Consolidated Case Nos. 20-15398, 20-15399, 20-16045, & 20-35044

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY & COUNTY OF SAN FRANCISCO,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II, et al.,

Defendants-Appellants.

Appeal from the United States District Courts for the
Northern District of California and the Eastern District of Washington

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BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, AMERICAN COLLEGE OF PEDIATRICIANS, CATHOLIC MEDICAL ASSOCIATION, NATIONAL CATHOLIC BIOETHICS CENTER, AND NATIONAL ASSOCIATION OF CATHOLIC NURSES, USA IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amici are nonprofit organizations with no parent corporations that do not issue stock.

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG) is a nonprofit professional medical organization with over 4,000 obstetrician-gynecologist members and associates. Before the American College/Congress of Obstetricians and Gynecologists discontinued the title, it recognized the American Association of Pro-Life Obstetricians and Gynecologists as a "special interest group" for 40 years. AAPLOG strives to ensure that pregnant women receive quality care, and that they are informed of abortion's potential long-term consequences on women's health. AAPLOG offers healthcare providers and the public a better understanding of abortion-related health risks, such as depression, substance abuse, suicide, subsequent preterm birth, and *placenta previa*.

The American College of Pediatricians is a national nonprofit organization of pediatricians and other healthcare professionals dedicated to ensuring that children reach their optimal physical and emotional health, and well-being. The College of Pediatricians' membership consists of over 600 qualifying healthcare professionals in 47 states and several countries outside the United States who share the College's mission, vision, and values. The College drafts position

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

statements to advance children's health from conception forward, and produces sound policy based on the best-available research to assist parents and society in caring for children.

The Catholic Medical Association is a national, physician-led community of healthcare professionals that informs, organizes, and inspires its members in steadfast fidelity to the Catholic Church's teachings. The Catholic Medical Association strives to uphold the principles of the Catholic faith in the science and practice of medicine.

The National Catholic Bioethics Center is a nonprofit research and educational institute that applies the Catholic Church's moral teachings to ethical issues that arise in healthcare and the life sciences. The Bioethics Center has 1,200 members, many of whom are institutions, thus representing thousands of individuals. In collaboration with two graduate programs that provide degrees to dually-enrolled students concentrating in bioethics, the Center administers a certification program in bioethics. The Center also provides consultations regarding the application of Catholic moral teachings to ethical issues that impact vulnerable populations and the conscience rights of their providers. In recent years, healthcare providers (both the Center's members and non-members alike) have increasingly sought the Center's counsel about efforts to coerce them to violate their deeply held religious beliefs or moral values.

The National Association of Catholic Nurses, USA provides nurses of different backgrounds who share Roman Catholic values opportunities to promote Catholic moral principles and engage in professional development. The Catholic Nurses Association, whose motto is "Unity in Charity," promotes educational programs, spiritual nourishment, patient advocacy, and integration of faith and health. While offering support to those in need, the Association promotes Catholic nursing ethics and offers guidance and support to Catholic nurses and nursing students, and other healthcare professionals who support its goals.

Amici file this brief under Federal Rule of Appellate Procedure 29(a) in defense of federal regulations that directly benefit amici, their members, and their well-known interest in the integration of faith and work. All parties to these consolidated appeals consented to the filing of this brief.

BACKGROUND

Conscience protection is one of the United States' defining features. Despite the "universal calamity" in which the colonists found themselves during the Revolutionary War, the Continental Congress still exempted Quakers and other objectors from military service. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1469 (1990) (cleaned up). The Founders did not regard these conscientious objectors as opponents or excessive baggage, but as a valuable resource that could serve "their distressed brethren" and "contribute liberally" to the burgeoning Republic in other ways. *Id.* (cleaned up).

Almost 200 years later, Congress took the same tack to conscientious objections in the wake of *Roe v. Wade*, 410 U.S. 113 (1973). Its immediate response was the Church Amendments, which (among other things) condition the award of some federal funds on recipients' agreement not to discriminate in employment based on a healthcare provider's refusal to perform or assist in abortions or sterilization procedures. 42 U.S.C. § 300a-7(c). Congress understood that driving objectors from healthcare professions was unjust, and that shrinking the number of medical personnel served no one's interests.

