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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

STATE OF WASHINGTON,)	C20-01105-JLR
)	
Plaintiff,)	SEATTLE, WASHINGTON
)	
v.)	August 14, 2020 -
)	2:00 P.M.
)	
UNITED STATES DEPARTMENT OF)	
HEALTH AND HUMAN SERVICES;)	
ALEX M. AZAR, in his official)	ZOOM PRELIMINARY
capacity as the Secretary of)	INJUNCTION HEARING
the United States Department)	
of Health and Human Services,)	
)	
Defendants.)	
)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES L. ROBERT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	Brian J Sutherland Marsha J. Chien Attorney General's Office 800 Fifth Avenue Suite 2000 Seattle, WA 98104
For the Defendants:	Liam Holland U.S. Department of Justice Civil- Federal Programs Branch 1100 L Street NW Washington, DC 20530

Proceedings stenographically reported and transcript produced with computer-aided technology

1 THE COURT: Please call the case.

2 THE CLERK: Case No. C20-1105, State of Washington
3 versus United States Department of Health and Human Services, et
4 al.

5 Will counsel for the plaintiff, and then defendant, please
6 make your appearance for the record?

7 MS. CHIEN: Good evening -- or good afternoon. This is
8 Marsha Chien for the State of Washington.

9 MR. SUTHERLAND: This is Brian Sutherland for the State
10 of Washington.

11 MR. HOLLAND: Good afternoon, Your Honor. This is Liam
12 Holland for the Department of Justice.

13 THE COURT: Is Mr. Lane joining you?

14 MR. HOLLAND: No, Your Honor. I believe he might be on
15 the telephone, but I will be the only one speaking on video
16 today.

17 THE COURT: All right.

18 Counsel, thank you for your hard work on this matter. Let me
19 tell you that we've tried, as best we can in the relatively small
20 amount of time you left us, to get as prepared as we can. We
21 have a court reporter on the line, so there is a transcript of
22 this matter being taken down.

23 I would like to proceed in the following manner. It seems to
24 me that the State's motion, which is found in the docket at Entry
25 4, asks the Court to enjoin three provisions: one, dealing with

1 the interpretation of sex discrimination under Section 1557;
2 secondly, the question of the religious exemption; and then,
3 third, the construction of the scope of covered entity.

4 Now, having done that, I'm going to ask that the argument
5 take place following that same outline. I know that you have
6 suggested that you wanted to talk about standing first. I would
7 rather talk about standing as we cover each of those subjects.

8 So I know the State is planning on splitting its argument.
9 That's something I normally do not allow, but what I will do is,
10 Mr. Sutherland can talk about my questions concerning standing,
11 and Ms. Chien can speak to the merits of those topics. So that's
12 how we're going to proceed.

13 I will tell you that at the end of this, we're going to take
14 the matter under advisement and we'll issue a written order. I
15 also should warn you that you're likely to get an order from us
16 saying we found some additional briefing to be of assistance and
17 you are hereby officially on notice that we are going to ruin
18 your weekend. So, sorry, but that's the situation, frankly, that
19 you guys created by continuing this to as close a time as the
20 hearing and the effective date.

21 So let's start with "on the basis of sex." Mr. Sutherland,
22 where has Washington identified a concrete injury?

23 MR. SUTHERLAND: Thank you, Your Honor. And good
24 afternoon.

25 The State of Washington has identified several concrete

1 injuries that are threatened by this Final Rule. They fall,
2 basically, into four categories. These include administrative
3 costs, costs for the State to provide healthcare services for
4 people who turn to the State for those services after losing
5 health care coverage, longer term healthcare spending that the
6 State expects to have to spend for, as well as lost tax revenues.
7 And I can take each of those in turn.

8 THE COURT: Well, let's talk about administrative costs.
9 If I adopt that as your line of reasoning, it seems to me that
10 every time Congress changes anything, you have standing to
11 challenge it because it costs the State some money. That can't
12 possibly be the rule.

13 Can you give me a case that holds that increased
14 administrative costs will do this? I'm aware of the Texas
15 driver's license case, but I think that's the only one I have
16 seen.

17 MR. SUTHERLAND: Yes, Your Honor. I have a couple of
18 cases on that point. One of them is the *City and County of San*
19 *Francisco v. United States Citizenship and Immigration Services*.
20 In that case, the Ninth Circuit recognized that increased
21 administrative costs were part of a direct injury to the State of
22 California and the City and County of San Francisco in that case.
23 There's also a couple of cases from the Southern District of New
24 York, one of which deals with a change to the Department of
25 Labor's joint employer rule under the Fair Labor Standards Act,

1 which the State of New York alleged was going to result in a
2 number of different costs, some of which were an increase in
3 administrative costs for enforcement of its own state statute
4 relating to that and dealing with their state agencies in regards
5 to the change in the rule.

6 THE COURT: Well, you know, looking at your four
7 reasons, it strikes me that you start with the assumption that
8 this is already going to happen. Where I think our analysis is
9 that we're less concerned about the preamble since, under case
10 law, we're to disregard that except in certain circumstances.
11 And at that point it doesn't seem, and given the recent events
12 that have occurred in the *Bostock* case, that you can really show
13 anything. How do you respond to that?

14 MR. SUTHERLAND: Well, Your Honor, I would point to the
15 case of *California v. Azar*, which was involving the exemptions to
16 the contraceptive mandate. And California and a number of other
17 states challenged that rule, and the argument was made by HHS
18 there, the same argument, that it wasn't reasonably probable that
19 these harms would occur. And the Ninth Circuit -- or, first, the
20 district court in California and then the Ninth Circuit rejected
21 that argument and concluded that it was reasonably probable that
22 women would lose healthcare coverage, especially in light of the
23 fact that HHS had admitted this in the Final Rule. And, here, in
24 this case, Your Honor, the same situation exists. And I would
25 invite the Court's attention to 85 Federal Register 37, 180 to

1 81, where HHS says that, presumably because of this Final Rule,
2 some insurers will no longer maintain healthcare coverage
3 consistent with the 2016 Rule. So the State's position is that
4 HHS admits that there will be a loss of healthcare coverage of
5 the kind that the 2016 Rule required as a result of this Final
6 Rule.

7 THE COURT: Well, I'm not sure that I can I cross that
8 bridge when we haven't gotten there yet. You're assuming that
9 those healthcare insurers are going to violate the rule, which --
10 It doesn't prescribe a dramatic change in the sense that, if
11 we're correct about *Bostock*, we basically are back to where we
12 started.

