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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

CITY AND COUNTY OF SAN FRANCISCO Plaintiff, vs. ALEX M. AZAR II, et al, Defendants.	No. C 19-2405 WHA
STATE OF CALIFORNIA, BY AND THROUGH ATTORNEY GENERAL XAVIER BECERRA Plaintiff, vs. ALEX M. AZAR II, et al, Defendants.	No. C 19-2796 WHA
COUNTY OF SANTA CLARA, ET AL Plaintiffs, vs. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al, Defendants.	No. C 19-2916 San Francisco, California Wednesday October 30, 2019 8:00 a.m.

TRANSCRIPT OF PROCEEDINGS

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

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Official Reporter - US District Court
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Wednesday - October 30, 2019 **8:05 a.m.**

P R O C E E D I N G S

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THE CLERK: Calling Civil Action 19-2405, City and County of San Francisco versus Azar II, et al.

And related cases 19-2769, State of California versus Azar, et al.

And Civil Action 19-2916, County of Santa Clara, et al, versus U.S. Department of Health and Human Services, et al.

Counsel, please step forward and state your appearances for the record.

MS. HULING DELAYE: Your Honor, Jaime Huling Delaye for plaintiff San Francisco.

THE COURT: Great. Welcome.

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

THE COURT: Okay. Welcome to you, too.

We have a few hours here, and I think the best way to proceed is to give each side about 20 minutes to make your overview, and I'll try not to interrupt. And then I think we will spend several hours going into some of the -- a deep dive, so to speak, into some of the specifics.

I have a lot of questions, but it might be better for me to hold my questions and be more informed by your overview

presentations.

So I'd like to give each side about 20 minutes to kind of -- a higher level of argument would be worthwhile, and then we will go into some of the more detailed things.

Now, does that work for you two? Are you making all the argument this morning?

MS. HULING DELAYE: Your Honor, plaintiffs have reached an agreement to split the issues amongst counsel for the different cases. And so would you like one attorney to address the entire overview? If it's possible, we prefer to split that.

THE COURT: Okay. I would rather you do it that way than split it up. We'll eventually get around to -- maybe everyone will get a chance in response to more specific questions, but isn't there somebody on your side capable of giving me the overview?

MS. HULING DELAYE: Your Honor, we can do that. If you would give us a minute to convene, we would appreciate that.

THE COURT: No, you're going to do that.

MS. HULING DELAYE: Okay.

THE COURT: You can do that. Come on.

All right. So you have a seat. And we'll let the plaintiffs go first with the overview, and then we'll get your overview, and we can come back to more specific material.

I want you all to know that I find this to be -- it's hard for the judge. You all are dedicated partisans and live with the details. I've got hundreds of other cases, including people that the Government wants to put in prison, and I find the level of detail excruciating here. And it's hard for my eyesight to read this tiny print.

So it's not easy for me, and I am not going to decide this based on politics. That's a given. It's going to be on the law. That's all I care about, is does this measure up to the law or not?

So I want you to help me with that. I don't want to hear political arguments today, on either side, please.

All right. You get to go first.

MS. HULING DELAYE: Thank you, Your Honor.

The fundamental disagreement between the parties is whether Congress has delegated to HHS the authority to promulgate substantive regulations with the force of law interpreting statutory authority.

THE COURT: No, no. I'm going to stop you right there. I'll just tell you both.

This is an interpretive regulation. It is not a legislative regulation. I agree with you, it does not have the force of law. It's an interpretation. The reg even says that.

Now, if the Government disagrees, then you can have your chance at it, but I -- I was in the Justice Department. I know

what an interpretive regulation is versus a legislative reg.

This is a interpretive regulation. At no point in history did Congress give the agency the authority to issue legislative regulations. So that's a given.

But nevertheless, nevertheless -- see, you built your whole argument on a false premise. Nevertheless, the agencies from time immemorial have given interpretations of the laws they are supposed to enforce. So what's wrong with that?

That's what you've got to help me understand, is what is wrong with the agency putting out a regulation saying: Here is how we're going to interpret the law.

MS. HULING DELAYE: Your Honor --

THE COURT: So that's, to me, where -- you've got to help me understand that point.

MS. HULING DELAYE: In the absence of *Chevron* deference, it does not have the force of law --

THE COURT: Let's say there is no *Chevron* deference. Let's just say there is no -- well, that's a different question.

See, I've already violated my own... I told you I was going to give you 20 minutes and right off the bat you got me excited.

(Laughter.)

But let's put *Chevron* deference, all the deference issues to one side.

Here, I'm going to give you how I see this. Congress passed these amendments. Whether you like them or not, that's what the -- you don't like these amendments, but that's what Congress. So there are strings attached to the money, and we have to honor what Congress has done.

But the agency has no authority to add to or subtract from what the Church amendment said, the Weldon amendment said or what the Coats-Snowe amendment said, and you don't either. We are stuck with what Congress said and so is the agency.

Now, maybe in a very close case where the -- the wording is ambiguous, you defer to the expertise of the agency, something like that. But the agency can't just mash together all these amendments and start putting in new definitions or definitions that they would prefer motivated by political considerations. The agency is stuck with what Congress said.

Now, it can interpret those. I mean, every agency is going to have to interpret. What's wrong with that?

When I practiced for 25 years before I got this job, I occasionally had some Comptroller of the Currency regulation. They were all interpretive regs. They were all interpretive regs. And the Courts sometime went along with it, sometimes they didn't go along with it. But they were all just interpretations right there in the C.F.R. Everyone understood that. They weren't legislative regs.

And that's the same with these. These are interpretive

regulations telling the world how the agency intends to try to enforce these amendments. And as long as they don't add to or subtract from what's actually there in the amendments, I don't see what's wrong with that.

Okay. So I'm going to -- your time has not been taken. I have been pontificating, so I'm going to try to not take away from your time.

Okay. Please, your name is what?

MS. HULING DELAYE: Jaime Huling Delaye.

THE COURT: All right. Please go ahead.

MS. HULING DELAYE: Your Honor, we agree with everything that you've said. And the problem is that the definitions that have been adopted by HHS here reach far beyond what the conscience statutes say and what --

THE COURT: Give me some examples of that. I have been struggling to find those examples. Maybe there are a couple of them, but give me a good example of something that goes far beyond what they actually say.

MS. HULING DELAYE: So "assist in the performance" extends to anyone who takes an action that has specific reasonable and articulable connection to furthering a procedure. And HHS's definition makes clear that that includes, quote, making arrangements for the procedure.