When governments began to target conscientious objectors anyway, Congress stepped in again. It passed the Coats-Snowe Amendment in 1996 to condition federal, state, and local governments'

receipt of certain federal funds on their agreement not to discriminate against healthcare entities that object to facilitating or training employees to perform abortions. 42 U.S.C. § 238n. Congress knew that shutting out professional training programs run by objectors, and objecting professionals, was wrong and would worsen the nation's enduring shortage of healthcare providers and put lives at risk.

But that did not end the assaults on conscience, forcing Congress to pass the Weldon Amendments beginning in 2005. These Amendments strip a variety of federal funds from any federal agency or program, or state or local government, that discriminates against health care professionals, hospitals, health insurance plans, or other types of health care facilities, organizations or plans that object to providing, paying for, providing coverage of, or referring for abortions. *E.g.*, *Consolidated Appropriations Act, 2018*, Pub. L. No. 115-141, § 507(d), 132 Stat. 348, 764 (Mar. 23, 2018).

Three years later, the U.S. Department of Health and Human Services ("HHS") issued a regulation clarifying the requirements of the Church, Coats-Snowe, and Weldon Amendments, 73 Fed. Reg. 78,072 (Dec. 19, 2008), that was calculated to ensure Congress's words were "interpreted and implemented broadly to effectuate their protective purposes," 84 Fed. Reg. 23,170, 23,174 (May 21, 2019). But following a change in administration, the federal government took an alarming step backward. HHS moved to rescind the 2008 rule and issued a new

rule that removed all of the 2008 rule's substantive provisions. 76 Fed. Reg. 9,968 (Feb. 23, 2011). Predictably, serious violations of the Church, Coats-Snowe, and Weldon Amendments soared. *Infra* Part I.

Recognizing the serious attacks on conscience, HHS, after another change in administration, restored the safeguards for ensuring compliance with Congress's directives by issuing the 2019 final rule challenged here. 84 Fed. Reg. at 23,176–77. The 2019 rule's conventional but vital purpose is "to ensure knowledge of, compliance with, and enforcement of, [the] Federal conscience and anti-discrimination laws" Congress passed after *Roe*. *Id.* at 23,175. In substance, the 2019 rule "generally reinstates the structure of the 2008 Rule, includes further definitions of terms, and provides robust certification and enforcement provisions comparable to provision found in OCR's other civil rights regulations." *Id.* at 23,179.

States, local governments, and private organizations that oppose HHS taking Congress's conscience protections seriously sued before the 2019 rule went into effect. Three of their main contentions were that (1) HHS lacked authority to issue the regulations, (2) the 2019 rule was arbitrary and capricious, and (3) the 2019 rule violated the Establishment Clause. The United States District Courts for the Northern District of California and the Eastern District of Washington ruled for the plaintiffs, invalidating the 2019 rule in its entirety on Administrative Procedure Act grounds. In so doing, Judge Bastian

adopted the reasoning set forth in Judge Engelmayer's opinion for the United States District Court for the Southern District of New York. *Washington v. Azar*, 426 F. Supp. 3d 704, 720 (E.D. Wash. 2019) (adopting the "reasoning set forth" in *New York v. U.S. Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475, 580 (S.D.N.Y. 2019)).

The federal government appealed, requesting this Court uphold the 2019 rule and reverse the district courts. Amici submit this brief to address three issues on appeal: (1) the need for the 2019 rule, (2) HHS's authority to issue those regulations, and (3) the 2019 rule's interrelationship with Title VII and the Emergency Medical Treatment and Labor Act.

ARGUMENT

I. Serial violations of healthcare providers' conscience rights justified HHS's issuance of the 2019 rule.

The administrative record is replete with shocking violations of healthcare providers' conscience rights before and after HHS moved to rescind the 2008 rule. HHS had ample grounds to conclude that stronger measures than the 2011 rule were needed to ensure that federal-funding recipients comply with the nondiscrimination requirements that Congress set. The Southern District of New York could only hold that the 2019 rule "did not respond to any documented problem," *New York*, 414 F. Supp. 3d at 546, by ignoring serial violations of healthcare providers' conscience rights and ineffectually nitpicking the volume of complaints HHS received over the years, *id.* at 541–42, 544, 546 n.55.

