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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II, et al.,

Defendants-Appellants.

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

REPLY BRIEF FOR APPELLANTS

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

DAVID L. ANDERSON
WILLIAM D. HYSLOP
United States Attorneys

MICHAEL S. RAAB
LOWELL V. STURGILL JR.
SARAH CARROLL
LEIF OVERVOLD
Attorneys, Appellate Staff
Civil Division, Room 7226
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 532-4631

Of Counsel:

ROBERT P. CHARROW
General Counsel

SEAN R. KEVENEY
Deputy General Counsel

U.S. Department of Health & Human Services

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INTRODUCTION AND SUMMARY

The Department of Health and Human Services' (HHS's) provider conscience rule collects conscience-related statutory requirements applicable to HHS funds, offers the best reading of key statutory terms, and clarifies procedures for ensuring statutory compliance. The Rule is within HHS's authority and consistent with the Administrative Procedure Act (APA), other statutes, and the Constitution. Erroneously assuming the Rule expands on the conscience statutes' protections, plaintiffs fail to persuasively defend the district courts' criticisms. At minimum, the courts lacked authority to vacate the Rule beyond the parties to these suits and the aspects of the Rule the courts found invalid.

ARGUMENT

I. The Rule Is Within HHS's Authority

Plaintiffs challenge the interpretive and housekeeping nature of the Rule by asserting it changes HHS's existing enforcement authority or requirements imposed by the conscience statutes. The Rule has no such effects, however, and HHS plainly has authority to issue a Rule outlining HHS's procedures for enforcing the conscience statutes, ensuring statutory compliance through certification requirements, and interpreting statutory terms.

A. The Rule's Enforcement Provisions Permissibly Set Out Actions HHS May Take To Respond To Noncompliance With The Conscience Statutes

The Rule's enforcement provisions outline HHS's existing authority to take action to enforce the conscience statutes. *See* Appellants' Opening Br. (AOB) 20-24. Such provisions are not "legislative" (SF Br. 37) but rather are consistent with preexisting regulatory authorities and are authorized by HHS's housekeeping authority and the conscience statutes themselves.

Under its unchallenged grant and contract administration authority, HHS may "terminate the Federal award," 45 C.F.R. § 75.371, or "terminate the contract completely or partially," 48 C.F.R. §§ 49.402-1, 52.249-8, if a recipient violates applicable requirements. Plaintiffs do not meaningfully dispute that HHS can enforce the conscience statutes by terminating funding. *See* Cal. Br. 24 (recognizing violations of the conscience statutes may implicate "specific streams of funding"); SF Br. 39-40 (recognizing conscience statutes may be enforced "on a case by case basis").[1]

[1] To the extent Santa Clara disagrees (Br. 41), it does not explain why HHS should be precluded from enforcing conditions imposed by the conscience statutes through HHS's general grant and contract administration authorities. It further misunderstands the import of *United States v. Marion County School District*, 625 F.2d 607, 611 (5th Cir. 1980), and the case law that decision discusses. That case recognized that the government may sue to enforce conditions placed on federal funds without a particular statute authorizing it to do so. *See id.* The same logic implies that the government may enforce such requirements by simply declining to continue to provide conditioned funding to a recipient that does not comply with the relevant condition.

Instead, plaintiffs assert that one subparagraph of the Rule—stating that HHS may effect compliance with the conscience statutes by "[t]erminating Federal financial assistance or other Federal funds from the Department, in whole or in part," 45 C.F.R. § 88.7(i)(3)—impermissibly authorizes HHS to "immediately terminate or withhold *all* HHS-administered federal financial assistance" that an entity receives based on noncompliance with "*any* of the federal provisions listed in the Rule or the Rule itself." Cal. Br. 23-24; *see also* SF Br. 39.

That is incorrect. The Rule's preamble (and not any "litigating position" (Cal. Br. 26)) makes clear that a conscience-statute violation threatens only "the funding streams that such statutes directly implicate." 84 Fed. Reg. 23,170, 23,223 (May 21, 2019). The challenged provision, moreover, merely presents termination of HHS funding as one of a range of remedies HHS "may" take in response to the gamut of violations HHS may encounter. *See* AOB 21; *cf. Munsell v. USDA*, 509 F.3d 572, 587 (D.C. Cir. 2007) (noting, where challenged directive listed several discretionary enforcement actions, "it is unclear if, when or how the agency will employ it" (quotation marks omitted)). Plaintiffs also do not dispute that at least one conscience statute—the Weldon Amendment—may impose requirements on all funding an entity receives from the Federal government. *See* Cal. Br. 26; *see also* AOB 23-24. Nor do they identify anything in the HHS Uniform Administrative Requirements (UAR) or Federal Acquisition Regulation that would preclude a recipient-wide funding

termination where a violation extends to each award received. At minimum, including this provision among a range of remedies is not facially invalid.

Plaintiffs complain that the Rule's enforcement provisions do not incorporate certain funding-termination procedures from the HHS UAR. Santa Clara Br. 43. But the Rule does not supplant the UAR, *see* 84 Fed. Reg. at 23,184, and requires HHS to act "pursuant to statutes and regulations" governing its funding arrangements. 45 C.F.R. § 88.7(i)(3). That is equally true for any "funding claw backs," Santa Clara Br. 43, contemplated. *See* 84 Fed. Reg. at 23,180 (identifying funding claw backs as potential enforcement mechanism "to the extent permitted by law").

B. The Rule's Certification Requirements Permissibly Ensure Compliance With The Conscience Statutes

Consistent with existing authorities, HHS may require recipients to certify compliance with applicable conscience statutes. *See* 45 C.F.R. § 75.300(a); 48 C.F.R. § 1.301(a)(1); AOB 25-26. Santa Clara suggests (Br. 40) this aspect of the Rule is substantive, citing *New York v. HHS*, 414 F. Supp. 3d 475, 526 (S.D.N.Y. 2019), *appeal filed*, Nos. 19-4254 et al. (2d Cir. Dec. 18, 2019), but does not address that court's reliance on an inapposite Second Circuit decision, *Perales v. Sullivan*, 948 F.2d 1348 (2d Cir. 1991). *See* AOB 25-26. Unlike in *Perales*, plaintiffs have notice of the Rule's certification requirements, which reflect existing duties that the conscience statutes impose on HHS and its funding recipients. Nor do the projected costs associated with the certification requirements render them substantive (Santa Clara Br. 44); the

Rule simply "alter[s] administrative duties" without changing the statutes' substantive requirements. *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984); *cf. JEM Broad. Co. v. FCC*, 22 F.3d 320, 327 (D.C. Cir. 1994) (rule not substantive where it did not change substantive standards, even if procedural requirements "might have harsh effects").