But this is directly contrary to the legislative history of the Church amendment in which Senator Church himself said:

"The amendment is meant to give protection to the physicians, to the nurses, to the hospitals themselves if they are religious, but there is no intention here to permit a frivolous objection from someone unconnected with the procedure."

There were comments that were given to the agency that said: We're concerned that this definition is so broad that it would apply to people who schedule a procedure or prepare a room or sterilize instruments for an abortion. And the agency clarified in the rule that it is -- that this definition is intended to reach those people.

THE COURT: Okay. Let's take that -- that's very helpful for you to give me that example. Let's go through that for a second.

I read that legislative history, the floor debates. Do you know who he was responding to?

MS. HULING DELAYE: Off the top of my head I don't recall.

THE COURT: Senator Long, I believe it's Russell Long, raised that very question, and then Senator Church gave the answer that you just read.

So that's a good point in your favor. But where in the reg does it -- and you know how they got all the comments? They say: We got this comment. Here is our response. We got this comment. That goes on ad infinitum.

So help me find in this small print where -- where the agency said it would pick up schedulers.

MS. HULING DELAYE: Your Honor, the quote is from 84 Federal Register Page 23186.

THE COURT: 23186. I'm on that page. There are three columns. Where would I look?

MS. HULING DELAYE: At the bottom of the right-hand column the comment is:

"The Department received comments stating that the proposed, quote, articulable connection standard is too broad and would permit objection" --

THE COURT: Wait, wait, wait. 23180- --

MS. HULING DELAYE: -6.

THE COURT: -6.

At which column?

MS. HULING DELAYE: The right-hand column, the bottom of the page.

THE COURT: Mine doesn't say that. It says:

"The Department believes" --

Oh, no I see. Up there under "Comment." Oh, that's where you're reading. All right. Yes. You're right.

"The Department received comments stating that the proposed articulable connection standard is too broad and would permit objections by persons whom certain commenters contend have only a tangential

connection to the objected-to procedure or health services program or research activity."

By the way, that sounds kind of like what Russell Long was saying.

"Some commenters included examples such as a person preparing a room for an abortion or scheduling an abortion."

Then here is the response:

"The Department believes that the proffered examples are properly considered as within the scope of protections enacted by Congress for those who choose to assist and those who choose not to assist in the performance of an abortion. Scheduling an abortion or preparing a room and the instruments for an abortion are necessary parts of the process of providing an abortion, and it is reasonable to consider performing these actions as constituting assisting."

Okay. So what you told me is exactly right. It's right there in the -- so whenever it's your turn over there on the government's side, I'm going to ask you how you can square this with what Senator Church himself said in response to Russell Long. Because I think he said that you would be -- that wouldn't go that far.

Okay. All right. So that's Page 186.

All right. See, that's helpful to me to have these specific examples.

Give me another specific example.

MS. HULING DELAYE: Another specific -- well, another example, another reason that "assist in the performance" is too broad is because it should be construed as a term of art as used in the medical field. Whereas, the department has argued that it can take dictionary definitions of "assist" and "perform" and string them together to create this broad articulable connection definition.

The proper way to understand terms of art, as indicated by the United States Supreme Court in *Louisiana Public Service Commission versus FCC* is to be interpreted by reference to the industry in which they apply.

And here "assist in the performance" is a term of art in the medical field, and we have proffered declarations to that effect.

The Chen declaration at Paragraphs 14 through 16, and the Zevin declaration at Paragraphs 8 through 10 that indicate that the Department's understanding of the meaning of "assist in the performance" to extend to the examples that we just read from the Federal Register does not comport with the use of the term "assist in the performance" in the medical field.

And the broad definition of "assist in the performance" would sweep the additional types of refusals that were never

contemplated, let alone authorized by Congress.

So, for example, HHS recently conceded in a case brought by the State of New York challenging this exact same regulation that:

"The rule protects an ambulance driver's ability not to assist in the performance of a procedure to which the driver has an objection."

And that's a quote from HHS's lawyer.

THE COURT: Where was that quote from?

MS. HULING DELAYE: That quote was from the transcript of the hearing in front of Judge Engelmayer in the Southern District of New York on October 18th, and yesterday plaintiffs filed a request for leave to file a Request for Judicial Notice of that transcript.

THE COURT: All right. Is that ambulance driver point somewhere in the fine print of the Federal Register?

MS. HULING DELAYE: Yes, Your Honor, it is. And it was cited to in our reply brief as well. It's on Page 21188 of the Federal Register.

THE COURT: What I have doesn't go back that early. Mine starts at 23170.

MS. HULING DELAYE: I'm sorry. 23188.

THE COURT: 23188?

MS. HULING DELAYE: Yes.

THE COURT: All right. Then I do have that. What

column, please?

MS. HULING DELAYE: It begins on the far left column.

THE COURT: Okay. I see it:

"The Department received comments expressing concern that the definition of 'assist in the performance' would cover ambulance drivers.

"Response. EMTs and paramedics are treated like other healthcare professionals under this definition. Federal Conscience and Anti-Discrimination Laws would apply to them or not based on whether the elements of the law and this final rule are satisfied in a particular circumstance."

That's kind of wishy-washy.

"To the extent the commenters contend that the kinds of actions the ambulance crews perform never count as assisting in the performance of a procedure encompassed by a Federal Conscience or Anti-Discrimination Law, the Department declines to take a categorical approach."

All right. It goes on and on and on, but I'll stop there.

So that is not categorical. What did the Government say? Read to me what the Government said in the New York case.

MS. HULING DELAYE: Your Honor, if I may just highlight a few other portions from the Department's long response?

THE COURT: Yes, please.

MS. HULING DELAYE: They say, quote:

"EMTs and paramedics are trained medical professionals, not mere drivers."

And then near the top of the center column:

"To the extent commenters are referring to emergency transportation of persons with conditions such as an ectopic pregnancy, where the potential procedures performed at the hospital may include abortion, the question of whether such transportation falls under the definition of "assist in the performance" would depend on the facts and circumstances."

And to the extent that the Department believes that it depends on the particular facts of the case, that indicates that there are some situations in which a woman who is suffering from a potentially life-threatening emergency ectopic pregnancy could have an ambulance driver refuse to transport her to the hospital while she bleeds internally. And that is exactly the example that was given by judge Engelmayer in the New York case.

And if you turn to Page 117 of the Southern District transcript, which I have a copy for you, if you would like to see it?

THE COURT: I don't have it here, but just read it

exactly to me.

