

# 19-4254(L), 20-31, 20- 32, 20-41

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***In the United States Court of Appeals for the Second Circuit***

STATE OF NEW YORK, CITY OF NEW YORK, STATE OF COLORADO, STATE OF  
CONNECTICUT, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF HAWAII,  
*(Caption continued on inside cover)*

On Appeal from the United States District Court for the  
Southern District of New York, No. 1:19-CV-04676-PAE

**BRIEF OF AMICI CURIAE JEWISH COALITION FOR RELIGIOUS  
LIBERTY AND COALITION FOR JEWISH VALUES IN SUPPORT OF  
INTERVENOR DR. REGINA FROST AND REVERSAL**

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STATE OF ILLINOIS, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS,  
STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW  
JERSEY, STATE OF NEW MEXICO, STATE OF OREGON, COMMONWEALTH OF  
PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF VERMONT, COMMONWEALTH  
OF VIRGINIA, STATE OF WISCONSIN, CITY OF CHICAGO, COOK COUNTY, ILLINOIS,

Plaintiffs-Appellees,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., PLANNED PARENTHOOD OF  
NORTHERN NEW ENGLAND, INC., NATIONAL FAMILY PLANNING AND REPRODUCTIVE  
HEALTH ASSOCIATION, PUBLIC HEALTH SOLUTIONS, INC.,

Consolidated-Plaintiffs-Appellees,

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, UNITED STATES OF AMERICA,

Defendants-Appellants,

DR. REGINA FROST, CHRISTIAN MEDICAL AND DENTAL ASSOCIATION,

Intervenors-Defendants-Appellants,

ROGER T. 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,

Consolidated-Defendants-Appellants.

## **DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Jewish Coalition for Religious Liberty certifies that it has no parent corporation and no corporation or publicly held entity owns 10% or more of its stock. The Coalition for Jewish Values also certifies that it has no parent corporation and no corporation or publicly held entity owns 10% or more of its stock.

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## **INTEREST OF AMICI CURIAE<sup>1</sup>**

Amicus Curiae Jewish Coalition for Religious Liberty (“JCRL”) is a non-denominational organization of Jewish communal and lay leaders, seeking to protect the ability of all Americans to freely practice their faith. JCRL also aims to foster cooperation between Jewish and other faith communities in an American public square that recognizes the unique societal benefits of religious exercise, religious liberty, and religious diversity.

Amicus Curiae Coalition for Jewish Values (CJV) is a charity incorporated in the State of Maryland and operating pursuant to 26 U.S.C. §501(c)(3). CJV represents over 1,500 traditional, Orthodox rabbis and advocates for classical Jewish ideas and standards in matters of American public policy. All parties have consented to the filing of this amicus brief. Fed. R. App. P. 29(a)(2).

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<sup>1</sup> This brief is filed with the consent of all parties, as permitted by Federal Rule of Appellate Procedure 29(a)(2) and Local Rule 29.1(b). No party’s counsel has authored this amicus brief, in whole or in part. Further, no party or party’s counsel has contributed money that was intended to fund the preparation or submission of the brief. No person—other than amici curiae, their members, or their counsel—has contributed money that was intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(e).

## **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

Religious liberty has always enjoyed protection under the First Amendment of the U.S. Constitution. Despite this constitutional guarantee, religious medical professionals are facing a consistent problem of unconstitutional discrimination at the hands of both private employers and state and local governments. To remedy this problem, the Department of Health and Human Services promulgated the “Conscience Rule” that helps protect religious medical professionals from being forced out of their professions as a penalty for refusing to betray their sincerely held religious beliefs. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (May 21, 2019) (“Conscience Rule”).

Intervenor Dr. Regina Frost, a Christian, is one of many religious medical professionals facing the possibility of termination for refusing to carry out abortion procedures in violation of their religious beliefs. Amici JCRL and CJV file this brief to highlight that Christians are not the only medical professionals at risk of being deprived of religious liberty. Jews, too, face the prospects of losing their healthcare jobs when they refuse to violate their religious beliefs by performing or assisting in procedures like abortion and sterilizations.

Medical employers are often blind to the conscience objections of minority faiths, so it is essential for conscience protections to be clearly spelled out and robustly enforced—just as the Conscience Rule demands. Large religions like

Christianity sometimes can invoke safety-in-numbers to shield their adherents from religious discrimination, but the Conscience Rule is vital to minority faiths like Judaism who lack access to such tactics.

