

1 ARNOLD & PORTER KAYE SCHOLER LLP  
2 GILBERT R. SEROTA (SBN 75305)  
3 Gilbert.Serota@arnoldporter.com  
4 BENJAMIN HALBIG (SBN 321523)  
5 Benjamin.Halbig@arnoldporter.com  
6 Three Embarcadero Center, 10<sup>th</sup> Floor  
7 San Francisco, CA 94111  
8 Telephone: (415) 471-3100  
9 Facsimile: (415) 471-3400

10 Counsel for *Amici Curiae*

11 ANTI-DEFAMATION LEAGUE  
12 DAVID L. BARKEY (*pro hac vice* forthcoming)  
13 dbarkey@adl.com  
14 5292 Town Center Road, Suite 500  
15 Boca Raton, FL 33486  
16 Telephone: (561) 988-2912

17 ANTI-DEFAMATION LEAGUE  
18 STEVEN M. FREEMAN (*pro hac vice* forthcoming)  
19 sfreeman@adl.com  
20 605 Third Avenue  
21 New York, NY 10158  
22 Telephone: (212) 885-7700

23 Counsel for *Amicus Curiae*  
24 ANTI-DEFAMATION LEAGUE

25 **UNITED STATES DISTRICT COURT**  
26 **NORTHERN DISTRICT OF CALIFORNIA**

27 CITY AND COUNTY OF SAN FRANCISCO,

28 Plaintiff,

vs.

ALEX M. AZAR II, Secretary of U.S.  
Department of Health and Human Services;  
ROGER SEVERINO, Director, Office for Civil  
Rights, Department of Health and Human  
Services; U.S. DEPARTMENT OF HEALTH  
AND HUMAN SERVICES; and DOES 1-25,

Defendants.

Case No. 3:19-cv-02405-WHA

**MOTION FOR LEAVE TO FILE  
BRIEF OF ANTI-DEFAMATION  
LEAGUE AND OTHER CIVIL  
RIGHTS & RELIGIOUS  
ORGANIZATIONS AS AMICI  
CURIAE IN SUPPORT OF  
PLAINTIFFS' CROSS-MOTION FOR  
SUMMARY JUDGMENT**

Hearing Date: October 30, 2019

Time: 8:00 a.m.

Judge: Hon. William H. Alsup

STATE OF CALIFORNIA, by and through  
XAVIER BECERRA, Attorney General,

Case No. 3:19-cv-02769-WHA

Plaintiff,

vs.

ALEX M. AZAR, in his OFFICIAL CAPACITY  
as SECRETARY of the U.S. DEPARTMENT of  
HEALTH & HUMAN SERVICES; U.S.  
DEPARTMENT OF HEALTH AND HUMAN  
SERVICES; DOES 1-100,

Defendants.

COUNTY OF SANTA CLARA, TRUST  
WOMEN SEATTLE, LOS ANGELES LGBT  
CENTER, WHITMAN-WALKER CLINIC,  
INC., d/b/a WHITMAN-WALKER HEALTH,  
BRADBURY-SULLIVAN LGBT  
COMMUNITY CENTER, CENTER ON  
HALSTED, HARTFORD GYN CENTER,  
MAZZONI CENTER, MEDICAL STUDENTS  
FOR CHOICE, AGLP: THE ASSOCIATION  
OF LGBTQ+ PSYCHIATRISTS, AMERICAN  
ASSOCIATION OF PHYSICIANS FOR  
HUMAN RIGHTS d/b/a GLMA: HEALTH  
PROFESSIONALS ADVANCING LGBTQ  
EQUALITY, COLLEEN McNICHOLAS,  
ROBERT BOLAN, WARD CARPENTER,  
SARAH HENN, and RANDY PUMPHREY,

Case No. 3:19-cv-02916-WHA

Plaintiffs,

vs.

U.S. DEPARTMENT OF HEALTH AND  
HUMAN SERVICES and ALEX M. AZAR, II.  
in his official capacity as SECRETARY OF  
HEALTH AND HUMAN SERVICES,

Defendants.

1 **MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS’**  
2 **CROSS-MOTION FOR SUMMARY JUDGMENT**

3 ADL (Anti-Defamation League) by and through the undersigned counsel, respectfully  
4 submit this Motion for Leave to File an *Amici Curiae* Brief in Support of Plaintiffs’ Cross-Motion  
5 for Summary Judgment. ADL files this Motion and Brief attached hereto as Exhibit A pursuant to  
6 this Court’s Order Re Stipulated Request and Briefing Schedule (ECF 66) allowing *amicus* briefs in  
7 support of Plaintiffs to be filed by noon Pacific Time on September 12, 2019.

8 The *amici* on whose behalf ADL files this Motion and the Brief attached hereto as Exhibit A  
9 are a coalition of civil rights and religious organizations consisting of ADL; Tanenbaum Center for  
10 Interreligious Understanding; Bend the Arc: A Jewish Partnership for Justice; Central Conference  
11 of American Rabbis; Women of Reform Judaism; Men of Reform Judaism; Union for Reform  
12 Judaism; Interfaith Alliance; Jewish Women International; Keshet; T’ruah: The Rabbinic Call for  
13 Human Rights; National Council of Jewish Women; OCA - Asian Pacific American Advocates;  
14 Reconstructing Judaism; Reconstructionist Rabbinical Association; and The Sikh Coalition (jointly  
15 referred to below as “*amici*”).

16 In support of this Motion, ADL states as follows:

17 1. A District Court has broad discretion regarding the appointment of *amici curiae*.  
18 *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir.1982), *abrogated on other grounds by Sandin v.*  
19 *Conner*, 515 U.S. 472 (1995). This Court has previously recognized that whether to allow *amici* to  
20 file briefs is “solely within the Court’s discretion, and generally courts have exercised great  
21 liberality in permitting amicus briefs.” *California by & through Becerra v. United States Dep’t of*  
22 *the Interior*, 381 F. Supp. 3d 1153, 1164 (N.D. Cal. 2019) (citations omitted) (internal quotation  
23 marks omitted). There are no strict prerequisites that must be fulfilled prior to qualifying for *amicus*  
24 status; rather, “an individual seeking to appear as amicus must merely make a showing that his  
25 participation is useful or otherwise desirable to the court.” *Woodfin Suite Hotels, LLC v. City of*  
26 *Emeryville*, No. C 06-1254 SBA, 2007 WL 81911, at \*3 (N.D. Cal. Jan. 9, 2007) (citations omitted)  
27 (internal quotation marks omitted).

28 2. District Courts frequently welcome *amicus curiae* briefs concerning legal issues with

1 potential ramifications beyond the parties or if the *amici* can offer information or perspectives that  
2 can provide additional help to the court. *Io Grp., Inc. v. Veoh Networks, Inc.*, No. C06-03926 HRL,  
3 2007 WL 2433385, at \*1 (N.D. Cal. Aug. 22, 2007) (citations omitted); *see also California by &*  
4 *through Becerra*, 381 F. Supp. 3d at 1164 (“The ‘classic role’ of amicus curiae is to assist a court in  
5 a case of public interest by ‘supplementing the efforts of counsel, and drawing the court’s attention  
6 to law that escaped consideration.’”) (quoting *Miller-Wohl Co. v. Comm’r of Labor & Indus. State*  
7 *of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982)). Both of these factors support this motion.