While plaintiffs fault HHS for requiring compliance with both the statutes and the Rule (SF Br. 40), the Rule provides the best reading of statutory terms and collects relevant statutory requirements, imposing no duties beyond the statutes. *See infra* section I.C. The provision is thus neither "substantive" nor otherwise outside HHS's authority to ensure statutory compliance.

C. The Rule's Definitional Provisions Clarify Duties Imposed By The Conscience Statutes

Plaintiffs assert that the Rule's definitional provisions render it substantive. But substantive rules "create rights, impose obligations, or effect a change in existing law," *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003), while "an interpretation that spells out the scope of an agency's pre-existing duty will be interpretive, even if it widens that duty," *Erringer v. Thompson*, 371 F.3d 625, 632 n.12 (9th Cir. 2004) (quotation marks and alterations omitted). The definitional provisions are interpretive because they create no new rights or duties, instead clarifying those the statutes impose.

1. The validity of the Rule's definitions "stands or falls on the correctness of the agency's interpretation of [the statutory] provisions," *United Techs. Corp. v. EPA*,

821 F.2d 714, 719-20 (D.C. Cir. 1987), the hallmark of an interpretive rule. No plaintiff defends the *New York* court's erroneous focus on whether the Rule "shapes the primary conduct of regulated entities." 414 F. Supp. 3d at 522. San Francisco suggests an interpretive rule can only "express the agency's intended course of action" or "its tentative view" of a statutory term's meaning, Br. 18, 21 (quoting *Zaharakis v. Heckler*, 744 F.2d 711, 713 (9th Cir. 1984)), but this Court has held that the "binding" nature of a rule does not render it substantive where it "simply explain[s] something the statute already required," *Alcaraz*, 746 F.2d at 613-14; *see also Metropolitan Sch. Dist. of Wayne Twp. v. Davila*, 969 F.2d 485, 493 (7th Cir. 1992) ("All rules which interpret the underlying statute must be binding because they set forth what the agency believes is congressional intent.").

Plaintiffs argue that the Rule is legislative because the definitions use "prescriptive terms." SF Br. 23. But the definitional section uses "shall not" only once—stating that an entity "shall not be regarded as having engaged in discrimination" where it offers and a protected entity accepts an effective accommodation, 45 C.F.R. § 88.2—and that provision has no prescriptive effect on regulated entities. Likewise, "may only" appears once, indicating a limit on HHS's understanding of the reach of "discrimination," and does not render that provision (or the section as a whole) prescriptive. The argument that the Rule's definitional section gives content to the "Requirements" section (SF Br. 22-23) misses the point, since 45 C.F.R. § 88.3 simply collects statutory requirements (which plaintiffs do not

dispute), and the definitions offer the best reading of terms in those statutes. While this Court has recognized that substantive rules are "usually implementary to an existing law," *Alcaraz*, 746 F.2d at 613 (quotation marks omitted), it has not held that passing reference to "implementation" of statutes, *see* 45 C.F.R. § 88.1 (Rule's "Purpose" section), renders substantive a rule that "imposed no other substantial legal (as opposed to administrative) duties on the plaintiffs other than what the statute already imposed," *Alcaraz*, 746 F.2d at 614.

Plaintiffs' reference to exchanges before the New York district court regarding the Rule's purportedly substantive nature and before the California district court regarding the government's substantive rulemaking authority (Santa Clara Br. 39; SF Br. 19; Wash. Br. 19-20) elides the pertinent question, which, as demonstrated above, is whether the Rule adds to the obligations the statutes impose. It does not. And if the agency's "own label and intent" were relevant in determining whether a rule is substantive or interpretive (SF Br. 18), the Rule's preamble makes HHS's characterization clear: the Rule "does not substantively alter or amend the obligations of the respective statutes." 84 Fed. Reg. at 23,185. Finally, while the government invoked *Chevron* deference in its district court briefing, the briefing also emphasized that the Rule did not alter statutory requirements and set forth HHS's internal processes for enforcing the statutes. SER 1928-30, 1970.

2. Plaintiffs' arguments regarding the Rule's definitions likewise lack merit.

a. Plaintiffs contend that the statutory phrase "assist in the performance" has a term-of-art meaning limited to "a medical professional helping a treating doctor by physically handling instruments or the patient." SF Br. 27; *see also* Santa Clara Br. 28. But they base this argument only on extra-record declarations that the district court concluded were not relevant to its consideration of plaintiffs' APA claims, *see* ER 65, without demonstrating that any of the narrow circumstances in which courts may review extra-record materials exist here. *See, e.g.*, *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 600 (9th Cir. 2018). The Church Amendments' text and structure, moreover, expressly extend the provisions' protection to both "performance" and "assist[ance] in the performance." 42 U.S.C. § 300a-7(c)(1)-(2), (d); *see also id.* § 300a-7(b)(2)(A) (protecting hospitals, whose participation is necessarily indirect and involves "mak[ing] facilities available" or "provid[ing] any personnel" for a procedure). The Rule's definition tracks the meaning of the terms Congress chose and does not read "performance" out of the statute (Wash. Br. 35) but instead gives effect to the separate inclusion of "*assist* in the performance."

Congress sensibly chose to expand this protection, as religious or moral objections to complicity in acts believed to be immoral are not limited to direct support. *See* AOB 31-32. Contrary to plaintiffs' suggestion (Wash. Br. 36), the potential breadth of conscience-based objections was recognized long before Congress enacted the Church Amendments. *Cf. United States v. Seeger*, 380 U.S. 163,

177-78 (1965) (reflecting congressional consideration of those with "religious scruples against rendering military service in its various degrees").

Washington notes (Br. 35) that a separate Church Amendments provision references "counsel[ing]." *See* 42 U.S.C. § 300a-7(e). Washington does not explain, however, why Congress's choice to expressly cover such aid in that provision, added separately in 1979, requires a narrower understanding of "assist[ance]" in distinct provisions, or why Congress would provide broader protection to applicants for training or study than to those covered by other Church Amendments provisions. *See* 84 Fed Reg. at 23,188. Nor does it indicate why a reference to "training" or "referrals" in other conscience statutes narrows the meaning of the Church Amendments' plain terms.

