Exhibit 11

ACLJ
American Center for Law & Justice

May 9, 2018

RECEIVED
MAY 11 2018
HHS/OCR HQ

Centralized Case Management Operations
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Room 509F HHH Bldg.
Washington, D.C. 20201

Attn: Conscience and Religious Freedom Division

Re: Complaint for Discrimination in Violation of 42 U.S.C. § 300a-7(c)(1) ("Church Amendment")

Contact attorney for complainant:

Francis J. Manion, Esq.
Geoffrey R. Surtees, Esq.
American Center for Law and Justice
6375 New Hope Rd.
P.O. Box 60
New Hope, KY 40052
502-549-7020
fmanion@aclj.org

Complaint filed on behalf of:

[redacted]

Person/Agency/Organization committing discrimination:

The University of Vermont Medical Center
111 Colchester Avenue
Burlington, Vermont 05401
802-847-0000

Date and nature of discriminatory acts:

In 2017, the complainant, [redacted] RN, was coerced by her employer, University of Vermont Medical Center, Inc. ("UVMMC") into participating in an abortion. Ms [redacted] a Catholic, had previously informed her employer that she

6375 New Hope Road
New Hope, Kentucky 40052
(502) 549-7020
(502) 549-5252 (Facsimile)

could not participate in such procedures as a matter of religious belief. Her employer deliberately misled [redacted] about the nature of the procedure, and then, after [redacted] confirmed that she was, in fact, being assigned to an abortion, refused her request that other equally qualified and available personnel take her place. Fearing a charge of patient abandonment which could bring with it loss of employment and revocation of her nursing license, [redacted] participated in the procedure under duress. She suffered immediate emotional distress, attempted to suppress the event psychologically, and has been haunted by nightmares ever since. In addition, her employer has created a hostile environment targeting [redacted] and other employees who conscientiously object to participating in abortion procedures.

The coerced-participation event described above appears to have been related to a change in UVMMC policy regarding the hospital's performance of abortions. Under the leadership, since 2013, of a hospital board President with decades-long experience in senior leadership of Planned Parenthood facilities in Vermont, Portland, Oregon, and New York City, UVMMC reversed a longstanding policy which limited abortions in its facilities to those considered "medically necessary." While the policy appears to have been changed *sub silentio* at some point even before 2017, hospital staff, including [redacted] and other nurses, were only formally informed of the change in October of 2017. Thus, it is highly possible that other staff and, perhaps, [redacted] herself, have been deceived into participating in other abortion procedures which were misleadingly labeled as "miscarriages" or "medically necessary" but which were, in fact, purely elective abortions.

In addition, following public controversy which arose after the formal disclosure to staff of the hospital's new policy in the Fall of 2017, UVMMC, in February 2018, adopted a revised "Conflict of Care" policy. (Copy attached hereto). This policy is sharply inconsistent with existing federal conscience laws and inappropriately continues to leave the conscience rights of hospital employees to the virtually unbridled discretion of supervisors who, as [redacted] and others will attest, have a history of demeaning, belittling, and failing to respect the views of conscientious objectors.

The Church Amendment protects the conscience rights of individuals and entities that object to performing or assisting in the performance of abortion or sterilization procedures if doing so would be contrary to the provider's religious beliefs or moral convictions, and prohibits discrimination in employment of "any physician or other health care personnel . . . because of his religious beliefs or moral convictions respecting sterilization procedures or abortions." 42 U.S.C. §300a-7 *et seq.*

It is clear that [redacted] (and perhaps others employed at UVMMC) has suffered and continues to suffer discrimination and violations of her conscience rights under federal law. We urge your office to immediately initiate an

investigation of these charges and order appropriate remedial and corrective actions as soon as possible.

Our investigation has disclosed identities and contact information of individuals in addition to our client who have information pertinent to this matter. That information, to the extent said individuals have already spoken publicly about it or authorize us to disclose it, will be provided upon request.

Respectfully submitted,

Francis J. Manion
Senior Counsel
American Center for Law & Justice

Date: May 9, 2018

Documents Status: **Approved**

IDENT	HR-F-09
Type of Document	Policy
Applicability Type	Corporate
Title of Owner	Dir Human Resources
Title of Approving Official	VP Human Resources
Date Effective	2/5/2018
Date of Next Review	2/5/2021

THE University of Vermont MEDICAL CENTER

TITLE: Conflict of Care: Staff Conscientious Objection

PURPOSE: UVM Medical Center respects workforce diversity and the cultural values, ethics and religious beliefs of our staff. In situations where a conflict may exist between the employee's cultural values, ethics, and religious beliefs and their participation in any aspect of patient care, UVMMC supports a process by which an employee may request to be excused from performing specific duties.

Patients and their families' perspectives and choices are valued and honored in all phases of care. Accordingly, all patients are entitled to comprehensive, quality care, without regard to their diagnosis, race, color, sex, sexual orientation, gender identity or expression, ancestry, place of birth, HIV status, national origin, religion, marital status, age, language, socioeconomic status, physical or mental disability, protected veteran status.

UVMMC encourages open dialogue between the employee and their leader.

POLICY STATEMENT: Employees may request to be excused from participating in a type of care/treatment in situations where that care/treatment conflicts with the employee's cultural values, ethics, or religious beliefs. Procedures/treatments which may present conflict may include but are ***not limited*** to the following:

- Blood and blood component administration
- Elective termination of pregnancy
- Initiation and cessation of life support
- DNR/Life support issues for critically ill/terminally ill populations
- Assisting with the harvesting of human organs
- Sterilization procedures
- Reproductive technologies

Alternative staffing arrangements will be considered, and if appropriate, arranged. At no time will staff be allowed to act in a manner that negatively impacts the patient's care or treatment.

PROCEDURE:

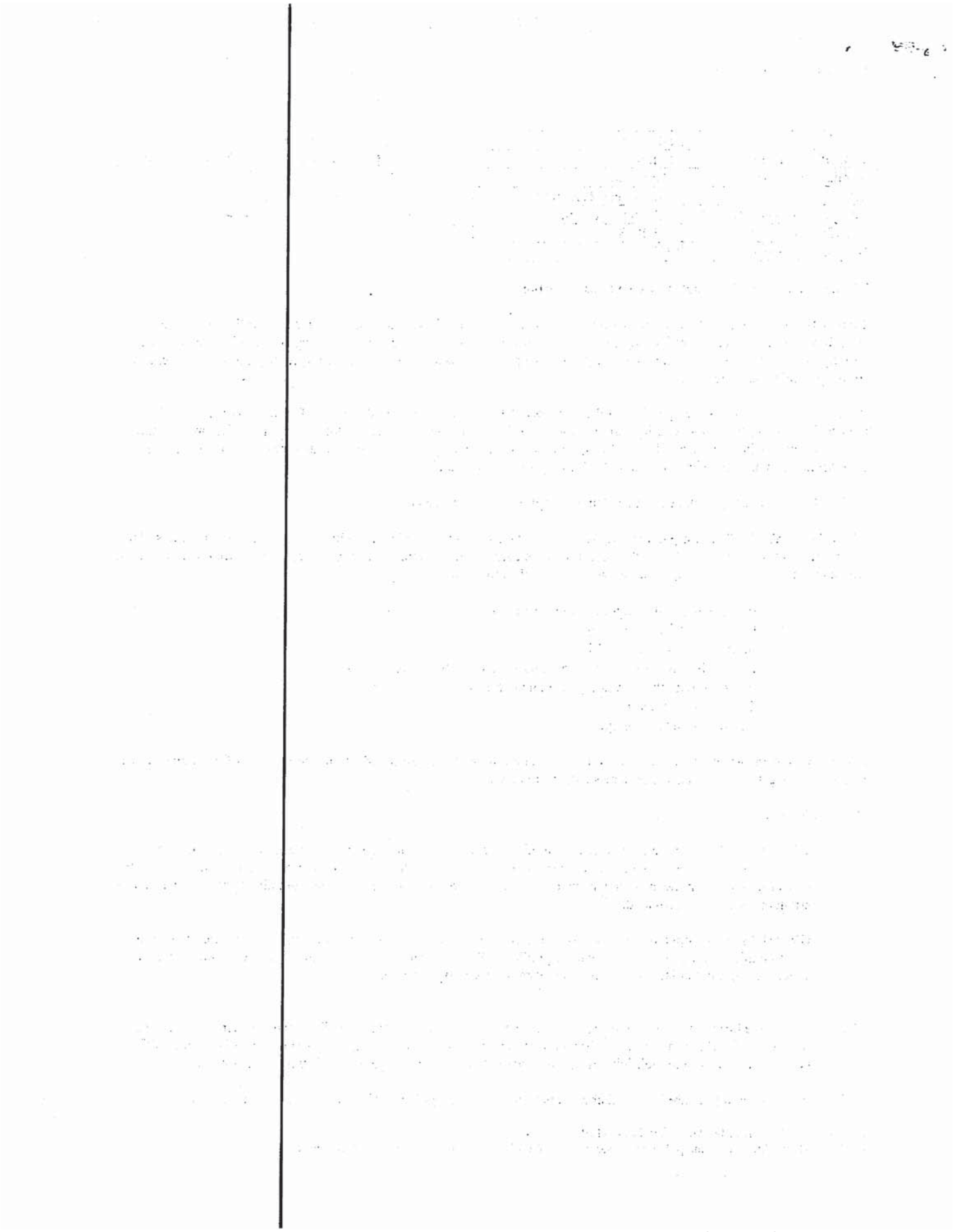
I. When the need to provide care or treatment of a patient is in conflict with an employee's cultural values, ethics or religious beliefs, the employee may request to be reassigned to other duties and not participate in the specific type of care or treatment. In the event a conflict of care arises, care of the patient will be maintained until alternate staffing arrangements can be provided.

II. UVMMC supports open dialogue between the employee and their leader when a conflict exists for the employee. We recognize that not all conflicts can be predicted. When possible we encourage employees to proactively raise concerns about potential conflicts in order to minimize impact to patient care.

III. During the hiring process, the hiring manager shall discuss the typical scope of practice and service within the department in which the candidate has applied to work. Employees are expected to perform all the duties of their positions as set forth in their job descriptions, given to them at the time of hire or whenever revised.

IV. All new employees are informed about this Conflict of Care policy during new employee orientation.

Printed on: 4/12/2018 11:00 AM By: [redacted]
DISCLAIMER: Only the online policy is considered official. Please compare with on-line document for accuracy.



Documents Status: **Approved**

V. The direct Supervisor/designee shall be responsible for administering and monitoring a process to accommodate an employee's cultural values, ethics, and religious beliefs regarding treatment of patients.

a) An employee who desires to be reassigned from a specific type of care or treatment shall submit the request in writing to the Supervisor/designee. Written request may be received on the form provided in this policy OR via an email addressed to the Supervisor/designee containing the details as requested/outlined on the form.

b) The written request will be acknowledged by the Supervisor/designee and maintained in the appropriate unit resource binder for scheduling purposes within the unit. The Supervisor/designee will assign staff as necessary for appropriate patient coverage. The written request will be placed in the employee's electronic personnel file by the Supervisor/designee.

c) Any conflict which may occur in an emergent situation for which staff may not have previously submitted a written request, may be brought to the Supervisor/designee. Alternative coverage may be sought at the discretion of the Supervisor/designee. The written request shall be submitted by the employee directly following the event and the request will be placed in the employee's electronic personnel file by the Supervisor/designee.

d) Any employee who is excused from an aspect of care will be re-assigned to other responsibilities.

e) In any scenario where circumstances prevent arrangements for alternate coverage, the staff member will be expected to provide the assigned care to ensure patient care is not negatively impacted.

f) Refusal to perform assigned job functions will be addressed in accordance with established corrective action procedures by the supervisor, in consultation with leadership and/or Human Resources.

VI. All employees have access to the Ethics Consultation through UVMMC's Director of Clinical Ethics and can request input on ethical issues by contacting Provider Access Services (847-2700), ask who the ethics consultant on call is and should then contact that consultant by phone or in person.

VII. An employee experiencing ongoing conflict of care issues should seek a transfer to a department or position where conflict of care issues are less likely to occur.

MONITORING PLAN: N/A

DEFINITIONS: N/A

RELATED POLICIES: Code of Conduct B1N; Clinical Ethics Consultations ETH15; Compliance & Privacy Plan B31

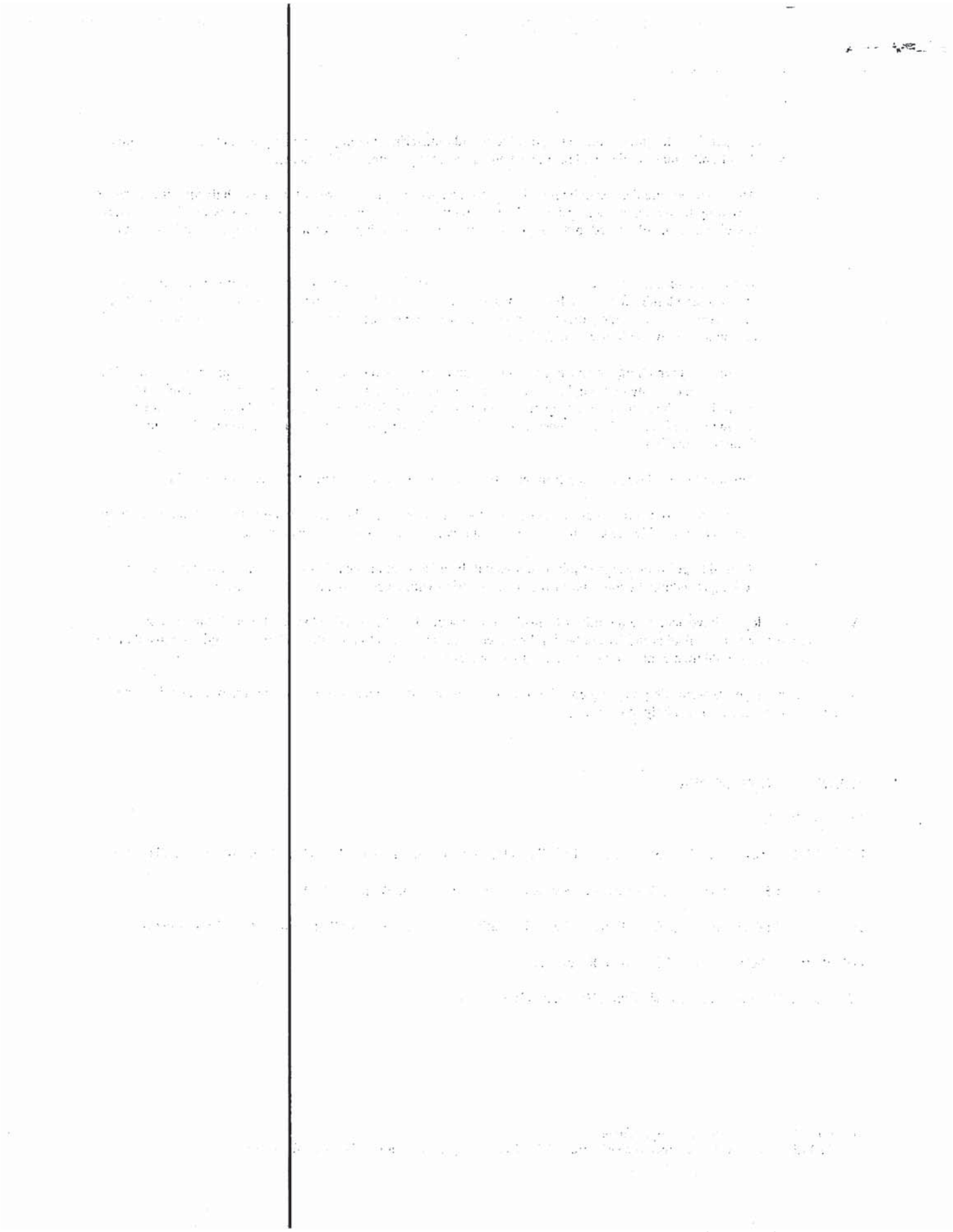
REFERENCES: 2017, Hospital Accreditation Standards, The Joint Commission LD.04.02

REVIEWERS: [redacted]

OWNER: [redacted], Dir Human Resources

APPROVING OFFICIAL: [redacted] Human Resources

Printed on: 4/12/2018 11:00 AM By: [redacted]
DISCLAIMER: Only the online policy is considered official. Please compare with on-line document for accuracy.



Documents Status: **Approved**

Conflict of Care Disclosure Form

To be completed by the employee making the request: *Make a copy of this form for your records and then give this form to your leader.*

Your Name: _____ (Please Print)

Your Signature: _____ Date: _____

Please identify the clinical circumstances where you experience personal conflict. Please provide specific details regarding which procedure/treatment you are requesting to be excused from.

Please briefly provide your reasons for requesting removal from the patient's care team.

Received by:_____ (Please Print)

Leader Signature _____ Date Received _____

Printed on: 4/12/2018 11:00 AM By: [redacted]
DISCLAIMER: Only the online policy is considered official. Please compare with on-line document for accuracy.

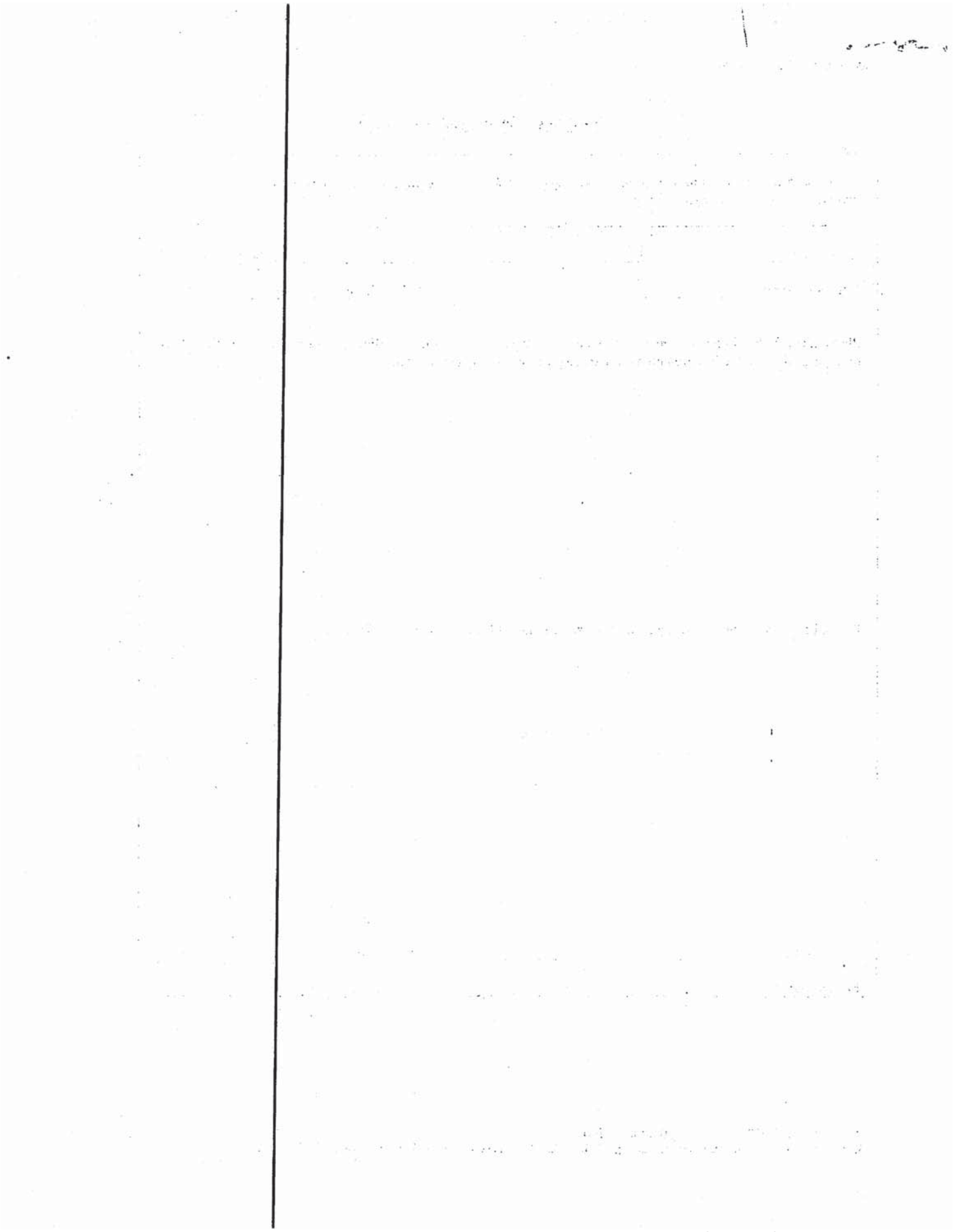


Exhibit 12

ACLJ
American Center for Law & Justice

August 4, 2017

RECEIVED
AUG 04 2017
HHS/OCR HQ

Centralized Case Management Operations
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Room 509F HHH Bldg.
Washington, D.C. 20201

Re: Complaint for Discrimination in Violation of 42 U.S.C. 300a-7(c)(1) ("Church Amendment")

Contact attorney for complainant:

[redacted]
American Center for Law and Justice
6375 New Hope Rd.
P.O. Box 60
New Hope, KY 40052
[redacted]

Complaint filed on behalf of:

[redacted]

Person/Agency/Organization committing discrimination:

Indiana University South Bend
School of Nursing
1700 Mishawaka Ave.
South Bend, IN 46615
(574) 520-4872

Date and nature of discriminatory acts:

In January 2017, complainant [redacted] applied for a full-time faculty position with Indiana University South Bend ("IUSB") to teach a course on Maternal Child Nursing which she had already been teaching at IUSB as an adjunct. Shortly after she began working at IUSB on August 1, 2016, complainant published an internet article entitled "How a Formerly Pro-Choice Nursing Instructor Discusses Abortion with her Students." *Available at:* http://thetorchblog.net/ ?p=996 (August 12, 2016).

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(502) 549-5252 (Facsimile)

Complainant interviewed for the full-time position on January 31, 2017 before a committee of four faculty members of the IUSB Nursing School. During the interview, [redacted] Assistant Dean of Nursing, asked questions of [redacted] which indicated that [redacted] was familiar with [redacted] article.

One of the other members of the search/interview committee believed that [redacted] was asking [redacted] about her views on abortion and interrupted her by saying something to the effect of that, on a mother-baby unit, abortion is not an issue. [redacted] did not correct or clarify that she was *not* asking about abortion.

On or about February 20, 2017, [redacted] learned that she was not hired for the position, purportedly due to a "lack of teaching experience." [redacted] has 19 years of relevant teaching experience (along with her Doctorate of Nursing Practice). The individual who was hired in her stead has less than 3 years teaching experience.

Further, [redacted] has learned that the decision not to hire her was made by IUSB on the recommendation of [redacted] *alone*, *i.e.*, without a vote of the search committee, contrary to normal procedure. In addition to her duties at IUSB [redacted] is employed as an advance practice nurse by Planned Parenthood. See Attached.

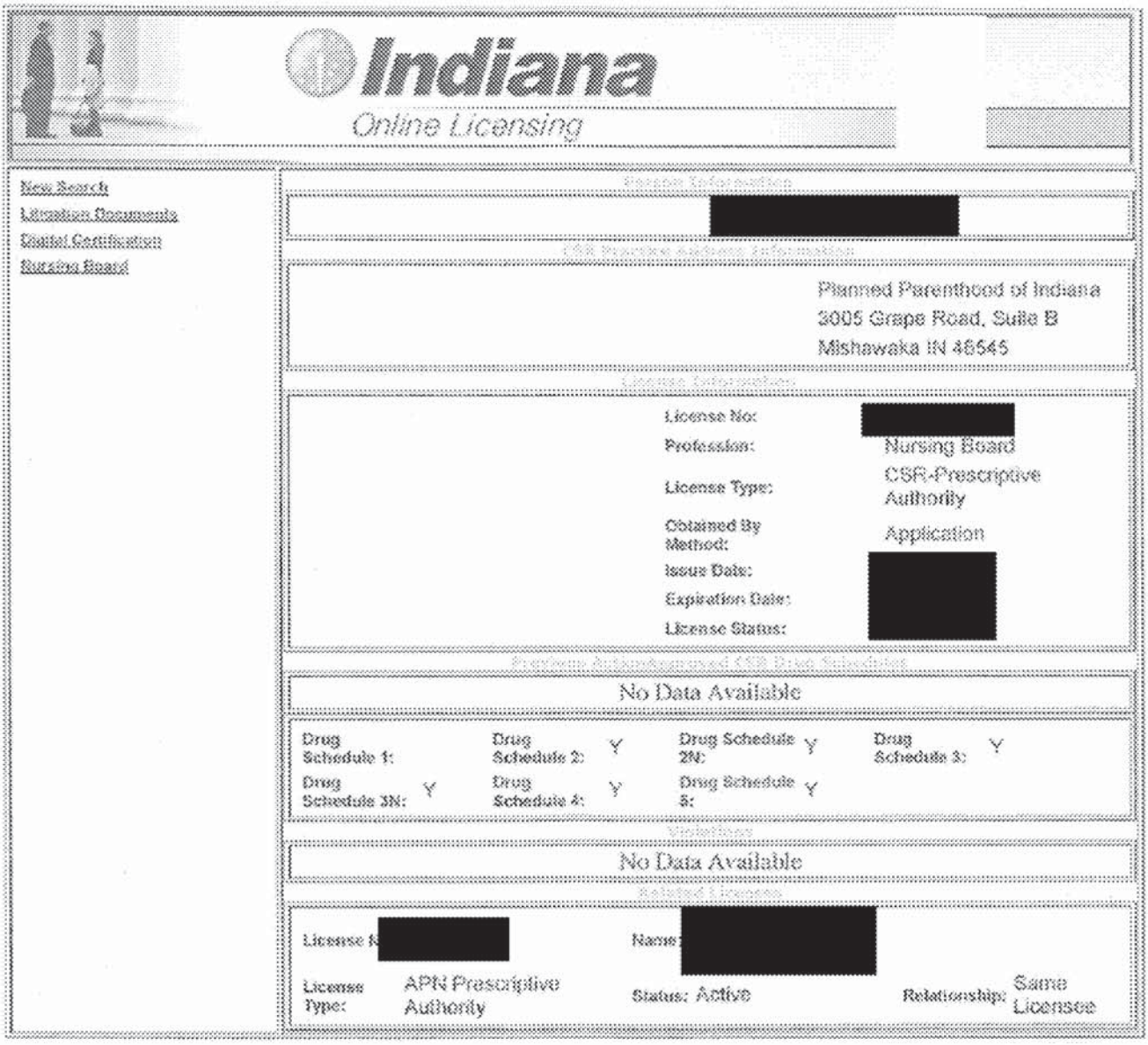
The evidence indicates that complainant was denied the position for which she applied due to [redacted] and/or IUSB's perceptions regarding her moral convictions and/or religious beliefs concerning abortion as set forth in her widely circulated internet article.

The Church Amendment prohibits discrimination in employment of "any physician or other health care personnel . . . because of his religious beliefs or moral convictions respecting sterilization procedures or abortions." 42 U.S.C. § 300a-7(c)(1). On information and belief, IUSB is an entity covered by the Church Amendment, and the circumstances surrounding IUSB's decision not to hire Isabell point to a violation of that statute.

Date: August 4, 2017

AMERICAN CENTER FOR LAW AND JUSTICE

[redacted]



Indiana
Online Licensing

New Search
Licensee Documents
Digital Certification
Nursing Board

Person Information

[redacted]

CSR Practice Address Information

Planned Parenthood of Indiana
3005 Grape Road, Suite B
Mishawaka IN 46545

License Information

License No:	[redacted]
Profession:	Nursing Board
License Type:	CSR-Prescriptive Authority
Obtained By Method:	Application
Issue Date:	[redacted]
Expiration Date:	
License Status:	

Practice Authorized CSR Drug Schedules

No Data Available

Drug Schedule 1:	Drug Schedule 2: Y	Drug Schedule 2N: Y	Drug Schedule 3: Y
Drug Schedule 3N: Y	Drug Schedule 4: Y	Drug Schedule 5: Y	

Collaborator

No Data Available

Related Licenses

License N[redacted] Name: [redacted]

License Type: APN Prescriptive Authority Status: Active Relationship: Same Licensee

Exhibit 13

Form Approved: OMB No. 0945-0002
Expiration Date: 04/30/2019.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE FOR CIVIL RIGHTS (OCR)

CIVIL RIGHTS DISCRIMINATION COMPLAINT

YOUR FIRST NAME	YOUR LAST NAME
Thomas More Society	N/A
HOME PHONE (Please include area code)	WORK PHONE (Please include area code)
( )	[redacted]

STREET ADDRESS	CITY
19 South LaSalle Street, Suite 603	Chicago

STATE	ZIP	E-MAIL ADDRESS (If available)
IL	60603	[redacted]

Are you filing this complaint for someone else? ☒ Yes ☐ No

If Yes, whose civil rights do you believe were violated?

FIRST NAME	LAST NAME
[redacted]; Hope Life Center; and others similarly situated	

I believe that I have been (or someone else has been) discriminated against on the basis of:

☐ Race / Color / National Origin ☐ Age ☒ Religion ☐ Sex
☐ Disability ☒ Other (specify): Abortion and First Amendment

Who or what agency or organization do you believe discriminated against you (or someone else)?

PERSON/AGENCY/ORGANIZATION

State of Illinois

STREET ADDRESS	CITY
Gov. Bruce Rauner, Office of the Governor, 207 State House	Springfield

STATE	ZIP	PHONE (Please include area code)
IL	62,076	(+1)(217) 782-0244

When do you believe that the civil rights discrimination occurred?

LIST DATE(S)

Starting January 1, 2017

Describe briefly what happened. How and why do you believe that you have been (or someone else has been) discriminated against? Please be as specific as possible. (Attach additional pages as needed)

Please see explanatory letter accompanying this complaint form.

Please sign and date this complaint. You do not need to sign if submitting this form by email because submission by email represents your signature.

SIGNATURE	DATE *(mm/dd/yyyy)*
	1-04-2018

Filing a complaint with OCR is voluntary. However, without the information requested above, OCR may be unable to proceed with your complaint. We collect this information under authority of Section 1557 of the Affordable Care Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973 and other civil rights statutes. We will use the information you provide to determine if we have jurisdiction and, if so, how we will process your complaint. Information submitted on this form is treated confidentially and is protected under the provisions of the Privacy Act of 1974. Names or other identifying information about individuals are disclosed when it is necessary for investigation of possible discrimination, for internal systems operations, or for routine uses, which include disclosure of information outside the Department of Health and Human Services (HHS) for purposes associated with civil rights compliance and as permitted by law. It is illegal for a recipient of Federal financial assistance from HHS to intimidate, threaten, coerce, or discriminate or retaliate against you for filing this complaint or for taking any other action to enforce your rights under Federal civil rights laws. You are not required to use this form. You also may write a letter or submit a complaint electronically with the same information. To submit an electronic complaint, go to OCR's web site at:
www.hhs.gov/ocr/civilrights/complaints/index.html. To mail a complaint, please see page 2 of this form for the mailing address.

HHS-700/11/15) (FRONT)

The remaining information on this form is optional. Failure to answer these voluntary questions will not affect OCR's decision to process your complaint.

Do you need special accommodations for us to communicate with you about this complaint? (Check all that apply)

☐ Braille ☐ Large Print ☐ Cassette tape ☐ Computer diskette ☐ Electronic mail ☐ TDD

☐ Sign language interpreter (specify language): _____

☐ Foreign language interpreter (specify language): _____ ☐ Other: _____

If we cannot reach you directly, is there someone we can contact to help us reach you?

FIRST NAME	LAST NAME
[redacted] Attorney at Thomas More Society	
HOME PHONE (Please include area code)	WORK PHONE (Please include area code)
( )	[redacted]

STREET ADDRESS	CITY
19 South LaSalle Street	Chicago

STATE	ZIP	E-MAIL ADDRESS (If available)
IL	60,603	tolp@thomasmoresociety.org

Have you filed your complaint anywhere else? If so, please provide the following. (Attach additional pages as needed)

PERSON/AGENCY/ORGANIZATION/ COURT NAME(S)

Hope Life Center is a plaintiff in Abigail Women's Center, et. al, v. Rauner, et al., in the Circuit Court of the 7th Judicial District, Sangamon County, Chancery Division

DATE(S) FILED	CASE NUMBER(S) (If known)
February 9, 2017	CASE NO. 2017CH000066 (consolidated withCASE NO. 2017CH000052)

To help us better serve the public, please provide the following information for the person you believe was discriminated against (you or the person on whose behalf you are filing).

ETHNICITY (select one)

☐ Hispanic or Latino ☐ Not Hispanic or Latino

RACE (select one or more)

☐ American Indian or Alaska Native ☐ Asian ☐ Native Hawaiian or Other Pacific Islander ☐ Black or African American ☐ White ☐ Other (specify): _____

PRIMARY LANGUAGE SPOKEN (if other then English) _____

How did you learn about the Office for Civil Rights?

☒ HHS Website/Internet Search ☐ Family/Friend/Associate ☐ Religious/Community Org ☐ Lawyer/Legal Org ☐ Phone Directory ☐ Employer

☐ Fed/State/Local Gov ☐ Healthcare Provider/Health Plan ☐ Conference/OCR Brochure ☐ Other (specify): _____

To submit a complaint, please type or print, sign, and return completed complaint form package (including consent form) to the OCR Headquarters address below.

U.S. Department of Health and Human Services
Office for Civil Rights
Centralized Case Management Operations
200 Independence Ave., S.W.
Suite 515F, HHH Building
Washington, D.C. 20201
Customer Response Center: (800) 368-1019
Fax: (202) 619-3818
TDD: (800) 537-7697
Email: ocrmail@hhs.gov

Burden Statement

Public reporting burden for the collection of information on this complaint form is estimated to average 45 minutes per response, including the time for reviewing instructions, gathering the data needed and entering and reviewing the information on the completed complaint form. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: HHS/OS Reports Clearance Officer, Office of Information Resources Management, 200 Independence Ave. S.W., Room 531H, Washington, D.C. 20201. **Please do not mail complaint form to this address.**

HHS-700 11/15) (BACK)

COMPLAINANT CONSENT FORM

The Department of Health and Human Services' (HHS) Office for Civil Rights (OCR) has the authority to collect and receive material and information about you, including personnel and medical records, which are relevant to its investigation of your complaint.

To investigate your complaint, OCR may need to reveal your identity or identifying information about you to persons at the entity or agency under investigation or to other persons, agencies, or entities.

The Privacy Act of 1974 protects certain federal records that contain personally identifiable information about you and, with your consent, allows OCR to use your name or other personal information, if necessary, to investigate your complaint.

Consent is voluntary, and it is not always needed in order to investigate your complaint; however, failure to give consent is likely to impede the investigation of your complaint and may result in the closure of your case.

Additionally, OCR may disclose information, including medical records and other personal information, which it has gathered during the course of its investigation in order to comply with a request under the Freedom of Information Act (FOIA) and may refer your complaint to another appropriate agency.

Under FOIA, OCR may be required to release information regarding the investigation of your complaint; however, we will make every effort, as permitted by law, to protect information that identifies individuals or that, if released, could constitute a clearly unwarranted invasion of personal privacy.

Please read and review the documents entitled, *Notice to Complainants and Other Individuals Asked to Supply Information to the Office for Civil Rights* and *Protecting Personal Information in Complaint Investigations* for further information regarding how OCR may obtain, use, and disclose your information while investigating your complaint.

In order to expedite the investigation of your complaint if it is accepted by OCR, please read, sign, and return one copy of this consent form to OCR with your complaint. Please make one copy for your records.

- As a complainant, I understand that in the course of the investigation of my complaint it may become necessary for OCR to reveal my identity or identifying information about me to persons at the entity or agency under investigation or to other persons, agencies, or entities.

- I am also aware of the obligations of OCR to honor requests under the Freedom of Information Act (FOIA). I understand that it may be necessary for OCR to disclose information, including personally identifying information, which it has gathered as part of its investigation of my complaint.
- In addition, I understand that as a complainant I am covered by the Department of Health and Human Services' (HHS) regulations which protect any individual from being intimidated, threatened, coerced, retaliated against, or discriminated against because he/she has made a complaint, testified, assisted, or participated in any manner in any mediation, investigation, hearing, proceeding, or other part of HHS' investigation, conciliation, or enforcement process.

After reading the above information, please check ONLY ONE of the following boxes:

☒ **CONSENT**: I have read, understand, and agree to the above and give permission to OCR to reveal my identity or identifying information about me in my case file to persons at the entity or agency under investigation or to other relevant persons, agencies, or entities during any part of HHS' investigation, conciliation, or enforcement process.

☐ **CONSENT DENIED**: I have read and I understand the above and do not give permission to OCR to reveal my identity or identifying information about me. I understand that this denial of consent is likely to impede the investigation of my complaint and may result in closure of the investigation.

Signature: _____ Date: 1-4-2018

**Please sign and date this complaint. You do not need to sign if submitting this form by email because submission by email represents your signature.*

Name (Please print): [redacted] Attorney, Thomas More Society

Address: 19 South LaSalle Street, Suite 603, Chicago, IL 60603

Telephone Number: [redacted]

NOTICE TO COMPLAINANTS AND OTHER INDIVIDUALS ASKED TO SUPPLY INFORMATION TO THE OFFICE FOR CIVIL RIGHTS

Privacy Act

The Privacy Act of 1974 (5 U.S.C. §552a) requires OCR to notify individuals whom it asks to supply information that:

— OCR is authorized to solicit information under:
(i) Federal laws barring discrimination by recipients of Federal financial assistance on grounds of race, color, national origin, disability, age, sex, religion under programs and activities receiving Federal financial assistance from the U.S. Department of Health and Human Services (HHS), including, but not limited to, Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), the Age Discrimination Act of 1975 (42 U.S.C. §6101 et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. §1681 et seq.), and Sections 794 and 855 of the Public Health Service Act (42 U.S.C. §§295m and 296g);
(ii) Titles VI and XVI of the Public Health Service Act (42 U.S.C. §§291 et seq. and 300s et seq.) and 42 C.F.R. Part 124, Subpart G (Community Service obligations of Hill-Burton facilities);
(iii) 45 C.F.R. Part 85, as it implements Section 504 of the Rehabilitation Act in programs conducted by HHS; and
(iv) Title II of the Americans with Disabilities Act (42 U.S.C. §12131 et seq.) and Department of Justice regulations at 28 C.F.R. Part 35, which give HHS "designated agency" authority to investigate and resolve disability discrimination complaints against certain public entities, defined as health and service agencies of state and local governments, regardless of whether they receive federal financial assistance.
(v) The Standards for the Privacy of Individually Identifiable Health Information (The Privacy Rule) at 45 C.F.R. Part 160 and Subparts A and E of Part 164, which enforce the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 U.S.C. §1320d-2).

OCR will request information for the purpose of determining and securing compliance with the Federal laws listed above. Disclosure of this requested information to OCR by individuals who are not recipients of federal financial assistance is voluntary; however, even individuals who voluntarily disclose information are subject to prosecution and penalties under 18 U.S.C. § 1001 for making false statements.

Additionally, although disclosure is voluntary for individuals who are not recipients of federal financial assistance, failure to provide OCR with requested information may preclude OCR from making a compliance determination or enforcing the laws above.

OCR has the authority to disclose personal information collected during an investigation without the individual's consent for the following routine uses:

(i) to make disclosures to OCR contractors who are required to maintain Privacy Act safeguards with respect to such records;
(ii) for disclosure to a congressional office from the record of an individual in response to an inquiry made at the request of the individual;
(iii) to make disclosures to the Department of Justice to permit effective defense of litigation; and
(iv) to make disclosures to the appropriate agency in the event that records maintained by OCR to carry out its functions indicate a violation or potential violation of law.

Under 5 U.S.C. §552a(k)(2) and the HHS Privacy Act regulations at 45 C.F.R. §5b.11 OCR complaint records have been exempted as investigatory material compiled for law enforcement purposes from certain Privacy Act access, amendment, correction and notification requirements.

Freedom of Information Act

A complainant, the recipient or any member of the public may request release of OCR records under the Freedom of Information Act (5 U.S.C. §552) (FOIA) and HHS regulations at 45 C.F.R. Part 5.

Fraud and False Statements

Federal law, at 18 U.S.C. §1001, authorizes prosecution and penalties of fine or imprisonment for conviction of "whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry".

PROTECTING PERSONAL INFORMATION IN COMPLAINT INVESTIGATIONS

To investigate your complaint, the Department of Health and Human Services' (HHS) Office for Civil Rights (OCR) will collect information from different sources. Depending on the type of complaint, we may need to get copies of your medical records, or other information that is personal to you. This Fact Sheet explains how OCR protects your personal information that is part of your case file.

HOW DOES OCR PROTECT MY PERSONAL INFORMATION?

OCR is required by law to protect your personal information. The Privacy Act of 1974 protects Federal records about an individual containing personally identifiable information, including, but not limited to, the individual's medical history, education, financial transactions, and criminal or employment history that contains an individual's name or other identifying information.

Because of the Privacy Act, OCR will use your name or other personal information with a signed consent and only when it is necessary to complete the investigation of your complaint or to enforce civil rights laws or when it is otherwise permitted by law.

Consent is voluntary, and it is not always needed in order to investigate your complaint; however, failure to give consent is likely to impede the investigation of your complaint and may result in the closure of your case.

CAN I SEE MY OCR FILE?

Under the Freedom of Information Act (FOIA), you can request a copy of your case file once your case has been closed; however, OCR can withhold information from you in order to protect the identities of witnesses and other sources of information.

CAN OCR GIVE MY FILE TO ANY ONE ELSE?

If a complaint indicates a violation or a potential violation of law, OCR can refer the complaint to another appropriate agency without your permission.

If you file a complaint with OCR, and we decide we cannot help you, we may refer your complaint to another agency such as the Department of Justice.

CAN ANYONE ELSE SEE THE INFORMATION IN MY FILE?

Access to OCR's files and records is controlled by the Freedom of Information Act (FOIA). Under FOIA, OCR may be required to release information about this case upon public request. In the event that OCR receives such a request, we will make every effort,

as permitted by law, to protect information that identifies individuals, or that, if released, could constitute a clearly unwarranted invasion of personal privacy.

If OCR receives protected health information about you in connection with a HIPAA Privacy Rule investigation or compliance review, we will only share this information with individuals outside of HHS if necessary for our compliance efforts or if we are required to do so by another law.

DOES IT COST ANYTHING FOR ME (OR SOMEONE ELSE) TO OBTAIN A COPY OF MY FILE?

In most cases, the first two hours spent searching for document(s) you request under the Freedom of Information Act and the first 100 pages are free. Additional search time or copying time may result in a cost for which you will be responsible. If you wish to limit the search time and number of pages to a maximum of two hours and 100 pages; please specify this in your request. You may also set a specific cost limit, for example, cost not to exceed $100.00.

If you have any questions about this complaint and consent package,
Please contact OCR at http://www.hhs.gov/ocr/office/about/contactus/index.html

OR

Contact the Customer Response Center at (800) 368-1019
(see contact information on page 2 of the Complaint Form)

THOMAS MORE SOCIETY
A National Public Interest Law Firm

January 4, 2018

Via US Mail & email: ocrmail@hhs.gov

U.S. Department of Health and Human Services
Office of Civil Rights
Centralized Case Management Operations
200 Independence Ave., S.W.
Suite 515F, HHH Building
Washington, D.C. 20201

Re: Violations of Federal Law arising from Illinois Public Act 99-690.

Dear members of the Office of Civil Rights for the Department:

We write on behalf of our clients, [redacted] and Hope Life Center, to request that the Office of Civil Rights investigate what we believe to be ongoing, serious violations of federal law by the State of Illinois. The basis for our request is Illinois' enactment and enforcement of Illinois Public Act 99-690, which became effective January 1, 2017, and which amends the 1977 Illinois Health Care Right of Conscience Act, 745 ILCS 70/1, *et seq.*, in ways that gut its protection of state and federal conscience rights. (P.A. 99-690 is attached as **Exhibit 1**.) As explained below, we believe that P.A. 99-690 violates existing federal laws that have been enacted to protect the conscience rights of healthcare providers. We respectfully request your office to investigate this claim and to take appropriate action to prevent the State's application of P.A. 99-690 to our clients, and similarly situated health care providers in Illinois, who cannot comply with the amendment because of their sincerely held religious beliefs.

The complainant, [redacted], is a physician licensed to practice in Illinois. He serves, pro bono, as a medical director of Hope Life Center, a pregnancy resource center providing limited medical services (pregnancy testing, ultrasounds, and STD tests) to women facing unplanned pregnancies. Although abortion, sterilization, and abortifacient contraception are "legal treatment options" for these women under P.A. 99-690, [redacted] cannot, in conscience, perform or promote these procedures, or refer women to, or provide identifying information about, providers of these procedures. Yet, P.A. 99-690 now requires him, and the officers, employees, and volunteers who work at Hope Life Center, to perform these very actions.