13 And, you know, what documentation or compelling evidence do
14 you have that these insurers are going to suddenly change their
15 policy?

16 MR. SUTHERLAND: Well, it's twofold, Your Honor. And I
17 think that does overlap with the issue of the preamble, which
18 Ms. Chien will speak to as well. But, you know, the preamble
19 language, HHS suggests this is just, you know, a description of
20 the law or, you know, declining to provide a definition. Well,
21 that's just not true in the sense that HHS's preamble language is
22 a statement of its intent with respect to how the statute will be
23 administered and applied to the regulated entities. And, again,
24 to point to that documentation, the documentation first and
25 foremost is HHS's own admission that it expects this new

1 interpretation of the rule implementing Section 1557 will result
2 in a loss of coverage for some folks. But we would also point to
3 information contained in the declaration of Michele Roberts,
4 who's our Department of Health Chief of Staff, who explained,
5 basically, by comparing some of the data pre-2016 Rule with what
6 happened after the 2016 Rule, which is the basis for an
7 independent expectation that health insurance/health coverage
8 will be lost to transgender folks.

9 THE COURT: Well, what is the impact of *Bostock* on the
10 preamble?

11 MR. SUTHERLAND: Well, I think, Your Honor, that the
12 preamble is a statement that is contrary to *Bostock* and other law
13 which establishes that Title IX is to be interpreted as Title
14 VII, and that discrimination "on the basis of sex" includes
15 discrimination on the basis of sexual orientation and gender
16 identity.

17 THE COURT: Well, in taking that as your position, I
18 think you've just walked out of your standing.

19 MR. SUTHERLAND: I'm not sure I understand, Your Honor.

20 THE COURT: Well, preamble language should not be
21 considered unless the regulation is ambiguous. Will you agree
22 with me that that's a proper statement of the law?

23 MR. SUTHERLAND: I don't think so, Your Honor. I think
24 that the Ninth Circuit standard is that -- and this is also the
25 standard in other circuits as well -- that the preamble language

1 is evidence of the agency's intent, is routinely referred to, but
2 that, also, where it is sufficiently clear to be reviewable as a
3 statement of the agency's intent with respect to how it
4 administers the statute, it will be reviewed and assessed for
5 whether or not it's contrary to law and in excess of statutory
6 authority, et cetera.

7 THE COURT: Well, sir, aren't you suggesting then that
8 DHHS is going to violate *Bostock* in order to get to the point you
9 want to make?

10 MR. SUTHERLAND: Well, Your Honor, I think that's a
11 question for the agency. But the agency's preamble language
12 indicates that it doesn't think *Bostock* applies, which we believe
13 is contrary to the law.

14 THE COURT: Well, you're going to have to help me with
15 the chronology here. Are you telling me that the preamble was
16 published and in effect prior to *Bostock*, or after *Bostock*?

17 MS. CHIEN: Your Honor, if I may? The --

18 THE COURT: Counsel, you may not. Don't jump in in the
19 middle of your colleague's speech. You will get your chance in a
20 moment.

21 MR. SUTHERLAND: I'm sorry, Your Honor. Could you
22 please repeat your question?

23 THE COURT: Well, you have just made the assertion that
24 when the preamble was written, DHHS knew what the outcome of
25 *Bostock* was going to be.

1 MR. SUTHERLAND: I don't think that's what I said. But
2 what I would say is that the preamble, when the Notice of
3 Proposed Rule Making was issued, the agency explained that it
4 expected the *Bostock* decision and that it expected it would have,
5 quote, "ramifications" for the interpretation of Title IX, and,
6 therefore, Section 1557. And then the Final Rule was issued
7 after the *Bostock* decision was -- very close to the time when the
8 *Bostock* decision was expected, and four days, four days -- made
9 effective four days after the decision was rendered. And only in
10 the Final Rule, for the first time, did the agency suggest that
11 it would not control.

12 THE COURT: All right. The last question, and then
13 we'll move on to the merits of the "basis of sex," and Ms. Chien
14 will get her chance.

15 Why isn't the *Franciscan Alliance* case controlling in this
16 circumstance? Isn't that the law as I am to follow it at this
17 time?

18 MR. SUTHERLAND: I don't think so, Your Honor, for a
19 couple of reasons. One is that the *Franciscan* decision was
20 limited in terms of the provisions that it vacated from the 2016
21 Rule. It only vacated the definition of "sex" to include gender
22 identity and pregnancy termination. It did not deal with the
23 categorical coverage exclusions in the rule. It also did not
24 deal with the definition of "sex" to include sex stereotyping.

25 Another point about the *Franciscan* decision is that the final

1 judgment in that case is now on appeal to the Fifth Circuit. But
2 I would say that with respect to redressability, Washington
3 State's position is not that we would like Your Honor to somehow
4 compel the agency to bring back the 2016 Rule. That is not the
5 argument being made. The argument being made is that the 2020
6 Rule, this new Final Rule, is contrary to law and arbitrary and
7 capricious and in excess of statutory authority for what it does
8 now with respect to the operations of HHS and covered entities.

9 THE COURT: All right. Ms. Chien, you wanted to say
10 something.

11 MS. CHIEN: Thank you, Your Honor.

12 I just wanted to start by addressing the concern that I think
13 you have, which is that, at the end of the day -- which is HHS's
14 argument -- which is at the end of the day, we didn't do anything
15 wrong. But that's not how the APA works. The APA requires
16 agencies to show their work. Agencies can't claim that their
17 answer is right without showing their work. I think the Supreme
18 Court's recent decision in *Regents* confirms that, where it says
19 that the -- where --

20 THE COURT: Which case?

21 MS. CHIEN: *Regents*, which is the DACA case, which
22 basically concluded that even if the decision at the end of the
23 day was lawful, how and why that decision is made matters, and,
24 here, why HHS, the Department, has eliminated the definitions and
25 protections for LGBTQ discrimination matters. In 30 pages of

1 analysis, all issued after *Bostock* already came down, HHS
2 indicates that it does not believe that gender identity or sexual
3 orientation counts as sex discrimination. That can't stand after
4 *Bostock*.

5 THE COURT: Let me interrupt you and ask you this
6 question. As I understand it, HHS's decision reverts to the text
7 of Title IX. So isn't the 2020 Rule coextensive then with Title
8 IX?

