

# ORIGINAL

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

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STATE OF WASHINGTON,	)	
	)	Case No. 2:19-CV-00183-SAB
Plaintiff,	)	
	)	November 7, 2019
vs.	)	Spokane, Washington
	)	
ALEX M. AZAR, II, and UNITED	)	Motion Hearing
STATES DEPARTMENT OF HEALTH AND	)	
HUMAN SERVICES,	)	Pages 1 - 53
	)	
Defendants.	)	

BEFORE THE HONORABLE STANLEY A. BASTIAN  
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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For the Defendants:	Ms. Rebecca Kopplin Mr. Benjamin T. Takemoto Trial Attorneys U.S. Department of Justice Civil Division Federal Programs Branch P.O. Box 883, Ben Franklin Station Washington, DC 20044
Official Court Reporter:	Ronelle F. Corbey, RPR, CRR, CCR Washington CCR No. 2968 United States District Courthouse P.O. Box 700 Spokane, Washington 99210 (509) 458-5283

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MOTION HEARING - NOVEMBER 7, 2019

1 (Court convened on November 7, 2019, at 9:59 a.m.)

2 THE COURTROOM DEPUTY: All rise.

3 (Call to Order of the Court)

4 THE COURT: Good morning. Please be seated.

5 THE COURTROOM DEPUTY: The matter now before the Court

6 is the *State of Washington v. Azar II, et al.*, Case

7 No. 2:19-CV-183-SAB. This is the time set for a motion hearing.

8 Counsel, would you please state your presence for the Court  
9 and record.

10 MR. TAKEMOTO: Benjamin Takemoto from the Department  
11 of Justice on behalf of the Department of Health and Human  
12 Services.

13 THE COURT: All right. Good morning.

14 MR. TAKEMOTO: Good morning.

15 MS. KOPPLIN: Rebecca Kopplin, your Honor, also from  
16 the Department of Justice.

17 THE COURT: All right. Good morning.

18 MR. SPRUNG: Good morning, your Honor. Assistant  
19 Attorney General Jeff Sprung on behalf of the State of  
20 Washington.

21 THE COURT: All right.

22 MS. FRAAS: Lauryn Fraas from the Washington State  
23 Attorney General's office.

24 THE COURT: Good morning.

25 MR. CRISALLI: Good morning, your Honor.

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COURT'S OPENING REMARKS

1 Paul Crisalli on behalf of the State of Washington.

2 THE COURT: Good morning to you, as well. Well, thank  
3 you all for coming and for visiting us here in Spokane. This is  
4 not my chambers so I'm -- my chair's not quite right, and I've  
5 got this little thing here that keeps popping out on me. So  
6 I'll try to adjust everything.

7 Let me make some remarks before we get started with our  
8 argument itself; and then when I'm done, if you have any  
9 questions as to -- we can deal with that.

10 In this case, the State of Washington is challenging a rule  
11 recently adopted by the defendant, the US Department of Health  
12 and Human Resources. That rule is called "Protecting Statutory  
13 Rights in Healthcare;" and it's found, as I understand it, at  
14 84 Federal Regulation 23170. It was adopted in May of 2019.  
15 And it's my understanding that it was scheduled to take effect  
16 on November 22nd of this year.

17 The parties have filed cross motions of summary judgment,  
18 and we have both parties here. We also have briefing from four  
19 amicus participants: The Institute for Policy Integrity at the  
20 New York University School of Law; the scholars of the LGBT  
21 population; the National Center for Lesbian Rights; and a group  
22 of medical organizations, which includes the American College of  
23 OB-GYN, the American Medical Association, the American Academy  
24 of Pediatrics, and the American College of Emergency Physicians.

25 I want to thank the parties for the briefing that you've

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1 provided. It's been very helpful. And given the nature of this  
2 case, your briefs were refreshingly brief.

3 The nature of this hearing most likely, in the Court's  
4 opinion, changed yesterday when Judge Paul Engelmayer from the  
5 District Court of the Southern District of New York issued his  
6 decision and opinion in a case I'll call the *State of New York*  
7 *v. Azar*. His decision vacated the rule in its entirety and  
8 across the nation.

9 Judge Engelmayer's case involved three separate lawsuits,  
10 which apparently were filed in his District and then  
11 consolidated in -- onto his docket. His consolidated cases  
12 involved the total of 19 states, the District of Columbia, 3  
13 local governments, Planned Parenthood, the National Family  
14 Planning and Reproductive Health Associations were, together,  
15 the plaintiffs.

16 There were also four amici participants who participated in  
17 filing ten amicus briefs.

18 Judge Engelmayer's opinion was sent to me, and I do thank  
19 you for sending that to me yesterday. And I was able to review  
20 it yesterday evening. His opinion is 147 pages long. It's  
21 comprehensive and thorough and has an excellent summary of the  
22 facts, the law, and the arguments made by all of the parties  
23 involved and the amicus participants involved.

24 My understanding of the rule is that Judge Engelmayer -- or  
25 not the rule, the opinion -- is that Judge Engelmayer ruled in

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1 favor of the plaintiffs, vacated the rule in its entirety, and,  
2 in doing so, he concluded:

3       One, that it was appropriate to decide the case in front of  
4 him in the context of the cross and pending motions for summary  
5 judgment.

6       Second, he decided that the defendant had exceeded its  
7 statutory authority in adopting the rule.

8       Third, Judge Engelmayer decided that the defendant acted  
9 arbitrarily and capriciously in adopting the rule because the  
10 defendants' justifications for the rule were contrary to the  
11 evidence into the record. The defendant failed to supply a  
12 reasoned explanation for its policy change from the previous  
13 rule. I believe there was one in 2008, and then the most  
14 current rule was 2011 before this one was adopted in 2019.

15       He ruled that the defendant failed to consider important  
16 aspects of the problem before it, and the defendant failed to  
17 properly account for the costs and benefits of the rule.

18       Finally, Judge Engelmayer ruled that the -- the rule was  
19 unconstitutional in several ways, including it violated the  
20 separation of powers and the spending clause; but it was my  
21 understanding that he did not find it to be a violation of the  
22 establishment clause.

23       So that's my understanding of what he did. I could be  
24 wrong. As I said, it was 147 pages; and I went through it once.  
25 So, anyway, it is what it is and that's my understanding.

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PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BY MR. SPRUNG

1 So I'd like to start off today first by indicating: Do we  
2 have any of the amicus participants in court with us today? I  
3 don't think so. Okay. I was going to ask if any of them wanted  
4 to present, but I guess the answer to that is "No."

5 I think that we can -- once I turn it over to you, we can  
6 limit our arguments to 30 minutes or less. But I have two  
7 questions that I'd like you both to address, which I think you  
8 can probably anticipate. I'd like you to address if there are  
9 any differences between the case that I have and that we're here  
10 for today and the case that Judge Engelmayer had in New York,  
11 whether there's any factual differences or any legal  
12 differences.

13 And, secondly, I'd like to hear from both of you regarding  
14 whether we have a case. Judge Engelmayer has vacated the rule  
15 in its entirety; and, as a matter of judicial economy, do we  
16 need to proceed?

17 So who would like to start? I believe that the State of  
18 Washington challenged the rule so it seems appropriate that you  
19 would start, but --

20 MR. SPRUNG: Thank you, your Honor.

21 THE COURT: -- these are cross motions.

22 MR. SPRUNG: Jeff Sprung, again, your Honor; and it's  
23 an honor to be in your courtroom again today. And we have three  
24 lawyers from our office whom you've met who may be presenting  
25 some argument. Myself. We have a new lawyer in our office,

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1 Lauryn Fraas. And then she -- she may address some of the  
2 arbitrary and capricious issues. And Assistant Attorney General  
3 Paul Crisalli may address some of the constitutional issues.

4 I'd like to turn first to the second point that you raised  
5 whether there is a case still remaining to be decided, and there  
6 are -- there are two issues that that raises: One is a mootness  
7 question and the other is whether there is a case of  
8 controversy, whether there is a dispute between the parties.