[redacted] and Hope Life Center thus face an unacceptable dilemma under the new Illinois law. P.A. 99-690 requires them to discuss so-called "benefits" of the very abortion and sterilization procedures they, as a matter of conscience, vigorously oppose. See P.A. 99-690 at Sec. 6 and Sec. 6.1(1). And it requires them, if asked, to refer for, or provide information about, providers of the very abortion services they abhor. See P.A. 99-690 at Sec.

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"Injustice anywhere is a threat to justice everywhere." – Rev. Dr. Martin Luther King

6.1(3)(ii)&(iii). Failure to comply with the amendment subjects them to loss of conscience protection under the Health Care Right of Conscience Act, the possibility of professional discipline, liability for penalties and damages (including attorneys fees), and discrimination in funding and licensing under Illinois law. See 745 ILCS §70/6.1 (stripping protection of IHRCA from those who do not comply with its conditions); see also, 745 ILCS §70/4 & §§70/9—70/11.4 (forms of protection stripped away by Section 6.1); see also, 745 ILCS §70/10 (private cause of action for violations of statute, including statutory minimum damage award and liability for attorney's fees and costs).

We believe that Illinois is using this amendment (P.A. 99-690) to target and discriminate against healthcare providers in violation of federal law. First, the Hyde-Weldon Amendment, 114 P.L. 116, Title V, §507(d), as incorporated in 114 P.L. 223, Title III, Division C, Section 101(a)(8), prohibits any state or local government receiving federal HHS funds from discriminating against any health care entity based on its refusal to "provide, pay for, provide coverage of, or refer for" abortions. Second, Coates-Snow, 42 U.S.C. §238n, prohibits a state or local government that receives federal financial assistance from discriminating against a healthcare entity because it refuses to "perform" induced abortions, "provide referrals for" abortions, or "make arrangements for" abortions. Third, the Church Amendment, 42 U.S.C. §300a-7 prohibits an entity receiving federal funds under a wide range of federal legislation from discriminating against physicians or healthcare personnel because they refuse "to perform or assist in the performance of any sterilization procedure or abortion. . . contrary to [the person's] religious beliefs or moral convictions." The State of Illinois and its political subdivisions are subject to these federal laws by virtue of federal funding of many social welfare programs including Medicare, Medicaid, Child's Health Insurance Program, Head Start, Supplemental Nutrition Assistance Program, and Temporary Assistance for Needy Families. Yet P.A. 99-690 purports to nullify the protection Illinois physicians and health care providers enjoy under these federal laws.

P.A. 99-690 violates federal law in its purpose, practical operation, and effects. Section 6.1(1) compels physicians and other healthcare providers to inform patients about supposed "benefits" of abortions, abortifacient drugs, or sterilization, as legal treatment options. Provision of medical advice within the professional competence of a medical provider is an integral part of medical practice. Yet P.A. 99-690's discussion requirement coerces physicians and other healthcare providers, against their consciences, to assist in the promotion and provision of abortion or sterilization. This result, we believe, is directly contrary to the federal laws cited. In addition, Section 6.1(3)(ii)&(iii) of P.A. 99-690 requires medical professionals, upon request, to refer for abortion or sterilization, or in the alternative, to supply patients with a list of abortion and/or sterilization providers. In this way, P.A. 99-690 coerces physicians and other healthcare providers to promote and participate in abortion and sterilization, contrary to the cited federal laws.

A review of the publicly available committee proceedings and floor debates of the Illinois General Assembly shows that the clear intent of this law was to force medical professionals and their medical facilities to cooperate with abortion in ways that violate the deeply held religious

and moral beliefs of those professionals and facilities. The Illinois General Assembly knew well the risks of enacting P.A. 99-690, as even the fiscal note entered on the bill by the Illinois Department of Healthcare & Family Services recognized that:

> It is unclear if the passage of SB 1564 would jeopardize federal funding for the Illinois Medical Assistance Program. The Church Amendment codified at 42 U.S.C. § 300a-7, stipulates that for healthcare services funded in whole or in part by a program administered by the U.S. Department of Health and Human Services (HHS), no person may be required to 'perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions.' *The requirement in SB 1564 that the provider refer individuals to other providers who perform the procedure, especially if abortion or sterilization, violates the Church amendment*; such referral could be interpreted as assistance with a morally objectionable procedure.

(emphasis added). See Bill Status of P.A. 99-690, at http://www.ilga.gov/legislation/billstatus.asp?DocNum=1564&GAID=13&GA=99&DocTypeID=SB&LegID=88256&SessionID=88&SpecSess= (accessed on December 19, 2017).

P.A. 99-690 also violates our clients' First Amendment rights to free speech and the free exercise of religion. The law is content-based, compelling speech, and viewpoint discriminatory, targeting only conscientious objectors. It is not religiously neutral because on its face it blatantly discriminates against the religious beliefs and practices of pro life physicians and health providers. The unconstitutionality of P.A. 99-690 was recognized earlier this year when its application against conscientious objectors was preliminarily enjoined on First Amendment grounds. See *NIFLA, et al., v. Rauner, et al.*, 16 C 51030, (N.D. Ill., July 19, 2017, Hon. Frederick J. Kapala, attached as **Exhibit 2**. The decision did not, however, find that the Plaintiffs had a private right of action under the Coates-Snowe Amendment, observing that "enforcement of § 238n is left up to the Department of Health and Human Services which may terminate funding in the event of non-compliance. See 45 C.F.R. § 88.2." *Id.* at p.4.

We are therefore requesting the Office of Civil Rights of the Department of Health and Human Services to investigate this complaint that alleges that P.A. 99-690 violates the federal laws cited, and to act to prohibit enforcement of P.A. 99-690 by the State of Illinois against our clients and all similarly situated health care providers in the State through all means at its disposal. We urge the Office to take prompt and effective action to prevent the State of Illinois from ever using P.A. 99-690 to punish physicians and healthcare providers who refrain, because of conscience, to counsel patients about so-called benefits of abortion or who refrain from assisting women desiring an abortion by referring them to (or providing information about) abortion providers.

We also respectfully request, for the benefit of physicians and healthcare providers throughout the nation, that your office issue interpretive guidelines making it clear that the cited federal

laws reach, and prohibit, any state law which, like P.A. 99-690, targets and punishes religious and conscience-based opposition to the practice of abortion. The cited federal laws were enacted precisely to protect conscience-based refusals to participate in abortion, and should be interpreted so as to be effective in prohibiting state laws like P.A. 99-690, which seek to force conscience objectors to participate in and promote abortion against their will. Without this office's interpretive guidance some states will continue to interpret these laws in ways contrary to their manifest purpose, and will continue to enact laws punishing conscience-based refusals to participate in abortion, as did Illinois through enactment of P.A. 99-690. Such state actions flouting the federal laws cited should not be countenanced. This office's regulatory guidance would facilitate that desired outcome.

Thank you for considering this complaint. Contact the undersigned in the event additional information is needed to bring your investigation to conclusion.

Respectfully,

Counsel, Thomas More Society
19 South LaSalle Street, Suite 603
Chicago, IL 60603
tolp@thomasmoresociety.org

Enclosures:
Exhibit 1 - Text of P.A.99-690
Exhibit 2 - Hon. Frederick J. Kapala's decision in *NIFLA, et al., v. Rauner*

EXHIBIT ONE

AN ACT concerning civil law.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Health Care Right of Conscience Act is amended by changing Sections 2, 3, 6, and 9 and by adding Sections 6.1 and 6.2 as follows:

(745 ILCS 70/2) (from Ch. 111 1/2, par. 5302)

Sec. 2. Findings and policy. The General Assembly finds and declares that people and organizations hold different beliefs about whether certain health care services are morally acceptable. It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in <u>providing, paying for, or</u> refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care. <u>It is also the public policy of the State of</u>

Illinois to ensure that patients receive timely access to information and medically appropriate care.

(Source: P.A. 90-246, eff. 1-1-98.)

(745 ILCS 70/3) (from Ch. 111 1/2, par. 5303)

Sec. 3. Definitions. As used in this Act, unless the context clearly otherwise requires:

(a) "Health care" means any phase of patient care, including but not limited to, testing; diagnosis; prognosis; ancillary research; instructions; family planning, counselling, referrals, or any other advice in connection with the use or procurement of contraceptives and sterilization or abortion procedures; medication; or surgery or other care or treatment rendered by a physician or physicians, nurses, paraprofessionals or health care facility, intended for the physical, emotional, and mental well-being of persons;

(b) "Physician" means any person who is licensed by the State of Illinois under the Medical Practice Act of 1987;

(c) "Health care personnel" means any nurse, nurses' aide, medical school student, professional, paraprofessional or any other person who furnishes, or assists in the furnishing of, health care services;

(d) "Health care facility" means any public or private hospital, clinic, center, medical school, medical training institution, laboratory or diagnostic facility, physician's office, infirmary, dispensary, ambulatory surgical treatment

center or other institution or location wherein health care services are provided to any person, including physician organizations and associations, networks, joint ventures, and all other combinations of those organizations;

(e) "Conscience" means a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths; ~~and~~

(f) "Health care payer" means a health maintenance organization, insurance company, management services organization, or any other entity that pays for or arranges for the payment of any health care or medical care service, procedure, or product; and ~~.~~

(g) "Undue delay" means unreasonable delay that causes impairment of the patient's health.

The above definitions include not only the traditional combinations and forms of these persons and organizations but also all new and emerging forms and combinations of these persons and organizations.

(Source: P.A. 90-246, eff. 1-1-98.)

(745 ILCS 70/6) (from Ch. 111 1/2, par. 5306)

Sec. 6. Duty of physicians and other health care personnel. Nothing in this Act shall relieve a physician from any duty, which may exist under any laws concerning current standards~~,~~ of

~~normal~~ medical practice or care ~~practices and procedures~~, to inform his or her patient of the patient's condition, prognosis, legal treatment options, and risks and benefits of treatment options, provided, however, that such physician shall be under no duty to perform, assist, counsel, suggest, recommend, refer or participate in any way in any form of medical practice or health care service that is contrary to his or her conscience.

Nothing in this Act shall be construed so as to relieve a physician or other health care personnel from obligations under the law of providing emergency medical care.

(Source: P.A. 90-246, eff. 1-1-98.)

(745 ILCS 70/6.1 new)

Sec. 6.1. Access to care and information protocols. All health care facilities shall adopt written access to care and information protocols that are designed to ensure that conscience-based objections do not cause impairment of patients' health and that explain how conscience-based objections will be addressed in a timely manner to facilitate patient health care services. The protections of Sections 4, 5, 7, 8, 9, 10, and 11 of this Act only apply if conscience-based refusals occur in accordance with these protocols. These protocols must, at a minimum, address the following:

(1) The health care facility, physician, or health care personnel shall inform a patient of the patient's

condition, prognosis, legal treatment options, and risks and benefits of the treatment options in a timely manner, consistent with current standards of medical practice or care.

(2) When a health care facility, physician, or health care personnel is unable to permit, perform, or participate in a health care service that is a diagnostic or treatment option requested by a patient because the health care service is contrary to the conscience of the health care facility, physician, or health care personnel, then the patient shall either be provided the requested health care service by others in the facility or be notified that the health care will not be provided and be referred, transferred, or given information in accordance with paragraph (3).

(3) If requested by the patient or the legal representative of the patient, the health care facility, physician, or health care personnel shall: (i) refer the patient to, or (ii) transfer the patient to, or (iii) provide in writing information to the patient about other health care providers who they reasonably believe may offer the health care service the health care facility, physician, or health personnel refuses to permit, perform, or participate in because of a conscience-based objection.

(4) If requested by the patient or the legal representative of the patient, the health care facility,

physician, or health care personnel shall provide copies of medical records to the patient or to another health care professional or health care facility designated by the patient in accordance with Illinois law, without undue delay.

(745 ILCS 70/6.2 new)

Sec. 6.2. Permissible acts related to access to care and information protocols. Nothing in this Act shall be construed to prevent a health care facility from requiring that physicians or health care personnel working in the facility comply with access to care and information protocols that comply with the provisions of this Act.

(745 ILCS 70/9) (from Ch. 111 1/2, par. 5309)

Sec. 9. Liability. No person, association, or corporation, which owns, operates, supervises, or manages a health care facility shall be civilly or criminally liable to any person, estate, or public or private entity by reason of refusal of the health care facility to permit or provide any particular form of health care service which violates the facility's conscience as documented in its ethical guidelines, mission statement, constitution, bylaws, articles of incorporation, regulations, or other governing documents.

Nothing in this Act ~~act~~ shall be construed so as to relieve a physician, ~~or other~~ health care personnel, or a health care

facility from obligations under the law of providing emergency medical care.

(Source: P.A. 90-246, eff. 1-1-98.)

EXHIBIT TWO

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

National Institute of Family and Life Advocates, et al.,	)	
Plaintiffs,	)	
v.	)	Case No: 16 C 50310
Governor Bruce Rauner, et al.,	)	
Defendants.	)	Judge Frederick J. Kapala

ORDER

Defendants' motion to dismiss plaintiffs' complaint [15] is granted in part and denied in part. Counts II, IV, and V are dismissed in their entirety and those portions of Counts I, III, and V that are based upon the Illinois Constitution are dismissed. All claims against Governor Rauner are dismissed and he is terminated as a defendant in this case. The motion to dismiss is denied in all other respects. Plaintiffs' motion for preliminary injunction [35] is granted.

STATEMENT

Plaintiffs, the National Institute of Family and Life Advocates, four non-profit pro-life pregnancy centers, and Dr. Tina Gingrich, M.D., have filed a Verified Complaint for Injunctive and Declaratory Relief against Illinois Governor Bruce Rauner and Secretary of the Illinois Department of Financial & Professional Regulation Bryan A. Schneider challenging the constitutionality of an amendment to the Illinois Healthcare Right of Conscience Act ("HCRCA"), 745 ILCS 70/1 et seq. This court has jurisdiction under 28 U.S.C. § 1331. Before the court are defendants' motion to dismiss plaintiffs' complaint and plaintiffs' motion for a preliminary injunction. For the reasons that follow, the motion to dismiss is granted in part and denied in part and the motion for a preliminary injunction is granted.

I. BACKGROUND

In the wake of Roe v. Wade, 410 U.S. 113 (1973), Illinois and other states enacted laws protecting physicians, hospitals, and others from civil liability arising from the refusal to recommend, perform, or assist in the performance of an abortion. See 745 ILCS 30/1. The HCRCA was enacted in 1977 "to respect and protect the right of conscience of all persons who refuse to . . . act contrary to their conscience or conscientious convictions in providing . . . health care services and medical care." 745 ILCS 70/2. Consistent with this goal, the HCRCA provides that "[n]o physician or health care personnel shall be civilly or criminally liable . . . by reason of his or her refusal to perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care service which is contrary to the conscience of such physician or health

care personnel." Id. § 70/4. The HCRCA also makes it unlawful for public officials to discriminate against any person, in any manner, in licensing "because of such person's conscientious refusal to receive, obtain, accept, perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care services contrary to his or her conscience." Id. § 70/5. "Conscience" is defined as "a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths." Id. § 70/3(e).

Forty years later, the Illinois General Assembly passed Public Act 99-690, signed into law on July 29, 2016 and effective January 1, 2017, also known as SB 1564 ("the amended act"), which now requires physicians and other health care personnel seeking protection under the HCRCA to adopt and follow certain protocols:

> § 6.1. Access to care and information protocols. All health care facilities shall adopt written access to care and information protocols that are designed to ensure that conscience-based objections do not cause impairment of patients' health and that explain how conscience-based objections will be addressed in a timely manner to facilitate patient health care services. The protections of Sections 4, 5, 7, 8, 9, 10, and 11 of this Act only apply if conscience-based refusals occur in accordance with these protocols. These protocols must, at a minimum, address the following:
>
> (1) The health care facility, physician, or health care personnel shall inform a patient of the patient's condition, prognosis, legal treatment options, and risks and benefits of the treatment options in a timely manner, consistent with current standards of medical practice or care.
>
> (2) When a health care facility, physician, or health care personnel is unable to permit, perform, or participate in a health care service that is a diagnostic or treatment option requested by a patient because the health care service is contrary to the conscience of the health care facility, physician, or health care personnel, then the patient shall either be provided the requested health care service by others in the facility or be notified that the health care will not be provided and be referred, transferred, or given information in accordance with paragraph (3).
>
> (3) If requested by the patient or the legal representative of the patient, the health care facility, physician, or health care personnel shall: (i) refer the patient to, or (ii) transfer the patient to, or (iii) provide in writing information to the patient about other health care providers who they reasonably believe may offer the health care service the health care facility, physician, or health personnel refuses to permit, perform, or participate in because of a conscience-based objection.
>
> (4) If requested by the patient or the legal representative of the patient, the health care facility, physician, or health care personnel shall provide copies of medical records to the patient or to another health care professional or health care facility designated by the patient in accordance with Illinois law, without undue delay.

Id. § 70/6.1. The amended act also includes an affirmative duty that physicians and other health care personnel inform his or her patient of the patient's "legal treatment options, and risks and benefits of treatment options." Id. § 70/6.

Plaintiffs are health care facilities and health professionals who offer medical services to support women in giving birth and discourage them from seeking abortion. Plaintiffs explain that they treat every unborn child as a human being with inalienable dignity and as a patient along with the child's mother. Consequently, their religious and pro-life beliefs prohibit them from providing women with the names of other health care providers who may perform abortions because that would implicate them in destroying a human life and violate one of the leading principles of the Hippocratic Oath, that doctors do no harm to those under their care. Based on these ethical and religious beliefs, plaintiffs do not consider abortion to have medical "benefits," and do not consider abortion a "treatment option." Plaintiffs maintain that the amended act compels them to tell pregnant women the names of other doctors they believe offer abortions, and compels them to tell pregnant women that abortion has "benefits" and is a "treatment option" for pregnancy. Plaintiffs have religious and moral objections to speaking about abortion in these ways.

In their verified complaint for declaratory and injunctive relief, plaintiffs challenge the amended act in five counts. In particular, plaintiffs allege that it violates the Free Speech Clause of the First Amendment to the U.S. Constitution and Article I, § 4 of the Illinois Constitution (Count I); the Illinois Religious Freedom Restoration Act, 775 ILCS 35/1 et seq. (Count II); the free exercise of religion clause of the First Amendment to the U.S. Constitution and Article I, § 3 of the Illinois Constitution (Count III); the Coats-Snowe Amendment, 42 U.S.C. § 238n (Count IV); and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Article I, § 2 of the Illinois Constitution (Count V).

II. MOTION TO DISMISS

Initially, defendants contend that plaintiffs' state-law claims are barred under the sovereign immunity afforded by the Eleventh Amendment. In response, plaintiffs have agreed to withdraw their state-law claims. Accordingly, Count II, advancing a claim under the Illinois Religious Freedom Restoration Act, as well as those portions of Counts I, III, and V based upon the Illinois Constitution are dismissed.

Next, defendants argue that plaintiffs' First Amendment free speech and free exercise claims in Counts I and III fail to state a claim upon which relief can be granted. Although defendants have cited the applicable Twombly/Iqbal plausibility standard in their memorandum of law filed in support of their motion to dismiss plaintiffs' complaint, they have not incorporated that standard into their arguments seeking dismissal of the First Amendment claims in Counts I and III. Instead, defendants contend, for example, that intermediate scrutiny should be applied, not strict scrutiny, but that the amended act survives either; and that the amended act imposes no substantial burden on plaintiffs' exercise of religion. These are substantive arguments more appropriately made in opposing plaintiffs' request for a preliminary injunction or for a permanent injunction, not arguments that plaintiffs' complaint is somehow insufficiently pleaded. Thus, defendants have advanced an insufficient basis to dismiss Counts I and III. In any event, in light of this court's finding below that plaintiffs have made a substantial showing of a likelihood of success on the merits of their claim

under the Free Speech Clause of the First Amendment, defendants' motion to dismiss Counts I and III is denied.

Next, defendants argue that plaintiffs' Coates-Snowe Amendment claim in Count IV fails because: (1) § 238n prohibits discrimination against any "health care entity" which "includes an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions," 42 U.S.C. § 238n(c)(2), and therefore the only plaintiff afforded protection is Dr. Gingrich; (2) there is no private right of action under § 238n; and (3) even if there were such an action, plaintiffs have failed to state a claim under § 238n. The relevant part of the Coates-Snowe Amendment prohibits health care entities that receive federal financial assistance from discriminating on the basis that the entity refuses to perform or provide training in the performance of abortion or to refer for abortion or such training. Id. § 238n(a). However, because the court agrees that the Coates-Snowe Amendment does not confer a private right of action for such discrimination, it need not reach defendants' other arguments. Section 238n does not contain an express private right of action and a strong presumption exists against creation of an implied right of action. See Endsley v. City of Chi., 230 F.3d 276, 281 (7th Cir. 2000). Instead, enforcement of § 238n is left up to the Department of Health and Human Services which may terminate funding in the event of non-compliance. See 45 C.F.R. § 88.2. Plaintiffs do not cite any legislative history to suggest a private right of action was intended nor do they cite any decision where such an action has been recognized. Therefore, this court, "will not imply a private right of action where none appears in the statute," Endsley, 230 F.3d at 281, and Count IV is dismissed.

Next, defendants argue that plaintiffs' equal protection claim under the Fourteenth Amendment fails because they have not pleaded dissimilar treatment of similarly situated classes. Defendants also argue that Count V should be dismissed because plaintiffs' equal protection claim adds nothing to their First Amendment free exercise claim. Irrespective of whether plaintiff's have identified similarly situated groups that are treated dissimilarly under the amended act, they have pleaded that such differential treatment impairs their fundamental right of freedom of religion. Plaintiffs do maintain that they have stated an Equal Protection claim by pleading dissimilar treatment of similarly situated classes, but they do not dispute the contention that their equal protection claim adds nothing to their First Amendment claims. Consequently, the court agrees that plaintiffs' Fourteenth Amendment Equal Protection claim in Count V is unnecessary and redundant in light of the more specific First Amendment free exercise claim in Count III. See Goodman v. Carter, No. 2000 C 948, 2001 WL 755137, at *7 (N.D. Ill. July 2, 2001) (finding a separate equal protection analysis unnecessary because "the protection afforded religious practice by the Equal Protection Clause is no greater than that granted by the First Amendment"). Accordingly, Count V is dismissed.

Finally, defendants argue that plaintiffs' claims against Governor Rauner should be dismissed because he is not a proper defendant in a case challenging the constitutionality of a state statute. In support of this argument, defendants cite Johnson v. Rauner, No. 15 C 131, 2016 WL 3917372, at *3 (N.D. Ill. July 20, 2016) (dismissing Governor Rauner as defendant in an action challenging the Sex Offender Registration Act on constitutional grounds); Illinois League of Advocates for the Developmentally Disabled v. Quinn, No. 13 C 1300, 2013 WL 5548929, at *4 (N.D. Ill. Oct. 8, 2013) (citing Ex Parte Young, 209 U.S. 123, 157 (1908), in concluding that Governor Quinn was

not a proper defendant because the proper defendant has some connection with the enforcement of the challenged law and the governor's general obligations to enforce the law are insufficient); Weinstein v. Edgar, 826 F. Supp. 1165, 1166 (N.D. Ill. 1993) ("Implicit in the right to sue state officials for prospective injunctive relief, however, is the requirement that the state official bear some connection with the enforcement of the challenged statute."). In response, plaintiffs do not take issue with these authorities or maintain that they are somehow inapplicable or distinguishable. Instead, plaintiffs simply argue that the injunction issued in Morr-Fitz, Inc. v. Quinn, 2012 IL App (4th) 110398, ¶ 84, enjoined "all defendants" which included Governor Pat Quinn. The problem with plaintiffs' argument is that there is no indication that Governor Quinn ever moved to dismiss the claims brought against him in Morr-Fritz. Accordingly, the claims against Governor Rauner are dismissed and he is terminated as a defendant in this case.

III. MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs move, based on their claim under the Free Speech Clause of the First Amendment, for a preliminary injunction enjoining defendants from enforcing the amended act to the extent that enforcement would penalize health facilities or professionals who object to furnishing information about other health care providers who offer abortion or who object to describing abortion as a beneficial treatment option.[1] Defendants' oppose the motion. When bringing a motion for a preliminary injunction, plaintiffs must demonstrate: (1) that they are likely to succeed on the merits of their claim; (2) that they are likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). "The purpose of [a preliminary injunction] is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." Trump v. Int'l Refugee Assistance Project, 582 U.S. ____, No. 16-1436, 2017 WL 2722580, at *5 (U.S. June 26, 2017). The Seventh Circuit has recently explained that in First Amendment cases such as this the likelihood of success on the merits is the lynchpin factor:

> [I]n First Amendment cases, the likelihood of success on the merits will often be the determinative factor. That is because even short deprivations of First Amendment rights constitute irreparable harm, and the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional. So the analysis begins and ends with the likelihood of success on the merits of the [First Amendment] claim.

Higher Soc'y of Ind. v. Tippecanoe Cty., Ind., 858 F.3d 1113, 1116 (7th Cir. 2017) (citations omitted). "[T]he threshold for demonstrating a likelihood of success on the merits is low." D.U. v. Rhoades, 825 F.3d 331, 338 (7th Cir. 2016). "[P]laintiff's chances of prevailing need only be better

[1] Plaintiffs also move for a preliminary injunction based on their claim under the First Amendment Free Exercise Clause. However, because the court grants plaintiffs a preliminary injunction based on their First Amendment Free Speech claim and has enjoined enforcement of the amended act against them, the court need not address plaintiffs' free exercise claim. The parties will have a full and fair opportunity to litigate that claim as this case moves forward.

than negligible." Id. The court will therefore address the likelihood of plaintiffs' success on the merits of their First Amendment Free Speech claim.

The First Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, prohibits states from enacting laws "abridging the freedom of speech." U.S. Const. amend. I. The Free Speech Clause of the First Amendment provides protection from both government suppressed speech and government compelled speech. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., ___ U.S. ___, 133 S. Ct. 2321, 2327 (2013) ("It is . . . a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say."); Knox v. Serv. Employees Int'l Union, Local 1000, 567 U.S. 298, 309 (2012) ("The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves."). Thus, the First Amendment prohibits not only direct burdens on speech, but also indirect burdens that are created when the government conditions receipt of a benefit on compelling or foregoing constitutionally-protected speech. See Perry v. Sindermann, 408 U.S. 593, 597 (1972). This principle, known as the unconstitutional conditions doctrine, acknowledges that the government, having no obligation to furnish a benefit, nevertheless cannot force a citizen to choose between a benefit and free speech. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 59-60 (2006); Perry, 408 U.S. at 597.

The parties dispute the proper level of scrutiny that should be applied to the amended act. Defendants contend that intermediate scrutiny applies to legislation like the amended act which regulates professional speech. Plaintiffs, on the other hand, contend that the amended act is subject to strict scrutiny because it is a content- and viewpoint-based regulation.

In support of their position, defendants argue that federal courts have generally applied intermediate scrutiny to regulations aimed at medical professionals. For example, defendants cite National Institute of Family and Life Advocates v. Harris, wherein the Ninth Circuit applied intermediate scrutiny to a California law requiring all pregnancy-related clinics to disseminate a notice stating the existence of publicly-funded family-planning services, including contraception and abortion. 839 F.3d 823, 828 (9th Cir. 2016). The Ninth Circuit only did so, however, after concluding that the law, while content-based because it required speech on a particular matter, did not discriminate based on viewpoint because it "applies to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services." Id. at 835. Thus, neither Harris nor the other cases cited by defendants stand for the proposition that content-based laws that discriminate based on viewpoint are subject to intermediate scrutiny.

In any event, in this court's view, any dispute about the applicable level of scrutiny to be applied to the amended act is resolved by the Supreme Court's recent decision in Matal v. Tam, 582 U.S. ____, No. 15-1293, 2017 WL 2621315 (U.S. June 19, 2017). In Tam, the question of whether trademarks are commercial speech to which the relaxed scrutiny, i.e. intermediate scrutiny, applied was left unanswered in the opinion of the Court because the Court concluded that the regulation under review did not withstand even relaxed scrutiny. Id. at *18-19. Nevertheless, in concurring opinions, five justices agreed that even commercial speech that is viewpoint discriminatory is subject to heightened or strict scrutiny. Id. at *23 ("Commercial speech is no exception, the Court has explained, to the principle that the First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys.

Unlike content based discrimination, discrimination based on viewpoint, including a regulation that targets speech for its offensiveness, remains of serious concern in the commercial context." (citations omitted) (Kennedy, J. with Ginsburg, Sotomayor, and Kagan J.J.); id. at *25 ("I also write separately because I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as commercial.") (Thomas, J., concurring in part and concurring in judgment)). Thus, it is clear that the prevailing view of a majority of the Supreme Court is that content-based laws that discriminate based on point of view, even if for the purpose of regulating commercial or professional speech, are still subject to strict scrutiny.

In this case, there is a substantial likelihood that plaintiffs will be successful in demonstrating that the amended act is content-based because it "[m]andat[es] speech that a speaker would not otherwise make" which "necessarily alters the content of the speech." Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988). Defendants do not advance a discernible argument that the amended act is not content-based. The parties do dispute, however, whether the amended act is viewpoint discriminatory. A law discriminates based on viewpoint when it regulates speech "based on the specific motivating ideology or the opinion or perspective of the speaker [and] is a more blatant and egregious form of content discrimination." Reed v. Town of Gilbert, Ariz., 576 U.S. ___, 135 S. Ct. 2218, 2230 (2015).

Defendants maintain that the pre-existing ethical standards of informed consent governing the medical profession, which are incorporated into Illinois law, unambiguously require health care providers to disclose all relevant treatment options to their patients. Defendants argue that the HCRCA was amended to ensure that health care providers with conscience-based objections to certain treatments nevertheless provide their patients with certain information to make an informed decision regarding their health, and thus the amended act is not a viewpoint-based law.

However, the HCRCA was enacted to excuse health care providers from performing legal treatment options like abortion because they had conscience-based objections and the HCRCA provided them with protection from any resulting civil liability or professional discipline. 745 ILCS 70/4. The HCRCA also excused such health care providers from referring their patients to other providers who would perform the abortion and excused them from in any way assisting, counseling, suggesting, recommending, or participating in abortion as a legal treatment option. Id. The amended act fundamentally changes the HCRCA by conditioning its protection on a protocol requiring health care providers with conscience-based objections to abortion to now do some of the things the HCRCA formerly excused them from doing. In particular, the amended act now requires plaintiffs to inform their patients about abortion and counsel them on the risks and benefits of abortion. Id. § 70/6.1(1). In addition, if requested by the patient or her legal representative, those with conscience-based objections must now either refer their patient to a provider who will perform the abortion, transfer her to a provider who will perform the abortion, or provide her with the information about other providers who will perform the abortion. Id. § 70/6.1(3). It is clear that the amended act targets the free speech rights of people who have a specific viewpoint. Thus, plaintiffs have demonstrated a better than negligible chance of succeeding in showing that the amended act discriminates based on their viewpoint by compelling them to tell their patients that abortion is a legal treatment option, which has benefits, and, at a minimum and upon request, to give their patients

the identifying information of providers who will perform an abortion. Moreover, in conditioning the protections of the HCRCA on compelled speech, the amended act has potentially violated the unconstitutional conditions doctrine. See Rumsfeld, 547 U.S. at 59-60 (explaining that while the government has no obligation to furnish a benefit it cannot force a citizen to choose between a benefit and free speech); see also United States v. American Library Ass'n, Inc., 539 U.S. 194, 210 (2003).("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.").

A comparison to the regulation under review in Harris demonstrates the viewpoint discrimination present in the amended act. The law being challenged in Harris required that all licensed and unlicensed pregnancy-related clinics disseminate a notice stating the existence of publically-funded family-planning services, including contraception and abortion. Harris, 839 F.3d at 828-29. In concluding that the law did not discriminate based on the point of view or ideology of the compelled speaker, the court in Harris relied on the circumstance that the law applied to all pregnancy-related clinics "regardless of what, if any, objections they may have to certain family-planning services." Id. at 835. In contrast, the amended act under review in this case applies only to health care providers with conscience-based objections to certain legal treatment options such as abortion. Therefore, the court finds that plaintiffs have demonstrated a likelihood of showing that the amended act discriminates against health care providers that are of the point of view that abortion is wrong by compelling only them to speak a message that, from their viewpoint, is abhorrent.

Having found that plaintiffs have demonstrated a likelihood of success in showing that the amended act is content-based and viewpoint discriminatory, the amended act will be subject to strict scrutiny, that is, it must be the least restrictive means of achieving a compelling state interest. See McCullen v. Coakley, 573 U.S. ___, 134 S. Ct. 2518, 2530 (2014). Defendants contend that even if strict scrutiny applies, the amended act survives because it is the least restrictive means of protecting Illinois' compelling interest in protecting the health and autonomy of its citizens by ensuring that they receive information that they need to make informed medical decisions. Plaintiffs argue that defendants have not demonstrated a need for the compelled speech, let alone a compelling state interest in having those with conscience-based objections to make these statements to their patients. Defendants also argue that the requirements of the amended act, particularly the compelled discussion of abortion as a legal treatment option and providing the patient with information about other health care providers who they reasonably believe may offer abortion, are clearly not the least restrictive means to achieve this interest when this information is or could be provided through other means such as telephone directories and internet websites. At this stage of the litigation and on this record, suffice it to say that defendants have yet to satisfy their burden of proving that the compelled speech requirements of the amended act are the least restrictive means of achieving its interest. See St. John's United Church of Christ v. City of Chi., 502 F.3d 616, 646 (7th Cir. 2007) (noting that under strict scrutiny review, the government bears the burden of proving both elements). In contrast, plaintiffs have demonstrated a better than negligible chance of showing that Illinois has multiple options less restrictive than compelling those with conscience-based objections to abortion to communicate to a patient that abortion is a legal treatment option as well as the information she will need to obtain an abortion. Moreover, the special concern of overburdening speech is implicated when, as here, the compelled speech is on a matter of public debate:

> Regardless of whether less restrictive means exist, the Services Disclosure overly burdens Plaintiffs' speech. When evaluating compelled speech, we consider the context in which the speech is made. Here, the context is a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated by Local Law 17 provide alternatives. [E]xpression on public issues has always rested on the highest rung on the hierarchy of First Amendment values. Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. A requirement that pregnancy services centers address abortion, emergency contraception, or prenatal care at the beginning of their contact with potential clients alters the centers' political speech by mandating the manner in which the discussion of these issues begins.

Evergreen Ass'n, Inc. v. City of N.Y., 740 F.3d 233, 249 (2d Cir. 2014) (citations omitted).

The court finds further that even if the intermediate scrutiny applicable to laws regulating professional or commercial speech were applied in this case, see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of New York, 447 U.S. 557, 561-62 (1980), plaintiffs have demonstrated a better than negligible chance of showing that the amended act would still likely fail. Once again, at this stage of the litigation and on this record, defendants have not proven that the amended act is narrowly tailored to achieve a substantial government interest. See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71 n.20 (1983) ("The party seeking to uphold a restriction on commercial speech carries the burden of justifying it."). Plaintiffs have, on the other hand, demonstrated a better than negligible chance of showing that a law compelling the health care provider with conscience-based objections to abortion to serve as the source of information about the legal treatment option of abortion and to serve as a directory of health care providers performing abortions is not narrowly tailored to achieve a substantial government interest. For these reasons, plaintiffs have demonstrated a likelihood of success on their First Amendment Free Speech claim and a preliminary injunction will issue.[2]

IV. CONCLUSION

For these reasons, defendants' motion to dismiss is granted in part and denied in part. Plaintiff's motion for a preliminary injunction is granted. The Secretary of the Illinois Department of Financial & Professional Regulation is hereby enjoined pursuant to Federal Rule of Civil Procedure 65(a) from enforcing the amended act to the extent that enforcement would penalize health care facilities, health care personnel, or physicians who object to providing information about health care providers who may offer abortion or who object to describing abortion as a beneficial

[2]Even if the court were to consider the remaining factors, the court would find that they weigh in favor of granting the preliminary injunction. The second factor is satisfied because irreparable harm is presumed. See Christian Legal Soc'y v. Walker, 453 F.3d 853, 867 (7th Cir. 2006) ("Violations of First Amendment rights are presumed to constitute irreparable injuries."). With respect to factors three and four, the court concludes that in balancing the equities in consideration of the public interest, Illinois is not harmed by preliminarily enjoining the enforcement of a law that probably violates the First Amendment. See Higher Soc'y of Ind. 858 F.3d at 1116. Moreover, the legal right to an abortion is widely known and a person desiring such a procedure, except in the most extraordinary circumstances, would have little difficulty in finding a provider.

treatment option. This preliminary injunction is effective until the conclusion of this action or further order of the court.

Date: 7/19/2017

ENTER:

FREDERICK J. KAPALA
District Judge

Exhibit 14

Form Approved: OMB No. 0990-0269.
See OMB Statement on Reverse.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE FOR CIVIL RIGHTS (OCR)

CIVIL RIGHTS DISCRIMINATION COMPLAINT

YOUR FIRST NAME [redacted] | YOUR LAST NAME [redacted]

H[redacted] / CELL PHONE (Please include area code) | W[redacted] ONE (Please include area code)

S[redacted] x____ | CITY [redacted]

ST [redacted] | ZIP [redacted] | E-MAIL ADDRESS (If availa[redacted]

Are you filing this complaint for someone else? ☐ Yes ☒ No

If Yes, whose civil rights do you believe were violated?

FIRST NAME | LAST NAME

I believe that I have been (or someone else has been) discriminated against on the basis of:

☐ Race / Color / National Origin ☐ Age ☒ Religion / Conscience ☐ Sex

☐ Disability ☐ Other (specify): _____

Who or what agency or organization do you believe discriminated against you (or someone else)?

PERSON/AGENCY/ORGANIZATION

State of Wisconsin Department of Safety and Professional Services

STREET ADDRESS: 4822 Madison Yards Way | CITY: Madison

STATE: Wisconsin | ZIP: 53705 | PHONE (Please include area code): [redacted]

When do you believe that the discrimination occurred?

LIST DATE(S)

04/13/2005

Describe briefly what happened. How and why do you believe that you have been discriminated against? Please be as specific as possible.
(Attach additional pages as needed)

In Wisconsin in 2002 as a pharmacist I did not feel comfortable with a prescription refill. I determined that the refill was being used for contraception. Therefore, I made a conscientious objection out of a sincerely held religious belief not to dispense or to participate in the transfer of the refill order.

The State Board of Pharmacy determined that my objection was "unprofessional." I was formally

This field may be truncated due to size limit. See the "Allegation Description" file in the case folder.

Please sign and date this complaint. You do not need to sign if submitting this form by email because submission by email represents your signature.

SIGNATURE [redacted] | DATE *(mm/dd/yyyy)* 09/17/2018

Filing a complaint with OCR is voluntary. However, without the information requested above, OCR may be unable to proceed with your complaint. We collect this information under authority of Sections 1553 and 1557 of the Affordable Care Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Church Amendments, the Coats-Snowe Amendment, the Weldon Amendment, and other civil rights statutes. We will use the information you provide to determine if we have jurisdiction and, if so, how we will process your complaint. Information submitted on this form is treated confidentially and is protected under the provisions of the Privacy Act of 1974. Names or other identifying information about individuals are disclosed when it is necessary for investigation of possible discrimination, for internal systems operations, or for routine uses, which include disclosure of information outside the Department of Health and Human Services (HHS) for purposes associated with civil rights compliance and as permitted by law. It is illegal for a recipient of Federal financial assistance from HHS to intimidate, threaten, coerce, or discriminate or retaliate against you for filing this complaint or for taking any other action to enforce your rights under Federal civil rights laws. You are not required to use this form. You also may write a letter or submit a complaint electronically with the same information. To submit an electronic complaint, go to OCR's web site at: **www.hhs.gov/ocr/civilrights/complaints/index.html**. To submit a complaint using alternative methods, see reverse page (page 2 of the complaint form).

The remaining information on this form is optional. Failure to answer these voluntary questions will not affect OCR's decision to process your complaint.

Do you need special accommodations for us to communicate with you about this complaint? (Check all that apply)

☐ Braille ☐ Large Print ☐ Cassette tape ☐ Computer diskette ☐ Electronic mail ☐ TDD

☐ Sign language interpreter (specify language): _____

☐ Foreign language interpreter (specify language): _____ ☐ Other: _____

If we cannot reach you directly, is there someone we can contact to help us reach you?

FIRST NAME	LAST NAME
HOME PHONE (Please include area code)	WORK PHONE (Please include area code)
STREET ADDRESS	CITY
STATE / ZIP	E-MAIL ADDRESS (If available)

Have you filed your complaint anywhere else? If so, please provide the following. (Attach additional pages as needed)

PERSON/AGENCY/ORGANIZATION/ COURT NAME(S)

DATE(S) FILED	CASE NUMBER(S) (If known)

To help us better serve the public, please provide the following information for the person you believe was discriminated against (you or the person on whose behalf you are filing).

ETHNICITY (select one)

☐ Hispanic or Latino

☐ Not Hispanic or Latino

RACE (select one or more)

☐ American Indian or Alaska Native ☐ Asian ☐ Native Hawaiian or Other Pacific Islander

☐ Black or African American ☐ White ☐ Other (specify): _____

PRIMARY LANGUAGE SPOKEN (if other then English) _____

How did you learn about the Office for Civil Rights?

☐ HHS Website/Internet Search ☐ Family/Friend/Associate ☐ Religious/Community Org ☐ Lawyer/Legal Org ☐ Phone Directory ☐ Employer

☐ Fed/State/Local Gov ☐ Healthcare Provider/Health Plan ☐ Conference/OCR Brochure ☐ Other (specify): _____

To submit a complaint, please type or print, sign, and return completed complaint form package (including consent form) to the OCR Headquarters address below.

U.S. Department of Health and Human Services
Office for Civil Rights
Centralized Case Management Operations
200 Independence Ave., S.W.
Suite 515F, HHH Building
Washington, D.C. 20201
Customer Response Center: (800) 368-1019
Fax: (202) 619-3818
TDD: (800) 537-7697
Email: ocrmail@hhs.gov

Burden Statement

Public reporting burden for the collection of information on this complaint form is estimated to average 45 minutes per response, including the time for reviewing instructions, gathering the data needed and entering and reviewing the information on the completed complaint form. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: HHS/OS Reports Clearance Officer, Office of Information Resources Management, 200 Independence Ave. S.W., Room 531H, Washington, D.C. 20201. **Please do not mail complaint form to this address.**

HHS-699 (7/09) (BACK)

COMPLAINANT CONSENT FORM

The Department of Health and Human Services' (HHS) Office for Civil Rights (OCR) has the authority to collect and receive material and information about you, including personnel and medical records, which are relevant to its investigation of your complaint.

To investigate your complaint, OCR may need to reveal your identity or identifying information about you to persons at the entity or agency under investigation or to other persons, agencies, or entities.

The Privacy Act of 1974 protects certain federal records that contain personally identifiable information about you and, with your consent, allows OCR to use your name or other personal information, if necessary, to investigate your complaint.

Consent is voluntary, and it is not always needed in order to investigate your complaint; however, failure to give consent is likely to impede the investigation of your complaint and may result in the closure of your case.

Additionally, OCR may disclose information, including medical records and other personal information, which it has gathered during the course of its investigation in order to comply with a request under the Freedom of Information Act (FOIA) and may refer your complaint to another appropriate agency.

Under FOIA, OCR may be required to release information regarding the investigation of your complaint; however, we will make every effort, as permitted by law, to protect information that identifies individuals or that, if released, could constitute a clearly unwarranted invasion of personal privacy.

Please read and review the documents entitled, *Notice to Complainants and Other Individuals Asked to Supply Information to the Office for Civil Rights* and *Protecting Personal Information in Complaint Investigations* for further information regarding how OCR may obtain, use, and disclose your information while investigating your complaint.

In order to expedite the investigation of your complaint if it is accepted by OCR, please read, sign, and return one copy of this consent form to OCR with your complaint. Please make one copy for your records.

- As a complainant, I understand that in the course of the investigation of my complaint it may become necessary for OCR to reveal my identity or identifying information about me to persons at the entity or agency under investigation or to other persons, agencies, or entities.

- I am also aware of the obligations of OCR to honor requests under the Freedom of Information Act (FOIA). I understand that it may be necessary for OCR to disclose information, including personally identifying information, which it has gathered as part of its investigation of my complaint.