But whether conscience complaints increased is beside the point. Healthcare providers and others who experienced conscience-based discrimination were dissuaded from filing complaints by HHS's previous inaction. 84 Fed. Reg. at 23,179. The problem HHS set out to solve was not only ensuring a proper response to complaints actually made, but a longstanding "environment of discrimination toward, and attempted coercion of, those who object to certain health care procedures based on religious beliefs or moral convictions" that justified both the 2008 and 2019 rules, 84 Fed. Reg. at 23,175, and which the 2011 rule failed to account for or remedy, *id.* at 23,176–79. Years of

litigation prove that this environment of discrimination is real, and that HHS reasonably sought to restrain it as Congress commanded.

The evidence HHS marshalled in the 2019 regulations is wide-ranging and compelling. Amici highlight only a few objectors, cited in the 2019 regulations, who the final rule was designed to help. Their stories prove a systemic lack of regard for conscience rights that HHS had not just reasonable but compelling grounds to address.

A. Mt. Sinai Hospital forced Cathy Cenzon-DeCarlo to participate in a surgical, late-term abortion.

Cathy Cenzon-DeCarlo is a devout Catholic who served as a surgical nurse at Mt. Sinai Hospital, a private hospital in New York City. Even though Cenzon-DeCarlo made her religious objection to abortion clear when she took the job, and submitted paperwork to that effect, Mt. Sinai ordered her to assist in the surgical abortion of a 22-week-old preborn baby in 2009. No emergency circumstances were involved. Yet hospital officials refused to even look for a replacement nurse and threatened Cenzon-DeCarlo with charges of "insubordination and patient abandonment" if she refused to assist in the abortion.

Faced with potentially losing her job and nursing license, Cenzon-DeCarlo relented and suffered lasting emotional and psychological trauma after viewing the abortion and transporting away the dismembered remains. She filed suit against the hospital under the Church Amendment. V. Compl., *Cenzon-DeCarlo v. Mt. Sinai Hosp.,* No. 09-cv-

3120 (E.D.N.Y. July 21, 2009). But the Second Circuit held that the Church Amendment, unlike Title VII, did "not confer upon Cenzon-DeCarlo a private right of action to enforce its terms." *Cenzon-DeCarlo v. Mt. Sinai Hosp.*, 626 F.3d 695, 699 (2d Cir. 2010) (per curiam).

Cenzon-DeCarlo was forced to rely on HHS officials to investigate her case. They did after a delay, during which the hospital changed its policies, but HHS never fully resolved Cenzon-DeCarlo's complaint. HHS cited Cenzon-DeCarlo's case in support of the 2019 regulations four separate times. 84 Fed. Reg. at 23,176, 23,178, 23,228 n.149, 23,254 n.357. The Southern District of New York's 146-page opinion never mentions it once.

B. Tampa Family Health Centers refused to consider Sara Hellwege for a nurse-midwife job because of her religious, pro-life beliefs.

Sara Hellwege was about to graduate and become a licensed advanced practice nurse. Excited to begin her new career, she applied for a nurse-midwife position at Tampa Family Health Centers in 2014. But the Health Centers refused to give Hellwege even an interview because she is a Christian who believes human life begins at conception and is consequently a member of Amicus the American Association of Pro-Life Obstetricians & Gynecologists. Meanwhile, the Health Centers had not filled all its nursing positions and continued to seek other applicants. The Health Centers had only one reason for turning

Hellwege away: it is a Title X clinic and Hellwege had a conscientious objection to prescribing some hormonal birth control methods that could lead to an abortion.

Hellwege filed suit under the Church Amendments and Title VII. Am. Compl., *Hellwege v. Tampa Family Health Ctrs.*, No. 8:14-cv-01576 (M.D. Fla. Feb. 4, 2015). Following the Second Circuit's analysis, the district court held that "no private right of action exists under the Church Amendments," *Hellwege v. Tampa Family Health Ctrs.*, 103 F. Supp. 3d 1303, 1312 (M.D. Fla. 2015), which again left HHS with sole authority to enforce the nondiscrimination conditions Congress placed on employers that receive certain federal funds.

Hellwege was able to reach a settlement with the Health Centers only because the court refused to dismiss her failure-to-hire claim under Title VII. *Id.* at 1313. HHS cited Hellwege's experience five separate times as justifying the 2019 regulations. 84 Fed. Reg. at 23,176, 23,178, 23,229 n.153, 23,239 n.271, 23,254 n.357. Again, the Southern District of New York proceeded as if cases like hers either did not exist or merited no response.