MS. HULING DELAYE: So the judge says -- so the judge is talking about whether an ambulance driver can literally drop a woman off in the middle of Central Park in New York on her way to Mount Sinai and leave her by the side of the road.

And the Court says:

"Right. It's certainly not a best practice, but the issue is is the conduct of the ambulance driver in refusing to drive any further because of the ambulance driver's sincere religious objection to the procedure, is that protected by the rule?"

And DOJ responds:

"The rule protects an ambulance driver's ability not to assist in the performance of a procedure to which this driver has an objection."

And then colloquy continues with the Court raising the question of EMTALA, and the -- and says basically that -- the DOJ essentially says if one ambulance driver isn't willing to transport someone with an ectopic pregnancy, that's something the employer should have planned for in advance.

But that is not a situation that the plaintiff healthcare providers can plan for in advance and that is made clear by the declaration of the Santa Clara EMT department director, who states that EMTS are dispatched in teams of two, one to transport and one to treat; that they do not know who they are

going to be receiving for treatment when they are dispatched. There is no way to know in advance whether they have an objection to the care that the individual needs in that emergency, and that it would be a violation -- a cause for discipline under state law for any EMT to refuse to provide care.

And that's in the Miller declaration at page -- Paragraphs 6 and 7.

So that is a very serious concern, Your Honor, that people could be in emergency situation where they need urgent care and there is no exception in this rule for emergencies. And for that reason the rule violates EMTALA, the Emergency Medical Treatment and Active Labor Act, which requires all medical professionals to provide stabilizing treatment; and if not available at that facility, stabilizing treatment, transfer to another facility where the individual can get the care that they need.

And we know that Senator Church was not considering allowing emergency -- refusals in emergency situations. If you look at Congressional -- 119 Congressional Record Page S9601, Senator Church says:

> "In an emergency situation, life or death type, no hospital, religious or not, would deny such services."

THE COURT: The floor debate? What page?

MS. HULING DELAYE: 119, Congressional Record S9601.

THE COURT: I have the floor debate. I don't have that page.

MS. HULING DELAYE: Your Honor, I apologize.

THE COURT: Is that in a Senate report? What is that you're reading from?

MS. HULING DELAYE: It's in the Congressional Record. I believe it's in the Senate report. I believe it immediately follows the pages that we were discussing a few moments ago.

THE COURT: All right. Read it again, please.

MS. HULING DELAYE: (As read:)

"In an emergency situation, life or death type, no hospital, religious or not, would deny such services."

So we have two problems here. One, Senator Church did not intend for the Church amendments to reach care not provided by doctors or nurses. It was performed by perhaps orderlies, receptionists, ambulance drivers.

And Senator Church intended that even the doctors, nurses and hospitals he intended to cover through this amendment would, of course, make an exception for an emergency to care for someone's life. And HHS has not made either consideration.

And that is similar to how the Weldon amendment should be interpreted. The Weldon amendment says -- does not include the term "assist in the performance," but it was intended to also

have an emergency exception.

At 151 Congressional Record H176, Representative Weldon says:

> "It simply prohibits coercion in non-life threatening situations. It ensures that in situations where a mother's life is in danger, a healthcare provider must act to protect the mother's life. In fact, Congress passed the Federal Emergency Medical Treatment and Active Labor Act, EMTALA, forbidding critical care health facilities to abandon patients in medical emergencies and requires them to provide treatment to stabilize the medical condition of such patients, particularly pregnant women."

And, yet, HHS says that this rule would allow an ambulance driver -- so it never intended to be covered by this rule -- to leave a woman bleeding internally, at risk of losing her life, by the side of the road in the middle of an emergency.

THE COURT: Show me -- what I have on the Church amendment doesn't have what you have. So I have -- hand up to me the page that you read from about the emergency.

MS. HULING DELAYE: Your Honor, I simply have my notes, but I'm happy to share them.

THE COURT: Okay.

MS. HULING DELAYE: On the third column over under "Legislative History."

THE COURT: This one over here says "enabling statute." This refers to Weldon.

MS. HULING DELAYE: Yes. I'm reading from the legislative history of Weldon, which is in the third column of that table.

THE COURT: I thought we were talking about the Church amendment. You said "Senator Church says."

MS. HULING DELAYE: Senator Church said that was on the first page of that document, and also Senator Weldon indicated the same objection.

Oh, Your Honor, I have the --

THE COURT: I just want to focus on Church for a minute.

MS. HULING DELAYE: Okay.

THE COURT: Where is the part the -- here it is. 11998 -- 11998 Congressional Record.

MS. HULING DELAYE: In the -- so, Your Honor --

THE COURT: S9601 --

MS. HULING DELAYE: -- S9601 is the citation.

It's in the second RJN that was provided by plaintiffs in conjunction with our reply brief.

THE COURT: Well, all right. I'm sure it's here somewhere.

All right. Ambulance drivers. Give me one more example that you feel is concrete and beyond the scope of the statutes

themselves.

MS. HULING DELAYE: With respect to "assist in the performance" at Page 23187:

"Nursing staff refusing to provide routine, pre and post operative support in connection with abortion or sterilization procedures."

THE COURT: What column was that now? I'm 23187. Three columns. So which one do I look at?

MS. HULING DELAYE: Your Honor, I'm -- sorry. I'm trying to find it myself at this moment.

(Brief pause.)

MS. HULING DELAYE: It is in the discussion of the *Danquah* lawsuit, which is in the center column. And in the center of that column:

"Nurses contended they were required to assist abortion cases in violation of the Church amendment. A public hospital receiving Public Health Service Act funds filed a brief in federal court stating that to administer routine pre and post operative care to abortion patients does not constitute assisting in the performance of an abortion under the Church amendment. Without taking a position on the facts of that case, the Department disagrees with a narrow interpretation of "assisting in the performance" that excludes pre and post operative support to a scheduled abortion

procedure."

THE COURT: Well, all right. I see your point, but it doesn't say categorically. It says they disagree with the categorical statement in that lawsuit.

MS. HULING DELAYE: I believe it says:

"The Department disagrees with an interpretation of "assisting in the performance" that excludes pre and post operative support."

THE COURT: Right.

MS. HULING DELAYE: And so that, to me, I read as the Department saying that it extends the definition of "assist in the performance" to include pre and post operative support, which means that not only would a hospital need to arrange for additional nursing support if there were a nurse who refused to scrub in on an abortion procedure.

