50226, 2004 WL 539994, at \*3 (N.D. Ill. Mar. 12, 2004) (mentioning only legislative history as an indicia of legislative intent to create or deny a right of action); *Nead*, 2006 WL 1582454, at \*5 (C.D. Ill. June 6, 2006) (same).

159. *See* *Eisendstadt*, *supra* note 51, at 160 (saying that the legislative history of the Church Amendment gives little indication concerning the existence of a private right of action under the statute).

160. *See* *Carey v. Maricopa Cnty.*, 602 F. Supp. 2d 1132, 1144 (D. Ariz. Mar. 12, 2009) (ruling that the plaintiff had the right to bring a claim for damages against Maricopa County defendants under 28 U.S.C. § 300a-7).

which he claimed attempted to remove him from leadership positions at Maricopa County Medical Center because of his participation in and position on abortions.<sup>161</sup> Defendants' motions for summary judgment on each of the plaintiff's federal law claims were denied.<sup>162</sup> Surprisingly, the court ruled that the plaintiff's punitive damages claim under the Church Amendment survived the summary judgment motion without providing even a cursory discussion concerning the propriety of implying a right of action under the statute.<sup>163</sup> While this is certainly a recent example of a private remedy being allowed under the Church Amendment, as *Cenzon-DeCarlo*'s counsel rightly pointed out, the fact that the implication of a private remedy was not addressed by the court may make *Carey* somewhat unpersuasive in cases where that issue is directly in dispute.<sup>164</sup>

Not surprisingly, the result in *Cenzon-DeCarlo* suggests that the Eastern District of New York was not persuaded by the *Carey* decision.<sup>165</sup> As with the only other cases that directly address the propriety of implying a right of action under the Church Amendment, *Nead* and *Moncivaiz*, the district court in *Cenzon-DeCarlo* found ample justification from authoritative Supreme Court and Circuit Court precedent to quickly dispose of the plaintiff's claim.<sup>166</sup> Although the *Cenzon-DeCarlo* court's analysis differed from the earlier Church Amendment decisions, the result reinforces the reluctance of the modern courts to recognize implied remedies.<sup>167</sup> The

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161. *See id.* at 1135 (stating that the plaintiff's unauthorized rotation with Planned Parenthood was used by the County as a reason to remove him from leadership positions amounting to, in the plaintiff's view, "unlawful discrimination . . . on the basis of his religious and moral views under state and federal law").

162. *See id.* at 1136 ("Each of Plaintiff's federal claims against County Defendants will survive summary judgment.").

163. *See id.* at 1144 ("Defendants do not dispute that there is no bar to his recovery of punitive damages against the Kunaseks under § 1983 or Title VII, nor against all County Defendants under 42 U.S.C. § 300a-7. Thus, those claims will stand.").

164. *See id.* (suggesting that punitive damages were allowed under the Church Amendment because of the defendant's failure to make an assertion to the contrary); *see also* Response to Letter Request for Pre-Motion Conference at 2, *Cenzon-DeCarlo v. Mount Sinai Hosp.*, No. 09 CV 3120(RJD), 2010 WL 169485 (E.D.N.Y. Jan. 15, 2010) ("[J]ust this year the United States District Court in Arizona not only recognized an individual right, but allowed the plaintiff . . . to seek punitive damages").

165. *See Cenzon-DeCarlo*, 2010 WL 169485, at \*4 (dismissing the plaintiff's claim brought under the Church Amendment due to the finding that it does not imply a private right of action and making no mention of the different result reached in *Carey*).

166. *See id.* at \*3-4 (referencing a host of Supreme Court opinions holding that the propriety of implying a right of action depends entirely on congressional intent and holding that evidence of such intent is lacking in the Church Amendment).

167. *See Alexander v. Sandoval*, 532 U.S. 275, 315 (2001) (Stevens, J., dissenting)

result in *Cenzon-DeCarlo* is made all the more damaging to plaintiffs seeking to convince courts of the propriety of an implied right of action under the Church Amendment because the dismissal of the claim on the basis that the text itself definitively proves the absence of congressional intent effectively precludes the introduction of extra-textual evidence of congressional intent such as contemporary legal context.<sup>168</sup>

In disposing of *Cenzon-DeCarlo*'s claim, the Eastern District of New York relied heavily on *Gonzaga University v. Doe*<sup>169</sup> in effort to show that the Church Amendment, far from showing congressional intent to create a private *remedy*, fails to show congressional intent to create a private *right*.<sup>170</sup> In *Gonzaga*, the Supreme Court reasoned that the initial inquiry in an implied right of action case is substantially the same as in cases brought under § 1983.<sup>171</sup> In both cases, the Court must first determine whether Congress intended for the statute to create a federal right rather than mere

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(saying that the Supreme Court's rejection of a private remedy demonstrates an "evident antipathy toward implied rights of action"). *Compare supra* notes 1–8 and accompanying text (discussing the result reached by the Eastern District of New York in *Cenzon-DeCarlo* which stemmed from the court's determination that the Church Amendment did not contain sufficiently strong rights-creating language to justify implication), *with supra* notes 134–59 and accompanying text (discussing the reliance of the *Nead* and *Moncivaiz* courts on the absence of proof in the legislative history concerning congressional intent to create a private remedy).

168. *Cf. Sandoval*, 532 U.S. at 288 ("In determining whether statutes create private rights of action, as in interpreting statutes generally, legal context matters only to the extent it clarifies text.").

169. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002) (holding that the Family Educational Rights and Privacy Act [FERPA] did not create a federal right enforceable under § 1983). In *Gonzaga*, the plaintiff brought a § 1983 action against Gonzaga University claiming unauthorized release of private information to an unauthorized person in violation of FERPA. *Id.* at 277. The Supreme Court considered whether FERPA created a federal right enforceable by private individuals bringing § 1983 actions. *Id.* at 276. The Court held that FERPA did not confer enforceable rights. *Id.* at 290. In reaching this conclusion, the Court found that FERPA lacked the classic rights-creating language showing congressional intent to create a new right, had an aggregate rather than individual focus, and contained an independent enforcement mechanism through the Department of Education. *Id.* at 287–89.

170. *See Cenzon-DeCarlo v. Mount Sinai Hosp.*, No. 09 CV 3120(RJD), 2010 WL 169485, at 3–4 (E.D.N.Y. Jan. 15, 2010) (dismissing the plaintiff's argument that the Church Amendment meaningfully differs from the statute at issue in *Gonzaga* and holding that the Church Amendment similarly "lacks the classic individual rights-creating language . . . under which implied rights of action have been found" (quoting *Gonzaga*, 536 U.S. at 287)).