The legislative-history colloquies on which plaintiffs (*e.g.*, Wash. Br. 35-36) rely indicate only that Congress did not intend the Church Amendments to protect a "frivolous objection from someone unconnected with the procedure" or someone with "no responsibility, directly or indirectly with regard to [its] performance." 119 Cong. Rec. 9597 (1973). That is consistent with the Rule's requirement that an action have a "specific, reasonable, and articulable connection" to furthering a procedure and its recognition that assistance may be provided in numerous ways. 45 C.F.R. § 88.2. In any case, individual legislators' floor statements warrant little weight, *see, e.g.*, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017), and cannot import an atextual limitation into the statute.

b. Plaintiffs do not dispute that actions catalogued in paragraphs (1)-(3) of the Rule's definition of "discriminate or discrimination" comport with the terms' ordinary meaning. While plaintiffs argue that the definition "expands liability by making 'any' employment change actionable" (Wash. Br. 30), they do not identify covered actions that fall outside the terms' ordinary understanding, and in any event the Rule simply provides a non-exhaustive list of actions that *may* constitute discrimination, 45 C.F.R. § 88.2. Plaintiffs appear to question whether a transfer or reassignment may be discriminatory. *See* SF Br. 35; Wash. Br. 30-31 (citing *NFPRHA v. Gonzales*, 468 F.3d 826, 829-30 (D.C. Cir. 2006)). But they provide no basis for thinking that a reassignment for impermissible reasons could not constitute discrimination if, for example, it represents an "exclu[sion] from" employment. 45 C.F.R. § 88.2; *see also* 73 Fed. Reg. 78,072, 78,077 (Dec. 19, 2008) (rejecting suggestion that reassigning objecting employee can never constitute discrimination).

Though plaintiffs argue that the Rule should incorporate Title VII's undue-hardship and reasonable-accommodation defenses (Santa Clara Br. 34; SF Br. 35-36; Wash. Br. 22-27), the conscience statutes neither expressly nor implicitly import these defenses (or related requirements regarding, for example, negotiating an appropriate accommodation, *see* Wash. Br. 28-29). *See infra* section II.A.1. Plaintiffs also suggest that paragraphs (4)-(6) of the Rule's "discrimination" definition "place[] unprecedented restrictions" on providers' ability to accommodate objections. Santa Clara Br. 32. But paragraphs (4)-(6) describe conduct that would not be considered

discrimination; that conduct falls outside these paragraphs does not necessarily mean it falls within paragraphs (1)-(3), which describe actions that may constitute discrimination "as applicable to, and to the extent permitted by," a given conscience statute. 45 C.F.R. § 88.2. The Rule explains, for example, that "non-retaliatory staff rotations" do not amount to discrimination, 84 Fed. Reg. at 23,191, and whether any particular rotation amounts to retaliation will depend on all the facts and circumstances. *See* AOB 33-34.

Finally, plaintiffs suggest that the Rule's definition impermissibly prevents employers from inquiring about, or taking action with respect to, an applicant's willingness to perform certain functions even where those functions are "central to the job" at issue. SF Br. 35; *see also* Wash. Br. 30-32. But the Rule allows employers to inquire about conscience objections, *inter alia*, when "supported by a persuasive justification." 45 C.F.R. § 88.2. HHS specifically declined to resolve how the Rule would apply where an employee objected to performing essential job functions, moreover, because "the Department [was] not aware of any instances in which individuals with religious or moral objections to [covered] practices have sought out such jobs." 84 Fed. Reg. at 23,192. And while HHS did not, for example, authorize rural hospitals to discriminate where the statutes would prohibit it (and had no textual basis for doing so) (*see* Wash. Br. 32-33), it also did not decide how other hypothetical scenarios would be resolved given the inquiry's undisputedly fact-dependent nature.

c. San Francisco defends (SF Br. 34 n.9) the California court's invalidation of the Rule's "entity" definition, but does not explain why the court could properly request briefing on a challenge no party had raised. *Cf. United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). Nor does it explain why any plaintiff would have standing to challenge this element of the Rule. *See* AOB 35.

Plaintiffs further do not dispute that the Rule's definition fits within the term's ordinary meaning. *See* SF Br. 33-34; Santa Clara Br. 37. And they identify nothing in the Church Amendments' use of the terms "entity" and "individual" suggesting that Congress intended to excuse fund recipients from complying with the statute simply because they are individuals, much less grounds for any such statute-specific concern to warrant facial invalidation of a definition applicable to the Rule as a whole. *See* AOB 35-36.

d. Plaintiffs object to the inclusion of "pharmacist[s]," "pharmac[ies]," and "medical laborator[ies]" in the Rule's Coats-Snowe-specific definition of "health care entity" because those entities "do not offer training on abortion, nor are they involved in the performance of the procedure itself." Cal. Br. 21; *see also* Santa Clara Br. 35; Wash. Br. 38. But the statutory text covers the broader category of "participant[s] in a program of training in the health professions," 42 U.S.C. § 238n(c)(2), and extends protections beyond the training context, *id.* § 238n(a)(1). Plaintiffs do not dispute that the additional categories the Rule's definition covers are "health care entities" under any ordinary understanding of the term.

Nor does the *ejusdem generis* canon require a narrower reading. *See, e.g.*, SF Br. 32. That canon does not displace a statutory term's plain meaning, particularly when the examples the statute "includes" are illustrative rather than exhaustive (which is plainly the case here). *See, e.g.*, *United States v. Migi*, 329 F.3d 1085, 1088-89 (9th Cir. 2003). Even if the "defining essence," Santa Clara Br. 37, of the statute's examples were relevant, that "essence" is that they are all health-care entities potentially involved in abortion, through training and other means. Similar efforts to limit Coats-Snowe's plain text by reference to its purpose (Wash. Br. 38) ignore "the reality that," even if the narrow purpose asserted were accurate, "the reach of a statute often exceeds the precise evil to be eliminated." *Brogan v. United States*, 522 U.S. 398, 403 (1998).

As for Weldon and the Patient Protection and Affordable Care Act (ACA), plaintiffs do not dispute that plan sponsors and third-party administrators listed in the Rule's "health care entity" definition provide or administer health-care coverage. They suggest the statutory term applies only to "direct participants in the health care industry," Wash. Br. 39, or that the manner of plan sponsors' and third-party administrators' involvement in health care somehow does not qualify (Cal. Br. 22-23; Wash. Br. 39), but those limitations have no basis in the statutory text. The same is true of San Francisco's objection to the inclusion of "health care personnel" because that term may include persons "not directly involved in patient care." Br. 32-33.