9 The short answer is, your Honor, that it is important for  
10 the Court still to rule on the cross motions.

11 And the reason for that, first, under the mootness  
12 doctrine, if -- clearly this is a circumstance, if  
13 Judge Engelmayer's decision was reversed on appeal, that the  
14 problems here would be capable of repetition. Yet, if the Court  
15 refused -- or declined to address, it would be -- would evade  
16 review.

17 And, second, for similar reasons, there continues to be a  
18 live case or controversy between the parties for the same  
19 reason. If the Second Circuit reversed Judge Engelmayer,  
20 then -- then we still would be injured as we laid out  
21 previously -- as we've laid out extensively in our briefs by the  
22 rule.

23 So there are -- there is precedent as recently as the  
24 Title X case, which this Court was involved in, where there were  
25 both limited and nationwide injunctions issued. And in those

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1 cases, each of the judges continued in order to be able to  
2 present a case to the Court of Appeals regardless of an  
3 injunction having been entered in another case. And --

4 THE COURT: Is this -- I should have asked my third  
5 question. Are these the only two cases? The case -- or the  
6 consolidated cases in New York and the case here or are there  
7 other cases pending?

8 MR. SPRUNG: There's a case pending in California, as  
9 well. And I get my cases mixed up. I believe that's two  
10 consolidated cases pending in California. The State of  
11 California is representing several states along with California  
12 itself. So there's -- yeah, there's another case.

13 In the California case, there was oral argument in that  
14 case two or three days ago.

15 THE COURT: All right. Thank you.

16 MR. SPRUNG: And the *California v. Azar* case in the  
17 Ninth Circuit really anticipates the question that you're  
18 asking, your Honor. The Court in *California v. Azar* -- this was  
19 in the contraception case, a case involving the Administration's  
20 rule dealing with employer exemptions from the contraceptive  
21 mandate that the Court of Appeals chastised the District Court  
22 for not having, once an injunction was issued -- it's a little  
23 different circumstance. Once the injunction was issued, the  
24 District Court allowed the parties to stay the proceedings  
25 before the -- the Court of -- before it while the preliminary

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1 injunction was on appeal. And the Court of Appeals chastised  
2 the District judge and said proceedings have to go on because  
3 it's important for the Courts of Appeals to have multiple  
4 decisions. That's how the -- the process for developing law in  
5 the way our system works percolating upwards works.

6 And that same principle applies here. Once one ruling has  
7 issued, the Court of Appeals still want to have multiple views,  
8 multiple judges for them to be able to develop the -- the law  
9 and the rulings that they are trying to develop in anticipation  
10 of the Supreme Court.

11 So we would say that it is important for the Court to  
12 continue to hear these motions.

13 The -- the only other thing I'd like to address and then  
14 I'm going to preserve almost everything that I've prepared for  
15 rebuttal in case it's useful, but I do want to point out a few  
16 areas where we diverge from -- either diverge from  
17 Judge Engelmayer or issues Judge Engelmayer didn't address.

18 And the first one is we do diverge from Judge Engelmayer on  
19 a narrow point as to whether the rule encompasses moneys that  
20 are issued to the State of Washington by the Department of Labor  
21 and the Department of Education. And I don't know if the Court  
22 recalls that, but there is this -- it is our position that  
23 these -- what we termed the "draconian penalty provisions,"  
24 which -- which could potentially dock all \$10 billion that  
25 Washington receives from HHS for its -- for Washington's own or

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1 even vicarious liability for a subgrantee's violation of the  
2 rule. That -- there is one provision that not only would dock  
3 moneys coming to Washington from -- from HHS but also moneys  
4 that come from two other federal agencies, Department of Labor  
5 and Department of Education. Judge Engelmayer did not interpret  
6 the rule in that way.

7 And I just want to point out to the Court the statutory --  
8 or the rules section that makes clear that those two funding  
9 streams also are encompassed by the rule. Not a critical point,  
10 frankly, your Honor, because, as Judge Engelmayer found, even  
11 the idea of docking all of -- or penalizing Washington with the  
12 loss of all of its Medicaid and all of its HHS funding streams  
13 was unconstitutional beyond statutory authority.

14 But it is -- if the Court looks at 40 -- at the rule  
15 provision at 88.7(i)(3) and then under that the -- the penalty  
16 provisions are listed. And there are five or six different  
17 subsections, and the first of those refers to federal funds by  
18 itself. The rest of them refer to federal funds from the  
19 Department of Health and Human Services.

20 So it is, you know, under -- under rules of regulatory  
21 interpretation the fact that in the very next three or four  
22 sections the rules specifically constrain the definition of --  
23 or the term "federal funds" to federal funds from the Department  
24 while the first one does not. It -- it indicates the intent by  
25 HHS that they were being broader than they were in the

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1 subsequent ones. We made that argument in our briefs. The  
2 Department of Health and Human Services has never denied that  
3 that is their intent. That's the scope of the rule.

4 And the reason that HHS has that view -- and, you know,  
5 we'd be thrilled if counsel for HHS today in this courtroom  
6 said, "No, that's not our view."

7 But the reason that we believe HHS has that view is  
8 twofold: One, if one looks at the definition of "federal funds"  
9 or "federal financial assistance," it's -- the term as defined  
10 in the rule, it has no limitation to funds from HHS alone. So  
11 that's in the definition Section 88.2 of the rule.

12 And then the second point is that what HHS seems to believe  
13 is its authority to penalize stems from the funding streams --  
14 in the huge funding streams of the -- of the conscience statutes  
15 and several of the amendments are in that -- that HHS believes  
16 gives it this broad authority apply not just to HHS but to  
17 Department of Labor and Department of Education, too.

18 So they say, "Well, that authority was created in this  
19 provision where Congress was defining limits on funding for  
20 these three agencies. So we get to penalize funds coming from  
21 those three -- three agencies."

22 That's -- that's the source of our disagreement with  
23 Judge Engelmayer on that point.

24 Judge Engelmayer doesn't address ripeness, your Honor. I'm  
25 happy to address that on rebuttal if that's something that's

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1 worth addressing.

2 And the final point I want to address is Judge Engelmayer  
3 doesn't address the impact of the rule on transgender patients.  
4 And the only thing I want to do is point the Court to the  
5 regulatory section that applies the rule to transgender patients  
6 because it is a really important point in this case. The scope  
7 of the rule and HHS's silence about whether they intend to apply  
8 this to transgender patients is alarming for those of us in the  
9 State of Washington where we have very strong protections  
10 against discrimination against transgender patients.

11 And so I direct the Court to the rule-making section, 88 --  
12 88.3(a) (2) (vi), and that is the section that applies the rule to  
13 transgender patients. And what that says, your Honor, is that  
14 there are some -- there's a narrow provision in the Church  
15 Amendment that doesn't tie the antidiscrimination provision to a  
16 particular type of treatment, whether it be abortion, end of  
17 life, those other things.

18 That provision, the Church Amendment, which is  
19 42 USC § 300a-7(d) -- that provision says any discrimination  
20 against someone on the basis of their religious beliefs is  
21 prohibited. HHS is interpreting that to apply their expanded  
22 provisions in this rule not just to abortion, not just to end of  
23 life; but this, they say, gives them kind of a roaming authority  
24 to apply it to anywhere someone has a religious or moral  
25 objection.

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1 Of course, there are people in our country who have  
2 religious and moral objections to transgender patients, to  
3 transgender individuals. So -- so it really creates a very  
4 broad authority for a provider to discriminate against a  
5 transgender person because of their religious or moral beliefs.

6 There's another element, which is the sterilization point.  
7 That comes up in -- in the Church Amendments. That would --  
8 that could also capture transgender patients because the hormone  
9 treatment -- a by-product of hormone treatments that are  
10 resolved -- that are prescribed for gender transition purposes,  
11 a by-product of that can be sterilization. Just like a  
12 by-product of chemotherapy for a cancer patient could be  
13 sterilization.

14 So HHS views, as an additional reason to apply this rule to  
15 transgender patients, the -- that sterilization provision in the  
16 Church Amendment.