- In addition, I understand that as a complainant I am covered by the Department of Health and Human Services' (HHS) regulations which protect any individual from being intimidated, threatened, coerced, retaliated against, or discriminated against because he/she has made a complaint, testified, assisted, or participated in any manner in any mediation, investigation, hearing, proceeding, or other part of HHS' investigation, conciliation, or enforcement process.

After reading the above information, please check ONLY ONE of the following boxes:

[X] **CONSENT:** I have read, understand, and agree to the above and give permission to OCR to reveal my identity or identifying information about me in my case file to persons at the entity or agency under investigation or to other relevant persons, agencies, or entities during any part of HHS' investigation, conciliation, or enforcement process.

[ ] **CONSENT DENIED:** I have read and I understand the above and do not give permission to OCR to reveal my identity or identifying information about me. I understand that this denial of consent is likely to impede the investigation of my complaint and may result in closure of the investigation.

Signature: [redacted] Date: 09/17/2018

**Please sign and date [redacted]ed to sign if submitting this form by email because submission by email represents your signature.*

Name (Please print): [redacted]

Address: [redacted]

Telephone Number: [redacted] x (H)

NOTICE TO COMPLAINANTS AND OTHER INDIVIDUALS ASKED TO SUPPLY INFORMATION TO THE OFFICE FOR CIVIL RIGHTS

Privacy Act

The Privacy Act of 1974 (5 U.S.C. § 552a) requires OCR to notify individuals whom it asks to supply information that:

— OCR is authorized to solicit information under:
(i) Federal laws barring discrimination by recipients of Federal financial assistance on grounds of race, color, national origin, disability, age, sex, religion, and conscience under programs and activities receiving Federal financial assistance from the U.S. Department of Health and Human Services (HHS), including, but not limited to, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), the Age Discrimination Act of 1975 (42 U.S.C. § 6101 *et seq.*), Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.), Sections 794 and 855 of the Public Health Service Act (42 U.S.C. §§ 295m and 296g), Section 1553 of the Affordable Care Act (42 U.S.C. § 18113), the Church Amendments (42 U.S.C. § 300a-7), the Coats-Snowe Amendment (42 U.S.C. § 238n) and the Weldon Amendment (*e.g.*, Consolidated Appropriations Act of 2017, Pub. L. 115-31, Div. H, Tit. V, § 507);
(ii) Titles VI and XVI of the Public Health Service Act (42 U.S.C. §§ 291 *et seq.* and 300s *et seq.*) and 42 C.F.R. Part 124, Subpart G (Community Service obligations of Hill- Burton facilities);
(iii) 45 C.F.R. Part 85, as it implements Section 504 of the Rehabilitation Act in programs conducted by HHS; and
(iv) Title II of the Americans with Disabilities Act (42 U.S.C. § 12131 et seq.) and Department of Justice regulations at 28 C.F.R. Part 35, which give HHS "designated agency" authority to investigate and resolve disability discrimination complaints against certain public entities, defined as health and service agencies of state and local governments, regardless of whether they receive federal financial assistance.
(v) The Standards for the Privacy of Individually Identifiable Health Information (The Privacy Rule) at 45 C.F.R. Part 160 and Subparts A and E of Part 164, which enforce the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 U.S.C. § 1320d-2).

OCR will request information for the purpose of determining and securing compliance with the Federal laws listed above. Disclosure of this requested information to OCR by individuals who are not recipients of Federal financial assistance is voluntary; however, even individuals who voluntarily disclose information are subject to prosecution and penalties under 18 U.S.C. § 1001 for making false statements.

Additionally, although disclosure is voluntary for individuals who are not recipients of Federal financial assistance, failure to provide OCR with requested information may preclude OCR from making a compliance determination or enforcing the laws above.

OCR has the authority to disclose personal information collected during an investigation without the individual's consent for the following routine uses:

(i) to make disclosures to OCR contractors who are required to maintain Privacy Act safeguards with respect to such records;
(ii) for disclosure to a congressional office from the record of an individual in response to an inquiry made at the request of the individual;
(iii) to make disclosures to the Department of Justice to permit effective defense of litigation; and
(iv) to make disclosures to the appropriate agency in the event that records maintained by OCR to carry out its functions indicate a violation or potential violation of law.

Under 5 U.S.C. § 552a(k)(2) and the HHS Privacy Act regulations at 45 C.F.R. § 5b.11 OCR complaint records have been exempted as investigatory material compiled for law enforcement purposes from certain Privacy Act access, amendment, correction and notification requirements.

Freedom of Information Act
A complainant, the recipient or any member of the public may request release of OCR records under the Freedom of Information Act (5 U.S.C. § 552) (FOIA) and HHS regulations at 45 C.F.R. Part 5.

Fraud and False Statements
Federal law, at 18 U.S.C. §1001, authorizes prosecution and penalties of fine or imprisonment for conviction of "whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry".

PROTECTING PERSONAL INFORMATION IN COMPLAINT INVESTIGATIONS

To investigate your complaint, the Department of Health and Human Services' (HHS) Office for Civil Rights (OCR) will collect information from different sources. Depending on the type of complaint, we may need to get copies of your medical records, or other information that is personal to you. This Fact Sheet explains how OCR protects your personal information that is part of your case file.

HOW DOES OCR PROTECT MY PERSONAL INFORMATION?

OCR is required by law to protect your personal information. The Privacy Act of 1974 protects Federal records about an individual containing personally identifiable information, including, but not limited to, the individual's medical history, education, financial transactions, and criminal or employment history that contains an individual's name or other identifying information.

Because of the Privacy Act, OCR will use your name or other personal information with a signed consent and only when it is necessary to complete the investigation of your complaint or to enforce civil rights laws or when it is otherwise permitted by law.

Consent is voluntary, and it is not always needed in order to investigate your complaint; however, failure to give consent is likely to impede the investigation of your complaint and may result in the closure of your case.

CAN I SEE MY OCR FILE?

Under the Freedom of Information Act (FOIA), you can request a copy of your case file once your case has been closed; however, OCR can withhold information from you in order to protect the identities of witnesses and other sources of information.

CAN OCR GIVE MY FILE TO ANY ONE ELSE?

If a complaint indicates a violation or a potential violation of law, OCR can refer the complaint to another appropriate agency without your permission.

If you file a complaint with OCR, and we decide we cannot help you, we may refer your complaint to another agency such as the Department of Justice.

CAN ANYONE ELSE SEE THE INFORMATION IN MY FILE?

Access to OCR's files and records is controlled by the Freedom of Information Act (FOIA). Under FOIA, OCR may be required to release information about this case upon public request. In the event that OCR receives such a request, we will make every effort, as permitted by law, to protect information that identifies individuals, or that, if released, could constitute a clearly unwarranted invasion of personal privacy.

If OCR receives protected health information about you in connection with a HIPAA Privacy Rule investigation or compliance review, we will only share this information with individuals outside of HHS if necessary for our compliance efforts or if we are required to do so by another law.

DOES IT COST ANYTHING FOR ME (OR SOMEONE ELSE) TO OBTAIN A COPY OF MY FILE?

In most cases, the first two hours spent searching for document(s) you request under the Freedom of Information Act and the first 100 pages are free. Additional search time or copying time may result in a cost for which you will be responsible. If you wish to limit the search time and number of pages to a maximum of two hours and 100 pages; please specify this in your request. You may also set a specific cost limit, for example, cost not to exceed $100.00.

If you have any questions about this complaint and consent package, Please contact OCR at http://www.hhs.gov/ocr/office/about/contactus/index.html

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.* Plaintiffs, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX M. AZAR II, *in his official capacity as Secretary of the United States Department of Health and Human Services*; and UNITED STATES OF AMERICA, Defendants.	No. 1:19-cv-04676-PAE (rel. 1:19-cv-05433-PAE; 1:19-cv-05435-PAE) **DEFENDANTS' NOTICE OF FILING OF EXHIBIT**
PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; and PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, INC., Plaintiffs, v. ALEX M. AZAR II, in his official capacity as Secretary, United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROGER SEVERINO, in his official capacity as Director, Office for Civil Rights, United States Department of Health and Human Services; and OFFICE FOR CIVIL RIGHTS, United States Department of Health and Human Services, Defendants.	No. 1:19-cv-05433-PAE (rel. 1:19-cv-0476-PAE; 1:19-cv-05435-PAE)

NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION; and PUBLIC HEALTH SOLUTIONS, Plaintiffs, v. ALEX M. AZAR II, in his official capacity as Secretary of the U.S. Department of Health and Human Services; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROGER SEVERINO, in his official capacity as Director of the Office for Civil Rights of the U.S. Department of Health and Human Services; OFFICE FOR CIVIL RIGHTS of the U.S. Department of Health and Human Services, Defendants.	)	No. 1:19-cv-05435-PAE (rel. 1:19-cv-0476-PAE; 1:19-cv-05433-PAE)

Please take notice that Defendants file the attached article, *Conscientious Refusals to Refer: Findings from a National Physician Survey*, as Exhibit 15 in support of their reply in support of their motion to dismiss or, in the alternative, for summary judgment and opposition to Plaintiffs' motion for summary judgment. *See* ECF 224. This article, which is in the administrative record sent to Plaintiffs, was cited on page 15 of Defendants' brief. However, it was inadvertently omitted from yesterday's filing. Defendants apologize for any inconvenience.

Dated: September 20, 2019

Respectfully submitted,

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Exhibit 15

Conscientious refusals to refer: findings from a national physician survey

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ABSTRACT

Background Regarding controversial medical services, many have argued that if physicians cannot in good conscience provide a legal medical intervention for which a patient is a candidate, they should refer the requesting patient to an accommodating provider. This study examines what US physicians think a doctor is obligated to do when the doctor thinks it would be immoral to provide a referral.

Method The authors conducted a cross-sectional survey of a random sample of 2000 US physicians from all specialties. The primary criterion variable was agreement that physicians have a professional obligation to refer patients for all legal medical services for which the patients are candidates, even if the physician believes that such a referral is immoral.

Results Of 1895 eligible physicians, 1032 (55%) responded. 57% of physicians agreed that doctors must refer patients regardless of whether or not the doctor believes the referral itself is immoral. Holding this opinion was independently associated with being more theologically pluralistic, describing oneself as sociopolitically liberal, and indicating that respect for patient autonomy is the most important bioethical principle in one's practice (multivariable ORs, 1.6–2.4).

Conclusions Physicians are divided about a professional obligation to refer when the physician believes that referral itself is immoral. These data suggest there is no uncontroversial way to resolve conflicts posed when patients request interventions that their physicians cannot in good conscience provide.

INTRODUCTION

Few issues in medicine pique professional and public interest more than debates over physician conscientious refusals.[1–6] These debates take place within and are informed by broader disagreements over how to balance and prioritise different ethical principles and concerns in the practice of medicine. Physicians' freedom to refuse medical interventions for reasons of conscience has been defended on the grounds that medicine as a moral practice depends on physicians doing that which they in good faith believe is in the patient's interest, and also that physicians have a right to protect their integrity by acting according their values.[7–10] Yet, critics argue that such refusals violate patient autonomy[11–13] and unjustly make patients' access to healthcare services dependent on the personal values of individual physicians.[6 14]

A commonly proposed solution seeks to balance competing concerns by permitting refusals so long as the physician refers the patient to a provider who will accommodate the request.[8 15–17] Dan Brock argues that this 'conventional compromise' respects individual physicians' integrity while fulfilling the medical profession's obligation to make the full range of legal medical interventions available to patients.[15] Previous studies suggest that most physicians agree both that doctors are not obligated to do something they think is immoral and that they should provide a referral for services they are unwilling to provide themselves.[18 19] But what about those situations in which a physician believes that making a referral is itself immoral? Brock and others have argued that physicians must refer in these cases or face professional sanction,[15 20] but to date no empirical studies have examined the views of practicing physicians.

We examined data from a national survey to describe physicians' beliefs about whether or not they have a professional obligation to refer patients even when they believe the referral itself is immoral. In addition, we sought to clarify how theoretical ethics informs physicians' judgement in this area by asking physicians to indicate which bioethical principle—among beneficence, respect for autonomy, and justice[21]—is most important to their practice. Despite the prominence of these principles in medical ethics discourse, no empirical studies have assessed how physicians rank their priority with respect to clinical practice. Building on prior studies, we examined the relationships between believing that doctors are always obligated to refer, identifying autonomy as the most important principle in one's practice, and physicians' demographic, religious and sociopolitical characteristics.

METHODS

The methods of this study have been described elsewhere.[22] In 2009 we mailed a confidential, self-administered questionnaire up to three times to a random sample of 2000 practicing US physicians, aged 65 years or younger and from all specialties, selected from the American Medical Association Masterfile. The initial mailing included a gift, and an additional US$25 was promised to those who responded. The Mayo Clinic Institutional Review Board approved this study.

Questionnaire

Our primary criterion variable was agreement with the statement: 'Physicians have a professional obligation to refer patients for all legal medical services for which the patients are candidates, even if the physician believes that such a referral is immoral'. We also asked: 'Which of the following ethical principles is the most important in your practice as a physician? (1) Respect for autonomy—honouring the rights of patients to make decisions

for themselves; (2) Justice—seeking fair treatment of patients based on medical need and fair distribution of healthcare resources; and (3) Beneficience/non-maleficence—promoting the wellbeing of patients and preventing illness, while minimising harm.'

Primary predictor variables were physicians' religious characteristics and sociopolitical views. Religious affiliation was categorised as: no religion, Jewish, Roman Catholic or Eastern Orthodox, non-evangelical Protestants (includes non-evangelical other Christians), evangelical Protestants (includes evangelical other Christians) and other religions. Religious salience[23 24] was assessed with the question: 'How important would you say your religion is in your life?' Responses were: 'the most important part of my life', 'very important', 'fairly important', 'not very important' and 'not applicable—I have no religion'; the last two categories were collapsed into one. Spirituality was measured by asking: 'To what extent do you consider yourself a spiritual person?' Responses were: 'very spiritual', 'moderately spiritual', 'fairly spiritual' and 'not very spiritual'.

Additionally, we scored physicians on a scale of theological pluralism—the extent to which physicians believe that no religion is uniquely and comprehensively true. An earlier study found that physicians with high theological pluralism were more likely to endorse nondirective counsel in areas of moral controversy.[25] We asked physicians to rate their level of agreement with three statements: (1) There is truth in one religion; (2) Different religions have different versions of the truth and each may be equally right in its own way; and (3) There is no one, true, right religion. Responses were scored on a four point scale from 'agree strongly' to 'disagree strongly'. After reverse-scoring the first statement, responses were summed (Cronbach α=0.75) and scores trichotomised into low, moderate and high theological pluralism.

Sociopolitical views were measured by responses to the question, 'How would you characterise yourself on social issues?' Responses were: 'conservative', 'moderate', 'liberal' and 'other'. Secondary predictors included age, sex, race, region of the country and medical specialty.

Statistical analyses

After generating population estimates from physicians' responses to each item, we used the χ^2 test to examine associations between the two primary criterion variables, and between each criterion and each predictor. We then used multiple logistic regression to test whether bivariate associations remained after adjustment for relevant covariates. All analyses were conducted with Stata SE statistical software V.11.0. Respondents who left items blank were omitted from analysis of those items.

RESULTS

Of the 2000 physicians surveyed, 5% (n=105) could not be contacted. Of 1895 eligible physicians, 1032 completed the survey, giving a cooperation rate of 55%.[26] Table 1 displays the demographic, religious and sociopolitical characteristics of respondents.

As seen in table 2, the majority (57%) of respondents agreed that physicians have a professional duty to refer patients for all legal medical services for which the patients are candidates, even if the physician believes that such a referral is immoral. Almost two thirds (64%) indicated that beneficence was the most important ethical principle to their medical practice, one in four (26%) indicated respect for autonomy and one in 10 (10%) indicated justice.

Table 1 Demographic, religious, and sociopolitical characteristics of survey respondents (n=1032*)

Characteristics	n (%)
Male	728 (72)
Female	283 (28)
Race (n=1011)	
White	786 (78)
Asian	146 (14)
Other	54 (5)
Black	25 (2)
Region (n=1015)	
South	331 (33)
Midwest	251 (25)
Northeast	227 (22)
West	206 (20)
Medical specialty (n=1032)	
General medicine	183 (18)
Medicine subspecialty	197 (19)
Family practice	119 (12)
Surgery	158 (15)
OB/gyn	47 (5)
Psychiatry	66 (6)
Pediatrics & peds. subspecialties	131 (13)
Diagnostic (pathology & radiology)	54 (5)
Anaesthesiology	66 (6)
Non-clinical/other	11 (1)
Religious affiliation (n=994)	
No religion	146 (15)
Jewish	136 (14)
Roman Catholic/Eastern orthodox	238 (24)
Non-evangelical protestant†	249 (25)
Evangelical protestant†	87 (9)
Other religion	138 (14)
Religious Salience (n=1003)	
Not important	300 (30)
Fairly important	285 (28)
Very important	313 (31)
Most important thing in my life	105 (10)
Spirituality (n=1000)	
Not spiritual	115 (12)
Moderately spiritual	231 (23)
Slightly spiritual	397 (40)
Very spiritual	257 (26)
Theological pluralism (n=977)	
Low	274 (28)
Moderate	265 (27)
High	438 (45)
Sociopolitical views (n=1018)	
Conservative	291 (29)
Moderate	426 (42)
Liberal	281 (28)
Other	20 (2)

The mean age (SD) of respondents was 49.8 (8.7) years.
*Not all values sum to 1032 due to partial non-response.
†Protestant includes those who identified as 'Other Christian'.

Table 3 presents the incidence and odds of agreeing that physicians must refer even if they believe that referral is itself immoral, stratified by physicians' religious characteristics, sociopolitical views, and the ethical principle most important to their practice. After adjusting for potential covariates, physicians remained more likely to agree that they were obligated to refer if they had moderate or high theological pluralism (compared to low theological pluralism, OR 1.6, 95% CI 1.1 to 2.5 and OR 1.9, 95% CI 1.3 to 2.8, respectively), they self-identified as liberal

Table 2 US physicians' responses regarding whether physicians are professionally obligated to refer even if the physician believes the referral is immoral, and which bioethical principle is most important to their practice

Response	n (%)
Survey item: Physicians have a professional obligation to refer patients for all legal medical services for which the patients are candidates, even if the physician believes that such a referral is immoral. (n=997)	
Strongly agree	268 (27)
Moderately agree	298 (30)
Moderately disagree	245 (25)
Strongly disagree	186 (19)
Survey item: Which of the following ethical principles is the most important to your practice as a physician? (n=1000)	
Beneficence/non-maleficence	641 (64)
Respect for autonomy	255 (26)
Justice	104 (10)

(OR 2.4, 95% CI 1.5 to 3.8, compared to conservative) or they rated respect for autonomy as the most important ethical principle (OR 1.6, 95% CI 1.1 to 2.3, compared to beneficence/nonmaleficence).

After adjusting for relevant covariates, physicians' beliefs about referral were not associated with age, gender or region.

Table 3 Association of physicians' religious, spiritual, theological and sociopolitical characteristics with agreement that physicians are professional obligated to refer patients even if they believe the referral is immoral

Characteristic	n (%)	p Value (χ2)	OR (95% CI)
Religious affiliation (n)			
No religion (144)	102 (71)		1.0 referent
Jewish (135)	83 (61)	<0.001	0.8 (0.3 to 1.7)
Roman Catholic/Eastern Orthodox (236)	112 (47)		0.7 (0.3 to 1.5)
Non-evangelical Protestant (235)	127 (54)		1 (0.5 to 2.1)
Evangelical Protestant (100)	45 (45)		0.8 (0.3 to 2.1)
Other religion (136)	91 (67)		1.9 (0.8 to 4.5)
Religious salience† (n)			
Not important	199 (67)		1.0 referent
Fairly important	179 (63)	<0.001	1.0 (0.7 to 1.6)
Very important	148 (48)		0.7 (0.4 to 1.1)
Most important thing in my life	39 (38)		0.5 (0.3 to 1.02)
Spiritualilty† (n)			
Not spiritual	71 (62)		1.0 referent
Moderately spiritual	140 (61)	0.005	1.2 (0.7 to 2.1)
Slightly spiritual	233 (59)		1.5 (0.8 to 2.6)
Very spiritual	121 (47)		1.2 (0.6 to 2.2)
Theological pluralism† (n)			
Low	111 (41)		1.0 referent
Moderate	156 (60)	<0.001	1.6* (1.1 to 2.5)
High	286 (66)		1.9* (1.3 to 2.8)
Sociopolitical views (n)			
Conservative	114 (41)		1.0 referent
Moderate	234 (57)	<0.001	1.3 (0.9 to 1.8)
Liberal	205 (75)		2.4* (1.5 to 3.8)
Other	8 (42)		0.6 (0.2 to 1.9)
Most important ethical principle (n)			
Beneficence/non-maleficence	334 (54)		1.0 referent
Respect for autonomy	159 (64)	0.02	1.6* (1.1 to 2.3)
Justice	61 (62)		1.3 (0.8 to 2.2)

*p value <0.05.
†Regression model includes sex, age, region, specialty, religious affiliation, sociopolitical views and most important ethical principle as covariates.

Asian physicians were less likely than white physicians (OR 0.6, 95% CI 0.4 to 0.95), and obstetrician/gynecologists were more likely than general medicine physicians (OR 2.6, 95% CI 1.1 to 5.9), to agree that they are always obligated to refer (data not shown in tables).

In multivariate analyses, pediatricians were much less likely than general medicine physicians (OR 0.1, 95% CI 0.04 to 0.3) to indicate that autonomy is the most important ethical principle in their practice, but choosing autonomy was not associated with any religious, sociopolitical or demographic characteristics.

DISCUSSION

In a large, contemporary survey of practicing US physicians from all specialties, we found that a small majority agrees that physicians have a professional obligation to refer patients for all legal medical services for which the patients are candidates, even if the physician believes that such a referral is immoral. This opinion is associated with being theologically pluralistic, sociopolitically liberal and/or believing that respect for patient autonomy is the most important bioethical principle in one's practice.

These data expand on previous findings about physicians' obligations when a patient requests a legal medical intervention to which their physician objects on moral grounds. Two prior studies found that most physicians (71%[18] and 82%[19]) agree that when a patient requests a legal medical procedure to which the physician objects, the physician is obligated to provide a referral to a willing physician. This study asked explicitly about physicians' obligations when they object even to referral and finds that only slightly more than half of doctors believe that physicians are obligated to refer in those instances.

Previous research into conscience and medicine suggested that many physicians are ambivalent about their obligations in areas of moral controversy. In a prior study, 42% of physicians agreed that 'a physician should never do what he or she believes is morally wrong, no matter what experts say', 22% agreed that 'sometimes physicians have a professional ethical obligation to provide medical services even if they personally believe it would be morally wrong to do so,' and 36% agreed with both of these seemingly contradictory statements.[19] The percentage of physicians in that study who believed that physicians are never obligated to violate their consciences corresponds very closely to the percentage of physicians in this present study (43%) who did not agree that physicians are obligated to make referrals that they believe are immoral.

Physician's conflicting opinions regarding referrals mirror disagreements among bioethicists, with leading figures both rejecting and defending physicians' right to refuse to refer if they believe a referral is immoral.[15 27] Further complicating this issue is the reality that every clinical situation is unique; ethical rules do not always apply equally to different scenarios.[28] Moreover, patients and physicians often come from different moral communities and disparate worldviews.[29] As such, physicians and patients must at times negotiate complex clinical decisions without recourse to a shared ethical standard.

Our data highlight how this deliberative process depends to a real extent on the characteristics of the individual physician. Physicians who are more theologically pluralistic are more likely to believe they are always obligated to refer. Physicians who believe that neither their own nor any other religion is uniquely and comprehensively true, or that different religions or moral traditions may each be right in their own way, might sensibly accommodate requests that reflect the patient's moral valuations even if such valuations contradict those of the physician.

Likewise, physicians who describe their social views as liberal are also more likely to believe physicians should always refer. The term 'liberal' has many uses, so we are cautious to avoid overinterpreting this finding. However, this finding is consistent with what philosopher Charles Taylor calls 'the liberalism of neutrality', in which individuals make choices according to their own authentic convictions regarding what constitutes a good life.[30] In such a framework, the state, and perhaps public professions like medicine, should remain neutral regarding patients' choices.

Nor is it surprising that physicians who prioritise respect for autonomy would be more accommodating of patient requests. The principle of patient autonomy receives great emphasis in the bioethics literature,[31–33] and in our study one in four physicians rated autonomy as the most important bioethical principle in their clinical practice. However, we did not ask physicians to rank how they prioritise the ethical principles in morally complex scenarios and we cannot, therefore, infer which principle they believe is most important in such cases. Previous studies[25 34] suggest that this proportion would probably have been higher if we had specified a morally complex scenario rather than physicians' general clinical practice. Further study is needed to draw these sorts of distinctions.

Together with earlier findings, these data make clear that consensus is narrow regarding how physicians should respond when patients request interventions to which their physicians have moral objections. Few would deny that physicians should be candid and forthcoming, taking care to not deceive or mislead the patient about the reason for the refusal or the options available. Likewise, it is widely recognised that patients have a legal right to seek all legal medical interventions, and that physician refusals for these services are made problematic and consequential for patients because professional licensing makes physicians the gatekeepers to most such interventions. Yet beyond this area of agreement, there are no uncontroversial solutions to the dilemmas posed by conscientious refusals to refer.

One proposed resolution would have physicians either leave the profession or choose specialties where they will not be asked to violate their consciences.[3 14 20] Given the rapid evolution of medical practice, not to mention its segmentation and subspecialisation, those entering medical practice cannot fully anticipate whether a certain specialty will or will not coincide with their values in the future. Furthermore, this proposed resolution does not adequately address what is to be done with individuals who have a passionate interest in and aptitude for a particular clinical specialty, but who have misgivings about a small segment of that specialty's practice.

Another solution would have physicians inform patients, at the beginning of the physician-patient relationship or another reasonable time, what medical services they are and are not willing to provide.[15 16] This would ostensibly enhance patient autonomy by allowing patients to seek out physicians who will at least accommodate their values. Many patients, however, have limited choices regarding their physicians, either because they live in rural or otherwise remote areas or because of their insurance status. In addition, it is unreasonable to expect patients to anticipate all circumstances that might transpire or the medical interventions they might one day request.[27 35] Therefore, even if physicians make sincere efforts to proactively disclose their relevant objections to patients, conflicts will arise.

Future efforts to resolve problems posed by conscientious refusals should be informed by our findings. The conventional compromise, which permits conscientious refusals so long as physicians make timely referrals to accommodating providers, has been advanced as a way of protecting both physician integrity and patient autonomy. However, the compromise is unproblematic only when physicians can in good conscience make the referral. When they cannot, our data suggest that almost half (43%) of US physicians do not believe the conventional compromise applies. Policies that mandate referrals are therefore likely to be resisted by large portions of the profession. Less contentious, perhaps, would be policies that focus on meeting patients' interest in having increased access to controversial interventions without asking or requiring individual physicians to do what they believe is immoral.[36]

Our study suggests a possible role for healthcare institutions in mediating disputes over controversial medical services. Healthcare institutions have obligations not only to individual patients, but also to their broader communities.[37] Moreover, healthcare institutions have the capacity to anticipate the sorts of conflicts that may emerge between physicians and patients, and to set up systems that minimise both the inconvenience to the patient and the complicity of the medical personnel.[38] Some institutions are committed to providing all legal medical interventions. Others, such as Catholic hospitals, exclude those interventions that are inconsistent with their mission and identity. Either way, healthcare institutions can ask clinicians' to disclose clinically relevant objections, and should have policies and procedures to facilitate referrals, transfers of care, or other accommodations when patients' request interventions to which their physicians object.

There are additional limitations to this study. Although our response rate is consistent with other surveys of this type,[39] there is a possibility that non-respondents differed in ways that biased our findings. Theological pluralism has internal consistency and has been found previously to account for difference in physicians' ethical judgements, but it remains a novel variable and should be considered provisional until further research affirms its validity. In addition, the structure of the questionnaire allowed respondents to imagine clinical scenarios specific to their practice. Future studies would benefit from vignettes that to some extent normalise how respondents think about conscientious refusals. Finally, the cross-sectional design of this study does not permit any causal inferences from statistical associations, nor can we say how physicians in fact behave in any specific instance.

Despite these limitations, this study indicates that physicians are divided about a professional obligation to refer if the physician believes that referral itself is immoral. Given the absence of consensus concerning a requirement to refer, at this time there remains no uncontroversial way to resolve conflicts posed when patients request interventions that their physicians cannot in good conscience provide.

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Competing interests None.

Provenance and peer review Not commissioned; externally peer reviewed.

REFERENCES

1. **Young S.** *White House set to reverse health care conscience clause*. CNN: Politics [Internet] Atlanta: CNN, 2009. http://www.cnn.com/2009/POLITICS/02/27/conscience.rollback/index.html (accessed 10 Aug 2010).
2. **Charo RA.** The celestial fire of conscience—refusing to deliver medical care. *N Engl J Med* 2005;**352**:2471–3.
3. **Cantor JD.** Conscientious objection gone awry—restoring selfless professionalism in medicine. *N Engl J Med* 2009;**360**:1484–5.
4. **Gold A.** Physicians' 'Right of conscience'—beyond politics. *J Law Med Ethics* 2010;**38**:134–42.
5. **Swartz MS.** Conscience clauses or unconscionable clauses: personal beliefs versus professional responsibilities. *Yale J Health Policy Law Ethics* 2006;**6**:269–350.
6. **White KA.** Crisis of conscience: reconciling religious health care providers' beliefs and patients' rights. *Stanford Law Rev* 1999;**51**:1703–49.
7. **Asch A.** Two cheers for conscience exceptions. *Hastings Cent Rep* 2006;**36**:11–12.
8. **Pellegrino ED.** Toward a reconstruction of medical morality. *Am J Bioeth* 2006;**6**:65–71.
9. **Sulmasy DP.** What is conscience and why is respect for it so important? *Theor Med Bioeth* 2008;**29**:135–49.
10. **Thomasma DC.** Beyond medical paternalism and patient autonomy: A model of physician conscience for the physician-patient relationship. *Ann Intern Med* 1983;**98**:243–8.
11. **Savulescu J.** Rational non-interventional paternalism: why doctors ought to make judgments of what is best for their patients. *BMJ* 1995;**21**:327–31.
12. **Savulescu J.** The proper place of values in the delivery of medicine. *Am J Bioeth* 2007;**7**:21–2; discussion W1–2.
13. **Chervenak FA,** McCullough LB. Professional responsibility and individual conscience: protecting the informed consent process from impermissible bias. *J Clin Ethics* 2008;**19**:24–5.
14. **Savulescu J.** Conscientious objection in medicine. *BMJ* 2006;**332**:294–7.
15. **Brock DW.** Conscientious refusal by physicians and pharmacists: who is obligated to do what, and why? *Theor Med Bioeth* 2008;**29**:187–200.
16. **Wicclair MR.** Conscientious objection in medicine. *Bioethics* 2000;**14**:205–27.
17. **American Medical Association.** *Council on Ethical and Judicial Affairs. CEJA Report 6-A- 07: Physician Objection to Treatment and Individual Patient Discrimination*. Chicago, IL: American Medical Association, 2007. http://www.ama-assn.org/ama1/pub/upload/mm/369/ceja_6a07.pdf (accessed 6 Aug 2010).
18. **Curlin FA,** Lawrence RE, Chin MH, *et al*. Religion, conscience, and controversial clinical practices. *N Engl J Med* 2007;**356**:593–600.
19. **Lawrence RE,** Curlin FA. Physicians' beliefs about conscience in medicine: a national survey. *Acad Med* 2009;**84**:1276–82.
20. **Rhodes R.** The ethical standard of care. *Am J Bioeth* 2006;**6**:76–8.
21. **Beauchamp TL,** Childress JF. *Principles of Biomedical Ethics*. USA: Oxford University Press, 2001.
22. **Antiel RM,** Curlin FA, James KM, *et al*. Physicians' beliefs and U.S. health care reform—a national survey. *N Engl J Med* 2009;**361**:e23.
23. **Donahue MJ.** Intrinsic and extrinsic religiousness: Review and meta-analysis. *J Pers Soc Psychol* 1985;**48**:400–19.
24. **Gorsuch RL,** McFarland SG. Single vs multiple-item scales for measuring religious values. *J Sci Study Relig* 1972;**11**:53–64.
25. **Yoon JD,** Rasinski KA, Curlin FA. Moral Controversy, Directive Counsel, and the Doctor's Role: Findings from a National Survey of Obstetrician-Gynecologists. *Acad Med* 2010;**85**:1475–81.
26. **The American Association for Public Opinion Research.** *Standard Definitions: Final Dispositions of Case Codes and Outcome Rates for Surveys*. 5th edn. Lenexa, Kansas: AAPOR, 2008.
27. **Pellegrino ED.** Commentary: value neutrality, moral integrity, and the physician. *J Law Med Ethics* 2000;**28**:78–80. 3.
28. **Committee on Bioethics.** From the American academy of pediatrics: policy statements—physician refusal to provide information or treatment on the basis of claims of conscience. *Pediatrics* 2009;**124**:1689–93.
29. **Baker R.** Conscience and the unconscionable. *Bioethics* 2009;**23**:ii–v.
30. **Taylor C.** *The Ethics of Authenticity*. Cambridge, MA: Harvard University Press, 1992:142.
31. **Cassell EJ.** The function of medicine. *Hastings Cent Rep* 1977;**7**:16–19.
32. **Emanuel EJ,** Emanuel LL. Four models of the physician-patient relationship. *JAMA* 1992;**267**:2221–6.
33. **Quill TE,** Brody H. Physician recommendations and patient autonomy: finding a balance between physician power and patient choice. *Ann Intern Med* 1996;**125**:763–9.
34. **Lawrence RE,** Curlin FA. Autonomy, religion and clinical decisions: findings from a national physician survey. *J Med Ethics* 2009;**35**:214–18.
35. **Ross LF,** Clayton EW. Religion, conscience, and controversial clinical practices. *N Engl J Med* 2007;**356**:1889–92; author reply 1889–92.
36. **Antommaria AH.** Adjudicating rights or analyzing interests: ethicists' role in the debate over conscience in clinical practice. *Theor Med Bioeth* 2008;**29**:201–12.
37. **Winkler EC.** The ethics of policy writing: how should hospitals deal with moral disagreement about controversial medical practices? *J Med Ethics* 2005;**31**:559–66.
38. **Cook RJ,** Olaya MA, Dickens BM. Healthcare responsibilities and conscientious objection. *Int J Gynaecol Obstet* 2009;**104**:249–52.
39. **Asch DA,** Jedrziewski MK, Christakis NA. Response rates to mail surveys published in medical journals. *J Clin Epidemiol* 1997;**50**:1129–36.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., Defendants.	19 Civ. 4676 (PAE) (lead) 19 Civ. 5433 (PAE) (consolidated) 19 Civ. 5435 (PAE) (consolidated)

DECLARATION OF MATTHEW COLANGELO

Matthew Colangelo, pursuant to penalty of perjury under 28 U.S.C. § 1746, does hereby state the following:

I am an attorney in the Office of the New York State Attorney General and counsel to Plaintiffs in this action. I submit this Declaration in support of Plaintiffs' reply memorandum of law in support of their cross-motion for summary judgment.

Attached to this Declaration are true and correct copies of the following numbered exhibits, including parts of the administrative record produced by Defendants in this action:

137. Comment, Whitman-Walker Clinic, Inc. (AR 135450)

138. Comment, Former EEOC Chair Jenny Yang & Former EEOC Legal Counsel Peggy Mastroianni (AR 147884)

139. Compl. 18-292941 (AR 542316)

Dated: October 3, 2019

/s/ Matthew Colangelo
Matthew Colangelo
Office of the New York State Attorney General
28 Liberty Street
New York, NY 10005
Phone: (212) 416-6057

matthew.colangelo@ag.ny.gov

Attorney for the Plaintiffs

Exhibit 137

BEFORE THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

Protecting Statutory Conscience Rights in Health Care; Delegations of Authority	**Docket No. HHS-OCR-2018-0002; RIN 0945-ZA03**

Comments of Whitman-Walker Health on the Notice of Proposed Rulemaking

Whitman-Walker Clinic, Inc., dba Whitman-Walker Health (WWH or Whitman-Walker), submits these comments on the Proposed Rule published on January 26, 2018, 83 Fed. Reg. 3880. The Proposed Rule's sweeping language ventures far beyond the actual scope of the federal laws that it purports to enforce. HHS appears to be endorsing discriminatory behavior by health care workers, motivated by their personal beliefs, that would be corrosive of fundamental professional standards and would threaten our patients' welfare and Whitman-Walker's ability to fulfill our mission. We urge that the Proposed Rule be withdrawn, or at a minimum, that it be modified to make clear that no endorsement is intended of discrimination in health care against lesbian, gay, bisexual, transgender and queer persons – or any discrimination based on the race, ethnicity, gender, disability status or religion of patients.

Interest of Whitman-Walker Health

Whitman-Walker is a Federally Qualified Health Center serving the greater Washington, DC metropolitan area, with a distinctive mission. As our Mission Statement declares:

> Whitman-Walker Health offers affirming community-based health and wellness services to all with a special expertise in LGBTQ and HIV care. We empower all persons to live healthy, love openly, and achieve equality and inclusion.

Our patient population is quite diverse and reflects our commitment to be a health home for individuals and families that have experienced stigma and discrimination, and have otherwise encountered challenges in obtaining affordable, high-quality health care. In calendar year 2017, we provided health-related services to more than 20,000 unique individuals. Of our medical and

behavioral health patients, approximately 40% identified themselves as Black; approximately 40% identified themselves as White; and approximately 18% identified themselves as Hispanic. More than one-half identified their sexual orientation as gay, lesbian, bisexual or otherwise non-heterosexual. Approximately 8% identified themselves as transgender or gender-nonconforming. Our patients also are quite diverse economically; in 2017 approximately 35% of our medical and behavioral health patients reported annual income of less than the Federal Poverty Level, and another 12% reported income of 100 – 200% of the FPL.

Since the mid-1980s, Whitman-Walker's Legal Services Department has provided a wide range of civil legal assistance to our patients and to others in the community living with HIV or identifying as sexual or gender minorities. Through their work, our attorneys have broad and deep experience with HIV, sexual orientation and gender identity discrimination in health care, employment, education, housing and public services. In 2017, approximately one-half of the more than 3,000 individuals who received legal assistance, or assistance with public benefit programs, identified as gay, lesbian, bisexual or otherwise non-heterosexual, and 18% identified as transgender or gender-nonconforming.

As would be expected given our very diverse community, Whitman-Walker's patient population and legal clients also subscribe to a wide range of religious faiths.

Consistent with our commitment to welcoming and nondiscriminatory health care, our growing work force is very diverse. We currently have almost 270 employees at five sites in Washington, DC. More than 55% of our employees identify as people of color, and more than 55% are women. Although we of course do not require employees to identity their sexual orientation or gender identity, substantial numbers of our staff are sexual and gender minorities.

And while we do not collect data on employee religious beliefs or practices, our work force includes a wide range of religious beliefs and practices, as well as a wide range of non-religious beliefs and philosophies.

The diversity of our patient population, legal clients and work force all reflect our commitment to inclusive, welcoming and nondiscriminatory health care of the highest quality, with a special focus on persons who fear, or who have experienced, the lack of such care elsewhere. The Proposed Rule's sweeping language and lack of specificity are of great concern; they appear to endorse discriminatory behavior, motivated by personal beliefs, that would be corrosive of fundamental professional standards and would threaten our patients' health and welfare and Whitman-Walker's mission.

The Proposed Rule's Sweeping, Overbroad Language Threatens Great Harm to Our National Health Care System, and Particularly to Mission-Driven Health Systems Such as Whitman-Walker, and to LGBTQ Individuals and Families and Others Particularly at Risk of Discrimination

The Proposed Rule announces the intention of HHS' Office for Civil Rights to vigorously enforce a number of federal statutes that protect conscience rights under limited circumstances. Most of these statutes delineate the rights of health care providers, in certain circumstances, to decline to perform specific procedures without retaliation: abortion; procedures intended to result in sterilization; and medical interventions intended to end a patient's life. Several of the statutes pertain to the right of certain religious institutions to provide religiously-oriented, non-medical health care to their members. Other statutes delineate the right of certain health plans to participate in Medicaid or Medicare while declining to cover certain services, provided adequate notice is provided to their members. Other statutes address the right of *patients* (not providers) or the parents of minors to decline certain health-related screenings, vaccinations or treatments.

The Proposed Rule, however, contains broad language that appears to sweep far beyond these limited circumstances, and implies that persons working in a health care field have a general right to decline to provide care for any reason, moral or religious, or for no articulable reason at all. *See, e.g.,* proposed Section 88.1 (Purpose) and Appendix A (mandatory notice to employees) to 45 C.F.R., 83 Fed. Reg. at 3931, declaring a broad, undefined right to accommodation for any religious or moral belief. *See also* 83 Fed. Reg. at 3881, 3887-89, 3903, which discusses at length the "problem" of health care workers being legally or professionally compelled to meet patient needs regardless of their personal beliefs. Moreover, HHS' public pronouncements about the new Conscience and Religious Freedom Division within OCR, and encouraging health care workers to file complaints, send a message that health care workers' personal beliefs prevail over their duties to patients. *E.g.*, https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html (January 18, 2018 press release); https://www.hhs.gov/conscience/conscience-protections/index.html ("Conscience Protections for Health Care Providers") The statutes in question do not support these declarations of a general health care provider "right" to deny needed care.

The potentially harmful reach of the Proposed Rule is exacerbated by an overbroad, legally unsupported interpretation of what constitutes "assisting in the performance" of an objected-to medical procedure. The proposed definition – "to participate in any program or activity with an articulable connection to a procedure, health service, health program, or research activity .... [i]nclud[ing] but ... not limited to counseling, referral, training, and other arrangements for the procedure, health service, health program, or research activity" (Section

88.2, 83 Fed. Reg. at 3923) – is so broad that it might authorize an individual in any health care-related job to decline to provide information or any assistance whatever to someone seeking care to which they may object. The problem is compounded by the broad definition of a protected refusal to provide a "referral" as "includ[ing] the provision of any information … by any method … pertaining to a health care service, activity, or procedure … that could provide any assistance in a person obtaining … a particular health care service …." Section 88.2, 83 Fed. Reg. at 3924.

A sweeping interpretation of "conscience protection" rights for persons working in health care could have far-reaching consequences. Does HHS intend to countenance, for instance:

- Refusal to provide assistance to a same-sex couple with a sick child because of an objection to same-sex parenting?
- Refusal to even provide information to an individual questioning their gender identity on their possible options, or places where they might get the information or support they need?
- Refusal to provide help to a sick woman or man who is, or is thought to be Muslim because of a health care worker's aversion to Islam?
- Refusal to provide assistance to an individual struggling with an opioid addiction because of a conviction that the addiction is the result of sin or the patient's moral failings?
- Refusal to help an individual diagnosed with HIV or Hepatitis C because of moral or religious disapproval of the way that the individual acquired (or is assumed to have acquired) the infection – namely, sex or injection drug use?

The dangers to LGBTQ persons needing health care are particularly grave. Many studies and medical authorities have documented the persistence of biases – explicit or implicit – against LGBTQ persons among many health care workers at every level – from physicians, nurses and other licensed providers to front-desk staff. LGBTQ persons continue to encounter stigma and discrimination in virtually every health care setting, including hospitals, outpatient clinics,

private doctors' offices, rehabilitation centers, and nursing homes. Transgender and gender-nonconforming persons are particularly at risk of substandard care or outright refusals of care. In this regard, it is particularly disturbing that the Proposed Rule offers, as an example of the "ills" it seeks to address, a lawsuit against a surgeon and hospital for refusing to perform a hysterectomy on a transgender man because of the patient's transgender status. 83 Fed. Reg. at 3888 n.36, 3889, c*iting Minton* v. *Dignity Health,* No. 17–558259 (Calif. Super. Ct. Apr. 19, 2017). Statutes that provide limited protection for health care providers who object to performing sterilization procedures on religious or moral grounds provide no justification for denying a medically indicated treatment of any kind – surgical, hormonal or other – to a transgender person. Suggesting otherwise is to encourage the gender identity discrimination that already is too prevalent.

