

**UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND**

MAYOR AND CITY COUNCIL OF  
BALTIMORE,

Plaintiff,

v.

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

Defendants.

Civil Action No.: 1:19-cv-01672-GLR

Judge George L. Russell, III

**NOTICE OF SUPPLEMENTAL AUTHORITIES**

On Tuesday, November 19, 2019, the U.S. District Court for the Northern District of California (Alsup, J.) vacated in full the rule promulgated by the United States Department of Health and Human Services entitled “Protecting Statutory Conscience Rights in Health Care; Delegations of Authority,” 84 Fed. Reg. 23,170 (May 21, 2019) (codified at 45 C.F.R. pt. 88) (the “Rule”). The November 19, 2019 Order is attached as Exh. A (*City and County of San Francisco v. Azar*, 19 Civ. 2405, Dkt. 147 (N.D. Cal. Nov. 19, 2019)).

On Thursday, November 21, 2019, the U.S. District Court for the Eastern District of Washington (Bastian, J.) issued a written order setting forth the basis for his oral order of November 7, 2019, vacating the Rule in full. The November 21, 2019 Order is attached as Exh. B (*Washington v. Azar*, 19 Civ. 0183, Dkt. 74 (E.D. Was. Nov. 21, 2019)).

DATED: November 22, 2019

Respectfully submitted

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 22, 2019 the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system and all counsel of record will receive an electronic copy via the Court's CM/ECF system.

*/s/ Elisha B. Barron*

Elisha B. Barron

## EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

v.

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

Defendants.

No. C 19-02405 WHA

*Related to*

No. C 19-02769 WHA

*and*

No. C 19-02916 WHA

**ORDER RE MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT AND REQUESTS FOR JUDICIAL NOTICE**

**INTRODUCTION**

In these challenges to a final agency rule allowing those with religious, moral, or other conscientious objections to refuse to provide abortions and certain other medical services, federal defendants move to dismiss or, in the alternative, for summary judgment. Plaintiffs oppose and also move for their own summary judgment. For the following reasons, defendants' motion to dismiss is **DENIED**. To the extent stated below, plaintiffs' motion for summary judgment is **GRANTED**.

**STATEMENT**

Following *Roe v. Wade*, 410 U.S. 113 (1973), at least one religiously affiliated hospital became forced by a court to allow its facilities to be used for abortion procedures. *See, e.g.*,

1 *Taylor v. St. Vincent's Hospital*, 369 F. Supp. 948 (D. Mont. 1973). That provoked the first  
2 federal statute to ensure that federally-financed hospitals as well as doctors, among others, could  
3 refuse to perform such procedures on grounds of conscientious objection. Over the years, the  
4 right to refuse on such grounds has received yet more attention in further contexts via federal  
5 statutes. Defendant United States Department of Health and Human Services (HHS) has  
6 recently promulgated a rule that, plaintiffs say, expands these protections beyond what Congress  
7 intended and will hamstring the delivery of health care. Plaintiffs fear losing important federal  
8 grants as a result of their inability to comply with the new rule.

9 Under the new rule, to preview just one example, an ambulance driver would be free,  
10 on religious or moral grounds, to eject a patient en route to a hospital upon learning that the  
11 patient needed an emergency abortion. Such harsh treatment would be blessed by the new rule.  
12 One important question presented herein is the extent to which such scenarios conflict with the  
13 underlying statutes themselves. Although this order does not accept all of plaintiffs' criticisms,  
14 this order holds that the new rule conflicts with those statutes in a number of ways and upsets  
15 the balance drawn by Congress between protecting conscientious objections versus protecting  
16 the uninterrupted effective flow of health care to Americans.

17 **1. HISTORY OF CONSCIENCE STATUTES.**

18 Starting in 1973, Congress enacted laws providing certain protections to doctors and  
19 others who objected to performing abortions and certain other procedures. Relevant for our  
20 purposes are the following: (1) the Church Amendment; (2) the Coats-Snowe Amendment;  
21 (3) Medicaid and Medicare Advantage law; (4) the Weldon Amendment; and (5) the Patient and  
22 Affordable Care Act. Since the new rule purports to interpret these statutes, let's review them.

23 **A. Church Amendment (1973).**

24 Senator Frank Church of Idaho will be remembered by many for his opposition to the  
25 Vietnam War, his hearings exposing abuse by CIA surveillance of American citizens, and his  
26 championing of wilderness and environmental causes. For our immediate purposes, however,  
27 we remember him for the Church Amendment.  
28

1           Following *Roe v. Wade*, as stated, a Montana district court issued a temporary injunction  
2 requiring a Catholic hospital to allow its facilities to be used for sterilization, specifically, a tubal  
3 ligation procedure. *Taylor*, 369 F. Supp. at 948. Senator Church stated the purpose of his  
4 amendment was, among other things, to clarify the intent of Congress as to “physicians, nurses,  
5 or institutions” who don’t perform “abortions or sterilization in religious affiliated hospitals  
6 where such operations are contrary to religious belief.” 119 Cong. Rec. 9595–97.

7           The Church Amendment provided that the receipt of federal funds by any individual  
8 or entity did not authorize any court or public official to require such individual to perform  
9 or assist in the performance of any sterilization procedure or abortion contrary to his religion  
10 or conscience, nor to require such entity to make its facilities available for sterilization or  
11 abortion if such procedure was prohibited by the entity on the basis of religious or moral  
12 convictions. Entities receiving federal funds were barred from discriminating “in the  
13 employment, promotion, or termination of employment” of physicians or health care personnel  
14 as well as from discriminating “in the extension of staff or other privileges” to physicians  
15 or “health care personnel” based upon their conscientious refusal to perform or assist in the  
16 performance of those procedures. The amendment also provided that “[n]o individual shall be  
17 required to perform or assist in the performance of any part of a health service program or  
18 research activity funded in whole or in part under a program administered by the Secretary  
19 of Health and Human Services if his performance or assistance in the performance of such part  
20 of such program or activity would be contrary to his religious beliefs or moral convictions.”  
21 42 U.S.C. § 300a-7. The statute gave no delegation of authority to any agency to issue  
22 legislative rules (or even interpretive rules, for that matter).

23           **B. Coats-Snowe Amendment (1996).**

24           Twenty-three years passed. No agency rule issued or was even proposed. In 1996,  
25 however, a new concern surfaced, namely that medical students felt coerced into learning how  
26 to perform abortions. Still, no agency acted — but Congress did act. A 1996 amendment  
27 drew sponsorship from Senators Olympia Snowe and Dan Coats. Until her recent retirement,  
28 Senator Snowe of Maine received notice for her finding bi-partisan ways forward through

1 contentious issues. Senator Dan Coats became known for sponsoring the “Don’t Ask, Don’t  
2 Tell” policy of the early 1990s. He later served as Director of National Intelligence from  
3 March 2017 to August 2019.

4 The Coats-Snowe Amendment prohibited, among other things, government entities  
5 receiving federal financial assistance from discriminating against any “health care entity” that  
6 “refuses to undergo training in the performance of induced abortions, to require or provide such  
7 training, to perform such abortions, or to provide referrals for such training or such abortions”  
8 or refusing to make arrangements for those activities. The amendment specifically defined the  
9 term “health care entity” to include “an individual physician, a postgraduate physician training  
10 program, and a participant in a program of training in the health professions.” 42 U.S.C. § 238n.

11 The Amendment also required government entities receiving federal financial instance to  
12 accredit health care entities “that would be accredited but for the accrediting agency’s reliance  
13 upon an accreditation standards that requires an entity to perform an induced abortion or require,  
14 provide, or refer for training in the performance of induced abortions, or make arrangements for  
15 such training.” The Amendment provided express rulemaking authority as to that provision  
16 only. *Id.* at § 238n(b)(1).

17 **C. Medicaid and Medicare Advantage (1997).**

18 The following year, in 1997, Congress passed the Balanced Budget Act, which changed  
19 key components of Medicaid and introduced Medicare Advantage. Of importance, the statute  
20 stated that Medicaid-managed organizations and Medicare Advantage plans were not  
21 required to “provide, reimburse for, or provide coverage of a counseling or referral service”  
22 if the organization objected to the service on moral or religious grounds. 42 U.S.C.  
23 §§ 1395w-22(j)(3)(B), 1396u-2(b)(3)(B). The Social Security Act provided express rulemaking  
24 authority to HHS to implement the Medicaid and Medicare Advantage provisions. *Id.* at  
25 §§ 1302(a); 1395w-26(b)(1).

1                                   **D.      Weldon Amendment (2004).**

2           In 2004 came the Weldon Amendment. Representative Dave Weldon, a doctor,  
3           made headlines for legislation regarding home ownership affordability, vaccine safety, and  
4           the prevention of human cloning.

5           The Weldon Amendment provided that no federal funds “may be made available to  
6           a Federal agency or program, or to a State or local government, if such agency, program, or  
7           government subjects any institutional or individual health care entity to discrimination on the  
8           basis that the health care entity does not provide, pay for, *provide coverage of, or refer for*  
9           *abortions.*” Importantly, it expressly defined the term “health care entity” for purposes of the  
10          Amendment to include “an individual physician or other *health care professional, a hospital,*  
11          *a provider-sponsored organization, a health maintenance organization, a health insurance*  
12          *plan, or any other kind of health care facility, organization, or plan.*” See, e.g., Appropriations  
13          Act, Pub. L. No. 115-245, Div. B., § 507(d), 132 Stat. 2981, 3118 (2018) (emphasis added).  
14          This definition differed from the definition of the same phrase as used in the Coats-Snowe  
15          Amendment. The Weldon Amendment was meant to protect “health care entities” from being  
16          forced by the government to provide, cover, refer, or pay for abortions. HMOs and health  
17          insurance plans could not, under the amendment, be discriminated against with respect to federal  
18          funds on account of their refusal to cover abortions.

19                                   **E.      Patient Protection and Affordable Care Act (2010).**

20          Finally, in 2010 came the Patient Protection and Affordable Care Act with several  
21          new conscience provisions. One such notable provision stated the federal government or any  
22          governmental agency that received federal financial assistance under the act “may not subject  
23          an individual or institutional health care entity to discrimination on the basis that the entity  
24          does not provide any health care item or service furnished for the purpose of causing, or for  
25          the purpose of assisting in causing, the death of any individual, such as by assisted suicide,  
26          euthanasia, or mercy killing.” 42 U.S.C. § 18113. For that section only, the Act defined  
27          “health care entity” in the same way as the Weldon Amendment, to include, “an individual  
28          physician or other health care professional, a hospital, a provider-sponsored organization,

1 a health maintenance organization, a health insurance plan, or any other kind of health care  
2 facility, organization, or plan.” *Ibid.*

3 Another provision said that a State could prohibit abortion coverage in qualified health  
4 care plans, and that a qualified health care plan could not discriminate against a health  
5 care provider or entity that was unwilling to provide, pay for, provide coverage of, or refer for  
6 abortions. *Id.* § 18023. A further provision allowed individuals to seek exemption based on,  
7 among other things, their religion. *Id.* § 18081(b)(5)(A). The Act also provided HHS with  
8 express rulemaking authority to implement the Act. *Id.* § 18041(a)(1).

9 **2. THE HISTORY OF AGENCY RULES REGARDING THESE STATUTES.**

10 None of the foregoing statutes other than the Coats-Snowe Amendment, the  
11 Medicare/Medicaid laws, and the Affordable Care Act expressly delegated rulemaking authority  
12 to any agency. Even in those cases, the delegation remained limited. From 1973 until 2008, no  
13 agency issued any rule of any type concerning any health care conscience statute.

14 **A. 2008 and 2011 Rules.**

15 In August 2008, however, HHS first proposed an interpretive rule for the enforcement  
16 of the conscience statutes then in place. The comments in response to the proposed rule  
17 expressed many of the same concerns as plaintiffs express in this instant action, stating, for  
18 example, that the definitions of the terms “assist in the performance of” and “health care entity”  
19 were too broad. Critics also worried that the proposal conflicted with Medicaid, Title X (which  
20 required family planning projects to offer certain family planning services), and the Emergency  
21 Medical Training and Active Labor Act (EMTALA) (which required certain hospitals to  
22 stabilize or transfer patients in emergency situations). 42 U.S.C. §§ 300; 1395dd.

23 The 2008 rule defined many of the same statutory terms as does the 2019 rule at issue,  
24 such as “assist in the performance” and “health care entity,” to take only two examples. *See*  
25 *Ensuring That HHS Funds Do Not Support Coercive or Discriminatory Policies or Practices*  
26 *in Violation of Federal Law*, 73 Fed. Reg. at 78,082, 78,097 (Dec. 19, 2008). It ultimately  
27 prohibited HHS fund recipients from discriminating against health care entities that did not  
28 “provide, pay for, provide coverage of, or refer for abortions,” and further required HHS fund

1 recipients to certify compliance with the rule. For those that did not comply with the rule, HHS  
2 stated it “intend[ed] to work with recipients . . . to ensure compliance with the requirements or  
3 prohibitions promulgated in this regulation, and, if such assistance fails to achieve compliance,  
4 the Department will consider all legal options, including termination of funding.” The rule  
5 designated the Office of Civil Rights (OCR) to receive complaints of discrimination and  
6 coercion based on the health care conscience protection statutes. *Id.* at 78,074–79, 93.

7 Three months after the rule took effect, however, and with a different administration in  
8 office, HHS proposed to rescind the rule in order to review the regulation and “ensure its  
9 consistency with current Administration policy and to reevaluate the necessity for regulation.”  
10 74 Fed. Reg. 10,207 (Mar. 10, 2009). HHS received over 300,000 comments in response.  
11 Many of these comments expressed concern the 2008 rule “unacceptably impacted patient rights  
12 and restricted access to health care and conflicted with federal law, state law, and other  
13 guidelines addressing informed consent.” Regulation for the Enforcement of Federal Health  
14 Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968, 9971 (Feb. 23, 2011). In 2011,  
15 HHS rescinded in part and revised in part the 2008 rule. Of importance, the 2011 rule rescinded  
16 the definitions “because of concerns that they may have caused confusion regarding the scope of  
17 the federal health care provider conscience protection statutes” and stated “individual  
18 investigations will provide the best means of answering questions about the application of the  
19 statutes in particular circumstances.” The rule also stated “the certification requirements in the  
20 2008 Final Rule are unnecessary to ensure compliance with the federal health care provider  
21 conscience protection statutes, and that the certification requirements created unnecessary  
22 additional financial and administrative burdens on health care entities.” The rule further  
23 designated the OCR to receive complaints of discrimination and coercion based on the  
24 conscience protection statutes and to coordinate the handling of complaints with the HHS  
25 funding components. *Id.* at 9974.