17 That's all I have for your Honor.

18 THE COURT: All right. Thank you, Mr. Sprung.

19 MR. SPRUNG: Thank you.

20 THE COURT: Did we want to hear from your colleagues  
21 then or --

22 MR. SPRUNG: I -- I'd like to --

23 THE COURT: Yes, okay.

24 MR. SPRUNG: -- give them the chance.

25 THE COURT: Yes. So Ms. Fraas? Is that --

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1 MS. FRAAS: Yes, your Honor.

2 THE COURT: All right.

3 MS. FRAAS: Good morning, your Honor.

4 THE COURT: Good morning.

5 MS. FRAAS: Just very briefly. When I had put  
6 together my presentation on what I planned to talk to the Court  
7 about today, they were exactly the issues that Judge Engelmayer  
8 addressed in arbitrary and capricious in terms of the -- the  
9 factual -- the administrative record with regard to the  
10 complaints, failure to put forth good reasons for the policy,  
11 ignoring the comments of leading medical organizations, and  
12 failure to address the abandonment of the serious reliance on  
13 the Title VII framework.

14 Our briefing puts forth additional reasons, your Honor; and  
15 I would be happy to address any of those. We are also, however,  
16 comfortable resting on the arguments set forth in the briefing  
17 and just reiterating that -- that we believe that  
18 Judge Engelmayer's decision really does go -- covers the -- the  
19 crux of our arguments with respect to the arbitrary and  
20 capricious issues.

21 THE COURT: Well, since we have a little bit of time,  
22 how -- what arguments are you making that Judge Engelmayer  
23 didn't cover?

24 MS. FRAAS: Okay. Additional issues that we put forth  
25 were with respect to medical ethics. We -- we talked about, in

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1 our briefing, which is also very well covered by the amicus  
2 brief of -- of leading medical organizations, about how the rule  
3 is -- is irreconcilable with medical ethics as -- as the amicus  
4 brief explains, because it permits refusals to provide necessary  
5 services even in cases of emergency; it fails to protect the  
6 continuity of care for all patients; and it permits individuals  
7 without medical training to -- to impede patient treatment.

8 Our main argument on those was just that the rules fuel a  
9 few boiler-point sentences on the issue; did not -- did not  
10 address the concerns.

11 We also talked about vulnerable populations and that the  
12 rule failed to -- ignored the impact that it would have on  
13 those -- on those groups. The comments are insufficient in that  
14 regard. Judge Engelmayer's rule does discuss access to care and  
15 a lot of the -- a lot of our argument centers around access to  
16 care.

17 So that is in some ways encapsulated within that, but our  
18 briefing sets forth additional reasons.

19 THE COURT: All right. Thank you.

20 MS. FRAAS: Thank you.

21 THE COURT: And, Mr. Crisalli, did you have some  
22 comments, as well?

23 MR. CRISALLI: I have nothing else to add unless the  
24 Court has questions.

25 THE COURT: No, I don't.

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1 MR. CRISALLI: Thank you.

2 THE COURT: All right. All right. Let's turn our  
3 attention to the -- to the Government. Are you going to divide  
4 your -- your time up with the issues?

5 MS. KOPPLIN: Yes.

6 THE COURT: Okay. So is it Kopplin?

7 MS. KOPPLIN: It's Kopplin. Yes, your Honor.

8 THE COURT: Thank you. All right.

9 MS. KOPPLIN: Thank you, your Honor. So I just wanted  
10 to start by addressing the questions that your Honor just posed  
11 and then, perhaps, turn to the merits. And I wanted to just  
12 clarify before I did that.

13 Obviously, we do have this opinion in SDNY. It's still our  
14 hope to present argument and explain, you know, some of the  
15 issues as we see them and, perhaps, have the chance of you  
16 reaching an independent decision. But I just wanted to make  
17 sure that's something that you're opening to hearing right now  
18 also.

19 THE COURT: Well, I am, yes. I mean, I recognize,  
20 though, that whether I agree or disagree with Judge Engelmayer,  
21 it's a -- it's a comprehensive Order and opinion that he  
22 developed. I certainly assume that there's going to be appeals  
23 just as I assume there'll be appeals from whatever I do, whether  
24 I rule in favor of the US Government or the State of Washington.

25 So that's why I was wondering do we really have to proceed

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1 with this case. The State has given us some reasons why we  
2 should, but the basis of my question is I -- I recognize this  
3 ultimately will be decided by the Court of Appeals or maybe even  
4 the Supreme Court. And they've got a pretty good decision that  
5 lays out all the issues, most of them anyway, from New York.

6 So --

7 MS. KOPPLIN: All right. That makes sense.

8 THE COURT: That's why I started the way I did.

9 MS. KOPPLIN: That makes sense. And I think --

10 THE COURT: Okay.

11 MS. KOPPLIN: -- with your Honor's permission, then,  
12 we'll answer the questions --

13 THE COURT: Sure.

14 MS. KOPPLIN: -- and then we will also address the  
15 substance; and we do plan to divide the issues between myself  
16 and Mr. Takemoto.

17 THE COURT: Very good.

18 MS. KOPPLIN: So your first -- taking them in the same  
19 order that Washington did, first, the question whether this case  
20 is moot, we -- maybe surprisingly but we agree with Washington  
21 on this point that the Court should still continue to consider  
22 the motion for summary judgment and reach its own decision. As  
23 plaintiffs note, there's been other cases in the Ninth Circuit  
24 recently where the Ninth Circuit has indicated that it is the  
25 preferred course to let District Courts percolate and reach

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1 their own independent decisions on motions for summary judgment  
2 even if appeals are pending.

3 Here, of course, the Order in SDNY is not yet final in that  
4 it may be appealed. It may be narrowed on appeal. It may be  
5 overturned on appeal. As a practical matter, it may make some  
6 difference if that happens --

7 (Interruption by the reporter)

8 MS. KOPPLIN: I'm sorry, ma'am.

9 (Interruption by the reporter)

10 MS. KOPPLIN: As a practical matter, if that happens  
11 and it's overturned or narrowed, it may make a difference to the  
12 plaintiffs here what the scope of the relief, if any, that your  
13 Honor feels appropriate would be.

14 So we would also believe that this case should be --  
15 continue to be decided on the motions for summary judgment.

16 To the first question: What the differences are, I  
17 somewhat defer to plaintiffs, obviously, as they're the --  
18 they're the masters of their case. I know you just heard from  
19 plaintiff's counsel that they raise an argument about medical  
20 ethics that was not in the SDNY case. I also note they have an  
21 argument about the possibility that the rule contradicts with  
22 the ACA's preventive care requirement that I do not believe was  
23 encompassed in the SDNY decision.

24 I think their case may also be somewhat narrower than the  
25 SDNY case in a few ways. For example, in SDNY there was a large

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1 decision about -- a large discussion of reliance interests and  
2 of whether the rule was a logical outgrowth of the definitions  
3 that were in the proposed rule that I do not believe have been  
4 argued here.

5 I apologize for not being, perhaps, totally comfortable  
6 with this as my colleague and I were on a plane for many hours  
7 yesterday when this was coming out; but we did look at it last  
8 night and that's kind of our first -- our first pass at the  
9 answer to that question.

10 And then the last thing I wanted to say on that question  
11 was just -- you'd asked my colleague on the other side what the  
12 other cases were -- to just provide a little bit more  
13 information about that.

14 So there's the case in SDNY or the three cases. Then  
15 there's three cases in the Northern District of California that  
16 are related but not consolidated, and those are the cases that  
17 were just recently argued.

18 Then there's also one case in Baltimore that has motions  
19 for summary judgment and a PI pending, and argument in that case  
20 has been scheduled for later this month. So just to round out  
21 the summary on that.

22 THE COURT: So the three cases in California. Are  
23 they in front of the same judge? You said they're not  
24 consolidated, but --

25 MS. KOPPLIN: They are. They're not technically

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1 consolidated, but they're in front of the same judge,  
2 Judge Alsup. The arguments all happened together. We've been  
3 filing things on just one of the dockets.