Here too, moreover, *ejusdem generis* cannot displace the term's plain meaning, and the Rule's definition includes entities that are in any case similar to those the statutes enumerate because of their role in delivering health care. *See* AOB 38. And while plaintiffs highlight the district court's reliance on a statement from Representative Weldon (Cal. Br. 23 (citing ER 53)), that statement cannot limit the statutory text. *See* AOB 38-39.

e. Plaintiffs do not rebut the government's showing that the Rule's definition of "referral of refer for" comports with the terms' ordinary understanding, nor do they attempt to defend the California district court's reliance on inapposite legislative history to support a contrary understanding. *See* AOB 39-41. They claim the Rule's definition is too broad (Santa Clara Br. 42), but fail to explain why providing information, where it will reasonably foreseeably aid a person in obtaining a procedure, does not "actually send[] or direct[]" a person for that procedure. AOB 40. The Rule's preamble makes clear, moreover, that the definition relies on a "non-exhaustive list of illustrations to guide the scope of the definition," recognizing that the terms "take many forms and occur in many contexts." 84 Fed. Reg. at 23,201.

Plaintiffs argue that "referral or refer for" should be defined by reference to the terms' asserted term-of-art usage in the medical context. SF Br. 29-30; Santa Clara Br. 41-42; Cal. Br. 29-30. But they identify nothing adopting that definition for these provisions. Nor do plaintiffs attempt to reconcile their proposed meaning with

Coats-Snowe's protections relating to referring "for" abortion generally or referrals for abortion-related *training*. 42 U.S.C. § 238n(a)(1).

II. Plaintiffs' Other Criticisms Of The Rule Lack Merit

A. The Rule Is Not Contrary To Law

1. The Rule Is Consistent With Title VII

The Rule does not conflict with Title VII by not including Title VII's reasonable-accommodation and undue-hardship defenses. Title VII does not require that those defenses be applied in this context, and the later-enacted conscience statutes do not include them. *See* AOB 41-44.

Plaintiffs provide no textual basis for reading these defenses into the conscience statutes. Plaintiffs' concerns about patient safety cannot justify departure from the statutory terms Congress enacted, and plaintiffs are wrong in any event to assume hospitals cannot recognize statutorily protected conscience objections while also providing adequate patient care. *See infra* section II.B.

That Title VII's undue-hardship defense predated the conscience statutes (*see* SF Br. 46) does not provide a ground for reading that defense into the conscience statutes. To the contrary, that timing confirms that Congress deliberately chose *not* to include these Title VII defenses in this context. *See DHS v. MacLean*, 574 U.S. 383, 393-94 (2015); AOB 43. Plaintiffs attempt to distinguish *MacLean* on the facts (Wash. Br. 24-25), but the point is that Congress plainly knew how to adopt these defenses

and neither did so for the conscience statutes nor incorporated Title VII's definition of "religion" in which they are found.

The Rule does not facially conflict with Title VII (SF Br. 45-46) by specifying that an employer does not engage in prohibited discrimination where it "offers and the protected entity voluntarily accepts an effective accommodation," 45 C.F.R. § 88.2; those provisions simply describe conduct that is not considered discriminatory. *See supra* section I.C.2.b. Resolving whether any particular action constitutes discrimination under the Rule's definition involves consideration of all facts and circumstances, *see id.*, as under Title VII, *see*, *e.g.*, *Shelton v. University of Med. & Dentistry of N.J.*, 223 F.3d 220, 226-27 (3rd Cir. 2000) (employer offered reasonable accommodation under Title VII where employee failed to prove that transfer would subject her to religious conflict or adversely affect her pay and benefits). Plaintiffs' citations (SF Br. 46) to various other fact-specific rulings regarding whether an accommodation was reasonable under Title VII accordingly do not reveal any facial conflict between the Rule and Title VII either.

2. The Rule Is Consistent With EMTALA

The *New York* court incorrectly held that the Rule facially conflicts with the Emergency Treatment and Active Labor Act (EMTALA), which requires hospitals with emergency rooms either to (A) stabilize a presenting patient's emergency medical condition "within the staff and facilities available at the hospital" or (B) transfer the patient to another medical facility as permitted by EMTALA. 42 U.S.C.

§ 1395dd(b)(1). The *New York* court's concerns (repeated by plaintiffs here) that the Rule would preclude hospitals from providing EMTALA-required emergency care are unfounded and represent at most grounds for potential as-applied challenges to the Rule, not a facial attack. *See* AOB 44-47.

San Francisco's contention that the Rule facially conflicts with EMTALA because the Rule "categorically places the objector's beliefs over the needs of the patient in *every* instance in which a conflict between them arises," Br. 42, wrongly assumes such a conflict will inevitably occur. The Rule empowers hospitals to prevent such conflicts by requiring employees to disclose objections upon hiring, annually thereafter, and whenever there is a "persuasive justification." *See* AOB 46.[2] Accordingly, the Rule does not conflict with EMTALA merely because, hypothetically, every staff member in a hospital could raise a protected conscience objection to a particular medical service. *Cf.* Santa Clara Br. 47. The Rule provides hospitals with a mechanism to plan for that hypothetical situation, and every other context in which the conscience statutes require an exception for objecting employees, and plaintiffs provide only unwarranted speculation (*see* Cal. Br. 33 n.11)

[2] As of 2008, HHS was not aware of any instance in which a facility was unable to provide EMTALA-required emergency care because its entire staff objected to the service on religious or moral grounds. *See* AOB 44-45. California argues (Br. 31) that the record "belies" that fact, but the cited materials concern hospital policies, rather than denials of service resulting from employee-conscience objections. Similarly, the examples Santa Clara cites (Br. 48) appear not to involve either the denial of hospital emergency services required by EMTALA or the denial of services resulting from individual emergency room employees' conscience objections.

in suggesting that the provision will be ineffective in each such situation. While California posits (Br. 33 n.11) that HHS would not accept a hospital's need to provide emergency care as a "persuasive justification," the Rule expressly notes that employers may require a protected employee to inform them of such objections "to the extent there is a reasonable likelihood that" the employee "may be asked in good faith" to provide objected-to services. 45 C.F.R § 88.2.