For these reasons, as well as for those advanced by Intervenor Dr. Frost and the Christian Medical and Dental Association, this Court should reverse the summary judgment and reinstate the Conscience Rule in total.

## **ARGUMENT**

### **I. RELIGIOUS LIBERTY PROTECTIONS ARE PARTICULARLY IMPORTANT TO MEMBERS OF MINORITY FAITHS.**

In American legal circles, the mere mention of “religious liberty” evinces imagery of crosses and creches, evangelical prayers at football games and Christian scriptures on the office whiteboard. This perception is inaccurate.<sup>2</sup> Religious liberty is not a just-for-Christians right that protects mere symbols.

The Jewish people have paid a staggering price for the right to practice their religion. Having suffered a long history of anti-Semitic persecution and discrimination, Jews understand that the words “religious liberty” must not be allowed to devolve into a meaningless catch phrase. The Jewish community has

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<sup>2</sup> A survey conducted in the Tenth Circuit found that members of the minority faiths were disproportionately likely to bring religious liberty claims. Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 Seton Hall L. Rev. 353, 356 (2018).

never had the luxury of diminishing “religious liberty” to battles over what words appear on a Starbucks cup at Christmas time. Rather, the ramifications of whether “religious liberty” protections exist are profound, impacting all aspects of daily life.

The district court’s vacatur of the Conscience Rule places many Jewish medical professionals in an untenable position. A substantial number of Jews, and particularly Orthodox Jews, view procedures like abortion and sterilization as grave sins. If forced to perform such procedures, many might be forced to leave the profession altogether.

That ultimatum is unconstitutional, and it could not come at a worse time. Today, many Jewish healthcare professionals are risking their lives to treat patients during the COVID-19 pandemic. In this moment of national crisis when need for their service has never been greater, Jewish doctors and nurses should not be forced to abandon their strongly held religious convictions upon penalty of losing their jobs and livelihoods. The judgment below should be reversed.

## **II. JEWS HAVE A STRONG TRADITION OF RELIGIOUS INVOLVEMENT IN THE MEDICAL FIELDS.**

For centuries, the tenets and doctrines of Judaism have drawn its adherents to the practice of medicine. A National Center for Biotechnology Information (“NCBI”) survey found that Jews constitute 14% of religiously affiliated physicians. Farr A. Curlin, et al., *Religious Characteristics of U.S. Physicians, a National Survey* (2005), NCBI, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1490160/> (Table 1).

For many of these Jewish physicians, religion is the defining force in all aspects of life—including their medical practice. Per the NCBI survey, 34 percent of surveyed Jewish physicians agreed or strongly agreed with the statement that “I try hard to carry my religious beliefs over into all my other dealings in life.” *Id.* (Table 3). That same survey revealed that 31 percent agreed or strongly agreed with the statement that “my religious beliefs influence my practice of medicine.” *Id.*

These results are not surprising. For millennia, Judaism has recognized that physical health is indispensable to spiritual flourishing. The Torah imposes strict regulations for social hygiene that “are remarkable not only for their period but even by present-day standards. Hygiene and prophylaxis became religious dogmas intended for the welfare and preservation of the nation.” *Encyclopedia Judaica: Medicine*, Jewish Virtual Library: a Project of AICE, <https://www.jewishvirtuallibrary.org/medicine> (last visited May 8, 2020). Indeed, “[o]f 613 commandments, 213 are of a medical nature.” *Id.* Those hygiene dictates enabled early Jews to avoid succumbing to many epidemics and maladies that befell other nations during that same period. *See id.*

Judaism’s religious approach to physical health continued into the Talmudic era. An “underlying message of the Talmudic sages is the biblical link between physical and moral purity, always emphasizing that the maintenance of health is the maintenance of life.” Sherwin B. Nuland, *The New Republic* (Sept. 4, 2005), *My*

*Son, the Doctor*, <https://newrepublic.com/article/69457/my-son-the-doctor-0>. Later, Judaism’s famous philosopher-physician Maimonides reiterated that the purpose of keeping the body healthy is to “enable the unhindered pursuit of knowledge of God, and of the perfect morality for which God is the model.” *Id.* As such, the “study of medicine” is itself a “religious activity” for many Jewish adherents. *Id.*; Judy Siegel-Itzkovich, *Maimonides as Physician: Caring and Curing*, The Jerusalem Post (Apr. 2, 2013, 1:53 PM), <https://www.jpost.com/health-and-science/maimonides-as-physician-caring-and-curing-308369> (describing Maimonides as ascribing a “religious gravitas” to the “calling of medicine”).