9 MS. CHIEN: Well, HHS's rule -- you have to include the
10 preamble. And I think I should get to your point about the
11 preamble. Because even though -- even if we agree at the end of
12 the day that HHS could eliminate the definitions of sexual
13 orientation and gender identity, the reasons matter. And that is
14 the point that the APA makes, right? The analysis that the
15 APA -- or the agency undertakes matters. And that's what the
16 DACA case stands for. And, here, all of the reasons that the
17 Department enacted -- or eliminated the gender identity and
18 sexual orientation prong in the regulations were explicitly
19 rejected by *Bostock*.

20 And so returning to -- and returning to just the express --
21 There might be a way, there might be a feasible way, where the
22 agency could have come to the same conclusion, but the reasoning
23 and analysis here, which the AP requires us to provide and
24 consider, including in the preamble language, especially when the
25 preamble language is sufficiently clear, you can consider the

1 preamble. The cases cited by defendants --

2 THE COURT: Stop. Hold on a second. What case holds
3 that in the Ninth Circuit?

4 MS. CHIEN: *Safer Chemical*. *Safer Chemical* says that if
5 the preamble is sufficiently clear, it is reviewable. That's a
6 Ninth Circuit case.

7 And the cases that the defendants cite, which are -- two of
8 the three cases that defendant cites suggest otherwise aren't APA
9 cases at all. The third case involves, which is *Wyeth*, involves
10 an APA challenge, but, there, the Court decided that there were
11 so many mixed signals in that preamble that it could be
12 disregarded. Here, we don't have the same situation. There are
13 not mixed signals. There's 30 pages of analysis as to why gender
14 identity and sexual orientation don't count as sex
15 discrimination.

16 THE COURT: So I'm going to try and put words in your
17 mouth, which is one of my favorite things to do. What I hear you
18 saying is that I should disregard the fact that the 2020 Rule is
19 now coextensive with Title IX and instead peek behind the covers
20 and look at the preamble because that's the real reason that they
21 did something that now doesn't matter.

22 MS. CHIEN: Your Honor, my response to that is that this
23 isn't peeking behind the covers. The agency is required to
24 provide a concise and general statement by law. Under the
25 Administrative Procedure Act, they're required to provide a

1 concise and general statement explaining why it came to that
2 decision, and that explanation is reviewable.

3 THE COURT: All right. Was it reasonable for Health and
4 Human Services to rely on *Franciscan*? I mean, that seems to be
5 the common thread to most of their defense in this case.

6 MS. CHIEN: Not after *Bostock*. The *Bostock* decision
7 explicitly rejected *Franciscan Alliance*. So after *Bostock*, which
8 this issue published after *Bostock*, it should have made a
9 different decision. *Bostock* explicitly says that it is
10 impossible to discriminate against LGBTQ persons without also
11 discriminating against them based on sex.

12 THE COURT: All right. Well, Mr. Holland, I will hear
13 from you on the question of the definition of "sex."

14 MR. HOLLAND: So do you want me to start with standing,
15 Your Honor?

16 THE COURT: You have all of their arguments up through
17 one. If you don't get to them, I will. So go ahead.

18 MR. HOLLAND: Okay.

19 Well, I think Your Honor is on the right track, at least in a
20 few different areas. In *Clapper v. Amnesty International*, the
21 Supreme Court established that injury is not certainly impending
22 if it relies on the impact of future judicial decisions. And
23 that, as you were kind of alluding to, is very similar here.

24 The definition of "sex" that the agency has included in -- it
25 has not included the definition of "sex" in the rule. It's

1 coextensive with the statute. And so whatever courts decide
2 that definition to mean, including if they take *Bostock* into
3 account, that's what that definition means. So they can't really
4 establish certainly impending injury.

5 THE COURT: Is the government's position that *Bostock's*
6 holding regarding Title VII and Title IX, that Title IX is now
7 governed by *Bostock*?

8 MR. HOLLAND: So *Bostock* only applies to Title VII. It
9 specifically has -- There's a lot of discussion in *Bostock* about
10 how it's not deciding Title IX, it's not deciding other cases.
11 So it is not the government's position right now that *Bostock*
12 definitively governs the outcome here. HHS is still considering
13 what the meaning of "sex" in its new regulation is in light of
14 *Bostock*.

15 And I think it's important to make clear here that the
16 agency -- You know, there's a lot of discussion about the
17 preamble language with respect to the United States' position in
18 *Bostock*, technically, before this was published. First of all,
19 this rule is dated May 20th -- that's when it was signed by the
20 secretary -- 2020. It was posted on HHS's website and made
21 publicly available on June 15th -- I'm sorry, on June 12th, which
22 is three days before *Bostock* came out. That's when it was sent
23 to the Federal Register's office. So for all real purposes, this
24 rule was -- HHS was done with this rule before *Bostock* came out.
25 So that's why a lot of that reasoning is still in there. But the

1 reason why that reasoning is not important or is harmless to any
2 extent is because HHS also explained that "... to the extent that
3 a Supreme Court decision is applicable in interpreting the
4 meaning of a statutory term, the elimination of a regulatory
5 definition of such term would not preclude application -- "

6 THE COURT: Slow down, sir. Slow down. When you get
7 racing along, the reporter will never be able to follow you.

8 MR. HOLLAND: I'm sorry about that.

9 The plaintiffs ignore the fact that at page 37-168 of the
10 final ruling, HHS explained that "... to the extent that a
11 Supreme Court decision is applicable in interpreting the meaning
12 of a statutory term, the elimination of a regulatory definition
13 of such term would not preclude application of the Court's
14 construction."

15 So even assuming that HHS might be illegally erroneous -- may
16 have made illegally erroneous -- included language that's
17 illegally erroneous in the Court's view, you kind of take it
18 aside in light of *Bostock* because they included that language.
19 That's that, you know, there's no real -- Any error is harmless,
20 and harmless error, I'm pretty sure, must be taken into account
21 in the APA context.

22 And just to return to it, I think one of the most important
23 parts of the standing issue here is the redressability question
24 in terms of "on the basis of sex."

25 What the Court is permitted to do in an APA action at this

1 stage, in preliminary -- when the plaintiffs seek a preliminary
2 injunction, is to enjoin the 2020 Rule. And if you were to
3 enjoin the definition or the lack of definition in the 2020 Rule,
4 we would just bring back the 2016 Rule's definition. But that
5 "gender identity," part of that definition, was vacated in 2019
6 by another district court. So it just doesn't exist. So to the
7 extent that their injuries are aligned on the purported lack of
8 an explicit definition of gender identity from the rule, that's
9 not redressable by a decision that Your Honor can make under the
10 APA.