Accordingly, the Rule does not "admit[] that patients can be denied care in emergencies," Santa Clara Br. 48, but rather contemplates that hospitals can and must comply fully with both the conscience statutes and EMTALA, by planning for the possibility of conscience-based objections, *see* AOB 46. Plaintiffs' discussion of various hypothetical situations (*see* SF Br. 42-43; Cal. Br. 30-31) fails to identify a facial conflict with EMTALA for the same reason; each hypothetical wrongly assumes that the Rule would result in the denial of emergency care and that a hospital could not plan for potential conscience objections.[3]

Even if honoring a conscience objection protected by a conscience statute (other than the ACA, which contains an exception for EMTALA-required emergency services, *see* AOB 45) would result in the denial of medical services EMTALA would

[3] For example, the Rule does not specify that transporting a patient with an ectopic pregnancy to a hospital necessarily would qualify as assisting in the performance of a medical procedure. Rather, the Rule's application in that context would depend on the facts and circumstances, *see* 84 Fed. Reg. at 23,188, and is thus not amenable to a facial challenge, *see* AOB 44-45.

otherwise require, EMTALA would not compel a violation of the applicable conscience statute. The ACA's inclusion of an express EMTALA exemption shows that Congress did not intend to include such an exemption in any of the other conscience statutes, *see* AOB 45, and EMTALA also requires emergency care only "within the staff and facilities available at the hospital." 42 U.S.C. § 1395dd(b)(1). Statutorily protected conscience objections can affect what staff are "available at the hospital," and plaintiffs identify no case that has held otherwise.[4]

Finally, as explained (*see* AOB 47), plaintiffs' reliance on statements by individual legislators (*see* SF Br. 44; Santa Clara Br. 47; Cal. Br. 33) does not support overriding the text of the conscience statutes and EMTALA. In addition, EMTALA does not override the conscience statutes on the ground that it is more specific (Cal. Br. 33) since the statutes do not conflict and the conscience statutes are in any event more specific in addressing conscience objections in particular.

B. The Rule Is Not Arbitrary And Capricious

1. Plaintiffs do not dispute that the APA's arbitrary-and-capricious standard is "deferential" and "narrow," *Department of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (quotation marks omitted), and that consistency with statutory language is itself adequate justification for an agency's choice, *Encino Motorcars, LLC v. Navarro*, 136 S.

[4] Plaintiffs (SF Br. 44; Santa Clara Br. 45 n.11) cite *In re Baby K*, 16 F.3d 590 (4th Cir. 1994), for the proposition that employees' conscience rights must yield to EMTALA, but that case did not involve an asserted federal statutory right. *See id.* at 597.

Ct. 2117, 2127 (2016). The Rule's definitional provisions reflect the best reading of the conscience statutes, providing significant public benefits of notice and clarity. While plaintiffs allege that enforcement of the statutes imposes various costs, Congress, not HHS, was responsible for weighing those considerations.

2. Plaintiffs' criticisms also lack merit on their own terms. Plaintiffs complain that HHS had an inadequate basis for promulgating the Rule, focusing on HHS's statement that there had recently been a "significant increase" in complaints alleging conscience violations. 84 Fed. Reg. at 23,175. As the Rule explains and plaintiffs do not dispute, HHS's Office of Civil Rights (OCR) received "approximately 1.25 complaints per year alleging such violations during the eight years preceding the change in Administration." *Id.* at 23,245. By contrast, even on plaintiffs' view of the record (*see* Cal. Br. 37-38; Wash. Br. 46-47), OCR received about 20 complaints implicating the conscience provisions in a single fiscal year shortly before the Rule was issued. That increase would indisputably be "significant" even if plaintiffs' total were correct.

Plaintiffs focus on a few statements in the Rule's preamble that HHS received 343 complaints alleging conscience violations in one recent fiscal year, but plaintiffs are wrong to claim the Rule is premised on any specific number of meritorious complaints. *See, e.g.*, Wash. Br. 46-48; Cal. Br. 39. Indeed, even the fact of an *increase* in complaints, which is indisputable even assuming the absolute *number* of complaints is not, was only "one of the many metrics used to demonstrate [the Rule's]

importance." 84 Fed. Reg. at 23,229; *see id.* at 23,175-78 (discussing other support); *cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 517 (2009) (explaining that "superfluous" reasoning in an agency decision does not provide basis for reversal, even if it "may not be entirely convincing").

Plaintiffs also dispute HHS's conclusions that discrimination and public confusion regarding the conscience statutes supported the Rule's promulgation. But plaintiffs' attempts to rebut HHS's analysis of these points (Wash. Br. 49-51; Cal. Br. 40) simply underscore that these are not issues HHS "entirely fail[ed] to consider," *Ursack, Inc. v. Sierra Interagency Black Bear Grp.*, 639 F.3d 949, 957 (9th Cir. 2011). There was ample support for HHS's judgment that it would be useful to issue a Rule clarifying the conscience statutes and the tools for enforcing them. HHS received comments, for example, stating that health professionals' careers were "jeopardized because entities [were] completely unaware or willfully dismissive of applicable" conscience statutes. 84 Fed. Reg. at 23,228-29; *see id.* at 23,178-79. HHS noted a series of lawsuits claiming that "Federal or State laws require private religious entities to perform abortions and sterilizations" notwithstanding the conscience statutes. *Id.* at 23,178. And HHS believed some conscience statutes might never even have been enforced because HHS "ha[d] devoted no meaningful attention to [them], ha[d] not conducted outreach to the public on them, and ha[d] not adopted regulations with enforcement procedures for them." *Id.* at 23,183.

Washington alleges that HHS "investigated and resolved less than five percent" of complaints from fiscal year 2018, before the Rule was issued, and suggests that HHS therefore had no reason to clarify its enforcement procedures. Wash. Br. 52. But if anything, a suggestion that HHS's prior enforcement efforts were meager supports a decision to clarify HHS's procedures for investigating and resolving such matters, not Washington's suggestion that no change was needed. The record contains numerous examples of alleged discrimination against health-care professionals based on their conscience beliefs, and if HHS had not previously acted on many such complaints, that would only underscore the Rule's importance.

3. Plaintiffs also claim HHS inadequately considered various matters. But even a legislative rule may be overturned as arbitrary and capricious only if the agency "entirely failed to consider an important aspect of the problem," for instance, or reached a conclusion "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 957 F.3d 1024, 1033 (9th Cir. 2020) (quotation marks omitted). The Rule's extensive analysis would easily clear that bar even assuming it applied.