The hospital would also need to make sure that to the extent that the patient needed to be prepped for surgery, or needed care after surgery, or perhaps returned to the hospital with complications from surgery, such as a post-operative infection, they would need to have -- a nurse would be allowed to object in that scenario and the hospital would need to provide alternative care to ensure that the patient was properly treated.

So on day one of this regulation going into effect, plaintiff healthcare providers would need to conform with that

understanding of the rule.

THE COURT: Okay. That brings me to a different point.

Why is that? This is just an interpretation. If the hospital feels that this interpretation is wrong, the hospital can complain with OCR, get a ruling from OCR, and then go take judicial review and -- under the APA and get it adjudicated on a very specific set of facts.

There is a ripeness problem that I see here. There are -- there are probably a thousand scenarios we can come up with that haven't yet happened, and you're asking me to rule in advance on a thousand scenarios.

I'm not a medical professional. I don't feel comfortable doing that. Maybe I could rule on a few that are clear cut, but there are so many -- this is not a legislative rule. I've got to get that clear. This is -- this does not have the effect of law. It has no more effect of law than the amendments itself. It's just their interpretation.

You have a -- a judge is eventually going to decide on a case-by-case basis.

I want to turn now to the -- to something that troubles me about your lawsuit, which is: Is this even ripe for me to decide or the judge in New York to decide when all of these issues, many of them will never come up. Many of them will never come up. But they might. And then they could be

adjudicated on a case-by-case with the real facts instead of hypothetical facts.

MS. HULING DELAYE: Your Honor --

THE COURT: Help me on the -- help me -- maybe an ambulance driver would do what you said in Central Park. I kind of doubt that would he ever happen, but it might. But that's an emergency situation. I'm more sympathetic to saying something on that.

But the one that you gave me about the post op, hospitals can reassign people. It may not even ever come up. So why should I get into that?

MS. HULING DELAYE: Well, your Honor, so a few points.

First, we're not asking you to rule on every hypothetical fact scenario that may come up. We're asking you to rule as a matter of law that the legal definitions that have been adopted by HHS in promulgating this law conflict with the Congressional statutes and that they are in violation of the Congressional intent and should be stricken and vacated under the APA.

THE COURT: Wouldn't it be sufficient for the judge to say, one paragraph: The agency cannot go beyond the wording of the amendments themselves. The agency has no power to add or subtract from what the law already said. And to the extent those definitions go beyond that, they are invalid.

I'm not going to get into -- you are asking me to get into

one multiplicity of scenarios, otherwise -- I mean, that much I could do.

But what I can't do, I feel, is to go through dozens -- let's say even a dozen hypothetical situations and say: Okay, I'm going to imagine this could occur. Would that be okay under this statute?

MS. HULING DELAYE: Your Honor --

THE COURT: See, your whole argument is trying -- is built on the false premise that this is a legislative rule. It is not. I'm willing to say that.

This is an interpretive only and they have no authority to expand on what the law says. That's quite clear to me.

And -- but beyond that, why do I need to say anything more?

MS. HULING DELAYE: Your Honor, you are empowered to say more. The case of *Morton v Ruiz*, the Supreme Court found that there was an interpretive rule promulgated by the BIA that it was in conflict with the Congressional intent and that it should be stricken. There are multiple examples of that, even recently, in this district.

THE COURT: Just give me appellate, just appellate ones. There are too many District Court decisions going all different ways. So stick with the one in the Supreme Court. What happened there?

MS. HULING DELAYE: Yes. *Morton v Ruiz* is 415 U.S.

199, 1974. Very recently the Ninth Circuit found that in *California versus HHS*, which just came out last week, the Ninth Circuit found that it was appropriate to look to legislative history even outside of the *Chevron* framework and to strike down an agency action. And that has not yet been published, but it's a Ninth Circuit decision by Judge Wallace. It's 2019 Westlaw 538,2250.

THE COURT: What were the facts in the Morton case?

MS. HULING DELAYE: In *Morton v Ruiz* the BIA was responsible for distributing Indian assistance, is what it was called. It was essentially financial assistance to Native Americans who needed financial support. And even though the BIA had in that case explicit authority to promulgate regulations, because they had not followed the APA procedure the Court held that there was no *Chevron* deference and looked at the rule as if it were simply an interpretive rule as opposed to a legislative rule.

And it looked very closely at the Congressional history to determine whether the assistance that the BIA was supposed to administer was supposed to go only to Native Americans living on a reservation or whether it was intended by Congress to go to Native Americans living on or near a reservation.

And the BIA -- the case came about because the BIA had denied financial assistance under that act to Mr. Ruiz, who was living near the reservation of the tribe that he was a member

of.

And there the Court said that the BIA could not adopt an interpretation that was in conflict with the Congressional intent to give that assistance to Native Americans on or near reservations.

THE COURT: Well, but that sounds like a case where the victim, Mr. Ruiz, brought a lawsuit to say: I'm entitled to my money. And he won. And the Supreme Court affirmed on the ground -- ruled for him on the ground that the interpretation by BIA was incorrect. Of course, that's right.

But you said --

MS. HULING DELAYE: And, Your Honor --

THE COURT: You said it stood for the proposition that a judge can reach out and strike an entire interpretation by an agency without a concrete setting. That's not quite what you -- that's not the fact.

MS. HULING DELAYE: No, Your Honor. I meant that the Court that -- I was intending to cite it for the proposition that the Court can strike an agency's interpretation even if it's not considered by the Court to be a legislative rule.

THE COURT: Of course. That's -- I mean, in a concrete case. Let's take the -- let's say that in our situation that the government, HHS, cut off federal funds to San Francisco General because of -- it wouldn't extend protection to ambulance drivers. Let's say that.

And then you came to court and said: They've cut off our money. We want our money. Just like Mr. Ruiz said: I want my money.

And then a judge would say: You can or cannot, whatever the interpretation would be under these amendments. The amendments do not authorize you to cut off the money on -- the protection doesn't extend to ambulance drivers, or they might rule the other way.

So that would be a concrete case. And, of course, you would have to say that the interpretation is either correct or incorrect.

MS. HULING DELAYE: Your Honor --

THE COURT: So I -- but here we don't have a concrete case yet.

MS. HULING DELAYE: This case is ripe because on the day that this rule goes into effect, all of the plaintiff -- the rule requires that all plaintiff recipients who receive federal funds, which is all of us, must act in all instances as if we are covered by the rule because we need to make assurances and certifications, which are required under the rule, in order to continue to receive our funds.

