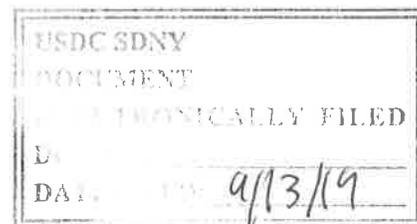


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



STATE OF NEW YORK, *et al.*,
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, *et al.*,
Defendants.

Case No. 1:19-cv-4676 (PAE) (lead)

Case No. 19-cv-5433 (PAE) (consolidated)

Case No. 19-cv-5435 (PAE) (consolidated)

**UNOPPOSED MOTION OF THE INSTITUTE FOR POLICY INTEGRITY
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS'
CROSS-MOTION FOR SUMMARY JUDGMENT**

The Institute for Policy Integrity at New York University School of Law (“Policy Integrity”) hereby moves the Court for leave to file the accompanying *amicus curiae* brief in the above-captioned case in support of Plaintiffs’ Cross-Motion for Summary Judgment. Policy Integrity has conferred with counsel for the parties concerning the filing of this motion, and counsel for all parties have indicated that they consent. As explained below, Policy Integrity’s motion satisfies the relevant legal standard for leave to file as an *amicus curiae*.

I. LEGAL STANDARD

“District courts have broad discretion to permit or deny the appearance of amici curiae in a given case.” *United States v. Yaroshenko*, 86 F. Supp. 3d 289, 290 (S.D.N.Y. 2015) (citing *United States v. Ahmed*, 788 F. Supp. 196, 198 (S.D.N.Y. 1992)). “The primary reason to allow *amicus curiae* briefing is that the *amicus curiae* offer insights not available from the parties, thereby aiding the Court.” *Andersen v. Leavitt*, No. 03-CV-6115 DRHARL, 2007 WL 2343672, at *2 (E.D.N.Y.

Aug. 13, 2007) (internal quotation omitted). Such a grant is more likely if the case “involve[s] matters of public interest.” *Id.*

II. INTEREST OF *AMICUS CURIAE*

Policy Integrity has a strong interest in this case. Policy Integrity is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity’s legal and economic experts have produced extensive scholarship on the best practices for regulatory impact analysis and the proper valuation of regulatory costs and benefits. Most notably, our director, Richard L. Revesz, has published more than eighty articles and books on administrative law, including works on the legal and economic principles that inform rational regulatory decisions. *See, e.g.*, Richard L. Revesz & Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* (2008).¹

In furtherance of its mission to promote rational decisionmaking, Policy Integrity has filed *amicus curiae* briefs addressing agency analysis of costs and benefits in many recent cases. *See, e.g.*, Br. for Inst. for Policy Integrity as Amicus Curiae in Support of Plaintiffs’ Motion for Summary Judgment, *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017) (No. 17-cv-3804-EDL) (arguing that agency’s failure to consider forgone benefits that would result from a delay in implementation of methane standards was arbitrary); Br. for Inst. for Policy Integrity as Amicus Curiae in Support of Plaintiffs’ Motion for Summary Judgment, *California v. U.S. Dep’t of the Interior*, 381 F. Supp. 3d 1153 (N.D. Cal. 2019) (No. 17-cv-5948-SBA) (arguing that repeal of procedural reforms for mineral valuation was unreasonable due to agency’s inaccurate assessment of repeal’s economic impact). In those cases, courts have agreed

¹ A full list of publications can be found in Revesz’s online faculty profile, available at <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=20228>.

that the agency analyses—and, in turn, the rules issued in reliance on those analyses—were arbitrary and capricious. *California v. BLM*, 277 F. Supp. 3d at 1123 (holding failure to consider forgone benefits arbitrary); *California v. Interior*, 381 F. Supp. 3d at 1170 (finding repeal arbitrary due in part to agency’s flawed economic impact assessment).

Policy Integrity has particular expertise on the regulatory impact analysis that the United States Department of Health and Human Services (“HHS”) conducted in support of the rule at issue in this case, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (May 21, 2019) (“Final Rule”). In 2008, we submitted an expert report on the defective analysis HHS prepared to support a previous effort to expand statutory conscience rights through rulemaking. *See* Inst. for the Study of Regulation, Comments on Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law (Sept. 16, 2008).² That 2008 rule was repealed in 2011, but the Final Rule is similar in many respects and has similar fundamental deficiencies in its cost-benefit analysis, as Policy Integrity pointed out in a March 2018 comment letter to HHS. Inst. for Policy Integrity, Comment Letter on Protecting Statutory Conscience Rights in Health Care (Mar. 27, 2018).³ We also presented these critiques to the White House Office of Information and Regulatory Affairs in an April 2019 teleconference.

Policy Integrity seeks to provide this court with information about the legal and economic standards for good regulatory impact analysis, which HHS failed to satisfy in its assessment of the Final Rule’s costs and benefits. Policy Integrity’s general interest in this case is to ensure that

² Available at <https://www.regulations.gov/document?D=HHS-OS-2008-0011-4969>. The Institute for Policy Integrity was formerly called the Institute for the Study of Regulation.

³ Available at <https://www.regulations.gov/document?D=HHS-OCR-2018-0002-72071>.

agencies comply with their obligation to accurately assess the positive and negative impacts of regulatory decisions.

III. POLICY INTEGRITY'S EXPERTISE WILL BENEFIT THE COURT

Policy Integrity's proposed *amicus* brief is also useful to the Court. As noted above, Policy Integrity has experience with the Final Rule at issue in this case, having submitted comments on the proposed version of the Final Rule and having prepared an expert report on the defective analysis HHS prepared to support a similar regulatory expansion of statutory conscience rights in 2008. Policy Integrity has made use of that experience, as well as its expertise in cost-benefit analysis, to explain why HHS's regulatory impact analysis is badly flawed and its Final Rule arbitrary and capricious. While Plaintiffs have made a variety of arguments regarding HHS's failure to provide a reasoned explanation for the Final Rule, Policy Integrity's brief is uniquely focused on the agency's economic analysis. The brief can serve as a resource for the Court as it analyzes Plaintiffs' claims that the Final Rule does not satisfy the requirements of the Administrative Procedure Act. In particular, Policy Integrity's discussion of the shortcomings in HHS's regulatory impact analysis can help the Court as it engages with the question of whether the agency's decisionmaking was arbitrary and capricious.

IV. MEET AND CONFER AND TIMELINESS

Policy Integrity has conferred with the parties concerning the filing of this motion. All parties consent to this motion.

This motion is timely. The Court's July 16 scheduling order set a deadline of September 12 for *amicus* briefs in support of Plaintiffs' cross-motion for summary judgment. Doc. No. 121.

CONCLUSION

For the forgoing reasons, Policy Integrity respectfully requests that the Court grant this motion and accept for filing the accompanying *amicus curiae* brief.

Dated: September 12, 2019

Respectfully submitted,

/s/ Richard L. Revesz

Richard L. Revesz

Justin Gundlach (admitted *pro hac vice*)

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Granted.
SO ORDERED.

9/13/19



PAUL A. ENGELMAYER
United States District Judge