171. *See Gonzaga*, 536 U.S. at 284–85 ("But the initial inquiry—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied right of action case . . . which is to determine whether or not a statute 'confers rights on a particular class of persons.'" (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981))).

"benefits or interests."<sup>172</sup> The Court contrasted the provisions of the statute at issue in *Gonzaga* which says "No funds shall be made available" with the classic rights-creating language of Title VI, which is phrased in terms of the individual protected, providing that "No person . . . shall . . . be subjected to discrimination."<sup>173</sup> The Court concluded that the "[n]o funds" language is too far removed from the individuals protected to give rise to a claim under § 1983.<sup>174</sup> The Eastern District of New York incorporated this line of analysis in *Cenzon-DeCarlo* concluding that the lack of the classic "[n]o person shall" language present in Title VI and Title IX meant that the Church Amendment did not create private rights.<sup>175</sup> Because there cannot logically be a right of action to enforce a nonexistent right, *Cenzon-DeCarlo*'s arguments were rejected and the case dismissed.<sup>176</sup>

The Eastern District's reliance on *Gonzaga* in dismissing *Cenzon-DeCarlo*'s claim is dissatisfying for two different reasons. First, *Gonzaga* dealt with a claim brought under § 1983.<sup>177</sup> *Cenzon-DeCarlo*, on the other hand, concerns implication, a related but different question.<sup>178</sup> Although the language of the *Gonzaga* opinion downplays this dividing line for the purpose of importing some standards from implication cases into the § 1983 case before the Court, it does not necessarily follow that language incidental to the Court's application of those standards to a § 1983 case should be imported back into an implication decision.<sup>179</sup> Second, the

172. *See id.* at 285 ("Both inquiries simply require a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries.").

173. *Id.* at 287.

174. *See id.* ("This focus is two steps removed from the interests of individual students and parents and clearly does not confer the sort of 'individual entitlement' that is enforceable under § 1983." (quoting *Blessing v. Freestone*, 520 U.S. 329, 343 (1997))).

175. *See Cenzon-DeCarlo*, 2010 WL 169485, at \*4 ("Like FERPA, the Church Amendment lacks the classic individual rights-creating language of Title VI and Title IX ('No person . . . shall . . . be subjected to discrimination . . .') under which implied private rights of action have been found." (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002))).

176. *See id.* (dismissing *Cenzon-DeCarlo*'s complaint on the grounds that no private right was granted and therefore no private right of action was intended).

177. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002) ("The question presented is whether a student may sue a private university for damages under . . . 42 U.S.C. § 1983 . . . to enforce provisions of the Family Educational Rights and Privacy Act of 1974 . . .").

178. *See Cenzon-DeCarlo v. Mount Sinai Hosp.*, No. 09 CV 3120(RJD), 2010 WL 169485, at \*4 (E.D.N.Y. Jan. 15, 2010) (answering in the negative the question of whether the Church Amendment confers a private right of action); *Gonzaga*, 536 U.S. at 283 (discussing the similarities and differences between § 1983 and implied right of action cases).

179. *See Gonzaga*, 536 U.S. at 283 ("[W]e further reject the notion that our implied right of action cases are separate and distinct from our § 1983 cases. To the contrary, our

Eastern District of New York's treatment of *Gonzaga* takes the "rights-creating" analysis a step further than the Supreme Court did. The Supreme Court indicated that the language of FERPA was too far removed from the private interests at stake to support finding a private right.<sup>180</sup> In so doing, it compared FERPA's language to the classic rights-creating provisions of Title VI and Title IX; however, it did not treat the absence of Title IX's "no person" language as dispositive.<sup>181</sup> Rather, the Court also considered whether the statute concerned itself with aggregate or individual needs as well as the method of enforcement provided by Congress in the statute.<sup>182</sup> Alternatively, the Eastern District of New York effectively gives dispositive weight to the absence of the "no person" language in the Church Amendment.<sup>183</sup>

On appeal, the Second Circuit affirmed the judgment of the district court, albeit under a slightly different mode of analysis.<sup>184</sup> Rather than holding that the Church Amendment did not confer individual rights in the first place, the Second Circuit focused on the absence of proof that Congress intended to confer a private right of action.<sup>185</sup> By focusing on proof of congressional intent to confer a private mode of enforcement, the Second Circuit produced a somewhat more palatable opinion than the district court which ruled that Congress did not confer individual rights in the first place. Although the Second Circuit stopped short of analyzing congressional intent in light of the contemporary legal context, it did at

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implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983."); *see also id.* ("We have recognized that whether a statutory violation may be enforced through § 1983 'is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute.'" (quoting *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990))).

180. *See id.* at 287 ("This focus is two steps removed from the interests of individual students and parents and clearly does not confer the sort of individual entitlement that is enforceable under § 1983." (citations omitted)).

181. *See id.* at 287–89 (considering, in addition to the difference between FERPA and Titles VI and IX, the aggregate focus, the loose substantial compliance requirement, and the agency policy focus of the statute to conclude that no private rights were conferred).

182. *Id.* at 288–89.

183. *See Cenzon-DeCarlo*, 2010 WL 169485, at \*4 ("[I]t speaks to the funded entity rather than to any benefitted class and, therefore, lacks the focus on individuals that would indicate the necessary congressional intent that a private right of action be implied.").

184. *See Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 699 (2d Cir. 2010) ("Section 300 does not confer upon Cenzon-DeCarlo a private right of action to enforce its terms.").