8         3.         The Brief attached hereto addresses the limited issue of the application of the  
9 Establishment and Free Exercise Clauses of the First Amendment to the motions pending before the  
10 Court concerning the Department of Health and Human Services’ (“HHS”) final rule, Protecting  
11 Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (May  
12 21, 2019) (the “Final Rule” or “Rule”). *Amici* have unique information and perspectives on this  
13 limited issue that would be useful to the Court because they are well-established and long-standing  
14 religious and civil-rights organizations that represent diverse beliefs, experiences, and faith  
15 traditions. They share a commitment to religious freedom in America through separation of church  
16 and state as effectuated by both the Establishment and Free Exercise Clauses to the First  
17 Amendment. *Amici* have unique experience and expertise on these issues that will supplement the  
18 efforts of counsel and provide additional assistance to this Court.

19         4.         **ADL.** ADL was founded in 1913 with a dual mission to stop the defamation of the  
20 Jewish people and to secure justice and fair treatment for all. Today, it is one of the world’s leading  
21 organizations fighting hatred, bigotry, discrimination, and anti-Semitism, and advocating for civil  
22 rights for all. To this end, ADL is a steadfast supporter of the religious liberties guaranteed by both  
23 the Establishment and Free Exercise Clauses, which permit and sometimes require accommodations  
24 of the religiously observant. Such accommodations, however, must be balanced with the rights of  
25 others. While ADL staunchly believes that the Free Exercise Clause is a critical means to protect  
26 individual religious exercise, it should not be used as a vehicle to do harm or discriminate by  
27 enabling some Americans to impose their religious beliefs on others. In furtherance of this mission,  
28 ADL has filed or joined *amicus curiae* briefs addressing the importance of balancing free religious

1 exercise with the rights of others in many recent cases. *See, e.g.*, Br. of Americans United for  
2 Separation of Church and State, ADL, et al. as *Amici Curiae* in Support of Respondents, 138 S. Ct.  
3 1719 (2018) (No. 16-111) (arguing that neither Establishment Clause nor Free Exercise Clause  
4 allowed cakeshop to discriminate against LGBT individuals); Br. of *Amici Curiae* of ADL et al. in  
5 Support of Appellees, *Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017) (No. 16-60477) (arguing that  
6 Mississippi statute protecting religious employees' discrimination against LGBT individuals  
7 violated Establishment Clause).

8       5.       **Tanenbaum Center for Interreligious Understanding.** Tanenbaum Center for  
9 Interreligious Understanding ("Tanenbaum") is a secular, non-sectarian organization dedicated to  
10 building a society in which mutual respect for different religious beliefs and practices is the norm in  
11 everyday life. In accordance with these goals, Tanenbaum dedicates its resources to creating  
12 practical strategies to protect religious pluralism. Tanenbaum believes that the Establishment and  
13 Free Exercise Clauses are invaluable tools for safeguarding the religious liberties sanctified by the  
14 United States Constitution. However, the religious accommodations afforded by these Clauses  
15 must be balanced against competing rights and should never be used to forcibly impose personal  
16 religious beliefs upon others. Conferring special protections to certain faith-based beliefs at the  
17 expense of others violates the Establishment Clause and is antithetical to Tanenbaum's mission of  
18 protecting and preserving religious pluralism and religious freedom throughout the United States.  
19 In pursuit of this goal, Tanenbaum has previously filed *amicus curiae* briefs concerning  
20 antidiscrimination and religious accommodation laws. *See, e.g.*, Br. for Tanenbaum Center for  
21 Interreligious Understanding as *Amicus Curiae* in Support of Respondents, *Masterpiece Cakeshop,*  
22 *Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (No.16-111) (2018).

23       6.       **Bend the Arc: A Jewish Partnership for Justice.** Bend the Arc: A Jewish  
24 Partnership for Justice ("Bend the Arc") is a national organization inspired by Jewish values and the  
25 steadfast belief that Jewish Americans, regardless of religious or institutional affiliations, are  
26 compelled to create justice and opportunity for Americans. Bend the Arc joins the *amici* Brief  
27 attached hereto as Exhibit A because it believes that the First Amendment would be undermined by  
28 the Rule's overly-broad religious exemptions that would harm innocent third parties and constitute a

1 preference for one specific religious viewpoint above all others.

2           7.       **Union for Reform Judaism, Central Conference of American Rabbis, Women of**  
3 **Reform Judaism, and Men of Reform Judaism (collectively, “URJ”).** URJ consists of: the  
4 Union for Reform Judaism, whose 900 congregations across North America include 1.5 million  
5 Reform Jews; the Central Conference of American Rabbis, whose membership includes more than  
6 2,000 Reform rabbis; Women of Reform Judaism, which represents more than 65,000 women in  
7 nearly 500 women’s groups in North America and around the world; and Men of Reform Judaism,  
8 who come to this issue out of their longstanding commitment to the principles of separation of  
9 church and state and religious freedom. It is the position of the organizations encompassing URJ  
10 that the United States’ commitment to religious liberty has allowed religious freedom to thrive  
11 throughout its history. At the same time, the URJ organizations believe strongly in protecting  
12 fundamental civil and human rights. They are guided by the Jewish value that we are all created  
13 b’tzelem Elohim, in the image of God. Their commitment to protecting the civil rights and equality  
14 of all stems from this prophetic mandate.

15           8.       **Interfaith Alliance Foundation.** Interfaith Alliance Foundation is a national non-  
16 profit organization committed to promoting true religious freedom and strengthening the separation  
17 between religion and government. With members from over 75 faith traditions and of no faith,  
18 Interfaith Alliance promotes policies that protect personal belief, combat extremism, and ensure that  
19 all Americans are treated equally under law.

20           9.       **Jewish Women International.** Jewish Women International (“JWI”) is a leading  
21 Jewish organization working to empower women and girls. JWI has been an unwavering Jewish  
22 voice for comprehensive reproductive health services, and continues to advocate for reproductive  
23 justice. As a faith-based organization JWI upholds the importance of protecting religious liberty,  
24 but not at the expense of an individual’s right to access health care services or information.

25           10.       **Keshet.** Keshet is a national nonprofit organization that strives for the full equality  
26 of all LGBTQ Jews and families in Jewish life. Since 1996, this organization has worked to create  
27 spaces where all LGBTQ Jewish people feel seen and valued, consistent with Jewish traditions of  
28 equality, inclusion, and human dignity. Keshet seeks to equip Jewish organizations, including

1 health and wellness centers, with the skills and knowledge to build LGBTQ-affirming communities.

2           11.     **T’ruah: The Rabbinic Call for Human Rights.** T’ruah: The Rabbinic Call for  
3 Human Rights (“T’ruah”) brings together rabbis and cantors from all streams of Judaism with all  
4 members of the Jewish community to act on the Jewish imperative to respect and advance the  
5 human rights of all people. T’ruah trains and mobilizes a network of 1,800 rabbis and cantors and  
6 their communities to bring Jewish values to life through strategic and meaningful action. As an  
7 organization of members of a religious minority, T’ruah supports the Brief attached hereto as  
8 Exhibit A because it believes that the Rule’s overly-broad religious exemption undermines the First  
9 Amendment’s protection of religious freedom through imposing harm on others and demonstrating  
10 a preference for one specific religious viewpoint to the detriment of others.

11           12.     **National Council of Jewish Women.** The National Council of Jewish Women  
12 (“NCJW”) is a grassroots organization of 90,000 volunteers and advocates who turn progressive  
13 ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the  
14 quality of life for women, children, and families and by safeguarding individual rights and  
15 freedoms. NCJW believes that religious liberty and the separation of religion and state are  
16 constitutional principles that must be protected and preserved in order to maintain democratic  
17 society. It also resolves to work for laws, policies, and practices that protect every woman’s right  
18 and ability to make reproductive and child bearing decisions. Consistent with its core principles,  
19 NCJW joins the Brief attached hereto as Exhibit A.