C. University of Medicine and Dentistry of New Jersey ordered nurses to assist abortions or lose their jobs.

The University of Medicine and Dentistry of New Jersey, a public hospital, operated a same-day surgery unit that generally provided non-emergency operations. Beginning in 2011, the University adopted a

policy that required employees to assist in abortions or lose their jobs. It further mandated that nurses engage in weekly abortion trainings, which involved assisting in actual surgical abortions. Although nurses expressed their religious objections, the University told them their religious beliefs did not matter, an action in blatant violation of federal law.

The University forced several nurses with conscientious objections to participate in abortions on pain of termination. These nurses suffered emotional, psychological, and spiritual trauma as a result. After University officials refused to hold a planned meeting with objecting nurses and their counsel, 12 nurses filed suit under the Church Amendments and the Fourteenth Amendment's Due Process Clause. V. Compl., *Danquah v. Univ. of Med. & Dentistry of N.J.*, No. 2:11-cv-06377, (D.N.J. Oct 31, 2011).

The district court issued a temporary restraining order with the University's consent. TRO, *Danquah v. Univ. of Med. & Dentistry of N.J.*, No. 2:11-cv-06377 (D.N.J. Nov. 3, 2011). At a court hearing, the University agreed to respect the nurses' conscience rights, the nurses affirmed their continued willingness to care for women suffering a true emergency from an abortion until other help arrived, and the case settled. Tr. of Proceedings, *Danquah v. Univ. of Med. & Dentistry of N.J.*, No. 2:11-cv-06377 (D.N.J. Dec. 22, 2011).

HHS cited these 12 nurses' devastating ordeal twice in validating the 2019 regulations. 84 Fed. Reg. at 23,176, 23,187 & n.55. Yet the Southern District of New York's decision ignored their plight.

D. California officials mandated that churches cover elective abortions in their health plans.

Houses of worship and other religious nonprofits have long purchased health plans that exclude abortion coverage in keeping with the tenets of their faith. But the California Department of Managed Health Care set out to stop that. It sent a letter to insurance companies in 2014 insisting that all health plans in California cover all legal abortions. Insurers unilaterally changed the health plans of Skyline Wesleyan Church, Foothill Church, and other houses of worship to cover elective abortions in direct and serious violation of their religious beliefs—sometimes without notice.

Skyline Wesleyan Church and Foothill Church filed complaints with HHS in 2014 under the Weldon Amendments, but the agency failed to act. HHS Compl. (Oct. 9, 2014), https://bit.ly/2ADSS8J. So both churches sued to vindicate their First and Fourteenth Amendment rights. Compl., *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, No. 3:16-cv00501 (S.D. Cal. Feb. 4, 2016); First Am. Compl., *Foothill Church v. Rouillard*, 2:15-cv-02165 (E.D. Cal. Aug. 1, 2016). The churches' filings noted California's violation of the Weldon Amendments, but the Second Circuit's holding in *Cenzon-DeCarlo*

discouraged them from suing on that ground. Unless and until HHS chose to enforce the Weldon Amendment, no one else could.

HHS cited the *Skyline* and *Foothill* litigation multiple times as support for the 2019 rule. 84 Fed. Reg. at 23,177, 23,179, 23,228 n.148. Over five years after the churches filed an administrative complaint, HHS issued a notice of violation concluding that California violated the Weldon Amendment. HHS, Office for Civil Rights, Notice of Violation (Jan. 24, 2020), https://bit.ly/2WDM1og. Recently, this Court held in *Skyline Wesleyan Church v. California Department of Managed Health Care*, 959 F.3d 341 (9th Cir. 2020), the church had standing to challenge California's abortion-coverage requirement and remanded for the district court to consider the church's free exercise and other claims.

All told, the case-by-case approach that district courts have forced HHS to maintain (against its better judgment) failed to prevent widespread and appalling violations of statutorily-guaranteed conscience rights. If the 2019 rule had been in place earlier, houses of worship would likely not have needed to engage in unending years of litigation and administrative proceedings to defend their rights. Nor would hospitals likely have compelled nurses who are dedicated to preserving life to participate in abortion procedures against their will. This is no trivial matter: once the act is complete, conscientious objectors' trauma is lasting and cannot be undone.

II. Congress expected HHS to employ conventional agency means to enforce the Church, Coats-Snowe, and Weldon Amendments, not that courts would deny HHS's authority to give these conscience protections force and effect.