26 **B. The Instant Rule.**

27 In May 2017, President Donald Trump issued an executive order instructing the Attorney  
28 General to “issue guidance interpreting religious liberty protections in Federal law.” Promoting

1 Free Speech and Religious Liberty, 82 Fed. Reg. 21,675 (May 4, 2017). In October 2017,  
2 Attorney General Jeff Sessions issued a memorandum to “guide all administrative agencies  
3 and executive departments” in doing so. Federal Law Protections for Religious Liberty Attorney  
4 General Memorandum (Oct. 6, 2017). In January 2018, HHS proposed to resurrect most of the  
5 2008 rule, stating that the 2011 rescission had “created confusion over what is and is not  
6 required under Federal conscience and anti-discrimination laws.” Protecting Statutory  
7 Conscience Rights in Health Care, 83 Fed. Reg. 3880 (Jan. 26, 2018). HHS received over  
8 242,000 comments in response. Many comments expressed the same concerns as plaintiffs here,  
9 including among other things, that the rule would lead to a decrease in access to health care;  
10 that the proposed definitions for terms such as “health care entity,” “referral or refer for,” and  
11 “assist in the performance of” were too broad; and that the rule conflicted with laws such as  
12 EMTALA and Title X (*see, e.g.*, AR 006-58592, 008-187087, 008-187916, 008-191263).

13 In May 2019, HHS issued its final rule — the rule in suit. Protecting Statutory  
14 Conscience Rights in Health Care, 84 Fed. Reg. 23,170 (May 21, 2019). It defines various  
15 nouns, verbs, and phrases in the conscience statutes in an expansive way, as explained below,  
16 so as to inflate the scope of protections for conscientious objectors. The rule also provides  
17 compliance and certification provisions that require covered entities to certify their compliance  
18 with federal conscience statutes, anti-discrimination laws, *and the rule itself*. Covered entities  
19 that fail to abide by these requirements risk losing the *entirety* of their federal funding, not just  
20 categories of funding such as grants, loans, and insurance.

21 Plaintiff City and County of San Francisco filed the instant action, alleging the rule  
22 violated the Administrative Procedure Act (APA) and the Constitution. *City and County of*  
23 *San Francisco v. Alex M. Azar II, et al.*, C 19-02405 WHA. A few weeks later, plaintiff State of  
24 California filed an action making most of the same claims as San Francisco with an additional  
25 FOIA claim. *State of California v. Alex M. Azar II, et al.*, C 19-02769 WHA. A week later,  
26 plaintiffs County of Santa Clara and various health and LGBTQ organizations also filed an  
27 action challenging the rule, making the same claims. *County of Santa Clara, et al., v. U.S. Dept.*  
28 *of Health and Human Services, et al.*, C 19-02916 WHA. An order granted the parties’

1 stipulated request to postpone the effective date of the rule until November 22, 2019, thus  
2 obviating the need to consider any provisional relief. Defendants now move to dismiss under  
3 FRCP 12(b)(1) and 12(b)(6) or, in the alternative, for summary judgment. Plaintiffs also move  
4 for summary judgment (Dkt. Nos. 14, 66, 89, 136). The Court appreciates the briefing and  
5 argument by both sides and the notable contributions made by amici.

## 6 ANALYSIS

### 7 1. RULE 12(B)(1) MOTION TO DISMISS.

8 Defendants raise two jurisdictional arguments under FRCP 12(b)(1). *First*, they argue  
9 plaintiffs' spending clause and establishment clause claims are not ripe for review because  
10 they have not identified any specific enforcement actions against them. *Second*, they argue the  
11 physician plaintiffs in *Santa Clara* lack standing to bring free speech, equal protection, and due  
12 process claims on behalf of their patients.

#### 13 A. Plaintiffs' Spending Clause and Establishment 14 Clause Claims Are Ripe for Review.

15 Determining whether an action is ripe for judicial review requires an evaluation of:  
16 (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial  
17 intervention would inappropriately interfere with further administrative action; and (3) whether  
18 the courts would benefit from further factual development of the issues presented. *Ohio Forestry*  
19 *Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). Hardship can occur when the impact of the  
20 regulation can be felt immediately by those subject to it in conducting their day-to-day affairs.  
21 *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 164 (1967). Specifically, "where a regulation  
22 requires an immediate and significant change in the plaintiffs' conduct of their affairs with  
23 serious penalties attached to noncompliance," the claims are ripe for review. *Abbott Labs. v.*  
24 *Gardner*, 387 U.S. 136, 153 (1967), *overruled on other grounds by Califano v. Sanders*,  
25 430 U.S. 99, 105 (1977).

26 Defendants argue plaintiffs' establishment clause and spending clause claims are not ripe  
27 because the claims rest on contingent future events. In particular, they contend that plaintiffs  
28 have only provided speculative scenarios in which the two claims can be evaluated. Not so.  
Regardless of how the rule is interpreted, plaintiffs would need to conduct extensive inquiries

1 into hospitals and personnel to determine their compliance with not only the underlying statutes,  
2 but the rule itself. Plaintiffs have further provided examples of numerous hospital policies which  
3 contain provisions regarding discrimination that may need to be overhauled under the final rule.  
4 For example, Zuckerberg San Francisco General Hospital policies state (*State of California*, Dkt.  
5 No. 69 ¶ 8):

6 In the event a staff member feels reluctant to participate in an  
7 aspect of patient care because the patient’s condition, treatment  
8 plan, or physician’s orders are in conflict with the staff member’s  
9 religious beliefs, cultural values, or ethics, the staff member’s  
10 written request for accommodation will be considered if the  
11 request does not negatively affect the quality of patient’s care.

12 Such policies would need to be rewritten and alternative business practices or procedures  
13 created to comply with the rule while also ensuring patients receive adequate care. Furthermore,  
14 if plaintiffs alternatively choose not to comply with the rule, they would need to prepare for the  
15 contingency of the termination of all federal funding. Although defendants have stated that the  
16 extent of enforcement in regard to funding is now unknown given the postponement of the rule,  
17 this does not change the fact that the whole point of the rule is to “clarify” the statutes in a way  
18 that will impose changes to comply. Accordingly, defendants’ motion to dismiss plaintiffs’  
19 spending clause and establishment clause claims is **DENIED**.

20 **B. The *Santa Clara* Physician Plaintiffs Have Standing.**

21 Defendants challenge the standing of the *Santa Clara* physician plaintiffs in raising free  
22 speech, equal protection, and due process claims on behalf of their LGBTQ and abortion-seeking  
23 patients. Although plaintiffs generally must assert their own legal rights and interests, a third  
24 party may have standing depending on the relationship of the litigant to the person whose right  
25 he or she seeks to assert and the ability of the third party to assert his or her own rights.  
26 *Singleton v. Wulff*, 428 U.S. 106, 114–16 (1976).

27 Defendants attempt to distinguish *Singleton* from the instant case by stating its holding  
28 only applies to physicians who perform nonmedically indicated abortions and are asserting  
rights on behalf of pregnant women. Not so. *Singleton*’s holding is broader, as the Supreme  
Court found that the physicians had third party standing given the *confidential nature of the  
relationship between physicians and women seeking the abortion* as well as the obstacles women

1 have in asserting their right to an abortion. In particular, women generally cannot safely secure  
2 abortions without the aid of physicians and “the constitutionally protected abortion decision is  
3 one in which the physician is intimately involved.” *Singleton*, 428 U.S. at 115–17.

4 In the instant case, physicians are similarly asserting claims on behalf of women seeking  
5 abortions and LGBTQ patients. Doctors and their patients have a confidential relationship,  
6 especially when it comes to asserting rights related to invasive procedures and treatments.  
7 Furthermore, most of the medical procedures at issue here such as abortions, gender-affirming  
8 surgery, and HIV treatments cannot be safely secured without the aid of a physician. The rights  
9 of the individual physician plaintiffs and their patients here are thus closely intertwined.  
10 Because the physician plaintiffs in *Santa Clara* have standing, defendants’ motion to dismiss  
11 the *Santa Clara* physician plaintiffs’ free speech, equal protection, and due process claims is  
12 **DENIED.**

13 **2. RULES 12(B)(6) AND 56 — THE APA CLAIM.**

14 On the merits, this order holds that the new rule sets forth new definitions of statutory  
15 terms that conflict with the statutes themselves — expansive definitions that would upset the  
16 balance drawn by Congress between protecting conscientious objectors versus facilitating the  
17 uninterrupted provision of health care to Americans.

18 With the minor exceptions noted below, the new rule is purely an interpretive rule,  
19 not a legislative rule. An agency, of course, must interpret a statute under its care. But an  
20 interpretation, even if cast in the form of a regulation, is nothing more than that —  
21 an interpretation. The statute itself is what has the force of law, not the interpretation.  
22 No interpretation can add or subtract from the actual scope of the statute itself. If the agency  
23 misconstrues a statute, then the statute controls, not the interpretation.

24 The guiding principle, therefore, is that no interpretation, not even an agency  
25 interpretation, can add or subtract from what the statute itself specifies. In a close case of  
26 statutory construction, we might defer to the agency’s interpretation. But otherwise, we must  
27 remain faithful to the statutes enacted by Congress. And while a legislative rule may add to a  
28 statute, it cannot subtract from a statute. Fidelity to the statute is paramount.

1 In reading the statutes in question, the Court sees that Congress tried to strike a balance  
2 between two competing considerations. One consideration was recognition that, due to religious  
3 or ethical beliefs, some doctors, nurses, and hospitals, among others, wanted no part in the  
4 performing of abortions and sterilizations, among other medical procedures, and Congress  
5 wanted to protect them from discrimination for their refusal to perform them. The countervailing  
6 consideration was recognition of the need to preserve the effective delivery of health care to  
7 Americans, including to those seeking, for example, abortions and sterilizations. Every doctor  
8 or nurse, for example, who bowed out of a procedure for religious or ethical reasons became one  
9 more doctor or nurse whose shifts had to be covered by someone else, a burden on the healthcare  
10 system. Congress struck a balance between these two opposing considerations.

11 In reading the rule in question, the Court sees a persistent and pronounced redefinition  
12 of statutory terms that significantly expands the scope of protected conscientious objections.  
13 As laudable as that sounds, however, it would come at a cost — a burden on the effective  
14 delivery of health care to Americans in derogation of the actual balance struck by Congress.

15 **A. Definitions.**

16 The new rule includes five columns (in the Federal Register) of new definitions of  
17 statutory terms. These definitions, as will be seen, make the mischief. Then follow many  
18 columns of restatements of the statutes in question, which restatements remain largely true to the  
19 words used by Congress (but whose scope becomes expanded by the definitions). Finally come  
20 concluding columns imposing “assurance” and “compliance” certificate obligations on  
21 applicants for federal funds. This order will now turn to the definitions, the heart of the problem.

22 **(1) “Assist in the Performance of.”**

23 The reader will recall that the Church Amendment protected not only those individuals  
24 who “perform” abortions and sterilizations but also those individuals who “assist in the  
25 performance” of abortions and sterilizations. Only the Church Amendment used “assist in  
26 the performance of,” and it did so as follows:

27 The receipt of any grant, contract, loan, or loan guarantee under  
28 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

1 authorize any court or any public official or other public authority  
2 to require (1) such individual *to perform or assist in the*  
3 *performance of* any sterilization procedure or abortion if his  
4 *performance or assistance in the performance of* such procedure or  
5 abortion would be contrary to his religious beliefs or moral  
6 convictions; [. . .]

42 U.S.C. § 300a-7 (emphasis added).

The final rule now defines “assist in the performance” as:

7 [T]o take an action that has a specific, reasonable, and articulable  
8 connection to furthering a procedure or a part of a health service  
9 program or research activity undertaken by or with another person  
10 or entity. This may include counseling, referral, training, or  
11 otherwise making arrangements for the procedure or a part of a  
12 health service program or research activity, depending on whether  
13 aid is provided by such actions.

14 “Assist in the performance” was originally intended to cover *only those individuals in the*  
15 *operating room who actually assisted the physician in carrying out the abortion or sterilization*  
16 *procedure*. This is clear from the colloquy between Senator Russell Long and Senator Church  
17 on the floor prior to the passage of the amendment:

18 Mr. Long: The thought occurs to me that it would seem  
19 reasonable to say that where one seeks a sterilization  
20 procedure or an abortion, it could not be performed  
21 because there might be a nurse or an attendant  
22 somewhere in the hospital who objected to it. If it  
23 was not a matter of concern to that individual, it  
24 seems to me that that is getting to be a little far-  
25 fetched, that is, that someone who had nothing to do  
26 with the matter *and was not involved in it one way or*  
27 *the other, just someone who happened to be working*  
28 *in a hospital, and was not involved in an abortion or*  
*a sterilization procedure*, could veto the rights of a  
physician and the rights of patients to have a  
procedure which the Supreme Court has upheld.

Mr. Church: Let me make clear, Mr. President, that such is not  
my intention. I understand the basis for the  
expression of concern on the part of the Senator from  
Louisiana, but the words on line 19, “. . . of such  
physician or other health care personnel, . . .” relate  
back to the same words used on lines 12 and 13 and  
must be read in context with those words.

Mr. Long: If I understand what the Senator is saying, he is  
saying that a nurse or an attendant who has religious  
feelings contrary to sterilization or abortion should  
not be required and would not be required by any  
Federal activity to participate in any such procedure

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to which they hold strong moral or religious convictions to the contrary.

Mr. Church: That is correct.

Mr. Long: So that this would not, in effect, say that one who sought such an operation would be denied it because someone working in the hospital objected *who had no responsibility, directly or indirectly with regard to the performance of that procedure. It would only be that one who was involved in performing the operation or in assisting to perform the operation could not be required to participate when he or she held convictions against that type of procedure.*

Mr. Church: *The Senator is correct.* The amendment is meant to give protection to the physicians, to the nurses, to the hospitals themselves, if they are religious affiliated institutions. So the fact Federal funds may have been extended will not be used as an excuse for requiring physicians, nurses, or institutions to perform abortions or sterilizations that are contrary to their religious precepts. That is the objective of the amendment. *There is no intention here to permit a frivolous objection from someone unconnected with the procedure to be the basis for a refusal to perform what would otherwise be a legal operation.*

119 Cong. Rec. 9597 (1973) (emphasis added). Accordingly, the phrase “assist in the performance” refers only to the assistance provided by nurses or other medical professionals involved in the procedure itself in the operating room, not the ambulance driver or anyone else outside the time and place of the procedure itself.