Plaintiffs contend that HHS inadequately grappled with various harms they claim the Rule will cause. But the Rule's definitional provisions simply set out HHS's reading of terms in the conscience statutes, and an agency cannot "excuse" a regulated entity from complying with a federal statute based "on a finding that the detrimental effects of compliance outweigh the benefits." *New York v. Department of Justice*, 951

F.3d 84, 122 (2d Cir. 2020). In any event, HHS carefully considered all the issues plaintiffs raise here. *See, e.g.*, 84 Fed. Reg. at 23,180-82, 23,246-48, 23,250-54 (access to care, including in rural communities); *id.* at 23,182-83, 23,188, 23,224 (emergency care and EMTALA); *id.* at 23,189, 23,200 (informed consent and medical ethics); *id.* at 23,191 (interaction with Title VII); *id.* at 23,191-92, 23,217, 23,219, 23,239-46 (alleged burdens on hospitals); *id.* at 23,251-54 (LGBT patients and other underserved communities). At bottom, plaintiffs are left to label HHS's analysis insufficiently "meaningful[]." Wash. Br. 53. But HHS considered the issues plaintiffs raise, and agency action is not arbitrary and capricious simply because plaintiffs or a reviewing court might disagree with the agency's conclusions. *See Fox*, 556 U.S. at 513 ("[A] court is not to substitute its judgment for that of the agency[.]" (quotation marks omitted)).[5]

4. Contrary to plaintiffs' contention, the Rule did not upend legitimate reliance interests. In the 2011 Rule, HHS cautioned that "Departmental funding recipients must continue to comply with the" conscience statutes and stated that "individual investigations w[ould] provide the best means of answering questions about the

[5] Plaintiffs complain (*e.g.*, Santa Clara Br. 54-55) that HHS relied on anecdotal evidence supporting its conclusions, while rejecting anecdotal evidence of potential harm to certain communities. HHS considered the accounts of harm and concluded that they did not establish that the conscience statutes had "played any causal role in the discrimination experienced," 84 Fed. Reg. at 23,252, a determination well within HHS's broad discretion to weigh the record evidence, *see Trout Unlimited v. Lohn*, 559 F.3d 946, 959 (9th Cir. 2009) ("It is not our role to ask whether we would have given more or less weight to different evidence, were we the agency.").

application of the statutes in particular circumstances." 76 Fed. Reg. 9968, 9972-74 (Feb. 23, 2011). The 2011 Rule therefore did not set standards of conduct on which regulated entities might rely, nor do plaintiffs identify any agency pronouncement that could support their broad assertions of reliance.

Though San Francisco asserts that the Rule conflicts with its "understanding" of Title VII and EMTALA, SF Br. 48, San Francisco does not claim any such "understanding" originated from HHS. To the contrary, the 2011 Rule expressly declared "[t]he relationship between the protections contained under the [conscience statutes] and the protections afforded under Title VII" to be "outside" that rule's "scope." 76 Fed. Reg. at 9973; *see also* 73 Fed. Reg. at 78,084 (finding it not "necessary or appropriate to incorporate elements of Title VII jurisprudence into" 2008 Rule). HHS likewise declined in the 2011 Rule to address the conscience statutes' relationship with EMTALA, deciding instead to resolve "any perceived conflicts" through "a case by case investigation and, if necessary, enforcement." 76 Fed. Reg. at 9973.

California claims it relied on HHS's 2016 decision to close three complaints challenging California's requirement that health-insurance plans cover abortion. *See* Br. 41-42. The closure of three complaints in 2016 does not give rise to "decades"-long "industry reliance" on an agency "policy" of the sort *Encino Motorcars* addressed, *see* 136 S. Ct. at 2126, nor, in any event, does the Rule's preamble even "ma[k]e a judgment" about "the compatibility of California's policy with the Weldon

Amendment." 84 Fed. Reg. at 23,179. California asserts more generally that it relied "on the underlying conscience provisions themselves," Br. 43, but the Rule does not purport to alter those statutes' protections. Far from making a "policy" change of the sort addressed in *Encino Motorcars*, 136 S. Ct. at 2126, the Rule merely provides notice of HHS's reading of statutes to which plaintiffs have always known they are subject.

5. Plaintiffs also criticize HHS's prediction that the Rule would, on balance, increase access to care by helping to ensure that health-care professionals could remain in their jobs while honoring their religious beliefs or moral convictions. But such "[a]gency predictions of how regulated parties will respond to its regulations" "are entitled to particularly deferential review," *California ex rel. Becerra v. Azar*, 950 F.3d 1067, 1096 (9th Cir. 2020) (en banc) (quotation marks omitted), and multiple pieces of evidence supported HHS's prediction here. Santa Clara mischaracterizes the record in asserting that "one limited poll" supported HHS's access-to-care prediction. Br. 53-54; *see* Cal. Br. 45-47 (acknowledging HHS's reliance on multiple pieces of evidence but criticizing one poll). HHS acknowledged that there was no comprehensive data on the matter but relied, in its expertise, on multiple surveys and other forms of evidence. 84 Fed. Reg. at 23,252-54; *see id.* at 23,246-47 (citing "[n]umerous studies and comments" for the finding that "the failure to protect conscience is a barrier to careers in the health care field").

C. The Rule Is Constitutional

1. The Rule Is Consistent With The Separation Of Powers

Plaintiffs do not dispute that their separation-of-powers claim depends on the Washington district court's holding that the Rule's enforcement provisions exceed HHS's authority. Because that conclusion cannot be sustained, as discussed *supra*, their constitutional claim fails as well. While plaintiffs assert that HHS lacks "unilateral authority" to refuse to spend appropriated funds (Santa Clara Br. 63 (quoting *In re Aiken County*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013))), HHS has asserted no such authority in this case. Plaintiffs otherwise do not even attempt to demonstrate any constitutional violation distinct from the alleged lack of statutory authority. *See Dalton v. Specter*, 511 U.S. 462, 472-74 & nn.5-6 (1994). This claim consequently should be rejected.

2. Plaintiffs' Spending Clause Challenge Is Unripe And Meritless

a. The ripeness inquiry requires the court to "consider the fitness of the issues for judicial review, followed by the hardship to the parties of withholding court consideration." *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 837 (9th Cir. 2012). On the first prong, plaintiffs do not deny that a Spending Clause claim premised on the possibility that HHS might terminate all of a State's funding under the Rule depends on a chain of speculative hypotheticals that may not occur as anticipated or at all. *See* AOB 58-59. Nor do they dispute that a concrete

enforcement action and further administrative proceedings would facilitate the Court's review of the legal question and prevent it from deciding a constitutional question in a vacuum, *see* AOB 59, even if they maintain that distinct legal questions may not require factual development, *see* Cal. Br. 50. Plaintiffs object (Wash. Br. 65) that any administrative proceedings may not track the procedures provided by the UAR, but the Rule requires that HHS resolve compliance issues "pursuant to statutes and regulations which govern the administration of" the relevant funding arrangement, 45 C.F.R. § 88.7(i)(3). In any event, plaintiffs' reliance on a hypothetical defect in administrative proceedings that have not occurred underscores that further proceedings would facilitate the Court's review. S*ee Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009) (noting absence of "incomplete hypotheticals or open factual questions" in the case).