4 THE COURT: All right. Thank you.

5 MS. KOPPLIN: All right. So from that I would like to  
6 turn briefly to the substance, and I'll just let you know that  
7 how we had planned to divide it was that my colleague would talk  
8 about the statutory authority for the rules and the question of  
9 whether the rule's contrary to law and I would discuss whether  
10 the rule's arbitrary and capricious and the constitutional  
11 issues.

12 If I could possibly just get a notice when I have about  
13 15 minutes left, I'd like to make sure that he has plenty of  
14 time to say what he needs to say.

15 THE COURT: Sure. We just need to be wrapping things  
16 up by about quarter to 12:00 for staff purposes. But other than  
17 that, I want to make sure that you have a chance to make the  
18 points you want me to consider. And I'm a notoriously bad time  
19 keeper as Mr. Durkin back there can tell you. So --

20 MS. KOPPLIN: Well, I just -- I certainly don't want  
21 to short him. So I'll -- I'll do my best, too. But any kind of  
22 heads up, I'll --

23 THE COURT: All right.

24 MS. KOPPLIN: -- try to respect that; and then I'll  
25 wrap things up so that he can speak.

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1 THE COURT: Okay.

2 MS. KOPPLIN: So, first, turning to the question of  
3 whether the rule's arbitrary and capricious, I just want to  
4 remind the Court this should be a very lenient review where the  
5 Court is not instructed to substitute its judgment for the  
6 judgment of the Agency. The Court's merely checking to see if  
7 it can reasonably discern the path that the Agency took, and  
8 that's been more than met here.

9 There is one thing that I just wanted to turn to right at  
10 the top because this came up a lot in the SDNY decision, and  
11 that's this question of what remedies the rule provides for and  
12 whether it provides for new remedies that are not otherwise  
13 existing in HHS's various statutes, like, the UAR and the FAR  
14 that determine how HHS can handle its grants and contracts. And  
15 I just wanted to point to, your Honor, to several places in the  
16 rule where this issue was actually discussed at length.

17 For example, on Page 23183 to 23184 of the preamble, the  
18 rule explicitly says: (Reading) The Department, therefore, will  
19 enforce such terms and conditions, et cetera, et cetera, in  
20 accordance with existing statutes, regulations, and policies  
21 that govern such instruments, such as the Federal Acquisition  
22 Regulation; the Uniform Administrative Requirements, Cost  
23 Principles, and Audit Requirements for HHS Awards, 45 CFR  
24 Part 75; regulations applicable to CMS programs; the associated  
25 regulations relating to the suspension and disbarment (sic); as

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1 well as any other regulations or procedures that govern the  
2 Department's ability to impose and enforce terms and conditions  
3 on funding recipients to comply with Federal requirements.

4 And there's a similar discussion in the rule at Page 23221  
5 to 23223 where the Agency again makes explicit that enforcement  
6 of the rule happens through the existing regulations and  
7 existing statutes that HHS uses to control the funds that it  
8 handles.

9 Those are both in the preamble. In the rule itself, in the  
10 text of the rule, at 88.7(i)(3), the rule before it lists kind  
11 of a menu of options and that menu kind of covers everything  
12 that could possibly happen. It's not saying each of these  
13 things will for certain happen. And before it lists that menu,  
14 the rule actually says that these steps will be taken, quote,  
15 ... taken in coordination with the relevant Department  
16 component, and pursuant to statutes and regulations which govern  
17 the administration of contracts (e.g., Federal Acquisition  
18 Regulation), grants (e.g., 45 CFR part 75) and CMS funding --  
19 CFR part 75 -- oh, sorry -- and CMS funding arrangements (e.g.,  
20 the Social Security Act), end quote.

21 So even in the text of the rule itself, it's clear that  
22 each of these enforcements actions is meant to be taken pursuant  
23 to the existing statutes and regulations that HHS is otherwise  
24 following. I think that's important to note when you're reading  
25 the SDNY decision.

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1 Turning back to the reasons that the Agency had for taking  
2 this course, first, I want to start with the question of the  
3 complaints the Agency received because this is something that  
4 plaintiffs really want to make a big deal out of and they're  
5 kind of getting really into this minutiae of "Let's double check  
6 the Agency's home work; and let's sort of count up each  
7 complaint and see if we can attribute whether we think each  
8 complaint was or was not correctly counted by the Agency."

9 THE COURT: Well, that's kind of the point of  
10 administrative -- or judicial review of administrative action,  
11 isn't it?

12 MS. KOPPLIN: I have the utmost respect for judicial  
13 review. My point here is simply that the Agency is using these  
14 complaints to say, "Look, we got many complaints." So it's more  
15 using them for the fact that it got these complaints.

16 THE COURT: Six.

17 MS. KOPPLIN: Not six. I think --

18 THE COURT: Did you get more than six?

19 MS. KOPPLIN: Well, they got 343. And I think --

20 THE COURT: Six. You got six.

21 MS. KOPPLIN: Well, we attached six, I believe, but  
22 even --

23 THE COURT: You got more than six?

24 MS. KOPPLIN: Um-hum.

25 THE COURT: And you only attached six?

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1 MS. KOPPLIN: Well, we didn't want to bury your Honor  
2 in papers.

3 THE COURT: Well, I can -- I can deal with paper. But  
4 the record before me is that you got six complaints, and the  
5 record before Judge Engelmayer is that you got six complaints  
6 that relate to the issue of conscientious objectors.

7 MS. KOPPLIN: I hear -- I hear what you're saying.

8 THE COURT: Did you get more than six than that? I  
9 just -- I just want to know. Did the US Government --

10 MS. KOPPLIN: Yes.

11 THE COURT: -- get more than six?

12 MS. KOPPLIN: Yes, your Honor.

13 THE COURT: How many did you get?

14 MS. KOPPLIN: So of the 343, plaintiffs try to kind of  
15 shuffle many aside by saying --

16 THE COURT: How many did you get?

17 MS. KOPPLIN: I -- can I -- can I finish my  
18 explanation because I think it does really relate to the  
19 question you're asking?

20 THE COURT: All right.

21 MS. KOPPLIN: Plaintiffs are trying to say that these  
22 complaints about vaccines would, for example, not be counted  
23 because they say that there's not a statute that would be  
24 violated by the conduct that's being described in those. So  
25 none of the federal conscience statutes was violated.

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1 When the Agency said that it received complaints addressing  
2 issues of conscience in healthcare, it didn't necessarily mean  
3 that each of those complaints at the end of a long period of  
4 investigation and legal analysis stated an actionable violation  
5 of one of the statutes.

6 Someone might come to HHS and say, "Hey, I have a  
7 conscience-related complaint," and it might turn out that what  
8 they're complaining about isn't actually covered by a statute.  
9 They have a complaint, they had a problem, but it wasn't covered  
10 by a statute. That's a thing that could happen. Probably does  
11 happen pretty frequently. And when HHS gets those complaints --

12 THE COURT: Probably?

13 MS. KOPPLIN: -- it still looks into them.

14 THE COURT: Is the Government adopting rules because  
15 "probably" there might be some problems out there?

16 MS. KOPPLIN: Well, your Honor, one of the problems  
17 the rule is trying to address was a lack of information and  
18 clarity among the public and among regulated entities. So --

19 THE COURT: In whose opinion?

20 MS. KOPPLIN: In the Agency's opinion, your Honor.

21 THE COURT: All right. So how many complaints did you  
22 get? I totaled it up six. That's the record that the plaintiff  
23 has -- has provided to this Court and that's the same record  
24 that Judge Engelmayer had. So six.

25 MS. KOPPLIN: Well, my -- my Honor (sic) -- your

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1 Honor, my point is that, in the 343, I think all of the  
2 complaints about the vaccinations -- they tranche on this  
3 question of whether conscience rights have been violated in  
4 healthcare. They might not affect a violation of the statutes,  
5 but HHS can still look at those and say, "Look, people are  
6 confused about what the statutes cover and don't cover. People  
7 think that the statutes cover this, but maybe they don't. Maybe  
8 we need to clarify what the statutes do and don't cover because  
9 we're getting a lot of complaints from people who think that  
10 they're covered but they're not actually."