HHS nevertheless insists that “driving a person to a hospital or clinic for a scheduled abortion could constitute ‘assisting in the performance of’ an abortion, as would physically delivering drugs for inducing abortion.” 84 Fed. Reg. 23,188 (May 21, 2019). At recent oral argument for a similar challenge to the same rule in the United States District Court for the Southern District of New York, District Judge Paul Engelmayer presented counsel for HHS with the following situation:

A pregnant woman takes an ambulance across Central Park to Mt. Sinai Hospital and, midway through, from conversation with the ambulance driver, it becomes clear that she is headed there to terminate an ectopic pregnancy. The driver tells her to get out in the middle of the park, and the employer fires the ambulance driver for that. Is the ambulance driver assisting in the

1 performance of the procedure if the ambulance driver takes her to  
2 the hospital?

3 In response, government counsel insisted “[t]he rule protects an ambulance driver’s ability  
4 not to assist in the performance of a procedure to which the driver has an objection” (*State of*  
5 *California*, Dkt. No. 133, Exh. A at 116:21–25; 117:1–18). During oral argument in the instant  
6 action, HHS again insisted that ambulance drivers should and would be covered (*Id.*, Dkt. No.  
7 139 at 48–52).

8 Under a proper reading of the Church Amendment, however, no driver or EMT could  
9 ever qualify, under any circumstance, as an individual who “assists in the performance of” an  
10 abortion or sterilization. The colloquy between Senators Church and Long demonstrated that  
11 the Church Amendment was meant to protect those who would be involved in carrying out the  
12 procedure itself, such as physicians, nurses assisting the physicians, and others in the operating  
13 room necessary for the procedure itself. An ambulance driver assists in no such way.  
14 Ambulance drivers and EMTs aboard ambulances transport and stabilize. Accordingly, neither  
15 an ambulance driver nor an EMT “assist in the performance” and thus fall outside the Church  
16 Amendment.

17 Also covered under HHS’s interpretation of the rule would be schedulers and  
18 housekeeping staff. HHS has stated “[s]cheduling an abortion or preparing a room and the  
19 instruments for an abortion are necessary parts of the process of providing an abortion, and  
20 it is reasonable to consider performing these actions as constituting ‘assistance.’” 84 Fed. Reg.  
21 23,186–87 (May 21, 2019). Under the rule, a clerk scheduling surgeries for an operating room  
22 could refuse to reserve slots for abortions and sterilizations. So could an employee who merely  
23 sterilizes and places surgical instruments or ensures that the supply cabinets in the operating  
24 room are fully stocked in preparation for an abortion. For the reasons already stated, the Church  
25 Amendment was never intended to apply to those who have no role in the actual performance of  
26 the abortion or sterilization. Neither those who schedule abortions nor those who prepare an  
27 operating room assist in the performance of such a procedure under the Church Amendment.

28 HHS also states it disagrees with any interpretation of “assisting in the performance” that  
excludes pre- and post-operative support to an abortion patient. *Id.* at 23,187. But Senators

1 Long and Church agreed that it would be far-fetched for the amendment to cover situations  
2 in which “one seeks a sterilization procedure or an abortion, [and] it could not be performed  
3 because there might be a nurse or an attendant somewhere in the hospital who objected to it.”  
4 119 Cong. Rec. 9597 (1973). Pre- and post-op tasks include monitoring and ensuring that a  
5 patient is stable and/or recovering following a procedure such as taking vitals and placing an  
6 intravenous line — tasks that are generic to surgeries in general, not specific to abortions or  
7 sterilization.<sup>1</sup>

8 (2) ***“Health Care Entity” For Purposes***  
9 ***of the Coats-Snowe Amendment.***

10 The reader will recall that the Coats-Snowe Amendment protected “health care  
11 entities” that refused to undergo or provide training for abortions against discrimination.  
12 The Coats-Snowe Amendment defined “health care entity” as including “an individual  
13 physician, a postgraduate physician training program, and a participant in a program of training  
14 in the health professions,” meaning, in short, doctors, residency programs, and medical students  
15 or residents. 42 U.S.C. 238n(c)(2). The Coats-Snowe Amendment followed a new standard by  
16 the Accrediting Council on Graduate Medical Education “indicating that failure to provide  
17 training for induced abortions could lead to loss of accreditation” for hospitals and training  
18 programs. The purpose of the amendment was thus to (1) ensure medical training programs  
19 such as schools and residencies were not required to provide abortion training in order to be  
20 accredited, and (2) extend conscience protections to students and faculty in the context of  
21 training for abortions as well as to extend the protection to state schools (not just religious  
22 schools). 142 Cong. Rec. 2264–65 (1996).

23 The final rule, however, redefines “health care entity” for purposes of the Coats-Snowe  
24 Amendment as:

25 (1) For purposes of the Coats-Snowe Amendment (42 U.S.C.  
26 238n) and the subsections of this part implementing that law  
(§ 88.3(b)), an individual physician or other *health care*

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27 <sup>1</sup> This order recognizes that the physical act of removing and disposing a fetus during and immediately  
28 following an abortion would be “assisting in its performance.” The definition proposed by HHS, however, goes  
well beyond such assistance and cannot be squared with the statute itself.

1           *professional, including a pharmacist; health care personnel;*  
2           *a participant in a program of training in the health professions;*  
3           *an applicant for training or study in the health professions; a*  
4           *postgraduate physician training program; a hospital; a medical*  
5           *laboratory; an entity engaging in biomedical or behavioral*  
6           *research; a pharmacy; or any other health care provider or*  
7           *health care facility. As applicable, components of State or*  
8           *local governments may be health care entities under the*  
9           *Coats-Snowe Amendment.*

10           84 Fed. Reg. 23,264 (May 21, 2019).

11           The problem with the redefinition in the rule is that it adds several new persons and  
12           entities beyond those in the actual statute (as italicized above). To be precise, the following  
13           did not appear in the Coats-Snowe Amendment (or its legislative history) but now surface in the  
14           redefinition of “health care entity”:

15           health care professional, a pharmacist, health care personnel, an  
16           applicant for training or study in the health professions, a hospital,  
17           medical laboratory, an entity engaging in biomedical or behavioral  
18           research, a pharmacy, or any other health care provider or health  
19           care facility.

20           To be sure, some of these entities appeared in *other* conscience statutes. For example, the  
21           Church Amendment protected “applicants for training or study in the health professions.”  
22           The Church Amendment also referenced entities engaging in biomedical or behavior research,  
23           but only as entities *that were prohibited from discriminating*. Under the final rule, however,  
24           they have been moved to the other side of the ledger — as entities protected *from discrimination*  
25           and, equally problematic, imported from a different statute.

26           Other additions, however, never appeared in any conscience statute. Let’s start with  
27           pharmacists and pharmacies. The rule states that “[a] pharmacy is a health care entity,  
28           considering the ordinary meaning of that term, because it provides pharmaceuticals and  
          information, which are health care items and services.” 84 Fed. Reg. 23,196 (May 21, 2019).  
          Nowhere in the text or legislative history of the Coats-Snowe Amendment, however, is a “health  
          care entity” defined as one that provides health care items and services. Rather, when it comes  
          to individuals (as opposed to organizations), the statute consistently includes only those  
          engaging in or needing to engage in the actual performance of the procedure in question or  
          assisting in the procedure, such as doctors and nurses.

1 The Coats-Snowe Amendment was aimed at protecting doctors, residents, and  
2 medical students in the context of training. Pharmacists, like ambulance drivers, don't fit.  
3 A pharmacist's only possible role in an abortion or sterilization procedure would be dispensing  
4 advance medication to facilitate the procedure or post-procedure medication to stabilize or heal  
5 the patient, such as pain medication. Dispensing such medication, however, is not specific to the  
6 performance of the procedure itself.

7 "Medical laboratories" is another term added into the new definition that did not appear  
8 in another statute. The Coats-Snowe Amendment, to repeat, expressly defined "health care  
9 entity" as "an individual physician, a postgraduate physician training program, and a participant  
10 in a program of training in the health professions." Medical laboratories run tests that assist in  
11 diagnosing or in analyzing the outcome of certain procedures. They do not fit the statutory  
12 definition. Medical laboratories are thus not health care entities as defined or contemplated  
13 by the Coats-Snowe Amendment and the final rule was wrong to include them.

14 HHS has made many other additions in defining the term and justified doing so by  
15 stating that the Coats-Snowe Amendment used the word "include." It is, of course, true that  
16 the statutory definition used the verb "include," and the Supreme Court has held that the word  
17 "include" can signal that the list that follows is meant to be illustrative rather than exhaustive.  
18 *Samantar v. Yousuf*, 560 U.S. 305, 317 (2010). But when interpreting Congress's intent or  
19 administrative regulations, the word "include" is nonetheless bounded by the intent expressed  
20 in the legislative history. *See United States v. \$215,587.22 in U.S. Currency Seized from Bank*  
21 *Account No. 100606401387436 held in the Name of JJ Szlavik Companies, Inc. at Citizens Bank*,  
22 *306 F. Supp. 3d 213, 218 (D.D.C. 2018)*. In other words, even when the listed terms in an  
23 inclusive definition are illustrative, a list still cannot be inflated with terms lacking the defining  
24 essence of those in the list, as has occurred here. *See Russell Motor Car Co. v. United States*,  
25 *261 U.S. 514, 519 (1923)*.

26 (3) ***"Health Care Entity" For Purposes of the***  
27 ***Weldon Amendment and the Affordable Care Act.***

28 The Weldon Amendment itself provided its own statutory definition of "health care  
entity," stating "[i]n this subsection, the term 'health care entity' includes an individual

1 physician or other health care professional, a hospital, a provider-sponsored organization, a  
2 health maintenance organization, a health insurance plan, or any other kind of health care  
3 facility, organization or plan.” Pub. L. No. 1154-245, Div. B., § 507(d)(2), 132 Stat. 2981, 3118  
4 (2018). Note that this definition differed from the statutory definition of the same term in the  
5 Coats-Snowe Amendment. The final rule, however, redefines “health care entity” for purposes  
6 of the Weldon Amendment (and for purposes of the Affordable Care Act, discussed hereafter)  
7 as:

8 (2) For purposes of the Weldon Amendment (e.g., Department of  
9 Defense and Labor, Health and Human Services, and Education  
10 Appropriations Act, 2019, and Continuing Appropriations Act,  
11 2019, Pub. L. 115–245, Div. B., sec. 507(d), 132 Stat. 2981,  
12 3118 (Sept. 28, 2018)), Patient Protection and Affordable Care  
13 Act section 1553 (42 U.S.C. 18113), and to sections of this part  
14 implementing those laws (§ 88.3(c) and (e)), an individual  
15 physician or other health care professional, including *a*  
16 *pharmacist; health care personnel; a participant in a program of*  
17 *training in the health professions; an applicant for training or*  
18 *study in the health professions; a postgraduate physician training*  
19 *program; a hospital; a medical laboratory; an entity engaging in*  
20 *biomedical or behavioral research; a pharmacy; a provider-*  
21 *sponsored organization; a health maintenance organization; a*  
22 *health insurance issuer; a health insurance plan (including group*  
23 *or individual plans); a plan sponsor or third-party administrator;*  
24 *or any other kind of health care organization, facility, or plan.*  
25 As applicable, components of State or local governments may be  
26 health care entities under the Weldon Amendment and Patient  
27 Protection and Affordable Care Act section 1553.

18 84 Fed. Reg. 23,264 (May 21, 2019). The following individuals and organizations did not  
19 appear in the Weldon Amendment (nor in its legislative history), but now appear as part of the  
20 expanded definition of “health care entity” for purposes of the Weldon Amendment:

21 pharmacist, health care personnel, a participant in a program of  
22 training in the health professions, an applicant for training or study  
23 in the health professions, a postgraduate physician training  
24 program, a medical laboratory, an entity engaging in biomedical  
25 or behavioral research; a pharmacy, a health insurance issuer, and  
26 a plan sponsor or third-party administrator.

25 In presenting the Amendment, Representative Weldon stated the following:

26 The reason I sought to include this provision in the bill is my  
27 experience as a physician, and I still see patients, is that the  
28 majority of nurses, technicians and doctors who claim to be  
29 pro-choice who claim to support *Roe v. Wade* always say to me  
30 that they would never want to participate in an abortion, perform  
31 an abortion, or be affiliated with doing an abortion. This provision

1 is meant to protect health care entities from discrimination because  
2 they choose not to provide abortion services.

3 In addressing Representative Zoe Lofgren’s concern that the “sweeping new legislation”  
4 would allow “any individual physician, health care professional, hospital, HMO, health  
5 insurance plan or any other kind of health care facility, organization, or plan from providing,  
6 paying for, or even referring a patient for abortion services,” Representative Weldon stated that,  
7 “[t]his provision is intended to protect the decisions of physicians, nurses, clinics, hospitals,  
8 medical centers, and even health insurance providers from being forced by the government to  
9 provide, refer, or pay for abortions.” 150 Cong. Rec. 25,044–45 (2004).

10 As with the Coats-Snowe Amendment, the redefinition for purposes of the Weldon  
11 Amendment adds a host of individuals and organizations under “health care entities.” Some of  
12 these terms come from conscience provisions in other statutes and others do not. Regardless,  
13 none of these additions was defined or contemplated in the underlying statute. For example, a  
14 pharmacist has again been included. As Representative Weldon stated, however, the protection  
15 against discrimination was only extended to “physicians, nurses, clinics, hospitals, medical  
16 centers, and even health insurance providers.” Unlike those listed individuals and entities, a  
17 pharmacist does not play a role specific to the performance of an abortion or sterilization  
18 procedure. The addition of individuals such as pharmacists and other such organizations like  
19 pharmacies fall outside the intent of the underlying statute and the final rule is wrong to include  
20 them.

21 \* \* \*

22 The Affordable Care Act protected health care entities from discrimination in the  
23 context of assisted suicides. The ACA defined the term “health care entity” in exactly the  
24 same way as the Weldon Amendment. The same entities added in by the new rule for the  
25 Weldon Amendment was also added in for purposes of the ACA. Nonetheless, the definition  
26 of “health care entity” under the ACA presents a closer question, given the fact that the ACA  
27 applied to health care entities in the context of assisted suicides and not abortions and given  
28 that, unlike the other statutes, the ACA did delegate legislative rulemaking power to the agency.  
We can accept that a pharmacy is a “health care entity” for purposes of the ACA. Although

1 pharmacists do not play a significant role in treatment in the context of abortions and  
2 sterilizations, they do in assisted suicides. For example, one method of assisted suicide requires  
3 patients to ingest lethal amounts of barbitol capsules, and a pharmacist could be required to  
4 dispense such medication and ultimately cause the patient's death. In that context, it is clear  
5 that the pharmacist would have a role in the actual treatment of the patient. This order is thus  
6 unable to find a clear conflict of the definition of "health care entity" for purposes of the ACA  
7 in the challenged rule versus the definition in the ACA.