Messaging that health care workers are legally entitled to refuse or restrict care, based on their personal religious or moral beliefs, flies in the face of the standards and ethics of every health care profession, and would sow confusion and undermine the entire health care system. Health care is a fundamentally patient-oriented endeavor. With limited exceptions explicitly recognized in the statues referenced in the Proposed Rule, the personal beliefs of health care workers are irrelevant to the performance of their jobs. A broad notion of a right to avoid "complicity" in medical procedures, lifestyles, or actions of other people with which one might personally disagree, which disregards the harm that might result to others, is legally, morally and politically unsupportable, particularly in a society like ours which encompasses, and encourages, a diversity of religious beliefs, cultures and philosophies. In health care, a sweeping right to "avoid complicity" is fundamentally corrosive. Encouraging employees of hospitals, health

systems, clinics, nursing homes and physician offices to express and act on their individual beliefs, in our religiously and morally diverse nation, would invite chaos, consume health care institutions with litigation, and result in denial of adequate care to uncounted numbers of people – particularly racial and ethnic minorities and LGBTQ people. No hospital, clinic or other health care entity or office could function in such an environment.

The impact of a broad, legally unsupported expansion of health care worker refusal rights on Whitman-Walker and our patients would be particularly drastic. Providing welcoming, high-quality care to the LGBTQ community and to persons affected by HIV is at the core of our mission. These are communities which are in particular need of affirming, culturally competent care because of the widespread stigma and discrimination they have experienced and continue to experience. We strive to message to all our staff that one's personal religious and moral views are irrelevant to our mission and to patient needs. It would be very difficult if not impossible for us to accommodate individual health care staff who might object to, e.g., transgender care, or counseling and assisting pregnant clients with their pregnancy termination options, or harm-reduction care for substance abusers, or care for lesbian, gay or bisexual patients – without fundamentally compromising our mission and the quality of patient care. Many of our LGBTQ patients and patients with HIV have experienced substantial stigma and discrimination and are very sensitive to being welcomed or not welcomed in a health care setting. If they encounter discrimination at WWH from any staff person at any point, our reputation as a safe and welcoming place would be undermined. There are multiple "patient touches" in our system as in any health care system: from the staff person answering the phone or sitting at the front desk to

the physician to the pharmacy worker. Each of those touches can promote or undermine patient health – can convey respect and affirmation or disrespect and rejection.

Moreover, in our diverse workforce, encouraging individual employees to think that their personal beliefs can prevail over their duties to patients – and to their fellow employees – would introduce confusion and discord into our staff as well pose barriers to patient care. The harm to our operations, finances and employee morale would be particularly complicated because we, like many health care entities, have a quasi-unionized workforce. Attempts to accommodate, for instance, one employee's unwillingness to work with transgender patients, or patients perceived to be gay, or Muslim patients, or persons with opioid addiction, would impose burdens on other staff, and likely would result in grievances filed by other employees. We would incur substantial financial costs and drains on staff time that would substantially challenge our ability to care for a growing patient load. There would also be increased pressure to ascertain whether job applicants will be unwilling to perform essential job functions, which seems likely to undermine our philosophy, which is to foster a diverse workforce.

In addition, there is every reason to believe that the Proposed Rule, and HHS' overly broad messaging of its legal authority, would result in increased discrimination against LGBTQ people and people with HIV at other health care centers and providers, outside Whitman-Walker. Biased attitudes towards LGBTQ people are still widespread but have tended to be more restrained or repressed due to changing social norms in some places. HHS messaging about the conscience rights of health care workers, particularly if not narrowly confined to specific procedures identified in the authorizing statutes, threatens to stimulate a sharp increase in those attitudes, which will have significant negative impacts on individual and public health. Fear of

discrimination among LGBTQ people would also increase. Whitman-Walker's health care providers – particularly our counselors, psychiatrists and other behavioral health staff – have many patients who have experienced traumatic stigma and discrimination – based on sexual orientation, gender identity, HIV status, race/ethnicity, and/or other factors. The creation of the new OCR Conscience and Religious Freedom Division, and HHS messaging to date, is causing increased fear and anxiety among our patients and in the LGBTQ community generally.

Escalating health care discrimination, and escalating fear of such discrimination, would result in increased demand for Whitman-Walker's services. Such increased demand would present considerable financial challenges. Many of our services to current patients lose money, due to third-party reimbursement rates and indirect cost reimbursement rates in contracts and grants which are substantially less than our cost of service. Substantially increased demand for our services, driven by increased discrimination and fear of discrimination outside Whitman-Walker, would exacerbate that pressure.

Conclusion

For the above reasons, Whitman-Walker Health requests that the Proposed Rule be withdrawn. At a minimum, HHS should substantially modify the Rule to make clear that it does not permit discrimination in health care against lesbian, gay, bisexual, transgender and queer persons – or any discrimination based on the race, ethnicity, gender, disability status or religion of any patient.

Respectfully Submitted,

Naseema Shafi, JD, Deputy Executive Director
Meghan Davies, MPH, CHES, CPH, Chief of Operations and Program Integration
Sarah Henn, MD, MPH, Senior Director of Health Care Operations and Medical Services
Randy Pumphrey, D.Min., LPC, BCC, Senior Director of Behavioral Health
Daniel Bruner, JD, MPP, Senior Director of Policy
Erin M. Loubier, JD, Senior Director of Health and Legal Integration
Carole Schor, PhD, SPHR, Director of Human Resources

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dbruner@whitman-walker.org

March 27, 2018

Exhibit 138

March 27, 2018

Director Roger Severino
Office for Civil Rights
Department of Health and Human Services
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue, SW
Washington, D.C. 20201

Submitted Electronically

Attention: Comments in Response to Department of Health and Human Services, Office for Civil Rights, Conscience NPRM, RIN 0945-ZA03

As a former Chair and a former Legal Counsel of the U.S. Equal Employment Opportunity Commission ("EEOC"), we are writing in strong opposition to the Department of Health and Human Services' (the "Department") proposed rule "Protecting Statutory Rights in Health Care" ("Proposed Rule").[1] Because the Proposed Rule will upset the careful balance struck under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"),[2] lead to unnecessary confusion and litigation, and result in patients losing access to critical care, we urge you to withdraw the Proposed Rule in its entirety. At the very least, the Proposed Rule should make clear that nothing in the regulation should be construed to alter the legal framework for religious accommodation requests under Title VII.

Background

As you know, Title VII prohibits, among other things, religious discrimination in employment. Under Title VII, employers must provide reasonable accommodation of employees' sincerely held religious beliefs, observances, and practices when requested, unless doing so would impose an undue hardship on the employer in conducting business operations.[3] The statute provides an

[1] Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3880 (proposed Jan. 26, 2018) (*to be codified at* 45 C.F.R. pt. 88) [*hereinafter* Rule].
[2] 42 U.S.C. § 2000e-2 et seq.
[3] 42 U.S.C. § 2000e-2(a) provides that it is an unlawful employment practice for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> 42 U.S.C. § 2000e(j) provides that:
>
> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or

exception for religious organizations with respect to the prohibition on religious discrimination, allowing them to give preference for employment to members of their own religion, even when that employment is not directly related to the religious activities of the organization.[4]

There is a robust body of case law that has developed under federal courts' interpretation of Title VII's prohibition on religious discrimination, which balances an employee's right to religious belief and an employers' business need, including the need to ensure patient access to care. In addition, the EEOC has issued regulations and guidance that further explain and interpret Title VII's religious discrimination prohibition, including a Compliance Manual Chapter issued in July 2008 following a unanimous, bipartisan vote of the Commission, which remains in effect today.[5] This approach is constitutionally sound, and consistent with the Establishment Clause of the U.S. Constitution.

The Proposed Rule Is Unnecessary

Title VII already protects individuals from employment discrimination based on religion, rendering the Proposed Rule unnecessary. Like other employees governed by Title VII, healthcare workers are already protected from religious discrimination and have the right to reasonable accommodation of their religious beliefs. Cases illustrate that this right has been applied to health care workers by courts across the country.[6] In light of these long-standing protections, it is clear the Proposed Rule seeks to solve a problem that does not exist.

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prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Subject to certain jurisdictional requirements, Title VII's prohibitions apply to employers, employment agencies, and unions. 42 U.S.C. § 2000e-2.

[4] Section 702(a) of Title VII, 42 U.S.C. § 2000e-1(a), provides:

> This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Section 703(e)(2) of Title VII, 42 U.S.C. § 2000e-2(e)(2) provides:

> it shall not be an unlawful employment practice for a school, college, university, or educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

[5] *See Guidelines on Discrimination Because of Religion*, 29 C.F.R. Part 1605; U.S. EQUAL EMP. OPPORTUNITY COMM'N,, *Compliance Manual Section* 12 (2008), *available at* http://www.eeoc.gov/policy/docs/religion.html.

[6] *See, e.g.*,Hellwege v. Tampa Family Health Ctrs. 103 F. Supp. 3d 1303, 1313 (M.D. Fla. 2015) (finding that plaintiff adequately alleged a prima facie case of employment discrimination under Title VII after the potential employer failed to hire her as a midwife given her religious beliefs against hormonal contraceptives); Nead v. Board of Trustees of Eastern Ill. Univ., No. 05-2137, 2006 WL 1582454, *4 (C.D. Ill. 2006) (denying employer's motion to dismiss as the plaintiff established a prima facie case of employment discrimination on the basis of religion by the employer when it denied a promotion to a nurse who would not dispense emergency contraception); Hellinger v.

The Proposed Rule Conflicts With and Upsets Title VII's Carefully Balanced Framework and Likely Violates the Establishment Clause

An employee's right to accommodation for religious belief is not absolute, and Title VII recognizes that there are some cases in which an employer may be excused from providing an accommodation if doing so would impose an undue hardship on the employer. The undue hardship consideration may include the effect on the public or patients seeking care. For example, an employer considering a request by a pharmacist not to fill certain prescriptions may argue that allowing the sole pharmacist on duty to refuse could place the employer in the position of being unable to effectively provide services to the public. In such a case, the EEOC recognizes that the employer may be excused from providing the accommodation because it would impose an undue hardship.[7] Additionally, courts have found that an employer may refuse a request for an accommodation that would result in discrimination against others or deprive them of contractual or other statutory rights.[8]

In other words, Title VII requires a careful balancing. And this balancing of interests that characterizes the Title VII analysis is particularly essential in the health care context, where a patient's life and health may be endangered because of an employee's refusal to provide needed health care.

In contrast to the Title VII framework, the Proposed Rule attempts to create an absolute right to religious accommodation for health care providers who oppose particular medical procedures. It also appears intended to override state laws governing access to health care, which would conflict with court decisions under Title VII that consider whether an accommodation would result in the denial of health care services in violation of state law requiring the provision of certain services by health care providers.[9] The Proposed Rule therefore threatens to disrupt Title VII's balance, which is the legal framework under which complaints of employment discrimination based on religion have been judged for over 40 years.

Moreover, the Proposed Rule likely violates the Establishment Clause. The Proposed Rule conditions the receipt of federal funds on an agreement to give preference to particular religious beliefs, and purports to nullify the undue hardship defense to religious accommodation claims by health care workers who oppose abortion and other selected medical procedures. These weaknesses, when introduced into the Title VII analysis, threaten to dismantle a complex

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Eckerd Corp., 67 F. Supp. 2d 1359, 1366 (S.D. Fla. 1999) (finding that defendant violated Title VII by failing to consider an accommodation for a pharmacist who refused to sell condoms).

[7] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Compliance Manual Section* 12-IV-C-3 (2008), *available at* http://www.eeoc.gov/policy/docs/religion.html.

[8] Peterson v. Hewlett-Packard Co., 358 F.3d 599, 606 (9th Cir. 2004) ("[A]n employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights.").

[9] *See* Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1383-84 (9th Cir. 1984) (holding that an employer is not liable under Title VII when accommodating an employee's religious belief would require the employer to violate federal or state law); Westbrook v. North Carolina A&T Univ., 51 F. Supp. 3d 612, 625 (M.D.N.C. 2014).

statutory framework that has consistently withstood constitutional challenge under the Establishment Clause.[10]

The Proposed Rule Will Lead to Confusion

The Proposed Rule makes no mention of Title VII and instead, sets out an entirely different and conflicting standard for some workplace discrimination complaints. As a practical matter, introducing another standard under the Proposed Rule will foster confusion among health care employers, who are left in the impossible position of being subject to, and trying to satisfy, both.

The lack of clarity regarding the interplay between the Proposed Rule and the Title VII religious accommodation analysis will not only result in profound confusion and extensive litigation, but will be especially burdensome to small businesses that are likely to have fewer resources available to help them understand how to apply the Proposed Rule. By the Department's own estimate, over three quarters of the more than 571,282 entities that would be affected by the Proposed Rule are doctors' offices and pharmacies.[11]

****

Given these legal and practical concerns, the Proposed Rule should be withdrawn. At a minimum, the Department should specify that Title VII will continue to provide the legal standard for deciding all workplace religious accommodation complaints. This is especially critical in the health care context, where the balancing of interests that characterizes the Title VII analysis is essential because of the need to ensure continuity of medical care for individuals without unnecessary and potentially life-threatening denials or delays.

Sincerely,

Peggy R. Mastroianni

Peggy Mastroianni

Jenny R. Yang

Jenny R. Yang

[10] *See* Trans World Airlines, Inc. v Hardison, 432 U.S. 63, 90 (1977); McDaniel v. Essex Int'l, Inc., 696 F.2d 34, 36 (6th Cir. 1982); Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO, 643 F.2d 445, 454 (7th Cir. 1981); Tooley v. Martin Marietta Corp., 648 F.2d 1239, 1244-46 (9th Cir. 1981).

[11] *See* Rule *supra* note 1, at 119-124 (Estimated number of persons and entities covered by NPRM; Of the estimated 571,282 persons and entities covered by the NPRM 430,232 are estimated to be doctors offices and pharmacies).

Exhibit 139

Form Approved: OMB No. 0990-0269.
See OMB Statement on Reverse.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE FOR CIVIL RIGHTS (OCR)

CIVIL RIGHTS DISCRIMINATION COMPLAINT

YOUR FIRST NAME	YOUR LAST NAME
[redacted]	[redacted]
H CELL PHONE (Please include area code)	W PHONE (Please include area code)
[redacted]	[redacted]
STREET ADDRESS	CITY
[redacted]	[redacted]
ST	E-MAIL ADDRESS (If availa
[redacted]	[redacted]

Are you filing this complaint for someone else? [X] Yes [ ] No

If Yes, whose civil rights do you believe were violated?

FIRST NAME	LAST NAME
The Little Sisters of the Poor	

I believe that I have been (or someone else has been) discriminated against on the basis of:

[ ] Race / Color / National Origin [ ] Age [X] Religion [ ] Sex

[ ] Disability [ ] Other (specify): _____

Who or what agency or organization do you believe discriminated against you (or someone else)?

PERSON/AGENCY/ORGANIZATION

Commonwealth of Pennsylvania, Attorney General Josh Shapiro

STREET ADDRESS	CITY
Office of Attorney General , Strawberry Square, 16th Floor	Harrisburg

STATE	ZIP	PHONE (Please include area code)
Pennsylvania	17120	(717) 787-3391

When do you believe that the civil right discrimination occurred?

LIST DATE(S)

10/11/2017, 01/11/2018

Describe briefly what happened. How and why do you believe that you have been (or someone else has been) discriminated against? Please be as specific as possible. (Attach additional pages as needed)

Pennsylvania is trying to force religious objectors to provide insurance coverage for abortion-inducing drugs and devices, along with contraceptives and sterilization. Pennsylvania itself does not require health insurance plans governed by state law to cover contraceptives, https://www.governor.pa.gov/governor-wolf-calls-legislature-make-birth-control-coverage-mandate/, but that has not stopped it from challenging the federal government's religious exemption of the Little Sisters of the Poor (LSP) from a federal contraception mandate. Pennsylvania has filed a federal

This field may be truncated due to size limit. See the "Allegation Description" file in the case folder.

Please sign and date this complaint. You do not need to sign if submitting this form by email because submission by email represents your signature.

SIGNATURE	DATE *(mm/dd/yyyy)*
[redacted]	01/11/2018

Filing a complaint with OCR is voluntary. However, without the information requested above, OCR may be unable to proceed with your complaint. We collect this information under authority of Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of1973 and other civil rights statutes. We will use the information you provide to determine if we have jurisdiction and, if so, how we will process your complaint. Information submitted on this form is treated confidentially and is protected under the provisions of the Privacy Act of 1974. Names or other identifying information about individuals are disclosed when it is necessary for investigation of possible discrimination, for internal systems operations, or for routine uses, which include disclosure of information outside the Department of Health and Human Services (HHS) for purposes associated with civil rights compliance and as permitted by law. It is illegal for a recipient of Federal financial assistance from HHS to intimidate, threaten, coerce, or discriminate or retaliate against you for filing this complaint or for taking any other action to enforce your rights under Federal civil rights laws. You are not required to use this form. You also may write a letter or submit a complaint electronically with the same information. To submit an electronic complaint, go to OCR's web site at: **www.hhs.gov/ocr/civilrights/complaints/index.html**. To mail a complaint see reverse page for OCR Regional addresses.

The remaining information on this form is optional. Failure to answer these voluntary questions will not affect OCR's decision to process your complaint.

Do you need special accommodations for us to communicate with you about this complaint? (Check all that apply)

☐ Braille ☐ Large Print ☐ Cassette tape ☐ Computer diskette ☐ Electronic mail ☐ TDD

☐ Sign language interpreter (specify language): _____

☐ Foreign language interpreter (specify language): _____ ☐ Other: _____

If we cannot reach you directly, is there someone we can contact to help us reach you?

FIRST NAME	LAST NAME
HOME / CELL PHONE (Please include area code)	WORK PHONE (Please include area code)
STREET ADDRESS	CITY
STATE / ZIP	E-MAIL ADDRESS (If available)

Have you filed your complaint anywhere else? If so, please provide the following. (Attach additional pages as needed)

PERSON/AGENCY/ORGANIZATION/ COURT NAME(S)

DATE(S) FILED	CASE NUMBER(S) (If known)

To help us better serve the public, please provide the following information for the person you believe was discriminated against (you or the person on whose behalf you are filing).

ETHNICITY (select one)

☐ Hispanic or Latino ☐ Not Hispanic or Latino

RACE (select one or more)

☐ American Indian or Alaska Native ☐ Asian ☐ Native Hawaiian or Other Pacific Islander ☐ Black or African American ☐ White ☐ Other (specify): _____

PRIMARY LANGUAGE SPOKEN (if other then English) _____

How did you learn about the Office for Civil Rights?

☒ HHS Website/Internet Search ☐ Family/Friend/Associate ☐ Religious/Community Org ☐ Lawyer/Legal Org ☐ Phone Directory ☐ Employer ☐ Fed/State/Local Gov ☐ Healthcare Provider/Health Plan ☐ Conference/OCR Brochure ☐ Other (specify): _____

To mail a complaint, please type or print, and return completed complaint to the OCR Regional Address based on the region where the alleged violation took place. If you need assistance completing this form, contact the appropriate region listed below.

Region I - CT, ME, MA, NH, RI, VT
Office for Civil Rights, DHHS
JFK Federal Building - Room 1875
Boston, MA 02203
(617) 565-1340; (617) 565-1343 (TDD)
(617) 565-3809 FAX

Region II - NJ, NY, PR, VI
Office for Civil Rights, DHHS
26 Federal Plaza - Suite 3312
New York, NY 10278
(212) 264-3313; (212) 264-2355 (TDD)
(212) 264-3039 FAX

Region III - DE, DC, MD, PA, VA, WV
Office for Civil Rights, DHHS
150 S. Independence Mall West - Suite 372
Philadelphia, PA 19106-3499
(215) 861-4441; (215) 861-4440 (TDD)
(215) 861-4431 FAX

Region IV - AL, FL, GA, KY, MS, NC, SC, TN
Office for Civil Rights, DHHS
61 Forsyth Street, SW. - Suite 16T70
Atlanta, GA 30303-8909
(404) 562-7886; (404) 562-7884 (TDD)
(404) 562-7881 FAX

Region V - IL, IN, MI, MN, OH, WI
Office for Civil Rights, DHHS
233 N. Michigan Ave. - Suite 240
Chicago, IL 60601
(312) 886-2359; (312) 353-5693 (TDD)
(312) 886-1807 FAX

Region VI - AR, LA, NM, OK, TX
Office for Civil Rights, DHHS
1301 Young Street - Suite 1169
Dallas, TX 75202
(214) 767-4056; (214) 767-8940 (TDD)
(214) 767-0432 FAX

Region VII - IA, KS, MO, NE
Office for Civil Rights, DHHS
601 East 12th Street - Room 248
Kansas City, MO 64106
(816) 426-7277; (816) 426-7065 (TDD)
(816) 426-3686 FAX

Region VIII - CO, MT, ND, SD, UT, WY
Office for Civil Rights, DHHS
999 18th Street, Suite 417
Denver, CO 80202
(303) 844-2024; (303) 844-3439 (TDD)
(303) 844-2025 FAX

Region IX - AZ, CA, HI, NV, AS, GU, The U.S. Affiliated Pacific Island Jurisdictions
Office for Civil Rights, DHHS
90 7th Street, Suite 4-100
San Francisco, CA 94103
(415) 437-8310; (415) 437-8311 (TDD)
(415) 437-8329 FAX

Region X - AK, ID, OR, WA
Office for Civil Rights, DHHS
701 Fifth Avenue, Suite 1600, MS - 11
Seattle, WA 98104
(206) 615-2290; (206) 615-2296 (TDD)
(206) 615-2297 FAX

Burden Statement

Public reporting burden for the collection of information on this complaint form is estimated to average 45 minutes per response, including he time for reviewing instruc ions, gathering the data needed and entering and reviewing the information on he completed complaint form. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: HHS/OS Reports Clearance Officer, Office of Information Resources Management, 200 Independence Ave. S.W., Room 531H, Washington, D.C. 20201. **Please do not mail complaint form to this address.**

HHS-699 (7/09) (BACK)

COMPLAINANT CONSENT FORM

The Department of Health and Human Services' (HHS) Office for Civil Rights (OCR) has the authority to collect and receive material and information about you, including personnel and medical records, which are relevant to its investigation of your complaint.

To investigate your complaint, OCR may need to reveal your identity or identifying information about you to persons at the entity or agency under investigation or to other persons, agencies, or entities.

The Privacy Act of 1974 protects certain federal records that contain personally identifiable information about you and, with your consent, allows OCR to use your name or other personal information, if necessary, to investigate your complaint.

Consent is voluntary, and it is not always needed in order to investigate your complaint; however, failure to give consent is likely to impede the investigation of your complaint and may result in the closure of your case.

Additionally, OCR may disclose information, including medical records and other personal information, which it has gathered during the course of its investigation in order to comply with a request under the Freedom of Information Act (FOIA) and may refer your complaint to another appropriate agency.

Under FOIA, OCR may be required to release information regarding the investigation of your complaint; however, we will make every effort, as permitted by law, to protect information that identifies individuals or that, if released, could constitute a clearly unwarranted invasion of personal privacy.

Please read and review the documents entitled, *Notice to Complainants and Other Individuals Asked to Supply Information to the Office for Civil Rights* and *Protecting Personal Information in Complaint Investigations* for further information regarding how OCR may obtain, use, and disclose your information while investigating your complaint.

In order to expedite the investigation of your complaint if it is accepted by OCR, please read, sign, and return one copy of this consent form to OCR with your complaint. Please make one copy for your records.

- As a complainant, I understand that in the course of the investigation of my complaint it may become necessary for OCR to reveal my identity or identifying information about me to persons at the entity or agency under investigation or to other persons, agencies, or entities.

- I am also aware of the obligations of OCR to honor requests under the Freedom of Information Act (FOIA). I understand that it may be necessary for OCR to disclose information, including personally identifying information, which it has gathered as part of its investigation of my complaint.

- In addition, I understand that as a complainant I am covered by the Department of Health and Human Services' (HHS) regulations which protect any individual from being intimidated, threatened, coerced, retaliated against, or discriminated against because he/she has made a complaint, testified, assisted, or participated in any manner in any mediation, investigation, hearing, proceeding, or other part of HHS' investigation, conciliation, or enforcement process.

After reading the above information, please check ONLY ONE of the following boxes:

[X] **CONSENT:** I have read, understand, and agree to the above and give permission to OCR to reveal my identity or identifying information about me in my case file to persons at the entity or agency under investigation or to other relevant persons, agencies, or entities during any part of HHS' investigation, conciliation, or enforcement process.

[ ] **CONSENT DENIED:** I have read and I understand the above and do not give permission to OCR to reveal my identity or identifying information about me. I understand that this denial of consent is likely to impede the investigation of my complaint and may result in closure of the investigation.

Signature: [redacted] Date: 01/11/2018

**Please sign and date [redacted] need to sign if submitting this form by email because submission by email represents your signature.*

Name (Please print): [redacted]

Address: [redacted]

Telephone Number: , [redacted]

NOTICE TO COMPLAINANTS AND OTHER INDIVIDUALS ASKED TO SUPPLY INFORMATION TO THE OFFICE FOR CIVIL RIGHTS

Privacy Act

The Privacy Act of 1974 (5 U.S.C. §552a) requires OCR to notify individuals whom it asks to supply information that:

— OCR is authorized to solicit information under:
(i) Federal laws barring discrimination by recipients of Federal financial assistance on grounds of race, color, national origin, disability, age, sex, religion under programs and activities receiving Federal financial assistance from the U.S. Department of Health and Human Services (HHS), including, but not limited to, Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), the Age Discrimination Act of 1975 (42 U.S.C. §6101 et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. §1681 et seq.), and Sections 794 and 855 of the Public Health Service Act (42 U.S.C. §§295m and 296g);
(ii) Titles VI and XVI of the Public Health Service Act (42 U.S.C. §§291 et seq. and 300s et seq.) and 42 C.F.R. Part 124, Subpart G (Community Service obligations of Hill-Burton facilities);
(iii) 45 C.F.R. Part 85, as it implements Section 504 of the Rehabilitation Act in programs conducted by HHS; and
(iv) Title II of the Americans with Disabilities Act (42 U.S.C. §12131 et seq.) and Department of Justice regulations at 28 C.F.R. Part 35, which give HHS "designated agency" authority to investigate and resolve disability discrimination complaints against certain public entities, defined as health and service agencies of state and local governments, regardless of whether they receive federal financial assistance.
(v) The Standards for the Privacy of Individually Identifiable Health Information (The Privacy Rule) at 45 C.F.R. Part 160 and Subparts A and E of Part 164, which enforce the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 U.S.C. §1320d-2).

OCR will request information for the purpose of determining and securing compliance with the Federal laws listed above. Disclosure of this requested information to OCR by individuals who are not recipients of federal financial assistance is voluntary; however, even individuals who voluntarily disclose information are subject to prosecution and penalties under 18 U.S.C. § 1001 for making false statements.

Additionally, although disclosure is voluntary for individuals who are not recipients of federal financial assistance, failure to provide OCR with requested information may preclude OCR from making a compliance determination or enforcing the laws above.

OCR has the authority to disclose personal information collected during an investigation without the individual's consent for the following routine uses:

(i) to make disclosures to OCR contractors who are required to maintain Privacy Act safeguards with respect to such records;
(ii) for disclosure to a congressional office from the record of an individual in response to an inquiry made at the request of the individual;
(iii) to make disclosures to the Department of Justice to permit effective defense of litigation; and
(iv) to make disclosures to the appropriate agency in the event that records maintained by OCR to carry out its functions indicate a violation or potential violation of law.

Under 5 U.S.C. §552a(k)(2) and the HHS Privacy Act regulations at 45 C.F.R. §5b.11 OCR complaint records have been exempted as investigatory material compiled for law enforcement purposes from certain Privacy Act access, amendment, correction and notification requirements.

Freedom of Information Act
A complainant, the recipient or any member of the public may request release of OCR records under the Freedom of Information Act (5 U.S.C. §552) (FOIA) and HHS regulations at 45 C.F.R. Part 5.

Fraud and False Statements
Federal law, at 18 U.S.C. §1001, authorizes prosecution and penalties of fine or imprisonment for conviction of "whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry".

PROTECTING PERSONAL INFORMATION IN COMPLAINT INVESTIGATIONS

To investigate your complaint, the Department of Health and Human Services' (HHS) Office for Civil Rights (OCR) will collect information from different sources. Depending on the type of complaint, we may need to get copies of your medical records, or other information that is personal to you. This Fact Sheet explains how OCR protects your personal information that is part of your case file.

HOW DOES OCR PROTECT MY PERSONAL INFORMATION?

OCR is required by law to protect your personal information. The Privacy Act of 1974 protects Federal records about an individual containing personally identifiable information, including, but not limited to, the individual's medical history, education, financial transactions, and criminal or employment history that contains an individual's name or other identifying information.

Because of the Privacy Act, OCR will use your name or other personal information with a signed consent and only when it is necessary to complete the investigation of your complaint or to enforce civil rights laws or when it is otherwise permitted by law.

Consent is voluntary, and it is not always needed in order to investigate your complaint; however, failure to give consent is likely to impede the investigation of your complaint and may result in the closure of your case.

CAN I SEE MY OCR FILE?

Under the Freedom of Information Act (FOIA), you can request a copy of your case file once your case has been closed; however, OCR can withhold information from you in order to protect the identities of witnesses and other sources of information.

CAN OCR GIVE MY FILE TO ANY ONE ELSE?

If a complaint indicates a violation or a potential violation of law, OCR can refer the complaint to another appropriate agency without your permission.

If you file a complaint with OCR, and we decide we cannot help you, we may refer your complaint to another agency such as the Department of Justice.

CAN ANYONE ELSE SEE THE INFORMATION IN MY FILE?

Access to OCR's files and records is controlled by the Freedom of Information Act (FOIA). Under FOIA, OCR may be required to release information about this case upon public request. In the event that OCR receives such a request, we will make every effort,

as permitted by law, to protect information that identifies individuals, or that, if released, could constitute a clearly unwarranted invasion of personal privacy.

If OCR receives protected health information about you in connection with a HIPAA Privacy Rule investigation or compliance review, we will only share this information with individuals outside of HHS if necessary for our compliance efforts or if we are required to do so by another law.

DOES IT COST ANYTHING FOR ME (OR SOMEONE ELSE) TO OBTAIN A COPY OF MY FILE?

In most cases, the first two hours spent searching for document(s) you request under the Freedom of Information Act and the first 100 pages are free. Additional search time or copying time may result in a cost for which you will be responsible. If you wish to limit the search time and number of pages to a maximum of two hours and 100 pages; please specify this in your request. You may also set a specific cost limit, for example, cost not to exceed $100.00.

If you have any questions about this complaint and consent package,
Please contact OCR at http://www.hhs.gov/ocr/office/about/contactus/index.html

OR

Contact your OCR Regional Office
(see Regional Office contact information on page 2 of the Complaint Form)

Pennsylvania is trying to force religious objectors to provide insurance coverage for abortion-inducing drugs and devices, along with contraceptives and sterilization. Pennsylvania itself does not require health insurance plans governed by state law to cover contraceptives, https://www.governor.pa.gov/governor-wolf-calls-legislature-make-birth-control-coverage-mandate/, but that has not stopped it from challenging the federal government's religious exemption of the Little Sisters of the Poor (LSP) from a federal contraception mandate. Pennsylvania has filed a federal lawsuit to try to force the federal government to take away the religious exemption it has provided to LSP and other groups.

Pennsylvania is thus engaged in religious discrimination. It is directly targeting religious objectors in an effort to force them to provide objected-to services, even though it has never objected to much larger exemptions for secular employers. For many years, many other employers were exempt from the federal contraceptive mandate—including millions of employers with grandfathered plans (who are allowed to exclude this coverage) and small employers (who do not need to provide any coverage at all). Pennsylvania did not sue the federal government or otherwise seek to interfere with the rights of these employers to exclude the relevant coverage for secular reasons, including purely financial reasons.

But in October, Pennsylvania filed a federal lawsuit seeking to attack the right of religious objectors to get the same treatment that other employers already have for secular reasons. Singling out religious actors for special negative treatment is the essence of religious discrimination. If the Little Sisters excluded this coverage because they had a grandfathered plan, Pennsylvania would apparently not complain; but because they exclude for religious reasons, Pennsylvania filed a federal lawsuit to attack their rights. Pennsylvania's complaint is available here: http://s3.amazonaws.com/becketnewsite/Complaint-in-Commonwealth-of-Pennsylvania-v.-Trump.pdf

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*, *Plaintiff*, v. ALEX M. AZAR II, *et al.*, *Defendants*.	No. 1:19-cv-04676-PAE
PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; and PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, INC., *Plaintiff*, v. ALEX M. AZAR II, *et al.*, *Defendants*.	No. 1:19-cv-05433-PAE
NATIONAL FAMILY PLANNING AND REPRODUCTION HEALTH ASSOCIATION; and PUBLIC HEALTH SOLUTIONS, INC. *Plaintiff*, v. ALEX M. AZAR II, *et al.*, *Defendants*.	No. 1:19-cv-05435-PAE

NOTICE OF FILING

Defendants submit this notice to inform the Court that, pursuant to the Court's October 21, 2019 and October 25, 2019 Orders, Defendants sent copies of the administrative record ("AR") in this case to the Court and to the Clerk's Office on thumb drives today via overnight courier. Attached to this notice as exhibits are the relevant certifications that the AR is complete, as well as indexes describing the AR's contents.

Dated: October 25, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

MICHELLE R. BENNETT
Assistant Branch Director

/s/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS
(D.C. Bar No. 988057)
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005
Phone: (202) 305-0878
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Counsel for Defendants

Exhibit A

Administrative Rulemaking Record for the 2019 Final Rule
Protecting Statutory Conscience Rights in Health Care; Delegations of Authority

CERTIFICATION OF THE ADMINISTRATIVE RECORD

Pursuant to 28 U.S.C. § 1746, I, March Bell, Chief of Staff, Office for Civil Rights, United States Department of Health and Human Services (HHS), certify, to the best of my knowledge, that the materials described in the accompanying Index, in addition to those publicly available materials otherwise referenced in the 2018 Proposed Rule, 83 Fed. Reg. 3,880 (Jan. 26, 2018) and in *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority,* 84 Fed. Reg. 23,170, 45 C.F.R. Part 88 (May 21, 2019) ("2019 Final Rule"), comprise the complete administrative rulemaking record for the 2019 Final Rule, and together with those publicly available materials, includes all materials considered by HHS in promulgating the 2019 Final Rule.

I declare under penalty of perjury that the foregoing is true and correct. Executed, this 22nd day of July, 2019, in Washington, District of Columbia.

March Bell, Esq.
Chief of Staff
Office for Civil Rights
United States Department of Health and Human Services

Exhibit B

CERTIFICATION

I, Luis E. Perez, state as follows:

1. I am Deputy Director of the Conscience and Religious Freedom Division of the Office for Civil Rights at the U.S. Department of Health and Human Services (HHS). I am familiar with the rule entitled *Protecting Statutory Conscience Rights in Health Care: Delegations of* Authority, 84 Fed. Reg. 23,170 (May 21, 2019) (2019 Final Rule), and the process by which HHS considered materials in finalizing that rule.

2. I certify to the best of my personal knowledge that the materials described below, together with the administrative record materials that Defendants provided on July 22, 2019, in the above captioned case (consisting of 546,163 pages), and with those publicly available materials otherwise referenced in the 2018 Proposed Rule, 83 Fed. Reg. 3,880 (Jan. 26, 2018) and in the 2019 Final Rule, which were referenced in the July 22, 2019, certification of the administrative record, constitute the complete administrative record for the 2019 Final Rule. The materials described below are as follows:

    a. Materials regarding conscience protections in U.S. foreign assistance, including the United States President's Emergency Plan for AIDS Relief (PEPFAR) (approximately 119 pages).

    b. Certain complaint records that were intended to be included in the administrative record on July 22, 2019 (approximately 43 pages).

    c. Excel spreadsheets of meta-data automatically-generated by the E-Rulemaking Initiative's Federal Docket Management System for the public submissions on the 2018 NPRM, Protecting Statutory Conscience Rights in

Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018).

3. Additionally, based on HHS's review, and the representations of counsel for Defendants in the accompanying declaration of Bradley Humphreys, to the best of my knowledge and in good faith, I certify that the materials described in the accompanying Supplemental Index constitute a compilation of publicly available materials that were cited in the 2019 Final Rule, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (Mar. 21, 2019), and the 2018 NPRM Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3,880 (proposed Jan. 26, 2018), *excluding* statutes, regulations, Federal Register citations, legal cases, Executive Orders, the congressional record, and unenacted bills.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on August 19, 2019

Luis E. Perez
Deputy Director

Exhibit C

DECLARATION OF BRADLEY P. HUMPHREYS

I, Bradley P. Humphreys, state as follows:

1. I am a Trial Attorney in the Federal Programs Branch of the Civil Division, United States Department of Justice, and I represent Defendants in the cases challenging the rule entitled *Protecting Statutory Conscience Rights in Health Care: Delegations of* Authority, 84 Fed. Reg. 23,170 (May 21, 2019) (Final Rule).

2. I submit this declaration, along with the accompanying supplemental certification Luis E. Perez, Deputy Director of the Conscience and Religious Freedom of the Office for Civil Rights (OCR), in response to the Court's August 16, 2019 Order in *State of New York, et al. v. U.S. Department of Health and Human Services*, No. 1:19-cv-0476 (S.D.N.Y), ECF No. 158.

3. To facilitate supplementation of the administrative record for the rulemaking at issue in these cases, my colleagues and I in the Federal Programs Branch worked with counsel and staff at the U.S. Department of Health & Human Services' Office of General Counsel and OCR.

4. In response to inquiries from the plaintiffs in these cases related to the completeness of the administrative record, and in order to respond to those inquiries expeditiously, my colleagues and I in the Federal Programs Branch assisted with gathering publicly available sources cited in the rule challenged in these cases, *Protecting Statutory Conscience Rights in Health Care: Delegations of* Authority, 84 Fed. Reg. 23,170 (May 21, 2019) (Final Rule), and the accompanying 2018 Notice of Proposed Rulemaking (NPRM), *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 83 Fed. Reg. 3880 (Jan. 26, 2018), *excluding* statutes, regulations, Federal Register citations, legal cases, Executive Orders, the congressional record, and unenacted bills.

5. OCR provided us a list of sources cited in the Final Rule and the NPRM. My

colleagues and I worked to compile the items on OCR's list, not including statutes, regulations, Federal Register citations, legal cases, Executive Orders, the congressional record, and unenacted bills, with the goal of compiling all such sources.

6. For websites publicly cited in the rulemakings in the scope of the Supplemental Index, we have included a screenshot of the website as close in time as possible to the date that was cited in the relevant rule or proposed rule. When no date was cited, we have included a screenshot of the website as close in time as possible to the date on which the relevant rule or proposed rule was published. If we were able to locate an archived screenshot of the relevant website, we included it. Otherwise, a current screenshot of the relevant website was included.