11 THE COURT: "A lot of complaints." How many?

12 MS. KOPPLIN: You know, I wish I had in front of me --  
13 but I just know that -- I think it's -- of the 343, plaintiffs  
14 kind of say, "Oh, you know, like, a couple hundred of them are  
15 about vaccines."

16 THE COURT: They say six. I mean, I've -- I've got  
17 the numbers. You say 343. The plaintiff says six. You say  
18 there was more than that. How many? What's the number?

19 MS. KOPPLIN: I'm not even -- I'm sorry, your Honor.  
20 I'm not even quite recalling the six. As I recall, plaintiffs  
21 had come down to sort of, like, about 21 that they said they  
22 thought were colorable.

23 THE COURT: Well, maybe it's six percent. Perhaps I'm  
24 wrong on the number, and I'm getting a nod here. I do  
25 apologize, Counsel. Six percent was the number I was using for

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1 the number. So 21. I apologize for that.

2 So 343. There were 21 complaints that the plaintiff  
3 indicates was relevant to this issue of conscientious -- or  
4 conscience objections, and that is six percent of the number of  
5 complaints that the Agency received. Are those -- is that math  
6 correct?

7 MS. KOPPLIN: So our -- our position is that far more  
8 than that is what's relevant to the Agency's analysis here  
9 because far more than that involved conscience rights in  
10 healthcare in general. Now, I think --

11 THE COURT: How many?

12 MS. KOPPLIN: -- there are a hand --

13 THE COURT: How many?

14 MS. KOPPLIN: I think it's --

15 THE COURT: That's what I'm trying to get at.

16 MS. KOPPLIN: You know, I don't have the exact number.  
17 I think it's a pretty high percentage. I think plaintiffs  
18 identify a handful, like, 10 or 20 that were just duplicates or  
19 that maybe seemed like they were just kind of in tally with  
20 something else. I'm not sure about those.

21 But of the ones that plaintiffs agree on and of the ones  
22 that are about vaccines, we think these are all within the realm  
23 of -- of things that the Agency looked at to decide people  
24 needed more clarity about what was covered by the federal  
25 statutes.

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1 And I just want to also explain --

2 THE COURT: Is the Government taking the position that  
3 all 343 complaints were relevant to this -- this rule?

4 MS. KOPPLIN: Like I said, I'm not taking that exact  
5 position for the reason I just mentioned. I think there were,  
6 perhaps, a couple duplicates in the order of, like, 10 or 20;  
7 but it's our position that most of them are relevant here.

8 THE COURT: Okay. So I'm willing to allow the fact  
9 that you might not have those numbers in mind, but did the  
10 Government do that analysis? I mean, the State of Washington  
11 did. They looked at the administrative record, and they added  
12 it up. And I misstated the number, and I apologize again for  
13 that. But they gave me those numbers. They gave  
14 Judge Engelmayer those numbers.

15 Did your client -- whether you remember it right now as you  
16 stand here or not, did your client, the US Government, do that?

17 MS. KOPPLIN: Well, our client did look at them all to  
18 determine that there was 343. They did that initial analysis.  
19 And I will explain -- I think plaintiffs seem to think this  
20 should have been a very final analysis that says, you know, "At  
21 the end of the day there's jurisdiction here. There was an  
22 actionable conduct within the statute of limitations."

23 That's not really feasible for the Agency to do. I mean,  
24 they did kind of a first pass. They said, "We've gotten a lot  
25 of complaints. They seem to be about conscience issues in

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1 healthcare. Maybe we should take a look at that."

2 Often these complaints -- also just -- just for your  
3 background, these complaints often come in. They're from *pro se*  
4 individuals often. They don't have counsel. They may or may  
5 not provide information. It's not necessarily an easy task for  
6 HHS to -- to discover right away if there's an actionable matter  
7 or not. There's, you know, 25 odd statutes we're dealing with  
8 here. So they have to sort of consider, which, if any, of these  
9 statutes would be affected? Where's the funding stream for what  
10 plaintiffs are -- for what the complainant is talking about?  
11 It's not always clear what the funding stream is. You know,  
12 when did this happen? So there might be factual follow up.

13 So that's why I'm saying this was kind of HHS's pass at  
14 this. This doesn't mean they finished chasing down every lead  
15 and then, at the end, they said, "We think there was a violation  
16 of a statute." That would have taken them -- me much longer.

17 THE COURT: Isn't that their job? I mean, they're  
18 proposing a rule, which, right or wrong, creates a substantial  
19 change in the law and a substantial change in the provision of  
20 medical care to everyone in the country and a substantial change  
21 in whether people in this country will have access to medical  
22 care. And you started your analysis and your comments by saying  
23 one of the reasons for this rule-making endeavor was because  
24 there were many, many complaints. So how many complaints were  
25 there?

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1 MS. KOPPLIN: I think there was probably the better  
2 part of 343.

3 THE COURT: Okay. All right.

4 MS. KOPPLIN: And as I also would like to point out,  
5 when we're looking at the question of an increase in complaints,  
6 it's important to think of what the background for that was.  
7 What was the baseline number?

8 So, in the rule, HHS said they got 10 complaints between  
9 2009 and 2016. That's barely more than one complaint a year.  
10 So there's seven years they're getting barely more than one  
11 complaint a year. Plaintiffs don't dispute that number that I  
12 know of.

13 Then between November 2016 and January 2018, they received  
14 a further 34 complaints. So from barely more than 1 a year to  
15 34 over the course of less than 2 years. And then we come to  
16 the 343 number, which is where plaintiffs have really dug in.  
17 And this is just during fiscal year 2018. This is just during  
18 one year.

19 So even if we take at face value plaintiff's -- it works  
20 out to about 21 total -- that is a significant increase to go  
21 from barely more than 1 a year to 34 in two years to 21 in a  
22 single year -- fiscal year 2018. That still does show a  
23 significant increase.

24 And as I mentioned at the beginning, this is, of course,  
25 only one of the reasons that HHS relied on in determining that

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1 there was a need for the rule.

2 In addition, HHS was also looking at some of the data from  
3 surveys that they had, comments they received during the 2011  
4 rule making, comments that they received during the 2018-2019  
5 rule making, and their sort of past-enforcement history and what  
6 they've been seeing as they did this work.

7 Many of those comments that I just alluded to did refer to  
8 a culture of hostility towards conscience in the healthcare  
9 profession and a lot of concerns by people who were working in  
10 the healthcare area that they had been coerced into taking  
11 things that they did not want to do based on their consciences  
12 that they'd otherwise been pressured.

13 Next, I'd like to address sort of the four areas where  
14 plaintiff says that the Agency failed to consider the potential  
15 harms of the rule. And one striking thing is that the Agency  
16 actually did consider each of these potential harms and wrote  
17 about each of them in their rule. So clearly they were  
18 considered. Plaintiff just has a policy disagreement about the  
19 outcome that HHS reached there.

20 So plaintiff talks a great deal about access to care.  
21 That's discussed for many pages in the rule starting at 23180.  
22 And the Agency concludes that, in light of the evidence before  
23 it and in the record, they think overall the access to care will  
24 increase because providing for better understanding enforcement  
25 of conscience protections will allow people who might have to

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1 leave the healthcare industry to stay there will allow people  
2 with religious and conscience beliefs to enter the healthcare  
3 profession if they were afraid to enter before, including in  
4 underserved communities.

5 THE COURT: What evidence did the Agency have to use  
6 to reach its conclusion that this rule would actually lead to an  
7 increase in access to care?

8 MS. KOPPLIN: So the Agency does say that they were  
9 unable to find any, really, sort of conclusive studies setting  
10 out either way whether it would increase or decrease the access  
11 to care. But in light of the evidence they did have, including  
12 the 2009 study that laid out pretty substantial percentages of  
13 people in the healthcare industry, faith-based individuals in  
14 the healthcare industry who had conscience concerns, I think it  
15 was 40 percent of the people in that survey who were faith-based  
16 healthcare professionals said that they had felt that their  
17 conscience rights had been violated. They'd been discriminated  
18 against because of them, which was a pretty high number.