185. *See id.* at 697–99 (acknowledging evidence that Congress intended to confer individual rights but concluding that the Church Amendment "may be a statute in which Congress conferred an individual right without an accompanying right of action").



least examine congressional intent in light of the text, structure, and legislative history of the statute.<sup>186</sup> Ultimately, the court concluded that the Church Amendment is nothing more than a ban on discriminatory conduct.<sup>187</sup> Relying on dicta from *Cannon*, the Second Circuit concluded that a private right of action should not be implied under the Church Amendment.<sup>188</sup> In so finding, the court noted its willingness to accept the reality that Congress may have created an individual right without an accompanying remedy.<sup>189</sup>

Although it is certainly possible, as the Second Circuit suggests, that Congress could create a private right without an accompanying right of action, it seems reasonable, in the face of that troubling irony, to ask whether that is the result Congress actually intended. This additional inquiry might well lead the courts to acknowledge other indicators of congressional intent such as the contemporary legal context in which the statute was passed. In the case of the Church Amendment, this deeper examination into legislative intent might well lead the courts to conclude that Congress did intend for the statute to be privately enforced.<sup>190</sup> In spite of this small glimmer of hope for plaintiffs like *Cenzon-DeCarlo*, it is necessary to acknowledge the clear impact of the Second Circuit's decision in *Cenzon-DeCarlo*—the federal courts are unlikely to recognize privately enforceable rights under the Church Amendment.<sup>191</sup> The clear trend since the mid-twentieth century has been away from implied rights of action and towards a strict requirement of explicit congressional authorization for private suits.<sup>192</sup>

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186. *Id.*

187. *See id.* at 698–99 (concluding that the language of the Church Amendment operates merely as a ban on discriminatory conduct (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690–93 (1979))).

188. *See id.* at 698 ("*Cannon* explicitly warns that language like that of Section 300 does not signal Congressional intent to create a private remedy.>").

189. *See id.* at 698–99 ("Section 300 may be a statute in which Congress conferred an individual right without an accompanying right of action.>").

190. *See infra* Part VII (advancing an argument for finding an implied right of action under the Church Amendment).

191. *See supra* notes 119–89 and accompanying text (examining the previous instances of judicial rejection of an implied private right of action under the Church Amendment).

192. *See supra* notes 71–118 and accompanying text (demonstrating the departure of the Supreme Court from the early remedial approach to deciding implication questions and the Court's adoption of a more restrictive approach to finding rights of action).

*VII. An Argument for an Implied Right of Action Under the Church Amendment*

Notwithstanding the trend away from finding implied rights of action, Supreme Court precedent does not completely foreclose the possibility of an implied remedy under the Church Amendment. There are valid arguments to be made that should lead the courts to conduct a more searching examination concerning the possibility of an implied remedy under the Church Amendment. To begin with, plaintiffs under the Church Amendment should carefully distinguish that statute from the one at issue in *Gonzaga* to show that an individual right was created and intended by Congress.<sup>193</sup> Unlike FERPA, at issue in *Gonzaga*, the Church Amendment is not clearly meant to condition the receipt of federal funds on compliance with the statute.<sup>194</sup> Certainly the language of the Church Amendment differs from the language of Titles VI and IX which has been enshrined as *the* "classic rights-creating language," yet the Church Amendment also lacks the clear funds-conditioning language of FERPA.<sup>195</sup> The language of the Church Amendment lies somewhere in between these two extremes and accordingly deserves a more searching inquiry to determine whether Congress intended to create an individual right. Indeed, Senator Javits, who sponsored the anti-discrimination portion of the Church Amendment, made clear that it was crafted to protect the right of the individual to be free from discrimination because of his or her position on abortion.<sup>196</sup>

If the purpose of the Church Amendment was merely to condition the receipt of federal funds on compliance, one might wonder why Congress

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193. See *Cenzon-DeCarlo v. Mount Sinai Hosp.*, No. 09 CV 3120(RJD), 2010 WL 169485, at \*4 (E.D.N.Y. Jan. 15, 2010) (showing that the application of the Court's reasoning in *Gonzaga* to the Church Amendment effectively forecloses all other arguments in favor of implying a right of action).

194. Compare *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278–79 (2002) (showing that FERPA was enacted to condition the receipt of federal funding on compliance with its requirements as evidenced by its language that begins "No funds shall be made available" to noncompliant programs (citations omitted)), with Church Amendment, 42 U.S.C. § 300a-7(c) (2006) (lacking funds-conditioning language like that in FERPA and proscribing certain discriminatory actions by entities against individuals).

195. Compare FERPA, 20 U.S.C. § 1232(g)(a) (2006) (beginning "[n]o funds shall be made available under any applicable program" which fails to conform to the statute's privacy requirements), with Church Amendment, 42 U.S.C. § 300a-7(c) (beginning "[n]o entity . . . may discriminate in . . . employment . . . or extension of staff or other privileges" on the basis of an individual's willingness to participate in abortions or sterilizations).

196. See 119 CONG. REC. 9603 (1973) (statement of Senator Javits) ("I wish to make it clear that that particular amendment simply will protect anybody who works for that hospital against being fired or losing his hospital privileges . . .").

would fail to make that purpose explicit as it has done in other statutes such as FERPA. Even if the Court's analysis in *Gonzaga* is found to be authoritative in the implication context, the courts should recognize that the Church Amendment presents a different and more difficult case than the FERPA provisions with which that case is concerned.<sup>197</sup> The requirement, as applied by the court in *Cenzon-DeCarlo*, that legislators from nearly forty years ago adhere with strict precision to a wording that would only later be dubbed as the "classic rights-creating language" seems to be a strangely imprecise means of determining "whether or not Congress intended to confer individual rights upon a class of beneficiaries."<sup>198</sup>

The anti-discrimination provision of the Church Amendment is undeniably crafted to protect individuals from discriminatory behavior by healthcare entities receiving federal funding because of their religious beliefs or moral convictions concerning abortion or sterilization.<sup>199</sup> Although worded differently, it is analogous to the protections of Title VI which protects individuals from discrimination on the basis of race, color, or national origin by entities receiving federal funding.<sup>200</sup> Though aimed at different forms of discrimination, both statutes share the same essential elements. Both statutes affirm the *right* of individuals to be free from certain forms of discrimination by entities that have been empowered by

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197. See *supra* notes 194–95 and accompanying text (demonstrating that the Church Amendment does not fit cleanly within either the *classic* rights-creating or the funds-conditioning framework).

198. *Gonzaga*, 536 U.S. at 285; see also *Cenzon-DeCarlo*, 2010 WL 169485, at \*4 (suggesting that the failure to conform to the structure of Titles VI and IX demonstrates Congress's lack of intention to create a private right for individuals in the healthcare industry).

199. See Church Amendment, 42 U.S.C. § 300a-7(c) (prohibiting discrimination against healthcare workers by entities receiving federal funds on the basis of the individual's religious beliefs or moral convictions); 119 CONG. REC. 9603 (comments by Senator Javits) ("I wish to make it clear that [the anti-discrimination provision] simply will protect anybody who works for that hospital against being fired or losing his hospital privileges . . ."); *id.* (statement of Sen. Church) ("[I]f a physician who was part of a staff of a Catholic hospital . . . were to perform [sterilizations or abortions] . . . then he would not be discriminated against by the Catholic hospital for having performed those operations . . .").