7. After compiling the publicly available materials described above, we provided the documents to OCR for them to review in order to ensure that the versions we collected were the same versions considered by OCR during the rulemaking process.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 19, 2019

Respectfully submitted,

BRADLEY P. HUMPHREYS
(D.C. Bar No. 988057)
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005
Phone: (202) 305-0878
E-mail: Bradley.Humphreys@usdoj.gov

Counsel for Defendants

Exhibit D

INDEX TO THE ADMINISTRATIVE RECORD

Final Rule: Protecting Statutory Conscience Rights in Health Care; Delegations of Authority

84 Fed. Reg. 23,170 (Mar. 21, 2019)

Bates Number	Description
000000001 - 000185296	Public comments submitted in response to 2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
000185297 - 000185308	2008 NPRM, Ensuring that Department of Health and Human Service Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law (Proposed Rule), 73 Fed. Reg. 50,274 (Aug. 26, 2008)
000185309 - 000198372	Public comments submitted in response to 2008 NPRM, Ensuring that Department of Health and Human Service Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law (Proposed Rule), 73 Fed. Reg. 50,274 (Aug. 26, 2008)
000198373 - 000198403	2008 Final Rule, Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law (Final Rule), 73 Fed. Reg. 78,072 (Dec. 19, 2008)
000198404 - 000198408	2009 NPRM, Rescission of the Regulation Entitled "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law"; Proposal (Proposed Rule), 74 Fed. Reg. 10,207 (March 10, 2009)
000198409 – 000537538	Public comments submitted in response to 2009 NPRM, Rescission of the Regulation Entitled "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law"; Proposal (Proposed Rule), 74 Fed. Reg. 10,207 (March 10, 2009)
000537539 – 000537548	2011 Final Rule, Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws (Final Rule), 76 Fed. Reg. 9,968 (Feb. 23, 2011)
000537549 - 000537560	Armand H. Matheny Antommaria, *Adjudicating rights or analyzing interests: ethicists' role in the debate over conscience in clinical practice*, Theor. Med. Bioeth. 29:201-212 (2008)
000537561 - 000537562	Letter from Members of Congress to Sylvia M. Burwell, Secretary of Health and Human Services, and Jocelyn Samuels, Director of the Office for Civil Rights (June 28, 2016)
000537563 - 000537577	Lisa H. Harris *et al.*, *Obstetrician-Gynecologists' Objections to an Willingness to Help Patients Obtain and Abortion*, Obstet. Gynecol. 118(4): 905-912 (October 2011)
000537578 - 000537579	Letter from Michael O. Leavitt, Secretary of Health and Human Services, to Norman F. Gant, Executive Director of the American Board of Obstetrics and Gynecology (Mar. 13, 2008)
000537580 - 000537593	Peter A. Clark, *Medical Ethics at Guantanamo Bay and Abu Ghraib, the Problem of Dual Loyalty*, 34 J.L. Med. & Ethics 570 (Fall 2006)
000537594 - 000537602	Letter from Members of Congress to Sylvia Mathews Burwell, Secretary of Health and Human Services (Nov. 25, 2014)
000537603 – 000537608	Letter from Members of Congress to Kathleen Sebelius, Secretary of Health and Human Services (Feb. 11, 2011)
000537609 - 000537613	Freedom2Care and The Christian Medical Association, Summary of Polling Data

Bates Number	Description
000537614 - 000537744	William W. Bassett, *Private Religious Hospitals: Limitation Upon Autonomous Moral Choices in Reproductive Medicine*, J. Contemp. H. L. & Policy 17: 455-583 (2001)
000537745 - 000537752	List of 343 Conscience Complaints OCR Received in FY 2018
000537753 - 000537755	Census Statistics of U.S. Businesses Data
000537756 - 000537757	2010 Census Geographic Entity Tallies by State and Type
000537758 - 000537801	FY 2016 HHS Awards to Junior Colleges, Colleges, and Universities
000537802 - 000537806	FY 2017 HHS Awards from PEPFAR Implementing Agencies to Foreign Nonprofits, Foreign Governments, and International Organizations
000537807 - 000537820	FY 2017 HHS Awards to Counties
000537821 - 000537828	FY 2017 HHS Awards to the State of California, Pivot Table
000537829 - 000537872	FY 2020, HHS OCR, Justification of Estimates for Appropriations Committees
000537873	HHS Table Supporting Regulatory Impact Analysis
000537874	Form HHS-690, Civil Rights Assurance of Compliance
000537875	Form SF-424B – R&R, Federal Agency Form Instructions
000537876 - 000537877	Form SF-424B
000537878 - 000537879	Financial Assistance General Certifications and Representations - Test from Grants.Gov Staff
000537880 - 000537891	Christian Medical Association, Memorandum to Office of Public Health and Science Department of Health and Human Services (Apr. 9, 2009)
000537892 - 000537893	Douglas B. White & Baruch Brody, *Would Accommodating Some Conscientious Objections by Physicians Promote Quality in Medical Care?*, JAMA, Vol. 305, No. 17 (May 4, 2011)
000537894 - 000537900	Josh Hyatt, *Recognizing Moral Disengagement and Its Impact on Patient Safety*, J. of Nursing Reg., Vol. 7, Issue 4 (Jan. 2017)
000537901 - 000537923	Joan McCarthy & Chris Gastmans, *Moral distress: A review of the argument-based nursing ethics literature*, Nursing Ethics, Vol. 22(I), 131-152 (2015)
000537924 - 000537931	Farr A. Curlin, *et al.*, Religion, Conscience, and Controversial Clinic Practice, N. Engl. J. Med., 356:593-600 (2017)
000537932 - 000537951	Lynn Stout, Cultivating Conscience: How Good Laws Make Good People, Chapter 1
000537952 - 000537996	Kevin H. Theriot & Ken Connelly, *Free to Do No Harm: Conscience Protections for Healthcare Professionals*, 49 Ariz. State L. J. 549 (Summer 2017)
000537997 - 000537999	Letter from George Washington to the Society of Quakers (Oct. 13, 1789)

Bates Number	Description
000538000 - 000538014	*United States v. Seeger*, 380 U.S. (1965)
000538015 - 000538028	Christy Mallory & Brad Sears, *Evidence of Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008-2014*, The Williams Institute (Feb. 2016)
000538029 - 000538045	Christy A. Rentmeester, *Moral Damage to Health Care Professionals and Trainees: Legalism and Other Consequences for Patients and Colleagues, Journal of Medicine and Philosophy*, J. Med. & Philosophy, 33: 27-43 (2008)
000538046 - 000538051	Kathleen M. Morrell and Wendy Chavkin, *Conscientious Objection to Abortion and Reproductive Healthcare: A Review of Recent Literature and Implications for Adolescents*, Curr. Opin. Obstet. Gynecol. 27:333-338 (2015)
000538052 - 000538075	Emmanuel Scheppers, *et al.*, Potential Barriers to the Use of Health Services Among Ethnic Minorities: A Review, Family Practice 23: 325-348 (2006)
000538076 - 000538504	James Madison, *The Writings of James Madison*, ed. Gallard Hunt Vol. 2 (1901)
000538505 - 000538552	Human Rights Watch, *"All We Want is Equality" Religious Exemptions and Discrimination against LGBT People in the United States* (2018)
000538553 - 000538637	Letter from Lawrence J. Joseph on behalf of the American Association of Pro-Life Obstetricians and Gynecologists to the Department of Health & Human Services Office of Public Health & Science (April 9, 2009)
000538638 - 000538666	Christopher C. Lund, *Religion is Special Enough*, 103 Va. L. Rev. 481 (May 2017)
000538667	James Madison, Property, The Founders' Constitution, Vol. 1, Ch. 16, Doc. 23
000538670 – 000538674	Michael P. Combs *et al.*, *Conscientious refusal to refer: findings from a national physician survey*, J. Med. Ethics 37:397-401 (2011)
000538675 - 000538708	*Conscientious objection to the provision of reproductive health care*, Ed. Wendy Chavkin, Supp. to Int'l J. Gynecology & Obstetrics 123 Supp. 3
000538709 - 000538727	Stephen J. Genuis and Chris Lipp, Review Article: *Ethical Diversity and the Role of Conscience in Clinical Medicine*, Int'l J. Family Medicine (2013)
000538728 - 000538732	Letter from Reverent Dennis H. Holtschneider, Executive Vice President and Chief Operations Officer of Ascension to Alex M. Azar II, Secretary of Health and Human Services (March 27, 2018)
000538733 - 000538740	Fariba Borhani *et al.*, *The relationship between moral distress, professional stress, and intent to stay in nursing profession*, J. Med. Ethics & History of Med. 7:4 (2014)
000538741 - 000538764	Matthew S. Bowman and Christopher P. Schandevel, *The Harmony between Professional Conscience Rights and Patients' Right of Access*, 6 Phoenix L. Rev. 31 (Fall 2012)
000538765 - 000538788	Kathleen A. Brady, *The Disappearance of Religion from Debates about Religious Accommodation*, 20 Lewis & Clark L. Rev. 1093 (2017)
000538789 - 000538791	Letter from Sr. Carol Keehan, President and CEO of the Catholic Health Association of the United States to Department of Health and Human Services (March 27, 2018)

Bates Number	Description
000538792 - 000538810	Fallon Chipidza *et al*., *Impact of the Doctor-Patient Relationship*, Prim. Care Companion CNS Discord. 2015; 17(5)
000538811 - 000538815	Freedom2Care and The Christian Medical Association, Summary of Polling Data
000538816 - 000538821	Ezekiel Emmanuel *et al*., *Euthanasia and Physician-Assisted Suicide: attitudes and experiences of oncology patients, oncologists, and the public*, The Lancet 347, 9018 (Jun. 29, 1996)
000538822 - 000539068	Department of Health and Human Services, Fiscal Year 2018, Administration for Community Living: Justification of Estimates for Appropriations Committees
000539069	Estimated Cost for Reporting Notices of Violation per Firm – Required by 88.6d
000539070 - 000539402	Department of Health and Human Services, Fiscal Year 2018, Centers for Disease Control and Prevention: Justification of Estimates for Appropriations Committees
000539403 - 000539748	Department of Health and Human Services, Fiscal Year 2018, Centers for Medicare & Medicaid Services: Justification of Estimates for Appropriations Committees
000539749 - 000540125	Department of Health and Human Services, Fiscal Year 2018, Administration for Children and Families: Justification of Estimates for Appropriations Committees
000540126 - 000540128	Centers for Disease Control and Prevention, Global Health Funding Webpage, viewed 2017
000540129 - 000540130	Analysis of Firms and Establishments Impacted by Voluntary Notice Provision at 88.5
000540131 - 000540140	Final Rule Assumptions and Calculations for Regulatory Impact Analysis
000540141 - 000540155	Buildings HHS_Report_10302018
000540156 - 000540172	Executive Office of the President, Office of Management and Budget, M-17-21, Memorandum for Regulatory Policy Officers at Executive Departments and Agencies and Managing and Executive Directors of Certain Agencies and Commissions on EO 13771 (April 5, 2017)
000540173 - 000540321	Department of Health and Human Services, Fiscal Year 2018, National Institutes of Health: Justification of Estimates for Appropriations Committees
000540322 - 000540672	Department of Health and Human Services, Fiscal Year 2018, Health Resources and Services Administration: Justification of Estimates for Appropriations Committees
000540673 - 000540919	Department of Health and Human Services, Fiscal Year 2018, Administration for Community Living: Justification of Estimates for Appropriations Committees
000540920 - 000541227	Department of Health and Human Services, Fiscal Year 2018, Substance Abuse and Mental Health Services Administration: Justification of Estimates for Appropriations Committees

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000541228 - 000541233	Notes and materials from February 15, 2019 listening session with the California Attorney General, Oregon Attorney General, California Department of Health and Human Services, and California Department of Healthcare Services
000541234 - 000541240	Notes and materials from February 19, 2019 listening session with the National Women's Law Center
000541241 - 000541296	Notes and materials from February 22, 2019 listening session with the National Center for Transgender Equality
000541297 - 000541301	Notes and materials from February 25, 2019 listening session with Lambda Legal
000541302 - 000541307	Notes and materials from February 28, 2019 listening session with the Center for Reproductive Rights
000541308 - 000541314	Notes and materials from March 5, 2019 listening session with Americans United for Separation of Church and State
000541315 - 000541538	Notes and materials from March 7, 2019 listening session with the American Association of Pro-Life Obstetricians & Gynecologists
000541539 - 000541545	Notes and materials from March 7, 2019 listening session with the National Council of Jewish Women, Inc.
000541546 - 000541550	Notes and materials from March 11, 2019 listening session with the Human Rights Campaign
000541551 - 000541557	Notes and materials from March 12, 2019 listening session with the National Center for Lesbian Rights
000541558 - 000541560	Notes and materials from March 13, 2019 listening session with the Concerned Women for America Legislative Action Committee
000541561 - 000541565	Letter from the Anti-Defamation League to the Department of Health and Human Services Office for Civil Rights (March 26, 2018)
000541566 - 000541570	Notes and materials from March 20, 2019 listening session with the American Civil Liberties Union
000541571 - 000541575	Notes and materials from April 8, 2019 listening session with the American Psychological Association
000541576 - 000541580	Notes and materials from April 10, 2019 listening session with the Alliance Defending Freedom
000541581 - 000541585	Notes and materials from April 11, 2019 listening session with Americans United for Life
000541586 - 000541589	Notes and materials from April 23, 2019 listening session with the NYC Mayor's office and Law Department
000541590 - 000541632	Notes and materials from April 30, 2019 listening session with the National Catholic Bioethics Center / Catholic Medical Association
000541633 - 000541634	Notes and materials from April 30, 2019 listening session with NYU Law School
000541635 - 000541642	Transcript of FedSoc Teleforum Conference Call with Roger Severino (Feb. 13, 2018)
000541643 - 000541745	2019 Final Rule, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Final Rule), 84 Fed. Reg. 23,170 (May 21, 2019)

Bates Number	Description
000541746 – 000541797	2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
000541798 - 000541995	Complaint records referenced in 2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
000541996 - 000542016	Complaint records referenced in the 2019 Final Rule, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Final Rule), 84 Fed. Reg. 23,170 (May 21, 2019)
000542017 - 000545608	343 Complaints referenced in the 2019 Final Rule, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Final Rule), 84 Fed. Reg. 23,170 (May 21, 2019), as listed at 000537745 – 000537752.
000545609 - 000546163	Additional Complaint records referenced in 2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)

Exhibit E

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84 Fed. Reg. 23,170 (Mar. 21, 2019)

Bates Number	Description
000546164 - 000546204	Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121 (2012)
000546205 - 000546342	Department of Justice Title VI Legal Manual
000546343 - 000546344	*Federal Marketplace Progress Fact Sheet*, CCIIO, May 31, 2013
000546345 - 000546594	IHS FY 2018 Congressional Justification of Estimates to the Appropriations Committees (2017)
000546595 - 000546630	Bureau of Labor Statistics, *Occupational and Employment Statistics, Occupational Employment and Wages*, May 2016
000546631 - 000546632	*Abortion is Legal, but What Percentage of ObGyns Will Provide One?*, Freakonomics (August 24, 2011, 1:57 p.m.)
000546633 - 000546634	*U.S. Catholic Health Care: The Nation's Largest Group of Not-for-Profit Health Care Providers*, Catholic Health Association of the United States (2017)
000546635 - 000546636	HHS-5161-1 Form (OMB No. 0990-0317) (expiration date 1/31/2017)
000546637 - 000546640	*History of Our Ministry*, Christian Medical & Dental Associations
000546641 - 000546643	*About Us*, American Association of Pro-Life Obstetricians and Gynecologists
000546644 - 000546688	Table of Small Business Size Standards, Small Business Administration, Oct. 1, 2017
000546689 - 000546692	Memorandum from Jacob Lew, Dir., Office Of Mgmt. & Budget, Exec. Office of the President, To Heads of Exec. Dep'ts, Agencies, & Independent Establishments Assessment of Federal Regulations and Policies on Families (Jan. 26, 1999)
000546693 - 000546717	Memorandum from the Attorney General, Federal Law Protections for Religious Liberty (Oct. 6, 2017)
000546718 - 000546719	Civil Rights Information Request for Medicare Certification, OMB No. 0945–0006 (expiration date 04/30/2017) (Medicare Part A)
000546720 - 000546721	HHS-5161-1 Form (OMB No. 0930–0367) (expiration date 06/30/2020) (HHS Grant Applications)
000546722 - 000546725	Guidance on Hardship Exemptions from the Individual Shared Responsibility Provision for Persons Experiencing Limited Issuer Options or Other Circumstances, Center for Consumer Information and Insurance Oversight, Centers for Medicare & Medicaid Services
000546726 - 000546727	Medicare.gov, Religious non-medical health care institution items & services
000546728 - 000546729	CMS.gov, Religious Nonmedical Health Care Institutions
000546730 - 000546732	Rob Stein, *Obama Plans to Roll Back 'Conscience' Rule Protecting Health Care Of Workers Who Object to Some Types of Care*, The Washington Post (Feb. 28, 2009)

000546733 - 000546733	LI Hospital issues abortion apology to nurses, N.Y. Post (Apr. 28, 2010)
000546734 - 000546776	U.S. Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Services* (Nov. 17, 2009)
000546777 - 000546782	ACOG, *The Limits of Conscientious Refusal in Medicine*, Committee Opinion No. 385, 110 Obstet Gyn. 1479 (2007)
000546783 - 000546794	Letter from Roger T. Severino, Dir., Dep't of Health & Human Serv's. Office for Civil Rights, to Xavier Becerra, Att'y. Gen., State of Cal. (Jan. 18, 2019)
000546795 - 000546796	Letter from California Department of Managed Health Care, Re: Limitations or Exclusions of Abortion Services
000546797 - 000546806	Bob Egelko, *California's assisted-dying loophole: Some doctors won't help patients die*, San Francisco Chronicle (Aug. 12, 2017)
000546807 - 000546811	Letter from OCR Director to Complainants (June 21, 2016)
000546812 - 000546823	Pew Research Center, *What Unites and Divides Urban, Suburban, and Rural Communities* (May 22, 2018)
000546824 - 000546829	*Counseling and Waiting Periods for Abortion*, Guttmacher Institute (Oct. 1, 2018)
000546830 - 000546857	1 Richard J. Pierce, Jr., Administrative Law Treatise § 6.4 (4th ed. 2002)
000546858 - 000546867	https://www.merriamwebster.com/dictionary/refer
000546868 - 000546876	https://www.dictionary.com/browse/refer
000546877 - 000546883	U.S. Policy Statement for the International Conference on Population, 10 Population & Dev. Rev. 574 (1984)
000546884 - 000547100	U.S. Dep't of Health & Human Serv., HHS, Office of the Assistant Secretary for Resources and Technology, Office of Grants, HHS Grants Policy Statement, I–31 (Jan. 2007)
000547101 - 000547103	Provider Payment and Delivery Systems, Medicaid and CHIP Payment and Access Commission (MACPAC)
000547104 - 000547107	Medicare Advantage Program Payment System, The Medicare Payment Advisory Commission (MEDPAC) (Oct. 2016)
000547108 - 000547172	International Covenant on Economic, Cultural and Social Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3.
000547173 - 000547173	CMS.gov, Centers for Medicare & Medicaid Services, Religious Nonmedical Health Care Institutions
000547174 - 000547177	Administration for Community Living, National Network of University Centers for Excellence in Developmental Disabilities Education, Research & Service
000547178 - 000547184	Administration for Community Living, The Development Disabilities Assistance and Bill of Rights of 2000 (DD Act) Funding Allocations
000547185 - 000547185	Administration for Community Living, AIDD Developmental Disabilities Councils (DDC) Awards for the States/Territories, FY 2017 Annual Allocation,

000547186 - 000547186	Administration for Community Living, AIDD Protection and Advocacy (PADD) Awards for the States/Territories FY 2017 Annual Allocation, https://www.acl.gov/sites/default/files/about-acl/2017-06/PADD-2017.pdf
000547187 - 000547694	2012 North American Industry Classification System Definitions
000547695 - 000547702	Statistics of U.S. Businesses Methodology
000547703 - 000547706	U.S. Census, NACIS, Frequently Asked Questions
000547707 - 000547707	U.S. Census Glossary, Firm
000547708 - 000547715	Esther Hing, et al., Nat'l Ctr. For Health Statistics, Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Servs., *Acceptance of New Patients with Public and Private Insurance by Office-Based Physicians: United States, 2013*, NCHS Data Brief No. 195 (Mar. 2015).
000547716 - 000547717	U.S. Census, 2012 NAICS Definition, 621399 Offices of All Other Miscellaneous Health Practitioners
000547718 - 000547999	Indian Health Service, FY 2019 Justification of Estimates for Appropriations Committees (2018)
000548000 - 000548094	Guidance for Regulatory Impact Analysis, Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, 2016
000548095 - 000548097	Executive Office of the President, Office of Management and Budget, M-18-24, Memorandum for Heads of Executive Departments and Agencies, Strategies to Reduce Grant Recipient Reporting Burden (Sept. 5, 2018)
000548098 - 000548314	U.S. Dep't of Health & Human Serv., HHS, Office of the Assistant Secretary for Resources and Technology, Office of Grants, HHS Grants Policy Statement, I–31 (Jan. 2007)
000548315 - 000548318	USPS Postage Rates, Stamps.com
000548319 - 000548366	Circular A-4, Regulatory Analysis, OMB (Sept. 17, 2003)
000548367 - 000548367	Salary Table 2016-DCB, OPM (effective January 2016)
000548368 - 000548368	Salary Table No. 2016-ES, OPM (effective January 2016)
000548369 - 000548413	Table of Small Business Size Standards Marched to North American Industry Classification System Codes, U.S. Small Business Administration, (effective Oct. 1, 2017)
000548414 - 000548416	Application for Financial Assistance SF-424, OMB # 4040-0004
000548417 - 000548418	Application for Financial Assistance SF-424 (R&R), OMB # 4040-0001

000548419 - 000548419	System for Award Management, Home, U.S. Gen. Servs. Admin.
000548420 - 000548433	Letters from Michelle Rouillard, Director, California Department of Managed Health Care, to Seven Insurers Re: Limitations or Exclusions of Abortion Services (Aug. 22, 2014).
000548434 - 000548435	Julie D. Cantor, M.D., J.D., *Conscientious Objection Gone Awry—Restoring Selfless Professionalism in Medicine*, 360 New England J. Med. 1484–85 (April 9, 2009)
000548436 - 000548438	The Polling Company, Inc./WomanTrend, Highlights of The Polling Company, Inc. Phone Survey of the American Public and Online Survey of Faith-Based Professionals (polls released April 8, 2009)
000548439 - 000548443	Additional materials from the 343 Complaints referenced in the 2019 Final Rule, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Final Rule), 84 Fed. Reg. 23,170 (May 21, 2019).
000548444 - 000548444	U.S. Census Bureau, Statistics of U.S. Businesses, 2015, NAICS code 611310 (Colleges, Universities, and Professional Schools)
000548445 - 000548490	Lynn Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 Ave Maria L. Rev. 1 (2010)
000548491 - 000548499	Occupational Employment Statistics: Occupational Employment and Wages, 29-1064 Obstetricians and Gynecologists, May 2017
000548500 - 000548504	Lori R. Freedman, *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, AM. J. PUB. HEALTH (2008)
000548505 - 000548515	Thorne, et al., *Reproductive Health Care in Catholic Facilities: A Scoping Review*, Obstet. Gynecol. 2019;133:105–15
000548516 - 000548598	Hill, et al., Reproductive Health Care in Catholic-Owned Hospitals, NBER Working Paper No. 23768 (2017)
000548599 - 000548603	Kaiser Foundation Health Plan and Hospitals Report: 2017 Financial Results, Kaiser Permanente (Feb. 9, 2018)
000548604 - 000548610	Our One Ascension Journey: Year in Review, Ascension
000548611 - 000548613	Facts and Stats, Ascension
000548614 - 000548620	Thrive: Give Back, Kaiser Permanente
000548621 - 000548626	U.S. Gen. Servs. Admin., System for Award Management, SAM Release Notes Build 2019–02–01 (Feb. 2, 2019)
000548627 - 000548706	Defs.' Brief in Opp. To Pls.' App. For Prelim. Inj. at 26, *Danquah v. Univ. of Med. & Dentistry of N.J.*, No. 2:11-cv-06377-JLL-MAH, ECF No. 26 (D.N.J. filed Nov. 22, 2011)
000548707 - 000548710	Christian Medical & Dental Association summary of Key Findings on Conscience Rights Polling conducted April, 2009
000548711 - 000548726	Luisa Blanchfield, *Abortion and Family Planning-Related Provisions in U.S. Foreign Assistance Legislation and Policy*, Congressional Research Service (Dec. 1, 2010)

000548727 - 000548742	Luisa Blanchfield, *Abortion and Family Planning-Related Provisions in U.S. Foreign Assistance Legislation and Policy*, Congressional Research Service (Jan. 24, 2017)
000548743 - 000548759	Luisa Blanchfield, *Abortion and Family Planning-Related Provisions in U.S. Foreign Assistance Legislation and Policy*, Congressional Research Service (Updated Sept. 12, 2018)
000548760 - 000548762	SF-1151 Nonexpenditure Transfer Authorization of funds from the U.S. Department of State to U.S. Department of Health and Human Services, Example
000548763 - 000548780	Amendment #1 to Memorandum of Agreement Between the Department of State Office of the U.S. Global AIDS Coordinator (OGAC) and the U.S. Department of Health and Human Services (HHS) to Allocate Funds Appropriated in FY 2017
000548781 - 000548782	48 C.F.R. 253-370-9 Non-Discrimination for Conscience
000548783 - 000548784	HHS.gov, President's Emergency Plan for AIDS Relief (PEPFAR) Office
000548785 - 000548829	A Firm Foundation: the PEPFAR Consultation on the Role of Faith-based Organizations in Sustaining Community and Country Leadership in the Response to HIV/AIDS (2012)
000548830 - 000549863	Excel spreadsheets of meta-data from the E-Rulemaking Initiative's Federal Docket Management System for public submissions submitted on the 2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
00549864 - 000549872	Letter from Roger T. Severino, Dir., Dep't of Health & Human Serv's. Office for Civil Rights, to Clare E. Connors, Att'y. Gen., State of Haw. (Mar. 21, 2019)
000549873 - 000549887	Memorandum from Jonathan Imbody, Christian Medical Association, Vice President for Government Relations to Office of Public Health and Science, Department of Health and Human Services (Apr. 9, 2009)
000549888 - 000549902	The Polling Company, Inc./WomanTrend, Highlights of The Polling Company, Inc. Phone Survey of the American Public, fielded March 31, 2009 through April 3, 2009)
000549903 - 000549940	Additional materials from the 343 Complaints referenced in the 2019 Final Rule, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Final Rule), 84 Fed. Reg. 23,170 (May 21, 2019).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

STATE OF NEW YORK, et al.,

Plaintiffs,

v. 19-cv-4676 (PAE)
19-cv-5433 (PAE)
19-cv-5435 (PAE)

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

Defendants. Argument

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New York, N.Y.
October 18, 2019
9:32 a.m.

Before:

HON. PAUL A. ENGELMAYER

District Judge

APPEARANCES

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The State of New York
BY: MATTHEW COLANGELO, ESQ.
AMANDA MEYER, ESQ

PLANNED PARENTHOOD FEDERATION OF AMERICA
BY: DIANA SALGADO, ESQ
-and-
COVINGTON & BURLING
BY: DAVID M. ZIONTS, ESQ

AMERICAN CIVIL LIBERTIES UNION
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APPEARANCES CONTINUED

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BY: DANIEL BLOMBERG

(In open court)

THE COURT: Good morning everyone.

I will have some words of introduction in a moment but before I do I want to just take the roll to make sure I understand who is who. Who do I have appearing for the provider plaintiffs?

MS. KOLBI-MOLINAS: Alexa Kolbi-Molinas for plaintiffs National Family Planning Reproductive Health Association and Public Health solutions.

THE COURT: Good morning, Ms. Kolbi-Molinas.

MR. ZIONTS: Good morning, your Honor.

David Zionts for the Planned Parenthood plaintiffs.

THE COURT: Good morning, Mr. Zionts.

Anyone else for the provider plaintiffs?

MS. SALGADO: Yes, your Honor. Diana Salgado on behalf of the Planned Parenthood plaintiffs.

THE COURT: Good morning, Ms. Salgado.

For the New York State and other state plaintiffs.

MS. SALGADO: Good morning, your Honor. Matthew Colangelo from the New York Attorney General's Office on behalf of the governmental plaintiffs.

There are a number of other plaintiffs' counsel in the courtroom but not near a microphone. They include Marie Soueid for the State of New Jersey, Jonathan Burke for Massachusetts, Cynthia Weaver for New York City, Lisa Landau for New York

State and Justin Deabler for New York State.

THE COURT: Good morning, Mr. Colangelo.

I appreciate your putting those names on the record. I take as a given that a number of the people who are here are lawyers who have worked in one way or the other on the case. Solely in the interest of economy, I'm taking appearance only from those in front of the bar but I very much value, as I'll say in a moment, the contributions by everybody here and behind the scenes.

MS. MEYER: Good morning, your Honor. Amanda Meyer on behalf of the governmental plaintiffs.

THE COURT: Good morning to you, Ms. Meyer.

Now for the defense, who do I have for HHS?

MR. BATES: Christopher Bates from the U.S. Department of Justice representing HHS but you're asking about counsel from HHS?

THE COURT: Yes. Well I was asking for the government. Thank you, Mr. Bates. Good morning.

MR. KEVENEY: Good morning, your Honor. Sean Keveney with HHS.

THE COURT: Very good. Good morning, Mr. Keveney. Anyone else for the government?

MR. VOLTAIRE: Jean-Michel Voltaire for HHS.

THE COURT: Very good, it's Mr. Voltaire?

MR. VOLTAIRE: Yes.

THE COURT: Very good. Good morning, Mr. Voltaire.

Anyone else for HHS?

MS. ANDRAPALLIYAL: Vinita Andrapalliyal from DOJ representing HHS.

THE COURT: Good morning, Ms. Andrapalliyal.

Anyone else for HHS?

MR. TAKEMOTO: And Benjamin Takemoto for the Department of the Justice.

THE COURT: Good. Very good. Good morning Mr. Takemoto. All right.

And for the intervenor defendants, who do I have?

MR. DUNN: Good morning, your Honor. Robert Dunn for the Christian Medical and Dental Association.

THE COURT: Good morning, Mr. Dunn.

MR. BLOMBERG: Daniel Blomberg for intervenor defendants.

THE COURT: Good morning, Mr. Blomberg.

You may all be seated.

Let me begin just by welcoming everyone in this courtroom and to the extent there is anybody following in the overflow courtroom, although at this point it doesn't appear necessary, welcome to you as well.

We're here today for argument on a rule promulgated earlier this year by the Department of Health and Human Services. The rule is entitled Protecting Statutory Conscience

Rights in Health Care Delegations of Authority. It is scheduled to take effect on November 22.

In the consolidated lawsuits before me several groups of plaintiffs challenged the rule on various grounds, including based on The Administrative Procedure Act and on several provisions of the Constitution.

Before argument begins I want to take a moment and thank and compliment counsel. I have received, it is safe to say, extensive briefing from the parties. The briefs have been absolutely first rate. Really absolutely first rate. They are as good as it gets. And I have benefited enormously from counsel's thoughtful and close attention to the many complex issues in the case.

I've also received a large number of amicus briefs. They too have been thoughtful and very valuable to me.

So thank you to all of those who worked on the briefs. And I'd ask the lead counsel here to please kindly, on my behalf, acknowledge all of the lawyers and staff on your teams who worked on these briefs and associated materials and please thank them for me for a job very, very, very well done.

In terms of argument, here is how we will proceed. And earlier this week I issued an order to this effect so this will not come as a surprise to the counsel in front.

First of all, I'm going to hear argument from the plaintiffs. I've allocated 75 minutes for that.

Plaintiffs have divided their time and topics according to a letter I received from them among four advocates. The first two are on behalf of the provider plaintiffs, which is to say Planned Parenthood and the National Family Planning and Reproductive Health Association, et al. The second two are on behalf of the governmental or state plaintiffs and are from the New York State Attorney General's office.

As I did in my order, I had asked plaintiffs' counsel to please watch the clock and be sure to leave sufficient time for the later of your four advocates because I expect I'll be active in asking questions that may get you off script. I need you, nevertheless, to be mindful of the time just so that important topics that happen to be batting third and fourth don't get squeezed for time.

After I hear from the plaintiffs, we'll then take a short comfort break and I will then hear from the defendants to whom I've also allocated 75 minutes. Specifically, I've allocated 65 minutes for HHS and ten minutes to the intervenor defendants, specifically counsel for Dr. Regina Frost and the Christian Medical and Dental Association.

I hope afterwards we will have time for rebuttal and follow-up. I certainly expect that I will have a lot of questions for all counsel throughout.

So with that preface, let's begin with the provider

plaintiffs and I understand that I'll hear first from Mr. Zionts.

MR. ZIONTS: Thank you, your Honor.

THE COURT: Go ahead.

MR. ZIONTS: Thank you, your Honor. And good morning. I'm mindful of your Honor's instruction in terms of time allocation. Just to let you know in advance my plan here is to speak for about 15 minutes and each of my colleagues plan to speak for about 20 minutes although, of course, we'll be in your hands in terms --

THE COURT: Thank you. That's helpful to know.

MR. ZIONTS: Your Honor, I'll be spoking about HHS's authority or rather lack of authority to issue this regulation. I'd like to start with a basic but fundamental point.

The heart of HHS's position is that the rule is just housekeeping. The agency says it is just letting everyone know how it interprets the refusal statutes and how it enforces them so it doesn't need any delegation of substantive rule-making authority.

Your Honor, the best answer to this argument is in the text of the rule itself. At every step it is clear from the face of the rule that it is legislative, imposing substantive requirements on regulated parties.

So with the Court's permission, I would like to very briefly walk through the rule's key provisions.

THE COURT: If I may. I know -- I know what the key provisions are. Let me see -- I understand your point that components of the rule are substantive and legislative and I understand those to involve the definitions of discriminate and assist in the procedure and the like.

But let's focus on the other side of the equation. Is there some part of the rule that you would acknowledge is housekeeping and that can properly be done under the housekeeping statute?

MR. ZIONTS: Your Honor, what I would say is there are parts of this rule that could have been done in a way that would be consistent with housekeeping.

For example, if the agency had simply said: Go look at the UAR; we are letting you know that we will follow to the letter the UAR and that is how we will enforce, I think that would indeed be housekeeping.

But the way this rule is structured at every step of the way it's hard to disassociate the pieces of this that impose substantive requirements from other provisions that might for example, if done differently, could be genuine housekeeping.

THE COURT: Well let me pushback on that. You say repeatedly in your briefs that you're not challenging the conscience provisions that are in the statutes, correct?

MR. ZIONTS: Correct, your Honor.

THE COURT: Let's assume for argument's sake, imagine whatever scenario you would concede would be a between-the-eyes blatant violation of those statutes. Right now I take it the law is silent as to remedy.

Imagine a violation of the statutes. Put aside any gloss on those statutes by rule. Just imagine a between-the-eyes violation.

MR. ZIONTS: Right.

THE COURT: What does HHS do without rule-making to explain how the process of adjudicating a violation is and what the consequences would be and is that something that HHS can properly rule-make on?

MR. ZIONTS: Well, your Honor, there was a 2011 rule, that we do not challenge its validity, that provided a complaints mechanism and we don't dispute the agency's power to do that.

THE COURT: Now let's suppose the complaints process results in a finding of a between-the-eyes violation or set of violations. Is there anything out there right now that would set out the consequences?

MR. ZIONTS: Your Honor, we also do not challenge the existing regulatory grant procedure.

So, for example, if OCR, through that 2011 complaint procedure, determined that there was a square violation of the statute -- not the rule, of the statute -- then the agency's

position, and we don't have any problem with this, is that they would go through the ordinary procedures under the UAR. Remedies would be limited to that. There would be notice and due process and there would be -- one key feature of the UAR is the remedy is generally limited to the specific source of funding at issue. And they could do that. We're not disputing that.

THE COURT: So if there were a violation, let's say, of any or all of the ACA, Medicaid, or the other three primary statutes that are our main focus here, you don't dispute that under existing authority the agency, if it crossed its Ts and dotted its Is, it could ultimately get to the place of retracting federal funding limited to the funding stream attributable to that statute?

MR. ZIONTS: Right, your Honor. It would be limited to the funding stream.

And one just additional crucial point would be that in terms of -- I think in this hypothetical we're talking about a square, everyone-would-agree violation. And just one key proviso I would put would be: HHS would have its view of what the statute means and it would go through this procedure and it would be free -- it would be upon the regulated party to potentially go to court and say it doesn't mean this. And there would be no deference at that point. The Court would decide.

THE COURT: Give me an example of something you would agree is a between-the-eyes violation of the conscience statutes.

MR. ZIONTS: Your Honor, I think Ms. Salgado may be able to speak to this a bit more when she addresses discrimination. If, for example, just turning to the Church Amendments, speaking of discrimination of employment because someone performed or refused to perform.

If you had someone who was -- who an employer demanded you must perform an abortion or you'll be fired, there is no hardship to the employer to find someone else to do it. There is really no reason for purposes of patient care. There is no emergency, etc. It's essentially: Person standing there. Do it or you're fired. No good reason, no hardship preventing that. I think we would all agree that that violates the statute.

THE COURT: Under the UAR suppose there's a singular violation, one violation to that effect. But it's absolutely adjudicated perfectly and there is no question that exactly that happened.

If the agency, crosses its Ts and dots its Is, at the end of that possess for that single violation does the existing statute and the existing regulations, do they permit the agency to pull the entity's entire funding under that statute?

MR. ZIONTS: The agency's entire funding, I don't

think so, your Honor.

THE COURT: Under that statutory -- under that one statute?

MR. ZIONTS: Well, your Honor, I think it's not just -- I distinguish between the statute itself.

So, for example, the Church Amendments which might impose obligations across a range of funding stream grants, etc. Generally the way the UAR works is that it speaks of the cost of the specific federal award or activity. So in general if there was -- we're speaking hypotheticals -- if there were to be an actual health care entity that committed this violation and committed a violation, of course, of a particular funding stream, I think what the UAR would say is you could lose that. Of course, there's voluntary remedies. The UAR is phrased a little differently from this rule in that it is intended to escalate and to give various offramps for voluntary remedies and cessation. But ultimately you could lose funding under the particular grant at issue. We don't think anything in the UAR provides for just wiping out all federal funds.

THE COURT: Go ahead.

Sorry. Just explain to me just a little more the meaning of funding stream, as you concede, it could be implicated by a violation. The Church Amendment covers a number of different funding streams. I want to be sure that I understand what you're acknowledging and what you're resisting.

How would HHS ultimately, if we got to the end of the series of enforcement events, how would they go about defining the funding stream that is jeopardized by such a brief?

MR. ZIONTS: Your Honor, I think just looking at the language of Church, and it applies based on receiving a grant contract, loan, or loan guarantee under the Public Health Service Act. So I think you would go grant-by-grant, contract-by-contract. And, again, you would have to see how this would play it, and it could vary depending upon the circumstances. I think you would look at the grant.

THE COURT: Let's look at a big one. Let's suppose it's Medicare or Medicaid. Let's use New York State as an example, although they'll have an opportunity to defend their own perspective on this. But imagine, again, a between-the-eyes violation of the sort that you hypothesize and assuming that no offramp applies or is activated, at the end of the day for one error like that, can New York State lose its entire let us say Medicaid funding?

MR. ZIONTS: Your Honor, I do not want to stand here and bind the State of New York.

THE COURT: Choose some other state.

MR. ZIONTS: Particularly when they are sitting right here.

What I would say, it's an interesting problem that the agency itself has not clarified. Their position here has been

this is all part of existing regulations. And they're fairly specific about the UAR, which is about grants in particular.

THE COURT: Why can't -- go ahead.

MR. ZIONTS: I was going to say with respect to Medicaid, we're actually not sure how the agency believes it would go about withdrawing federal funding; not in terms of the rule, in terms of if it believes it as the existing statute.

So in the part of the rule where it speaks to: For grants, see the UAR; for contracts, see this. For Medicaid, it just says in the rule: See the Social Security Act. They don't point to a provision. They don't point to a regulation. So we're not really sure how they think existing regulations would allow --

THE COURT: Well then that begs the question. It's the agency's existing regulations don't clarify the universe. What is it that prevents the agency, whether in the context of this rule or another, from sharpening up its guidance even if, perhaps, having a more muscular approach to these problems and saying at least in this area where we're talking about violations of religious or moral conscience rights recognized by statute, we're going to have a particularly strong penalty and deterrent. Why can't they do that?

MR. ZIONTS: Your Honor, we think -- well, first of all, the statute itself, just looking at the Church Amendment, Church B-- this may not be a good example because it doesn't

apply to Medicaid funds but Church D may. Church D is simply written as individuals have a right not to do acts. And it doesn't say anything about: Or else you lose X or Y or X, Y, and Z or everything under the sun.

So in our view -- we acknowledge there are things that HHS can do under its existing authorities in a careful step-by-step way, in a way that has been done for as long as these statutes have been on the books and, in particular, under the 2011 Rule.

But when Congress intends the Draconian remedy of you lose all your federal funding, a state loses Medicaid, it says so. Title VI says so. It says agencies have the authority to promulgate regulations, provide for the termination of funding, provide adaptors to process. There's even notice to congressional committees. And it doesn't say anything like this. So while -- we're happy to concede that there is some level in the administration of these grant programs that it can do, it would be quite anomalous if we're -- in Title VI Congress was very explicit in saying you can take money but only up to here and with these protections. Here, the Congress didn't say anything but HHS has free reign to say we can take it all.

THE COURT: Very helpful. I want to give you a chance in a moment just to turn to the more substantive dimensions of the regulation, but one final housekeeping-type question.

The rule has new assurance and certification requirements imposed on recipients. Are those compatible with the housekeeping statutes?

MR. ZIONTS: We don't think so, your Honor. And, again, if you look at the rule, here's how Section 88.6 is written. Parties shall, in quotes, shall. Excuse me. It's 88.4. Requires that the applicant or recipient to comply with applicable federal conscience and discrimination laws and this part, and this part is referring to this part of the CFR.

So, first of all, that certification does not just certify that you comply with the underlying statutes. It's saying what we just added to the CFR, which are substantive legislative requirements, you have to certify --

THE COURT: Fair. Fair point. Strip away the substantive components of the rule and focus just on the violations or not of the statute.

Could HHS under its housekeeping authority require the hospital, state, etc. to comply with assurance and certification if those -- if that's limited to compliance with the statute?

MR. ZIONTS: Your Honor, I think there are -- in the existing UAR there are much more general certifications. This is a bit different in that --

THE COURT: But the UAR is a measure of what the agency can do. It's one thing the agency has done but they may

or may not be able to do more.

MR. ZIONTS: Agreed, your Honor.

The main point I would make is that this is, in our view, a substantive requirement: You shall complete the certification. And that has legal consequences. A certification raises issues under the False Claims Act. You could potentially be sued if someone thinks that you have made a certification for compliance with these statutes and someone believes that that was false and that led to receiving federal funds. And so when an agency legislates and says you must do this -- and when you look at the enforcement provisions as well, 88.7, the enforcement provisions, they say they will take your money away if you violate this part, and that includes certification.

So even if you haven't done anything substantively wrong, if you just don't do the certification the way they say, they say you violated the regulation, we will enforce it, that's a substantive force of law rule.

THE COURT: All right. Let's turn to the substantive parts of the statute. And I think I understand from your briefs the definitions of all the various statutory terms are ones that you intend, and I understand why, are substantive.

MR. ZIONTS: Right. Your Honor, I think I'm about at fifteen minutes. I will just say one word. The -- we do think it is clear when you look at the way this rule is framed,

including with the definitions and the way they work with what the rule calls applicable requirements and prohibitions, this is a federal agency telling regulated third parties: Do this or you will be in trouble. Do this or we will enforce against you.

The one point, just because it's not in the briefing, I wanted to alert your Honor to a decision, fairly recent decision from the D.C. Circuit called Guedes v. ATF. The citation is 920 F.3d 1. It's somewhat similar in the sense that there you had an agency insisting that all it was doing was interpreting, telling people -- this had to do with the bump stocks regulation -- it was just telling people how it interprets this rule.

The agency said: No. It says shall. It's in this CFR. The agency was claiming Chevron deference. Everything about it said legislative substantive rule-making. And the Court said yes. And I think the Court, if you look at the opinion, you'll find a number of parallels. The one difference in that statute was the agency was actually delegated authority to issue a legislative rule. Here, we have all the indicia of a substantive legislative rule. We just don't have any source of authority to do that.

THE COURT: Final point on that. That appears to be so, at least explicitly with respect to Church and Coats-Snowe and Weldon. But under the Affordable Care Act and Medicare and

Medicaid there is some grant of substantive rule-making authority.

Suppose the rule had simply defined terms like discriminate or refer, etc., within the framework of the statutes that do have substantive rule-making authority delegated to the agency. Could the agency have done that, had it confined the definitions to the statutes that have the explicit delegation of rule-making provisions?

MR. ZIONTS: We may have other problems with that, but in terms of statutory authority, we absolutely agree. The ACA says you can regulate on this topic. It can't --

THE COURT: So while you're not happy with the definitions, as it relates to those statutes, the ACA, Medicare, Medicaid, you're not making a lack-of-authority challenge with respect to the definition of those statutory terms for those statutes.

MR. ZIONTS: That's right, your Honor.

THE COURT: Thank you.

MR. ZIONTS: In the interest of keeping everything moving, I'll turn things over to Ms. Salgado, unless your Honor has any other questions on the rule-making issue.

THE COURT: No. I think there will be an issue about remedy and severability that is very much implicated by our last exchange. But I think it's better to move on and we'll touch on that later. Very helpful. Thank you.

So next up I think is Ms. Salgado.

MS. SALGADO: May it please the Court, Diana Salgado on behalf of plaintiffs.

Your Honor I'm going to focus my time on two plaintiffs' claims: That the rule is contrary to law and, if time permits, that the final rule is not a logical outgrowth of the proposal.

There are several reasons that the rule is contrary to law but I'd like to start with conflict with the underlying statutes. In promulgating this challenge regulation, not only has the agency given the rule the force of law but it has also stretched the terms of the statutes beyond their limit and far exceed what Congress intended.

Starting with the term discrimination, which is found in nearly all of the underlying statutes, HHS has taken a general prohibition on nondiscrimination and promulgated a regulation that defines the term to mean that health care entities, such as the plaintiffs here, have an absolute duty to accommodate employees who have objections to performing or assisting in the performance of, and depending on the statute, abortion or sterilization and must do so regardless of the burden on employers and the patients they're seeking to serve.

THE COURT: So pause on that for a moment.

Let's focus on the part of the rule that affects employees and employers. I take it your view is that up to

this point the Title VII framework has governed that.

MS. SALGADO: That's correct, your Honor.

THE COURT: And Title VII requires that ultimately at the end of the sequence if there is an undue hardship essentially the employer is allowed to refuse to accommodate the religious objector.

MS. SALGADO: Yes.

Title VII requires that an employer provide a reasonable accommodation unless there is an undue hardship on that employer.

THE COURT: So is the point here then at least as to the employment dimension of the world covered by the rule, we've got a square conflict with a statute, Title VII.

MS. SALGADO: Well, your Honor, we haven't -- that's true. There is -- that the statutes or actually that the agency, in the way that they have interpreted the statutes in this rule, seeks to abrogate Title VII's application.

THE COURT: I have read with great interest your briefs that focus on the emergency care and Title X and whatnot. Why isn't the most explicit example or, as good an example you have, Title VII where since 1972 we have a statute that appears to encode the hardship exception and, therefore, it has much more of a carve-out than the rule does in allowing an employer that needs to exist to insist.

MS. SALGADO: I'm sorry, your Honor. Are you

asking --

THE COURT: It's a softball but it's an important question. But the reason I'm asking is from your briefs I did not get the impression you were pushing nearly as frontally on the conflict with the statute, and a familiar one at that, Title VII, as a basis for your contrary-to-law argument.

MS. SALGADO: Well it is true, your Honor, as you know, we have brought many claims in this case and one specific one is not that the rule itself conflicts with Title VII; rather, that the term discrimination and the way that the agency has interpreted that rule here is not a faithful application of the underlying statutes; that the agency has exceeded what Congress intended when it passed the refusal statutes.

THE COURT: Right. I'm just trying to understand why the argument isn't being made flat-out that at least as to the definition of discriminate it can't stand because that aspect of the rule is contrary to a separate law, not the law under which the agency purports to have but Title VII, which predates even the first of the conscience statutes, has given employers an opportunity -- a hardship basis for refusing to accommodate.

Why isn't the simple answer -- and I'll obviously be eager to hear the government's perspective -- why isn't the simple answer Title VII is law; the agency by regulation can't contravene that?

MS. SALGADO: That is our position. That's absolutely our position, your Honor, is that in interpreting this -- the statutes that the agency has promulgated a definition of discrimination that is in conflict with Title VII.

THE COURT: If I were to agree on that, what part of the rule would be unaffected by it? Would it be the parts that simply don't affect the employment context?

MS. SALGADO: Your Honor, absolutely those parts would be affected. I think that raises a fair question, which is: Are there other applications of the agency's definition of discrimination that are not a faithful application of the statute beyond the employer and employee context.

And as a whole, your Honor, we believe that the term discrimination is always sensitive to context and circumstance. It always considers whether there is a justification for the treatment that's being complained of.

So as a broader matter, the term discrimination that the agency has put forth here in this rule as a whole is not a faithful application of the statutes.

THE COURT: So let's get down to brass tacks. Your agency employs medical professionals, correct?

MS. SALGADO: That's correct.

THE COURT: Pre-rule, if you had a religious objector who didn't want to participate in an abortion, didn't want to hand the forceps over or something like that, how would --

within the Title VII framework and in the real world how does your agency deal with an objector like that?

MS. SALGADO: Well, your Honor, you're correct that we have health care professionals that would be subject to this rule in medical centers all across the country, in every state of this country. And how a religious objections are dealt with are through the Title VII framework.

THE COURT: So a nurse says: I've been on the job for a while. I've now developed a sincere religious view that prevents me from assisting in an abortion. Let's put the nurse in the operating room so we're not dealing with more distended ways of assisting. The nurses says: No can do.

What is it that the -- how does the agency -- how does your -- as an employer, how does your client deal with that problem now within the Title VII framework?

MS. SALGADO: Well, your Honor, it's a hard question to answer because the -- in terms of how a very specific objection would be dealt with, I think it would depend on a number of factors. It would depend on whether the agency or the plaintiffs in this case have a duty to try to reasonably accommodate the nurse.