19 THE COURT: But how would that -- let's assume that  
20 number were -- was, in fact, correct and accurate. How would  
21 giving them -- or how would this rule increase their ability to  
22 provide more access? What they're saying is, "We don't want to  
23 give access." Isn't that what they're saying? "We object to  
24 this type of care. We object to caring for people from the LGBT  
25 community. We object to providing information or treatment

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1 regarding abortion rights."

2       So how is this rule going to increase their willingness or  
3 ability to provide access to care to the people they don't want  
4 to care for?

5           MS. KOPPLIN: So first, your Honor --

6           THE COURT: I don't understand that link.

7           MS. KOPPLIN: No, let me -- I --

8           THE COURT: So if you could help me --

9           MS. KOPPLIN: I'm happy to try and clarify.

10          THE COURT: Okay.

11          MS. KOPPLIN: So, first, there -- just the -- one step  
12 back from the high level here. The rule deals with individuals'  
13 objections to providing certain treatment, certain procedures.  
14 Nothing in the rule is about protecting someone's ability to  
15 discriminate against a certain type of person. That's not  
16 something the rule talks about. We're talking about objections  
17 providing certain procedures --

18          THE COURT: Discrimination by another name. But how  
19 is this going to increase the amount of care provided to these  
20 communities?

21          MS. KOPPLIN: So imagine that you are, you know, a  
22 doctor. You've been practicing for a number of years. Maybe  
23 you have a sort of general practice in a rural area. You handle  
24 a lot stuff. And you have a sincere, deeply held objection to  
25 providing abortions. And for a long time you've been able to

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1 make your way doing things. Maybe you refer people. I'm not  
2 sure how you handle it.

3 But now someone else is coming along. Maybe it's the  
4 State, maybe it's your employer, and they're saying, "We need  
5 you to provide abortions. If you can't provide abortions, then  
6 you're not going to have a job with us anymore." So you're  
7 forced to leave the healthcare industry. Right?

8 A lot of the people in the survey -- 90 percent say they  
9 would rather leave their jobs than be forced to violate their  
10 consciences.

11 (Interruption by the reporter)

12 MS. KOPPLIN: Sorry, ma'am. So that's healthcare  
13 opportunities that have just been missed out on.

14 We also have comments from students who are studying the  
15 healthcare professions who say they feel like they are afraid to  
16 enter the OB-GYN area or other areas where these things come up  
17 often because, although they generally want to provide OB-GYN  
18 care, they have a sincere, deeply held objection to providing an  
19 abortion, for example. And so, therefore, they choose to go  
20 into dermatology or something where they don't think this issue  
21 will come up. Right? There's people who are being sort of  
22 scared out of these certain areas of practice, even areas that  
23 might be very necessary to have people practicing in.

24 THE COURT: So we'll get more dermatologists by this  
25 rule.

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1 MS. KOPPLIN: Well, no. I'm saying, in this status  
2 quo, we're getting dermatologists. With the rule, people feel  
3 their consciences will be protected. Those people might be able  
4 to, you know, follow their first inclination and practice where  
5 they want to practice instead of being driven out.

6 THE COURT: Okay.

7 MS. KOPPLIN: Secondly -- the other -- the other three  
8 areas I'll just touch on briefly here unless your Honor has more  
9 questions; but those are the emergency care aspect, medical  
10 ethics, and Title VII. Each of these the Agency did certainly  
11 consider and address in their rule. The Agency considered  
12 emergency access at 23182 to 83, it considered issues of medical  
13 ethics at 23189, and it considered Title VII at 23190 to 191.  
14 And I know my colleague is going to discuss contrary to law more  
15 so I might just let him get into the details there. But,  
16 obviously, we briefed it; and the Agency considered it.

17 Finally, turning to plaintiff's constitutional claims, I'll  
18 start with the establishment clause. I'm sure you can guess,  
19 even after a brief read, but there's a lot in the SDNY opinion  
20 we disagree with; but one thing --

21 (Interruption by the reporter)

22 MS. KOPPLIN: In the SDNY opinion that we disagree  
23 with. One thing we don't have to disagree with is his  
24 conclusion on the establishment clause. When you have here a  
25 rule that is generally neutral between religion and

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1 non-religion, it's very difficult to see how that could be  
2 improperly promoting religion.

3 Turning to the spending clause and the separation of  
4 powers, I think Judge Engelmayer's decision on this actually had  
5 a lot to do with the very first issue that I raised today and  
6 that's this question of: Does the rule sort of add an entirely  
7 new remedy that didn't exist before? Does the rule sort of hand  
8 HHS this new stick that it can hit people with that it didn't  
9 used to have? And I've already addressed that so I won't return  
10 to that right now.

11 But under separation of powers, our position is that,  
12 because the rule does not change that substantive law and does  
13 not change the substantive power that HHS has, it does not  
14 violate the -- the separation of powers.

15 And similarly, on the spending clause, because the rule  
16 covers the same funding streams that the statutes covered, if  
17 plaintiffs really thought they had a spending clause problem,  
18 then they should be here suing about the statutes. And the fact  
19 that they even say in their briefing they're big fans of the  
20 statutes shows that, if the statutes are constitutional, the  
21 rule is, too, because it affects the same funding streams.

22 THE COURT: Isn't -- isn't their argument, though, is  
23 that the statutes don't take the funding away but the rule does  
24 assuming there's a violation?

25 MS. KOPPLIN: You know, I've -- I've never entirely

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1 understood their argument so I'm not gonna say that it's --

2 THE COURT: Well, that's my understanding.

3 MS. KOPPLIN: That's not how I've understood it.

4 THE COURT: Okay.

5 MS. KOPPLIN: I mean, I think -- I could be wrong. I  
6 think plaintiffs understand that the Weldon Amendment, Church  
7 Amendments, these say, you know, HHS should not permit this  
8 funding to be used in these ways. I think they will admit that  
9 that has some teeth, that has some meaning, that is not a -- you  
10 know, an hortatory provision floating out there that has nothing  
11 to do with money. I think they know that the money is supposed  
12 to be affected here.

13 They do argue, for example, that they think the rule is  
14 ambiguous and, thus, the spending clause problem; but the rule  
15 is less ambiguous than the statutes. The statutes don't have a  
16 definition of discrimination at all. The statutes don't have a  
17 definition of assistance of performance at all. It's the rule  
18 that's been trying to put some more meat on the bones and say,  
19 "Look, this is what we think these terms mean."

20 And the Agency here really tried to do that in the right  
21 way by going through notice and comment and rule making and --  
22 and kind of showing all its cards and saying, "Look, here's what  
23 we think. Here's what we think discrimination means." So  
24 they're trying to make it less ambiguous than it was before.

25 THE COURT: The new rule is.

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1 MS. KOPPLIN: The rule is less ambiguous than the  
2 federal conscience statutes, which don't even define many of  
3 these provisions.

4 And, finally, on the question of what relief would be  
5 appropriate, of course, our position is that there should be no  
6 relief. But in the event that your Honor believes some kind of  
7 relief would be appropriate, it's our position that that relief  
8 should be limited to the plaintiffs because of the longstanding  
9 understanding that the Court should just be remedying the  
10 specific injury in fact the plaintiff has. So here our  
11 plaintiff is just the State of Washington.

12 THE COURT: That's ridiculous. The rule applies  
13 nationwide, does it not?

14 MS. KOPPLIN: It does, your Honor.

15 THE COURT: I mean, assuming we still have a rule.

16 MS. KOPPLIN: Correct.

17 THE COURT: How can this Court -- I'm still a federal  
18 Court, at least, the last time I looked at that seal  
19 (indicating). How can this Court say, "This nationwide rule is  
20 improper ..." for whatever reasons I were to decide that if I go  
21 down that path "... but it's invalid as to the State of  
22 Washington but all the other states are fine." So the community  
23 20 miles down the street, Coeur d'Alene, Idaho, good rule; but  
24 here in Spokane, not a good rule.