11 THE COURT: All right. I'm going to go back to
12 Ms. Chien. I think this is your area. Talk to me about the
13 argument that they have just made. It seems to me that that's
14 one of the things you guys are just at odd ends on. So talk to
15 me. What's your rebuttal on *Franciscan*?

16 MS. CHIEN: Well, rebuttal on *Franciscan* or on the
17 vacatur?

18 THE COURT: Yes.

19 MS. CHIEN: First of all, *Franciscan Alliance* is up for
20 review before the Fifth Circuit. It's currently being briefed as
21 we speak. So there's certainly a possibility that a court or the
22 Court of Appeals could decide that *Bostock* has nullified that
23 vacatur before *Franciscan Alliance*. And that would be infinitely
24 better than what we would have left right now if we leave the
25 2020 Rule as it exists, which is HHS's suggestion, that gender

1 identical and sex discrimination {sic} still does not apply as
2 sex discrimination. And I think you even heard Mr. Holland state
3 that HHS's position still hasn't changed even after *Bostock*. I
4 think the preamble language indicating that the 2020 Rule, quote,
5 doesn't preclude application of *Bostock*, that's not the same
6 thing as HHS saying that it will apply *Bostock*. Its decision, as
7 it stand -- The 2020 Rule, as it stands, suggests that HHS still
8 will not enforce LGBTQ protections in the healthcare context, and
9 that harm still exists and that's why we're still here today and
10 that's why vacating the rule based on the -- based on all of the
11 contrary -- the fact that it's contrary to law redresses the harm
12 because right now, as it stands right now, the rule confuses the
13 issue. And it should be clear that *Bostock*, to all healthcare
14 providers, that sex discrimination includes gender identity and
15 sex orientation. Right now, with the 2020 Rule, you know, even
16 accepting that HHS hasn't come to a decision as to whether or not
17 *Bostock* applies, it has thrown up in the air healthcare providers
18 as to whether or not they can or cannot engage in discrimination
19 based on gender identity or sexual orientation, and that is
20 arbitrary and capricious.

21 THE COURT: All right. I think I understand your
22 argument. Help me out. It's been a long time since I was in law
23 school, and I slept through most of civil procedure. But my
24 recollection was that lower-court decisions remain binding even
25 if they're appealed. Have I got the law wrong?

1 MS. CHIEN: They are binding, but if you -- It is on
2 review, right? So I think that leaving the 2020 Rule as is to
3 state -- To include the preamble as is almost negates whatever
4 happens at the Fifth Circuit regarding the 2016 Rule. And that's
5 the problem that we have here, that we're going to have a rule --
6 Regardless of what happens with the 2016 Rule in *Franciscan*
7 *Alliance*, it indicates that sexual orientation and gender
8 identity are not sex discrimination, because that's what we would
9 be left with if we only look at the 2020 Rule.

10 THE COURT: All right. Mr. Sutherland, let's talk about
11 standing on the question of covered entities. I didn't find
12 anything in your briefing that even mentions that topic. Is that
13 a concession on your part that it's not your strong suit?

14 MR. SUTHERLAND: Oh, not at all, Your Honor. You know,
15 the explanation of the harms that the State has put forth in the
16 briefing are harms that will result from, you know, HHS and
17 Section 1557 not being applied to prohibit sexual orientation --
18 I'm sorry, sexual orientation and gender identity discrimination
19 in the healthcare context. In essence, the harm exists for --
20 the same harms exist for all three of the challenged provisions.
21 So to the extent that there are third-party administrators,
22 insurance companies acting as third-party administrators, who are
23 now no longer touched by the rule because HHS says that they're
24 exempt, those entities can now practice the type of
25 discrimination on the basis of gender identity or sexual

1 orientation that will cause the harms we've talked about with
2 respect to the definition itself, if that makes sense.

3 THE COURT: I'm not sure it does. Because as I
4 understand it, in this context, procedural context, you have to
5 show standing on each of the three provisions that you want
6 struck down. And you just said to me, well, you know, it's the
7 same for all three of them. That seems to me to be somewhat
8 inconsistent.

9 Why didn't the State explain its standing arguments in
10 regards to covered entities? I mean, just give me the pages in
11 your brief, we will go back and look. Because, apparently, we
12 missed it.

13 MR. SUTHERLAND: Well, no, Your Honor. I think that we
14 did explain -- the State did explain it in our brief. With
15 respect to the discrimination that folks who will not be
16 protected because of the new rule, those folks are going to
17 suffer discrimination, and those instances of discrimination are
18 going to have specific direct costs for the State. And as our
19 brief explained, that discrimination is going to occur because
20 the definition of "sex" no longer, according to HHS, no longer
21 includes sexual orientation or gender identity. They will also
22 occur because providers and others will be allowed to use a
23 religious exemption imported from Title IX, when it should not
24 have been, and also will occur because there are certain covered
25 entities which will no longer be covered by Section 1557 at all.

1 THE COURT: Well, so why -- What I just heard you tell
2 me was if I reject increased costs, I reject all three of the
3 provisions; is that correct?

4 MR. SUTHERLAND: No, Your Honor.

5 THE COURT: Your challenge is to all three provisions.

6 MR. SUTHERLAND: I don't think that that's -- oh, I'm
7 sorry. You're asking if you reject -- if you reject increased
8 administrative costs as a harm, does that require you to reject
9 the challenge on the merits to all of the provisions?

10 THE COURT: And I'm asking you -- What I thought I
11 heard you just say was that was the State's position, was that it
12 was a common harm, and if I find that common harm is not
13 sufficient, then the challenge to all three provisions is out the
14 window because you haven't shown standing.

15 MR. SUTHERLAND: Well, I think, Your Honor, with respect
16 to the increased administrative costs that you asked about, you
17 know, certainly if you find that some provision of the rule is
18 contrary to law or otherwise invalid, then the harms -- or there
19 is no harms for the State in, you know, fixing the rule, then
20 that would have an impact on a merits finding. But what I guess
21 I'm trying to explain, and maybe not too well, is that the harms
22 that will occur, the harms the State is going to suffer
23 financially by providing care, referring folks to find care,
24 which is now being denied because somebody is refusing to based
25 on gender identity or sexual orientation; the harms to, you know,

1 revenues for the State resulting from increased mental distress
2 and suicidality and these sorts of things, those things are going
3 to happen because of the covered entities scoping provision, as
4 well as because of the definition of "sex" provision, as well as
5 because of the religious exemption provision.