20           13.     **OCA - Asian Pacific American Advocates.** OCA - Asian Pacific American  
21 Advocates is a national non-profit, membership-driven civil rights organization dedicated to  
22 advancing the social, political, and economic well-being of Asian Americans and Pacific Islanders  
23 (“APIs”). Founded in 1973, OCA – Asian Pacific American Advocates is based in Washington,  
24 D.C. with over 50 chapters and affiliates around the country. For decades, OCA has backed the  
25 personal rights and health care decisions of APIs and all individuals, which is why OCA strongly  
26 supports and joins in the Brief attached hereto as Exhibit A.

27           14.     **Reconstructing Judaism.** Reconstructing Judaism is the central organization of the  
28 Reconstructionist movement. It trains the next generation of rabbis, supports and uplifts

1 congregations and havurot, and fosters emerging expressions of Jewish life—helping to shape what  
2 it means to be Jewish today and to imagine the Jewish future. There are over 100 Reconstructionist  
3 communities in the United States committed to Jewish learning, ethics, and social justice.  
4 Reconstructing Judaism works to bring about a more just and compassionate world where creative  
5 Jewish living and learning guide people toward lives of holiness, meaning, and purpose.  
6 Reconstructing Judaism believes in the importance of the separation of church and state to ensure  
7 religious freedom, equal rights, and equal dignity for all. It further believes that the reproductive  
8 rights of all people must be preserved and protected as well as the equal rights and protections for  
9 people who are transgender, nonbinary, and gender nonconforming.

10           15.     **Reconstructionist Rabbinical Association.** The Reconstructionist Rabbinical  
11 Association is a 501(c)(3) organization that serves as the professional association of 400  
12 Reconstructionist rabbis, the rabbinic voice of the Reconstructionist movement, and a  
13 Reconstructionist Jewish voice in the public sphere. Based on its understanding of Jewish teachings  
14 that every human being is created in the divine image, the Reconstructionist Rabbinical Association  
15 has long advocated for public policies of inclusion, antidiscrimination, and equality.

16           16.     **Sikh Coalition.** The Sikh Coalition is the largest community-based Sikh civil rights  
17 organization in the United States. Since its inception following the tragic events of September 11,  
18 2001, the Sikh Coalition has worked to defend civil rights and liberties for all people, to empower  
19 the Sikh community, to create an environment where Sikhs can lead a dignified life unhindered by  
20 bias or discrimination, and to educate the broader community about Sikhism in order to promote  
21 cultural understanding and diversity. The Sikh Coalition has vindicated the rights of numerous Sikh  
22 Americans subjected to bias and discrimination because of their faiths. Ensuring the rights of  
23 religious and other minorities is a cornerstone of the Sikh Coalition’s work. The Sikh Coalition  
24 joins the *amici* Brief attached hereto as Exhibit A in the belief that the Establishment Clause is an  
25 indispensable safeguard for religious-minority communities. Overly broad religious exemptions,  
26 such as the HHS Rule in question, could severely limit the rights of and negatively impact minority  
27 faiths. The Sikh Coalition believe strongly that Sikh Americans across the country have a vital  
28 interest in the separation of church and state.



**ATTESTATION OF FILER**

I, Gilbert R. Serota, am the ECF user whose identification and password are being used to file the foregoing document. Pursuant to Civil Local Rule 5-1(i)(3), I hereby attest that all other signatories to this document concurred in its filing.

DATED: September 12, 2019

/s/ Gilbert R. Serota  
GILBERT R. SEROTA

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# EXHIBIT A

1 ARNOLD & PORTER KAYE SCHOLER LLP  
2 GILBERT R. SEROTA (SBN 75305)  
3 Gilbert.Serota@arnoldporter.com  
4 BENJAMIN HALBIG (SBN 321523)  
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8 Telephone: (415) 471-3100  
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7 ANTI-DEFAMATION LEAGUE  
8 DAVID L. BARKEY (*pro hac vice* forthcoming)  
9 dbarkey@adl.com  
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17 **UNITED STATES DISTRICT COURT**  
18 **NORTHERN DISTRICT OF CALIFORNIA**

19  
20 CITY AND COUNTY OF SAN FRANCISCO,

21 Plaintiff,

22 vs.

23 ALEX M. AZAR II, Secretary of U.S.  
24 Department of Health and Human Services;  
25 ROGER SEVERINO, Director, Office for Civil  
26 Rights, Department of Health and Human  
27 Services; U.S. DEPARTMENT OF HEALTH  
28 AND HUMAN SERVICES; and DOES 1-25,

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Case No. 3:19-cv-02405-WHA

**BRIEF OF THE ANTI-DEFAMATION  
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COUNTY OF SANTA CLARA, TRUST  
WOMEN SEATTLE, LOS ANGELES LGBT  
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BRADBURY-SULLIVAN LGBT  
COMMUNITY CENTER, CENTER ON  
HALSTED, HARTFORD GYN CENTER,  
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FOR CHOICE, AGLP: THE ASSOCIATION  
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PROFESSIONALS ADVANCING LGBTQ  
EQUALITY, COLLEEN McNICHOLAS,  
ROBERT BOLAN, WARD CARPENTER,  
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Case No. 3:19-cv-02916-WHA

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 17 *circumcisions. She says her Jewish faith leads her to do both*, Washington Post  
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1 health, including the decision to have an abortion.

2 As applied to reproductive health care, the Rule improperly favors those who oppose abortion  
 3 by broadly granting them a near absolute right to refuse to perform any and all services which have  
 4 an “articulable connection” to the procedure. These services could range from actual medical  
 5 procedures to talking to patients, filling out paperwork, and cleaning or preparing facilities necessary  
 6 to perform safe abortions. Not only are the rights to refuse broad, the Rule further prohibits health  
 7 care providers from limiting the scope of an accommodation to reasonably consider the availability  
 8 of alternate staff, the willingness of a doctor to perform the procedure, or even the safety and life of  
 9 the patient in emergency situations.

10 Under this Rule, HHS has created a virtual “veto power” over abortion services that can be  
 11 exercised by religious objectors to abortion in derogation of the beliefs and the needs of the patient,  
 12 physician, or provider. The overly broad religious exemption created by the Rule thus violates the  
 13 Establishment Clause because it harms third parties, as well as constitutes a preference for one  
 14 specific religious viewpoint above all others.

## 15 ARGUMENT

### 16 I. AMERICANS HOLD A WIDE VARIETY OF RELIGIOUS, MORAL, AND 17 SPIRITUAL VIEWS REGARDING ABORTION.

18 Americans have long held a wide variety of religious beliefs concerning a woman’s right to  
 19 terminate her pregnancy.<sup>1</sup> In the majority opinion in *Roe v. Wade*, Justice Blackmun acknowledged  
 20 the complexity of the subject, noting “the vigorous opposing views, even among physicians” that it  
 21 inspires, and the “wide divergence of thinking on this most sensitive and difficult question.” 410 U.S.  
 22 113, 116, 160 (1973). Close to fifty years after that decision, Americans continue to hold diverse  
 23 viewpoints on abortion. According to a 2018 Pew Research Center survey, 58% of United States  
 24 adults believe that it should be legal in all or most cases, whereas 37% say that it should be illegal in  
 25

26  
 27  
 28 <sup>1</sup> See, e.g., *Religious Perspectives on the Abortion Decision*, 35 N.Y.U. Rev. L. & Soc. Change 281 (2011).