Given Judaism’s deep respect for medicine, the physician plays an honored and essential role in Jewish society. Whereas some religions have treated resort to medicine as a failure of faith in God, the Talmud recognizes that even faithful man who “is in pain will go to the physician.” Babylonian Talmud: Baba Kama 46(b). In keeping with this recognition, a physician and a surgeon are included among the ten indispensable components of any city where a scholar lives. *Encyclopedia Judaica: Medicine*, Jewish Virtual Library: a Project of AICE, <https://www.jewishvirtuallibrary.org/medicine> (last visited May 8, 2020).

Judaism’s profound respect for the physician’s role has led many devout Jews to enter the practice of medicine. The Talmud states that whoever destroys a single life is considered by Scripture to have destroyed the whole world, and whoever saves

a single life is considered by Scripture to have saved the entire world. Mishnah Sanhedrin 4:5; Babylonian Talmud Sanhedrin 37a. Jewish doctors and nurses put this precept into practice every day, living out their faith through their vocations.

### **III. THE CONSCIENCE RULE PROVIDES VITAL SECURITY FOR MANY JEWISH MEDICAL PROFESSIONALS.**

For many Jewish medical professionals, the Conscience Rule is an essential safeguard that enables them to perform their duties each day without fear of being terminated on account of their religious beliefs. As explained below, many Jewish medical professionals (especially those in the Orthodox denomination) view abortion, sterilization procedures, and physician-assisted suicide as grave sins. The Conscience Rule prevents these religious minorities from being penalized for their religious objections to these procedures.

#### *Elective Abortion*

Although many assume that Judaism is a pro-choice religion, a significant number of practicing Jews are pro-life and consider it consistent with, or even mandated by, their faith. See Mitchell Rocklin & Howard Slugh, *The Jewish Position on Abortion Isn't What You Think It Is*, Public Discourse (July 16, 2018), <https://www.thepublicdiscourse.com/2018/07/22070/>. Pro-life philosophy finds its earliest roots in Judaic teaching. From the beginning, Judaism has “disseminated the idea that God has a covenantal relationship with all of His children and, therefore, regards their wanton destruction as an abomination rather than a matter of individual

choice.” *Id.*; see Coalition for Jewish Values, *Statement on Abortion*, <https://coalitionforjewishvalues.org/wp-content/uploads/2017/12/CJV-Statement-on-Abortion.pdf> (reflecting consensus of traditional, Orthodox rabbis).

Maimonides reaffirmed Judaism’s commitment to valuing human life, writing that abortion is prohibited except to save a mother’s life. Maimonides, Hil. Rotze’ach, 1:9; see also Shulchan Arukh, Choshen Mishpat 425:2. The Talmud—one of the earliest sources of rabbinic law—contains this position as well. Likewise, the *Zohar*, the most prominent Jewish book of mysticism, describes abortion as an abominable and pagan practice. See Daniel Sayani, *Abortion and the Igros Moshe*, The Times of Israel Blog (Aug. 2, 2018, 12:30 PM), <https://blogs.timesofisrael.com/abortion-and-the-igros-moshe/>, Igros Moshe, Choshen Mishpat 2:69.

Modern Jewish teachings also support this pro-life worldview. The “most respected Orthodox rabbis for nearly a century, Rabbi Moshe Feinstein and Rabbi Joseph Soloveitchik, wrote that abortion constitutes murder. Rabbi Feinstein even prohibited amniocentesis, a test that can detect fetal abnormalities, out of fear that parents might choose to abort a fetus with birth defects.” See *supra* Rocklin & Slugh. Rabbi Soloveitchik advocated that “[t]he murder of an unborn child is classified” as a violation of Jewish law. Rabbi Joseph B. Soloveitchik, *The Emergency of Ethical Man*, 28 (2005). He also taught that Jewish law requires one to violate the Sabbath—

an action only permitted where necessary to save human life—for the sake of preserving fetal life. *See supra* Rocklin & Slugh.