6 THE COURT: All right. Ms. Chien, you're up for
7 defending the merits of this. What we have not talked about thus
8 far is the *Chevron* doctrine appears to still be alive and well.
9 Somewhat reduced, but alive and well. If that's the case, you
10 know, why isn't DHHS permitted to make this kind of finding? I
11 mean, isn't it within their agency expertise?

12 MS. CHIEN: Your Honor, I just want to clarify that the
13 covered entities issue is actually two separate issues, all
14 right? It's both whether or not HHS is exempt, it can exempt
15 itself from Section 1557's ambit, as well as whether or not HHS
16 can exclude health insurers from coverage under 1557. And I
17 think under both doctrines what HHS did is not entitled to
18 *Chevron* deference because there were reliance interests because
19 the positions that HHS takes in the 2020 Rule are explicitly
20 opposite to the 2016 Rule. And when they're clearly opposite,
21 there's a little bit more that the agency needs to do. It needs
22 to provide a reasoned explanation for why it is changing its
23 position. And in both cases it's changing its position
24 diametrically.

25 If I can refer first to the first -- the first covered

1 entities issue, which is whether or not HHS can exempt itself
2 from Section 1557. The only argument that HHS makes is that
3 it's, quote, "at least as reasonable" as what the 2016 Rule did.
4 That's not enough. You have to provide -- No *Chevron* deference
5 applies, given that there was a previous decision that was the
6 complete opposite.

7 On the health insurers issue, on the covered entities or
8 health insurers issue, I would also just like to remind the Court
9 to put this into this context. Section 1557 is one part of
10 comprehensive healthcare reform that was meant to ensure
11 healthcare coverage for all. There's no reasoning to knock
12 health insurers from Section 1557. It extends to any health
13 program or activity. And nowhere does 1557 limit it to direct
14 medical care.

15 The Ninth Circuit, and I would turn the Court to the *Schmitt*
16 case that was recently decided in July of this year, which
17 explicitly found that health insurers, a non-ACA health insurer,
18 was subject to Section 1557 scope. So, clearly, what HHS is
19 doing is not in keeping with what courts have decided or with
20 what the statute or what the 2016 Rule had done. And I think the
21 *Schmitt* case demonstrates the reliance interest people have made,
22 that health insurers and health -- and individuals alike have
23 made on the 2016 Rule, suggesting that 1557 applies to health
24 insurers. So it cannot just choose something that might be as
25 reasonable because it's not writing on a blank slate anymore.

1 THE COURT: Well, you have answered one of my questions,
2 which had to do with -- I want to see if I can try and put words
3 in your mouth. You're saying Section 1557 applies to any program
4 or action by any executive agency?

5 MS. CHIEN: No. Just to clarify, we're saying that the
6 program -- that Section 1557 should apply to HHS -- all of HHS's
7 activities. It shouldn't -- That the government -- the
8 Department is attempting to modify the statute by saying that it
9 only applies to HHS's activities under Title I. We're saying it
10 doesn't -- it's not limited to Title I. It should apply to all
11 of HHS.

12 THE COURT: Well, it seems to me that insurers, if you
13 take the government's position, don't provide a health program or
14 activity, and, therefore, they are outside the scope. How do you
15 respond to that?

16 MS. CHIEN: I disagree. I think that in the 2016
17 Rule -- So in the 2020 Rule, the Department relies on the Civil
18 Rights Restoration Act to suggest that that means -- when it
19 says when an entity is "principally engaged in the business of
20 providing healthcare," that is what counts as a health program or
21 activity. And then the 2020 Rules comes to conclusion and
22 passes -- comes to the conclusion that this doesn't include
23 health insurance. But the 2016 Rule took that same provision and
24 considered it and -- considered it and included health insurance
25 because the CRRRA states "in the business of providing

1 healthcare." "In the business," must do some work. And I think
2 it's telling that the Department had to include a provision that
3 says, by the way, the CRRRA definition, which is principally
4 engaged in the business of providing healthcare, that doesn't
5 include health insurance. They had to explicitly state it
6 because it is not clear. And what the 2016 Rule did was take the
7 position that it did include health insurance. And so for it to
8 just take the opposite position and there not to be a reasoned
9 explanation for it, I mean, because in narrowing the coverage of
10 covered entities under the health insurance provision, the 2020
11 Rule leaves 1.5 million Washingtonians without protection under
12 1557.

13 THE COURT: Well, you've made that argument, you made it
14 in your brief, but tell me why the explanation that DHHS provided
15 the Court isn't adequate, other than you disagree with it?

16 MS. CHIEN: It's not just that we disagree with it.
17 It's that there has been reliance interests that have relied on
18 the 2016 Rule. And we think we provided in some of our briefing
19 how much insurers -- and maybe perhaps also I would refer the
20 Court to the Northwest Health Law Advocates briefing where it
21 indicates how much Section 1557 and the ACA changed how
22 health insurers do do their business. So there is some reliance
23 interest. They have sought to comply with Section 1557. The
24 Ninth Circuit has agreed that Section 1557 applies to health
25 insurers.

1 THE COURT: Slow down. Remember to breathe.

2 MS. CHIEN: Sorry.

3 And for the 2020 Rule to make that change, it must do so in
4 recognition that those people have made -- people, insurers --
5 have all made decisions based on the previous rule. Whereas I
6 don't necessarily take a position as to whether or not HHS could
7 have done this in the first place, could have made the same
8 determination in the first place, I do say they can't do it now
9 that it's already taken its position in 2016. And, again, I just
10 would go back to the idea that HHS -- that this has been enacted
11 in the context of comprehensive healthcare reform. It's all
12 about ensuring healthcare coverage for all. And the ACA
13 repeatedly regulates health insurers. For it not to include
14 health insurers makes little sense.

15 THE COURT: In your briefing, at least, we didn't find
16 anything dealing with the question of irreparable harm. Where is
17 it and what is your response on that?