25 MS. KOPPLIN: I mean, that is -- that is a

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1 condition --

2 THE COURT: I'm a District Court in the Eastern  
3 District of Washington. Arguably, I don't have -- I don't take  
4 cases from Seattle, Tacoma, or Everett or Vancouver. So if --  
5 if your clients' argument as to the extent of the remedy that  
6 this Court -- a federal court -- can provide if your argument is  
7 correct, then is my rule only good until the Cascade  
8 Mountains --

9 MS. KOPPLIN: Oh, no. That's not --

10 THE COURT: -- or does it go all the way --

11 MS. KOPPLIN: That's not what we're saying at all,  
12 your Honor.

13 THE COURT: -- to the Pacific Ocean?

14 MS. KOPPLIN: If -- if I could explain a little bit --

15 THE COURT: All right.

16 MS. KOPPLIN: -- I'm saying, if the State of  
17 Washington as well as the states of South Carolina, North  
18 Carolina, Louisiana, Alabama, Maryland, Mississippi -- if all  
19 fifty states and the District of Columbia had sued in your  
20 courtroom, then we're -- our argument would be different because  
21 you would have all those plaintiffs before you --

22 THE COURT: Would I have --

23 MS. KOPPLIN: -- and you'd be looking at all their  
24 injuries.

25 THE COURT: -- to have all 50 states? And so let's

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1 say I had 49 of them. Had everybody but Hawaii. So the rule --  
2 if I ruled in favor of the plaintiff, if I were to invalidate  
3 the rule and declare it vacated, would it apply only to the 49  
4 states I had but in -- in Hawaii it was just fine?

5 MS. KOPPLIN: So it should be --

6 THE COURT: I mean, I don't understand the reasoning.

7 MS. KOPPLIN: It should -- it should be set aside just  
8 as the plaintiffs that are before you. So if the State of  
9 Washington is concerned that it's going to have this rule  
10 enforced against it and that would be improper and your Honor  
11 agrees, then you should tell HHS "The rule is set aside as to  
12 Washington. You're not going to enforce this against the State  
13 of Washington. I've found they have some -- some arguments --"

14 THE COURT: What case law do you have to suggest that  
15 that's the limit to the remedy that this federal Court has here  
16 in Spokane, Washington?

17 MS. KOPPLIN: So one recent case would be the case  
18 *California v. Azar* in the Ninth Circuit where the Ninth Circuit  
19 vacated the nationwide scope of an injunction a District Court  
20 had entered.

21 THE COURT: We're not talking about an injunction.  
22 We're talking about a remedy. We're here on the substance. I  
23 was also one of the Courts on the *Azar* -- I call it the *Azar I*  
24 case, the Title X. I issued a nationwide injunction, and that  
25 issue is now with the Ninth Circuit. I understand that very,

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1 very clearly. I might disagree with it, but we'll see what the  
2 Circuit says.

3 But we're here now to decide whether this rule is valid or  
4 invalid. And so what case law do you have or constitutional  
5 provision do you have that this federal Court here in the  
6 Eastern District of Washington does not have the power to  
7 invalidate a nationwide rule? I'm not aware of that case or any  
8 case law that suggests that. But I'd like -- I know that your  
9 client is making that argument. I'd like to know what that  
10 argument is based on.

11 MS. KOPPLIN: Sure. So there's -- I'd point you first  
12 toward the *Gill v. Whitford* case from the Supreme Court where  
13 the Supreme Court said that relief should be limited to the  
14 inadequacy that produced the injury in fact that plaintiff has  
15 established. And it also said that a Court's constitutionally  
16 prescribed rule is to vindicate the individual rights of the  
17 people appearing before it. And it also said that a plaintiff's  
18 remedy must be tailored to address the plaintiff's particular  
19 injury.

20 THE COURT: But how can I invalidate a rule only  
21 within the District in which I sit?

22 MS. KOPPLIN: So it's not a question of this being  
23 tied to the District you sit. It's a question of what plaintiff  
24 do you have before you. The plaintiff here is the State of  
25 Washington. So our argument is that the remedy would be to

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1 correct any injury the State of Washington might suffer. If  
2 another plaintiff thinks they might have an injury, they can and  
3 have sued somewhere else. And -- and the Courts hearing those  
4 claims might want to reach their own decisions about what relief  
5 should apply to those -- those entities.

6 THE COURT: All right. You can assume you'll lose on  
7 that particular issue. So let's move on.

8 MS. KOPPLIN: Well, thank you for listening to me,  
9 your Honor.

10 And, also, on the scope of relief, I would say the relief  
11 should be limited only to the specific provisions of the rule  
12 that your Honor has a problem with. There is a severability  
13 clause in the rule. So if your Honor is particularly troubled  
14 by a certain definition, then it's plaintiff's burden to show  
15 that the rule cannot stand without that particular definition.

16 THE COURT: I'm more open to that particular argument.

17 MS. KOPPLIN: Well, I'm glad to hear it, your Honor.

18 THE COURT: All right.

19 MS. KOPPLIN: I've reached the end of what I prepared  
20 here. So I will -- or, actually, I'm sorry. I thought of one  
21 more thing.

22 THE COURT: Go ahead.

23 MS. KOPPLIN: This is just in response to one thing  
24 that plaintiff said. Plaintiffs were discussing this issue of  
25 whether or not the rule affects funding from the Departments of

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1 Labor and Education.

2 THE COURT: Right.

3 MS. KOPPLIN: And they noted that as a possible  
4 disagreement with the SDNY decision. We did address in our  
5 briefing and I think we also generally agree with the SDNY  
6 decision. Its basis, as I recall from my hasty reading, was  
7 that in 88.7 the provisions for relief are limited to the  
8 Department's funds; and the Department is defined as HHS. So  
9 we're a little bit unclear how that would cover funds from  
10 Education or Labor.

11 So with that, I'll let my colleague address the other  
12 issues.

13 THE COURT: All right. Thank you, Ms. Kopplin. And I  
14 apologize again for having my facts mixed up at the beginning of  
15 your argument, but --

16 MS. KOPPLIN: Oh, no. Thank you.

17 THE COURT: -- I appreciate the fact that you  
18 clarified that for me. Mr. Takemoto.

19 MR. TAKEMOTO: Good morning, your Honor.

20 THE COURT: Good morning.

21 MR. TAKEMOTO: As my co-counsel said, I will, at your  
22 discretion, discuss the statutory authority and contrary-to-law  
23 claims that plaintiffs have brought.

24 To begin -- yes?

25 THE COURT: No, no. You said at my discretion or

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1 my -- that's fine. That's why we're here. So please.

2 MR. TAKEMOTO: To begin on the statutory authority  
3 claims, there are, essentially, three sources of statutory  
4 authority for this rule. The first concerns the explicit  
5 authority that HHS has been granted, including provisions in the  
6 Affordable Care Act, Medicare and Medicaid Acts, and CHIP.  
7 Those are major programs, and so they're worth pointing out.

8 Another source of authority for this rule are the -- is the  
9 implicit authority that HHS has been given through the  
10 conscience statutes.

11 And then the last authority that HHS relies on is the  
12 housekeeping authority, which my co-counsel has -- has already  
13 discussed.

14 Going into some of the definitions, it's worth stepping  
15 back and, you know, assessing what this rule does. It basically  
16 has two key provisions. One is the definition section, which  
17 defines certain terms that either aren't defined in the statutes  
18 or defined through non-exhaustive lists.

19 The other key portion of the rule concerns -- basically  
20 describes for regulated entities the authority that HHS has to  
21 enforce the conscience statutes when recipients agree to comply  
22 with them.

23 And both of these provisions are squarely within HHS's  
24 authority as we set out in the briefs. We go through, you know,  
25 each of the definitions and explain why they meet that *Chevron*

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1 Step One, the plain language of the statutes, and then at Step  
2 Two of *Chevron*, you know, why this is a reasonable construction  
3 of those definitions.

4 I don't have much more to add on the contrary-to-law claims  
5 other than to point out that this is a facial challenge to this  
6 rule, and so identifying hypothetical scenarios that may --  
7 where a statute may conflict with the rule is not sufficient to  
8 vacate the rule.