200. Compare Title VI § 602, 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."), with Church Amendment, 42 U.S.C. § 300a-7(c) (prohibiting discrimination on the basis of religious beliefs or moral convictions regarding abortion or sterilization against "any physician or other healthcare personnel" by any entity receiving federal funding).

federal funding.<sup>201</sup> To conclude otherwise would be to blindly elevate form over substance.

Adding force to the argument that Congress intended to create individual rights by passing the Church Amendment is the fact that § 214(A) of the National Research Service Award Act of 1974, which amended the original language of the Church Amendment, bears the heading "Individual Rights."<sup>202</sup> Although the Second Circuit acknowledged this evidence, it was ultimately dismissive, saying that "the title alone cannot confer individual rights; the most it could do is provide evidence of Congressional intent to confer them."<sup>203</sup> The court properly noted that it is the Statutes at Large that provide the "legal evidence of laws" unless Congress has enacted a title of the United States Code itself as positive law.<sup>204</sup> However, rather than acknowledge that Congress intended to create an individual right, the court focused on the lack of evidence that Congress intended to create a right of action.<sup>205</sup> This approach is overly dismissive of the role that evidence of intent to create an individual right plays in the implication question. Such evidence signals congressional intent to create a right of action,<sup>206</sup> and its presence justifies an investigation into the statute's contemporary legal context.

Convincing the courts that the statute creates individual rights is a necessary but insufficient step in proving the propriety of a private right of action. The Supreme Court has often noted that litigants must prove not merely the existence of a private right but must further prove that a private

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201. See *supra* note 200 and accompanying text (detailing the similarities between the Church Amendment and Title VI).

202. National Research Service Award Act of 1974, Pub. L. 93-348, § 214, 88 Stat. 342, 353 (codified as amended at 42 U.S.C. § 300 (2006)).

203. *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 697 (2d Cir. 2010).

204. See *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) ("[I]t is the Statutes at Large that provides the 'legal evidence of laws,' and despite its omission from the Code section 92 remains on the books if the Statutes at Large so dictates.").

205. See *Cenzon-DeCarlo*, 626 F.3d at 697 ("While there may be some colorable evidence of intent to confer or recognize an individual right, there is *no* evidence that Congress intended to create a right of action.").

206. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 288–89 (2001) (beginning the Court's search for evidence of congressional intent to create a private right of action by considering whether there is evidence of congressional intent to create an individual right); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 689 (1979) ("*First*, the threshold question under *Cort* is whether the statute was enacted for the benefit of a special class of which the plaintiff is a member.").

remedy was intended by Congress.<sup>207</sup> Unfortunately, the Supreme Court has been somewhat inconsistent concerning what level and kind of proof is required to make this showing.<sup>208</sup> Most recently, the Court has shown great reluctance to consider extra-textual evidence of congressional intent on this point, choosing rather to determine whether the text and structure give rise to the inference that a private right of action was intended.<sup>209</sup> In *Sandoval*, the Court rejected the notion that contextual evidence could attain relevance independent from the text of the statute, saying that "legal context matters only to the extent it clarifies text."<sup>210</sup> So what is needed is not an argument that circumvents the statutory text and structure in favor of purely contextual or policy arguments, rather, what is needed is a textual and structural demonstration of the need for a clarifying exploration into legal context.

Contextual considerations are necessary in the case of the Church Amendment because the statute is susceptible to multiple interpretations.<sup>211</sup> The Church Amendment is unlike both Title VI and FERPA, the two statutory schemes considered in *Gonzaga*, in that it lacks provisions that specifically authorize the withholding of funds in the case of noncompliance.<sup>212</sup> Of the three Senators that spoke concerning the possibility of withholding funds, two suggested that funds would not be withheld and the third expressed doubt as to whether the statute would be

207. See *Sandoval*, 532 U.S. at 286 ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but *also* a private remedy." (emphasis added)).

208. Compare *Cort v. Ash*, 422 U.S. 66, 82 (1975) ("[When] it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling."), with *Sandoval*, 532 U.S. at 286 (requiring litigants to put forth evidence that Congress affirmatively intended to create a private right of action).

209. See *Sandoval*, 532 U.S. at 288 ("We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI.")

210. *Id.*

211. See *supra* notes 194–201 and accompanying text (demonstrating that the Church Amendment does not cleanly fit into the mold of either the "classic rights-creating" language of Title VI or the purely funds-conditioning language of statutes like FERPA).

212. Compare Church Amendment, 42 U.S.C. § 300a-7(c) (2006) (prohibiting discriminatory conduct but failing to specifically authorize the withholding of funds in the event of noncompliance), with Title VI § 602, 42 U.S.C. § 2000d-1 ("Compliance with any requirement adopted pursuant to this section may be effected by the termination of or refusal to grant or to continue assistance under such program . . ."), and FERPA, 20 U.S.C. § 1232(g)(a) (2006) (providing that "[n]o funds shall be made available under any applicable program" which fails to conform to the statute's privacy requirements).

construed in that way.<sup>213</sup> Thus, there is considerable evidence that the provision was not meant to operate in a funds-conditioning manner. If this conclusion is read in conjunction with the decision reached by the court in *Cenzon-DeCarlo*, we are left with a statute that facially prohibits discrimination but which allows neither private enforcement nor enforcement by means of conditioning the receipt of federal funding.<sup>214</sup> This cannot be. It stretches the imagination to think that Congress intended the Church Amendment to be a purely advisory statute.<sup>215</sup>

Because Congress's intent cannot readily be distilled from the text and structure of the Amendment, this is an appropriate instance to turn to alternative means of determining intent. One of the most often considered alternative sources of proof, suggested by Court precedent, is the contemporary legal context in which the law was passed.<sup>216</sup> This approach acknowledges that Congress does not legislate in a vacuum but with an awareness of judicial practices in play at the time.<sup>217</sup> At the time the

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213. See 119 CONG. REC. 9603 (1973) (statement of Sen. Church) (answering no to the question of whether funding would be denied to non-compliant hospitals); *id.* (statement of Senator Jackson) (same); *id.* (statement of Senator Javits) (answering the question as to whether there was a penalty by responding that he hoped there would be but did not know if it would be so construed in that way by the administrator).