18 MS. CHIEN: I will actually defer to my colleague,
19 Mr. Sutherland, on that, if I may.

20 THE COURT: All right.

21 MR. SUTHERLAND: Yes, Your Honor.

22 Many of the cases dealing with the irreparable harm appear in
23 the State's opening brief for the preliminary injunction motion.
24 Part of the irreparable harm, kind of straight out of the gate,
25 is the fact that all of the costs that the State estimates and

1 expects, and some of which HHS has admitted, will not be
2 recoverable by the State through any sort of damages action. And
3 courts have recognized that, including in the Ninth Circuit, to
4 mean that the harm is irreparable because there's no way that the
5 State is going to be able to reimburse itself for these costs.
6 There's also additional citations in the opening brief regarding
7 the fact that people turning to state-run healthcare services is
8 irreparable harm for purposes of these cases.

9 So those are two of the major areas in which we provided some
10 authorities to the Court. Again, like I say, I believe they're
11 at pages 20 to 22 or 20 to 23 of the State's opening brief.

12 THE COURT: All right. Mr. Holland, I will hear from
13 you. I think I understand the State's position.

14 MR. HOLLAND: Well, if I can just start to clarify by
15 clarifying what's on appeal in *Franciscan Alliance*. Because I
16 think I was confused a little bit. In the Fifth Circuit, the
17 government did not appeal the decision in *Franciscan Alliance*.
18 In *Franciscan Alliance*, even though the plaintiffs had gotten a
19 whole bunch of things that they wanted from the district court
20 judge there, they were actually seeking, in addition to what they
21 found, which is {indecipherable} a whole bunch of parts of the
22 rule, they were also seeking a permanent injunction for HHS to
23 ever apply in any manner the Section 1557 rule against
24 gender-identity folks, and they appealed the district court
25 judge's decision not to give them that, to the Fifth Circuit.

1 That's what's on decision, that is what is being decided on
2 appeal. So there is no plausible way in which the Fifth Circuit
3 decision would result in an action that's -- in a decision that's
4 favorable to the plaintiff. It won't affect in any circumstance
5 that. I thought that was just important to clarify.

6 So then getting into the standing for, you know, the covered
7 entities piece of this. So, you know, we don't necessarily
8 disagree that a plaintiff state can establish standing through a
9 very long causal chain. *California v. Azar* does kind of stand
10 for that. But the plaintiffs themselves have said in their reply
11 brief that only can be the case if the chain is not --

12 THE COURT REPORTER: I'm sorry. Sir, can you slow down
13 and repeat what you just said, please? You are talking a little
14 too fast.

15 MR. HOLLAND: I'm really sorry about that.

16 We do not disagree with the plaintiffs that a state -- just a
17 second, I'm sorry -- that a state may establish injury through a
18 very long causal chain. But that being said, it still must be
19 concrete at every link, resulting in certainly impending injury.
20 Their whole chain of causation relies on the actions of
21 third-party entities of hypothetical insurance companies,
22 hypothetical self-insured employers primarily, who might engage
23 in discrimination. That's basically what they've said. Someone
24 who might engage in discrimination is not sufficient for Article
25 III standing, and that's the broken link in their chain. That's

1 what makes this case very different than *California v. Azar*. For
2 example, where you had an intervenor defendant, Little Sisters of
3 the Poor, an employer that was not -- that had said it would not
4 provide contraceptive coverage to women. That is what is missing
5 here. They haven't identified any particular entity, any
6 Section 1557 entity, that is going to engage in invidious
7 discrimination. And that's fundamentally just different than any
8 of the other cases. If there is a case, an actual case in
9 Washington State, where a Washington resident was unfortunately
10 invidiously discriminated against in a manner that the plaintiffs
11 or that individual believes violates Section 1557, then they can
12 seek -- they can bring a claim in your court, and if you decide
13 that Title IX doesn't occlude a private right of action, then you
14 could decide whether or not that violates Section 1557 and
15 whether the Department's rules are valid in the context of an
16 actual case or controversy. But they can't rely on speculation
17 that there might be discrimination to establish standing.

18 And I also want to point out, on the irreparable harm point,
19 the Ninth Circuit just decided a May case, *Doe No. 1 v. Trump*,
20 957 F.3d at 1050, which said that monetary interest injury to the
21 government is not considered irreparable injury. And while it is
22 true that there is some circumstances where an entity might be
23 able to establish irreparable injury against the federal
24 government because of its inability to be sued for damages,
25 Washington -- that's not the question for irreparable harm. The

1 question is actually whether or not it's recoverable at all
2 because the State of Washington, you know, is a state with taxing
3 power. They're not going to be harmed. They're not going to be
4 irreparably injured by spending \$178,000, even if that was --
5 even if that -- even if that money was sufficient to establish
6 standing.

7 THE COURT: Would you give us that cite again, please?

8 MR. HOLLAND: Of course. *Doe No. 1 v. Trump*.

9 THE COURT: Is it Door, D-o-o-r, or Doe, D-o-e?

10 MR. HOLLAND: D-o-e, Your Honor.

11 THE COURT: All right.

12 MR. HOLLAND: 957 F.3d. 1050.

13 And if I may just talk about these administrative costs of
14 \$178,000. If you read all the declarations, it seems like they
15 are just talking about kind of a notice that they want -- and as
16 you suggested earlier, Your Honor, you know, if they were
17 allowed to establish injury based on that, I mean, you know, they
18 could hypothetically say we would like to notify every one of the
19 7.6 million Washingtonian residents about HHS's changes and we
20 would like to do it by courier service, and that's going to cost
21 billions and billions of dollars. That's really just -- it's
22 really a decision that they want to engage in to inform their
23 citizens about this stuff. That's not fairly traceable to the
24 2020 Rule. And I think that kind of proximate cause analysis in
25 standing applies in the Ninth Circuit, and that was established

1 in *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121,
2 1996.

3 THE COURT: Let me change your direction a little bit
4 here.

5 MR. HOLLAND: Yes.

6 THE COURT: Where in the record is described the
7 adequate basis for you changing the definitions from where it was
8 before to now? It says the APA requires an adequate record.
9 Where in the material before me is that adequate record
10 explaining that?

11 MR. HOLLAND: It's in the Final Rule on 37 at 170, in
12 terms of the covered entities at least, I believe. But it is in
13 the Final Rule. The Final Rule sets out its explanation for why
14 it decided to make all of these changes. And I believe around 37
15 at 170 is where it talks about covered entities. But you can
16 find that by looking at the table of contents, Judge.