1 all or most cases.<sup>2</sup> These beliefs often correspond to a person's religious affiliation. When surveyed  
 2 on the topic of abortion, 90% of self-identified Unitarian Universalists responded that abortion should  
 3 be legal in all or most cases, though only 18% of Jehovah's Witnesses answered the same.<sup>3</sup>

4 Denominations' stated positions on abortion also vary greatly. The official positions of some  
 5 religions strongly oppose abortion with few or no exceptions, such as the Roman Catholic Church,  
 6 the Southern Baptist Convention, and the Church of Jesus Christ of Latter-day Saints.<sup>4</sup> By contrast,  
 7 the Presbyterian Church,<sup>5</sup> Reform<sup>6</sup> and Conservative Judaism<sup>7</sup>, and the United Church of Christ<sup>8</sup> have  
 8 taken the position that a woman has the right to choose whether to terminate her pregnancy in most  
 9 or all circumstances. Many leaders from religious organizations have been active proponents of  
 10 abortion rights for decades. The Clergy Consultation Service on Abortion, for example, was founded  
 11

12 <sup>2</sup> *Public Opinion on Abortion*, Pew Research Center (Oct. 15, 2018),  
 13 <https://www.pewforum.org/fact-sheet/public-opinion-on-abortion/>.

14 <sup>3</sup> David Masci, *American religious groups vary widely in their views of abortion*, Pew Research  
 15 Center (Jan. 22, 2018), [https://www.pewresearch.org/fact-tank/2018/01/22/american-religious-](https://www.pewresearch.org/fact-tank/2018/01/22/american-religious-groups-vary-widely-in-their-views-of-abortion/)  
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17 <sup>4</sup> David Masci, *Where major religious groups stand on abortion*," Pew Research Center (June 21,  
 18 2016), [https://www.pewresearch.org/fact-tank/2016/06/21/where-major-religious-groups-stand-on-](https://www.pewresearch.org/fact-tank/2016/06/21/where-major-religious-groups-stand-on-abortion/)  
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20 <sup>5</sup> Presbyterian Church (U.S.A.) Office Of The General Assembly, *Report of the Special Committee*  
 21 *on Problem Pregnancies and Abortion* 11 (1992) at 11,  
 22 [http://www.pcusa.org/site\\_media/media/uploads/oga/pdf/problem-pregnancies.pdf](http://www.pcusa.org/site_media/media/uploads/oga/pdf/problem-pregnancies.pdf) ("We do not  
 23 wish to see laws enacted that would attach criminal penalties to those who seek abortions or to  
 24 appropriately qualified and licensed persons who perform abortions in medically approved  
 25 facilities").

26 <sup>6</sup> Central Conference Of American Rabbis, *Resolution Adopted by the CCAR On Abortion and the*  
 27 *Hyde Amendment*, (1984) <https://www.ccarnet.org/ccar-resolutions/abortion1984/> (stating that "the  
 28 Central Conference of American Rabbis has gone on record in 1967, 1975, and 1980 in affirming  
 the right of a woman or individual family to terminate a pregnancy."); UNION FOR REFORM  
 JUDAISM, *Reproductive Rights* (last visited Mar. 13, 2018) [https://urj.org/what-we-](https://urj.org/what-we-believe/resolutions/reproductive-rights)  
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<sup>7</sup> The Rabbinical Assembly, *Resolution on Reproductive Freedom*, (June 15, 2011),  
<https://www.rabbinicalassembly.org/resolution-reproductive-freedom> ("the Rabbinical Assembly  
 urges its members to support full access for all women to the entire spectrum of reproductive  
 healthcare, and to oppose all efforts by federal, state, local or private entities or individuals to limit  
 such access.").

<sup>8</sup> United Church Of Christ, *General Synod Statements and Resolutions Regarding Freedom of*  
*Choice* (last visited Mar. 13, 2018),  
[http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy\\_url/2038/GS-Resolutions-](http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/2038/GS-Resolutions-Freedom-of-Choice.pdf?1418425637)  
[Freedom-of-Choice.pdf?1418425637](http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/2038/GS-Resolutions-Freedom-of-Choice.pdf?1418425637) ("for 20 years, Synods of the United Church of Christ have  
 affirmed a woman's right to choose with respect to abortion.").

1 in 1967 by twenty-one ministers and one rabbi. It offers women seeking abortions counseling and  
2 referrals to safe practitioners.<sup>9</sup>

3 Even within religious denominations officially opposed to the provision of abortion in most  
4 cases, there are numerous followers whose beliefs differ from official religious doctrine. According  
5 to recent polling, U.S. Catholics are considerably divided on the issue, with a narrow plurality  
6 supportive of legal abortion – 48% to 47%.<sup>10</sup> In 1973, Catholics for Choice was founded to serve as  
7 a voice for Catholics who believe that the core traditions and teachings of their faith support women’s  
8 reproductive autonomy.<sup>11</sup> The same polling also shows that 30% of Southern Baptists and 27% of  
9 Mormons in the United States believe that abortion should be legal in all or most cases.<sup>12</sup> There can  
10 be little doubt that Americans hold a diverse range of sincere religious beliefs regarding abortion and  
11 its morality.

12 Consistent with this diversity of viewpoints, U.S. medical providers have a wide variety of  
13 positions as to whether they are willing to provide abortion care to their patients. A recent survey of  
14 American Obstetrician-Gynecologists (“OBGYNs”) indicated that one in three doctors had personal,  
15 moral, or religious objections to performing abortion services.<sup>13</sup> By contrast, the faith-based views  
16 of other doctors lead them to believe in providing and to actually provide the procedure for patients.  
17 One Jewish doctor’s study of the Torah, Talmud, and other religious texts led her to devote the latter  
18 part of her career to providing abortion care to patients,<sup>14</sup> while a Christian physician in the American  
19 South started performing the procedure as part of his belief that the Bible compels him to help people  
20

21 <sup>9</sup> David P. Cline, *Creating Choice: A Community Responds to the Need for Abortion and Birth*  
22 *Control, 1961-1973*, 6-7 (1st ed. 2006).

23 <sup>10</sup> Masci, *supra* n.3

24 <sup>11</sup> *See About Us*, Catholics for Choice, <http://www.catholicsforchoice.org/about-us/>.

25 <sup>12</sup> Masci, *supra* n.3.

26 <sup>13</sup> Melissa Healy, *OB-GYNs Remain Conflicted About Abortion, Survey Shows, But Pills May Be*  
27 *Changing Attitudes* Los Angeles Times (Feb. 8, 2019),  
28 [https://www.latimes.com/science/sciencenow/la-sci-sn-doctors-medical-abortion-20190208-](https://www.latimes.com/science/sciencenow/la-sci-sn-doctors-medical-abortion-20190208-story.html)  
[story.html](https://www.latimes.com/science/sciencenow/la-sci-sn-doctors-medical-abortion-20190208-story.html).

<sup>14</sup> Hannah Natanson, *This retired doctor spends her time performing abortions and circumcisions. She says her Jewish faith leads her to do both*, Washington Post (Aug. 6, 2019),  
[https://www.washingtonpost.com/religion/2019/08/06/this-retired-doctor-spends-her-time-](https://www.washingtonpost.com/religion/2019/08/06/this-retired-doctor-spends-her-time-performing-abortion-circumcisions-she-says-her-jewish-faith-leads-her-do-both/)  
[performing-abortion-circumcisions-she-says-her-jewish-faith-leads-her-do-both/](https://www.washingtonpost.com/religion/2019/08/06/this-retired-doctor-spends-her-time-performing-abortion-circumcisions-she-says-her-jewish-faith-leads-her-do-both/).