8 (4) ***"Entity."***

9 At this point, let's return briefly to the Church Amendment. Although it did not use the  
10 term "health care entity," it did use the term "entity." It also used the term "individual." It  
11 consistently used those terms so as to distinguish "entities" from "individuals," the former being  
12 organizations and the latter being natural persons. This is quite evident from a simple reading of  
13 the statute.

14 The final rule, however, merges the two. Specifically, it defines "entity" to include,  
15 among others, "*a 'person' as defined in 1 U.S.C. 1.*" In turn, Section 1 defines "person" to  
16 include: "corporations, companies, associations, firms, partnerships, societies, and joint stock  
17 companies, *as well as individuals*" (emphasis added). Therefore, the rule redefines "entity" to  
18 include "individual," exactly what the Church Amendment avoided. The new rule was wrong to  
19 do so.

20 (5) ***"Discriminate" or "Discrimination."***

21 The final rule defines "discriminate or discrimination" to include:

- 22 (1) To withhold, reduce, exclude from, terminate, restrict, or make  
23 unavailable or deny any grant, contract, subcontract, cooperative  
24 agreement, loan, license, certification, accreditation, employment,  
25 title, or other similar instrument, position, or status;
- 26 (2) To withhold, reduce, exclude from, terminate, restrict, or make  
27 unavailable or deny any benefit or privilege or impose any penalty;  
28 or
- (3) To utilize any criterion, method of administration, or site  
selection, including the enactment, application, or enforcement of  
laws, regulations, policies, or procedures directly or through  
contractual or other arrangements, that subjects individuals or  
entities protected under this part to any adverse treatment with

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respect to individuals, entities, or conduct protected under this part on grounds prohibited under an applicable statute encompassed by this part.

(4) Notwithstanding paragraphs (1) through (3) of this definition, an entity subject to *any prohibition* in this part shall not be regarded as having engaged in discrimination against a protected entity where the entity offers and the protected entity voluntarily accepts an effective accommodation for the exercise of such protected entity’s protected conduct, religious beliefs, or moral convictions. In determining whether any entity has engaged in discriminatory action with respect to any complaint or compliance review under this part, OCR will take into account the degree to which an entity had implemented policies to provide effective accommodations for the exercise of protected conduct, religious beliefs, or moral convictions under this part and whether or not the entity took any adverse action against a protected entity on the basis of protected conduct, beliefs, or convictions before the provision of any accommodation.

(5) Notwithstanding paragraphs (1) through (3) of this definition, an entity subject to *any prohibition* in this part may require a protected entity to inform it of objections to performing, referring for, participating in, or assisting in the performance of specific procedures programs, research, counseling, or treatments, but only to the extent that there is a reasonable likelihood that the protected entity may be asked in good faith to perform, refer for, participate in, or assist in the performance of, any act or conduct just described. *Such inquiry may only occur after the hiring of, contracting with, or awarding of a grant or benefit to a protected entity, and once per calendar year thereafter, unless supported by a persuasive justification.*

(6) The taking of steps by an entity subject to *prohibitions* in this part to use alternate staff or methods to provide or further any objected-to conduct identified in paragraph (5) of this definition would not, by itself, constitute discrimination or a prohibited referral, if such entity does not require any additional action by, or does not take any adverse action against, the objecting protected entity (including individuals or health care entities), and if such methods do not exclude protected entities from fields of practice on the basis of their protected objections. Entities subject to prohibitions in this part may also inform the public of the availability of alternate staff or methods to provide or further the objected-to conduct, but such entity may not do so in a manner that constitutes adverse or retaliatory action against an objecting entity.

84 Fed. Reg. 23,263 (May 21, 2019). The problematic part of the new rule is its restriction on inquiry into conscientious objections during the hiring process (italicized above), something none of the underlying statutes expressly barred.

The Church Amendment, for example, provided that certain entities could not “discriminate in the employment, promotion, or termination of employment of any physician or

1 other health care personnel” or “discriminate in the extension of staff or other privileges to any  
2 physician or other health care personnel,” 42 U.S.C. § 300a-7(c), but nowhere did it expressly  
3 bar inquiry into any conscientious objections in the hiring process.

4 Plaintiffs attack the new definition because it does not include an “undue hardship”  
5 exception. To be clear, however, no federal conscience statute ever defined “discriminate” or  
6 “discrimination,” ever referred to Title VII, or itself provided any undue hardship exception.  
7 At first blush, therefore, it is a bit hard to grasp plaintiffs’ grievance.

8 Plaintiffs showcase a Florida case wherein a pro-life nurse applied for employment at a  
9 Title X health center. She applied for a position as an antepartum, laborist, postpartum, and  
10 preventative care nurse. *Hellwege v. Tampa Family Health Centers*, 103 F. Supp. 3d 1303, 1306  
11 (M.D. Fla. 2015). If the health center had not been able to inquire about any ethical objections  
12 she had to doing those jobs, it is possible she could have been staffed on an abortion procedure  
13 and only learned of her objection after she was on the job. Surely, the employer in such  
14 circumstance can ask if the applicant would have any conscience objection to doing the very  
15 job at issue. The district judge in *Hellwege* did not reach this issue, as she found the Church  
16 Amendment did not provide a private right of action. But scenarios like this could jeopardize  
17 federal funding under the challenged rule.

18 Plaintiffs are correct that Title VII, 42 U.S.C. § 2000e–2(a), provides protection for  
19 applicants of employment against discrimination based on their religious beliefs, yet provides  
20 an undue hardship exception. Specifically, Title VII defines the term “religion” to include “all  
21 aspects of religious observance and practice, as well as belief, unless an employer demonstrates  
22 that he is unable to reasonably accommodate an employee’s or prospective employee’s religious  
23 observance or practice without undue hardship on the conduct of the employer’s business.” *Id.*  
24 at § 2000e(j). The Supreme Court has held that an undue hardship is one where an  
25 accommodation would have “more than a de minimis cost.” *Trans World Airlines, Inc. v.*  
26 *Hardison*, 432 U.S. 63, 84 (1977).

27 In sum, Title VII allows an employer to inquire about religious beliefs that might impose  
28 a hardship on the employer and allows the employer to reject an applicant whose religious

1 practices cannot be reasonably accommodated. The question here is whether the Title VII  
2 scheme should be read into the Church Amendment (and any other conscience statutes covering  
3 applicants for employment). After hewing to the words actually used in the Church Amendment  
4 (as plaintiffs themselves have argued), it would be ironic to veer from the actual text of the  
5 Church Amendment and to read concepts into it from the Civil Rights Act. But it's unnecessary  
6 to decide that point. Note well that the new rule includes an exception for "persuasive  
7 justification," meaning pre-employment inquiries can be made and applicants rejected when  
8 supported by a "persuasive justification." Although this term is not further defined by the rule,  
9 this order expects that any undue hardships would supply persuasive justification. Therefore,  
10 this order will not criticize the rule based on its definition of "discriminate" or "discrimination."

11 (6) *"Referral" or "Refer for."*

12 The final rule defines "referral" or "refer for" to include:

13 [T]he provision of information in oral, written, or electronic  
14 form (including names, addresses, phone numbers, email or  
15 web addresses, directions, instructions, descriptions, or other  
16 information resources), where the purpose or reasonably  
17 foreseeable outcome of provision of the information is to assist a  
18 person in receiving funding or financing for, training in, obtaining,  
19 or performing a particular health care service, program, activity,  
20 or procedure.

21 84 Fed. Reg. 23,264 (May 21, 2019).

22 The Church Amendment only addressed the performance and assistance in the  
23 performance of abortions, not referrals. The other conscience statutes, however, did use the  
24 terms "referral" or "refer for." The Coats-Snowe Amendment applied to health care entities  
25 that chose not to train "in the performance of induced abortions, to require or provide such  
26 training, to perform such abortions, or to provide *referrals for* such training or such abortions."  
27 42 U.S.C. §238n(a)(1) (emphasis added). The Medicaid and Medicare laws stated that  
28 Medicaid-managed organizations and Medicare Advantage plans were not required to "provide,  
reimburse for, or provide coverage of a counseling or *referral service*" if the organization  
objected to the service on moral or religious grounds. 42 U.S.C. §§ 1395w-22(j)(3)(B),  
1396u-2(b)(3)(B) (emphasis added). The Affordable Care Act prohibited qualified health care  
plans from discriminating against "any individual health care provider or health care facility

1 because of its unwillingness to provide, pay for, provide coverage of, or *refer for* abortions.”  
2 *Id.* at § 18023(b)(4) (emphasis added). The Weldon Amendment applied to health care entities  
3 that do not “pay for, provide coverage of, or *refer for*” abortions. Pub. L. No. 115-245, Div. B  
4 § 507 (d), 132 Stat. 2981, 3118 (2018) (emphasis added).

5 The term was not defined nor addressed in the legislative history of any of the conscience  
6 statutes. However, the legislative history of at least the Weldon Amendment provided some  
7 guidance. In explaining his purpose, Representative Weldon stated:

8 This provision is intended to protect the decisions of physicians,  
9 nurses, clinics, hospitals, medical centers, and even health  
10 insurance providers from being forced by the government to  
11 provide, *refer*, or pay for abortions.

12 \* \* \*

13 This provision only applies to health care entities that refuse to  
14 provide abortion services. Furthermore, the provision only affects  
15 instances when a government requires that a health care entity  
16 provide abortion services. Therefore, contrary to what has been  
17 said, this provision will not affect access to abortion, *the provision*  
18 *of abortion-related information* or services by willing providers or  
19 the ability of States to fulfill Federal Medicaid legislation.

20 150 Cong. Rec. 25,044–45(2004) (emphasis added).

21 Therefore, Representative Weldon used the term “refer for” as separate from the  
22 provision of information, and further explicitly clarified that the Amendment was not meant to  
23 apply to the provision of abortion-related information.

24 Under the rule, however, the provision of any information by a “health care entity”  
25 that could reasonably lead to a patient obtaining the procedure at issue would be considered a  
26 “referral.” This means, for example, that an entity could lose all of its HHS funding if it fired a  
27 hospital front-desk employee for refusing to tell a woman seeking an emergency abortion for an  
28 ectopic pregnancy which floor she needed to go to for her procedure.

In justifying the need for this definition, HHS cites to *National Institute of Family and*  
*Life Advocates v. Becerra (NIFLA)*, a decision that addresses only the First Amendment  
concerns in providing information regarding abortions to patients. 138 S. Ct. 2361 (2018).  
Specifically in *NIFLA*, California enacted the FACT Act, which, in relevant part, required  
licensed clinics that offered pregnancy-related services to provide a government-drafted script

1 about the availability of state-sponsored services, including abortions. *Id.* at 2371. Although the  
2 Supreme Court found such provision of information to violate the First Amendment, it did not  
3 speak to whether the government-drafted script constituted a “referral” within the meaning of  
4 any conscience statute. *Id.* at 2365.

5       Instead, as to the Weldon Amendment at least, the legislative history is more instructive  
6 in determining whether the definition in the rule is appropriate. As quoted above, Representative  
7 Weldon explicitly stated his amendment was not meant to cover the provision of abortion-related  
8 information even though the rule covers exactly such provision of information (and more).  
9 Additionally, the Weldon Amendment used the term “referral” versus the general provision of  
10 information as separate things. This distinct use indicates that “referrals” are meant to cover  
11 narrower circumstances than the general provision of information.

12       The text and legislative histories of the remaining statutes do not provide any guidance  
13 regarding how “referral” or “refer for” should be defined. The use of the terms in the medical  
14 profession, however, does provides some guidance. In particular, medical professionals use the  
15 word “referral” as a term of art that ordinarily means a request from one physician to another to  
16 assume responsibility of a patient’s specified problems. *See, e.g.*, American Academy of Family  
17 Physicians Clinical Policies (2019);<sup>2</sup> 32 C.F.R. 199.2.<sup>3</sup> In contrast, the informal provision of  
18 general information such as emails, names, and directions are simply recommendations. The  
19 definition of the term “referral” in the rule here thus goes beyond the meaning of the term as  
20 understood by the very industry HHS purports it is trying to protect.

21       **3. INTERPRETIVE RULES VS. LEGISLATIVE RULES.**

22       HHS claims that it has authority to promulgate a substantive, legislative rule, not a mere  
23 interpretive rule. But there is no delegation of authority, either explicit or implicit, in any of the  
24 underlying statutes to do so except in the limited instances noted above. An interpretive rule can

25 \_\_\_\_\_  
26       <sup>2</sup> “A referral is a request from one physician to another to assume responsibility for management of  
one or more of a patient’s specified problems.”

27       <sup>3</sup> In the context of the Civilian Health and Medical Program of Uniformed Services (CHAMPUS), a  
28 *referral* relationship exists when a CHAMPUS beneficiary is sent, directed, assigned or influenced to use a  
specific CHAMPUS-authorized provider, or a specific individual or entity eligible to be a  
CHAMPUS-authorized provider.

1 never add to or subtract from a statute itself. A legislative rule can never subtract from a statute,  
2 though one can add to it if the addition falls within the delegation authority. No rule of either  
3 type can ever conflict with the statute itself. As shown above, the new definitions conflict with  
4 the underlying statutes in significant ways.

5 **A. Explicit Rulemaking Authority.**

6 Nothing in the Church or Weldon amendments provided that HHS could promulgate  
7 rules. Furthermore, the Coats-Snowe Amendment, Affordable Care Act and Medicare and  
8 Medicaid statutes cited by defendants conferred upon HHS authority to make and publish  
9 regulations only to a limited extent. For example, Section 1302 of Title 42 of the United States  
10 Code granted the Secretary explicit authority to publish rules regarding the impact of Medicare  
11 and Medicaid on small rural hospitals. Section 18113 furthermore explicitly designated HHS to  
12 receive complaints of discrimination based on the statute prohibiting discrimination on  
13 performing assisted suicides. HHS, of course, has rulemaking authority to implement the ACA  
14 and Medicare and Medicaid programs as well as the applicable conscience provisions. 42 U.S.C.  
15 §§ 18041, 1302, 1395w-26. But HHS does not have rulemaking authority to change, add to, or  
16 subtract from conscience provisions in other statutes such as the Church and Weldon  
17 Amendments.

18 Defendants further mistakenly rely on their “housekeeping authority” to support their  
19 authority to promulgate the rule. None of the statutes cited by defendants provide HHS with the  
20 authority to promulgate substantive rules. For example, 5 U.S.C. § 301 states:

21 The head of an Executive department or military department may  
22 prescribe regulations for the government of his department, the  
23 conduct of its employees, the distribution and performance of its  
24 business, and the custody, use, and preservation of its records,  
papers, and property. This section does not authorize withholding  
information from the public or limiting the availability of records  
to the public.

25 The Supreme Court and our court of appeals has found this statute to empower an agency to  
26 create rules regarding internal procedure, practice, or organization, not substantive rules.