And not only that, but we have put in the record examples of policies that we have in place, pursuant to city policy in the case of San Francisco, incorporated in labor agreements with our unions that are facially in conflict with this agency

interpretation.

So we will need to change our policies on day one, because we will need to sign that we are in compliance with the rule in order to keep receiving the federal funds that we receive.

These --

THE COURT: Whose declaration is that?

MS. HULING DELAYE: Your Honor, there are -- the assurance and certification is in the rule itself. And the declarations from San Francisco are numerous. I believe one is from Mr. Wagner. There is -- I'm sorry, let me just turn to...

The Chen declaration from the head of Zuckerberg San Francisco General Hospital. Exhibit A to that declaration is our Administrative Policy 5.15, which requires even individuals with a religious objection to performing care to continue providing that care until a substitute provider can be provided in order to ensure continuity of care and ensure that life is preserved.

And, Your Honor, in this case 40 percent of the funds that Zuckerberg San Francisco General receives are from HHS. And this rule would allow HHS to completely cut off all of those funds if they believe -- if there is a violation or, quote, threatened violation even while voluntary compliance efforts continue.

So there does not need to be notice and a hearing and a finding and due process under this rule before HHS can cut off

all funds. Not even just San Francisco General's funds, but all of San Francisco's funds, all of California's funds.

THE COURT: All right. Well, so let me -- let's say you're right for a moment, and let's say that I -- hypothetically that I would rule for you on the points that you brought up so far about the ambulance driver and the post op and preop.

Nevertheless, this regulation is very long and that's only a small part of it. So if I would declare those to be invalid and beyond the scope of the amendments, there would be other parts still in play. And then you would have the same argument: Well, Judge, 40 percent. They are going to cut off our money.

You've got to go through here and fly spec this with every little objection we've got.

MS. HULING DELAYE: Well, Your Honor --

THE COURT: I can't do that. This is impossible. You're asking an impossible thing of the poor judge.

How many things -- let's say I give you three things to object to. Then I rule on those. You're not going to be satisfied with three. You want to go through and have dozens of scenarios adjudicated in advance.

MS. HULING DELAYE: We believe that the -- a proper remedy under the APA is vacatur of the rule because it was adopted in a procedurally impermissible way. It was adopted

without statutory authority.

There is no authority. There is no authority for HHS to interpret these rules, these statutes at all.

THE COURT: Well, wait. How can that be? Doesn't the Office of Civil Rights -- is that what's it's called, OCR? Doesn't OCR from even back in the Obama administration administer these very statutes? No?

MS. HULING DELAYE: The only thing that the previous 2011 regulations did was identify OCR as the agency to accept complaints. It did not authorize them. And there is no Congressional authority for OCR or HHS to promulgate these -- interpretations that impose substantive obligations on regulated parties.

So here what they are doling is they are saying: You need to sign this notice of compliance. You need to sign these assurances. You need -- the enforcement provisions are incredibly broad and they mirror enforcement provisions in Title VI, which HHS had Congressional authority.

THE COURT: You're saying before the present administration in Washington, San Francisco General never had to certify anything to HHS?

MS. HULING DELAYE: Not with respect to any of these conscience statutes, that is correct. This is --

THE COURT: Then how did Congress have these -- let's say -- let's take it under the Obama administration. Take

politics out of it for a minute.

How did Congress -- what was the Congressional scheme for seeing that these conscience statutes were complied with?

MS. HULING DELAYE: After the 2011 regulations, a complaint would go to HHS. And HHS had no written interpretation saying that they had the right to certain enforcement mechanisms. And so what they would use is the UAR.

The UAR is a regulation that we do not challenge. It's the Uniform Administrative Requirements, and they have adopted that, we believe correctly, pursuant to their housekeeping authority under 5 U.S.C. Section 301. That allows an agency to promulgate regulations governing their own procedures and conduct, not the conduct of regulated parties. And that's the key difference here.

So under the UAR what they would do is they would follow those procedures. They would say: We need, perhaps, to reach out and discuss this issue with an entity receiving funds. We need to make sure that they are in compliance with federal law when they receive federal grants. And they might impose additional program requirements or impose additional monitoring.

But under the UAR they are not allowed to take any money. Not a dollar --

THE COURT: But wait, wait. Some of these amendments specifically --

MS. HULING DELAYE: Your Honor, I just want to clarify. Not a dollar until the procedure has been completed.

THE COURT: Look. Again, I want to understand how Congress intended for this to act.

I don't remember if it's Weldon or Coats-Snowe or Church, but one of the amendments said that no federal money could go to a state agency or other entity that discriminates against people who won't do abortions.

MS. HULING DELAYE: Uh-huh.

THE COURT: So let's say there is some hospital that, in fact, does discriminate and, nevertheless, somehow is getting federal money. You're telling me that HHS has no authority to stop the flow of funds?

MS. HULING DELAYE: HHS has authority under the UAR to terminate only the specific funding stream indicated by the particular violation and only after all voluntary compliance measures have completed and failed, there has been notice and a hearing and a finding. And that is not the case with these enforcement provisions.

These enforcement provisions allow HHS to take away all funds that HHS administers. And even they contend potentially all funds covered in the Weldon amendment, which includes Department of Education funds, Department of Labor funds, even while voluntary compliance measures are still ongoing and even where there has not been a finding of a violation.

And, Your Honor, I would like to direct you to two cases that, I apologize, are not in the briefs. But the Weldon amendment is not specifically directed to HHS. It's part of the Department of Defense, and Labor, Health and Human Services and Education Appropriations Act. It is directed to government entity recipients of funds from DOD, DOL, DOE and HHS.

Similarly, the Coats-Snowe amendment is directed to the federal government and any state or local Government that receives federal financial assistance.

And there is case law out of the D.C. Circuit from then Judge Cavanaugh in *U.S. Department of Navy versus Federal Labor Relations Agency* at 665 F.3d 1339-1348 saying that:

> "Deference is denied to appropriations riders" -- for example the Weldon's amendment -- "because a federal appropriations statute is not within the agency's area of expertise."

And there the Court denied -- refused to adopt and denied any deference to the Federal Labor Relations Authority's interpretation of a similar federal appropriations provision.

In that case the FLRA had ruled in the context of a labor dispute about whether people -- federal employees stationed at a particular location were allowed to get bottled water when tap water was available. And there was a -- an appropriations provision that said the federal government cannot pay for any kind of personal items for employees. And FLRA had ruled that

the bottled water was not a personal item, and so the facility could pay for the bottled water.