17 In any event, I want to talk about that for a moment. So --

18 THE COURT: Well, give me the process of why they
19 changed the scope of covered entities.

20 MR. HOLLAND: So several reasons, Your Honor. Primarily
21 because in reviewing the 2020 Rule, in light of all litigation,
22 the Department came to the conclusion -- they reasonably
23 concluded that they believed that their new interpretation is
24 more consistent with the statute and the intent of Congress than
25 the old interpretation. In addition to that, it's consistent

1 with their policy goals, which are to reduce regulatory burdens
2 as much as possible. But the primary reason, under *Encino*
3 *Motorcars* and under *Long Island Care at Home and Rust v.*
4 *Sullivan*, the Supreme Court has said that it's a reasonable
5 explanation for the agency to believe that their newer
6 interpretation is more consistent with the statutory text. And
7 if you want to explain -- And for the same reasons, it's not
8 contrary to law, Your Honor.

9 With respect to the scope of the federal agencies covered by
10 Section 1557 -- and on this point, I think I should point out I
11 don't understand how they've established injury directly from the
12 scope of a federal agency. They have only talked about insurers.
13 But in any event, the statute can be read almost -- it can be
14 read as in three clauses or it can kind of be read in two. And
15 the second part of it says that it prohibits discrimination under
16 any program or activity administered by an executive agency. And
17 this is a part of the Affordable Care Act. Nobody -- including
18 the 2016 Rule. I don't think the plaintiffs believe that that
19 means that this part of the Affordable Care Act governs
20 discrimination across every part of the federal government,
21 including the military.

22 And so the 2016 Rule attempted to limit the scope by
23 inserting the word "health" between "any program," but Congress
24 actually had that word in the first part of the section. So it's
25 reasonable to interpret them as trying to do something different

1 in the second part. So, instead, the agency relied on applying
2 "under this title" to all parts of the second, third, or final
3 clause. Even though that's also imperfect, there's no doubt
4 about that. But both definitions are -- both ways of
5 interpreting that provision are imperfect as a matter of just
6 plain tools of statutory construction. And because in this
7 manner they're interpreting it in a manner that applies under
8 this title, which exists in this statute, they thought it was
9 more consistent with the statutory text to go about making it in
10 this way.

11 With respect to health insurers, I think it's really
12 important to acknowledge, Your Honor, that when Congress wrote
13 this, you know, they were well aware of, you know, regulating
14 insurance companies. They do that throughout the entire
15 Affordable Care Act in a number of ways. As the plaintiffs point
16 out, they even defined "medical care" as including insurance
17 providers. But Congress did not include "medical care" or
18 "insurance providers" among the folks that are covered in the
19 statutory text. Instead, they used the term, repeatedly,
20 "program or activity," which is a -- it's a term of art in the
21 civil rights law context. It existed in Title IX. It exists in
22 Title -- in Section 504 of the Rehabilitation Act. The Supreme
23 Court interpreted those provisions in 1984 in two cases, *Grove*
24 *City College v. Bell* and *Consolidated Rail Corp.*, and Congress
25 ultimately disagreed with the Supreme Court's 1984 decision and

1 interpretation and passed the Civil Rights Restoration Act of
2 1987. That act defines the terms "program or activity" for all
3 of these different statutes that are incorporated by reference
4 into Section 1557, and it includes it -- and it defines it to
5 only apply to healthcare. And in light of -- So, therefore,
6 HHS determined that Section 1557, when it uses "program or
7 activity," it only applies to healthcare. And it --

8 THE COURT: You are inaudible. Slow down again.

9 MR. HOLLAND: I'm sorry about that.

10 THE COURT: Take a take a deep breath and repeat that
11 over again.

12 MR. HOLLAND: In light of the Civil Rights Restoration
13 Act of 1987, Your Honor, which defines "program or activity" to
14 apply to healthcare, HHS reasonably concluded that that same
15 word, "healthcare," is what Congress meant by using the term of
16 art "program or activity." And health insurance, they reasonably
17 determined was not healthcare, in the same way that homeowners
18 insurance is not lodging or auto insurance is not transportation.
19 If Congress intended to include health insurers, they could have
20 listed that as one of the entities to which -- to which
21 Section 1557 applies.

22 THE COURT: Mr. Holland, this will be my last question,
23 and then we are going to move on. It seems to me sort of the
24 simple analysis of this is that DHHS was counting on *Bostock*
25 being decided at the other side, and now they're facing the fact

1 that a decision came down which is inconsistent with the approach
2 that the Department took, and they seem to be in the process of
3 running away from what they did, which was to say, we took out
4 all of this language, we made it coextensive with the act
5 because, you know, we thought we were going to get what we wanted
6 and we didn't. Why should we bail you out of the problem that
7 you created?

8 MR. HOLLAND: I'm not sure I agree, Your Honor, that
9 that --

10 THE COURT: I would hope you wouldn't, but ...

11 MR. HOLLAND: So this is not a case where HHS decided to
12 define "on the basis of sex" in the regulation like the 2016 Rule
13 did. It did not define "on the basis of sex" to exclude sexual
14 orientation and to exclude gender identity. That is not in the
15 rule itself. There is a lot of explanation as to why it decided
16 not to include the 2016 definition. But one of those
17 definitions -- one of those reasons was to avoid litigation risk.
18 The 2016 Rule was in court for many, many years. That might not
19 have included a definition. But you can avoid litigation, and
20 let the courts and yourself decide, Your Honor. And these cases
21 are controversial, how "sex" applies in this context. And the
22 agency made that clear when they said, in the Final Rule --
23 notwithstanding what they thought at the time, consistent with
24 the United States' decision throughout the year-long rulemaking
25 process, regardless of what they thought -- they said, at

1 page 37-168, "To the extent that a Supreme Court decision is
2 applicable in interpreting the meaning of the statutory terms,
3 the elimination of the regulatory definition of such term would
4 not preclude application of the Court's construction."

5 THE COURT: All right. I'm going to go back to the
6 State for a moment. I'm not sure which of the two lawyers wants
7 to address this. The State of Washington seeks a nationwide
8 injunction. A very popular topic following the travel ban cases.
9 And, yet, the standing that the State claims is particularly
10 unique to the State of Washington. Wouldn't it be more
11 appropriate, if I were going to rule in the State's favor, to
12 limit it to Washington, maybe Western Washington, since that's
13 the district that we're in, and then address later on, when we
14 have a better idea of the scope, is this appropriate for
15 nationwide treatment?