1 in need.<sup>15</sup> Doctors whose faiths lead them to make abortion care available have described their work  
2 as “a ministry,” or a “mitzvah” (which is a commandment in Jewish teaching).<sup>16</sup>

3 **II. THE HHS RULE GRANTS ABSOLUTE PROTECTION TO RELIGIOUS**  
4 **OBJECTORS TO ABORTION AND OTHER PROCEDURES, WHO REFUSE TO**  
5 **PERFORM THEIR WORK REQUIREMENTS.**

6 The Rule purports to enforce provisions of the Church Amendments which accommodate  
7 health care workers who may have religious objections to performing abortions or other procedures  
8 such as sterilization. The Church Amendments prohibit providers receiving federal funding from  
9 requiring any “*individual to perform or assist in the performance*” of any sterilization procedure,  
10 abortion, or other “health service program or research activity” when the individual’s “performance  
11 or assistance in the performance” of the abortion, sterilization or other program or research activity  
12 “would be contrary to his religious beliefs or moral convictions.” 42 U.S.C. § 300a-7(b)(1),(2)(B),(d)  
13 (emphasis added); 45 C.F.R. § 88.3(a)(2)(iii), (vi). Those Amendments prohibit providers from  
14 “*discriminat[ing]*...against any physician or other health care personnel” when that individual refuses  
15 to “perform or assist in the performance” of any lawful sterilization procedure, abortion, or other  
16 lawful health service or research activity “on the grounds that his performance or assistance in the  
17 performance of such service would be contrary to his religious beliefs or moral convictions.” 42  
18 U.S.C. § 300a-7(c)(1)-(2); 45 C.F.R. § 88.3(a)(2)(v).

19 The definitions imposed by the HHS Rule go far beyond the statute, expanding the statutory  
20 protections to create an absolute right for workers to refuse to do their jobs based on their religious  
21 beliefs. “**Discrimination**” prohibited by the Rule is far broader than in the statute. It is defined to  
22 include virtually any negative action to “withhold, reduce, exclude from, terminate, restrict, or make  
23 unavailable or deny,” any “position,” “status,” “benefit,” or “privilege” in employment. 45 C.F.R. §  
24 88.2(1),(2). Providers may offer accommodation to objecting employees, but the employee must

25 <sup>15</sup> Nicholas Kristof, *Meet Dr. Willie Parker, a Southern Christian Abortion Provider*, New York  
26 Times (May 6, 2017), <https://www.nytimes.com/2017/05/06/opinion/sunday/meet-dr-willie-parker-a-southern-christian-abortion-provider.html>.

27 <sup>16</sup> Elizabeth Reiner Platt, *Many doctors are motivated by their moral and religious beliefs to*  
28 *provide abortions. Why doesn't HHS care about their consciences?* Medium (Mar. 27, 2018)  
[https://medium.com/@PRPCP\\_Columbia/many-doctors-are-motivated-by-their-moral-and-religious-beliefs-to-provide-abortions-aede31418bed](https://medium.com/@PRPCP_Columbia/many-doctors-are-motivated-by-their-moral-and-religious-beliefs-to-provide-abortions-aede31418bed).

1 “voluntarily” accept the accommodation. *Id.* There are no exceptions requiring objecting employees  
2 to do their job in emergencies, including when the life of the patient may be at stake. Nor is there  
3 any carve-out that allows a health care institution or provider to balance an employee’s religious  
4 objection against the financial or logistical burdens of honoring the request, such as the schedules of  
5 other employees or lack of available staff.

6 The Rule also expands the scope of the statutory protections to apply to any person or activity  
7 even tangentially connected to health care. “**Individual**” may cover any member of an entity’s  
8 “workforce,” 84 Fed. Reg. at 23,199, which includes any “employee[], “volunteer,” “trainee[],” or  
9 “contractor” subject to the control of that entity, or “holding privileges” with that entity. 45 C.F.R. §  
10 88.2. “**Assist in the performance**” means *any* action that “has a specific reasonable, and articulable  
11 connection to furthering a procedure or a part of a health service program,” including “counseling,  
12 **referral[s]**, and training.” *Id.* (Emphasis added.) “**Referral[s]**” is defined to include “the provision  
13 of information’ in any form “where the purpose or reasonably foreseeable outcome of provision of  
14 the information is to assist a person in receiving” a particular health service or procedure. *Id.* (2).

15 Read together, the Rule’s provisions give any person whose duties have some “articulable  
16 connection” to abortion, sterilization, or other lawful health care procedure the ability to materially  
17 burden and inhibit a provider’s capacity to provide those services. For example, a social worker may  
18 refuse to provide a pregnant woman with the name of an obstetrician who provides abortions; a  
19 receptionist may refuse to schedule the procedure; an administrator may refuse to process a patient’s  
20 insurance claim for the procedure; and a janitor may refuse to clean an operating room he thinks will  
21 be used for the procedure.

22 The Rule imposes harsh and coercive penalties for providers that do not completely comply  
23 with these religious objections. Providers must submit an assurance and certification of full  
24 compliance with the Rule and are subject to losing all HHS funding if they fail to comply in any  
25 aspect. 45 C.F.R. §§ 88.4(a),(b), 88.7.

26 In the world created by the Rule, abortion providers are presented with an impossible choice  
27 when an employee whose job is necessary to the procedure invokes the Rule to refuse to do their job  
28

1 on the basis of a religious objection: either the provider can comply with the objection (which may  
 2 mean not providing the abortion, including under emergency circumstances, if no other staff is  
 3 reasonably available) or, in an emergency situation when no other staff is available, the provider can  
 4 perform the procedure and risk losing the entirety of their HHS funding. Under this scheme, the  
 5 ultimate consideration as to whether a facility provides health care turns on whether its employees  
 6 raise religious objections.

7 **III. THE ABSOLUTE IMMUNITY GRANTED BY THE RULE TO RELIGIOUS**  
 8 **OBJECTIONS IS AN UNLAWFUL FOSTERING OF RELIGION THAT MUST BE**  
 9 **INVALIDATED UNDER THE ESTABLISHMENT CLAUSE.**

10 The Establishment Clause of the First Amendment prohibits the government from promoting  
 11 or affiliating itself with any particular set of religious beliefs. *Lions Club of Albany, California v.*  
 12 *City of Albany*, 323 F. Supp. 3d 1104, 1113 (N.D. Cal. 2018) (citing *Cty. Of Allegheny v. Am. Civil*  
 13 *Liberties Union*, 492 U.S. 573. 590 (1989) *abrogated on other grounds by Town of Greece v.*  
 14 *Galloway*, 572 U.S. 565 (2014)). In *Engel v. Vitale*, Justice Black detailed the history of the  
 15 fundamental American value of the separation of church and state reflected in the Establishment  
 Clause:

16 By the time of the adoption of the Constitution, our history shows that there was a  
 17 widespread awareness among many Americans of the dangers of a union of Church  
 18 and State. These people knew, some of them from bitter personal experience, that  
 19 one of the greatest dangers to the freedom of the individual to worship in his own  
 20 way lay in the Government's placing its official stamp of approval upon one  
 particular kind of prayer or one particular form of religious services . . . . The First  
 Amendment was added to the Constitution to stand as a guarantee that neither the  
 power nor the prestige of the Federal Government would be used to control, support  
 or influence the kinds of prayer the American people can say.