On the second prong, plaintiffs rely on the Rule's asserted compliance burdens in an effort to distinguish previous decisions rejecting challenges to Weldon, but the risk of funding termination that underlay the Washington district court's constitutional holding here is the same in those cases. *See NFPRHA*, 468 F.3d at 829-31; *California v. United States*, No. 05-00328, 2008 WL 744840, at *3 (N.D. Cal. Mar. 18, 2008). And the availability of future administrative proceedings distinguishes *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152-154 (1967), on which plaintiffs rely (Wash. Br. 63) for this argument. *See Connecticut v. Duncan*, 612 F.3d 107, 115 (2d Cir. 2010); AOB 59.

b. Plaintiffs' Spending Clause claims also lack merit. First, they assert that the Rule violates the clear-notice requirement of *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), not because the conscience statutes or the Rule are ambiguous, but because plaintiffs believe the Rule reflects funding conditions imposed by HHS rather than Congress. Wash. Br. 65. As discussed, the Rule does not change plaintiffs' substantive obligations or alter HHS's enforcement authority under the statutes, and it certainly does not "transform" an existing program into a new program as described in *NFIB v. Sebelius*, 567 U.S. 519, 584 (2012) (opinion of Roberts, C.J.). The case law on which Washington relies for this argument makes clear, moreover, that HHS may permissibly supply clarifying interpretations grounded in the conscience statutes, *see Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 670 (1985), and the Rule plainly notifies plaintiffs of the funding conditions HHS understands the conscience statutes to impose.

While California seeks to construct ambiguity based on phrases pulled from the Rule's purpose section, hypothetical applications of the Rule, or asserted confusion about affected funding streams (Br. 57-58), the Rule "ma[kes] clear that there were some conditions placed on receipt of federal funds," *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). And the Rule's guidance regarding HHS's understanding of statutory terms and collection of statutory requirements is determinate enough, more generally, to satisfy constitutional standards. *See* AOB 63-64; *see also Mayweathers v.*

Newland, 314 F.3d 1062, 1067 (9th Cir. 2002) ("Congress is not required to list every factual instance in which a state will fail to comply with a condition.").

Second, while California argues (Br. 59-61) that the Rule imposes retroactive conditions on funding already accepted, the Rule has no retroactive effect on funds received before the Rule's effective date, expressly tying its assurance and certification requirements, for example, to applications or reapplications for new funds. *See* 45 C.F.R. § 88.4(b). California argues (Br. 61) that the Rule's enforcement provisions permit retroactive claw backs of funds. The cited provisions do not reference any such mechanism, however, and the preamble makes clear that claw backs are available only "to the extent permitted by law," 84 Fed. Reg. at 23,180. To the extent California relies on *NFIB* to object to conditions applied to subsequent funds it accepts from existing programs, the conditions here—which simply reflect interpretations of conditions California does not dispute have long applied to these programs—again do not effect the "transformation" described in *NFIB*'s controlling opinion. 567 U.S. at 584.

Third, while plaintiffs assert that the Rule is unconstitutionally coercive, the Rule does not change HHS's ability to terminate funding due to a violation of the conscience statutes. As under the unchallenged statutes, the Rule places at risk only the funding implicated by a violation. The Rule also operates differently from the Medicaid expansion at issue in *NFIB*: it does not make termination of funding the default penalty and threatens only funds associated with the particular condition a

State violates, such that there is no effort to induce States to participate in a "new health care program." 567 U.S. at 584; *see* AOB 64-65. The Rule simply provides for the enforcement of statutes that have long governed funds plaintiffs receive, raising no Spending Clause concern.[6]

Finally, plaintiffs argue (Cal. Br. 61-63) that the Rule threatens funds unrelated to the federal interest in the programs the conscience statutes govern. But that argument is premised on the Washington district court's suggestion that the Rule's enforcement provisions regulate funds received by agencies other than HHS and the contention that the Rule permits termination of funds other than those directly implicated by a conscience-statute violation, both of which are erroneous. *See supra* section I.A; AOB 20-24.

3. Plaintiffs' Establishment Clause Challenge Also Fails

San Francisco alleges (Br. 56-58) that the Rule violates the Establishment Clause. First, this challenge is, like plaintiffs' Spending Clause challenges, unripe given the equivalent absence of factual context for this claim. *See supra* section II.D.2.a. Second, the California and Washington courts did not address this contention on the merits, but the *New York* court correctly rejected it because the Rule, "[l]ike the

[6] California raises a hypothetical application of the Rule's enforcement provisions based on a subrecipient's noncompliance (Cal. Br. 54-55), but the Rule simply indicates that a recipient in that situation "may be subject" to "funding restrictions or any appropriate remedies available." 45 C.F.R. § 88.6(a). HHS's discretion to impose appropriate remedies, *see* 84 Fed. Reg. at 23,220, comports with existing authorities and effects no coercive threat either.

Conscience Provisions it purports to construe," "equally recognizes secular ('moral') and religious objections to the covered medical procedures." 414 F. Supp. 3d at 574. Accordingly, the Rule "cannot be said, on its face, to 'command[] that . . . religious concerns automatically control over all secular interests,'" *id.* (alterations in original) (quoting *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985)), and is instead religiously neutral. *See id.*; *see also Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 311 (9th Cir. 1974) (rejecting Establishment Clause challenge to Church Amendment provision because the provision lawfully reflected the government's "neutrality in the face of religious differences" (quoting *Sherbert v. Verner*, 374 U.S. 398, 409 (1963))).

San Francisco argues that the Rule violates the Establishment Clause because it "detrimentally affect[s] third parties," Br. 55, but that consideration is pertinent where the government singles out religious entities for special accommodations. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989). As noted, this Rule does not have that effect and, because of its religious neutrality, differs from the state law that was at issue in *Estate of Thornton*.

III. The District Court Erroneously Vacated The Rule In Its Entirety And Against All Persons

A. Any Relief Should Be Limited To Plaintiffs

Article III standing principles require that any remedy ordered by a federal court "be limited to the inadequacy that produced the injury in fact that the plaintiff has established," *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) (quotation marks

omitted), and equitable principles likewise require that any relief "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quotation marks omitted). In addition, nationwide relief is inappropriate where it may "override contrary decisions from co-equal and appellate courts." *New York v. DHS*, 969 F.3d 42, 88 (2d Cir. 2020) (modifying injunction by limiting it to New York, Connecticut, and Vermont); *see also CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 262 (4th Cir. 2020) (holding district court erred by entering nationwide injunction under the APA); *City & Cty. of San Francisco v. USCIS*, No. 19-17213, 2020 WL 7052286, at *14-15 (9th Cir. Dec. 2, 2020) (similar). The district courts violated these principles (AOB 65-70) and others by vacating the Rule as to all potential parties, rather than rendering it inapplicable to plaintiffs.