This Court should reverse the district courts' holding that HHS lacked authority to issue most of the 2019 rule, which contradicts "the statutory context, structure, history, and purpose," as well as overall "common sense." *Abramski v. United States*, 573 U.S. 169, 179 (2014). No plausible argument exists that the district courts' decisions will promote Congress's purpose or give "effect . . . to every clause and word" that Congress wrote. *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (cleaned up). Instead, upholding the district courts' rulings would "emasculate . . . entire section[s]" of conscience protections that Congress has reaffirmed time and again. *Id.* (cleaned up).

When Congress passed the Church, Coats-Snowe, and Weldon Amendments, it expected HHS—the sole agency with enforcement authority—to give these conscience protections force and effect. That is how agency law, in general, and federal funding conditions, in particular, work. Congress expresses a general rule in statute and leaves it to the agency to give the statute teeth. It does not police the practices of federal-funding recipients itself.

Courts reviewing agencies' good-faith attempts to carry out such a congressional mandate usually apply the principle that "the act should

be liberally construed to promote its purpose, and it is of first importance that the purpose shall not be frustrated by unnecessarily placing technical limitations upon the agencies which are to carry it into effect." *U.S. ex rel. French v. Weeks*, 259 U.S. 326, 328 (1922). But not the district courts here. They recognized that HHS had authority to enforce the Church, Coats-Snowe, and Weldon Amendments through case-by-case determinations, but held that HHS could not give funding recipients notice how it would do so by issuing much of the 2019 rule—even though HHS enacted a similar regulation 11 years before.

That self-contradictory holding makes little sense. Congress never questioned HHS's authority to issue the 2008 or 2011 rules. Statutes like the Church, Coats-Snowe, and Weldon Amendments are dead letters without HHS taking basic steps to enforce them, such as instituting a certification requirement and promulgating definitions of statutory terms. Congress must have expected HHS to take such routine measures to give life to the words it wrote. Otherwise, there would be no point to Congress writing those words in the first place. A ban on recipients of federal money discriminating against conscientious objectors is virtually useless without Congress granting HHS authority to take rudimentary and indispensable measures of ensuring compliance with that requirement.

The district courts' holdings that HHS lacked authority to issue most of the 2019 rule flies in the face of decades of administrative law

and practice. Plaintiffs' objections on that score are tailor-made to abolish the 2019 rule and render the Church, Coats-Snowe, and Weldon Amendments unworkable. This Court should reverse the district courts.

III. The difference between the 2019 rule and Title VII is a virtue not a vice, and the asserted conflict with the Emergency Medical Treatment and Labor Act is imaginary and stigmatizing, not real.

One of the Southern District of New York's primary criticisms of the 2019 rule was that HHS did not read the Church, Coats-Snowe, and Weldon Amendments to require the same thing as Title VII. *New York*, 414 F. Supp. 3d at 513–14, 529, 537, 557, 559. But that lack of redundancy is a virtue not a vice. Congress had no reason to pass or maintain the Church, Coats-Snowe, and Weldon Amendments if Title VII was already doing the job. Those statutes must have independent meaning or they are useless, and Congress does not pass pointless riders year after year.

Title VII is not the be-all and end-all of nondiscrimination law as the Southern District of New York seemed to think. *Id.* at 559–60 (characterizing the 2019 rule as "overcom[ing] a longstanding statutory framework, Title VII's, that has governed the health care sector since 1972"). Employers deal with varying nondiscrimination requirements all the time depending on locale, the activities in which they engage, the source of their funding, etc. It blinks reality to say that HHS may only hold employers who knowingly accept federal funds with conscience-

protections attached to the low standard Congress established in Title VII for virtually all employers, including those who accept no federal funds at all.

No conflict exists between the Church, Coats-Snowe, and Weldon Amendments and Title VII. They are simply different statutes with varying rules that apply to disparate sets of employers in dissimilar ways. In short, Title VII is a floor, not a ceiling, and the Southern District of New York's contrary assumption that Title VII preempts the field is meritless.

What's more, the asserted conflict between the 2019 rule and the Emergency Medical Treatment and Labor Act is imaginary and stigmatizes conscientious healthcare providers who give their patients the highest standard of care *because* of their beliefs, not *in spite* of them. Amici can attest that conscientious objectors have no desire or intent to abandon patients in true emergencies. Plaintiffs' suggestion that conscientious objectors are likely to engage in unprofessional behavior smacks of reflexive mistrust grounded in religious hostility—an impermissible reason to invalidate the 2019 rules.