16 So, Mr. Sutherland, are you addressing that, or is that
17 Ms. Chien?

18 MR. SUTHERLAND: Yes, Your Honor, I will address that.
19 Thank you.

20 I think, Your Honor, that the ordinary rule on APA cases is
21 that the Court would set aside the rule that violated the law,
22 and that may affect other people other than the petitioners in
23 any given case. But there's no problem with that and that's not
24 inappropriate. In fact, it is appropriate where such relief is
25 necessary to give complete relief to the petitioner in the case.

1 In this case, you know, the subject matter of what we're
2 talking about here, we're talking about people not getting
3 healthcare, suffering, you know, adverse effects from not being
4 protected from discrimination in healthcare, and the State having
5 to pay certain expenses to take care of problems caused by that.
6 Those kind of issues are cross-border in our country. There are
7 people who are going to move to Washington State who will have
8 been discriminated against on the basis of gender identity or
9 sexual orientation in other places. Washington State will be
10 dealing with the harms it is explaining in the declarations for
11 many years to come. And it is obvious that the impact of this
12 rule nationwide will cause the harms that Washington is going to
13 suffer. So we think that nationwide -- we believe that
14 nationwide injunctive relief is appropriate in this case given
15 the factual circumstances.

16 THE COURT: Mr. Holland, briefly, I'll hear you in
17 rebuttal.

18 MR. HOLLAND: Your Honor, the idea that -- Article III
19 limits your ability to exercise a remedy to the plaintiffs at
20 issue in this case. And if you decide that an injunction is
21 appropriate, it should be limited to the harms that have been
22 alleged here, which we don't think are any, but at most would
23 apply to Washington State itself. The idea that then we could
24 speculate that people are going to move into Washington State and
25 cause additional harm and that could be the basis of injunctive

1 relief is completely at odds with the *City of Los Angeles v.*
2 *Lyons* and all kinds of cases. You know, so we would request if
3 you are going to issue an injunction, which we hope you do not,
4 that it's limited in scope to the plaintiffs here.

5 THE COURT: All right. Since we have got you on the
6 screen, you probably are going to be better able to answer this.
7 There is a case pending in the District of Columbia that has been
8 argued and is pending decision. There's a case in the Eastern
9 District of New York that I'm a little less certain on, but I
10 think there's been argument on it also.

11 What other cases are there, and what significance should I
12 attach to the fact that two of my colleagues have already gotten
13 out of the chute on this? That is authority you may not be
14 familiar with.

15 MR. HOLLAND: So there are -- I believe there are -- So
16 you named the three cases, including your own, in which there is
17 a pending preliminary injunction motion. So, you know, even if
18 this was something you should consider, it's something that is --
19 And there's two other cases, but those cases -- there's one in
20 SDNY and there's one in Massachusetts -- but neither of those
21 cases have a pending preliminary injunction motion.

22 You know, we do want to avoid having overlapping, conflicting
23 injunctions. So I think that is something to consider. But, you
24 know, I think you should -- we haven't requested that there be
25 some kind of a multidistrict order or something in this case. So

1 I think you need to approach the record that's before you and
2 address the case that's before you.

3 THE COURT: Has any judge indicated when they're going
4 to rule?

5 MR. HOLLAND: I do believe that Judge Boasberg has
6 indicated he would like to try to get a ruling before the rule
7 goes into effect. I think he has indicated that, or as soon as
8 possible thereafter, which would be, I think, August 20th. Judge
9 Block has not really indicated. So, no, I don't think -- there's
10 not a clear answer on that.

11 THE COURT: Is our target date the 18th or the 20th?

12 MR. HOLLAND: I believe the rule goes into effect on the
13 20th.

14 MS. CHIEN: I think it goes into effect the 18th.

15 MR. HOLLAND: Oh. I'm sorry about that.

16 THE COURT: I'm sorry. In this ping-pong match, I get
17 left out. Is it the 18th or the 20th? Do either one of you have
18 the date?

19 MR. HOLLAND: I thought it was the 20th for some reason,
20 Your Honor, but I have no reason to doubt that the plaintiffs, if
21 they have good reason to believe it's the 18th, that might be
22 correct. I just don't know why I don't have that in front of me.

23 THE COURT: All right. Let me ask the State of
24 Washington this question then. What is the impact if this Court
25 is unable to issue its decision by August 18? I recognize this

1 will have significance over how much free time you get this
2 weekend.

3 MS. CHIEN: I mean -- Your Honor, we filed a preliminary
4 injunction for a reason, right, and I think that we have laid out
5 all of the irreparable harm that we'll start to incur as soon as
6 this rules goes into effect. I don't think that it would be --
7 All of the administrative costs, all of the impact on public
8 health that Washington State will have to address will start to
9 occur -- incur as soon as this goes into effect. I don't think
10 that any of this could be delayed, what the State -- you know,
11 all of the costs that the State will have to incur could be
12 delayed pending an order that they don't know which will go
13 either way, and that is why we have brought -- This is a
14 preliminary injunction to stop the effective date before the
15 effective date of this rule.

16 THE COURT: Well, given that eloquent set of remarks,
17 why did you continue this for a week then and leave us an
18 insufficient period to address this on an incomplete record?

19 MS. CHIEN: Your Honor, DOJ made the point that we were
20 unable to serve them on the Thursday before, and that's why we
21 agreed to extend, and they requested an extension of a week,
22 having no basis to -- you know, the local rules require four
23 Fridays, and we served on a Friday. That didn't leave us much
24 choice, unfortunately.

25 THE COURT: Well, there's that provision about

1 temporary restraining orders that would have prevented that from
2 being a problem.

3 Counsel, I think that those are all the questions that I
4 have. You should expect to get some homework from us in the near
5 future.

6 Is there anything further that the State of Washington wishes
7 to say at this time?

8 MS. CHIEN: No, Your Honor.

9 THE COURT: All right.

10 Mr. Holland, anything on behalf of the Department?

11 MR. HOLLAND: No, Your Honor. But I think the effective
12 date is August 18th. So there's no disagreement there. I'm
13 sorry for the confusion.

14 THE COURT: All right. Counsel, thank you very much.
15 We will be in recess. Having taken this matter under advisement,
16 and as I indicated, we will be issuing a written decision.

17 Thank you, counsel. We're in recess.

18 (Adjourned.)

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C E R T I F I C A T E

I, Nickoline M. Drury, RMR, CRR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do certify that the foregoing is a correct transcript, to the best of my ability, from the record of proceedings in the above-entitled matter.

/s/ Nickoline Drury

Nickoline Drury