And the Court said it doesn't matter what the FLRA thinks about this appropriations statute. It was not directed to them. Congress did not give them the authority to interpret it. We are going to look at what we think the plain language says, at what we think the Congressional intent was, and we will not adopt the FLRA's interpretation.

THE COURT: Well, I've got to give the other side an opportunity to respond, and then you can have more time. But I -- I'm confused over this.

When Congress put these riders in, Church and Snowe and so forth, who -- which agency did Congress think was going to police the system? Was it -- I would have thought it was -- they thought it was HHS, but -- but who did Congress think would police the system to make sure that federal money was being spent in accordance with these amendments?

MS. HULING DELAYE: Well, your Honor, the fact that HHS has grant making authority and can administer grants pursuant to the UAR does not mean that Congress intended to give it any interpretive authority to promulgate rules and regulations.

And I understand that Your Honor has recognized that they don't have the authority to promulgate legislative regulations, but in the New York case they conceded that these are

substantive regulations that substantively interpret the scope of the --

THE COURT: They are just wrong about that. They are just wrong about --

MS. HULING DELAYE: Yes.

THE COURT: I have no authority whatsoever to issue a substantive regulation.

So, I'm sorry. I'm not -- don't give me that. You're not answering my question. Who did Congress think -- what agency did Congress think would police the system?

MS. HULING DELAYE: Your Honor, there is not a remedy for every one. And it is entirely possible --

THE COURT: You won't even answer my question.

MS. HULING DELAYE: Your Honor, what I'm saying is --

THE COURT: It has to be HHS or some agency --

MS. HULING DELAYE: HHS can do so through the UAR. They have for 40 years done so through the UAR. And now for the first time ever -- these rules were passed in the beginning of 70's. For the first time ever they are saying that they can create a new procedural framework that imposes substantive obligations. They can define definitions in a manner that's -- that's contrary to Congress's expressed intent. And they do not have the authority to do so.

And the proper remedy under the APA, when an agency acts in excess of its statutory jurisdiction or authority, is to

vacate the rule. You don't need to parse this rule. It can be vacated.

THE COURT: Listen. I practiced in the U.S. Justice Department, before the Supreme Court and the Solicitor General's Office, and I am positive that I could dig up many instances where the Justice Department defended, or it was just a background fact that many agencies issue interpretive regulations with zero authority to so, because it's just their interpretation. It tells the public how they are going to interpret it. And usually the public wants to know how it's going to get interpreted, but it does not have the force of law. It's just an interpretation.

So to my mind you don't need any legislation saying you can -- you have the authority to issue an interpretive regulation.

What Supreme Court decision ever held that an agency can't issue an interpretive regulation unless the statute expressly so says?

MS. HULING DELAYE: What they say is that then if it's a guideline, it only receives our deference or it receives no deference at all if there is no statutory authority; and that if the Court looks at the interpretation -- the Court then has the obligation to look at how substantively the agency has interpreted the rule and if it is in conflict with the Congressional statute, the plain language, and the

Congressional intent, it should strike and not adopt that interpretation.

THE COURT: All right. You're not answering my question. Thank you. Please have a seat.

I'm going to let the other side start. I'll come back to the plaintiffs later in the morning.

All right.

MS. HULING DELAYE: Thank you, Your Honor.

THE COURT: Your name is what?

MR. TAKEMOTO: Benjamin Takemoto.

THE COURT: All right. Mr. Takemoto, I'm going to tell you, this is an interpretive regulation at most. It's not a legislative history rule. It has no substantive effect. Do you disagree with that?

MR. TAKEMOTO: Yes, Your Honor.

THE COURT: All right. Tell me why. Because I think you're totally wrong, and I can't believe the U.S. Justice Department would take such a position.

However, you know, go ahead. Explain to me why this is anything more than just an interpretation. If it is, then you may be in a lot of trouble with me.

All right. Go ahead.

MR. TAKEMOTO: Your Honor, to begin -- and I will answer your question. I just want to say that in the alternative, we do have arguments if the Court finds that this

is an interpretive rule in --

THE COURT: Where is the authority under any statute for you to issue a -- this agency to issue a legislative history rule? Here. Maybe you could find it. I just missed it. But where is it?

MR. TAKAMOTO: The rule points to three sources of authority for the rule. The first is explicit authorities for the rule. And it's important to note --

THE COURT: Where is that? Maybe I missed it. I've got the rule right here.

MR. TAKEMOTO: One moment.

THE COURT: We're going to look at each one of these statutes, because I don't believe that you have any authority to issue something that enlarges on the Church amendment, Snowe amendment or the Weldon amendment.

MR. TAKEMOTO: No, Your Honor. With respect to those statutes, the Department relied on the implicit authority in those statutes.

THE COURT: Oh, yeah.

MR. TAKEMOTO: And it's worth pointing out --

THE COURT: Where is the implicit -- what do you mean? There is no such thing.

The Church amendment has zero words that gives you the authority to issue a legislative rule. Let's just stick with that one. I read it several times.

Where is the authority there for you, your agency, to issue a legislative rule?

MR. TAKEMOTO: Your Honor is absolutely correct, that there is no language in the statute itself that explicitly delegates authority.

THE COURT: Right. Then it has to be an interpretive rule; right?

MR. TAKEMOTO: No, your Honor. The Supreme Court has said on numerous occasions and we -- in *Chevron* itself, that agencies can have implicit authority, and the Court looks to --

THE COURT: Implicit authority to do what?

MR. TAKEMOTO: To make rules.

THE COURT: Yes. Interpretive rules.

MR. TAKEMOTO: To make legislative rules as well.

THE COURT: Oh, hand up -- give me your best authority on that. I would like to read that.

MR. TAKEMOTO: Your Honor, the best authority would be *Chevron* itself where the Court said:

> "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case the Court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administer of an agency."

The Court said the same thing in *Meade* --

THE COURT: Wait, wait. Let's stick with that one. What was the implicit -- the implicit example they gave there of a statute that did that?

MR. TAKEMOTO: Your Honor, in *Chevron* it involved an explicit delegation of authority. The Court said this as a way of notifying that delegations can be --

THE COURT: Well, then give me a Supreme Court decision then where there was implicit authority found in a statute to issue a legislative rule.

MR. TAKEMOTO: I don't have a specific case from the Supreme Court.

THE COURT: There never has been one.

MR. TAKEMOTO: Not to my knowledge.