21 370 U.S. 421, 429 (1962).

22 The Supreme Court has consistently given the Establishment Clause “broad meaning,” and  
 23 invalidated laws that aid one particular religion or specific religious belief. *Everson v. Bd. Of Educ.*  
 24 *of Ewing Twp.*, 330 U.S. 1, 14-16 (1947). The Clause ““gives no one the right to insist that in pursuit  
 25 of their own interests others must conform their conduct to his own religious necessities.”” *Estate of*  
 26 *Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (quoting *Otten v. Baltimore Ohio R. Co.*, 205 F.2d 58,  
 27 61 (2d Cir. 1953) (Hand, J.)). The state *must* “treat[] religious people, organizations, speech, or  
 28

1 activity equally to comparable secular people, organizations, speech or activity.” *American Legion*  
2 *v. Am. Humanist Assoc.*, 139 S. Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring).

3 At the same time, the Free Exercise Clause “requires government respect for, and  
4 noninterference with, the religious beliefs and practices of our Nation’s people.” *Cutter v. Wilkinson*,  
5 544 U.S. 709, 719 (2005). Consistent with the Free Exercise Clause, the Supreme Court “has long  
6 recognized that the government may (and sometimes must) accommodate religious practices and that  
7 it may do so without violating the Establishment Clause.” *Corp. of Presiding Bishop of Church of*  
8 *Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (quotation marks and citation  
9 omitted). But the “principle that the government may accommodate the free exercise of religion does  
10 not supersede the fundamental limitations imposed by the Establishment Clause.” *Lee v. Weisman*,  
11 505 U.S. 577, 578 (1992). The Supreme Court has warned that “[a]t some point, accommodation  
12 may devolve into an unlawful fostering of religion.” *Cutter*, 544 U.S. at 714 (quotation marks and  
13 citation omitted).

14 As explained below, the Rule violates the Establishment Clause for two related reasons. First,  
15 it creates an absolute right of health care workers to refuse to perform their duties, which imposes  
16 substantial burdens on third parties including on doctors and institutions attempting to provide and  
17 patients attempting to receive lawful abortion care. Second, it establishes a clear preference for  
18 religious beliefs opposed to abortion and other health care procedures at the expense of other faith-  
19 based views with different perspectives on such procedures.

20  
21 **A. The HHS Rule Amounts To An Unlawful Fostering Of Religion In That It  
Sanctions Harm To Third Parties.**

22 The Establishment Clause prohibits granting religious accommodations that would have a  
23 “detrimental effect on any third party.” *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729  
24 n.37 (2014); *Caldor*, 472 U.S. at 709; *Cutter*, 544 U.S. at 722; *see also Holt v. Hobbs*, 574 U.S. 853,  
25 867 (2015) (Ginsburg, J. concurring). This is precisely what the Rule does, however, because it grants  
26 workers, contractors, and even volunteers an absolute right to refuse to perform their duties based on  
27 a religious objection, irrespective of the detrimental effect their refusal might have on the autonomy,  
28

1 health and life of a patient or hospitals' ability to provide timely and effective abortion care.

2 Such a law was invalidated by the U.S. Supreme Court in *Caldor*. In that case, a Connecticut  
3 state statute granted employees "an absolute and unqualified right not to work on whatever day they  
4 designate[d] as their Sabbath." 472 U.S. at 709. Like the HHS Rule, the Connecticut law allowed  
5 Sabbath-observing workers from many different religious traditions to prevail over any other  
6 consideration, including the burden imposed on the employer forced to find alternative staff, and non-  
7 Sabbatarian employees who would be forced to work the days selected by their religious colleagues.  
8 *Id.* at 709-10. The Court held that the statute had "a primary effect that impermissibly advance[d] a  
9 religious practice" because it created an "unyielding weight[] in favor of Sabbath observers over all  
10 other interests." *Id.* at 710.

11 By contrast, the Court has consistently upheld government action that balances an individual's  
12 exercise of their religious beliefs against any detrimental effect that accommodation of that belief  
13 might impose on third parties. In *Cutter*, for example, the Court held that provisions of the Religious  
14 Land Use and Institutionalized Persons Act allowing for prisoners to practice their religion were valid  
15 under the Establishment Clause because there was room for consideration of the "urgency of  
16 discipline, order, safety, and security in penal institutions...." 544 U.S. at 723; *see also Holt*, 574  
17 U.S. at 867 (Ginsburg, J., concurring) (noting that allowing a prisoner to grow a beard consistent with  
18 his Muslim faith was required under RLUIPA because it "would not detrimentally affect others who  
19 do not share" that belief). In *Hobby Lobby*, the Court recognized that exempting employers with  
20 religious objections from HHS regulations requiring them to provide health insurance covering  
21 prescription contraception "need not result in any detrimental effect on third parties," since there were  
22 alternative methods of providing the coverage to employees without cost sharing. 573 U.S. at 729  
23 n.37.

24 In this case, the Rule vests employees opposed to abortion on religious grounds with an  
25 unqualified right to refuse to perform any aspect of their job duties having an articulable connection  
26 to the procedure but fails to give *any* consideration of the substantial burden imposed on health care  
27 institutions and doctors wishing to provide and patients wishing to receive lawful abortion care. The  
28

1 Rule allows no room for considering a religious worker’s objection against other concerns, such as  
2 the availability of other staff or the urgency of the situation. The Rule also allows religious objections  
3 to certain types of health care like abortion to override other faith-based and spiritual views, such as  
4 the views of a patient that a procedure is religiously appropriate, or the beliefs of the doctor or facility  
5 that an abortion should be performed consistent with their faith-based views regarding a mother’s  
6 autonomy in making reproductive health care decisions, or because their faith prioritizes the  
7 responsibility to save the mother’s life. The burden on third parties created by the Rule is especially  
8 significant given the wide swath of workers and contractors whose job duties may have an articulable  
9 connection to abortion care (and thus are entitled to protection under the Rule’s expansive  
10 definitions), such that the Rule may effectively bar many hospitals from providing otherwise lawful  
11 abortion care in the first place.

12 The Rule utterly ignores these significant, detrimental effects on third parties in the name of  
13 protecting and accommodating religious workers’ exercise of their beliefs, and allows those workers  
14 to determine whether and how abortion care is provided to patients. Because the Establishment  
15 Clause “‘gives no one the right to insist that in pursuit of their own interests others must conform  
16 their conduct to his own religious necessities,’” the Rule must be invalidated as an unlawful fostering  
17 of religion. *Caldor*, 472 U.S. at 710 (quoting *Otten v. Baltimore Ohio R. Co.*, 205 F.2d 58, 61 (2d  
18 Cir. 1953).