### *Sterilization*

While abortion draws more political attention, sterilization procedures are even more likely to raise conscience objections among Jewish medical professionals. In Genesis 1:28, God commands his people to “be fruitful and multiply.” Genesis 1:28. Extrapolating from this command, Jewish law states that one who undergoes a vasectomy is classified as a “kroos shafcha.” *Ask the Rabbi, Vasectomy*, aish.com, <https://www.aish.com/atr/Vasectomy.html> (last visited May 8, 2020); *see* Deuteronomy 23:2. This classification has severe consequences. One who falls into this category may not be married to a woman who is Jewish from birth. In fact, if he was married to a woman who was Jewish from birth and he underwent a vasectomy, he must get divorced. *See* Maimonides (Laws of Forbidden Relations, Chapter 16); The Code of Jewish Law (Even Ha’ezer, Chapters 5 and 16). Thus, according to Jewish law, a vasectomy is absolutely forbidden.

Judaism’s strong prohibition against elective sterilization makes the procedure anathema to many Jewish medical professionals. The procedure is one that they simply cannot perform them in good conscience.

### *Physician-assisted Suicide*

Many Jewish healthcare professionals would also consider physician-assisted suicide to be grievously sinful and prohibited. See Coalition for Jewish Values, *Statement on Euthanasia/Assisted Suicide*, <https://coalitionforjewishvalues.org/wp-content/uploads/2018/10/CJV-Statement-on-Euthanasia.pdf>.

The religious objection to physician-assisted suicide has deep roots. The Torah instructs that God has set before humanity “life and death, the blessing and the curse. You shall choose life, so that you and your offspring will live.” Deuteronomy 30:19. Many Jews view physician-assisted suicide as a repudiation of this command and thus prohibited. As Jewish psychiatrist Dr. Jacob Freeman explained, “[f]rom a Jewish perspective, physician-assisted suicide is a tragedy because life is a precious gift.” Dr. Jacob L. Freeman, *Death with Dignity*, <https://www.aish.com/ci/sam/Death-with-Dignity.html> (last visited May 8, 2020). That is because “[o]ur Creator wants us to do the best we can with what we’ve been given. Chronic pain and illness are not an easy thing to live through; nor are they an indication that one should throw away the life they’ve been given.” *Id.* Consequently, “[p]hysician-assisted suicide is not an ethical or Jewish concept.” *Id.* Dr. Freeman is not alone in this perspective. See Lazer Gurkow, *Murder or Compassion*, Chabad.org, [https://www.chabad.org/parshah/article\\_cdo/aid/1816661/jewish-/Murder-or-Compassion.htm](https://www.chabad.org/parshah/article_cdo/aid/1816661/jewish-/Murder-or-Compassion.htm) (last visited May 8, 2020).

For Jewish doctors and nurses who oppose physician-assisted suicide on religious grounds, performing the procedure is simply unthinkable. As Rabbi Yitzchack Breitowitz explained, “[t]he preservation of life has always been regarded as a cardinal value in Judaism. The Torah was given to man so ‘that he may live.’.... Because all human beings are formed in the image of the Divine, all life is regarded as being of infinite value regardless of its duration or quality.” Rabbi Yitzchok Breitowitz, *Physician-Assisted Suicide: A Halachic Approach*, Jewish Law, <https://www.jlaw.com/Articles/suicide.html> (last visited May 8, 2020). Consequently, while Jews “cannot personally condemn those who in the midst of unbearable pain and suffering take their own lives,” Jews “cannot encourage, condone, or participate in the commission of such an act.” *Id.* (citation omitted).

*Referrals for abortion, sterilization, or physician-assisted suicide*

Jews cannot always avoid violating their strongly held religious beliefs by referring patients elsewhere for these procedures they consider sinful. The Bible prohibits “putting a stumbling block in front of a blind man,” which is interpreted to mean facilitating another person’s commission of a sinful act. Leviticus 19:14. And in the words of Maimonides, “[w]hoever causes the loss of a soul is considered as if he destroyed the entire world.” Hil. Rotze’ach 1:16.