27 *Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979); *Exxon Shipping Co. v. U.S. Dep’t of*  
28 *Interior*, 34 F.3d 774, 777 (9th Cir. 1994). The challenged rule is not, however, a mere

1 housekeeping rule. The expansive definitions in the rule depart from the federal statutes, as  
2 explained above, changing the rights and responsibilities of health care providers. Coupled with  
3 the addition of the termination of all HHS funding as a consequence of noncompliance, the rule  
4 is undoubtedly substantive.

5 HHS next cites Section 121(c) of Title 40 of the United States Code, which provides the  
6 General Services Administrator (GSA) with authority to promulgate the Federal Acquisition  
7 Regulation. Section 121(d) goes on to state that the GSA does not have “the authority to  
8 prescribe regulations on matters of policy applying to executive agencies.” Statements on  
9 matters of policy are generally those that explain how an agency will enforce a statute or  
10 regulation. *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 251–52 (D.C. Cir. 2014).

11 HHS also invokes the Uniform Administrative Requirements (UAR). The UAR is the  
12 Office of Management and Budget’s (OMB) guidance for funding instruments. In relevant part,  
13 the UAR provides agencies with the authority to ensure that federal funding programs are  
14 implemented in full accordance with federal statutory and public policy requirements. While it  
15 is true that the UAR also provides agencies with the authority to require fund recipients to  
16 comply with federal statutes and regulations, it only allows for termination of an entity’s “federal  
17 award,” which is defined as “Federal financial assistance,” in instances of noncompliance. 45  
18 C.F.R. § 75.371(c). This means failure to comply under the UAR would only allow HHS to  
19 terminate limited categories of funding such as grants, loans, and insurance. Under the new rule,  
20 however, failure to comply would allow HHS to terminate all of an entity’s funding including  
21 Medicaid and Medicare reimbursements. For California, this would mean a single instance of  
22 noncompliance could jeopardize, for example, the \$63 billion in federal funding it receives for  
23 healthcare programs for one-third of Californians. There is no federal statute, UAR or  
24 otherwise, that delegates to HHS the authority to promulgate a rule with such draconian  
25 mechanisms.

1                                   **B.      Implicit Rulemaking Authority.**

2                   Nor do defendants have implicit authority to promulgate the instant rule. The Supreme  
3 Court has discussed the manner in which Congress may implicitly delegate legislative authority  
4 to an agency:

5                                   Congress [] may not have expressly delegated authority or  
6 responsibility to implement a particular provision or fill a  
7 particular gap. Yet it can still be apparent from the agency’s  
8 *generally conferred authority and other statutory circumstances*  
9 that Congress would expect the agency to be able to speak with  
10 the force of law when it addresses ambiguity in the statute or fills  
11 a space in the enacted law.

12                   *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (emphasis added). In other words,  
13 Congress may implicitly authorize an agency to promulgate a legislative regulation if it is  
14 apparent from the agency’s generally conferred authority and other statutory circumstances that  
15 Congress would expect the agency to be able to speak with the force of law when addressing  
16 ambiguity in a statute it administers. Such authorization may be indicated by express  
17 congressional delegation of rulemaking or adjudicative authority, or by some other indication of  
18 comparable congressional intent.

19                   To show this, HHS refers back to the UAR as well as 5 U.S.C. § 301 and 40 U.S.C.  
20 § 121(c) for the collective proposition that HHS has the authority to disburse funds and  
21 to condition such funds based on compliance with federal conscience provisions. There,  
22 nonetheless, exists a disconnect between HHS’s ability to condition funds based on compliance  
23 with the law versus any ability to change the law. HHS attempts to bridge that disconnect by  
24 explaining that, if HHS can and sometimes must condition funds based on compliance with the  
25 statutes it administers, “it follows from these authorizations that HHS may . . . explain its  
26 interpretation of those statutes” (*State of California*, Dkt. No. 54 at 13).

27                   True, any and all agencies must interpret the statutes under their care. But if their  
28 interpretations are wrong, then a court must set them aside. This order holds that Congress  
has not made any express or implicit delegation of authority for HHS to issue legislative rules  
(excepted in limited cases already cited) and thus it has no authority to add to the requirements  
of the underlying statutes. This order also holds that while HHS may interpret the statutes in

1 question, those interpretations may not add to or subtract from what the statutes themselves say.  
2 This order further holds that the rule in question does exactly that by adding expansive  
3 definitions in conflict with the statutes and imposing draconian financial penalties.

4 **4. RELIEF.**

5 When a rule is invalid, “[t]he reviewing court shall — hold unlawful and set aside agency  
6 action, findings, and conclusions found to be — (A) arbitrary, capricious, an abuse of discretion,  
7 or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege,  
8 or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory  
9 right . . . .” 5 U.S.C. § 706(2). For the foregoing reasons, this order holds the rule is “not in  
10 accordance with law,” by reason of conflict with the underlying statutes and is in conflict with  
11 the balance struck by Congress in harmonizing protection of conscience objections vis-a-vis the  
12 uninterrupted flow of health care to Americans. When a rule is so saturated with error, as here,  
13 there is no point in trying to sever the problematic provisions. The whole rule must go.

14 HHS has requested that the relief granted, if any, be limited to the parties. This order  
15 recognizes that in the past, our court of appeals has vacated nationwide preliminary injunctions  
16 when the record only demonstrated the impact the ruling would have on plaintiffs and not on the  
17 nation as a whole or when limited relief was sufficient to provide complete relief to the  
18 plaintiffs. *See, e.g., City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1244–45 (9th Cir.  
19 2018); *California v. Azar*, 911 F.3d 558, 582–84 (9th Cir. 2018).

20 Those cases did not, however, involve motions for summary judgment in which an entire  
21 rule was finally set aside, as here. The rule is not being enjoined or severed. It is being vacated  
22 in its entirety based on the administrative record and not on any considerations specific to the  
23 plaintiffs. Importantly, HHS does not and cannot cite to instances where a rule has been vacated  
24 in its entirety, but limited only to the parties. All of the courts that have been presented with the  
25 possibility of such a remedy have rejected it. *E.g., O.A. v. Trump*, 2019 WL 3536334, at \*29  
26 (D.D.C. Aug. 2, 2019) (Judge Randolph Moss); *Desert Survivors v. U.S. Dep’t of the Interior*,  
27 336 F. Supp. 3d 1131, 1134 (N.D. Cal. 2018). When reviewing courts have determined that a  
28 rule is facially invalid, the result is that the rule is vacated, “not that their application to the

1 individual petitioners is proscribed.” *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d  
2 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir.  
3 1989)); *see also Make the Rd. N.Y. v. McAleenan*, 2019 WL 4738070, at \*49 (D.D.C. Sept. 27,  
4 2019) (Judge Ketanji Brown Jackson) (finding that relief must not just be granted to the  
5 plaintiffs but to anyone to whom it could apply “so as to give interested parties (the plaintiff, the  
6 agency, and the public) a meaningful opportunity to try again”).

7         Setting aside the rule just for the plaintiffs in this case would not only go against the  
8 foregoing precedent, but would also be illogical given the fact that the APA violations found  
9 here would apply with equal force for any other plaintiff to whom the rule could apply. A rule  
10 cannot be vacated in its entirety on the ground that it is “not in accordance with law” for a  
11 limited group of parties only. It can only be vacated as to all applicable parties. And limiting  
12 relief would be especially illogical here given the fact that other courts have set aside the rule  
13 already.<sup>4</sup>

14         In light of the fact that the rule is vacated in its entirety, this order will and need not reach  
15 the remaining constitutional claims.

16         **5. REQUESTS FOR JUDICIAL NOTICE, USE OF DECLARATIONS, AND**  
17         **MISCELLANEOUS MOTIONS.**

18         Federal Rule of Evidence 201(b) permits courts to take judicial notice of any fact “that is  
19 not subject to reasonable dispute because it . . . can be accurately and readily determined from  
20 sources whose accuracy cannot reasonably be questioned.” While a court may take judicial  
21 notice of matters of public record at the motion to dismiss stage, it cannot take judicial notice of  
22 disputed facts contained in such public records. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d  
23 988, 999 (9th Cir. 2018).

24         Plaintiffs request judicial notice of the following documents: (1) the HHS Budget,  
25 (2) the HHS Guidelines for Regulatory Impact Analysis (2016), (3) the FDA’s “Importance of  
26

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27         <sup>4</sup> On November 6, 2019, the United States District Court for the Southern District of New York  
28 vacated the rule in its entirety on a nationwide basis. *State of New York, et al. v. U.S. Dep’t of Health & Human  
Servs.*, C 19-04676 (Dkt. No. 248).

1 Influenza Vaccination for Health Care Personnel,” (4) HHS, Office of Population Affairs,  
2 definition of “sterilization,” (5) HHS “Factsheet, Final Conscience Regulation,” (6) White  
3 House, Remarks by President Trump at the National Day of Prayer Service, (7) excerpts from  
4 the congressional record from the 93rd Congress (Senate), and (8) excerpts from the  
5 congressional record from the 109th Congress (House of Representatives). Because these  
6 documents are appropriate subjects of judicial notice, plaintiffs’ unopposed request is **GRANTED**.  
7 Plaintiffs’ administrative motion to request judicial notice and their request to judicially notice  
8 the transcript of oral arguments of the *State of New York* case is also **GRANTED**. The transcript  
9 contains clarifications and concessions regarding the scope of the text of the rule that were  
10 relevant to this Court’s decisionmaking.

11 The government has also opposed plaintiffs’ use of declarations in their briefing.  
12 These declarations were not relevant in the determination of the Administrative Procedures Act  
13 claims and is thus **DENIED AS MOOT**.

14 The motions for preliminary injunction (*City and County of San Francisco* Dkt. No. 14;  
15 *State of California* Dkt. No. 11; *County of Santa Clara* Dkt. No. 36) and the State of California’s  
16 administrative motion for leave to exceed the page limit for their preliminary injunction motion  
17 (Dkt. No. 12) are **DENIED AS MOOT**.

#### 18 CONCLUSION

19 For the foregoing reasons, defendants’ motion to dismiss and for summary judgment is  
20 **DENIED**. To the extent stated above, plaintiffs’ motion for summary judgment is **GRANTED**.

21 The challenged rule is set aside and shall be unenforceable. This order gives plaintiffs  
22 substantially all the relief they seek, although it has not reached all the claims tendered.

23 The undersigned judge accordingly believes this action is ready for appeal, and suggests that  
24 all sides stipulate to entry of final judgment with reservation of all issues not reached in this  
25 order in the event of a remand.

26 **IT IS SO ORDERED.**

27 Dated: November 19, 2019.

28   
\_\_\_\_\_  
WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE

## EXHIBIT B

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Nov 21, 2019**

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

v.

ALEX M. AZAR II, in his official capacity

as Secretary of the United States

Department of Health and Human

Services; and UNITED STATES

DEPARTMENT OF HEALTH AND

HUMAN SERVICES,

Defendants.

No. 2:19-cv-00183-SAB

**ORDER GRANTING  
PLAINTIFF’S MOTION FOR  
SUMMARY JUDGMENT;  
DENYING DEFENDANTS’  
MOTION TO DISMISS**

Before the Court are Defendants’ Motion to Dismiss, or, in the Alternative for Summary Judgment, ECF No. 44, and Plaintiff’s Motion for Summary Judgment, ECF No. 57. A hearing on the motion was held on November 7, 2019, in Spokane, Washington. Plaintiff was represented by Assistant Attorney Generals Jeffrey T. Sprung, Lauryn K. Fraas and Paul M. Crisalli. Defendants were represented Rebecca Kopplin and Benjamin T. Takemoto.

On May 21, 2019, U.S. Department of Health and Human Services (HHS) issued a Final Rule in the Federal Register.<sup>1</sup> On May 28, 2019, Plaintiff filed suit to

<sup>1</sup> *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 84 Fed. Reg. 23170 (May 21, 2019).

1 enjoin and set aside the Final Rule. In its Complaint, Plaintiff asserts the Final Rule  
2 “imposes the religious views of officials at HHS on Washingtonians and  
3 individuals across the country who seek timely, medically necessary care and  
4 information about reproductive health, LBGTQ health, and end-of-life care.” ECF  
5 No. 1 at 1.

6 In June 2019, Plaintiff filed a Motion for Preliminary Injunction, ECF No. 8.  
7 The parties then asked the Court to hold Plaintiff’s Motion for Preliminary  
8 Injunction in abeyance, given that the United States agreed to postpone the  
9 effective date of the Final Rule until November 22, 2019. ECF No. 27. The Court  
10 granted the parties’ request. ECF No. 28. A briefing schedule was entered that set  
11 the deadlines for the parties’ anticipated cross-motions for summary judgment to  
12 be filed. ECF No. 35.

13 The Court has reviewed the parties’ cross-motions for summary judgment;  
14 *amici curiae* briefs from the following entities: Scholars of the LGBT Population,  
15 ECF No. 53, Ex. 1; National Center for Lesbian Rights, ECF No. 55, Ex. 1;  
16 Institute for Policy Integrity at New York University School of Law, ECF No. 56,  
17 Ex. 1; Leading Medical Organizations, ECF No. 63, Ex. 1; and heard from counsel.  
18 For the reasons stated below, the Court grants Plaintiff’s Motion for Summary  
19 Judgment, ECF No. 57, and denies Defendants’ Motion to Dismiss, or, in the  
20 Alternative for Summary Judgment, ECF No. 44.

### 21 **Motion Standard**

22 Summary judgment is appropriate “if the movant shows that there is no  
23 genuine dispute as to any material fact and the movant is entitled to judgment as a  
24 matter of law.” Fed. R. Civ. P. 56(a). In an action reviewing the merits under the  
25 APA, however, the Court does not ask whether there is a genuine dispute as to any  
26 material fact. Rather, “the function of the district court is to determine whether or  
27 not as a matter of law the evidence in the administrative record permitted the  
28 agency to make the decision it did.” *Occidental Eng’g Co. v. I.N.S.*, 753 F.2d 766,

1 769 (9th Cir. 1985). In an APA review case, “summary judgment is the appropriate  
2 mechanism for deciding the legal question of whether the agency could reasonably  
3 have found the facts as it did.” *Id.*

4 Generally, courts reviewing an agency decision are limited to the  
5 administrative record in existence at the time of the decision. *Lands Council v.*  
6 *Powell*, 395 F.3d 1019, 1029 (9th Cir. 2005).

### 7 **Administrative Procedure Act**

8 Federal administrative agencies are required to engage in “reasoned  
9 decisionmaking.” *Michigan v. E.P.A.*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 2699, 2706 (2015).  
10 “Not only must an agency’s decreed result be within the scope of its lawful  
11 authority, but the process by which it reaches that result must be logical and  
12 rational.” *Id.* (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359,  
13 374 (1998)).