214. See *Cenzon-DeCarlo v. Mount Sinai Hosp.*, No. 09 CV 3120(RJD), 2010 WL 169485, at \*4 (E.D.N.Y. Jan. 15, 2010) (concluding that there was no possibility of private enforcement under the Church Amendment); *supra* notes 211–13 and accompanying text (demonstrating that the Church Amendment does not explicitly authorize conditioning the receipt of federal funds on compliance); see also Rescission of the Bush Administration Conscience Regulation, 74 Fed. Reg. 10,207, 10,209 (proposed Mar. 10, 2009) (to be codified at 45 C.F.R. pt. 88) ("No statutory provision requires the promulgation of rules to implement the requirements of the Church Amendments . . .").

215. See Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 306 (1995) ("By definition, a right must be enforceable. What would be the measure of a right whose transgression carried no penalty? It would look more like a hope, or a request, than a guarantee.").

216. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378 (1982) ("In determining whether a private cause of action is implicit in a federal statutory scheme . . . the initial focus must be on the state of the law at the time the legislation was enacted."); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696 (1979) (considering the legal context in conjunction with the text and legislative history and thereby concluding that Congress intended for Title IX to be privately enforceable).

217. See *Cannon*, 441 U.S. at 698 ("In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them."); *id.* at 718 (Rehnquist, J., concurring) ("We do not write on an entirely clean slate, however, and the Court's opinion demonstrates that Congress . . . [had] good reason to think that the federal judiciary would undertake this task [of implying a right of action]."); *Alexander v. Sandoval*, 532 U.S. 275, 313 (2001) (Stevens, J., dissenting)

Church Amendment was passed, the federal courts were very active in implying rights of action.<sup>218</sup> It was not until after the Church Amendment's enactment in 1973 that the Court decided *Cort v. Ash* and introduced the more restrictive approach to implying remedies.<sup>219</sup> Therefore, any determination of legislative intent regarding an implied right of action under the Church Amendment must take into account how that Congress understood the judicial approach to implication at the time.<sup>220</sup> Because the courts routinely implied remedies in the period prior to *Cort v. Ash*, Congress's silence concerning a remedy may well be the result of their reliance on the courts to fashion a suitable private remedy.<sup>221</sup>

While a majority of the Court has recently expressed doubt as to the viability of such contextual considerations, this view that context provides an important tool for determining legislative intent garnered the support of four dissenting justices in *Sandoval*.<sup>222</sup> Even the majority in *Sandoval* seems to concede that legal context is potentially relevant in a narrow class of cases.<sup>223</sup> The Church Amendment is such a case where legal context attains this particular degree of relevance. It is unreasonable to expect the Congress of 1973 to have explicitly considered the remedial effects of the Church Amendment when the courts had not yet indicated that such explicit consideration would be required to support a private remedy.<sup>224</sup>

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("[The Court's] unwillingness to even consider evidence as to the context in which Congress legislated is perplexing. Congress does not legislate in a vacuum.")

218. See *Cannon*, 441 U.S. at 698 ("[D]uring the period between the enactment of Title VI in 1964 and the enactment of Title IX in 1972, this Court had consistently found implied remedies—often in cases much less clear than this.")

219. See *Cort v. Ash*, 422 U.S. 66, 85 (1975) (declining to imply a private right of action under a federal criminal statute making it a crime for corporations to make contributions or expenditures in connection with Presidential elections).

220. See *Stabile*, *supra* note 69, at 889–90 (saying that courts interpreting the applicability of an implied right of action under an old statute must determine congressional intent with reference to how that Congress likely understood implication).

221. See *California v. Sierra Club*, 451 U.S. 287, 299–300 (1981) (Stevens, J., concurring) (concluding that Congress, aware of the courts' common practice of implying rights of action, expected that litigants "would have a remedy for any injury suffered by reason of a violation of the new federal statute").

222. Compare *Sandoval*, 532 U.S. at 288 ("[L]egal context matters only to the extent it clarifies text."), with *id.* at 314 (Stevens, J., dissenting) ("Assuming, as we must, that Congress was fully informed as to the state of the law, the contemporary context presents important evidence as to Congress' intent—evidence the majority declines to consider.")

223. See *id.* at 288 (majority opinion) (indicating that legal context may serve a clarifying function in limited circumstances).

224. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) (saying that the Court's decision in *Cannon*, occurring six years after the passage of the

Other than context, there are several other factors that weigh in favor of finding a right of action under the Church Amendment. For instance, the fact that the statute does not create any specific remedial scheme weighs in favor of an implied remedy.<sup>225</sup> When Congress creates a comprehensive remedial scheme, the Court has treated that as an indication of congressional intent to deny a right of action.<sup>226</sup> Thus, where Congress has not indicated a desire for the law to be enforced in another way, the argument for implication is strengthened.<sup>227</sup>

Adding further support for a private remedy, the Obama administration recently rolled back a HHS regulation aimed at protecting the conscience rights of healthcare workers.<sup>228</sup> At the end of the Bush Administration, HHS issued a regulation establishing a complaint procedure for individuals, like Cenzone-DeCarlo, who had faced discriminatory or coercive action by entities receiving HHS funding.<sup>229</sup> Furthermore, the regulation required written certification by such entities that they would abide by federal law, including the Church Amendment.<sup>230</sup> Less than three months after it was enacted, the Obama administration announced that it planned to rescind this ruling.<sup>231</sup> In so doing, HHS expressed its belief that the Church

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Church Amendment, had put Congress on notice that with respect to private remedies the "ball" was now "in its court").

225. See *supra* note 212 and accompanying text (noting that the Church Amendment does not direct funds to be withheld from noncompliant entities); see also Church Amendment, 42 U.S.C. § 300a-7 (2006) (containing no remedial provisions).

226. See *Karahalios v. Nat'l Fed'n of Fed. Emps.*, 489 U.S. 527, 533 (1989) ("It is also an 'elemental canon' of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies." (citations omitted)).

227. See *Stabile*, *supra* note 69, at 893–95 (suggesting that the lack of an explicit remedial framework weighs in favor of implying a right of action); see also *Cort v. Ash*, 422 U.S. 66, 78 (1975) (articulating the factors that must be considered in deciding whether an implied remedy is appropriate including whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff").

228. See *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 26 (1977) ("Once we identify the legislative purpose, we must then determine whether the creation by judicial interpretation of the implied cause of action asserted by Chris-Craft is necessary to effectuate Congress' goals.").