Plaintiffs argue that the cited principles do not apply to vacatur in an APA case, but that is incorrect. Article III standing is jurisdictional, and applies to all forms of relief. *See Gill*, 138 S. Ct. at 1931. As the Fourth Circuit recently held, the APA does not "even authorize[], much less compel[], nationwide injunctions." *CASA de Maryland*, 971 F.3d at 262 n.8; *see Virginia Soc'y for Human Life, Inc v. FEC*, 263 F.3d 379, 394 (4th Cir. 2001) ("Nothing in the language of the APA" requires that a regulation be "set[] aside . . . for the entire country."). Indeed, the APA's provisions confirm that "equitable defenses may be interposed," *Abbott Labs*, 387 U.S. at 155; *see* 5 U.S.C. §§ 702(1), 703, reinforcing that Congress did not intend to authorize vacatur

beyond the parties unless necessary to provide the parties with full relief or otherwise to depart from longstanding principles of equity. *See* AOB 68-69; Amicus Brief for Nicholas Bagley and Samuel L. Bray, *Trump v. Pennsylvania*, No. 19-454, 2020 WL 1433996, at *11-17 (Mar. 9, 2020) (noting APA left traditional equity practice undisturbed).

The cases plaintiffs cite on appeal are not to the contrary. For example, in *Regents of the University of California v. DHS*, 908 F.3d 476 (9th Cir. 2018), *reversed in part and vacated in part,* 140 S. Ct. 1891 (2020), the government failed to identify a narrower injunction that would have afforded plaintiffs full relief. *See id.* at 511. *Empire Health Foundation for Valley Hospital Medical Center v. Azar*, 958 F.3d 873 (9th Cir. 2020), also did not dispute that Article III and equitable principles preclude vacating a rule in all applications unless necessary to provide the plaintiff with full relief, noting only that vacatur, rather than rendering the rule inapplicable to the particular plaintiff, is the "ordinary result" in an APA case. *Id.* at 886 (quotation marks omitted). *Mayor & City Council of Baltimore v. Azar*, 973 F.3d 258 (4th Cir. 2020) (en banc), *petition for cert. filed*, No. 20-454 (Oct. 7, 2020), affirmed a grant of statewide relief only on a showing that it was necessary to provide the plaintiff with complete relief, *see id.* at 294, and *Alliance*

for the Wild Rockies v. U.S. Forest Service, 907 F.3d 1105 (9th Cir. 2018), did not involve any issue regarding the scope of relief at all, *see id.* at 1121.[7]

San Francisco contends (Br. 58 n.12) that vacatur does not prevent courts in different districts and circuits from reaching different conclusions on the validity of a rule. It fails to explain, however, how an agency could apply a rule that has been vacated, or why a rule's nationwide vacatur would not impair the development of the law in the same manner as this Court identified in *California v. Azar*, 911 F.3d 558, 583, 583 (9th Cir. 2018), and *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 665 (9th Cir. 2011).

Santa Clara suggests (Br. 66-67) that vacating the Rule only with respect to plaintiffs would be confusing and impractical, because, for example, of concern about what would appear in the Code of Federal Regulations (C.F.R.), but those concerns are unfounded. HHS and plaintiffs would know the Rule does not apply to plaintiffs without any revision to the C.F.R. Other parties would remain subject to the Rule,

[7] Plaintiffs also cite *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). There, the D.C. Circuit held that in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), the majority agreed with dissenting Justice Blackmun that where the plaintiff prevails in an APA case, "the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual." 145 F.3d at 1409 (citing *Lujan*, 497 U.S. at 913 (Blackmun, J., dissenting)). *National Mining* inaccurately reflects footnote two of the *Lujan* majority opinion, which does not state that a successful APA plaintiff is entitled to an order vacating the rule as to other parties where unnecessary to provide the plaintiff with full relief. *See* 497 U.S. at 890 n.2.

and could sue to protect their own interests if they believe they are entitled to similar relief.

B. Any Relief Should Be Limited To Specific Provisions

By vacating the Rule in its entirety without even attempting a severability analysis (*see* AOB 71-72), the district courts violated their "duty" "to maintain the [regulation] in so far as it is valid." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (quotation marks omitted). The courts' error is underscored by the Rule's express severability clause, *see* 45 C.F.R. § 88.10, which creates a "severability presumption," *National Mining Ass'n v. Zinke*, 877 F.3d 845, 862 (9th Cir. 2017).

The *New York* court properly recognized that "some aspects of the Rule are within HHS's authority," 414 F. Supp. 3d at 519, and plaintiffs do not rebut the argument (AOB 71) that the district courts improperly invalidated (1) portions of the Rule plaintiffs do not challenge, (2) definitions of terms plaintiffs do challenge, to the extent those terms have unquestioned applications, and (3) the delegation of authority to OCR to facilitate and coordinate HHS's enforcement of the conscience statutes. The courts did not hold that HHS lacks authority to issue those aspects of the Rule, and those provisions—plus any challenged provisions this Court may uphold—have value even if other provisions are held unlawful. *See* AOB 71.

Santa Clara argues (Br. 69-70) that the Rule's definitional provisions are inseverable from its certification and enforcement requirements because the latter provisions are tied to the requirements and prohibitions collected in the Rule to which

the definitions apply. The certification requirements, however, only pertain to "applicable" substantive requirements. 45 C.F.R. § 88.4(a)(1), (2). Accordingly, the certification requirements would continue to function, rationally and as intended, even if the Court were to hold certain definitions unlawful: the certification requirements would not cover any definitions or parts of definitions held unlawful, but would continue to cover substantive requirements not held unlawful. The recordkeeping, cooperation, and reporting requirements, *see id.* § 88.6(b)-(d), also would retain their intended functions regardless of the validity of the Rule's definitional provisions, and numerous unchallenged aspects of the Rule's enforcement provisions, *see id.* § 88.7, could function even if the court invalidated other provisions.

CONCLUSION

For the foregoing reasons and the reasons stated in the federal government's opening brief, the judgment of the district court should be reversed.

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

DAVID L. ANDERSON
WILLIAM D. HYSLOP
United States Attorney

MICHAEL S. RAAB

s/ Leif Overvold
LOWELL V. STURGILL JR.
SARAH CARROLL
LEIF OVERVOLD
Attorneys, Appellate Staff
Civil Division, Room 7226
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 532-4631
leif.overvold2@usdoj.gov

Of Counsel:

ROBERT P. CHARROW
General Counsel

SEAN KEVENEY
Deputy General Counsel

U.S. Department of Health & Human Services

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FOR THE NINTH CIRCUIT

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