14 The Administrative Procedure Act, 5 U.S.C § 551 *et seq.*, provides the  
15 judicial authority to review executive agency action for procedural correctness.  
16 *F.C.C v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). The APA  
17 requires a court to “hold unlawful and set aside agency action, findings, and  
18 conclusions found to be--(A) arbitrary, capricious, an abuse of discretion, or  
19 otherwise not in accordance with law; (B) contrary to constitutional right, power,  
20 privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or  
21 limitations, or short of statutory right; or (D) without observance of procedure  
22 required by law.” 5 U.S.C. § 706 (2).

23 Final agency actions are arbitrary and capricious if the agency fails to  
24 “examine relevant data,” “consider an important aspect of the problem,” or  
25 “articulate a satisfactory explanation for its action including a rational connection  
26 between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State*  
27 *Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). “Unexplained inconsistency”  
28 between agency actions is “a reason for holding an interpretation to be an arbitrary

1 and capricious change.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet*  
2 *Servs.*, 545 U.S. 967, 981 (2005). This Court’s review of an agency decision “is  
3 based on the administrative record and the basis for the agency’s decision must  
4 come from the record.” *Gill v. U.S. Dep’t of Justice*, 913 F.3d 1179, 1187 (9th Cir.  
5 2019) (quotation omitted). Such review is narrow; the Court may not substitute its  
6 own judgment for that of the agency. *Fox*, 556 U.S. at 513.

7       When the agency’s action represents a policy change, such action requires “a  
8 reasonable analysis for the change beyond that which may be required when an  
9 agency does not act in the first instance.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at  
10 42. “A policy change complies with the APA if the agency (1) displays ‘awareness  
11 that it is changing position’ (2) shows that ‘the new policy is permissible under the  
12 statute,’ (3) ‘believes’ the new policy is better, and (4) provides ‘good reasons’ for  
13 the new policy, which, if the ‘new policy rests upon factual findings that contradict  
14 those which underlay its prior policy,’ must include ‘a reasoned explanation . . . for  
15 disregarding facts and circumstances that underlay or were engendered by the prior  
16 policy.” *Organized Village of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 966  
17 (2015) (quoting *Fox*, 556 U.S. at 515-16). On the other hand, if the agency ignores  
18 or countermands its earlier factual findings without reasoned explanation for doing  
19 so, the policy change violates the APA. *Fox*, 556 U.S. at 537 (“An agency cannot  
20 simply disregard contrary or inconvenient factual determinations that it made in the  
21 past, any more than it can ignore inconvenient facts when it writes on a blank  
22 slate.”).

23       Not every violation of the APA invalidates an agency action. *Kake*, 795 F.3d  
24 at 969 (citing *Jicarilla Apache Nation v. U.S. Dep’t of Interior*, 613 F.3d 1112,  
25 1121 (D.C. Cir. 2010)). Rather, the opponent of the action has the burden to  
26 demonstrate that an error is prejudicial. *Id.* The required demonstration of  
27 prejudice is not particularly onerous. *Id.* “If prejudice is obvious to the court, the  
28

1 party challenging agency action need not demonstrate anything further.” *Id.*  
2 (quoting *Jicarilla*, 613 F.3d at 1121).

### 3 **Federal Conscience and Anti-Discrimination Laws**

4 In the Executive Summary of the Final Rule, HHS relies on a number of  
5 statutes it maintains reflect Congress’ intention to protect the freedoms of  
6 conscience and religious exercise in the health care context. 84 Fed. Reg. at 23170-  
7 74. These provisions include the Church Amendment, the Coats-Snowe  
8 Amendment, the Weldon Amendment, provisions under the Patient Protection and  
9 Affordable Care Act (“ACA”), provisions for Medicare Advantage organizations  
10 and Medicaid managed care organizations; provisions related to the performance  
11 of advanced directives; conscience provisions related to Global Health Programs,  
12 compulsory health care, hearing screening, occupational illness testing,  
13 vaccinations, mental health treatment; provisions in appropriations legislation;  
14 provisions for religious nonmedical health care providers and their patients. *Id.*

15 Many of these statutory protections have existed unchanged for decades.

#### 16 **1. The Church Amendments**

17 The Church Amendments were enacted at various times during the 1970’s.  
18 Among other things, they prohibit certain HHS grantees from discriminating in the  
19 employment of, or the extension of staff privileges to, any health care professional  
20 because they refused, based on their religious beliefs or moral convictions, to  
21 perform or assist in the performance of any lawful sterilization or abortion  
22 procedures.<sup>2</sup> The Church Amendments also prohibit individuals from being  
23 required to perform or assist in the performance of any health service program or  
24 research activity funded in whole or in part under a program administered by the  
25 Secretary that are contrary to their religious beliefs or moral convictions. *Id.*  
26 Any recipients of a grant, contract, loan, or loan guarantee under the Public Health

27  
28 <sup>2</sup> See 42 U.S.C. § 300a-7.

1 Service Act must comply with paragraphs (b) and (c)(1) of the Church  
2 Amendments.<sup>3</sup> Paragraph (c)(2) applies to the recipients of the HHS's grants or  
3 contracts for biomedical or behavioral research under any program administered by  
4 the Secretary.<sup>4</sup>

5 **i. Paragraph (b)**

6 Paragraph (b) of the Church Amendments provides, with regard to  
7 individuals, that no court, public official, or other public authority can use an  
8 individual's receipt of certain federal funding as grounds to require the individual  
9 to perform, or assist in, sterilization procedures or abortions, if doing so would be  
10 contrary to his or her religious beliefs or moral convictions; and prohibits public  
11 authorities from requiring an entity that receives federal funds under certain HHS  
12 programs to (1) to permit sterilizations or abortions in the entity's facilities if the  
13 performance of such procedures there violates the entity's religious beliefs or  
14 moral convictions, or (2) to make its personnel available for such procedures if  
15 contrary to the personnel's religious beliefs or moral convictions.<sup>5</sup>

16 **ii. Paragraph (c)**

17 Paragraph (c)(1) of the Church Amendments prohibits certain entities from  
18 discriminating in employment, promotion, or termination of employment decisions  
19 with respect to physicians and other health care personnel based on an individual  
20 declining to perform or assist in an abortion or sterilization because of that  
21 individual's religious beliefs or moral convictions; and prohibits those entities  
22 from discriminating in such decisions based on an individual's performance of a  
23 lawful abortion or sterilization procedure, or on an individual's religious beliefs or  
24

25 \_\_\_\_\_  
26 <sup>3</sup>84 Fed. Reg. at 23171.

27 <sup>4</sup> 42 U.S.C. § 300a-7(c)(2); 84 Fed. Reg. at 23171.

28 <sup>5</sup> 42 U.S.C. § 300a-7(b)(1),(2); 84 Fed. Reg. at 23171.

1 moral convictions about such procedures more generally.<sup>6</sup>

2 Paragraph (c)(2) prohibits discrimination by such an entity against  
3 physicians or other health care personnel in employment, promotion, or  
4 termination of employment, as well as discrimination in the extension of staff or  
5 other privileges, because of an individual's performance or assistance in any lawful  
6 health service or research activity, declining to perform or assist in any such  
7 service or activity based on religious beliefs or moral convictions, or the  
8 individual's religious beliefs or moral convictions respecting such services or  
9 activities more generally.<sup>7</sup>

10 **iii. Paragraph (d)**

11 Paragraph (d) of the Church Amendments applies to any part of a health  
12 service program or research activity funded in whole or in part under a program  
13 administered by the Secretary and states that no individual shall be required to  
14 perform or assist in the performance of any part of the program or research activity  
15 if doing so would be contrary to his or her religious beliefs or moral convictions.<sup>8</sup>

16 **iv. Paragraph (e)**

17 Paragraph (e) of the Church Amendments applies to health care training or  
18 study programs, including internships and residencies, and prohibits any entity  
19 receiving certain funds from denying admission to, or otherwise discriminating  
20 against, applicants for training or study based on the applicant's reluctance or  
21 willingness to counsel, suggest, recommend, assist, or in any way participate in the  
22 performance of abortions or sterilizations contrary to, or consistent with, the  
23 applicant's religious beliefs or moral convictions.<sup>9</sup>

24 \_\_\_\_\_  
25 <sup>6</sup> 42 U.S.C. § 300a-7(c)(1); 84 Fed. Reg. at 23171.

26 <sup>7</sup> 42 U.S.C. § 300a-7(c)(2); 84 Fed. Reg. at 23171.

27 <sup>8</sup> 42 U.S.C. § 300a-7(d); 84 Fed. Reg. at 23171.

28 <sup>9</sup> 42 U.S.C. § 300a-7(e); 84 Fed. Reg. at 23171.

1           **2.     1996 Coats-Snowe Amendment (Section 245 of the Public Health**  
2           **Services Act)**

3           The Coats-Snowe Amendment was passed in 1996. The Coats-Snowe  
4 Amendment bars the federal government and any State or local government that  
5 receives federal financial assistance from discriminating against a health care  
6 entity that (1) refuses to undergo training in the performance of induced abortions,  
7 to require or provide such training, to perform such abortions, or to provide  
8 referrals for such training or such abortions; (2) refuses to make arrangements for  
9 any of the activities specified in paragraph (1); or (3) the entity attends (or  
10 attended) a post-graduate physician training program, or any other program of  
11 training in the health professions, that does not (or did not) perform induced  
12 abortions or require, provide, or refer for training in the performance of induced  
13 abortions, or make arrangements for the provision of such training.<sup>10</sup> “Health care  
14 entity” is defined as including an individual physician, a postgraduate physician  
15 training program, and a participant in a program of training in the health  
16 professions.<sup>11</sup>

17           The Coats-Snowe Amendment also prohibits governments receiving federal  
18 assistance from denying a legal status (including a license or certificate) or  
19 financial assistance, services, or other benefits to a health care entity based on an  
20 applicable physician training program’s lack of accreditation due to the accrediting  
21 agency’s requirements that a health care entity perform induced abortions; require,  
22 provide, or refer for training in the performance of induced abortions; or make  
23 arrangements for such training, regardless of whether such standard provides  
24 exceptions or exemptions.<sup>12</sup>

25 \_\_\_\_\_  
26 <sup>10</sup> 42 U.S.C. 238n(a)(1)-(3).

27 <sup>11</sup> 42 U.S.C. § 238n(c)(2); 84 Fed. Reg. at 23171.

28 <sup>12</sup> 42 U.S.C. § 238n(b)(1); 84 Fed. Reg. at 23172.

1           **3.     2005 Weldon Amendment**

2           The Weldon Amendment was added to the annual 2005 health spending bill  
3 and has been included in subsequent appropriations bills.<sup>13</sup> It bars the use of  
4 appropriated funds on a federal agency or programs, or to a State or local  
5 government, if such agency, program, or government subjects any institutional or  
6 individual health care entity to discrimination on the basis that the health care  
7 entity does not, among other things, refer for abortions. *Id.*

8           The Weldon Amendment defines the term “health care entity” to include an  
9 individual physician or other health care professional, a hospital, a provider-  
10 sponsored organization, a health maintenance organization, a health insurance  
11 plan, or any other kind of health care facility, organization, or plan. *Id.*

12           **4.     Patient Protection Affordable Care Act (ACA)**

13           **i.     Section 1553**

14           Section 1553 of the ACA prohibits the Federal government, and any State or  
15 local government or health care provider that receives Federal financial assistance  
16 under the ACA, or any ACA health plans, from discriminating against an  
17 individual or institutional health care entity because of the individual or entity’s  
18 objection to providing any health care items or service for the purpose of causing  
19 or assisting in causing death, such as by assisted suicide, euthanasia, or mercy  
20 killing.<sup>14</sup> Section 1553 designates the Office of Civil Rights to receive complaints  
21 of discrimination on that basis. *Id.*

22           **ii.    Section 1303**

23           Section 1303 of the ACA specifically states that health plans are not  
24 required to provide coverage of abortion services as part of “essential health  
25

26 \_\_\_\_\_  
27 <sup>13</sup> 84 Fed. Reg. at 23172.

28 <sup>14</sup> 42 U.S.C. § 18113; 84 Fed. Reg. at 23172.

1 benefits for any plan year.”<sup>15</sup> No qualified health plan offered through an ACA  
2 exchange may discriminate against any individual health care provider or health  
3 care facility because of the facility or provider’s unwillingness to provide, pay for,  
4 provide coverage of, or refer for abortions.<sup>16</sup>

5 **iii. Section 1441**

6 Section 1441 provides exemptions from the individual responsibility  
7 requirement imposed under Internal Revenue Code § 5000A, including when such  
8 individuals are exempt based on a hardship (such as the inability to secure  
9 affordable coverage without abortion), are members of an exempt religious  
10 organization or division, or participate in a “health care sharing ministry.”<sup>17</sup>

11 **5. Patient’s Self-Determination Act**

12 Section 7 of the Assisted Suicide Funding Restriction Act of 1997<sup>18</sup> clarified  
13 that the Patient Self-Determination Act’s provisions stating that Medicare and  
14 Medicaid beneficiaries have certain self-determination rights do not (1) require any  
15 provider, organization, or any employee of such provider or organization  
16 participating in the Medicare or Medicaid program to inform or counsel any  
17 individual about a right to any item or service furnished for the purpose of causing  
18 or assisting in causing the death of such individual, such as assisted suicide,  
19 euthanasia, or mercy killing; or (2) apply to or affect any requirement with respect  
20 to a portion of an advance directive that directs the purposeful causing of, or  
21 assistance in causing, the death of an individual, such as by assisted suicide,  
22 euthanasia, or mercy killing.<sup>19</sup> Those protections extend to Medicaid and Medicare

23  
24 \_\_\_\_\_  
25 <sup>15</sup> 42 U.S.C. § 18023(b)(1)(A); 84 Fed. Reg. at 23172.

26 <sup>16</sup> 42 U.S.C. § 18023(b)(4); 84 Fed. Reg. at 23172.

27 <sup>17</sup> 42 U.S.C. § 18081; 26 U.S.C. § 5000A(d)(2); 84 Fed. Reg. at 23172.

28 <sup>18</sup> Pub. L. 105-12, 111 Stat. 23.

<sup>19</sup> 84 Fed. Reg. at 23172-3.