In light of these teachings, many Jews would consider the act of referring-out for a prohibited practice to be sinful. The Conscience Rule ensures that these

religious minorities will not be forced to make the painful choice between suffering religious discrimination (and even termination) for following their religion, or participating in procedures that violate their sincerely held religious beliefs.

**IV. RELIGIOUS MINORITIES ARE MOST VULNERABLE TO COERCION AND THEREFORE THEY WILL BENEFIT MOST FROM ROBUST, CLEAR, AND WELL-ADVERTISED CONSCIENCE PROTECTIONS.**

Whereas the Conscience Rule was promulgated to protect the religious freedom for medical professionals of all faiths, the Rule’s protections are most essential for religious minorities like the Orthodox Jewish community.

HHS promulgated the Conscience Rule in recognition that “[t]he freedoms of conscience and of religious exercise are foundational rights protected by the Constitution and numerous Federal statutes.” 84 Fed. Reg. at 23,170. The Rule’s substantive requirements derive from longstanding federal statutes and regulations, and many of the requirements are found in “laws [that] have existed for decades.” 84 Fed. Reg. at 23,222. Crucially, the Rule encourages recipients of federal funds to notify protected individuals—such as employees and students—of their conscience rights. *See id.* at 23,270 (§ 88.5). The Rule then requires such recipients to certify their compliance with these laws to HHS, and it gives the Office of Civil Rights (“OCR”) the tools necessary for enforcing compliance. *See id.* at 23,269-72.

This particular blend of protections is vital for minority faiths like the Orthodox Jewish community. Whereas medical employers may sometimes

recognize and accommodate the religious objections of majority faiths, medical employers are more likely to be ignorant about the practices that offend minority faiths. Also, many religious minorities are immigrants, and they may be less likely to be aware of their conscience rights. The Conscience Rule protects these vulnerable minorities by encouraging federal funding recipients to inform medical professionals of faith that they possess conscience rights that must be respected. When religious-liberty rights are not clearly spelled out, they are in danger of being trampled.

The enforcement component of the Rule is just as important. While religious liberty is guaranteed by the First Amendment and a host of federal statutes, enforcement of that protection has been lax. HHS identified numerous instances in which religious medical professionals were singled out for punishment or termination from their jobs as a result of refusing to perform or assist in the performance of procedures that violated their sincerely-held religious beliefs. 84 Fed. Reg. at 23,176-79. Worse still, certain advocacy organizations have sued to force religious medical professionals to perform these objectionable procedures. *Id.* at 23,178.

The Conscience Rule responds to these realities by giving HHS enforcement powers to ensure that religious liberties are real and not merely theoretical. HHS is well positioned to respond to religious-liberty violations, such as those referenced in

the Rule, if those complaints are made by religious conscientious objectors. It is important for HHS to protect such objectors to the extent legally possible, given that many courts have found that conscience-protection laws contain no private rights of action. *See, e.g., Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695 (2d Cir. 2010); *Hellwege v. Tampa Family Health Ctrs.*, 103 F. Supp. 3d 1303 (M.D. Fla. 2015).

To conclude, if put to the choice of adhering to their faith or losing their jobs, many religious doctors and nurses (including those of Jewish faith) would be forced out of the profession. HHS was aware of this reality when it found that the Conscience Rule would “delay the exit of certain health professionals from the field, by reducing discrimination or coercion.” 84 Fed. Reg. at 23,246. By contrast, a “lack of conscience protections diminishes the availability of qualified health care providers.” *Id.* Given the pressing demand for doctors and nurses to respond to the COVID-19 crisis, protecting religious liberty and conscience is “obviously in the public interest”—now more than ever. *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018). The judgment should be reversed.

### **CONCLUSION**

This Court should reverse the judgment and reinstate the Conscience Rule in full.

Dated: May 13, 2020

Respectfully submitted,

/s/April L. Farris

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## **CERTIFICATE OF COMPLIANCE**

1. This document complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) and Local Rule 32.1(a)(4)(A) because this document contains 3,032 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f).

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft® Office Word 2016 in 14-Point Times New Roman font.

Date: May 13, 2020

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### **CERTIFICATE OF SERVICE**

I certify that this brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit via the court's electronic filing system, on the 13th day of May, 2020, and an electronic copy of the brief was served on all counsel of record, additional counsel, and amici counsel who are registered CM/ECF users, via the court's electronic filing system on the same date.

/s/April L. Farris

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