19 HHS and its *amici* raise several arguments to downplay the significant burden the Rule  
20 imposes on patients, health care providers, and doctors, none of which are persuasive. HHS argues  
21 that *Caldor* is distinguishable because “any adverse effects . . . result from the conscience decisions  
22 of health care entities, not the government.” (Defs.’ Mot. for SJ at 34-35 (citing *Corp of Presiding*  
23 *Bishop of Church v. Amos*, 483 U.S. 327, 338 (1987).) In *Amos* the Supreme Court held that  
24 exempting religious organizations from Title VII’s prohibition against employment discrimination on  
25 the basis of religion did not violate the Establishment Clause. 483 U.S. at 338. The Court noted that  
26 the exemption from Title VII *furthered* the separation of church and state because it “allieviat[e]d  
27 significant governmental interference with the ability of religious organizations to define and carry  
28

1 out their religious missions.” *Id.* at 335. Though allowing a religious organization to fire an employee  
2 on the basis of religion impinged upon the employee’s freedom of choice in religious matters, “it was  
3 the Church . . . and not the government, who put him to the choice of changing his religious practices  
4 or losing his job.” *Id.* at 338 n.15. By contrast, the absolute right of refusal created by the Rule’s  
5 expansive definitions undermines the separation of church and state by “giv[ing] the force of law to  
6 the employee’s” religious refusal to perform their duties and requires “accommodation by the  
7 employer regardless of the burden which that constitute[s]” for health care providers, doctors,  
8 patients, or other employees. *See id.*

9 HHS and the *amicus* brief of the American Center for Law & Justice (“ACLJ”) also argue that  
10 the Rule creates no burden at all because providers may choose to either comply with the Rule or not  
11 receive federal funding from HHS. (Defs’ Mot. for SJ at 35; ACLJ *Amicus* Br. at 9.) HHS cites no  
12 authority for this proposition, and the cases cited by the ACLJ are inapposite. In one, the Court  
13 actually *invalidated* a condition for receiving federal funds as unduly coercive and because it  
14 infringed upon grant recipients’ First Amendment rights. *Agency for Int’l Dev. v. All. for Open Soc’y*  
15 *Int’l, Inc.*, 570 U.S. 205, 208 (2013) (federal government could not require NGO recipients of  
16 HIV/AIDS funding to adopt a policy expressly opposing abortion). In *Maher v. Roe*, the Court held  
17 that Connecticut did not violate the Equal Protection Clause of the 14th Amendment by choosing to  
18 fund expenses incident to childbirth, but not certain, discrete abortion-related expenses. 432 U.S.  
19 464, 472 (1977).

20 In this case, the Rule is unduly coercive because providers who do not come in full compliance  
21 with the Rule risk losing the entirety of their HHS funding as opposed to an insubstantial sum. *See*  
22 45 C.F.R. § 88.7(i)(3). That consequence would be catastrophic for providers such as Zuckerberg  
23 San Francisco General Hospital, which receives nearly 40% of its budget from HHS. (*See* San  
24 Francisco Mot. for Prelim. Inj. at 23-24.) The Supreme Court has rejected such conditioning of  
25 federal funds because they are “much more than ‘relatively mild encouragement, [but rather] a gun  
26 to the head.’” *Nat’l Fed’n of Indep. Bus. v. Sibelius*, 567 U.S. 519, 581-82 (2012) (condition that  
27 would impact 10% of States’ budgets was unduly coercive and violated Spending Clause).

1 Finally, the ACLJ argues in its *amicus* brief that any burden imposed under the Rule on  
 2 patients' ability to receive and doctors' ability to provide lawful abortion care is irrelevant because  
 3 the Rule protects objections based on both "[s]ecular moral convictions" and religious beliefs. (ACLJ  
 4 *Amicus* Brief at 8 (citing *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 673 (1970) and  
 5 *Bowen v. Kendrick*, 487 U.S. 589, 608 (1988).) The cases cited by the ACLJ involve the propriety of  
 6 extending federal funding or tax exemptions to religious organizations, which is an issue completely  
 7 inapposite to whether the absolute right of refusal created by the Rule is permissible under the  
 8 Establishment Clause. In *Walz*, the Supreme Court held that a New York property tax exemption  
 9 extended to religious organizations did not violate the Establishment Clause because the exemption  
 10 also applied to "a broad class of property" owned by various other non-profit groups. 397 U.S. at 672-  
 11 73. And in *Bowen*, the Court held that granting federal funds to religious organizations for teenage  
 12 sexuality services did not run afoul of the Clause because funds were also allocated to non-sectarian  
 13 organizations and the funded activities were not specifically religious. 487 U.S. at 608-13.<sup>17</sup>

14 None of the cases cited by the ACLJ support the proposition that the fostering of religion  
 15 created by the Rule's absolute right of refusal is somehow neutralized merely because individual  
 16 secular, moral views are also included. Here, the Rule requires hospitals, patients, and doctors to  
 17 "conform their conduct" to individual workers' religious objections. *See Caldor*, 472 U.S. at 710. It  
 18 must be invalidated as an unlawful fostering of religion.

19  
 20  
 21 <sup>17</sup> The ACLJ brief also cites to a line of cases standing for the proposition that a regulation does not  
 22 violate the Establishment Clause because "it happens to coincide or harmonize with the tenants of  
 23 some or all religions." (ACLJ *Amicus* Brief at 10 (citing *Harris v. McCrae*, 448 U.S. 297, 319  
 24 (1980); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961); *Newdow v. Rio Linda Union Sch. Dist.*,  
 25 597 F.3d 1007, 1034 (9th Cir 2010).) But each of those cases involved government action involving  
 26 a specific secular purpose that also happened to coincide with views of certain religions. *Harris*, 448  
 27 U.S. at 319 (restrictions on allocation of certain federal funds for abortion care did not violate  
 28 Establishment Clause merely because restrictions coincided with Catholic teachings on abortion);  
*McGowan*, 366 U.S. at 442, 445 (law prohibiting retailers from operating on Sundays permissible to  
 "provide a uniform day of rest for all citizens"); *Newdow*, 597 F.3d at 1034 (public school inclusion  
 of "under God" in voluntary pledge of allegiance permissible under Establishment Clause because of  
 secular purpose of reflecting history of the nation's founding). None of these cases stand for the  
 proposition that doctors and health care institutions must conform how and whether they provide  
 abortions and other procedures based on individual workers' religious or moral views without regard  
 to the burdens placed on them.

1           **B.       The Rule Is Not Neutral To Religious Views As Required By The Establishment**  
2           **Clause Because It Confers Special Protections To Particular Faith-Based**  
3           **Beliefs.**

4           “The clearest command of the Establishment Clause is that one religious denomination cannot  
5 be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982). The Clause  
6 “compels the state to pursue a course of ‘neutrality’ toward religion, favoring neither one religion  
7 over others nor religious adherents collectively over nonadherents.” *Board of Educ. of Kiryas Joel*  
8 *Village School Dist. v. Grumet*, 512 U.S. 687, 705 (1994) (citation omitted). A constitutional  
9 accommodation of religion must “confer[] no privileged status on any particular religious sect” and  
10 must be “administered neutrally among different faiths.” *Cutter*, 544 U.S. at 720, 724. As an  
11 illustration, in *Larson*, the Court invalidated a Minnesota law that imposed certain reporting and  
12 registration requirements on religious organizations receiving fifty per cent of their funds from non-  
13 members, because it granted clear sectarian preferences to “well-established churches,” at the expense  
14 of “churches which are new and lacking in constituency . . . which, as a matter of policy, may favor  
15 public solicitation . . .” 456 U.S. at 246 n.23 (quotation marks and citation omitted). And in *Kiryas*  
16 *Joel*, the Court held that New York school district lines violated the Establishment Clause because  
17 those lines created a special district for a highly religious community that excluded all but the  
18 members of that community. 512 U.S. at 704-05. Because the state’s creation of the special school  
19 district effectively delegated civic authority to one specific religious group without extending a  
20 similar benefit to other religious and non-religious groups, it violated the Clause’s “requirement of  
21 government neutrality.” *Id.* at 705.