THE COURT: So that is a -- that is a dictum of all dictums. And I don't -- you know, I don't believe that's what the vast majority of Supreme Court law -- in fact, I know of nothing to the contrary. That is a -- that statement is not very clear-cut to support the idea that you can issue legislative rules that add to or subtract from those three amendments.

MR. TAKAMOTO: Your Honor, I would also point you to the Supreme Court's decision in *Barnhart versus Walton*, 535 United States Reporter at 222.

THE COURT: Wait a minute. Wait a minute.

MR. TAKEMOTO: 535 United States Reporter.

THE COURT: What was the name of the decision?

MR. TAKEMOTO: *Barnhart versus Walton*.

THE COURT: *Barnhart*. And give me the cite again, please.

MR. TAKEMOTO: 535 United States Reporter Page 222.

THE COURT: All right. What happened there?

MR. TAKEMOTO: In that case the Supreme Court -- if your Honor is holding that that section of *Chevron* is dictum, this is also dictum.

But I do want to say that the Court pointed out several factors that the Court -- that Courts ought to look to to determine whether there is implicit authority.

THE COURT: Read to me exactly what the Supreme Court said.

MR. TAKEMOTO: Yes. Your Honor, the Supreme Court said:

> "Courts look to the interstitial nature of the question, the related expertise of the agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the agency has given the question over a long period of time, and all of those indicate that *Chevron* provides the appropriate legal lengths through which to view the legality of the agency interpretation here at issue."

So all of those factors --

THE COURT: That's talking about deference to an interpretation. It's not talking about deference -- I'm sorry, the authority to issue a legislative rule. At least as you read it, it didn't.

MR. TAKEMOTO: Your Honor, I don't know if the Court actually made a distinction between interpretive rules and legislative rules here.

THE COURT: The Supreme Court has in the past. It used to be quite clear that -- you know, here is what a legislative rule is.

There often are times where Congress will say: We hereby give authority to the Consumer Protection Board to issue rules and regulations with respect to home foreclosures. And then the agency will go through notice and rule making and give people a chance to comment and then will issue rules, substantive rules that have -- the same effect as a statute. And that's because Congress delegated that to them.

But in the absence of such a delegation, it can only -- the last word is what Congress said, and all you get to do is help interpret it. Well, and that's worth something, but it's still just an interpretation of what Congress intended.

So I -- that's the way I see it. I'm an old guy. I'm not going to change my ways on this. That one you're going to have to get the Court of Appeals to reverse me on.

But this is so clearly an interpretive rule, I can't imagine that the law has changed so much in ten or 15 years.

So let's stick with the idea that it's an interpretation. I'm going to go look at these things you cited, but help me on -- why -- if this is an interpretation, then is it really true that you think an ambulance driver could go through Central Park and find out that the passenger is on the way for an emergency procedure at the hospital connected with an abortion and say: Sorry, get out of my ambulance.

MR. TAKEMOTO: Your Honor, I have two responses to that question.

THE COURT: That's a pretty bad situation.

Go ahead. What are your responses?

MR. TAKEMOTO: First response is that this is a facial challenge to the rule. And as Your Honor has pointed out on numerous occasions, in order to invalidate the rule plaintiffs have an obligation to show that it's invalid in all circumstances.

So to the extent that they can point to some speculative example that's not in the record, that's not sufficient under the Administrative Procedure Act to invalidate the rule.

The second --

THE COURT: What is the remedy, though, there? What does -- I'll just tell you. I can't imagine that that's what Congress intended. None of these statutes, to my mind, would

go that far.

So I would rule against you if that case came before me, and it was an ambulance driver who did that, and I would say: The hospital was totally right to fire that person and make sure they never got a job in the industry again for endangering the life of somebody like that.

So that would be, to me, topsy-turvy to even think for a second that anybody in Congress intended that.

So now that's the way I feel. However, you say: Oh, well, the issue hasn't come up yet and it may never come up and so don't decide that now. In any event, it's just one scenario. We've got a thousand scenarios. So how can you invalidate the whole thing over one hypothetical?

Well, that part, that last point I -- I may be sympathetic to your position on.

All right. Help me on the -- give me cases on point that help me understand the framework here of what -- what do you do for an interpretive rule when one interpretation or two interpretations are not in accordance with the statute? Does the judge just throw those out? Does the judge invalidate the whole thing?

MR. TAKEMOTO: Yes, Your Honor.

THE COURT: What is the right answer here?

MR. TAKEMOTO: The right answer is if this Court determines that this is an interpretive rule, then the Court,

of course, has *de novo* review and actually looks at the statute itself, sees if the regulation comports with the statute, and then determines whether to uphold or invalidate the rule.

THE COURT: But can two examples undo the entire interpretation?

MR. TAKEMOTO: Not at all, Your Honor. And I would point the Court to the Supreme Court's decision in *Reno versus Flores*.

THE COURT: *Reno* what?

MR. TAKEMOTO: *Versus Flores*. I can give you the Reporter cite if you would like.

THE COURT: Give me the cite, please.

MR. TAKEMOTO: 507 United States Reporter 292 at Page 309 is the relevant portion of this case.

So in that case the plaintiff was an undocumented minor who was in the administrative immigration judge system, and there was a provision that permitted the waiver of the right to an immigration judge.

And the Supreme Court held that although there might be some circumstances where an underage undocumented individual may not be able to constitutionally or lawfully waive their right to an immigration judge, that it was the plaintiff's burden in that case to show that that regulation was unlawful in all applications. And, therefore, it did not allow that one, albeit serious hypothetical, to invalidate the entire

thing.

THE COURT: Okay. Thank you. That's worth looking at.

Help me understand why you think an ambulance driver would be covered by any of these three amendments or -- you know, these days it's more than a driver. There is an EMT person sitting in there. So it's not driving at all. I understand that.

So, but their purpose is to stabilize the passenger until they can get to the hospital. They don't actually do an abortion in the ambulance. Their role is to keep the passenger stabilized as best they can until the hospital can perform the abortion, let's say, in an emergency.

So why -- how does that even come close to what Frank Church had in mind?

MR. TAKEMOTO: Your Honor, of course, the Court turns first to the language of the statute. And the Weldon, Coats-Snowe and Affordable Care Act use the term "healthcare entity" and they provide definitions of that term through non-exhaustive lists.

And when HHS developed the definitions of healthcare entity in this case, it looked to those terms. It looked to the dictionary definition and that's how it developed the definitions that it did.

I will say, Your Honor, that -- Your Honor, I would also

point to Page 23188 of the regulation, which explains HHS's response to this particular question; that EMTs and paramedics are just like any other healthcare entity that's listed in that statute. In other words, they provide healthcare in some circumstances.