229. See 45 C.F.R. § 88 (2008) (establishing a complaint and compliance certification procedure to ensure that federal funds do not support discriminatory or coercive actions towards individuals who refuse to perform services or research that they object to for religious, moral, or ethical reasons).

230. See *id.* § 88.5 (requiring recipients of Health and Human Services funding to file a Certificate of Compliance with the anti-discrimination provisions summarized in the HHS regulation).

231. See *Rescission of the Bush Administration Conscience Regulation*, 74 Fed. Reg.



Amendment did not require it to promulgate rules to implement the anti-discrimination provisions.<sup>232</sup> In February of 2011, HHS announced its final rule rescinding portions of the Bush Administration regulation. The new rule cuts the compliance certification requirement and leaves only a complaint procedure through the Office for Civil Rights (OCR).<sup>233</sup> Given OCR's funding constraints and poor track record in the health care context, this complaint procedure likely offers only illusory hopes of meaningful recourse against discriminatory or coercive healthcare entities.<sup>234</sup> The absence of an effective administrative procedure to enforce the terms of the Church Amendment further demonstrates that private enforcement is necessary to achieve Congress's goal of protecting the conscience rights of healthcare workers.<sup>235</sup>

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10,207, 10,210 (proposed Mar. 10, 2009) (to be codified at 45 C.F.R. pt. 88) (announcing the planned rescission of the Bush administration anti-discrimination regulation which had established a complaint procedure and required recipients of HHS funds to certify their compliance with conscience-protecting statutes such as the Church Amendment). A lawsuit is currently pending in the district of Connecticut in which Connecticut is seeking to invalidate the Bush era conscience regulation. Complaint at 6, *Connecticut v. United States*, No. 3:09-cv-0054 (D. Conn. Jan. 15, 2009). The case was put on hold to give HHS time to issue its final rulemaking, a rulemaking which could moot the case.

232. See *Rescission of the Bush Administration Conscience Regulation*, 74 Fed. Reg. at 10,209 ("No statutory provision requires the promulgation of rules to implement the requirements of the Church Amendments . . .").

233. See *Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws*, 76 Fed. Reg. 9,968, 9,976 (Feb. 23, 2011) (to be codified at 45 C.F.R. pt. 88) ("The Office for Civil Rights (OCR) of the Department of Health and Human Services is designated to receive complaints based on the Federal health care provider conscience protection statutes.").

234. See Rose Cuison Villazor, *Community Lawyering: An Approach to Addressing Inequalities in Access to Health Care for Poor, of Color and Immigrant Communities*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 35, 47 (2004–2005) ("OCR is severely under-funded and its limited resources make it an ineffective governmental agency, not only for enforcing Title VI but also for regulating our huge health care system."); Sara Rosenbaum & Joel Teitelbaum, *Civil Rights Enforcement in the Modern Healthcare System: Reinvigorating the Role of the Federal Government in the Aftermath of Alexander v. Sandoval*, 3 YALE J. HEALTH POL'Y L. & ETHICS 215, 230–32 (2003) (describing the failures of OCR and the obstacles to its effective investigation of civil rights complaints).

235. See *supra* notes 196–201 and accompanying text (demonstrating that the intent of Congress in drafting the Church Amendment was to protect individuals with a moral or religious opposition to participating in abortions or sterilizations from discrimination in the workplace).

*VIII. The Insufficiency of Other Possible Statutory Protections*

Despite the various arguments favoring the implication of a private remedy under the Church Amendment, it is far from certain that the courts will respond favorably by allowing private enforcement. The most recent Supreme Court cases lend credence to Justice Stevens's suggestion that the current Court has "distaste" for implied remedies in general.<sup>236</sup> Due to the very real possibility that no private remedy will be implied under the Church Amendment and because of the great importance of the rights at stake in *Cenzon-DeCarlo*, it may be necessary for Congress to revisit this topic in order to make its purpose explicit. While there are currently several federal laws that appear to forbid the kind of discriminatory behavior described in *Cenzon-DeCarlo*, these statutes also fail to provide a meaningful remedy to individuals like Mrs. Cenzon-DeCarlo who have faced discrimination and coercion at the hands of a federally funded hospital.<sup>237</sup>

The strongest language concerning an individual's conscience rights in the healthcare context comes from a provision of the National Research Service Award Act of 1974.<sup>238</sup> The relevant provision states:

No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health, Education, and Welfare [now Health and Human Services] if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.<sup>239</sup>

Although this provision does not address discrimination, it provides meaningful protection from coercion to perform acts contrary to one's religious beliefs or moral convictions. Furthermore, this provision contains

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236. See *Alexander v. Sandoval*, 532 U.S. 275, 317 (2001) (Stevens, J., dissenting) (remarking that the Court's unwillingness to expand the scope of the Title VI right of action is rooted in a "profound distaste for implied causes of action" generally).

237. See generally Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(d)(1)–(2), 118 Stat. 2809, 3163 (2004) [hereinafter Weldon Amendment]; 42 U.S.C. § 238n (2006) [hereinafter Coats Snowe Amendment].

238. See National Research Service Award Act of 1974, Pub. L. No. 93-348, § 214(d), 88 Stat. 342, 353 (codified as amended at 42 U.S.C. § 300a-7(d) (2006)) (establishing restrictions on the use of human subjects in research projects and including a provision protecting individuals from requirements that they perform or assist in performing in any "health services program or research activity" against their moral or religious beliefs).

239. *Id.*

the "classic-rights creating language" that the courts have greatly favored in the implied right of action context.<sup>240</sup> Therefore, a litigant falling under the scope of this statute would presumably face fewer obstacles in showing the propriety of a right of action.<sup>241</sup> The difficulty with this provision will be in proving that the individual or the contested activity falls within the statute's scope.

This statute provides clear protection for an employee of a federally administered health service program or research activity.<sup>242</sup> It is less clear, however, whether an employee of any institution that has received federal funding from HHS is brought within the protection of the statute or whether the individual must be working directly within a project specifically funded by HHS. The indications given by the language, legislative history, and limited case law suggest that there must be a close nexus between the activity in question and the federal funding the institution has received.<sup>243</sup> There is considerable doubt, for instance, whether a hospital's receipt of a grant for facility improvements would transform the entire hospital and all of its employees into participants of a "health services program" for the purposes of the statute. However, an employee conducting research under a specified grant from HHS would present a clearer case for the statute's

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240. Compare *id.* (providing that "[n]o individual shall be required to perform or assist in the performance . . . of such part of such program or activity [that] would be contrary to his religious beliefs or moral convictions" (emphasis added)), with Title VI, 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (emphasis added)).

241. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002) (suggesting that a clear focus on the individuals protected, as in Titles VI and IX, gives rise to the inference that Congress intended to grant a private right on that class of persons).

242. See National Research Service Award Act of 1974 § 214(d) ("No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary . . ."); S. REP. NO. 93-381, at 23 (1973) (saying that the conscience provision "insures that no individual *employed* in a federally-funded health service program or research activity covered by the provisions of the Act shall be required to take part in any activity which would be contrary to his religious beliefs or moral conviction" (emphasis added)).

243. See S. REP. NO. 93-381, at 24 (suggesting that the authoring committee had employees of federally funded health programs and research activities in mind); see also *Gray v. Romeo*, 697 F. Supp. 580, 590 (D.R.I. 1988) (rejecting a doctor's claim that the statute protected his refusal to remove the feeding tube of a patient on the request of the family saying that the statute failed to reach the situation because the patient was not being treated "through a 'health service program'").

applicability since those activities could be classified as a "project" funded by HHS.<sup>244</sup>

Notwithstanding the statute's possible limitations, the absence of authoritative case law interpreting it suggests that it might be worth raising in cases like *Cenzon-DeCarlo*'s where employees of federally funded hospitals are required to perform activities against their religious or moral belief. This is particularly true in cases where the patient or employee can be traced to particular federal funding.<sup>245</sup> It is not clear whether the patient in *Cenzon-DeCarlo* was connected in that way to any particular federal funding. Since this particular provision was not raised, it is unclear whether the court would have been willing to adopt a more expansive reading of the statute than the one taken earlier by the District of Rhode Island where it was required that the patient be receiving treatment directly under a federal health service program.<sup>246</sup>

Finally, this statute is further limited in effect because it only reaches cases of coercion where individuals are required to perform or assist in an activity against their religious or moral beliefs.<sup>247</sup> Because it reaches only these cases, its strong "rights-creating language" cannot be used to gain a private remedy in cases where individuals have been discriminated against because of their refusal to perform procedures against their religious or moral beliefs. Thus, individuals with discrimination claims will still be forced to litigate the implication question under the Church Amendment in order to obtain a remedy. The statute is nonetheless an important federal protection for individuals working under a federally funded project from requirements that force them to violate their own conscience.<sup>248</sup>

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244. See H. REP. NO. 93-1148, at 26 (Conf. Rep.) ("The Senate amendment contained provisions which [] would prohibit an individual from being required to perform services or research *under projects* funded by the Secretary . . . ." (emphasis added)).

245. See National Research Service Award Act of 1974, Pub. L. No. 93-348, § 214(d), 88 Stat. 342, 353 (codified as amended at 42 U.S.C. § 300a-7(d) (2006)) (requiring that the program or activity be funded "in whole or in part under a program administered by the Secretary").

246. See *Gray*, 697 F. Supp. at 590 (rejecting a doctor's claim of protection under 42 U.S.C. § 300a-7(d) because the patient was not receiving treatment under a "health service program").

247. See 42 U.S.C. § 300a-7(d) (2006) (protecting individuals working under federally funded health programs or research activities from *requirements* that they perform operations against their religious or moral beliefs).

248. See Irene Prior Loftus, *I Have a Conscience Too: The Plight of Medical Personnel Confronting the Right to Die*, 65 NOTRE DAME L. REV. 699, 727 (1990) (suggesting that 42 U.S.C. § 300a-7(d) might be effective in protecting the rights of healthcare workers in cases where the stipulated federal funds are involved).

Perhaps the most well known federal statutory provision related to the conscience rights of healthcare workers is the Weldon Amendment.<sup>249</sup> This amendment prohibits the funding of any federal or state government or agency that subjects individuals or institutions to discrimination on the basis of a refusal to "provide, pay for, provide coverage of, or refer abortions."<sup>250</sup> While it establishes an important principal that federal funding should not be extended to entities that discriminate against the conscience rights of healthcare workers, it does not directly address the discriminatory actions themselves. Rather, Weldon is phrased in terms of a condition for the receipt of funding.<sup>251</sup> Furthermore, this amendment is directed at discrimination by federal or state governments, programs, and agencies and, therefore, does not reach nongovernmental healthcare providers such as federally funded, private hospitals.<sup>252</sup> Since the language of the statute is purely funds-conditioning and since the statute was passed long after the Supreme Court embraced a limited role in implying rights of action, there is far less justification for a private remedy under Weldon than under the Church Amendment.<sup>253</sup>

The Coats-Snowe Amendment<sup>254</sup> is another prominent federal statutory provision aimed at reducing discrimination towards entities that refuse to provide, cover, or refer abortions. However, like the Weldon Amendment, Coats-Snowe does not reach discrimination carried out by nongovernmental hospitals, clinics, or research institutions receiving

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249. See Weldon Amendment, Pub. L. No. 108-447, § 508(d)(1)–(2), 118 Stat. 2809, 3163 (2004) (providing that no funds would be made available to state or federal agencies, programs, or government if it "subjects any institutional or individual healthcare entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions").

250. *Id.* § 508(d)(1).

251. See *id.* (conditioning the receipt of federal funds by saying "[n]one of the funds made available in this Act may be made available to a Federal agency or program . . ." that discriminates).

252. See *id.* § 508(d)(1)–(2) (applying conditions on the receipt of federal funds to government agencies and programs while making no mention of private institutions).

253. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002) (finding that the pure funds-conditioning language of FERPA provided no suggestion that Congress intended to confer a right upon an identifiable class of individuals); see also *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981))).