9 And I would point your Honor to the Supreme Court's  
10 decision in *Reno v. Flores*, which involved an undocumented  
11 minor's ability to waive the right to an immigration judge. And  
12 the Supreme Court said that, although that right may be invalid  
13 in some circumstances because it conflicts with other -- other  
14 law, if the plaintiff's -- it was the plaintiff's burden to show  
15 that it was invalid in all circumstances. And that's at 507  
16 United States Reports, Page 309.

17 THE COURT: Thank you.

18 MR. TAKEMOTO: With that, if your Honor has any  
19 specific questions on these sections, I'm happy to answer them.  
20 Otherwise, we'll rest on our briefs.

21 THE COURT: No. Okay. Thank you.

22 MR. TAKEMOTO: Thank you.

23 THE COURT: I'll give the parties a few minutes to  
24 respond to each other. How about ten minutes per side? Would  
25 that be sufficient?

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1 MR. SPRUNG: Yeah. Yes.

2 THE COURT: Okay.

3 MR. SPRUNG: That is, your Honor.

4 THE COURT: Okay. Let's take a little break right  
5 now. Then you can gather your thoughts and you can start making  
6 your thoughts for a quick reply. And so let's take ten minutes  
7 and then we'll get back together and wrap this up. Thank you.

8 (Court recessed at 10:58 a.m.)

9 (Court reconvened at 11:13 a.m.)

10 THE COURT: All right. Thank you. Please be seated.  
11 All right. Let's have a brief rebuttal to each other, and we'll  
12 start with the State. And I'll try to limit it to about ten  
13 minutes each side so that we can get done on time.

14 MR. SPRUNG: Your Honor, we just have two points to  
15 make; and I'm going to ask Ms. Fraas to begin.

16 THE COURT: Okay. Thank you. Excuse me.

17 MS. FRAAS: Thank you, your Honor. Just on the issue  
18 of complaints, on Pages 31 to 34 of our motion for summary  
19 judgment, we carefully walked through our analysis of the  
20 administrative record. And we explained there, you know, how we  
21 went from 334 complaints in the record down to the arguably at  
22 most 21 percent -- at 21 complaints or 6 percent of the  
23 administrative record --

24 THE COURT: And that's what I flipped around in my  
25 mind, and I again apologize for that.

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1 MS. FRAAS: Absolutely. No, there's a lot of numbers  
2 in this case.

3 And I would just note that, in their opposition, the  
4 Government did not take any issue with our analysis of -- of the  
5 complaints there.

6 To the -- to their point that -- you know, that the Agency  
7 properly considered more than just the conscience violations  
8 complaints, I would just direct the Court to Page 23175 of the  
9 rule where the Government -- where the Agency says, and I quote,  
10 Since November 2016, there has been a significant increase in  
11 complaints filed with OCR alleging violations of the laws that  
12 were the subject of the 2011 rule.

13 And the 2011 rule, your Honor, only related to the three --  
14 the three statutes dealing with abortion and sterilization, not  
15 vaccinations and not all those other issues. So, clearly, I  
16 think that statement indicates that the Agency's belief that  
17 there was a substantial increase in complaints on the conscience  
18 statutes.

19 Thank you.

20 THE COURT: Thank you, Ms. Fraas.

21 MR. SPRUNG: Your Honor, the only point that I would  
22 be happy to address is the severability point. I'm happy to  
23 walk through the analysis of the severability issue if the Court  
24 would find that helpful.

25 THE COURT: I don't think I need it, but I'm certainly

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1 willing to listen if you'd like to make those arguments.

2 MR. SPRUNG: No. Thank you, your Honor.

3 THE COURT: All right. Thank you. From the  
4 Government, which I realize they're both government entities  
5 here; but I'm just used to calling the United States Government  
6 "the Government." And I think that's probably from the criminal  
7 docket. But go ahead.

8 MR. TAKEMOTO: The other government doesn't have  
9 anything to add.

10 THE COURT: "The other." All right. Thank you.  
11 Thank you.

12 All right. Well, I want to, again, thank all of you for  
13 the briefing that you did. It was helpful. And maybe you hear  
14 that all the time. I don't know. But -- but I maybe need to  
15 put it into context. We don't always get briefing from parties  
16 on cases that are this good. So I'm not just saying that. I  
17 really did appreciate the -- the good briefing that both parties  
18 and the amicus participants provided to the Court. It was  
19 helpful for us to understand the complex and, you know, large  
20 issue that needs to be decided.

21 I also want to thank you for your comments today. I think  
22 they were well organized and were helpful, and I realize that  
23 all of us were struggling with sort of a change in the -- in the  
24 terrain that occurred yesterday with the ruling out of the  
25 Southern District of New York. But I think you all responded to

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1 it adequately and well and you were helpful to the Court.

2 So I'm looking for my notes here, and I'm getting close to  
3 where -- there they are.

4 All right. So I am going to grant the motion for the  
5 plaintiff, State of Washington, and deny the motion for the US  
6 Government. I'm going to rule that Judge Engelmayer has  
7 approached the issue in the way that -- that I was approaching  
8 it, as well; but he did it in a very thorough and comprehensive  
9 way. And I don't intend to plow the same ground that he plowed.  
10 So I will accept his ruling.

11 I will have a written decision later that will address some  
12 of the additional issues the parties have asked this Court to  
13 address, but I don't intend to go into extensive detail on the  
14 issues that Judge Engelmayer handled so well.

15 But I agree with his conclusions that, first, it's  
16 appropriate for this Court to decide this issue on summary  
17 judgment; second, that the US Government and the Department of  
18 Health and Human Services exceeded its statutory authority in  
19 adopting this rule; third, that it acted arbitrarily and  
20 capriciously in adopting this rule for the reasons that he  
21 stated and that I summarized in my opening remarks; and,  
22 finally, that the rule is unconstitutional in several respects.

23 Again, my written order will address, hopefully, all of the  
24 issues that you've identified that -- that you think still need  
25 to be addressed and that Judge Engelmayer didn't address.

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1 We -- and, generally, this Court gets its written decisions  
2 out fairly quickly; but -- and we will try in this case, as  
3 well. This case is a little bit more complex than most.

4 However, I don't feel the pressure -- and I guess if you  
5 want to argue with me I'll give you a chance. I don't feel the  
6 pressure that we necessarily need to get a written order out by  
7 November 22nd, because whatever happens to Judge Engelmayer's  
8 order, ultimately nothing will happen to it most likely between  
9 now and the 22nd. So I think he took that -- that particular  
10 time deadline away from the other courts, me and Northern  
11 California and Baltimore that are deciding this issue.

12 If you want to address that, you can; but I don't feel that  
13 that's really a deadline that needed to be met. As of yesterday  
14 when I was preparing, I thought it was a deadline that needed to  
15 be met.

16 Am I wrong on that? I'm not asking you to agree or  
17 disagree with Judge Engelmayer. I think I know where you're  
18 headed with an appeal, but I doubt anything's going to happen to  
19 his order by the 22nd of November.

20 MR. TAKEMOTO: Your Honor, the Government -- the  
21 United States Government doesn't have anything to add to what  
22 you said.

23 THE COURT: All right. So, again, it's possible that  
24 we'll get our -- my decision out by -- before that; but if we  
25 can't do it, we can't do it. And I don't feel that that's a

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1 particular deadline that we have to meet.

2           So are there any other issues that we need to deal with on  
3 this case this morning?

4           MR. SPRUNG: No, your Honor.

5           MR. TAKEMOTO: No, your Honor.

6           THE COURT: All right. Well, thank you again for  
7 visiting with me here today and in -- in -- not Yakima, in  
8 Spokane. I hope you enjoyed your visit, and safe travels back  
9 home.

10           MR. TAKEMOTO: Thank you.

11           MS. FRAAS: Thank you, your Honor.

12           THE COURT: Thank you.

13           (Court adjourned at 11:20 a.m.)

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C E R T I F I C A T E

I, RONELLE F. CORBEY, do hereby certify:

That I am an Official Court Reporter for the United States District Court for the Eastern District of Washington in Spokane, Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on the first page hereto; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 19th day of November, 2019.



---

RONELLE F. CORBEY, RPR, CRR, CCR  
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U.S. District Court for the  
Eastern District of Washington in  
Spokane County, Washington