So the question would be: Is there is a way to accommodate this particular individual's objections by, for example, if abortions were only performed on a certain day then that nurse -- there would be perhaps a conversation about

whether that nurse would be willing to work on the days when abortions are not provided.

THE COURT: You would reallocate responsibility so the nurse worked on non-abortion procedures?

MS. SALGADO: Exactly, yes.

Or there might be a question of whether instead of actually working in a room where abortions are being provided, whether the nurse would actually be -- whether be able to work in a different room.

But all of those decisions have to be balanced with whether accommodating that nurse would impose a hardship.

And if I may, your Honor, just add that the record evidence, what it shows is that the plaintiffs in this case operate several clinics where there is only one medical professional.

THE COURT: That's where I was going to go in the rural hypothetical or the short-staffed hypothetical that appear here. Maybe it hasn't, in fact, arisen in the real world, but how -- under the current framework what would your client do if in the end there wasn't an alternative person to fill in?

MS. SALGADO: Well, your Honor, I do think there is a question of whether -- what the individual has been hired to do as one of their primary or substantial duties to perform, then I think there is a question of whether that individual was

qualified for that position.

THE COURT: Right. And I'm using the hypothetical in which a sincere religious conviction develops after the point of hire. And so we're the actually -- you've got an employee -- is it your view ultimately that under the Title VII framework, in our hypothetical rural hospital, if the person cannot do an essential part of the job and there's nobody else, in the end that could be a basis for something up to discharge?

MS. SALGADO: Depending on the facts and circumstances, yes. I mean I guess I would say that many of Planned Parenthood's affiliates operate several health centers in a particular region. So perhaps there would be -- and not every one of those centers offers abortion so there would be a conversation of whether that person could be transferred to a different health center. And, yes, your Honor, if what the nurse was hired to do was to assist with -- assist in the performance of abortion services or in states that actually allow it provide abortion services and the individual developed a religious objection and was not able to perform the primary duties of their position and was not willing to work on other days or be transferred to another health center, then, yes, your Honor, I think the Title VII framework does allow for consideration of undue hardship.

THE COURT: And under the rule, same hypothetical, if the rule were to take effect, how does it work as you

understand the rule?

MS. SALGADO: I think the rule has no consideration or the term -- the rule's definition of discrimination has no consideration of a balancing of interests, the interests of the employer in seeking to provide care, or the interests of their patients. And it doesn't allow for any consideration of hardship. The only thing that the rule references is, quote, an effective accommodation, which is one that the employee must voluntarily accept. And isn't lost on anyone than an effective accommodation is different than a reasonable accommodation that allows for some consideration of the balancing of interests.

THE COURT: But in the end there is no hardship exception to the rule is your point.

MS. SALGADO: That's correct, your Honor.

I would say as an example of, a real world example, because we've been talking about hypothetical situations, a real world example of how the rule would work, if I may, a reference the Court to the Shelton case.

THE COURT: I was -- I've got that on my list for the defendants.

MS. SALGADO: And in that case the nurse refused to assist in emergency abortions. The second time the patient was standing in a pool of blood and the nurse still refused to perform an emergency abortion. It took the hospital 30 minutes to find another person to fill in. And even after that the

hospital offered the nurse an accommodation to the NICU department. She refused and the hospital had no other option but the terminate her. She brought a Title VII claim and the Court found against her because the hospital had offered a reasonable accommodation.

THE COURT: Your point is under the rule if the rule were law Shelton comes out the other way?

MS. SALGADO: That's right.

And certainly the agency has not said otherwise.

THE COURT: All right. Thank you. Very helpful. I realize I've taken you off topic. Focus on other ways, apart from the Title VII conflict, that the rule is contrary to law.

MS. SALGADO: Yes, your Honor.

So I think the -- as we were just discussing in the context of emergency abortions, the rule has no exception for cases where there is a need to provide emergency treatment. And the parties agree that under the Emergency Medical Treatment and Labor Act there is a duty for providers to provide stabilizing treatments or a transfer, if possible. And defendants don't dispute that in some cases patients need emergency abortions. But the rule doesn't have any exception for that. All the agency has said is that it will -- it will seek to harmonize the statutes to the extent possible. That isn't -- EMTALA doesn't say that it can be applied, quote, to the extent possible. There is no exception.

THE COURT: When was EMTALA enacted, if you know?

MS. SALGADO: I don't, your Honor. I know that it predates -- I am sure that it predates Weldon and I don't know -- I'm being told 1985 or 1986.

THE COURT: So it comes after Church. It comes after the first of the conscience provisions but not some of the later ones. I guess the question is whether there's anything in the legislative history of the later ones that suggested an intention to modify the state of play under EMTALA, emergency statute.

MS. SALGADO: Yes, your Honor. Each of the statutes there was discussion about -- well Weldon specifically Representative Weldon specifically noted that EMTALA forbid health care facilities to abandon patients with medical emergencies and particularly pregnant women. Senator Church also made clear: We're not permitted to shield a hospital from denying services in, quote, in emergency situations, life or death type. And Senator Coats also stressed in his amendment which was, as I've said in the briefing, the Coats amendment was actually focused on abortion training, so it was a little bit more removed, but Senator Coats did stress that the amendment wouldn't prevent physicians from being able to provide -- or being trained to provide emergency treatment.

THE COURT: One thing I'm couldn't quite figure out was the interplay between EMTALA and Title VII under current

law. In other words, in practice is the way EMTALA applied in the use of undue hardship notes from Title VII but in an emergency context the employer has a particular deference, or the hardship concern comes particularly before you can't have somebody, you know, stopping in a transverse on the way to the hospital because they realize they're driving somebody to an abortion.

MS. SALGADO: Absolutely, your Honor. I think the Sheldon case highlights this; is that the hospital, after having two serious incidents in which a nurse was not providing care to a patient that had life-threatening conditions, the hospital had to remove the nurse. I'm not -- honestly, I'm not quite sure whether that decision discusses EMTALA, but I think that is an example where the hospital -- that it would have been an undue hardship for the hospital if -- to keep that staff and not be able to comply with EMTALA.

THE COURT: So I have your points on Title VII and EMTALA. Just come back just for a moment to the ACA.

The ACA does have a substantive ruling provision and it specifically says that nothing in the Act shall be construed to have any effect on federal laws regarding conscience protection.

Given that, what's the contrary-to-law argument you have with respect to the ACA?

MS. SALGADO: Well in the ACA, in Section 1554 of the

ACA specifically, that statute prohibits HHS from promulgating regulations -- or shall not promulgate any regulation that creates any unreasonable barrier, impedes timely access to health services. And specifically Section 1554 of the ACA what it says is: Notwithstanding any other provisions of this Act the Secretary of Health shall not promulgate any regulation that does these six different things.

So, your Honor, I think that it was clear that Section 1554 was meant to trump any other provision of the Act including section -- I think you're referring to Section 1303, 42 U.S.C. 1823. So I think it's clear by the face of the statute that Section 1554 was meant to trump any other provisions of the Act including that provision.

I would also note that in Section 1303 --

THE COURT: In other words, the ACA leaves in place all the conscience provisions that were there by statute. Your issue is that if the agency substantively expands the reach of those provisions, then you're not only -- whatever other rule-making issues there may be, you're now encroaching into a space that the ACA limits the agency's room to run in.

MS. SALGADO: Yes, your Honor. Section 1554 has been on the books for nearly nine years, coexisting with refusal statutes. So our position isn't that 15 -- defense counsel has tried to argue this but our position isn't that 1554 conflicts with the statute. It conflicts with the rule or, better yet,

the rule conflicts with the statute because the rule itself does -- it does create unreasonable barriers to the ability of individuals to obtain appropriate medical care. It does impede timely access to health care services. And the most clear example of that is by not having exceptions for emergency services. But I think that there are other ways in which the rule also violates 1554, right, even outside of emergency care. The rule also restricts full -- requires full disclosure of all relevant information to patients. But through the expansive definition of assist in the performance, which includes referral. And the way in which they have defined referral means that just the mere provision of information if that person believes that it will assist someone in performing an abortion is a referral, that would lead individuals to be able to deny people basic information such as if a patient faced with an unplanned pregnancy asked about abortion --

THE COURT: The rule reaches back to events, days, weeks, months before the procedure, including a phonecall, a conversation -- a chat with a receptionist.

MS. SALGADO: Exactly, your Honor. We think in those ways, by allowing refusals or individuals to refuse to provide basic information is another way in which it violates the clear mandate of Section 1554.

THE COURT: Why don't you in the remaining time just deal with logical outgrowth briefly. Your argument is that the

agency in it's notes and rule-making didn't, among other things, telegraph the possibility that it will be repudiating the Title VII accommodation framework. I get the argument. Nevertheless, a lot of commentators clearly understood that that was in play because a lot of the comments on the rule are addressing just that.

Doesn't that suggest that while the agency could have been more precise it was understood that the accommodation framework was in play in the rule-making process?

MS. SALGADO: Well I have two responses to that, your Honor.

The first is that, as a legal matter, the agency cannot bootstrap notice from the comments; otherwise, that would turn notice into an elaborate treasure hunt of which interested parties would have to search the record for the sort of buried treasure.

But you are right, your Honor. There were several commenters that submitted comments imploring the agency to make clear that it was not taking away the reasonable accommodation undue hardship framework. Those comments came from the plaintiffs in this case but they also came from major medical organizations, American College of Emergency Physicians, The American Medical Association, The American Hospital Association.

But they were in response -- what they were in

response to was the fact that the proposed rule actually -- it only had -- I think it had four sections. But the proposed rule gave a definition of discrimination that just listed out certain types of actions that would be deemed discrimination like the withdrawal of a benefit or termination. And that's all it said.

THE COURT: In other words, the rule was silent about the other side of the equation?

MS. SALGADO: Exactly.

And in response to the comments, where the plaintiffs and other organizations and other medical providers weren't sure what the rule meant, in response to that they submitted comments asking for the reasonable accommodation undue hardship framework, explaining that it would --

THE COURT: But from an administrative law perspective, the fact that the agency is essentially talking about a bright line ban and not talking about an offset, a hardship, a carve-out, an exception, why isn't that notice enough that the agency's not talking about a hardship or an exception; i.e., that's it's rethinking the whole framework?

MS. SALGADO: You're right, your Honor in that the -- we were on notice that the agency was rethinking or might have been, I guess, really, right; that the agency might have been rethinking the framework because our position is that when -- is that the term discrimination in the employment context

inherently requires a balancing of interests; it inherently, certainly in the context of religious accommodation, for decades that term has meant to include the reasonable accommodation undue hardship framework.

So what I would say what the public was on notice of was that the agency may be thinking that it was going to strip away Title VII protections. But what they weren't on notice of was the unusual ground rules that the agency has put into the rule in subsections four through six; not only that, there is this, quote, effective accommodation, which is a term that the agency has made up; but also that you can only ask employees about their objections once perfect calendar year or you can't ask potential hires unless there is persuasive justification. You might be able to post notices but only unless it's adverse action.

The public had no notice of those unusual groundworks.

THE COURT: This shows up in the final rule and not before.

MS. SALGADO: Exactly.

And the reason why I think -- the agency tries to push these away as just details, but at every turn through its briefing it points to those subsections as the agency's -- the framework that it is created and the reason why the rule is justifiable and reasonable. And so we believe that the agency's failure to put the public on notice of this new

framework it created does violate the notice of common procedures and the APA.

THE COURT: Ms. Salgado, I want to come back to contrary law. There's an establishment clause challenge. For argument's sake assume that the Court were to conclude that there was not a facial establishment clause problem here but there are all sorts of imaginable hypotheticals that could give rise to as-applied challenges. Does that then become a basis to argue that the rule is contrary to law or does the fact that any establishment clause problem on my hypothetical conclusion could only be as applied, prior view to the ability to identify the establishment clause violation as contrary to law?

MS. SALGADO: If the Court -- I just want to follow your hypothetical. If the Court found --

THE COURT: There is no facial establishment clause problem but as applied you could have any number of such problems but on its face it's not a violation of the establishment clause, does that prevent you as a matter of Administrative Procedure Act Doctrine, does that prevent you from arguing that on that basis the law is contrary to law -- that the rule is contrary to law?

Do as-applied violations count?

MS. SALGADO: Well, we don't believe this is an as-applied violation. But I will confess that you have stumped me and if I may confer with my colleagues and get back to you.

THE COURT: There will be a chance for -- I expect a chance for rebuttal. That is of interest to me. Thank you, Ms. Salgado. Very helpful.

Next up is Mr. Colangelo.

MR. COLANGELO: Good morning, your Honor.

Matthew Colangelo from the New York Attorney General's Office on behalf of the plaintiffs. And I will argue the arbitrary and capricious claims for relief in these consolidated challenges.

Your Honor, to meet the standard for reasoned decision making the agency must examine relevant data and articulate a rational connection between the facts found and the choice made. The agency fails this test and its decision must be set aside as arbitrary where its explanation runs counter to the evidence before the agency, the agency entirely failed to consider important aspects of the problem, or the agency doesn't justify its reversible unsettled policy.

Here, HHS fails each of these tests of a rational agency's action, first, because the agency's explanation is counter to the evidence in the administrative record.

In multiple critical respects the agency relied on a factual claim of evidence that examination shows to be either mischaracterized or flatly untrue.

THE COURT: I'm eager to have you get into it in just a moment. One threshold question. It looks as if it has been

ping pong ball between administrations here. You have the 2008 rule, which prefigures part of the current rule. It's retracted to say that at some point the administrative component in 2009 is substituted by a 2011 rule that, again, is more housekeeping and now there's a change of administration and there's a new policy.

To what degree does the agency have to -- let me put it this way. You're arguing that there's a change in effect from the 2011 rule and I appreciate that, but there is some harmony, some extension, but some harmony with the 2008 rule. Why isn't that also a relevant point of comparison here? Why is the only test here how this compares with what the agency had done and thought at the previous chapter which you go back to two administrations ago they're more in sync?

MR. COLANGELO: It doesn't inform the Court's analysis for two reasons, your Honor. First, if we're looking at the chapters in the story, I think the story most reasonably told is that for nearly the entire 46-year history, starting with the enactment of the first Church Amendment in 1973, there was no need at all for any regulatory implementation for any of these statutes. The 2008 rule, published in December of 2008, was the first effort to regulate these statutes at any point and never took effect. So as a practical matter I don't think the 2008 rule is --

THE COURT: Why did it never take effect? It was that

the implementation date was into the next administration and it was tabled or was there an injunction?

MR. COLANGELO: There was an implementation date that was to take effect I believe the day before the inauguration of the new president. The incoming administration suspended effective dates. There was litigation in the District of Connecticut. But then the agency said that it was not -- both not enforcing the regulation and was not completing the paperwork production act process to implement the certification requirement in the 2008 rule. So as a practical matter that rule was never enforced and didn't inform the state of play.

So I think the more realistic assessment of the state of play is that for nearly five decades no regulations had been necessary and, in fact, that's what the agency said in 2011 when it completed the rescission of the 2008 rule.

Your Honor to go to the many ways that this rule is counter to the evidence, there is no specific example where this error is more egregious than with respect to HHS's claim that it relied upon a, quote, significant increase in complaints filed with OCR alleging violations of the laws that were the subject of the 2011 rule. The administrative record makes clear, after we moved to compel its completion, that those assertions are factually false. And a factually false evidentiary claim can't be the basis for reasoned agency decision making. Now for context, your Honor --

THE COURT: There are a lot of complaints but they deal with extraneous matters like vaccinations, right.

MR. COLANGELO: Yes, your Honor.

Nearly 80 percent of the 343 complaints the agency said it relied on deal with vaccinations which the defendants now concede have nothing to do with the underlying statutes. Another 15 percent of the complaints are irrelevant because they either oppose the rule-making. They don't allege prohibitive conduct like the complaint that the state attorney was failing to prosecute a voyeur. They don't cover a protected entity like the complainant who said that the FDA was acting like the Mafia because it required the removal of social media ads for divine cancer care. That leaves just 21 complaints, only six percent of what the agency said in the final rule that they were relying on, that even potentially allege a violation.

Now we quarrel with some of those complaints. But even if you accept them all, to say that you've relied on 343 complaints of discrimination when the record -- the uncontested record shows you relied on at most 20 in a two-year period.

THE COURT: Is there any indication of how many complaints had been there before just by way of comparison?

MR. COLANGELO: So the administrative record shows that the agency received, I believe it was either nine or ten complaints from 2010 to 2016. So the figure that I believe the

agency cites is one or two each year for the years before 2016 and then they claim 343 in fiscal year 2018. In point of fact they received only 20 in a merely two-year period from the November 2016 election until the end of fiscal year 2018.

It's the definition of arbitrary to rest a decision so consequential on claims that are factually untrue or can be so readily disproved. The Second Circuit reached that conclusion three-and-a-half decades ago in the Mizerak v. Adams case. An agency's decision is arbitrary and must be set aside when it rests on a crucial factual premise shown by the agency's records to be indisputably incorrect.

Your Honor, to emphasize, this mismatch between what the agency says they relied on and what the record shows is only known because we sued and only known because after suing we moved to compel completion of the record. It should go without saying that it's not a rational basis for agency decision making to fail to disclose the true facts.

THE COURT: Put another way, the administrative record shows that this is a solution in search of a problem.

MR. COLANGELO: Yes, your Honor. I think that's exactly right.

There are a number of other ways in particular that the record shows that the rule is a solution in search of a problem. So, for example, the harms that the agency identifies, and by their own analysis HHS estimates that this

is a billion-dollar rule, costs more than nine hundred million dollars to implement over the first five years, so nearly a billion-dollar rule in quantifiable costs.

THE COURT: What would make it so costly?

MR. COLANGELO: The most significant component of those costs, your Honor, are the assurance and certification requirements. I believe they estimate about $150 million a year to implement the certification and assurance requirements. And then the additional costs that they quantify are other costs regarding familiarization with the rule and other compliance procedures.

One of the harms that they fail entirely to examine in any adequate way is the overwhelming showing of harm to specific patient populations in particular vulnerable communities like immigrants, poor people, women, people of ill health, the LGBT community. The administrative record includes overwhelming evidence from not only advocacy organizations but the nation's leading medical associations and health care providers that access to care would be undermined by this rule and the agency does not quantify those costs.

THE COURT: Come back for a moment though to your first point which had to do with the falsity in the stated number of complaints.

What should I take away from the fact of not just the falsity but the number of complaints? Why so few complaints?

What does that mean about the world as it's working?

MR. COLANGELO: So, your Honor, I think that the fact that there is so few complaints shows that the fundamental justifications for this rule are not well founded.

Now the agency says that they needed greater enforcement authority and they needed to clear up confusion. And they also make the assertion that the relative absence of complaints before 2016 was really only a function of the prior administration sending the signals that they weren't open for business. They didn't want to hear from complainants regarding violations of conscience rights.

Now, two-and-a-half years after the agency has attempted to send the opposite signal, to receive only ten complaints a year when, remember, your Honor, OCR receives in the last fiscal year for which we have records 30,000 complaints of the other statutes that they --

THE COURT: OCR is Office of Civil rights within HHS?

MR. COLANGELO: Yes, your Honor.

THE COURT: So what would be the paradigm complaint that that office gets?

MR. COLANGELO: So OCR investigates HIPAA complaints for violations of health care privacy. They investigate Title VI complaints for discrimination on the basis of race, color, or national origin which can include complaints regarding a denial of language access. OCR also investigates Title IX

complaints as well as, I believe, Section 504 which relates to disability.

So when the evidence here shows that less than three one-hundredths of a percent of their annual complaint volume relates to the statutes that they are enforce here, your Honor, I think to answer your question directly, I think it shows, again, that this is a solution in search of a problem.

THE COURT: I take your point about the number of complaints. A separate justification which I guess applies more to the enforcement architecture that the rule sets up as opposed to the substantive standard, but focus on that for a moment. Agency says essentially it's opaque. Where do you go and how do you get this enforced?

Does the record reflect any instance in which the agency did an investigation leading to enforcement action of the sort that we see from other federal agencies, whether DOJ, SEC, FCC, FTC. All sorts of agencies have enforcement apparatuses which result in notices of potential violations, evidence gathering, often a pre-allegation of what the charges would be and then ultimately a charge either brought administrative or either in litigation. I'm having difficulty in the record figuring out whether any such complaint ever reached the end line of that.

What have you found?

MR. COLANGELO: Your Honor, the final rule mentions

agency action with regard to a Hawaii state statute that the agency believe violated the Church Amendments. And the Hawaii Attorney General said she would not enforce the statute.

I believe my next example would not be in the record because it's more recent but within the last several months OCR, the Office for Civil Rights, issued a notice of violation regarding employment practices at the University of Vermont Medical Center.

THE COURT: That's based on the complaint at tab 130, right?

MR. COLANGELO: Yes, your Honor.

And then a third example I believe is the instance -- and the agency cites this in connection with litigation by affected employees, but the instance of the nurse at Mount Sinai Hospital here in New York. That nurse's complaint was ultimately resolved by a successful OCR investigation.

THE COURT: I guess the question is I'm trying to figure out whether there has been enough of a developed enforcement process to conclude -- to allow us to conclude whether there is clarity as to how it works and what the rules are so as to bear on the need for enforcement clarification.

MR. COLANGELO: Well I think, your Honor, we don't need to -- we don't necessarily need to look at some significant extant body of investigations and resolutions regarding the conscience protection because the question, as it

pertains to arbitrary and capricious review of the rule, is whether the agency has sufficiently connected the facts they found to the procedures and substantive prohibitions that they're implementing here. And the record does not show anything close to a need for the enforcement procedures and the intrusive mechanisms that they're implementing in this rule.

THE COURT: Even if the number of complaints investigated doesn't get you there, is there any place a person would go pre-rule to explain, for example, what the consequences or the outer bound consequences could be of a violation of one of the conscience statutes.

MR. COLANGELO: Yes, your Honor. I think the 2011 rule which delegates the authority to enforce these statutes to the HHS Office for Civil Rights sets out the assignment and delegation of that authority and someone could go to the Office for Civil Rights with a complaint or an inquiry --

THE COURT: Where would you go if you are a entity that is covered and, therefore, whose conduct could subject somebody to the loss of a funding stream, where would you go that spells out pre-rule what the consequences are of having on your watch an employee of yours or a subrecipient of a grant or whatnot violate a conscience statutory provision.

MR. COLANGELO: I think, your Honor, there are two answers to that question.

The first is that you would go to OCR, which has been

assigned authority to enforce these statutes, and one could request technical assistance. I should say three answers.

Second is that the statutes themselves setout what the contours of the prohibitions are.

THE COURT: Sorry. But that's the contours of the prohibitions. I'm asking about the consequences.

Assume a violation of the statute. Let's use the hypo from the first discussion I had. Is it clear right now to a provider or to a state that receives funding what is in jeopardy, concretely what funding stream is in jeopardy from a violation in a particular area or is that something where clarity could be enhanced by a rule.

MR. COLANGELO: I think -- there are two answers to that question. The first is that OCR has provided guidance regarding what funds are in jeopardy, including through the 2011 rule; but the second and more import answer, your Honor, is that even if it is true that the agency had reason to believe that greater clarity was needed in terms of what funds are at risk, for which violations of which statutes, the agency still has to connect this final rule to that concern. And they haven't done that. The focus of the rule, including on the complaints that they purport are at risk, and as implemented through these Draconian enforcement provisions, the expansion of liability to sub-recipients, the assurance and certification requirements, the recordkeeping obligations and the expanded

definitions of terms like health care entity, assist in the performance of discrimination, none of those mechanisms are necessary or at least not rationally connected in this record to any interest in clarifying what the consequences are of a violation of the statutes that the agency says here that they're implementing.

So I guess a different way to put it, your Honor, is that the agency --

THE COURT: Does the existing rule -- pre-rule, is it clear what the liability would be, for example, for New York State -- for a violation by a subrecipient, some -- you use your Medicare funds or whatnot fund, a hospital and somebody on their watch -- I may have a bad hypothetical, but essentially a subrecipient's violation, does the rule clarify the consequences, for example, to New York State if a subrecipient breaches one of the conscience statutes?

MR. COLANGELO: The 2019 rule does assign responsibility to every recipient for the activity of its subrecipients.

THE COURT: Does anything beforehand clearly speak to that? I'm trying to figure out if there are gaps or lacunas here that could properly be clarified by rule.

MR. COLANGELO: I don't believe the 2011 rule speaks to subrecipient conduct and a recipient's vicarious liability at all, your Honor.

There are, of course, preexisting mechanisms under the general grant-making and acquisition regulations and frameworks where recipients do have some obligation to ensure, for example, anti fraud protections in how a subrecipient uses the funds.

I will say, your Honor, there is no evidence in this administrative record, certainly not that the agency has pointed to, that either recipients or subrecipients or complainants were asking: What are we going to do about a subrecipient violating the conscience statutes?

Your Honor, I think the best way to think about this is that even if one believes that there are other aspects of the implementation of the refusal statutes that could fruitfully be clarified, the agency has articulated a justification that is based on specific claims of evidence that are untrue. And it has implemented specific provisions to enforce particular statutes that prohibit particular kinds of conduct in connection with particular funding with no record that there is any underlying justification for those -- for those prohibitions as to that particular conduct.

THE COURT: One of the points you make in your brief is that the agency didn't properly consider what you call reliance interest.

MR. COLANGELO: Yes.

THE COURT: I couldn't quite tell concretely what you

meant. What reliance interests should the agency have considered that it didn't?

MR. COLANGELO: So, your Honor, and I think the Court touched on this a moment ago with a question to my colleague regarding Title VII. But the regulated entities, which include the states and cities and providers that are plaintiffs in your courtroom this morning, your Honor, regulated entities have conformed their operations around the way HHS has implemented these statutes for nearly five decades in a number of ways. And this is evident both from the administrative record --

THE COURT: Pause on that. You said that HHS has implemented these statutes. The overall portrait I get is that the statutes have existed but that this is an area of relative inactivity. Has HHS done much to enforce these statutes over these decades or have plaintiffs essentially treated Title VII, for example, as applicable but not because HHS has done something but because Title VII is on the books.

MR. COLANGELO: Your Honor, the administrative record shows that the plaintiffs have aligned their policies to the refusal statutes consistent with how HHS has interpreted those refusal statutes.

So, for example, the governmental plaintiffs discuss this in our briefs in connection with how we have organized our personnel practices, the typical requirements for advanced notice of objections, the staffing procedures in terms of what

to do when somebody raises an objection that was unanticipated.

THE COURT: Sure. But I mean that's a matter of changing your procedures. Reliance interest I would think would be more: We've hired a bunch of people whom we thought we had the flexibility to move around and we're now stuck with them as parts that will prevent effective delivery of medicine in particular areas. Is there a reliance interest along those lines that hasn't been considered?

MR. COLANGELO: Yes, your Honor.

There certainly is reliance interest on exactly what the Court just articulated. And, in addition, if one thinks about the expansion of the definitions of health care entity to include nonmedical personnel, including plan sponsors, there is no plaintiff in the courtroom right now, your Honor, that has ever considered a clerk in the billing department, a receptionist at the check-in desk --

THE COURT: What about the ambulance drive?

MR. COLANGELO: The ambulance drivers are not typically considered in most employers' practices someone who assists in the performance, for example, of an abortion if the person they are transporting to the hospital may have a miscarriage that may result in an abortion.

THE COURT: I mean plaintiffs may have conceived of the rule a little differently but -- conceived of the statutes differently. But pre-rule, if you can generalize, how did the

providers and states treat the outer bound systems of performance? Was it in effect within the operating theater? Did it extend beyond that? How was it widely understood pre-rule?

MR. COLANGELO: What the administrative record shows is that, at least as to governmental plaintiffs, assist was widely understood within the rule as providing a typically medical aid in specific connection with and furtherance of a particular procedure. So the medical staff performing a procedure, the nurse assisting the medical stuff or performing procedures themselves, that would be considered assisting. The billing clerk at the insurance company after the fact who sends the bill, that's not -- no plaintiff --

THE COURT: And somebody who is giving patient guidance in the days or weeks beforehand that may inform the decision whether undertake the procedure, was that considered pre-rule assisting the performance?

MR. COLANGELO: Not typically, your Honor, no, it has not been.

THE COURT: And the scheduling -- not the scheduler, no?

MR. COLANGELO: Certainly not, your Honor.

For these reasons the rule is arbitrary and capricious. We're happy to address anymore questions on rebuttal.

THE COURT: Just one moment.

MR. COLANGELO: Yes.

THE COURT: Just explain to me you mentioned disadvantaged populations. What's the reason to infer that this rule would disproportionately affect particular populations?

MR. COLANGELO: So there are two reasons, your Honor. First, there is a documented existing pervasive disparities in health care as to discrete and identifiable populations including people of color, low-income families, the LGBT community, and immigrants.

So the first reason is that any rule that affects the delivery of health care will necessarily bear more heavily on disadvantaged populations. And the administrative record includes a number of examples. Both because those populations are already subject to discrimination in health care, but because in many instances they are also located in areas where the provision of health care is strained by other factors, whether it's rural communities or whether because of lack of financial resources their most common vehicles for delivery of care are in the emergency setting which is also stressed by this rule. So that's one reason why the vulnerable populations are likely to be particularly affected.

And the second reason, as a number of the administrative record comments point out, is that as a

historical matter many of the religious refusals to provide care have arisen in the context of circumstances that distinctly affect vulnerable populations like the LGBT community. So, for example, an objection to gender reassignment surgery or hormone therapy that would likely apply to only a transgender individual --

THE COURT: But your point as to that, and I thought this was in the context I think of one of the complaints, I think it's the Washington State complaint, I thought your point was that procedure is not implicated by these statutes at all.

MR. COLANGELO: Yes, your Honor. In connection with the Washington Department of Corrections complaint, it's pretty clear from the record that there is no connection between that complaint and that complainant's concerns and what the statutes are prohibiting. I'm trying to make a broader point that the record is full of evidence that transgender individuals face significant and extreme discrimination in health care.

THE COURT: Right. But the particular procedures that are implicated by these statutes are primarily abortion and sterilization, right?

MR. COLANGELO: Yes, your Honor.

THE COURT: To what extent do the statutes include, for example, what you're talking about now which is change of gender, procedures, that sort of thing?

MR. COLANGELO: Well, your Honor, there has been

religious objections to that kind of procedure on the ground that it would functionally result in sterilization.

THE COURT: So that's how it becomes within the scope of these statutes?

MR. COLANGELO: Yes, your Honor.

THE COURT: Final question. HHS, as to the issue of denial of access of care, says: No, we did respond to your concerns, you just don't agree with us. Their statement is that by making the health care world a more receptive one to people with strong religious views you'll actually increase the population of people who choose to participate in an area who are right now deterred by the possibility of being in effect stuck performing a procedure to which they object.

Is your objection to that simply that that's unpersuasive or that the agency didn't consider the issue?

MR. COLANGELO: Your Honor, the plaintiffs' objection to that is that its counter to the evidence and that they've failed adequately to consider the issue and although -- although your Honor is correct that the defendants do say, particularly in litigation, that this is simply a policy disagreement and that they have reached a contrary view that we disagree with, I think the fairest reading of what the agency actually said in the final rule was that after considering the overwhelming record evidence regarding access to care, including the agency's own determination just eight years ago

that expansion of the conscience protection rights would affect detrimentally access to care, the agency said, quote, that they should finalize the rule without regard to whether it exists on the effect of access to care.

So although your Honor is correct that the rule purports to walk through some of these analyses, I do think the fairest reading is that they ultimately concluded that the effect on access to care was immaterial.

I think the other reason why that conclusion is irrational is that they discount the record evidence regarding the effect on access to care for the same reasons that they credit record evidence that supports the conclusions that they -- we believe that they have predetermined that they wanted to reach.

So, in other words, they dismiss some of the concerns that your Honor and I have just been discussing regarding risks to the LGBT community, they dismiss those concerns as anecdotal and qualitative but they credit Kellyanne Conway's survey conducted on behalf of the Prison Medical Association as a qualitative survey because they thought it was informative. It's irrational to be internally inconsistent. If you believe qualitative evidence has some persuasive force, you can't dismiss qualitative evidence when it cuts against your --

THE COURT: Thank you, Mr. Colangelo. Very helpful. Finally, I'll hear from Ms. Meyer.

MS. MEYER: Good morning again, your Honor.

THE COURT: Good morning.

MS. MEYER: I want to first address both the ripeness and merits of the governmental plaintiffs --

THE COURT: The last thing you said?

MS. MEYER: Discuss the scope of relief of the plaintiffs.

Plaintiffs' spending clause claim is ripe for judicial review. On November 22 if the rule takes effect plaintiffs will need to adjust their conduct immediately and significantly or face risk -- or risk losing billions of dollars of funds that the rule authorizes HHS to withhold or suspend.

THE COURT: So let's assume the rule takes effect November 22. Right away what are the most primary, most significant transformative things you would need to do to meet the rule?

MS. MEYER: So if the rule takes effect the compliance requirements go into effect immediately because the threat of funding termination springs into effect immediately. So specifically the plaintiffs have submitted over 48 declarations containing hundreds of patients' sworn testimony from preeminent leaders across the country in the health care sector. And these leaders have testified that the harm stemming from the final rule is real and immediate.

For example, plaintiffs' institutions have various

policies and procedures in place that have balanced conscience objections with patient care for decades. For example, many of the institutions require that employees with conscience objections provide their employer with advanced notice in writing so that they can make accommodations in advance based on objections to care.

An employee may not object in real time or abandon a patient in need of care and an employee could face consequences for failing to abide by these critical notice requirements.

THE COURT: The employer could?

MS. MEYER: The employee under plaintiffs' policies exist -- that currently exist, if they do not provide advanced notice of an objection, they could face consequences.

THE COURT: Explain that. In other words, I thought your primary concern was really on the employer, that the employer suddenly has to scramble to meet a new framework and if it doesn't ask questions, for example, of employees to smoke out potential objections, the employer then could be stuck in a situation where it has somebody with a bona fide right to object who the employer has to accommodate in a situation which could affect care. I thought that was the primary argument. I didn't perceive a separate impact on the employee. Can you explain that?

MS. MEYER: Correct, your Honor. That is our primary argument. The only point with respect to the fact that an

employee could be disciplined for not giving an advanced notice requirement is that is a provision that allows employers to enforce these particular notice requirements that are now implicated by the final rule. When the final rule does take effect or if it does take effect on November 22, plaintiffs to comply with this are going to have to overhaul those policies and procedures in significant ways.

THE COURT: Give me a scenario of something that could happen in the first week after the rule takes effect that could affect let's say a funding stream but for the employer's quick adaptation to the rule.

MS. MEYER: Many of our declarants have testified, for example, in the emergency context that a women presenting with an obstetrics problem would face -- would encounter anywhere from 12 to 16 hospital employees. So our declarants have testified that if the final rule goes into effect, they need to be prepared to deal with objections on the spot from those various 12 to 16 employees. And this is because of, for example, the expansion of the definition of discrimination and the expansion of the definition of assisting performance.

THE COURT: Let's focus on the employers' ability under the rule to smoke out, if you will, from employees or applicants what they object. Under the rule what can the employer do in the hiring process to determine, if anything, whether an employee is going to be off limits for certain

procedures?

MS. MEYER: So in the hiring process the employer cannot ask the hire whether there's any objection.

THE COURT: And that's true even in our rural hypothetical even in the situation where accommodating may be impractical.

MS. MEYER: Correct.

Once the employee is hired, the employer may ask once per calendar year or with persuasive justification.

THE COURT: Let's suppose we don't know what persuasive justification is. I take it that's undefined.

MS. MEYER: Correct.

THE COURT: Let's assume that the process of adapting to the rule itself is a persuasive justification; that the fact that there's a new regulatory framework in place almost necessarily allows the employer right out of the gate to ask employees who's eligible for what, on a conscience perspective, for what areas of work.

Assume that the employer is allowed, at least, to ask that and that would clear a persuasive justification bar, what happens next? How is -- how is your primary conduct affected?

MS. MEYER: So assuming that that is a persuasive justification which, frankly, our declarants cannot rely on because they have not received that clarification from HHS so they have to proceed under this regime of one calendar per

year. But assuming that is a persuasive justification, there's still the extreme financial burdens that are imposed on institutions for needing to basically double or triple staff certain departments or going to an employer and asking if they will accept an accommodation like a transfer to a different department. If that employee says no, then our institutions have to have backup or shadows.

THE COURT: Is there anything out there in the world that would guide me in the record as to the number of employees, in fact, who work appertinent to procedures at issue who actually would object in them?

In other words, there are a lot of hypotheticals that have populated everybody's briefs. One thing that's a little less clear is, assuming a widespread regulatory right to object, assuming even a statute that said that, any information out there about in practice what that would mean?

MS. MEYER: The exact number of people who holds religious objections?

THE COURT: Right. Or number of people who both hold those religious objections and are let us say presently in jobs where those objections might be triggered.

MS. MEYER: We don't have those exact numbers in the record, your Honor, but the objections to procedures do exist and this is exactly why these policies and procedures are in place, to make sure that employers can accommodate those

conscience objections while protecting patient care.

THE COURT: Does the rule have any safe harbor, any unramped period in effect where an employer gets some period of time to adapt its procedures without being subject to loss of funding because the procedures have not been fully developed or implemented?

MS. MEYER: No, your Honor. HHS explicitly rejected comments requesting that it allow for compliance in one year after the effective date of the rule or for a one-year safe harbor. So HHS explicitly made this choice. And, in fact, one of the key reasons that HHS issued this final rule was to affect compliance with --

THE COURT: So going back to the hypothetical earlier, in the hypothetical situation in which a subrecipient of a New York Medicaid grant, let us say, breaches the rule by following a Title VII accommodation approach that's now been eclipsed by the rule, if that happens on November 23 subject to how the enforcement process plays out, at the end of that process New York's failure to adapt its subrecipient's policies to the new rule could cost New York its Medicaid funding?

MS. MEYER: Correct, your Honor.

THE COURT: Which is billions of dollars a year.

MS. MEYER: Yes. Yes, it is.

THE COURT: So I take -- I think I take the argument as to ripeness. Let's focus on the merits of the spending

clause point.

MS. MEYER: With respect to the final -- the merits, the final rule violates each of the four limitations placed on the federal government's use of funds in violation of this spending clause. Critically the rule conditions plaintiffs' compliance with HHS's new federal conscience reviews on 192 billion in federal health care funding. Specifically the rule gives the department the authority to withhold funding in the whole or part to deny use of federal financial assistance or funds from the department in whole or part, to wholly or partly suspend award activities, to terminate federal financial assistance or other federal funds from the department in whole or part, or to deny in whole or part new federal funds from the department. This all includes based on any indication that a recipient has failed to comply with the rule and during pendency of good faith compliance efforts or for failure to comply with the new assurance and certification requirements in the rule.

THE COURT: May I ask you. One of the situations that can give rise to a spending clause problem involves a situation where the rule would violate another constitutional provision. I'm going to come back to a question I asked one of your colleagues earlier. Focus on -- one thing that you argue is that the rule would violate the establishment clause. Indulge the hypothetical that it might in some applications but it

doesn't on its face and that that was the Court's determination.

Is the spending clause implicated by that problem in which one can imagine scenarios where you have an establishment clause problem but that on its face the rule doesn't?

MS. MEYER: It is, your Honor, especially in the context of this rule where if liability is imposed on the states for the activity of their staff recipient. So, for example, as a practical matter our declarants have testified that they will have to review their contractual arrangements with various subrecipients to ensure compliance with the final rule because they are now subject to vicarious liability. And in doing so, in reviewing those contracts and imposing conditions if necessary on subrecipients, if those conditions present a constitutional problem, what defendants are subjecting plaintiffs to is imposing those unconstitutional conditions on its recipients.

THE COURT: OK. Another dimension of spending clause analysis involves retroactively. Articulate for me why the rule has a retroactive effect. Right now are you able to hire people -- are you able to ask the conscience question in hiring?

MS. MEYER: We are, your Honor.

THE COURT: And is the retroactive point that you're now stuck with people -- so if -- that doesn't work. In other

words, if you were able to fence out people who simply couldn't do core parts of the job by virtue of asking that in hiring, how is there a retroactive application of the rule, meaning you are getting punished for past conduct or decisions?

MS. MEYER: So one of the prohibitions of the spending clause is retroactivity in the fact that plaintiffs need to knowingly and voluntarily accept the conditions of the funding streams. And when plaintiffs accepted these particular funds they had no idea that HHS would expand their substantive requirements to, for example, broaden definition of discrimination in such a way that it would severely curtail plaintiffs' current policies and procedures.

THE COURT: But you accept funding typically on a year-to-year basis.

MS. MEYER: That's correct.

THE COURT: So we're in right the middle or early part of the fiscal year right now. Suppose on November 23 comes the violation. Suppose it's adjudicated in full on January 1. Presumably the image -- I'm telescoping the process here just for purposes of a hypothetical, I know the world doesn't work that fast, but assuming that it did. If the agency were to cut off your funding from January 1 through the end of the fiscal year, why is that retroactive? Yes. You took the money not knowing that the regulatory world would change, although the notice was out there, but you would only be cutoff

prospectively unless the agency is threatening to clawback the money going back to the beginning of the fiscal year, how is that retroactive?

MS. MEYER: A couple of responses, your Honor.

First, let me clarify that various contracts and grants govern the administration of all of these underlying funds. And so I don't think that it is accurate to say that we renew, for instance, on a yearly basis. I think the underlying funds are governed by various provisions of the grants and contracts.

With respect to why this particular provision is, in fact, retroactive is the obligations that are imposed on day one go into effect on day one. And so the funding streams that are threatened are the funding streams that we currently operate under now and the policies and procedures that we have to change are policies --

THE COURT: You have hired people and engaged subcontractors and the like on the premises that the funding stream is intact at least through the end of that grant or installment whether it's yearly or whatnot. The point is there's an architecture that develops around the expectation that your Medicare grant isn't going to be yanked in the fiscal year.

MS. MEYER: Yes, your Honor. And, in fact, we have declarants that testified as to the expectation of the spending

streams the governs had budgeted for them in 2019 and 2020 and 2021 and so you have those reliance interests as well.

In addition, the written assurances and certifications of compliance with the final rule are new and retroactive conditions that plaintiffs may be subject to immediately. The final rule authorizes HHS to require certification if OCR suspects a violation and it makes that certification an explicit condition of continued receipt. So that's another way in which this rule is retroactive.

THE COURT: I realize there are multiple ways in which the spending clause could be violated but one of the things you say is that -- one of the concerns implicated is that retraction of spending is unrelated to the federal interests at issue.

Assume for argument's sake a small dose of conscience statutory violations. Just put aside the issue whether the rule faithfully implements the statute and just let's take our hypothetical of the no-doubt-about-it violation.

How would one go about narrowing the scope of the financial penalty to get rid of your concern about the penalty being Draconian or unrelated?

Is it literally just the salary of that employee? Is it real -- does the fit have to be that tight as to what the hospital or state uses or is there some broader retraction of funds that it would still be considered in effect related to

the violation?

MS. MEYER: So we think that under current procedures for any type of funding with withholding or suspending or termination that those procedures are tied to specific funding streams. So if a violation came up HHS would look to the specific funding stream that was implicated.

THE COURT: So right now assuming a violation of a conscience statute which is litigated to completion and procedurally sound, you would not contend there's a spending clause problem with the retraction of the entirety of the funds from that funding stream even if you only had one bad act or one bad apple in the hospital?

MS. MEYER: We would -- we would rely on the regulations and provisions that are already in place. So we do not take issue in the underlying statutes that say certain funding --

THE COURT: No. I appreciate that. But I'm trying to understand your constitutional argument based on the spending clause and I understand that you've argued ambiguity, coerciveness, violation of other constitutional provisions.

I'm just focusing now on the problem which you say also exists here of the penalty in effect, the spending clause -- spending retraction being unrelated to the problem.

I think what you're saying to me is that you don't have a problem with that as long as if -- even if the entire

funding stream is taken away on the basis of a single violation of the conscience statutes. Am I hearing you right?

MS. MEYER: So we're not quibbling with the fact that HHS has options through provisions like the UAR at its disposal. But here the amount of funding on which HHS conditions compliance in the final rule is a much larger pool.

THE COURT: Right. Let's suppose there's a Medicaid funding stream. I have the numbers handy somewhere. One moment.

New York received -- well it's not clear. I don't have it broken out by Medicaid. New York received many billions of dollars in health care funding, but certainly billions in Medicare. Let's just take Medicare for a moment.

Is it really your position that all of that could properly be taken away based on a violation of the conscience statutory provision applicable to Medicare by a single violation by a single person? Is that the way we define funding stream? And is that really your view that the spending clause concept of unrelatedness is not offended by that?

MS. MEYER: Your Honor, our view is not that -- that a small violation would jeopardize all of our Medicare funding, which is exactly what the final rule says here.