A. HHS rightly construed the Church, Coats-Snowe, and Weldon Amendments differently than Title VII; otherwise these statutes are largely superfluous.

The Southern District of New York faulted HHS for departing from Title VII's framework in the 2019 rule. *New York*, 414 F. Supp. 3d

at 514. Yet the agency could hardly have done otherwise. One of the basic canons of statutory interpretation is that agencies and courts must give effect to all of a statute's "provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (cleaned up). Reading the Church, Coats-Snowe, and Weldon Amendments as largely redundant of Title VII would render all three statutes insignificant or superfluous.

HHS rightly declined to take this approach. Congress decided that more than Title VII's balancing test was needed to protect conscientious objectors when it came to healthcare. We know this for three reasons.

First, Congress passed laws conditioning federal funding on employers and others respecting conscience rights in the healthcare context long after it enacted Title VII in 1964. The Church, Coats-Snowe, and Weldon Amendments originated in 1973, 2005, and 2008 respectively—after Title VII was on the books. If Title VII already solved the problem Congress wished to address, there was no need for Congress to continue acting, let alone three separate times.

Second, Congress in Title VII established a balancing test that asks whether an employer could accommodate an "employees' religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). But Congress wrote the Church, Coats-Snowe, and Weldon Amendments quite differently.

These statutes ban recipients of certain federal funds from discriminating against conscientious objectors totally, with no balancing. HHS could not ignore these textual variances without abusing its discretion.

Third, there is a world of difference between Title VII, which Congress enacted under the Commerce Clause and Fourteenth Amendment, and the Church, Coats-Snowe, and Weldon Amendments, which Congress enacted under the Spending Clause and Article I, Section 9. The former statute applies to nearly all employers regardless of their choices. But the latter statutes apply only to those who *voluntarily* accept certain federal funds and the nondiscrimination rules that come along with them.

Plaintiffs have no choice but to comply with Title VII, but the same is not true of the Church, Coats-Snowe, and Weldon Amendments. Spending Clause legislation is "in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181–82 (2005) (cleaned up). So Plaintiffs have little room to complain: "[a]s a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds," *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013), not sue to expunge a condition it disfavors.[2]

[2] Of course, the government cannot condition a benefit on private parties foregoing the exercise of their constitutional rights. *E.g.*,

"Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 203 (2003). And "[t]hese offers may well induce the States to adopt policies that the Federal Government itself could not impose." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 537 (2012) (plurality opinion). But to the extent Plaintiffs wish to discriminate against those with conscientious objections, "they are free to do so without federal assistance," *Am. Library Ass'n*, 539 U.S. at 212, provided they stay within Title VII's bounds. Congress merely decided "not to subsidize" that discrimination, *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 544 (1983), in keeping with its understanding of "the 'general Welfare,'" *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 576 (cleaned up).

In short, the funding conditions at issue in this case are nothing like Title VII. Congress rightly expects more of those who accept federal taxpayer dollars. And Congress's funding restrictions do not deprive the Plaintiffs of the freedom to discriminate against the faithful to the extent Title VII's balancing test allows. Plaintiffs simply cannot discriminate against conscientious objectors *and* still hold their hands out for certain federal funds.

Sherbert v. Verner, 374 U.S. 398, 403–06 (1963). But the private Plaintiffs (rightly) do not claim an affirmative constitutional right to discriminate against conscientious objectors.

B. Title VII is not the be-all and end-all of nondiscrimination laws, and there is no valid concern that HHS's 2019 rule "supersedes" it.

The Southern District of New York chastised HHS for "effectively supersed[ing] Title VII in the health care field," *New York*, 414 F. Supp. 3d at 513, based on its view that Title VII has "governed the health care sector since 1972," *id.* at 560. But nondiscrimination laws governing employers' activities—in the healthcare sector or otherwise—have never been so simple and unified.

Title VII sets a national floor of employment protection. It does not impose a ceiling. Nor is Title VII the only federal statute governing employment relations. *E.g.*, *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535–36 (1982) (Title IX proscribes employment discrimination based on sex in federally funded programs); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 460 (1975) (42 U.S.C. § 1981 bars employment discrimination based on race); *see also Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 65 n.4 (1992) (leaving whether the legal standard under Title VII and Title IX is the same an open question).