1 providers, such as hospitals, skilled nursing facilities, home health or personal care  
2 service providers, hospice programs, Medicaid managed care organizations, health  
3 maintenance organizations, Medicare+Choice (now Medicare Advantage)  
4 organizations, and prepaid organizations. *Id.*

## 5 **6. Counseling and Referral**

6 Certain Federal protections prohibit organizations offering Medicare+Choice  
7 (now Medicare Advantage) plans and Medicaid managed care organizations from  
8 being compelled under certain circumstances to provide, reimburse for, or cover,  
9 any counseling or referral service in plans over an objection on moral or religious  
10 grounds.<sup>20</sup> Department regulations provide that this conscience provision for  
11 managed care organizations also applies to prepaid inpatient health plans and  
12 prepaid ambulatory health plans under the Medicaid program.<sup>21</sup>

## 13 **7. Global Health Programs**

14 Recipients of foreign assistance funds for HIV/AIDS prevention, treatment,  
15 or care authorized by section 104A of the Foreign Assistance Act of 1961 cannot  
16 be required, as a condition of receiving such funds, (1) to “endorse or utilize a  
17 multisectoral or comprehensive approach to combating HIV/AIDS,” or (2) to  
18 “endorse, utilize, make a referral to, become integrated with, or otherwise  
19 participate in any program or activity to which the organization has a religious or  
20 moral objection.”<sup>22</sup> The government also cannot discriminate against such  
21 recipients in the solicitation or issuance of grants, contracts, or cooperative  
22  
23  
24

25 <sup>20</sup> 42 U.S.C. § 1395w-22(j)(3)(B) (Medicare+Choice); 42 U.S.C. § 1396u-  
26 2(b)(3)(B) (Medicaid managed care organization); 84 Fed. Reg. at 23173.

27 <sup>21</sup> 42 CFR § 438.102(a)(2); 84 Fed. Reg. at 23173.

28 <sup>22</sup> 22 U.S.C. § 7631(d)(1)(B).

1 agreements for the recipients’ refusal to do any such actions.<sup>23</sup>

2 **8. Compulsory Medical Screening, Examination, Diagnosis, or**  
3 **Treatment.**

4 Under the Public Health Service Act, certain suicide prevention programs  
5 are not to be construed to require “suicide assessment, early intervention, or  
6 treatment services for youth” if their parents or legal guardians have religious or  
7 moral objections to such services.<sup>24</sup>

8 Authority to issue certain grants through the Health Resources and Services  
9 Administration (HRSA), Centers for Disease Control and Prevention (CDC), and  
10 the National Institutes of Health (NIH) may not be construed to preempt or prohibit  
11 State laws which do not require hearing loss screening for newborn, infants or  
12 young children whose parents object to such screening based on religious beliefs.<sup>25</sup>

13 Certain State and local child abuse prevention and treatment programs  
14 funded by HHS are not to be construed as creating a Federal requirement that a  
15 parent or legal guardian provide a child any medical service or treatment against  
16 the religious beliefs of that parent or legal guardian.<sup>26</sup>

17 In providing pediatric vaccines funded by Federal medical assistance  
18 programs, providers must comply with any State laws relating to any religious or  
19 other exemptions.<sup>27</sup>

20 //

21 \_\_\_\_\_  
22 <sup>23</sup> 22 U.S.C. § 7631(d)(2) section 3(c) of the Garrett Lee Smith Memorial Act (Pub.  
23 L. 108-355, 118 Stat. 1404, reauthorized by Pub. L. 114-255 at sec. 9008); 84 Fed.  
24 Reg. at 23173.

25 <sup>24</sup> 42 U.S.C. 290bb-36(f); 84 Fed. Reg. at 23173.

26 <sup>25</sup> 42 U.S.C. § 280g-1(d); 84 Fed. Reg. at 23173.

27 <sup>26</sup> 42 U.S.C. § 5106i(a); 84 Fed. Reg. at 23173

28 <sup>27</sup> 42 U.S.C. 1396s(c)(2)(B)(ii).

1           **9. Religious Nonmedical Health Care Institutions (RNHCIs)**

2           Medicare and Medicaid provide accommodations for persons and  
3 institutions objecting to the acceptance or provision of medical care or services  
4 based on a belief in a religious method of healing through approval of religious  
5 nonmedical health care institutions (RNHCIs).<sup>28</sup> RNHCIs do not provide standard  
6 medical screenings, examination, diagnosis, prognosis, treatment, or the  
7 administration of medications.<sup>29</sup> Instead, RNHCIs furnish nonmedical items and  
8 services such as room and board, unmedicated wound dressings, and walkers, and  
9 they provide care exclusively through nonmedical nursing personnel assisting with  
10 nutrition, comfort, support, moving, positioning, ambulation, and other activities of  
11 daily living.<sup>30</sup>

12           Patients at RNHCIs can file an election with HHS stating that they are  
13 “conscientiously opposed to acceptance of” medical treatment, that is neither  
14 received involuntarily nor required under Federal or State law or the law of a  
15 political subdivision of a State, on the basis of “sincere religious beliefs,” yet they  
16 remain eligible for the nonmedical care and services ordinarily covered under  
17 Medicare, Medicaid, and CHIP.<sup>31</sup>

18           **10. Other Provisions**

19           Section 6703(a) of the Elder Justice Act of 2009<sup>32</sup> provides that Elder Justice  
20 and Social Services Block Grant programs may not interfere with or abridge an  
21 elder person’s “right to practice his or her religion through reliance on prayer alone  
22 for healing,” when the preference for such reliance is contemporaneously

23 \_\_\_\_\_  
24 <sup>28</sup> 84 Fed. Reg. at 23173.

25 <sup>29</sup> 42 U.S.C. 1395x(ss)(1).

26 <sup>30</sup> 84 Fed. Reg. at 23173.

27 <sup>31</sup> See, e.g., 42 U.S.C. 1395x(e), 1395x(y), and 1395i-5 (Medicare provisions).

28 <sup>32</sup> Pub. L. 111-148, 124 Stat. 119.

1 expressed, previously set forth in a living will or similar document, or  
2 unambiguously deduced from such person’s life history.<sup>33</sup> Additionally, the Child  
3 Abuse Prevention and Treatment Act (CAPTA) specifies that it does not require  
4 (though it also does not prevent) a State finding of child abuse or neglect in cases  
5 in which a parent or legal guardian relies solely or partially upon spiritual means  
6 rather than medical treatment, in accordance with religious beliefs.<sup>34</sup>

### 7 **The Emergency Medical Treatment and Labor Act (EMTALA)**

8 The Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. §  
9 1395dd, requires hospitals to treat patients that need emergency care. The purpose  
10 of EMTALA is to ensure that individuals receive adequate emergency medical care  
11 regardless of their ability to pay. *Jackson v. E. Bay Hosp.*, 246 F.3d 1248, 1254  
12 (9th Cir. 2001). Under EMTALA, a hospital must provide appropriate emergency  
13 medical care or transfer the patient to another medical facility. 42 U.S.C. §  
14 1395dd(b)(1).

## 15 **Regulatory History**

### 16 **1. 2008 Rule**

17 In 2008, HHS promulgated a Final Rule (“2008 Rule”) to “ensure that  
18 Department funds do not support morally coercive or discriminatory practices or  
19 policies in violation of federal law” and to “provide for the implementation and  
20 enforcement’ of the Church, Coats-Snowe, and Weldon Amendments.” 73 Fed.  
21 Reg. 78072, 78074 (Dec. 19, 2008). The 2008 Rule defined several terms: “Assist  
22 in the performance,” “Entity,” “Health Care Entity,” “Health Service Program,”  
23 “Individual,” “Instrument,” “Recipient,” “Sub-recipient,” and “Workforce.” 45 CFR  
24 § 88.2 (2008). The 2008 Rule set forth the applicability of the regulation to include  
25 any state or local government that receives federal funds, federal financial  
26

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27 <sup>33</sup> 42 U.S.C. 1397j-1(b).

28 <sup>34</sup> 42 U.S.C. 5106i(a)(2).

1 assistance, and certain grant contract loan or loan guarantees, and education  
2 institutions, teaching hospitals or programs for training of health care professionals  
3 or health care workers. § 88.3 (2008). Section 88.4 set forth the requirements and  
4 prohibitions against discriminating against entities that refuse to perform, train, or  
5 refer abortions or sterilization procedures or make its facilities available for these  
6 procedures, or requiring individuals to perform or assist in the performance of any  
7 health service program or research activity funded by the Department if such  
8 service or activity would be contrary to his or her religious or moral convictions.  
9 § 88.4 (2008). The 2008 Rule required written certifications of compliance. § 88.5  
10 (2008). The Office of Civil Rights was designated to receive complaints based on  
11 the health care conscience protection statutes and the regulation. § 88.6 (2008).

## 12 **2. 2011 Rule**

13 In February 2011, HHS rescinded most of the 2008 rule and finalized a new  
14 rule. 76 Fed. Reg. 9968 (Feb. 23, 2011), after notice and receipt of over 300,000  
15 comments. It noted that “[n]either the 2008 final rule, nor this final rule, alters the  
16 statutory protections for individuals and health care entities under the federal  
17 health care provider conscience protection statutes, including the Church  
18 Amendments, Section 245 of the Public Health Service Act, and the Weldon  
19 Amendment. These statutory health care provider conscience protections remain in  
20 effect.” *Id.*

21 HHS concluded that no regulations were required or necessary for the  
22 conscience protections contained in the Church Amendments, The Coats-Snowe  
23 Amendments and the Weldon Amendment to take effect. *Id.* at 9970. It noted that  
24 the conscience law and other federal statute governing HHS programs, including  
25 Medicaid, Title X, and EMTALA have operated side by side often for many  
26 decades. *Id.* It also noted that these laws and the 2008 Final Rule were “never  
27 intended to allow providers to refuse to provide medical care to an individual  
28 because the individual engages in behavior the health care provider found

1 objectionable.” *Id.* at 9973-74. HHS rescinded the definitions contained in the  
2 2008 Final Rule because of concerns they may have caused confusion regarding  
3 the scope of the federal health care provider conscience protection statutes. *Id.* at  
4 9974. HHS did not formulate new definitions because it believed that individual  
5 investigations will provide the best means of answering questions about the  
6 application of the statutes in particular circumstances. *Id.*

7 HHS concluded the 2008 Rule may have negatively affected the ability of  
8 patients to access care. *Id.* It was concerned the 2008 Rule may have undermined  
9 the ability of patients to access contraceptive services as required by the Medicaid  
10 program, especially in areas where there are few health care providers for the  
11 patient to choose from. *Id.*

12 The 2011 Rule retained the provisions of the 2008 Final Rule that designated  
13 OCR to receive complaints of discrimination and coercion based on the federal  
14 health care provider conscience protection statutes. *Id.* at 9972.

### 15 **The Final Rule**

16 After reviewing the previous rulemaking, comments from the public and  
17 OCR’s enforcement activities, HHS concluded that “there is a significant need to  
18 amend the 2011 Rule to ensure knowledge of, compliance with, and enforcement  
19 of, federal conscience and anti-discrimination laws.” 84 Fed. Reg. at 23175.  
20 Specifically, it noted:

21 The 2011 Rule created confusion over what is and is not required  
22 under Federal conscience and anti-discrimination laws and narrowed  
23 OCR’s enforcement processes. Since November 2016, there has been a  
24 significant increase in complaints filed with OCR alleging violations of  
25 the laws that were the subject of the 2011 Rule, compared to the time  
26 period between the 2009 proposal to repeal the 2008 Rule and  
27 November 2016. The increase underscores the need for the Department  
28 to have the proper enforcement tools available to appropriately enforce  
all Federal conscience and anti-discrimination laws.

*Id.*

1 HHS received over 242,000 comments in response to the notice of proposed  
2 rulemaking. *Id.* at 23180. The Final Rule generally reinstates the structure of the  
3 2008 Rule, providing further definitions of terms, and requires certification and  
4 enforcement provisions. *Id.* at 23179.

5 Section 88.2 includes the following definitions:

6 “*Assist in the performance*” means to take an action that has a specific,  
7 reasonable, and articulable connection to furthering a procedure or a part of a  
8 health service program or research activity undertaken by or with another person or  
9 entity. This may include counseling, referral, training, or otherwise making  
10 arrangements for the procedure or a part of a health service program or research  
11 activity, depending on whether aid is provided by such actions. 45 C.F.R. § 88.2  
12 (2019).

13 “*Discriminate*” or “*discrimination*” includes, as applicable to, and to the  
14 extent permitted by, the applicable statute:

- 15 (1) To withhold, reduce, exclude from, terminate, restrict, or make  
16 unavailable or deny any grant, contract, subcontract, cooperative  
17 agreement, loan, license, certification, accreditation, employment,  
18 title, or other similar instrument, position, or status;
- 19 (2) To withhold, reduce, exclude from, terminate, restrict, or make  
20 unavailable or deny any benefit or privilege or impose any penalty;  
21 or
- 22 (3) To utilize any criterion, method of administration, or site selection,  
23 including the enactment, application, or enforcement of laws,  
24 regulations, policies, or procedures directly or through contractual  
25 or other arrangements, that subjects individuals or entities  
26 protected under this part to any adverse treatment with respect to  
individuals, entities, or conduct protected under this part on  
grounds prohibited under an applicable statute encompassed by  
this part. . .

27 *Id.*

1 “*Entity*” means a “person” as defined in 1 U.S.C. § 1; the Department; a  
2 State, political subdivision of any State, instrumentality of any State or political  
3 subdivision thereof; any public agency, public institution, public organization, or  
4 other public entity in any State or political subdivision of any State; or, as  
5 applicable, a foreign government, foreign nongovernmental organization, or  
6 intergovernmental organization (such as the United Nations or its affiliated  
7 agencies). *Id.*

8 “*Health care entity*” includes:

9 (1) For purposes of the Coats–Snowe Amendment (42 U.S.C. 238n)  
10 and the subsections of this part implementing that law (§ 88.3(b)),  
11 an individual physician or other health care professional, including  
12 a pharmacist; health care personnel; a participant in a program of  
13 training in the health professions; an applicant for training or study  
14 in the health professions; a post-graduate physician training  
15 program; a hospital; a medical laboratory; an entity engaging in  
16 biomedical or behavioral research; a pharmacy; or any other health  
17 care provider or health care facility. As applicable, components of  
18 State or local governments may be health care entities under the  
19 Coats–Snowe Amendment; and

20 (2) For purposes of the Weldon Amendment (*e.g.*, Department of  
21 Defense and Labor, Health and Human Services, and Education  
22 Appropriations Act, 2019, and Continuing Appropriations Act,  
23 2019, Pub.L. 115–245, Div. B., sec. 507(d), 132 Stat. 2981, 3118  
24 (Sept. 28, 2018)), Patient Protection and Affordable Care Act  
25 section 1553 (42 U.S.C. 18113), and to sections of this part  
26 implementing those laws (§ 88.3(c) and (e)), an individual  
27 physician or other health care professional, including a pharmacist;  
28 health care personnel; a participant in a program of training in the  
health professions; an applicant for training or study in the health  
professions; a post-graduate physician training program; a hospital;  
a medical laboratory; an entity engaging in biomedical or  
behavioral research; a pharmacy; a provider-sponsored  
organization; a health maintenance organization; a health insurance  
issuer; a health insurance plan (including group or individual  
plans); a plan sponsor or third-party administrator; or any other  
kind of health care organization, facility, or plan. As applicable,  
components of State or local governments may be health care

1 entities under the Weldon Amendment and Patient Protection and  
2 Affordable Care Act section 1553.