THE COURT: So, is there a case that helps define the relatedness concept?

If you're saying that there's a separate problem here

that the funding -- that the threat to the funding stream implicated by a singular violation, if what you're saying to me is that presents a spending clause problem of an unrelated penalty, what's the case that helps me with that?

MS. MEYER: So I think that there is a distinction between our relatedness argument which we are saying that the termination scheme plainly violates that requirement because the rule conditions funds on things that have nothing to do with health care like the Department of Labor and Education.

THE COURT: Right. That's your point which is that we're going outside the scope of HHS or going to funding streams not implicated by a particular violation.

MS. MEYER: Yes, your Honor.

THE COURT: But you're not making that argument even if it costs you an entire funding stream that that is a spending clause problem?

MS. MEYER: No, your Honor.

We are arguing separately that this scheme here is coercive; it has combined funding streams. And it also puts the final rule's new provisions and conditions those compliance with new provisions on that funding stream.

THE COURT: Final couple questions just on remedy.

Hypothetically assume that portions of the rule are problematic for one reason or another, including the ones that have been articulated today, but that portions are not,

including ones that sound in a more housekeeping nature, or where the application of a certain term is authorized by a rule-making grant as in ACA or Medicare or Medicaid.

Why shouldn't, given the severability provision in the rule itself, the definitions that are statutorily authorized, assume that we don't have the other APA problems that Mr. Colangelo addressed, why shouldn't those definitions be permitted to stand and why shouldn't the portions of the regulatory administrative structure that I conclude are fair and housekeeping, why shouldn't those stand?

MS. MEYER: The rule's provisions, your Honor, are codependent. So, for example, several sections rely on one another and cross-reference one another. For example, the posting of notices in 88.5 is evidence of compliance for purposes of enforcement in 88.7.

We don't believe that severability is appropriate. So, for example, as to the definitions this rule is already incredibly ambiguous, as we argued in our papers. And the little explanation that HHS gives as to various situations in the preamble is predicated on their understanding of multiple interpretations and definitions in this rule working together. And so where this rule provides very little clarity for plaintiffs on how to comply in the first instance, if the Court were to sever certain definitions but leave others, we would be left with even less clarity.

In terms of the severability clause itself, there are several cases that say -- and we've cited them in our papers -- that the severability clause is not an indication by itself that the rule should not be vacated in its entirety. Instead, we look to the intent of the agency. And the agency made clear here that it was trying to address confusion created by the 2011 rule. The confusion created by the 2011 rule, it claims, stem from the 2011 rule's interpretation of Weldon, Coats-Snowe and the Church Amendments. And so if the Court were to, for instance, strike certain provisions with respect to those statutory provisions, it's not clear at all that HHS would have made the same decision to promulgate this rule absent those core statutes.

THE COURT: Thank you very much.

In a moment we'll take a break. Let me just ask counsel for defendants who will be arguing for each side and who will be arguing first.

MR. BATES: Your Honor, I will be arguing for HHS. Christopher Bates.

THE COURT: That's Mr. Bates. And you'll be going first, I take it?

MR. BATES: Yes your Honor.

THE COURT: Who will be arguing for the intervenor?

MR. DUNN: I will, your Honor.

THE COURT: That's Mister?

MR. DUNN: Dunn.

THE COURT: OK. Very good. We'll take a fifteen-minute comfort break. I'll see you in fifteen minutes. Thank you counsel.

(Recess)

THE COURT: Welcome back. Be seated.

I'll hear now from counsel for the government. That's Mr. Bates.

MR. BATES: Thank you your Honor. Would you like me to speak from here?

THE COURT: Podium, kindly, please.

MR. BATES: Good morning, your Honor.

THE COURT: Good morning.

MR. BATES: HHS promulgated a conference rule, a law that exercises at its core, in order to provide clarity and ensure robust protections for rights of conscience that are protected under federal statute. I'd like to begin with the agency's authority for this rule.

There are expressed delegations of authority to the agency in a number of statutes to ensure compliance with grant conditions, other conditions, and to insure clients under applicable law. There's been some discussion about today there are some limiting authority with regard to Medicare and Medicaid and CHIP, which we have cite in our briefs, 42 U.S.C. 1302. There is limiting authority with regard to the ACA that

applies to implementation of the ACA's conscience provisions which we've cited in our briefs as well. It's in 42 U.S.C. 18 -- these are expressed delegations of authority for the agency promulgated or related to --

THE COURT: But I take it with respect to Church, Weldon and Coats-Snowe it's not disputed that there is no express delegation.

There is not express delegation, you said, for those three?

MR. BATES: That's correct.

THE COURT: The question just to take -- just to focus our discussion. In total, there are about 30 or so statutes that contain conscience provisions. Having looked at the others, each is really targeted to a rather narrow scope type of activity. Can I assume that for the purposes of discussion we're really talking about the several you just mentioned that have express delegation provisions and the three that I just mentioned that do not, that the others are really targeted to small corners of the world?

MR. BATES: So the intersections that do have expressed limiting authority are -- do apply to a more discrete subject.

THE COURT: So for the purpose of this discussion am I safe to really treat us as talking about the ones you identified a moment ago and the three that I identified in my

statement to you?

MR. BATES: So in terms of rule-making as it pertains to those three conscience statutes that you mentioned.

THE COURT: The heart -- the rule covers a broad set of conduct. It, to be justified, would have to be justified saving those discrete areas' conduct by one of either the statutes you mentioned, Medicare, Medicaid, ACA, or the ones that I identified to you as lacking express rule-making authority. We're not for the most part relying on any of the other three.

MR. BATES: For the other three conscience statutes, that's correct, your Honor. There's also the other housekeeping statute which we point to as authority for the rule here. I would note for the Court's information that the general housekeeping statute is the authority for the UAR; it is, in fact, the only statute that the agency cites as authority for the UAR. UAR is a comprehensive regulatory scheme. It governs the agency's administration of grants and processing the AG uses for ensuring compliance with grants. It is a comprehensive scheme set for the UAR. The statute ability for the UAR is solely general housekeeping statutes. That doesn't indicate that the housekeeping statute does provide broad authority in terms of assuring compliance.

THE COURT: Has HHS ever taken away anybody's funding for violation of a conscience statute?

MR. BATES: Agency counsel informed me no.

THE COURT: Has HHS ever threatened to do that?

MR. BATES: HHS has issued notice. It has issued warning letters, notices of enforcement, has taken enforcement actions under the conscience statutes. In terms of the --

THE COURT: What actions has it taken that are -- if it's never taken away somebody's funding, what enforcement action has it taken?

MR. BATES: So, your Honor, I'm looking over here at agency counsel now for specifics.

THE COURT: Rather than your looking, agency counsel, if there's an answer to the question that you want to furnish, Mr. Bates, would write it out rather than our going --

MR. BATES: Certainly in the vast majority of instances, conscience statutes, civil rights statutes as well, the resolution that is reached is a voluntary resolution that's worked out throughout informal processing, informal means between the agency and the -- its only in instances where those informal processes do not result in voluntary compliance that further enforcement action is taken. As to the specifics of -- I'll wait for --

THE COURT: I'm eager to come back to get a quantification as to the number of full enforcement actions in this area. If it's not something you're immediately facile with it, we'll come back to it, but it is of interest to me.

Go ahead.

MR. BATES: So the general housekeeping statute is as well exclusive authority for HHS's actions here. And then there is also, as HHS explained in the rule, there is inherent in Congress's adoption of the conscience statutes to require recipients of federal funds from the department to comply with statutes, the authority of the department to take measures to ensure compliance with those statutes. The Supreme Court has been clear that delegations of authority to --

THE COURT: Let me ask you this. The very last page of your regulation -- and I take it this must be justified with your housekeeping statute -- states that as a remedy for a violation the agency can -- the remedies include, quote, terminating federal financial assistance or other federal funds from the department in whole or in part.

Putting aside what you say in the briefs, that appears to be stating that for a singular violation of a conscience statute, as interpreted in the rule, an entity such as New York could lose all of its federal funding from HHS and perhaps from other agencies.

Is there -- does the housekeeping statute UAR authorize a rule like that, a consequence like that?

(Continued on next page)

MR. BATES: So in terms of the last point about funds from HHS for other entities, HHS has been clear in the rule that the funding streams that are impacted by the rule are only funds that are administered through HHS. So it would not subject funding through other agencies for violations.

THE COURT: Does the rule say that?

MR. BATES: So, it says -- let me just turn to my notes here. There are a number of places where it says that the funds that are at issue in the rule are tied to specific funding streams.

So I can provide a couple of quotes here for the court's information. Page 23223: "The only funding streams threatened by a violation of the conscience statutes are the funding streams that such statutes directly implicate."

On page 23192: "The prohibition discrimination is always conditioned on and applied in the context of violating a specific right of protection, and each protected right is typically associated with the particular federal funding stream or streams."

THE COURT: Those are comments. The actual reg itself on the last page, on its face, it has no limitation as to funding stream. I appreciate that it can be read not to implicate policies of the Department of Education or of Labor. But on the face of it, what I just read to you seems to say that, for a singular violation by New York State, it could lose

the entirety of, let's say, the $46.9 billion it got from HHS in healthcare funding in fiscal year 2018. In the face of the reg itself, where does it limit the threatened consequence to a particular funding stream?

MR. BATES: So this is not a way in which the regulation is different from the UAR, your Honor. The UAR also uses somewhat broad language here, as well. HHS --

THE COURT: Does the UAR use the language that I quoted to you from the last page?

MR. BATES: So the UAR does not use identical language, but the UAR speaks about terminating funding in whole or in part.

THE COURT: It says here "other federal funds from the department." It's hard to read the words "other federal funds from the department" as, given that it is unlimited, as unlimited.

MR. BATES: So, again, your Honor, the agency made clear in the preamble to the rule.

THE COURT: Preamble is not the rule. The text of the rule appears, on an unlimited basis, to leave open the possibility that, in an extreme case, the -- the agency could seek to terminate all federal funds from the department. It doesn't have any limitation in there. Would the UAR permit that? Would the UAR permit as a matter of housekeeping the agency to enforce the conscience statute so as to, without

limitation to a particular funding stream, deprive a recipient of the entirety of HHS funding for a singular violation?

MR. BATES: So, your Honor, I'm going to look to agency counsel now to answer --

THE COURT: You have to stop looking at HHS counsel. In baseball we call that sign stealing. You have to give me the answer. This is a fundamental question. It is all over the briefs. Yes or no: Do the funding statutes authorize you to adopt a rule that on its face threatens the entirety of HHS funding for a single violation? I take it the answer might be different for a particular funding stream, but I'm reading the text of the regulation now.

MR. BATES: So first point, your Honor, is that the regulation would not do that. For the purposes -- for the terms of the UAR, my understanding is that the UAR would not do that either. The rule is similar to the UAR here in the sense that it is tied to the specific funds that are at issue with regard to the specific statute that the agency has found a potential violation.

THE COURT: All right. So if I am understanding you right, so we can proceed with the balance of the discussion, your position, at least in this litigation, is that "all" that is in jeopardy -- quote/unquote around "all" -- is the specific funding stream implicated, right?

MR. BATES: That's correct, your Honor.

THE COURT: So if, hypothetically, within the scope of activity under Medicaid, there was a singular violation, you would reserve the right or HHS would reserve the right to withdraw the entirety of the Medicaid funding scheme, but that wouldn't extend to, let's say, Medicare.

MR. BATES: That's correct, your Honor. And in practice, HHS's practice is to tie or limit those enforcement mechanisms to the specific grant report or funding stream that's at issue.

THE COURT: But that's never happened in the context of the conscience statute. It's happened in other contexts, right?

MR. BATES: Yes.

THE COURT: How often does HHS terminate funding midstream for a violation, civil rights violation?

MR. BATES: So my understanding, your Honor, is that it is not common. My understanding is that there are approximately 12 to 13 enforcement actions that are taken each year, that this is under the civil rights statutes as well as under the conscience statutes and HIPAA as well, which OCR also administers. And agency counsel just confirmed that they have never -- that they have never terminated funding for a violation.

THE COURT: For a violation of this statute or anything else?

MR. BATES: Of any of them.

THE COURT: So HHS has never terminated funding of any recipient for any civil rights violation?

MR. BATES: That's correct, your Honor.

THE COURT: So this would be a first if that were -- if what is threatened here, whatever the scope, were to transpire?

MR. BATES: If HHS took an enforcement action under the rule that resulted in the termination of funds, that would be the first time that the agency had done that. But the agency has authority, under other statutes, to do it in other instances as well. So that is not unique to the rule or to the conscience statutes.

THE COURT: May I ask you, do any of the conscience statutes say anything about a remedy?

MR. BATES: I'm sorry. Say that again.

THE COURT: Do any of the conscience statutes say anything about the remedy for a violation?

MR. BATES: So the conscience statutes provide that -- that none of the funds made available in the funding streams that are specified in the various conscience statutes may be used or made available to an entity that engages in discrimination or other prohibited acts under the statute in terms of what the -- a specific remedy for such violations are. The conscience statutes themselves, or at least the three

statutes that you identified, setting aside other conscience statutes that you have more detailed -- the three that you have identified do not specify those remedies. And so, again, for purposes of that aspect of this, we would look to the housekeeping statute and to other statutes that provide authority for ensuring compliance with applicable laws.

THE COURT: Why is it that -- and I am now going -- I have a question beyond conscience statute violations, but to other civil rights violations that are within the ambit of OCR, why is it that none of them ever reached a point by way of a remedy of retraction of funding? What are the lesser remedies that tend to be deployed?

MR. BATES: The funding component in HHS?

THE COURT: Right. In other words, I am now asking you, beyond conscience statutes, you have told me that for no violation has the department ever retracted or cut off funding. What do they do to a violater?

MR. BATES: So under the UAR, there are various remedies that are set off. The first point, again, your Honor, I think, would be that it is uncommon for there to be a formal enforcement remedy actually imposed. The vast majority of these are worked out between the agency and the regulated entity. And so at least in terms of the context of the UAR, so the UAR sets out various penalties or enforcement mechanisms that could come into play, such as temporarily withholding

payments --

THE COURT: Has that ever happened?

MR. BATES: -- disallowing matching funds.

THE COURT: Sorry. I took you to be saying essentially that there hasn't been a financial hit for violations. Maybe I misread you. Has there been some lesser financial consequence to violaters of any of these conscience statutes?

MR. BATES: So agency counsel informed me no.

THE COURT: Let's deal with the enforcement part of our argument now, and we will get back to the authorization.

To what degree has HHS ever investigated complaints of violations of the conscience statute? How often does that happen?

MR. BATES: So there are obviously more investigations per year than there are, you know, further action or further enforcement actions taken. I know that in this most recent year there were three enforcement actions that were brought. I believe that those were mentioned earlier.

In terms of the number of investigations beyond that, obviously the answer is higher. HHS does review complaints when they come in, institutes investigations of those complaints.

And in terms of a discrete number, with your Honor's indulgence, I'm going to wait for if agency's counsel has a

specific number to give me on that. I do know that the number --

THE COURT: Would it be useful just to take a moment and have agency counsel at the podium? Because I am interested in, in practice, how enforcement works and how it has worked. That's an important backdrop here. You tell me, but at some point I want to have that discussion about the history of enforcement of these statutes within HHS. If that's not something that you are familiar with, but agency counsel is, would that make sense?

MR. BATES: Yes, your Honor.

THE COURT: Let's just take a moment. I will come back to you, because I realize there are many categories and topics for us to discuss, but I would welcome briefly to hear from agency counsel.

MR. TAKEMOTO: Can we pause for a moment so that we can converse with --

THE COURT: No. No. You have prepared for months. Let's get agency counsel. Come on.

MR. KEVENEY: Sean Keveny, your Honor, with HHS.

THE COURT: Sorry, that is Mr.?

MR. KEVENEY: Keveney, your Honor.

THE COURT: Mr. Keveney.

Just tell me about the history of the actual enforcement of these statutes. How often does HHS investigate

a complaint for a violation of these statutes?

MR. KEVENEY: With the caveat that I have only been at HHS for about eight months, your Honor --

THE COURT: But you were the counsel assigned to this important case.

MR. KEVENEY: Correct, your Honor, and I have asked these questions within the agency.

There are approximately 35,000 complaints per year that come into OCR. Those cover the full range of areas for which OCR has enforcement authority, traditional civil rights cases, Title VI, Title IX, 504 of the Rehabilitation Act, HIPAA, and the conscience statutes.

THE COURT: Focusing on the conscience statutes, how many investigations have been undertaken, if you know, of the violations -- alleged violations of the conscience statutes?

MR. KEVENEY: It is my understanding, your Honor, that there are approximately 20 open investigations. It is my understanding that in the last three years there have been four formal or informal notices of violation issued in connection with the conscience statutes, including in Hawaii, Mt. Sinai Hospital here in New York, Vanderbilt University, and most recently the University of Vermont Medical Center.

THE COURT: That's the one that trips off of the complaint that I referenced earlier, the UVM one.

MR. KEVENEY: That's correct, your Honor.

THE COURT: How often has a violation been found by OCR of a conscience statute?

MR. KEVENEY: A formal finding has only occurred in the University of Vermont Medical Center.

THE COURT: Over the course of what period of time?

MR. KEVENEY: Over, to my knowledge, the last three years. But it is important to distinguish, too, your Honor, the difference between formal findings of violation and informal communication of concerns or potential violations to a covered entity -- and, by way of analogy, to put this in helpful light, I will point the court to the Justice Department's enforcement of Title VI the 1964 Civil Rights Act. That's been on the books for years, it covers a wide range of federal funding, and the Justice Department has never pulled federal funding for a violation of the '64 Act.

THE COURT: Tell me, with respect to the investigations of conscience violations, how many times has the agency determined that there was a violation even if it is not in an informal way?

MR. KEVENEY: To my knowledge, there are the four that I referenced, your Honor.

THE COURT: Over what period of time?

MR. KEVENEY: Over the last three years.

THE COURT: All right. And was there, in the course of that work, was there -- did the agency encounter problems

presented by limited enforcement authority or ambiguous enforcement authority, did the agency have any hiccups in doing its work.

MR. KEVENEY: Yes. I can point the court specifically, and I hesitate because we are in ongoing negotiations with the University of Vermont, so to the extent some of those negotiations may had been covered by the rules of evidence, but the University of Vermont specifically --

THE COURT: As of the date the rule had been promulgated here --

MR. KEVENEY: Yes.

THE COURT: -- what, if any, problems had the agency encountered in the enforcement of the conscience provisions?

MR. KEVENEY: I can tell your Honor the University of Vermont particularly challenged the agency's authority to enforce any of these statutes, and that is an issue over which we are engaged in ongoing discussions.

THE COURT: Was the University of Vermont experience or your experience with the University of Vermont a reason for this regulation? Does the rule say that; and, if not, is there a basis on which to represent that that was a reason for this rule?

MR. KEVENEY: Yes and no. So the rule, again, obviously wouldn't specifically refer to the situation with the University of Vermont, because it hadn't come up yet; but the

concerns that arose in dealing with the University of Vermont were very much on the agency's mind.

So, specifically, your Honor, the university, understandably, has questioned what the procedures are, what the procedures are for withdrawing funds, which portion -- which component of HHS would be ultimately responsible for withdrawing any particular grant funds that the university receives. Those are questions that this rule answers.

THE COURT: Prior to the University of Vermont issue, and I'm not eager to get into anything that's confidential in that case, but had the agency experienced any practical problems investigating or enforcing allegations of violations of conscience statutes?

MR. KEVENEY: Without knowing the details of the Mt. Sinai investigation, your Honor, I can't answer that definitively.

THE COURT: Can you answer it nondefinitively? I'm trying to understand whether any part of this rule has its anchor in learned experience from enforcing the statutes.

MR. KEVENEY: So I can tell you, your Honor, that much of this rule is anchored in OCR and the federal government's experience enforcing civil rights protections generally. Obviously the rule draws upon the Title VI enforcement framework and the federal government has -- and across the federal government, including at HHS, has long experience

enforcing Title VI. And it obviously has been useful over the years to make sure the covered entities are aware of the procedures the agencies will follow. The Justice Department has its Title VI manual available online for covered entities to see, so they are aware of what the potential consequences of violations are. So in that sense, the agency's long experience of enforcement does inform the architecture of this rule.

THE COURT: All right. In a moment I will let Mr. Bates get back, but this question, you mentioned that there are currently four notices of violation pending. How does that compare to the previous three-year period or the three-year period before that? Is the number four greater, lesser, or about the same?

MR. KEVENEY: Greater.

THE COURT: It grew to four from what?

MR. KEVENEY: There was approximately, as is set forth in the preamble of the rule, one complaint per year prior to the issuance of the MPRM that is increased by a thousand percent. There are approximately ten complaints per year.

THE COURT: That has happened since the notice of rule-making in this case.

MR. KEVENEY: That's correct.

THE COURT: And without going out on a limb, is it safe to assume that it was the notice of rule-making by the agency itself that may have been causative in the increase in

complaint.

MR. KEVENEY: That is certainly the agency's view, setting aside difficulties --

THE COURT: All right.

MR. KEVENEY: -- in cause and effect generally.

THE COURT: So prior to the notice of rule-making was there any empirical data that suggested an increase in complaints actually made to the agency in this area?

MR. KEVENEY: Not that I am aware of.

THE COURT: I think if --

MR. KEVENEY: I think the answer is no.

THE COURT: If there is no one else in the room who would be more aware of it, is the answer to that no?

MR. KEVENEY: I think the answer is no, your Honor. I hesitate because there very may well have been statements from the agency that it intended to start enforcing these statutes. The Office of Civil Rights stood up a new unit, and I think that predated the issuance of the MPRM.

THE COURT: All right. Mr. Keveney, I appreciate your help. Is there anything else responsive to what I have asked so far that you, given your familiarity as agency counsel, wish to clarify?

MR. KEVENEY: No, your Honor.

THE COURT: Thanks very much. I appreciate you didn't come here today expecting to argue, and I appreciate the

helpful answers under fire.

MR. KEVENEY: Absolutely. You're welcome, your Honor.

MR. TAKEMOTO: Your Honor, may I say one thing? I just want to formally object to the record just on the basis of APA case are limited to the record and not based off of agency testimony.

THE COURT: I appreciate that, so why don't we turn to the record?

Mr. Bates, let's go to what Mr. Colangelo was saying about the number of complaints. The record that Mr. Colangelo recites suggests that the number of complaints that were presented to the agency was not nearly the quote/unquote significant increase that the agency represented. Factually, over the course of your briefs, the number has gotten smaller and smaller and smaller.

How many complaints does the agency say it received in the ramp-up to this rule?

MR. BATES: So the agency stated in the rule that it received 343 alleging violations.

THE COURT: That's what it said, but once we strip away things like vaccinations, what are we left with that actually implicate this rule?

MR. BATES: So it is a smaller number, your Honor. We have cited a number of them in our reply brief. I believe that we cited about ten in the reply brief, and I know that

plaintiffs have stated that they believe that there are about 20 or 21. In terms of the exact number of complaints, there are -- we didn't cite all the ones in our reply that we would say fall in here, but it would be something probably relatively similar to the number that the plaintiffs provided.

THE COURT: So you are not directionally disagreeing with Mr. Colangelo's numeric representations.

MR. BATES: Not to the extent that plaintiffs have identified that a number of the complaints of those 343 did not allege violations that were relevant to the --

THE COURT: I'm sorry. Let's go back to the 343. The agency at the time it proposed the rule represented that there had been a significant increase in the number of complaints that it used the 343 as a measure of that. If I am hearing you right, that 343, once we strip away complaints that deal with extraneous problems like vaccination, we are down to something like 20, correct?

MR. BATES: In terms of the complaints that would have dealt more directly with rights that were protected under the conscience section.

THE COURT: I going to drill down a little more until I get a direct answer. Yes or no: Are we down to about 20 that actually implicate these statutes as opposed to other problems?

MR. BATES: Yes. In that ballpark, your Honor.

THE COURT: Now, your brief, your brief ultimately, I think it is your reply, identifies actually three at one point that you say are responsive. I took a look at the three and, unless I am missing something, two of the three aren't even responsive.

There is a complaint from a law firm on behalf of an adequacy group -- this is at tab 129 -- that doesn't cite any specific instance of discrimination. There is a complaint at tab 27 from the doctor at the Washington State Department of Corrections that deals with the sex transformation procedure, but there's no HHS funding that appears to be implicated. And the third one seems actually to fit the paradigm here, and that's the nurse at the University of Vermont who says she was coerced into participating in an abortion. Am I misreading you as to those three?

MR. BATES: So we also cited some additional complaints in our reply brief, your Honor. That's at page 26, note 5.

THE COURT: I have got that. But at one point you highlighted those three. Am I right that two of the three actually drop away?

MR. BATES: Two of the three would not implicate violations of the conscience statutes. Those complaints I believe would have alleged violation of the conscience statute; and, in part, the rule here, as the agency explained in the

preamble, was to help to increased understanding and awareness of the rights that are protected under the conscience statute. So the fact that there may have been complaints filed did not actually implicate is still relevant here, because it shows some confusion about what the statutes do cover.

THE COURT: All right. I took you off script. I know you wanted to talk initially about authority and rule-making authority. Thank you. Go ahead.

MR. BATES: So turning back to my notes here, so I think that I also, as we explain in our briefs, in addition to the express delegations of authority, there are also implicit delegations that are relevant. The Supreme Court has made clear that delegations of authority can be both explicit and implicit, and in the process of enacting the conscience statutes and imposing obligations on regulated entities, placing obligation on the agency to ensure compliance with those statutes, there was implicit delegation to the agency to ensure that the agency complies with requirements of those statutes. And so that is relevant --

THE COURT: What is the basis for arguing implicit delegation for the three statutes I mentioned earlier that would substantively define, for example, a term like "assist in the performance" to capture, for example, the range of services or acts that are covered? That seems substantive. That deals with the range of people whose primary conduct implicates the

rule. What's the basis for arguing that implicitly Congress meant HHS to fill that gap and define that?

MR. BATES: So HHS is the agency that's tasked with ensuring compliance with the statutes. So in the process of ensuring compliance, HHS has authority to set forth definitions for what those terms are in the statute.

THE COURT: But, so you say. I mean, isn't the other way to look at it that if Congress was able to affirmatively give you substantive rule-making authority for Medicare, Medicaid, ACA for terms like "discrimination" or "aid and assist in the performance," as the case may be, its silence on that, as to the Church and Weldon and Coates-Snowe amendments, implies that it wasn't intended to give, other than housekeeping, rule-making authority to the agency.

MR. BATES: So, again, delegations can be both explicit and implicit. The various statutes you have discussed here, they were passed at different times by different Congresses as parts of different public laws. So attempting to engage in some sort of intertextual comparison among the different statutes passed at different times doesn't necessarily show that --

THE COURT: Be that as it may, what's your affirmative evidence that when Frank Church put forward the Church amendment, after *Roe*, he intended HHS to rule-make? 1972, the year before Title VII adopts the accommodation framework with

the hardship exception, allowing the employer to insist on somebody's performance of the task. Frank Church was presumably well aware of that, as was Congress. They passed the Church amendment. There was not word one about Title VII and there is not one word about delegating to the agency the ability to rule-make in this area, let alone to supervene Title VII. What's the basis for implying that intention on Congress's part? It's the very next year.

MR. BATES: Well, that's, I think, the nature of an implicit delegation, your Honor. That there is not --

THE COURT: No, but that is circular. Give me something that suggests that HHS, in Congress's eyes, was free to roam around and define those terms, including in a way that would supervene a statute that Congress passed the previous year. I mean, you keep saying it is implied, but implied from what? Otherwise it is just a say-so. What's the evidence?

MR. BATES: Well, in terms of the question of supervening Title VII, your Honor, again, conscience statute, Church amendment was passed after Title VII. Congress chose not to include certain aspects of Title VII in the Church amendment. So that doesn't necessarily --

THE COURT: That doesn't mean that they disagree with it. Maybe they liked what they had previously done. I mean, in Title VII, as of 1972, you have an amendment that, at least in the context of the religion protection in Title VII, as

opposed to morality-based conscience objections, explicitly deals with this problem at a level of greater specificity than does Church or Coates-Snowe or Weldon. What is the basis for inferring in those very short conscience provisions that post date the 1972 amendment of Title VII that Congress was *sub silentio* saying, you know, be done with this hardship exception?

MR. BATES: So there is a difference in the statutory text there, your Honor. And I apologize, I have lost my train of thought here for a moment.

THE COURT: I'm focusing -- look, I want to engage with you on the basis for implying that -- for implying an intent on Congress's part to allow the agency to substantively rule-make here, let alone substantively rule-make in a way that would cover what were a different outcome and a different test, what Congress itself had dealt with the previous year in Title VII.

MR. BATES: I think that what you are speaking to here, your Honor, may be a statutory gap. So this question of how Congress set forth the scene in Title VII, how that's going to interact here with the conscience statute, that may be an example of a statutory gap that then is left for the agency to fill.

THE COURT: But it's not -- it would be perhaps a gap if there weren't conflict. But let's engage, then, with the

issue of how the rule intersects with the area of conduct covered by Title VII. So let's focus just on the employment context as opposed to, for example, benefits situations. In the context of employment, do you disagree with the way that plaintiffs portrayed, pre-rule, the operation of the hardship exception?

MR. BATES: In terms of?

THE COURT: How it worked.

MR. BATES: In terms of its application here?

THE COURT: How an employer, presented with an employee who asserted an objection to, let's say, assisting in an abortion. Do you disagree with the portrait, given by plaintiffs, as to how the dynamic worked under Title VII, that there would be an attempted accommodation, but in the end, if there was a -- forgive me, I'm forgetting the adjective modifying hardship. Undue hardship. Thank you. Do you agree that that was the standard that applied in terms of an employer's latitude to insist on an employee's performance of a task under Title VII?

MR. BATES: So that may have been the standard that the -- that employers of the plaintiffs were applying. That exception does not apply in the text of the conscience statutes.

THE COURT: No, no, no, no. Do you disagree that under Title VII the employer was able to overcome in effect a

religious-based objection to a procedure based on undue hardship?

MR. BATES: Under Title VII, yes.

THE COURT: Okay. So had any court ever held that the conscience statutes in the context of employment overcame that framework, the Title VII framework?

MR. BATES: I am not sure that that issue ever had been presented, your Honor.

THE COURT: Except in the *Shelton* case, which goes the other way, Third Circuit, right? That's exactly the Third Circuit. The Third Circuit in *Shelton* is an employment context involving the nurse who refuses to participate in the abortion and declines the accommodation, gets fired, sues, and loses, essentially based on the Title VII hardship framework, right?

MR. BATES: So, that question would then depend, your Honor, on if the plaintiff in that case raised the conscience statutes and what the court decided about the interplay of the conscience statute for Title VII in that case.

THE COURT: In other words, *Shelton*, you think, would have come out differently if the lawyer in that case had had the wisdom to invoke the conscience statute as having *sub silentio* overcome the Title VII framework.

MR. BATES: That the conscience statutes are more specific and address a more discrete instance, which is conscience protections in the healthcare arena, and that

therefore they apply there in that instance.

THE COURT: But the conscience statutes don't get to this level of granularity. They use words like "discriminate," which, by the way, is also used in Title VII. But beyond the words like "discriminate," they don't get granular as to the operation of the statute as applied to workplace context. They don't say there is or isn't an undue hardship. They just say "don't discriminate," right?

MR. BATES: Yes, that's correct.

THE COURT: So what is the basis for inferring in that that they meant discriminate in some way other than by then the very familiar Title VII framework? I understand that might have been preferred by some, but the statute itself just doesn't say that.

MR. BATES: Congress chose not to include an undue hardship exception in the conscience statutes.

THE COURT: When did they choose that? They use a general term, but they don't -- they simply don't spell out the details. But on what basis can you say that Congress affirmatively chose Frank Church and all the others to not afford an undue hardship exception? Was it a choice or was it simply silence?

MR. BATES: I mean, they knew that that provision was in Title VII. They could have included that provision in the conscience statutes if they chose to --

THE COURT: And they could have indicated in some way in the legislative history or a committee report or the text a disagreement with the existing framework and didn't do that either.

The point is, it seems like it's an *ipse dixit* to say that their silence means that they chose to quietly overcome this very familiar framework. I am looking for some dollop of evidence beyond your say-so that that's what Congress intended. Do you have anything?

(Pause)

MR. BATES: I am just turning to my notes here, your Honor.

THE COURT: Go ahead.

MR. BATES: So the absence in the text is a point, your Honor. As I also mentioned, there are also differences between what Title VII covers and what the conscience statutes cover. And Congress may have determined based on difference in scope not to include the exception there.

THE COURT: They might have done a lot of things. The issue is what they actually did. To a large degree, the conscience statutes cover the employment world, *i.e.*, the world covered by Title VII. I'm asking you, last time, if there is any reason to think, anything specific you can point to that indicates that anybody at Congress intended to overcome the Title VII framework with the conscience statutes in the area

the Title VII framework otherwise applies to.

MR. BATES: Just in the statutory text, your Honor.

THE COURT: May I ask you, up until this rule, I know that the Bush era 2008 rule doesn't define "discrimination," so it didn't seek to overcome the Title VII framework, correct?

MR. BATES: So I have here the rule in front of me, your Honor, the 2008 rule. I would need to review that specific provision of the rule. I will take your Honor's --

THE COURT: Well, it doesn't define "discriminate." It defines other terms, but it doesn't do that, right?

MR. BATES: I -- I'll -- I'll take your Honor's correct on that.

THE COURT: As you understand here now, can you think of any time prior to the promulgation of this rule when HHS, either in the context of a rule-making or in the context of the application of the conscience statutes to a particular scenario, ever took the position prior to this rule-making that the Title VII framework didn't apply to conscience objectors covered in the employment setting?

MR. BATES: I'm not aware of HHS having previously taken that position, your Honor.

THE COURT: So if Congress intended *sub silentio* to overcome Title VII, it was first discovered in or about 2019? Is that the point?

MR. BATES: That?

THE COURT: All those people have been dead for a while who passed -- it's the early parts of the statutes. What's the basis in 2019 for saying that archeology discovers that the framers of these statutes going back to 1973 intended to override Title VII?

MR. BATES: I mean, I, I, I, I apologize. It seems to be the same back-and-forth here, your Honor. It is based on the statutory text. There is a difference in the statutory text. Title VII explicitly has the exception that is not present in the statutory text in any of the conscience amendments which were passed at various times across various Congresses and various public laws. There were multiple times that Congress considered rights of conscience and in none of those instances did they incorporate an undue hardship exception.

THE COURT: Congress was surely aware with the second and third and fourth and all of those up to the 30 conscience statutes that there was apparently no authority out there that read the conscience statutes as intentioned with Title VII or as overcoming it. Given that Congress is presumed to be aware of the facts on the ground, wouldn't one have expected in conscience statutes 2 through 30 to then circle back and say, hey, wait a minute, you know nothing of our work, you don't know what we -- we obviously meant the first of these statutes to override Title VII. You have misread us, so we are going to

be clearer in each of the ensuing statutes.

Isn't there some mileage we can get out of the fact that they didn't do that?

MR. BATES: I mean, it would depend on the extent to which the issue had been brought to Congress's attention, your Honor. I mean, the fact that Congress, time after time, has enacted conscience statutes without this protection -- I suppose one could draw the inference both ways. Here in the text, we would say that the absence in the text, you compare Title VII -- and I apologize if we are just going round and round here, your Honor, but it is a difference in the statutory text, and the question is, what is the inference that you draw from the absence in the statutory text?

THE COURT: What inference do you draw from the fact that the ACA, Affordable Care Act, 2010 says that it doesn't conflict with Title VII?

MR. BATES: What do you mean, your Honor?

THE COURT: Doesn't the ACA, isn't the ACA, doesn't it contain the explicit language harmonizing itself with Title VII?

MR. BATES: It also says that nothing in the act -- let me just turn to. . .

THE COURT: That's one of your examples of substantive rule-making authority. But the ACA, it is hard to read that as, given its reference to Title VII, overcoming Title VII.

MR. BATES: The ACA also says that nothing in the act shall be construed to have any effect on federal laws regarding conscience protection.

THE COURT: Sure. But that assumes the conclusion. If you assume the conscience provisions overcame Title VII, I suppose that's right. If you start with the opposite conclusion, that Congress, in referencing Title VII, presumably, if it intended to override Title VII, would have said something different than it said, you come up to a very different place.

All right. Let's go back to other issues of authorization, unless there is something else you want to tell me about Title VII.

MR. BATES: Just one point. To the extent there is an issue you have identified here, your Honor, I think that it would apply to that specific aspect of the definition of "discrimination." And so to the extent that you find an issue here, that is not a basis to sort of go beyond that specific issue in terms of the scope of relief with regard to plaintiffs' challenge.

THE COURT: As to that, do you agree that the rule adopts a different framework with respect to discrimination and then Title VII?

MR. BATES: The rule does not include the undue hardship.

THE COURT: Give me a concrete example in which that difference would result in a different outcome.

MR. BATES: So the Title VII framework says that the employer has to provide a reasonable accommodation unless doing so would result in undue hardship. And so some of the examples we have talked about, where an employee raises an objection to a procedure and the employer offers an accommodation or the employee seeks an accommodation and the employer determines that the accommodation would be, you know, problematic, would result in the employer having to spend some more money or complicate their staffing decisions --

THE COURT: Let's be concrete. Suppose an employee now says she has been a nurse or he has been a nurse assisting in abortions and does not want to do so anymore, develops that objection, and the employer says, fine, you are now going to no longer be working in OB-GYN, but you can work in orthopedics, you can work in pediatrics, you can work in neonatal; and the employee says -- and same pay, same title, same perks -- and the employee says, no, I insist on staying in OB-GYN. Under the statute, under the rule, who wins?

MR. BATES: Under the conscience rule, your Honor?

THE COURT: Yes.

MR. BATES: So that will depend on whether that reassignment constitutes discrimination.

THE COURT: But doesn't discrimination -- if the

employee rejects the accommodation and the employee is being transferred because of the religious objection to performing a particular procedure in his or her department, doesn't that, under the rule, constitute discrimination?

MR. BATES: So the rule says that the acceptance of the accommodation, that that does not itself -- so it creates a safe harbor. It says the accommodation is not itself discrimination. It doesn't necessarily -- they will set in place the converse or --

THE COURT: Right.

MR. BATES: -- that's going to be a fact-dependent scenario depending on what the assignment entails that's going to be a question for the agency in the first instance to determine what the difference is between the responsibilities and --

THE COURT: In my scenario, here, though, the OB-GYN nurse is transferred to neonatal work, and every other mete and bound of the employment is the same, and the only reason for the transfer is, from the employer's perspective, it is functionally a challenge to have somebody there who is saying on a procedure-by-procedure basis, yes, I can, no, I can't. You would rather have somebody who is available for all procedures that come through the department. You can understand the functional reasons for that.

But if the employee refuses to get out of that

department than be transferred to another equally estimable reputable department, isn't that, under the rule, in terms of discrimination, there is nothing in the rule that gives the employer comfort that in doing so they are not jeopardizing their federal funds, correct?

MR. BATES: So again, your Honor, it is fact specific, and it is going to be a determination by the agency based on the facts of the scenario what the outcome is.

THE COURT: In the hypothetical I gave, though, does that mean that the employer could be, depending on how the agency views that problem, the employer could have violated the conscience statutes as interpreted by the agency under my scenario?

MR. BATES: Yes, your Honor.

THE COURT: Whereas, if, under the Title VII framework, there was an undue hardship determination, the employer would be free to do what it did, right? Undue hardship is no longer something the employer can trot out under this rule as a defense.

MR. BATES: That's correct, your Honor.

THE COURT: All right. So what defense does the employer have if it's being candid in saying, yeah, of course it is your objection to this procedure that is causing you to be moved, it is nothing else, but we have a job to do and it is much more functional to have somebody who is reporting for duty

for all aspects of the job to be in that department, we honor your work, we honor your religious conviction, but you are a better fit for pediatrics and neonatal than for handling an ectopic pregnancy. What defense does the employer have under the rule?

MR. BATES: What do you mean by defense, your Honor?

THE COURT: Well, if you claim that it was a violation and the employer admitted that the reason for the transfer was because of the conscience objection and what it -- the complications it presented for the workplace, under Title VII the complications in the workplace have a doctrinal home. It's called undue hardship. Maybe you meet it, maybe you don't. But under the rule, is there anything that the employer can point to to avoid liability for that behavior, for that transfer?

MR. BATES: Not in terms of the possibility of an undue hardship. The question would come down to what the nature of the reassignment is and whether the nature of the reassignment falls within the definition of the --

THE COURT: Right, but doesn't the rule essentially say that in the event -- the rule doesn't say that only a diminution of responsibility or a diminution of salary, or something like that, constitutes discrimination. It is the transfer itself, the accommodation itself, if it isn't accepted by the employee, that is the discrimination. I'm asking you,

can you point to something in the rule that you would, if you were the general counsel or the employer, point to and say, ah-ha, we have comfort. We can move this valued employee to an area in which he can do equally valued and equally paid work and not complicate our mission. Is there anything in the rule that gives the employer a legal hook to hold on to?

MR. BATES: So the rule sets forth what constitutes discrimination. The rule does not say *per se* that reassignment is discrimination. It talks about adverse impact and those sorts of things. I think that in the scenario that you posit, the best practice might be to contact the agency and discuss the situation with the agency and seek the agency's guidance.

THE COURT: I see. How long does that take?

MR. BATES: It could vary, your Honor. I mean, there is information on the agency's website about how to get in contact with the agency. I would presume it would vary depending upon the complexity of the question and those sort of things.

THE COURT: Would *Shelton* come out the other way under your reading if the rule were determinative?

MR. BATES: So in terms -- so if you had a scenario where you had a nurse who objected to performing an abortion and did not accept a reassignment to another unit, the question is --

THE COURT: And got fired.

MR. BATES: So it would depend on, your Honor, whether that reassignment constitutes discrimination.

THE COURT: No, it would be whether the termination constitutes discrimination. Remember in *Shelton* she gets fired and she sues for being fired after refusing the accommodation. And I am asking you, under the rule, isn't it clear that *Shelton* would come out the other way as long as providing the employee made the right argument under the rule.

MR. BATES: Well, it does depend on whether the reassignment is discrimination. Because if the employee were terminated for refusing to accept something that is not discrimination, then that wouldn't come within the ambit. There has to be discrimination in order for the rule to be --

THE COURT: Maybe this is circular, but I'm trying to figure out, it is HHS that has defined "discrimination." I'm trying to figure out what in the definition of "discrimination" gives the employer some latitude in dealing with this type of problem.

MR. BATES: So the definition sets forth what can constitute discrimination. It talks about -- let's see here. It talks about withholding, reducing, excluding, terminating employment, title, position, utilizing criterion, method of administration.

THE COURT: So there is terminating employment. *Shelton* nurse terminated employment. It is checkmate, isn't

it, under the rule?

MR. BATES: Not if the reassignment itself was not discrimination. So if the employer --

THE COURT: If the employee doesn't like being in pediatrics or neonatal and says no, under the rule, isn't it discrimination?

MR. BATES: Only if -- the reassignment. So the termination in this hypothetical is triggered by the rejection of the reassignment.

THE COURT: Right.

MR. BATES: So if the reassignment is discrimination, the consequence that follows from that would also be discrimination.

THE COURT: And under the rule, isn't the fact that the reassignment is triggered by the refusal to accommodate a -- it's triggered by the refusal to allow the morally objecting or religiously objecting nurse to stay in his or her job, isn't that itself an act of discrimination?

MR. BATES: I'm sorry. Can you repeat that, your Honor?

THE COURT: Let me put it this way. You are, I take it, at this point unprepared to give an answer to the question under the *Shelton* scenario, which is the case and the case law that is the most clear, how it would come out under the rule. You certainly can't assure me to come out the same way.

MR. BATES: No, your Honor.

THE COURT: Throughout your brief, you repeatedly tell the court that this is just about housekeeping. Is it really the agency's position that there is no substantive component to any part of this rule?

MR. BATES: No, your Honor. The agency does take the position that the rule is substantive, that it does impose obligations on regulated entities.

THE COURT: Is that a change from what was said in the brief? I think we collected about ten sound bites that say the opposite. I'm not going to waste your time reading them to you, but it was housekeeping, housekeeping, housekeeping throughout the brief. I think this dialogue explores and demonstrates that, for better or worse, there are substantive changes in the sense that the law applies different or potentially different consequences to the same primary conduct.

MR. BATES: And there are different elements at play here, your Honor, so I think with regard to the definitions, there are some substantive elements there. With regard to compliance and enforcement of grant conditions and those sorts of things, which, like the UAR, the agency has taken pursuant to the housekeeping statute, those are housekeeping matters.