254. See Coats Snowe Amendment, 42 U.S.C. § 238n (2006) (providing that the federal government, as well as any state governments receiving federal financial assistance, may not discriminate against a health care entity on the basis of their refusal to train in, perform, or refer abortions).

federal funding. By its terms, Coats-Snowe is directed at the federal, state, and local *governments* that receive federal financial assistance.<sup>255</sup> This provision is then without effect in cases like *Cenzon-DeCarlo* where the discriminatory actions are carried out by a private hospital that receives federal funding. Furthermore, even in a case where an individual faced discrimination at the hands of federal or state government because of their refusal to provide abortion services, Court precedent will likely foreclose private enforcement. Although the possibility of a private right of action would turn on an application of § 1983, the Court's decision in *Gonzaga* suggests that no privately enforceable right would be found under Coats-Snowe.<sup>256</sup>

Added to the lack of a federal judicial remedy for abortion-related coercion and discrimination is the apparent absence of administrative relief.<sup>257</sup> The recent enactment and subsequent repeal of the compliance certification procedure has generated a great deal of uncertainty regarding the limits of conscience protections for healthcare workers.<sup>258</sup> What is certain, however, is that this likely repeal leaves individuals who have faced such discrimination and coercion with no means of assuring that such events will not occur again in the future. Furthermore, the back and forth of HHS demonstrates the inherent insufficiency of administrative remedies in the conscience context. Because of the divisive nature of abortion related issues and the lack of clarity concerning Congress's intended means of enforcing the Church Amendment, an administrative remedy will only be effective to the extent that each administration is committed to the protection of conscience rights.

In the midst of the recent debate concerning healthcare reform, the issue of an individual's right to be free from coercion and discrimination relating to their views on abortion once again came to the surface.<sup>259</sup>

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255. *See id.* ("The Federal Government, and any State or local government that receives Federal financial assistance, may not subject any health care entity to discrimination . . .").

256. *See Gonzaga*, 536 U.S. at 287 (suggesting that the lack of Title VI and IX's rights-creating language creates a strong presumption against finding that Congress intended to create a right for an identifiable class of individuals).

257. *See* Rescission of the Bush Administration Conscience Regulation, 74 Fed. Reg. 10,207, 10,209 (proposed Mar. 10, 2009) (to be codified at 45 C.F.R. pt. 88) ("No statutory provision requires the promulgation of rules to implement the requirements of the Church Amendments . . .").

258. *See supra* notes 229–34 and accompanying text (detailing the enactment and repeal of the Bush administration conscience-protection regulation).

259. *See* 150 CONG. REC. S12,629 (daily ed. Dec. 7, 2009) (amendment offered by Sen. Coburn) (proposing an amendment to the Senate Health Bill that prohibits discrimination by

Various provisions attempting to protect conscience rights were proposed and considered.<sup>260</sup> The debate over healthcare presented yet another missed opportunity for Congress to fortify individual conscience protections. One proposal by Senator Coburn echoed some of the language of the Church Amendment but went further by establishing a complaint procedure through the Office of Civil Rights.<sup>261</sup> This proposal, as was the case with the others, was unsuccessful.<sup>262</sup> However, the fact that such a provision would even be deemed necessary lends credence to the argument that the Church Amendment has failed to satisfy its essential purposes. Furthermore, while a complaint procedure through OCR, like the one proposed by Senator Coburn, is better than nothing, still more is needed.<sup>263</sup> Congress should seize this opportunity, with healthcare on the forefront of the American consciousness, to fortify conscience protections by empowering individuals to pursue their own remedies in federal court against federally funded entities that use coercive or discriminatory measures in an attempt to undermine the individual's religious or moral objections to participation in abortion procedures.

### *IX. Conclusion*

The dismissal of Cenzon-DeCarlo's claim, in conjunction with the enactment and subsequent rescission of the HHS regulation, casts an unacceptable level of doubt upon the extent of an individual's conscience rights in the health care context. Presently, it is unclear whether an individual who refuses to perform or assist in the performance of abortions has a legally enforceable right to be free from discrimination and coercion at the hands of institutions empowered by federal funding. This state of

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recipients of funding under the Act against individual health care providers or institutions on the basis that they refuse to provide, provide coverage for, or refer abortions).

260. *See, e.g., id.* (showing one example of a conscience provision being offered as an amendment to the health bill).

261. *See id.* ("The Office for Civil Rights of the Department of Health and Human Services is designated to receive complaints of discrimination based on this section, and coordinate the investigation of such complaints.").

262. *See id.* (showing that Sen. Coburn's proposed amendment that prohibited discrimination was tabled).

263. *Cf. Melody Harris, Hitting 'Em Where It Hurts: Using Title IX Litigation to Bring Gender Equity to Athletics*, 72 DENV. U. L. REV. 57, 95 (1994) (discussing the failure of the Office of Civil Rights within the Department of Education to enforce the provisions of Title IX and the fact that OCR had never withdrawn funds from noncompliant educational institutions).

confusion leaves open the possibility that an individual could be without a defense against entities that force him or her to perform or assist in the performance of a procedure that fundamentally violates his or her conscientious, moral, or religious beliefs. As was noted by one of the Senators who passed the Church amendment, such a notion "is repugnant to our political traditions."<sup>264</sup> This principle that a person should not be compelled to violate their fervently held beliefs is reflected in numerous statutory provisions that prohibit such coercion and discrimination.<sup>265</sup> Furthermore, the Supreme Court has made clear that its decisions relating to abortion and contraception do not establish a constitutional right of access and that conscience clauses are appropriate means of protecting individuals and institutions who object to participation.<sup>266</sup> However, to wait in hope that the Court will one day recognize the importance of a private right of action under the Church Amendment would be ill-advised. In the meantime, a cloud of uncertainty, stirred up by the *Cenzon-DeCarlo* case, would loom in the minds of healthcare workers all across the United States. It is time, therefore, for Congress to move these various statutory provisions and statements of policy beyond the level of mere rhetoric by explicitly empowering individuals like Catherine Cenzon-DeCarlo to pursue a remedy against federally funded entities that employ discriminatory policies and practices against conscientious, religious, and moral objectors to participating in abortions.

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264. 119 CONG. REC. 9,601 (1973) (statement of Sen. Buckley).

265. See *supra* notes 43–53 and accompanying text (discussing the protections provided by the Church Amendment); *supra* notes 249–56 and accompanying text (addressing Congress's attempt in passing the Coats-Snowe and Weldon Amendments to prevent discrimination against individuals who, for religious or moral reasons, refuse to perform, provide coverage for, or refer for elective abortions).

266. See Robin Fretwell Wilson, *The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41, 54 (2008) ("[T]he U.S. Supreme Court on multiple occasions has made clear that *Griswold* and *Roe* established only negative rights to be free from government interference, not positive rights to the assistance of others."); *Doe v. Bolton*, 410 U.S. 179, 198 (1973) (suggesting that conscience clauses "afford appropriate protection to the individual and to denominational hospital"); *Harris v. McRae*, 448 U.S. 297, 316 (1980) (explaining that the rights recognized in *Roe* related to the freedom from government interference but such a right does not require the government to remove "obstacles . . . not of its own creation").