"[L]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). That is as true of the Church, Coats-Snowe, and Weldon Amendments as it is of any other nondiscrimination statute. *Cf. id.* at 48 (Congress intended

"to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes").

Any claim that the 2019 rule is arbitrary and capricious because it "conflict[s]" with, 414 F. Supp. 3d at 557, "override[s]," *id.*, or "is bounded by Title VII," *id.* at 529, is doomed to failure. States and localities have long had their own employment nondiscrimination rules, some of which are significantly more protective of religious liberty than Title VII's prevailing interpretation. *But see Patterson v. Walgreen Co.*, 140 S. Ct. 685, 685–86 (2020) (Alito, J., concurring in the denial of certiorari) (calling that interpretation into question).

California, for instance, requires employers to accommodate employees' religious practices unless they impose an "undue hardship." Cal. Gov. Code § 12940(l)(1). And California defines an undue hardship as a "significant difficulty or expense," not a de minimis one. *Compare* Cal. Gov. Code § 12926(u), *with Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). That California's nondiscrimination law differs from Title VII has caused no chaos, as the Southern District of New York suggested. Nor will the sky fall if this Court allows the 2019 rule to take effect.

The district courts' inconsistent-provisions rationale is similar to the conflict Justice Powell posited between Title VII and Title IX in the employment context nearly 40 years ago. *N. Haven Bd. of Educ.*, 456 U.S. at 552–54 (Powell, J., dissenting). Just like a majority of the

Supreme Court rejected Justice Powell's grounds for denying employees additional protection under Title IX, this Court should reject the Southern District of New York's reasons for denying employees more protection under the conscience provisions and the 2019 rule that gives them effect.

C. Conscientious objectors have no desire to abandon patients in true emergencies, and wild speculation they would is grounded in hostility, not fact.

Last but not least, the Southern District of New York identified a hypothetical conflict between the 2019 rule and the Emergency Medical Treatment and Labor Act. *New York*, 414 F. Supp. 3d at 537–39. But that clash is imaginary, born of Plaintiffs' mistrust of objecting healthcare professionals and the faith that animates their lives. The only support the district court gave for such wild speculation was a *hypothetical* ambulance driver who refuses to drive a patient to the hospital for emergency care related to an ectopic pregnancy. *Id.* at 555, 539.

No actual evidence of a serious problem exists. So the district court made one up. Yet courts cannot facially invalidate administrative guidelines by hypothesizing about some extraordinarily unlikely dilemma that might occur. At the very least, there must be a prevalent concern, grounded in the administrative record, that HHS unjustifiably ignored. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto.*

Ins. Co., 463 U.S. 29, 43 (1983) (to be arbitrary and capricious the agency must have "entirely failed to consider an *important* aspect of the problem") (emphasis added). Nothing of the sort exists here.

Amici know and represent thousands of healthcare professionals with conscientious objections to abortion. They are aware of no ambulance drivers who would object to transporting a woman with an ectopic pregnancy to the hospital for emergency care. Such an objection would have to be grounded in the belief that there is no morally permissible treatment for an ectopic pregnancy. Amici are aware of no faith tradition that holds that belief.

Amici and those like them are consummate professionals who have dedicated their lives to providing all their patients with the highest quality medical care. They do so not in spite of their religious beliefs but *because* their faith teaches that every life is God-given, valuable, and should be protected. Amici care about women's health and they work diligently to improve it every day. Suggesting that Amici and those they represent would abandon a woman experiencing a true medical emergency is not just baseless and irresponsible, it is offensive.

It is entirely possible for healthcare professionals to serve the public health and keep the faith. Amici do so every day. The stories of conscientious objectors recounted above demonstrate how that works in practice. *Supra* Part I. These accounts have the benefit of being concrete, factual, and real. HHS reasonably credited them and drafted

the 2019 rule to address these crises of conscience—*actual* violations of federal law that the district courts unjustifiably ignored.

CONCLUSION

Amici respectfully ask that this Court reverse the district courts' rulings Plaintiffs' favor and uphold HHS's promulgation of the 2019 rule. That rule is a reasonable and good-faith effort to enforce the nondiscrimination conditions Congress imposed on those who voluntarily accept certain federal funds.

Respectfully submitted,

/s/ Rory T. Gray

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June 22, 2020

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2020, the foregoing amicus brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Rory T. Gray
Rory T. Gray

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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