THE COURT: Okay. There certainly are some housekeeping matters in here, but the brief depicted the rule as entirely housekeeping.

Let me continue to understand how this rule would apply in some workplace context.

Let's take a clinic that unwittingly hires a receptionist who objects to abortions. The clinic largely does work that includes a lot of abortions. The receptionist refuses to schedule abortions and refuses to switch jobs. Business slows to a halt. Can the clinic fire the receptionist without potentially breaching the rule?

MR. BATES: So in the rule, the agency said that scheduling an abortion can constitute assistance in the performance, so that would then bring this action within the ambit of the rule.

THE COURT: Right.

MR. BATES: So that therefore the agency could not -- I'm sorry, not the agency -- the employer could not discriminate on the basis of that which would include termination.

THE COURT: Meaning that the termination, then, would appear to be a violation of the rule.

MR. BATES: That's correct, your Honor.

THE COURT: All right. 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 performance of the procedure if the ambulance driver takes her to the hospital?

MR. BATES: So the agency did say in the rule that transporting an individual to a hospital for the purpose of having a procedure that falls within the ambit of the rule, that that would constitute performance.

THE COURT: So the --

MR. BATES: I think that that might implicate other issues as how the ambulance driver dealt with that situation.

THE COURT: Right. It's certainly not a best practice. But the issue is, is the conduct of the ambulance driver, in refusing to drive any further because of the ambulance driver's sincere religious objection to the procedure, is that protected by the rule?

MR. BATES: The rule protects an ambulance driver's ability not to assist in the performance of a procedure to which the driver has an objection.

THE COURT: So play out for me what is supposed to happen in that scenario under the rule, if the ambulance driver simply says, I'm breaching my convictions to get to the other end of Central Park.

MR. BATES: So employers have an obligation, under EMTALA, to provide sufficient staffing and recourse in the event of emergencies that are implicated so the agency -- or,

sorry, I keep saying "agency" when I mean to say "employer" -- so the employer, under EMTALA, should already have in place procedures to handle that situation, and so therefore would put into place whatever --

THE COURT: Right now --

MR. BATES: -- ambulance procedures were and would have had the ability to ask the ambulance driver about his objections, so that they would then be aware to know what the proper way would be to deal with that situation.

THE COURT: So the employer, you are saying, would have known before the ambulance mission began -- the employer is allowed to ask the ambulance driver in the driver's employment whether or not he objects to any particular procedures, such as abortion, on religious grounds --

MR. BATES: Yes.

THE COURT: -- or other moral grounds.

And if the driver has said yes, then the employer is allowed to task the driver with nonabortion ambulance drives? I'm trying to understand just how this works.

MR. BATES: The employer would need to have in place a procedure to handle a situation just as your Honor has posited.

THE COURT: And now, look, we are talking about emergencies. It is a bleeding ectopic pregnancy, and the driver realizes in the middle of the park what the nature of this is. It's not, by the nature of emergency, something which

calm deliberation or all facts are brought to bear at the outset. So in the middle of the transverse in the park, the driver realizes what is going to happen when the ambulance hits the hospital, and the driver then says "no can do" and refuses to drive any further. Can the employer take action against the ambulance driver under this rule or is the employer risking its federal funding by taking action against the driver?

MR. BATES: So, again, the employer should have had in place procedures to deal with this, whether it be another driver in place or something in place to deal with this situation, and then to the question of what then happens to the driver, the driver would be protected under the rule because it would have had a right, under the conscience statutes, not to assist in the performance of a procedure as to which the driver has objection.

THE COURT: And in my scenario in which the -- we have an emergency situation that pops up in the middle of the drive that we have this problem, in other words, it can't be anticipated at the outset, the employer cannot say to the driver: We have somebody who is bleeding. You have to get to the hospital. Sorry. The employer can't do that, you are saying. The employer has to, quote, accommodate in the crucible.

MR. BATES: So the employer has to accommodate, that's correct, under the rule. HHS also made clear that if it

intends to read EMTALA harmoniously with the requirements under the rule, so that if it came to questions of enforcement by the agency, working out sort of what to do in the scenario, that's not necessarily to say, then, that the most extreme measures are necessarily going to come into play because the agency has said it intends to read them as harmoniously as possible.

THE COURT: Right. What that means is the agency may, in its grace, choose not to cut off billions of dollars of funding, but it also might, it still reserves the right to do so, correct?

MR. BATES: The rule would not prohibit that, but the agency is clear that it intends to read them harmoniously wherever possible, that it will begin -- it says it will begin with informal enforcement, informal communications, and only take further action when voluntary compliance cannot be reached. So there is a long series of events that has to take place before any of these more extreme eventualities come into play, and --

THE COURT: When, under the new rule, can the employer even ask about these matters? I gather once a year or if there is a persuasive justification, but not on a more regular basis, right?

MR. BATES: Yes. After hiring, and once a year, unless there is a more -- absent a persuasive justification.

THE COURT: What about the rural hypothetical? That's

the classic example that's given for undue hardship, where you have got a very limited number of personnel. You really need to have somebody there who is a full spectrum, you know, nurse, scheduler or whatnot. It is not realistic to have a substitute in the wings or something like that. How does the rule apply in that setting?

MR. BATES: It applies the same as it applies in other settings, your Honor. It sets forth the various responsibilities for employers. It doesn't create an exception or other conditions that apply in rural instances.

THE COURT: Okay. So meaning that essentially if there is an employee there who asserts religious objections to a range of procedures and it is economically impractical, you know, to have a platoon situation for objectionable and non-objectionable procedures, where you have different employees filling that role, the employer is -- simply has to find a way to pay for a second job there, even if it is impractical, right? The employer intends to continue performing that service and the one person who works there, the one scheduler, the one operating room nurse, that sort of thing, the employer is stuck.

MR. BATES: So with regard to the specific discrete service or discrete procedure that the employee may have an objection to, yes, the employer would in that instance not be able to force the employee to perform the procedure; and so if

the employer wished to continue providing that service, it would need to find an alternative way to do so.

THE COURT: Let's pivot now from discrimination, which has been largely the focus of this line of hypotheticals and questions, to "assist in the performance."

From your perspective, substantively, how does the rules definition of "assist in the performance," insofar as it spells out the range of people who are assisting in some sense with a medical -- with an abortion, just to be direct, how does it change, in your view, from prior definitions or understandings? There really wasn't a definition of "assist in the performance," but I take it the agency had never acted so as to apply the term to people, for example, who did something the day before a procedure. Is that correct?

MR. BATES: I believe so, your Honor.

THE COURT: So in what ways does "assist in the performance" expand the scope of that term from what was previously applied or understood?

MR. BATES: So in terms of the relationship between the term and the statute, we have argued in our briefs that the term is consistent, claiming in the statute, in terms of how HHS has applied that term in the past. I think that is a question that goes to prior enforcement actions.

THE COURT: So in any prior enforcement action, has HHS ever even investigated somebody for -- where the objection

was made by somebody who had a role in a procedure that didn't involve the same day?

MR. BATES: So, your Honor, I don't want to ask to bring agency counsel back up here, so I am going to say --

THE COURT: I'm sure agency counsel doesn't want to come back up either, but --

MR. BATES: So I'm going to say no, with the caveat that I would ask agency counsel to correct me if that's incorrect.

THE COURT: You would say what?

MR. BATES: I would say no with the caveat that agency counsel would correct me.

THE COURT: Agency counsel, if you have got an example in mind where there was a -- an enforcement action or interpretation taken where the conscience objection was to something on a day other than the date of the procedure, I would welcome your letting me know.

MR. BATES: No, your Honor.

THE COURT: I will construe silence that at least offhand you don't have such an example.

That is a not inconsequential change. Whether or not it is linguistically supportable by the text of the conscience statutes, you will agree that that is a consequential change in the way going forward these statutes would be applied, would you not?

MR. BATES: So your question is would that be -- to the extent that HHS has not brought an enforcement action in that scenario previously --

THE COURT: Or to the extent it is not announced that people who perform previous-day or post-day support roles are covered by the conscience statute, yeah, I mean, in other words, whether or not it can be linguistically supported by the text of the conscience statutes and the words "assist in the performance of," it is a newly articulated interpretation that doesn't have its anchor in anything that's been articulated or acted upon before. Is that much correct?

MR. BATES: Not previously by the agency.

THE COURT: Well, by anybody else? Who else?

MR. BATES: Well, there is the text of the statute which sets forth the term "assisted performance." HHS administers that statute. So insofar as HHS has not taken enforcement action pursuant to that scenario then --

THE COURT: Do you know if HHS has even been presented with the scenario before in all the years of these statutes, where somebody who was distressed about the possibility of non-same day steps or assistance towards an abortion felt that that religious objection, that conscience objection wasn't being respected, has the agency even been presented with that as a problem in any of the complaints presented?

MR. BATES: Not to my knowledge, your Honor, and we

would be happy to submit briefing to the court about these sort of specifics.

THE COURT: Let me ask you, you were relying on all these vaccination complaints. Did any one of those complaints even involve somebody who was scheduling a vaccination or doing something as to even a vaccination other than on the day of the vaccination?

MR. BATES: I don't know the answer to that, your Honor, not to my knowledge.

THE COURT: In terms of the rule-making process here and the factual basis, you heard me engage with Mr. Colangelo about the number of complaints. Can you point to a single complaint that the agency has ever gotten in connection with a failure to accommodate somebody whose connection to the abortion or sterilization procedure was other than on the day in question? Is there a single example of that?

MR. BATES: In terms of the complaints, not that I am aware of, your Honor.

THE COURT: So how can the agency be said to have a factual basis for that dimension of its work?

MR. BATES: Because "assistance in the performance," that term --

THE COURT: No, no, no, no. I understand that if we are playing the textual game that one can use -- one can construe "assist" in a variety of ways, and I understand the

linguistic basis for saying that assistance goes all the way back to, you know, a person who paid for the nursing school of the nurse, I get all that, you can do that. I am asking you factually why the rule was enacted? The agency said we have got the significant number of complaints. Well, that's all fine and good, but how does that sync up to the broadened definition of "assist in the performance"? Even if you had a lot of complaints, that might justify rule-making in the area of the ambit of the complaints, but if there literally wasn't anybody who complained that their conscience rights were being offended by participating in some non-same day way, I'm trying to understand if there is any factual way to prompt for that, for engaging in this space? Why rule-make on that point?

MR. BATES: So an agency does have authority and ability to use its expertise to engage in rule-making and set forth definitions, and I don't believe it is the case your Honor that, in setting forth the definition in this context or in another context, an agency must sync up every single individual piece of a definition that sets out with some complaint or a piece of evidence that was brought. It doesn't have to rate some massive chart where it is linking up all of the definitions with all of the complaints or evidence that was brought forward to the agency.

THE COURT: But arbitrary and capricious review turns, as Mr. Colangelo pointed out, on a factual basis. I am trying

to test the factual basis for this consequential part of the rule. That's all. And I take it the answer is that although there is a textual justification, there is not a factual basis for rule-making on that point.

MR. BATES: On the point that action taken a day before a procedure can constitute assistance in the performance of the procedure, so on that discrete point, there is not, to my knowledge, a complaint that addresses that issue.

THE COURT: Is the agency aware of any receptionist, ambulance driver, elevator repairman, anybody, who ever complained that their ancillary work, other than on the day of the procedure, was violating their conscience rights?

MR. BATES: Not that I'm aware of, your Honor.

THE COURT: All right. Is this statute consistent with EMTALA or not?

MR. BATES: May I add one point, your Honor?

THE COURT: Please go ahead.

MR. BATES: Getting back to that hypothetical you have identified a specific scenario, that doesn't necessarily then mean the definition itself as a whole is invalid. You have identified sort of one application that, to the extent it raises issues, may be a potential issue, but that would go to the application as to that specific factual scenario, like an as-applied challenge as opposed to a facial challenge, which is what we face here.

THE COURT: It would be facial as to parts of the definition but not to, perhaps, parts of the definition that involve the nurse handing over the forceps, right? In other words, it is not that -- it is not that the distant, remote assistance is in any scenario justified by an empirical basis before the agency, it is that there are parts of the definition that are not made problematic by that failure of evidence, *i.e.*, the nurse who is immediately in the operating theater.

MR. BATES: That's correct.

THE COURT: Just briefly, counsel for the plaintiffs says that, on the contrary to law point, the statute is inconsistent with EMTALA, the Emergency Medical Act.

Putting aside the agency's promise to do its best to harmonize them, on the face of the rule how is the rule -- is the rule, on its face, consistent with EMTALA?

MR. BATES: On this question, the rule is, like the conscience statutes themselves, the conscience statutes themselves do not discuss the interaction of those statutes with EMTALA. So this question applies equally to the conscience statutes themselves. And the agency said it intends to read them harmoniously. It applies both to the rule and to the conscience statutes.

THE COURT: Isn't there all sorts of legislative history, including Weldon and Church, that, if we consider it, makes clear they had no intention of compromising the execution

of emergency medicine? I recognize there are issues about the extent to which one can consider legislative history, but put that aside for a moment, doesn't the legislative history to the extent that it exists make clear that emergency medicine was intended to be cordoned off from the impact of the conscience statute.

MR. BATES: So there is legislative history indicating that the individuals who made those statements did not -- were not expecting for the conscience statutes to impact the requirements to provide emergency services under EMTALA.

THE COURT: Like Frank Church.

MR. BATES: That's correct.

THE COURT: All right.

MR. BATES: And the rule implements those statutes, and so the interaction between the statutes and EMTALA is going to be the same as the interaction between the rule and EMTALA.

THE COURT: It depends how one construes the statute. Has the agency -- prior to the rule, had the agency been presented by any complaint from anybody practicing emergency medicine?

MR. BATES: So there were complaints. There were complaints by various nurses. I don't know that those complaints specified whether the nurse participated in emergency services or not.

THE COURT: Why -- what was the agency's basis for

interpreting the rule so as not to carve out the emergency situation? Given that EMTALA is out there as a federal statute, what was the agency's reasoning in not correspondingly carving out the emergency space in terms of the ambit of the rule?

MR. BATES: I think it was consistent with the conscience statutes, which don't explicitly do that either. It was implementing the conscience statutes. Conscience statutes don't have that explicit carveout. So, again, it is a question of the interaction between the rule and EMTALA is going to be the same as the interaction between the statutes and EMTALA. So I don't think the agency found it necessary to carve that out because it wasn't in the statutes either, and the interaction is going to be the same between the two of those.

THE COURT: *Shelton*, of course, applies in the emergency context. It is at once a Title VII case and an emergency medical case. Did the agency consider *Shelton* explicitly in its rule-making as a federal appellate court application of these concepts in the Title VII context? Did it engage with that? What was its reasoning for, in effect, coming up with a different framework?

MR. BATES: So I believe that the agency did cite *Shelton* at some point in the footnotes. I don't know the exact footnote that that was at, your Honor.

But getting to your question about, again, the

interaction between the rule and EMTALA, again, I apologize if I am repeating myself, I think the agency determined reasonably that the interaction between the rule and EMTALA would be the same between the interaction between the conscience statutes and EMTALA, and so that it wasn't necessary, then, to provide an explicit carveout because the extent that there is tension there, it is the tension with the conscience statutes as well, so that resolving that tension is the same between the statutes and the rule, and so it wasn't necessary to provide a carveout that wasn't in the statutes that was implementing itself.

THE COURT: All right. Go ahead. I have taken you off. I think we have covered a lot of what I am sure you intended to cover, but I want to make sure that you have enough air time for the points you wanted to make to me.

MR. BATES: Thank you, your Honor. How much time do I have remaining?

THE COURT: I have taken you off script. You have got what you need.

MR. BATES: So let me just go through my notes here, your Honor.

So we talked about the evidence that the agency can serve. We talked about the complaints. I noted that, as we did cite in our reply, that a number of the complaints did implicate violations of the conscience statutes. So there was, before the agency, evidence of the complaints, as agency

counsel mentioned, that there was an increase in complaints, even setting aside the vaccination complaints, they went from, like, one year to around ten or so a year, so there was a substantial increase.

THE COURT: But that was after the notice of rule-making. Prior to the notice of rule-making, which presumably was prompted by -- I mean it is a Heisenberg principle you have here, right? Where you -- once you throw out the notice of rule-making, you are stirring the pot. Prior to the notice of rule-making, was there any increase in complaints?

MR. BATES: So not prior to the notice of the rule-making, but the rule-making, to the extent it did increase its knowledge or awareness of these rights --

THE COURT: But it's not laboratory conditions. In other words, if you say, We are open season for new complaints, you can't then treat the new complaints as reflecting that concern over an area as growing. You are responding to the invitation.

MR. BATES: Well, it could also be an indication that when individuals are made aware of these issues, that they will then respond by filing complaints. So, yes, there may have been a causal relationship between the MPRM and the complaints, but the fact that complaints were then filed and people were made aware may indicate that there had been problems going on

for a while, but just folks weren't aware of their rights. So once they were made aware of their rights by the MPRM that they then sought to bring them to the attention of the agency.

THE COURT: You said there were ten complaints after the notice of rule-making. With as much specificity as possible, what scenarios did they implicate?

MR. BATES: So among the ones that we cite in our reply, it depends on the level of specificity that is included in the complaints themselves. There was a nurse who was placed on administrative leave by a hospital on the ground -- she alleges this -- that she was placed on administrative leave by a hospital on the ground that she sought a religious accommodation for having to perform abortions.

THE COURT: The actual performance, in other words, operating theater apparently.

MR. BATES: She had not gone to that level of granular detail, but performance of abortions.

Complaint by a nurse alleging that she was terminated from a hospital for her unwillingness to participate in the provision of abortion-related services.

Complaint by a nurse alleging she was --

THE COURT: Do we know what that means, what services those were?

MR. BATES: She does not spell that out in the complaint.

Complaint by a nurse alleging that she was coerced into performing an abortion after previously notifying her employer of religious objections to performing abortions.

Complaint by a nursing professor alleging that she was not hired for a full-time faculty position because of her views on abortion.

So these are just a few examples, your Honor, that do show that there are instances where employers are not abiding by their obligations under the conscience statutes, and so this is evidence before the agency that there were problems and --

THE COURT: What would the reason be, if any, for an uptick if one was to credit that in disrespect for conscience-based -- sincere conscience-based objections? In other words, if the premise is this is a growing problem in our country, can you theorize why that would be? We are dealing with a quite small numbers here, so I am not blind to that. But if one accepts the premise that there had been a consequential increase not generated by the notice of rule-making, any idea why?

MR. BATES: So the fact that -- it is not necessarily going to be the case that there was an uptick in the actual violations of rights under the statute, although that might be the case, it may have been the case that there were -- even if the amount was consistent, going back 20 or 30 years, the folks were not aware of their obligations under the statute so that

they were not aware of their rights under the statutes, then that would be equally a problem as if there was a change in how employers dealt with requests --

THE COURT: So why not just have a public awareness campaign? Why not if you see something say something? Why isn't that the answer if people don't understand their rights? Why do we need this whole apparatus of the rule?

MR. BATES: That could have been one way that the agency could have addressed the problem, your Honor. The agency, in the exercise of its expertise, in the exercise of its authority, after having reviewed the situation, decided that, in addition to the notice requirements under the rules that would advise individuals of their rights, that the best way to address the problem was through the policy as implemented in the rule. The agency has the authority and the ability to, in the exercise of its expertise, to decide what the best way is to address a policy, and the court, upon review, need not agree with the agency that it was the best policy or even that it was better than the alternative policies, but merely that the agency gave a -- considered the relevant data and gave an explanation -- rational explanation for -- in connection between the data and the decisions that it made.

THE COURT: Can I come back "to assisting in the performance," that definition. Am I right that that is

actually only in the Church amendment or is that somewhere else?

MR. BATES: So I'm just comparing here Church, Coates-Snowe, and Weldon, because I know those are the ones we have been talking most about. So in those three, that is the only -- that is the only --

THE COURT: And that has no substantive rule-making delegation explicit.

MR. BATES: Church does not.

THE COURT: All right. I want to make sure I give a little time to our intervenors. Is there anything further you wanted to say to me? If not, I have got one or two more questions.

MR. BATES: I think I might just note, there was not a great deal of discussion today about the establishment clause. I would just point to -- point your Honor to our argument about the state or forum is distinguishable here.

And in terms of the scope of relief --

THE COURT: Yes. That's what I was going to get to.

MR. BATES: Okay. Just real quickly there, your Honor, plaintiffs have asserted that sort of a standard procedure when a court finds a rule invalid is vacatur of the rule in its entirety in nationwide application. I believe they cited some D.C. Circuit cases to that effect. We cited the California case, *California v. ASR*, out of the Ninth Circuit,

that vacated the nationwide scope of an injunction under a facial challenge under the APA.

Just for your Honor's information, in that *California v. ASR* case, that cites another Ninth Circuit case, *Havens Hospice*, which is relevant here and there is also a Fourth Circuit case, *Virginia Society for Human Life*, that I think has some very helpful language about in a similar instance where a plaintiff made an argument that, under the EPA, the standard remedy is vacatur in the entirety, nationwide relief, and the Fourth Circuit rejected that argument there.

So to the extent plaintiffs are saying that the normal -- the usual practice, there is authority out of both the Ninth and Fourth Circuits saying that is not in fact --

THE COURT: So there are two questions. One is severability and one is if there were an injunction, whether it applies on a more limited basis. Let's just take the second one. What is your view as to the proper geographic scope of any injunction or any relief in this case?

MR. BATES: So it would be the scope necessary to afford relief to the parties in this case, so there are various state and various municipal plaintiffs in this case. So it would be --

THE COURT: There are 23 states, right?

MR. BATES: 23 states and municipalities. I don't know that all of the government plaintiffs are states.

THE COURT: All right. But, in other words, by your lights, if the court were to rule against the government in whole or in part, and let's move out of the world of injunctions and focus on the merits, the summary judgment dimension, is it your view that that should be -- invalidation should only be as to those 23 states and as to the activities of the named plaintiffs in other states?

MR. BATES: That's correct, your Honor.

THE COURT: So the rule would still stand in 27 states, plus territories, less -- but not as applied to, for example, Planned Parenthood to the extent that it has a presence in those 27 states. Is that what you are saying?

MR. BATES: So it depends on who the plaintiffs are. So -- and that depends on sort of the relationship between Planned Parenthood writ large and its -- I don't know the exact terminology to use here, your Honor, but the sub-entities that it contracts with and sort of who are plaintiffs in the case and who are not, but our position would be that the remedy should be limited to the plaintiffs in this case. So it would be --

THE COURT: So other people in New York State who haven't joined the lawsuit could still have the rule enforced against them. Even if I found that it was arbitrary and capricious, contrary to law, all of that stuff, other people in New York State could still have the rule applied because they

didn't join this lawsuit.

MR. BATES: Other --

THE COURT: I thought what you were saying was 23 states it is invalid, 27 states somebody has got to sue in those states. I think you are now actually saying that unless this turned into a class action or an opt-in class involving every medical entity in the United States, you haven't actually sued in this case, you can't get the benefit of relief. Is that what the United States is telling me?

MR. BATES: That the relief should be limited to the plaintiffs as the regulated parties here.

THE COURT: So.

MR. BATES: To the extent New York is a regulated entity --

THE COURT: Right. You are telling me that to get relief, let's suppose, just indulge the hypothetical, that the rule is found by the court to be for one reason or another invalid. Is what you are really telling me is to get the benefit of that rule there now have to be follow-on lawsuits by every hospital and doctor and clinic and, you know, farmhouse, you know, to get relief as opposed to the invalidation of the rule having operation of law across the board? Is that really what the United States thinks is the right approach here? I get the problems with nationwide injunctions, but you are going way beyond that. You are telling me that you actually have to

be a party to the case to get relief. Was there thought given to that position before this argument began?

MR. BATES: So, your Honor, we have cited to the court the *Gill* case of the Supreme Court that instructed that the remedy should be limited to the inadequacy that produced the injury, tailored to redress the plaintiffs' particular injury. The remedy here should be tied to the injury that the plaintiffs have alleged. And my understanding is that the states and municipalities have brought this suit in their capacity as regulated entities.

THE COURT: Is there any reason why the arguments that have been made today and in the briefs apply any differently to the other 27 states or to medical providers in -- to covered entities by the rule in any -- in the 23 states who haven't filed suit or anywhere in the 27? The rule -- the infirmities that have been alleged about the rule rise or fall without respect to the identity of the plaintiff who sues, no?

MR. BATES: In terms of the arguments about why the rule is legally invalid in terms -- the harms that are alleged against the rule, those do relate to what services regulated entities provide, what policies those regulated entities have in place in terms of the alleged harms that are --

THE COURT: But that's more of a preliminary injunction notion, and I get that. That's a little different. But in the context of the relief that the parties reciprocally

seek on summary judgment, it is a unitary calculation. Regardless of whether you are affected a little or a lot, the rule either is valid or it is not, correct?

MR. BATES: Yes.

THE COURT: Okay. All right. Thank you very much. Appreciate the helpful argument under substantial fire. Thank you.

All right. I will hear now from Mr. Dunn.

MR. DUNN: Thank you, your Honor. Robert Dunn for defendant intervenors. Thank you for granting us intervention and the chance to present argument today.

THE COURT: As you know, the reason I granted intervention was substantially on the basis that the case might need to be resolved as a preliminary injunction and, as such, I wanted to make sure there was a voice given to parties who could be harmed by an injunction stopping the rule. I don't know whether or not we will go in that direction, but the unique value that the intervenors add is in bringing to bear in a real world sense the experiences of the people whose rights are affected by the rule.

MR. DUNN: Understood, and appreciate that. Hopefully our briefing contributed to that.

THE COURT: It did very much.

MR. DUNN: So a couple of points on that and then we can pivot to discussing the definition of discrimination which

might be helpful as well.

But the two quick points I want to make and advance, with respect to CNDA and its members, they treat patients of every religion, every race, every gender, sexual orientation, etc. There have been some insinuations in the brief that the rule is essentially a cloak or a cover for the expression of animus and bigotry, and I hope that plaintiffs' counsel will confirm that that's not the case, but the briefing suggests that --

THE COURT: I don't think plaintiffs' counsel said anything like that, and I take the conscience statutes as directed at protecting very valid interests, which is the legitimate desire of people, in good faith, for moral or religious reasons, not to participate in various procedures. I don't think that's at issue, and I appreciate as well your point that renaming the statutes, the refusal statutes may be seen by some as not fully respecting the legitimate conscience interests. I read that. I understood what you were saying.

MR. DUNN: So we are all agreed this is about protecting folks who have objections to specific procedures, not patients. With that in mind, our position is that the rule is important. I think there has been some discussion of is it a solution in search of a problem? In the rule-making, on pages 23175 to 179, I think the agency does a good job of looking back at some of the prior comments that were submitted

both in the 2008 and the 2011 and the current rule-making. Beyond complaints filed at OCR, these are comments from healthcare providers -- doctors, nurses in the profession -- who have personally experienced discrimination or pressure. There was some of discussion in the briefing about the 2008 CMDA survey. In that survey, the respondents -- we are talking about doctors and nurses primarily -- 40 percent of them said I have experienced personal pressure or some form of discrimination.

THE COURT: And I read that with interest. What was less clear to me was what their experiences had been in front of HHS.

MR. DUNN: And from what I gather, most do not proceed in front of HHS.

THE COURT: Is that because they are unaware of their legal right to do so?

MR. DUNN: I think it is probably because HHS cannot do much for them. There is no private right of action. HHS cannot get them reinstated, cannot provide them damages.

THE COURT: But your co-counsel, counsel for HHS, says that to the degree that there have been cases, in effect, some solution, some accommodation has often been worked out, whether in this or other civil rights areas, short of an ultimate adjudication in which simply reporting to the agency gets the mighty HHS on the side of the objector and often results, in

practice, in getting relief. And what was striking to me from what you submitted was not the number of people who say that they have had discomfort in the workplace because their conscience objections haven't been treated seriously, but any argument that the regulatory apparatus is not up to the task or that they have had bad experiences with it. Can you help me with that?

MR. DUNN: Yeah. I think that from the comments submitted to the agency, the uniform theme of those comments are there are no teeth in the actual existing regulation.

THE COURT: Has any member of CMDA -- there are 20,000 -- brought a complaint before the agency?

MR. DUNN: Not to my knowledge.

THE COURT: So maybe they should try. In other words, how can they say the agency is not up to the task if they haven't given it a whirl.

MR. DUNN: If you uphold the rule, I am sure they will.

THE COURT: But with respect, the justification for the rule is a greater number of complaints. I have heard about that. But that somehow or other there is a -- the agency has proven toothless or incapable of action. If this is a concern of your membership and none of them has ever gone to the agency, how do we know if that is true?

MR. DUNN: Well, I mean, you look at the existing

rule, the 2008 rule that was, you know, a blip in time, and the 2011 rule, which essentially, you know, wiped out all of the substantive provision of the 2008 rule --

THE COURT: But, sorry, it is your co-counsel who says the statutes are the source of all this authority and that the application by the agency is merely explaining what Congress meant by the rule, by the statutes. If you buy that, if you believe that, all along the statutes have had meaning consistent with what is being articulated today. That was an invitation for somebody to go before the agency and say, I shouldn't have had to hand over that forceps, I should have been respected when I said I didn't want to do it, or even other ways of assisting. I'm having difficulty with the premise that there is an enforcement gap here that is demonstrated other than stated. Is there anything you can point to?

MR. DUNN: Yeah. I think what it comes down to is if you are a physician or a nurse and you have been discriminated against or terminated or transferred, you have to put your career a little bit on the line to run to HHS and sort of flag yourself as a thorn in the side of a hospital that wants to provide these types of services. You are kind of putting your career in jeopardy. Once you have done that, you basically can be blacklisted essentially from the profession, and it is unclear what HHS can do for you, you know, absent the rule. So

you can run to HHS and say, hey, the Church amendment says they can't do this if they receive federal funds, and my understanding is my employer received federal funds, do something for me.

THE COURT: But HHS says that in the limited number of cases it has done something for people, just as it says it has done so with respect to other civil rights violations. Is the problem a public education problem? Do your clients know of either the conscience statutes or the existence of HHS or that there is a remedial place, procedure and a place to go? Do the members of the organization, Dr. Frost and the other 20,000, do they know about all this?

MR. DUNN: I'm quite certain that there is an information problem and that this is not something that is well known both for the employers and the employees. I think there were comments submitted to the effect that even in the enforcement proceedings some of the hospitals were made aware of the statutes and said, We didn't even know about these statutes. So I think there is a lack of awareness of the statutes themselves and certainly lack of awareness of HHS's role in them.

THE COURT: Am I correct to assume that most of your members probably fit into the employment box?

MR. DUNN: Almost all of them.

THE COURT: So what has their experience been with the

Title VII framework? How does that work for them?

MR. DUNN: Unclear. I think an employer who is fired probably has -- there have been undoubtedly Title VII claims in that context, you know, less clear when we are talking about transfers or other types of hiring, you know, I didn't get hired, difficult to --

THE COURT: Are they finding that the undue hardship exception, if you will, under Title VII has been applied to capaciously so as to, in effect, unneedlessly override legitimate conscience objections? Is that what they are saying?

MR. DUNN: I think that's a concern that's been expressed. It puts the burden quite heavily on them to prove that it wasn't an undue hardship. Because the employer can invoke the undue hardship standard and it is difficult for an employee to combat that.

I think the bigger concern is that many of these instances sort of evade Title VII, where people are feeling like they are pressured to do something, they do it, don't feel like they have a recourse under Title VII when they have sort of done it, and part of the thing that the rule provides is it gives them a recourse with the agency.

THE COURT: But they haven't -- but the -- they have had recourse, even the 2011 rule which you are not pleased with gave the recourse and presumably it was there before, but it

certainly is clear who you call, right? The rule is consequential here because of its interpretation of discrimination, aid in the performance, and referral and the like, but can it really be said that, after the 2011 rule, members of your organization didn't know where to go if they were concerned that their statutory conscience rights were being infringed?

MR. DUNN: Well, there are sort of two answers to that. The first is, I think there was probably a lack of confidence in the agency administering the rule at that point, and that's an issue of sort of, as you mentioned, the political ping-ponging, how serious is the administration and the agency taking conscience protections. You know, we had litigation all over the country regarding the contraception mandate and the agency was taking positions there that indicated it was not terribly sympathetic to, you know, sort of rights of conscience and religious freedom. So that I think probably plays a role. And I think the other part is just you go to the agency for what? And it is a big step for someone to sort of invoke the power of the federal government if you don't know what you are going to get or what the agency can do for you.

THE COURT: But isn't that exactly what the rule does? It just gives the agency -- it broadens, perhaps, the scope of the prohibitions beyond certainly what was previously understood and it may give the agency more muscle if you accept

the face of the rule that said all HHS funding is in play, but in the end there is still no private right of action. The statute still doesn't allow you to go to court if you are the ambulance driver or the nurse in *Shelton*. You have to bring your lawsuit under something else, like Title VII. The rule still directs you to the agency. So to the extent that that is a deterrent, what's changed?

MR. DUNN: Well, the specific power that HHS has invoked to step in and address funding streams, you know, regardless of how broadly you construe that, there is an extreme. You can cut off funds that the Labor Department supposedly administers. That would be an extreme version. But even if it was just a narrow funding stream to the specific offending employer, that's muscle.

THE COURT: It's because the agency is putting at risk, at least -- depending on how we construe this, at least the funding stream that the rule has teeth you were saying.

MR. DUNN: Yes. I think that's more or less it.

THE COURT: Doesn't that help plaintiffs on their spending clause argument?

MR. DUNN: They have to still prove all of the retroactivity and the unexpected nature of it, and we have addressed that in our briefing. But there is a spending element here. The agency specifically invoked its spending power, so I think the fact that it is putting spending at

risk --

THE COURT: The agency says that essentially under the UAR it had the same authority with or without the statute to implicate the spending stream.

MR. DUNN: But nobody knew that.

THE COURT: That's public education, right? There is a remedy other than a statute for that, than a rule.

MR. DUNN: If that's true, then the challenge to HHS's authority to strip funding under this rule is also irrelevant, because if they had that power all along, what are we talking about?

THE COURT: Understood. I get that.

From your perspective as an advocate for the religious or moral objector, what do we do with the *Shelton* scenario? What's the right answer to that?

MR. DUNN: I think that's a great question. I think I read the rule slightly differently than plaintiffs' counsel. Possibly I read the rule differently than DOJ. I don't think so. The way I look at it, if you take a look at the definition of discrimination in 88.2, you have to prove some sort of adverse treatment or some sort of penalty to even say this is discrimination. But paragraph 4, the point of paragraph 4, notwithstanding paragraphs 1 through 3, is to basically incentivize employers to provide reasonable or effective accommodations to provide them. Now there is a safe harbor if

it is accepted, so that's one thing. Provided it is accepted, there is no issue here.

THE COURT: But in *Shelton*, the nurse refuses to be transferred.

MR. DUNN: Yes. And I take the next sentence to basically say "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," etc., etc.

THE COURT: But it doesn't say we will take into account the impact on the entity of continuing the employee in the present job. In other words, it removes the Title VII undue hardship. It focuses on something else.

MR. DUNN: It does. But to the extent that, in *Shelton*, the accommodation offered appeared to be in effect an accommodation that appeared to be offered in good faith.

THE COURT: And was rejected.

MR. DUNN: And was rejected. I take the rule to say OCR will take that into consideration when even deciding if there was discrimination, and it might well decide in that particular situation that there was no discrimination.

THE COURT: Well, we don't know.

MR. DUNN: We don't know.

THE COURT: We can't.

Final question for you, and I realize this is a hypothetical, but the rural hypothetical and the ambulance in Central Park hypothetical, how does your client base view those?

MR. BATES: Sorry, say --

THE COURT: How would your client base view those scenarios where, in a very real world sense, there are adverse health consequences to patients from the Central Park driver refusing to bring the bleeding ectopic patient to the hospital because of an objection or in the rural scenario where the person refuses an accommodation and is essentially occupying a singular position.

You know, it is easy in the real world to understand adverse medical or treatment availability consequences. I welcome your view as an advocate for the people with religious objections, how you view those scenarios? I appreciate they are extreme, but they are out there in the briefing.

MR. DUNN: So with the ambulance hypothetical, that one strikes me as about as extreme as you can get, because nobody calls 911 and says, I am having an ectopic pregnancy. They say, I am having abdominal pain with bleeding. So the driver isn't going to ascertain what's going on, what the treatment is on the back end and make the decision to kick the person out. It's hard to deal with something quite that

extreme.

But the rural situation, that, I think, is a real issue, because you could have a doctor, the only physician in a hospital that itself permits abortions to be provided, and he or she objects and says --

THE COURT: And Title VII framework would presumably permit the person to be screened to allow the hiring of somebody who is able to do the full job or the termination of somebody who refuses to do a good portion of it in those circumstances. Just from a human perspective, how does your client -- do you object to the Title VII framework application to that scenario? Is there something problematic about that?

MR. DUNN: I don't object to the Title VII application, but with respect to the rule, I mean, I think the consequence of that is to say, well, you know, Christian doctors or religious doctors can never serve in those positions. So I think that would have some real world effects, too, if you are going -- and nurses, like no nurse can serve in a rural hospital if she has a religious objection to abortion. And I recognize this is a balancing, and there are winners and losers on both sides, but clinics closing down, nurses leaving their profession, doctors leaving the profession, that has an adverse impact on patients as well, and I think the agency tried to balance that.

THE COURT: All right. Thank you. Very helpful. I

appreciate the very thoughtful briefing as well.

Is there any rebuttal from plaintiffs?

MR. ZIONTS: Your Honor, we are very conscience of the time, and I think a couple of us have very, very few points to make, subject to any questions that you have.

THE COURT: Go ahead.

MR. ZIONTS: In terms of regulatory authority, really just two points, your Honor.

One, we have heard a lot of assurances this morning. We really aren't going to do that. The agency is not going to go that far. It's not going to take every last dime of New York's $45 billion in Medicaid. The rule says what it says. It says "terminating federal financial assistance from the department in whole or in part" and our clients can't say, well, in open court a lawyer from the Department of Justice did say they are probably not really going to do it. Our clients have to adjust their conduct based on what it says in the C.F.R.

The only other point I would make, your Honor, in terms of where the agency gets this implicit authority that it believes it has to issue substantive rules with authoritative interpretations, I think the closest we heard to something was essentially inferring it from their enforcement role, you know, they have to enforce these statutes so that, by implication, they bootstrap onto that the idea that they need to issue

substantive rules and authoritative interpretations.

Respectfully, your Honor, that is just flat out inconsistent with how Title VII and the EEOC have operated for half a century. It's been very clear, the Supreme Court has said it multiple times, EEOC obviously has a role to play in the enforcement of Title VII. But Congress did not delegate a substantive rule-making authority. It can issue binding force-of-law interpretations. that doesn't mean that agency is toothless. It issues guidance. It issues interpretive opinions. It tells -- you know, your Honor mentioned public awareness campaigns. The EEOC has no shortage of ways to let it be known how it views Title VII.

The exact same thing could be said of HHS here. HHS and other agencies, all the time they issue guidance documents. They have a big box at the front that says: This is not binding, a court may interpret this differently, but this is how we see the world, this is how we see is the statutes, this is how we are going to interpret it. There is nothing preventing HHS from doing that. It just didn't do it.

THE COURT: All right. Thank you. Anything else from plaintiffs?

MS. SALGADO: Yes, your Honor.

THE COURT: Go ahead.

MS. SALGADO: Your Honor, I wanted to get back to the question that you asked me, the last question you asked me.

There was some confusion about what the court was concerned about, but the question is whether, here, if the court believes that there is a constitutional violation, but that it is as applied to the plaintiffs --

THE COURT: It was that one could imagine constitutional applications that would be unconstitutional but that the rule was not facially invalid under the establishment clause. That was the hypothetical.

MS. SALGADO: Right. And I think here plaintiffs have shown that the rule is unconstitutional as to plaintiffs here because it does require plaintiffs to put above all other interests the day the rule takes effect those of religious beliefs that were put into this rule. So just take as a concrete example, on the day the rule takes effect, plaintiffs are required to change their hiring practices. The record shows they have open positions, they are hiring, and the record shows that through that process they ask questions. The rule prohibits that from doing so because it -- because -- well, I'm not really sure why the rule does that, but it prohibits covered entities from asking prospective employees whether they have religious objectives to performing the services that they are being hired to do. So in that example, your Honor, we believe that the rule is putting above all other interests those of religious beliefs and does violate the establishment clause. So the question about whether there is an as

applied -- the question about as applied versus facial --

THE COURT: Your premise is not that it is in fact an as-applied violation as to your client. That was not what I was -- I was not so finding but, rather, just positing that there are possible applications that could be unconstitutional. That was the question. If that's all we have got, is it contrary to law?

MS. SALGADO: The relief under the APA is under its nature the relief must be set aside.

THE COURT: Thank you.

MS. SALGADO: The only other question I wanted to -- oh, and just one last point about the question about as applied versus facial is that, even setting that aside, your Honor, I just wanted to say that the canon, the constitutional avoidance would still prohibit the agency from defining the term "discrimination" in the way that it has here.

THE COURT: All right. Thank you.

MS. SALGADO: Thank you.

THE COURT: Anything else from plaintiffs?

(Continued on next page)

MR. COLANGELO: Thank you, your Honor.

The justice department made a number of arguments attempting to pare back the Draconian scope of the enforcement provisions here and in particular mentioned the intent to pursue voluntary compliance efforts.

I want to point out that the rule itself expressly disclaims any need to wait for the resolution of voluntary compliance efforts before funds can be terminated. That's at 88.7(i)(2).

Attempts to resolve matters informally shall not preclude OCR from simultaneously pursuing any action described in the other paragraphs.

Your Honor, my second point. There has been considerable discussion regarding Title VII and the import for the Court's analysis of the rule's departure from the Title VII framework.

One argument that we just wanted to point out, your Honor, is the particularly on-point case that we've cited in our papers is Chamber of Commerce v. United States Department of Labor. This is a Fifth Circuit case from 2018 where the Court held that it was arbitrary for the Labor Department to interpret a long extant statute, in that case ERISA which was enacted in 1974, more or less contemporaneously with the amendments we're talking about here.

It was arbitrary for the Department of Labor to

interpret ERISA to regulate in a new way the thousands of people and organizations working in that market or to discover in a long extant statute an unheralded power to regulate a significant portion of the economy.

So for all the reasons the Court has been discussing, the concerns about Title VII bear directly on the arbitrary and capricious analysis.

Finally, your Honor, the agency has conceded in this courtroom that the complaint -- the volume of complaint evidence it was looking at was ten complaints a year, not 343. And of those ten complaints a year the agency has deemed only three or four complaints worthy of investigation.

That alone is fatal to the final rule. It is unsupportable for the agency to claim that this rule is necessary to enforce in a context where they've only pursued three or four a year and where it's not the explanation that they gave.

Thank you.

THE COURT: Thank you.

Ladies and gentlemen, we're going to adjourn now but before we do I just want to say something for the benefit of all the people out here which is you have all had the privilege of seeing some truly excellent lawyers all around and I think we judges don't often give shout-outs, not often enough. But the quality of the briefs I got in this case was extraordinary

and the quality of the advocacy I've gotten here was extraordinary and invaluable to me in making sense of what is really a series of complicated problems.

So thank you very much for the excellence of the advocacy and all the hard work.

We stand adjourned.

(Adjourned)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.* *Plaintiffs*, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX M. AZAR II, *in his official capacity as Secretary of the United States Department of Health and Human Services*; and UNITED STATES OF AMERICA, *Defendants*, DR. REGINA FROST and CHRISTIAN MEDICAL AND DENTAL ASSOCIATIONS, *Defendants-Intervenors*.	No. 1:19-cv-04676-PAE (consolidated with 1:19-cv-05433-PAE; 1:19-cv-05435-PAE) **NOTICE OF APPEAL**
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Notice is hereby given that Dr. Regina Frost and the Christian Medical and Dental Associations, Defendants-Intervenors in the above-named consolidated cases, hereby appeal to the United States Court of Appeals for the Second Circuit from the orders and final judgment entered on the 6th day of November, 2019—Dkts. 248, 249, and 250 in the lead case, No. 19-cv-04676; Dkts 116, 117, and 118 in case No. 19-cv-05433; and Dkts 122, 123, and 124 in case No. 19-cv-05435—granting plaintiffs' motions for summary judgment; denying defendant Department of Health and Human Services's ("HHS") motions to dismiss and for summary judgment; denying Defendants-Intervenors' motion for summary judgment; denying as moot plaintiffs' motion for preliminary relief; and vacating the challenged HHS rule in its entirety.

Dated: December 18, 2019

New York, New York

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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Dated: January 3, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Leif Overvold
Leif Overvold