22           In this case, HHS has provided a special benefit of refusing to participate in and effectively  
23 blocking certain abortion-related and other health care activities without conferring a similar benefit  
24 to those who have a different religious perspective, including doctors who believe that in making  
25 abortions available to women, they are performing a “ministry” or a “mitzvah.” To illustrate the  
26 disparate treatment of religious viewpoints regarding abortion, consider a Jewish hospital with a  
27 policy of making abortions available consistent with the Reform or Conservative Jewish viewpoint  
28 that a woman has the right to terminate her pregnancy, including when necessary to save the woman’s

1 life. The Rule authorizes virtually any Catholic employee or contractor at that hospital with a  
2 religious opposition to abortion to refuse to do any part of their duties that has “a specific reasonable,  
3 and articulable connection” to the procedure. The Rule prohibits the hospital from disciplining these  
4 employees or moving them to a different position where they would have no duties involving  
5 abortions, unless the employees voluntarily agreed to that arrangement. By contrast, a Catholic  
6 hospital with a policy of not providing any abortions or abortion-related services, such as referrals,  
7 has no obligation to accommodate the religious views of Jewish employees whose religious beliefs  
8 conflict with that policy, such as an OBGYN whose faith requires her to perform the procedure in  
9 order to save the woman’s life. The Rule requires *no* accommodation of the Jewish doctor’s religious  
10 objection to the hospital’s anti-abortion policy. The only protection to the doctor’s religious beliefs  
11 is that the Catholic hospital cannot fire or otherwise take adverse action towards the Jewish OBGYN  
12 if she provided an abortion at a different facility.

13           There is no doubt that in either of these instances, honoring the Catholic or Jewish employees’  
14 religious objections to their employers’ abortion policies impose a substantial burden on the facility  
15 that otherwise would provide or not provide the procedure. But the Rule grants the ability to  
16 commandeer whether and how their employer provides abortions *only* to workers with anti-abortion  
17 religious views without according similar protections to workers whose views require them to make  
18 the procedure available to women.



**ATTESTATION OF FILER**

I, Gilbert R. Serota, am the ECF user whose identification and password are being used to file **BRIEF OF THE ANTI-DEFAMATION LEAGUE AND OTHER CIVIL RIGHTS & RELIGIOUS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT**. Pursuant to Civil Local Rule 5-1(i)(3), I hereby attest that all other signatories to this document concurred in its filing.

DATED: September 12, 2019

/s/ Gilbert R. Serota

GILBERT R. SEROTA

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1 ARNOLD & PORTER KAYE SCHOLER LLP  
GILBERT R. SEROTA (SBN 75305)  
2 Gilbert.Serota@arnoldporter.com  
BENJAMIN HALBIG (SBN 321523)  
3 Benjamin.Halbig@arnoldporter.com  
4 Three Embarcadero Center, 10<sup>th</sup> Floor  
San Francisco, CA 94111  
5 Telephone: (415) 471-3100  
Facsimile: (415) 471-3400

6 Counsel for *Amici Curiae*

7 ANTI-DEFAMATION LEAGUE  
8 DAVID K. BARKEY (*pro hac vice* forthcoming)  
dbarkey@adl.com  
9 5292 Town Center Road, Suite 500  
Boca Raton, FL 33486  
10 Telephone: (561) 988-2912

11 ANTI-DEFAMATION LEAGUE  
12 STEVEN M. FREEMAN (*pro hac vice* forthcoming)  
sfreeman@adl.com  
13 605 Third Avenue  
New York, NY 10158  
14 Telephone: (212) 885-7700

15 Counsel for *Amicus Curiae*  
16 ANTI-DEFAMATION LEAGUE

17 **UNITED STATES DISTRICT COURT**  
18 **NORTHERN DISTRICT OF CALIFORNIA**

19  
20 CITY AND COUNTY OF SAN FRANCISCO,

21 Plaintiff,

22 vs.

23 ALEX M. AZAR II, Secretary of U.S.  
Department of Health and Human Services;  
24 ROGER SEVERINO, Director, Office for Civil  
Rights, Department of Health and Human  
25 Services; U.S. DEPARTMENT OF HEALTH  
AND HUMAN SERVICES; and DOES 1-25,

26 Defendants.  
27  
28

Case No. 3:19-cv-02405-WHA

**[PROPOSED] ORDER GRANTING  
MOTION FOR LEAVE TO FILE  
BRIEF OF ANTI-DEFAMATION  
LEAGUE AND OTHER CIVIL  
RIGHTS & RELIGIOUS  
ORGANIZATIONS AS AMICI  
CURIAE IN SUPPORT OF  
PLAINTIFFS' CROSS-MOTION FOR  
SUMMARY JUDGMENT**

Hearing Date: October 30, 2019  
Time: 8:00 a.m.  
Judge: Hon. William H. Alsup

STATE OF CALIFORNIA, by and through  
XAVIER BECERRA, Attorney General,

Case No. 3:19-cv-02769-WHA

Plaintiff,

vs.

ALEX M. AZAR, in his OFFICIAL CAPACITY  
as SECRETARY of the U.S. DEPARTMENT of  
HEALTH & HUMAN SERVICES; U.S.  
DEPARTMENT OF HEALTH AND HUMAN  
SERVICES; DOES 1-100,

Defendants.

COUNTY OF SANTA CLARA, TRUST  
WOMEN SEATTLE, LOS ANGELES LGBT  
CENTER, WHITMAN-WALKER CLINIC,  
INC., d/b/a WHITMAN-WALKER HEALTH,  
BRADBURY-SULLIVAN LGBT  
COMMUNITY CENTER, CENTER ON  
HALSTED, HARTFORD GYN CENTER,  
MAZZONI CENTER, MEDICAL STUDENTS  
FOR CHOICE, AGLP: THE ASSOCIATION  
OF LGBTQ+ PSYCHIATRISTS, AMERICAN  
ASSOCIATION OF PHYSICIANS FOR  
HUMAN RIGHTS d/b/a GLMA: HEALTH  
PROFESSIONALS ADVANCING LGBTQ  
EQUALITY, COLLEEN McNICHOLAS,  
ROBERT BOLAN, WARD CARPENTER,  
SARAH HENN, and RANDY PUMPHREY,

Case No. 3:19-cv-02916-WHA

Plaintiffs,

vs.

U.S. DEPARTMENT OF HEALTH AND  
HUMAN SERVICES and ALEX M. AZAR, II.  
in his official capacity as SECRETARY OF  
HEALTH AND HUMAN SERVICES,

Defendants.

1 On September 12, 2019, ADL (Anti-Defamation League) filed a Motion for Leave to File an  
2 *Amici Curiae* Brief on Behalf of the Tanenbaum Center for Interreligious Understanding, Bend the  
3 Arc: A Jewish Partnership for Justice, Central Conference of American Rabbis, Women of Reform  
4 Judaism, Men of Reform Judaism, Union for Reform Judaism, Interfaith Alliance, Jewish Women  
5 International, Keshet, T'ruah: The Rabbinic Call for Human Rights, National Council of Jewish  
6 Women, OCA - Asian Pacific American Advocates, Reconstructing Judaism, Reconstructionist  
7 Rabbinical Association, and the Sikh Coalition in Support of Plaintiffs' Cross-Motion for Summary  
8 Judgment.

9 Having considered the papers and pleadings on file, the Court GRANTS the Motion and  
10 ORDERS that the *Amici Curiae* Brief submitted by ADL be filed.

11 **IT IS SO ORDERED**

12  
13 Date: \_\_\_\_\_, 2019

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16 HONORABLE WILLIAM H. ALSUP  
17 Judge, United States District Court  
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