3 *Id.*

4 “Health service program” includes the provision or administration of any  
5 health or health-related services or research activities, health benefits, health or  
6 health-related insurance coverage, health studies, or any other service related to  
7 health or wellness, whether directly; through payments, grants, contracts, or other  
8 instruments; through insurance; or otherwise. *Id.*

9 “Referral” or “refer” for includes the provision of information in oral,  
10 written, or electronic form (including names, addresses, phone numbers, email or  
11 web addresses, directions, instructions, descriptions, or other information  
12 resources), where the purpose or reasonably foreseeable outcome of provision of  
13 the information is to assist a person in receiving funding or financing for, training  
14 in, obtaining, or performing a particular health care service, program, activity, or  
15 procedure. *Id.*

16 Section 88.3 sets forth the applicable requirements and prohibitions. 45  
17 C.F.R. § 88.3 (2019). This section sets forth prohibitions and requirements and  
18 refers to the specific provisions of the federal conscience and anti-discrimination  
19 statutes, including the Church Amendments, the Coats-Snow Amendment, the  
20 Weldon Amendments and the Affordable Care Act. Section 88.4 sets forth the  
21 requirements for assurance and certification of compliance requirements.

22 Section 88.4 continues to delegate to the OCR the authority to facilitate and  
23 coordinate the Department’s enforcement of the Federal conscience and anti-  
24 discrimination laws. Section 88.4 sets forth the enforcement mechanisms:

25 (i) Resolution of matters.

26 (1) If an investigation or compliance review reveals that no  
27 action is warranted, OCR will so inform any party who has been  
28 notified of the existence of the investigation or compliance review, if  
any, in writing.

(2) If an investigation or compliance review indicates a failure  
to comply with Federal conscience and anti-discrimination laws or

1 this part, OCR will so inform the relevant parties and the matter will  
2 be resolved by informal means whenever possible. Attempts to  
3 resolve matters informally shall not preclude OCR from  
4 simultaneously pursuing any action described in paragraphs (a)(5)  
through (7) of this section.

5 (3) If OCR determines that there is a failure to comply with  
6 Federal conscience and anti-discrimination laws or this part,  
7 compliance with these laws and this part may be effected by the  
8 following actions, taken in coordination with the relevant Department  
9 component, and pursuant to statutes and regulations which govern the  
administration of contracts (e.g., Federal Acquisition Regulation),  
grants (e.g., 45 CFR part 75) and CMS funding arrangements (e.g.,  
the Social Security Act):

10 (i) Temporarily withholding Federal financial assistance or other  
11 Federal funds, in whole or in part, pending correction of the  
deficiency;

12 (ii) Denying use of Federal financial assistance or other Federal  
13 funds from the Department, including any applicable matching  
credit, in whole or in part;

14 (iii) Wholly or partly suspending award activities;

15 (iv) Terminating Federal financial assistance or other Federal  
funds from the Department, in whole or in part;

16 (v) Denying or withholding, in whole or in part, new Federal  
17 financial assistance or other Federal funds from the Department  
18 administered by or through the Secretary for which an  
19 application or approval is required, including renewal or  
continuation of existing programs or activities or authorization  
of new activities;

20 (vi) In coordination with the Office of the General Counsel,  
21 referring the matter to the Attorney General for proceedings to  
22 enforce any rights of the United States, or obligations of the  
recipient or sub-recipient, under Federal law or this part; and

23 (vii) Taking any other remedies that may be legally available.

24 45 C.F.R. § 88.7 (2019).

25 Thus, enforcement mechanisms where voluntary resolution cannot be  
26 reached include termination of relevant funding, either in whole or part, funding  
27 claw-backs to the extent permitted by law, voluntary resolution agreements,  
28 referral to the Department of Justice, or other measures. *Id.* at 23180. Recipients

1 are responsible for their own compliance with federal conscience and anti-  
2 discrimination laws and implementing regulations, was well as for ensuring their  
3 sub-recipients comply with these laws. *Id.* at 23180.

4 Notably, the Final Rule contains no exceptions for emergency service.

### 5 **Plaintiff's Complaint**

6 Plaintiff is seeking declaratory and injunctive relief. Plaintiff argues such  
7 relief is appropriate for the following reasons: (1) Defendants violated the APA  
8 because the agency action was not in accordance with law and HHS's authority;  
9 (2) Defendants violated the APA because the agency action was not in accordance  
10 with other federal laws, including § 1554 of the ACA; contraceptive coverage  
11 requirement of the ACA; the EMTALA; non-directive mandates of the ACA; and  
12 Title VII; (3) Defendants violated the APA because the Final Rule resulted from  
13 arbitrary and capricious agency action; (4) the Final Rule violates U.S.  
14 Constitution's Spending Clause; (5) the Final Rule violates U.S. Constitution's  
15 Separation of Powers; and (6) the Final Rule violates the Establishment Clause of  
16 the U.S. Constitution.

### 17 **Judge Paul A. Engelmayer's Order**

18 One day before the Court was scheduled to hear oral argument on the  
19 parties' Motions, Judge Paul A. Engelmayer of the United States District Court for  
20 the Southern District of New York issued a well-reasoned and thorough order in  
21 which he vacated the Rule in full. *State v. United States Dept. of Health and*  
22 *Human Servs.*, \_\_ F.Supp.3d \_\_, 2019 WL 5781789 (S.D. N.Y. Nov. 6, 2019).

23 In his Order, Judge Engelmayer came to the following conclusions:

24 1. HHS lacked rulemaking authority to promulgate significant portions  
25 of the Rule that gave substantive content to the Conscience Provisions. *Id.* at \*20.  
26 Specifically, with respect to the Church, Coats-Snowe, and Weldon Amendments,  
27 HHS was never delegated and did not have substantive rule-making authority. *Id.*  
28 at \*66.

1 2. HHS lacked rulemaking authority empowering it to terminate all of a  
2 recipient's HHS funding in response to a violation of one of these provisions. *Id.* at  
3 \*32.

4 3. The Rule is "not in accordance with law" because it conflicts with  
5 Title VII and it conflicts with the EMTALA. *Id.* at \*35.

6 4. HHS acted arbitrarily and capriciously in promulgating the Rule  
7 because the stated reasons for undertaking rulemaking are not substantiated by the  
8 record before the agency; it did not adequately explain its change in policy; and it  
9 failed to consider important aspects of the problem before it. *Id.* at \*67.

10 5. HHS did not observe proper rulemaking procedures in promulgating  
11 the Rule insofar as portions of the Rule that define "discriminate or discrimination"  
12 were not a "logical outgrowth" of HHS's notice of proposed rulemaking (NPRM).  
13 *Id.*

14 6. The Rule's authorization in § 88.7(i)(3)(iv), as a penalty available to  
15 HHS's OCR in the event of a recipient's non-compliance of the termination of all  
16 of the recipient's HHS funds, violated the Separation of Powers and the Spending  
17 Clause of the Constitution, U.S. Const. art. I § 8, cl. 1. *Id.*

### 18 **Effect of Judge Engelmayer's Ruling**

19 At the hearing, the Court questioned the parties as to whether the pending  
20 motions are moot. Both parties agreed that the issues before the Court were not  
21 moot and asked the Court to issue a ruling, given that it is likely Judge  
22 Engelmayer's order would be appealed. Additionally, the Ninth Circuit recently  
23 noted that continued litigation over the lawfulness of agency Rules will promote  
24 "the development of the law and the percolation of legal issues in the lower courts"  
25 and allow the Supreme Court, if it chooses to address the Rule, to do so "[with] the  
26 benefit of additional viewpoints from other lower federal courts and [with] a fully  
27 developed factual record." *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026,  
28 1029 (9th Cir. 2019) (quotation omitted).

1 After oral argument, the Court agreed with the parties that it would be  
2 appropriate for it to rule on the pending cross-motions for summary judgment. It  
3 adopted the conclusions of Judge Engelmayer, finding that first, it is appropriate  
4 for this Court to decide this issue on summary judgment; second, HHS exceeded  
5 its statutory authority in adopting this Rule; third, it acted arbitrary and  
6 capriciously because HHS’s justifications for the Rule were contrary to the  
7 evidence in the record and because HHS failed to supply a reasoned explanation  
8 for its policy change from the previous Rule and finally, the Rule violated the U.S.  
9 Constitution—specifically the separation of powers and the Spending Clause. In  
10 doing so, the Court adopts the reasoning set forth in Judge Engelmayer’s Order in  
11 making these findings.

### 12 Analysis

13 At the hearing, Plaintiff asked the Court to address three additional  
14 arguments that presented in challenging the Rule. First, the Court should interpret  
15 the Rule to find that it impermissibly encompasses moneys that are issued to the  
16 State of Washington by the Department of Labor and Department of Education;  
17 second, address the impact of the Rule on transgendered patients; third, address  
18 whether the Rule is irreconcilable with medical ethics; and fourth, address assess to  
19 care and the impact the Rule would have on vulnerable populations.

#### 20 1. Threats to Unrelated Funding Streams

21 Plaintiff asserts the Rule authorizes HHS to withhold, deny, suspend, claw  
22 back, or terminate “Federal financial assistance or other Federal funds” if it  
23 determines there is a “failure to comply.” Plaintiff reads this provision as placing at  
24 risk not only its receipt of all federal funds from HHS, but also federal funds from  
25 the Department of Labor and Department of Education that are implicated by the  
26 Weldon Amendment, including, potentially, funds entirely unrelated to health care.  
27 To the extent the Rule can be read to authorize the withholding of federal funds  
28 from the Department of Labor and Department of Education, HHS has acted

1 outside the scope of its lawful authority to do so. *Allentown Mack Sales & Serv.*,  
2 522 U.S. at 374 (noting an agency’s decreed result must be within the scope of its  
3 lawful authority).

## 4           **2. Access to Care**

5           Plaintiff argues that in promulgating the Rule, HHS failed to consider  
6 evidence showing the Rule will undermine the provision of medical services. The  
7 Court agrees. While HHS indicated that access to care is a critical concern for the  
8 Department, it concluded that the Rule would not harm access to care. 84 Fed.  
9 Reg. at 23180. On the contrary, HHS stated the Rule will actually increase the  
10 number of people and entities that enter or remain in the health care field, and  
11 thereby presumably increase access to care. HHS’s conclusion rests on the  
12 assumptions that barriers exist, and that enforcement of the Rule will remove those  
13 barriers to entry into the health care professions. The Rule will open the door to  
14 more health care professionals with religious and moral objections to treating  
15 patients from vulnerable populations.

16           It seems elementary that increasing the number of medical professionals  
17 who would deny care based on religious or moral objections would not increase  
18 access to care; instead, access to care will deteriorate, especially for those  
19 individuals in vulnerable populations who will be the target of the religious or  
20 moral objections.

21           Plaintiff has demonstrated that medical care will be negatively impacted by  
22 the Rule. For example, if a pharmacist in a rural area refuses to dispense  
23 pharmaceuticals, give accurate advice, or refer the person to another provider, it is  
24 easy to imagine that this could deprive that person of critical, lifesaving services  
25 since more travel time would be required to seek alternative access to  
26 pharmaceuticals.

27           Similarly, the Court agrees with Plaintiff’s position that the Rule is arbitrary  
28 and capricious because HHS disregarded the comments and evidence showing the

1 Rule would severely and disproportionately harm certain vulnerable populations,  
2 including women; lesbian, gay bisexual, and transgender people (LGBT  
3 individuals); individuals with disabilities; and people living in rural areas. What is  
4 particularly glaring is HHS’s willingness to rely on anecdotes of bias and animus  
5 in the health care sector against individuals with religious beliefs and moral  
6 convictions, *id.* at 23247, but disregarding “anecdotal accounts of discrimination  
7 from LGBT” people, citing the lack of suitable data for estimating the impact of  
8 the rule. *Id.* at 23251-52. HHS’s “internally inconsistent” treatment of the  
9 anecdotal evidence—relying upon it when it supports the rule but dismissing it  
10 when it does not—renders the rulemaking process arbitrary and capricious. *See*  
11 *Nat. Res. Def. Council v. U.S. Nuclear Regulatory Comm’n*, 879 F.3d 1202, 1214  
12 (D.C. Cir. 2018).

13 Finally, the Rule is arbitrary and capricious because HHS failed to conduct a  
14 reasoned analysis of the requirements of basic medical ethics in adopting the Rule.  
15 HHS failed to consider that the Rule’s new statutory definitions, which would  
16 allow an employee to refuse to participate in life-saving treatment without notice  
17 and permits health care entities and providers to withhold basic information from  
18 patients, would contravene medical ethics and deprive patients of the ability to  
19 provide informed consent.

### 20 **3. Remedy**

21 Defendant asks the Court to confine its holdings to the state of Washington.  
22 The Court agrees, however, with Judge Engelmayer that “the APA violations are  
23 numerous, fundamental, and far-reaching.” 2019 WL 5781789 at \*69 (“that the  
24 rulemaking exercise here was sufficiently shot through with glaring legal defects as  
25 to not justify a search for survivors.”). Here, in making its decision, the Court did  
26 not rely on facts or considerations that are specific to the State of Washington. On  
27 the contrary, the violations of the APA and the Constitution found by Judge  
28 Engelmayer and this Court would affect any person living in the United States and

1 would result in a miscarriage of justice, especially if the Rule could not be  
2 implemented in Washington state, but could be in Idaho, 20 miles down the road.

3 The Court vacates the 2019 Rule in its entirety, pursuant to 5 U.S.C. §  
4 706(2).

5 Accordingly, **IT IS HEREBY ORDERED:**

- 6 1. Plaintiff's Motion for Preliminary Injunction, ECF No. 8, is **DENIED**,  
7 as moot.
- 8 2. Defendants' Motion to Dismiss, or, in the Alternative for Summary  
9 Judgment, ECF No. 44, is **DENIED**.
- 10 3. Plaintiff's Motion for Summary Judgment, ECF No 57, is **GRANTED**.
- 11 4. The District Court Executive is directed to enter judgment in favor of  
12 Plaintiff and against Defendants.

13 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order,  
14 forward copies to counsel and close the file.

15 **DATED** this 21st day of November 2019.



19  
20

A handwritten signature in blue ink that reads "Stanley A. Bastian".

21 Stanley A. Bastian  
22 United States District Judge  
23  
24  
25  
26  
27  
28