I will note at the bottom of the first column on that page HHS made perfectly clear that it's not saying that all ambulance drivers or all EMTs are healthcare entities under the rule. It said explicitly that the Department believes it would depend on the facts and circumstances of each case.

So the rule doesn't go as far as plaintiffs say here.

THE COURT: That's true, but why should it ever cover any ambulance driver or EMT aboard an ambulance? I have trouble thinking of any -- there could be any scenario where we would let an ambulance driver or EMT refuse service in an emergency, period.

And I just can't believe that Coats-Snowe or anybody else -- show me the language in Coats-Snowe. None of them refer to ambulance driver, by the way. I bet that's something that your agency came up with. But show me the language that gets as close as possible to that concept.

I think there is something about a technician; right? Is that what you mean?

MR. TAKEMOTO: I mean, I refer the Court to the Coats-Snowe amendment Subsection (c) where it defines the term

"healthcare entity."

THE COURT: All right. I've got it right here.

"The term healthcare entity includes" --

MR. TAKEMOTO: "Includes."

THE COURT: Yeah, "includes."

"...includes an individual physician, a post-graduate physician training program and a participant in a program of training in the health profession."

That's it; right? So there is nothing there that comes close to ambulance driver.

MR. TAKEMOTO: Your Honor, it may be that under the explicit terms of the statute, that an EMT is a participant in a program of training in the health provision. They, of course, undergo training.

THE COURT: Well, "a participant in a program of training in the health profession."

See, this whole thing is -- this particular amendment was directed at training. Really, isn't that it? Training.

MR. TAKEMOTO: Yes.

THE COURT: So this is like education; true? It's like med schools.

MR. TAKEMOTO: Yes.

THE COURT: So if you're in the medical school as a student and you don't want to be taught how to do an abortion

because you find it offensive, then this amendment protects you and says: Okay, you have the right, as a student, not to learn how to do an abortion.

So I get that. That's what the -- but the -- how does that kind of training relate to an EMT who is actually on the job in the ambulance and suddenly decides that he or she doesn't want to stabilize a woman on the way to get abortion?

MR. TAKAMOTO: Your Honor, that -- that may be the case with respect to Coats-Snowe. The rule nowhere says in this particular section that it's referring to Coats-Snowe.

I would also point Your Honor to --

THE COURT: I want to stick with these statutes. All right? So Coats-Snowe is out.

So how about Weldon? How does Weldon fit into the ambulance driver and the EMT?

MR. TAKEMOTO: Well, just with one respect to Coats-Snowe. I don't agree that it's out, as I said.

THE COURT: You use the word "include."

MR. TAKEMOTO: Yes, exactly.

THE COURT: Well, that could include -- that could include anybody under your definition. Maybe it's a taxi driver who is -- so the word "include" opens up the possibility that it has -- there is more people in there than just the ones that are mentioned there.

But, all right. With that possibility, that's all you've

got going for you on Coats-Snowe is the word "include;" right? There is nothing else. This whole thing is about training.

MR. TAKEMOTO: Exactly.

THE COURT: Med schools.

MR. TAKEMOTO: It does not say medical schools. It says --

THE COURT: Training.

MR. TAKEMOTO: (As read)

"The federal government may not subject any healthcare entity to discrimination on the basis that that entity refuses to undergo training in the performance of induced abortions..."

And it goes on and on.

THE COURT: All right. You're right. It's about training, learning how to do abortions.

MR. TAKEMOTO: Yes. And without stepping in front of OCR in any particular adjudication, I think it's a fair reading of the statute to say that an EMT might fall under the statute, might be protected by Coats-Snowe.

THE COURT: Let's say somebody who is an EMT, who is learning how to be an EMT, and you get to the course on abortions they say: I don't want to do that one. Okay. Let's say they are protected in that.

That's a far cry from once they become an EMT, that they will not assist -- they will not stabilize a patient who is on

the way to get an abortion in the ambulance.

To me, they are worlds apart. I just can't see how you can shoehorn that.

All right. So that's Coats-Snowe.

Let's go to Weldon now.

MR. TAKEMOTO: Yes.

THE COURT: How would Weldon cover ambulance drivers or EMTs aboard an ambulance?

MR. TAKEMOTO: So Weldon, Subsection (d)(2) defines the term "healthcare entity," and it --

THE COURT: (d)(2), as in delta.

MR. TAKEMOTO: Delta, yes. And it says it includes. Once again, we have that term "includes."

THE COURT: Right.

MR. TAKEMOTO: (As read)

"...an individual physician or other healthcare professional."

"Other healthcare professional." And it's HHS's's view that that term, "other healthcare professional "may include, depending on the circumstances, an EMT.

THE COURT: Let's say it does. Let's say "other healthcare professional" includes an EMT. Let's assume that for a second.

MR. TAKEMOTO: Okay.

THE COURT: But still, there is a specific purpose

for Weldon; right?

MR. TAKEMOTO: Yes.

THE COURT: So in what -- what was that specific purpose?

MR. TAKEMOTO: Well, I would turn the Court to (d)(1), which is the actual effective provision of Weldon.

It says:

"None of the funds made available in this Act may be available to any federal agency or program or to a state or local government if such agency, program or government subjects any institutional or individual healthcare entity to discrimination on the basis that the healthcare entity does not provide, pay for, provide coverage of or refer for abortions."

THE COURT: So how does an EMT in the ambulance who is supposed to be stabilizing the patient, they are not providing, paying for or providing coverage or referring for abortions. They are not doing any abortions. They are not performing abortions. They are stabilizing the patient.

MR. TAKEMOTO: With respect to that particular example, Your Honor, that very well may be the case. And as HHS has said in the rule, it intends to also affect EMTALA, which requires the provision of emergency care in circumstances.

So that particular example that Your Honor is referring

to, it may be the case that the ambulance driver or EMT is required to provide care, but as the --

THE COURT: So show -- well, give me a scenario why you think an EMT in an ambulance taking a woman to the hospital for an abortion, where that EMT person would have some coverage and conscience protection? What scenario could there be?

MR. TAKEMOTO: Your Honor, I would point the Court -- HHS actually gave an example of this.

THE COURT: All right.

MR. TAKEMOTO: In that same page, the same column, 23188 bottom of the first column.

THE COURT: Wait a minute.

MR. TAKEMOTO: Okay.

THE COURT: I've got to go back there. 23-?

MR. TAKEMOTO: -188.

THE COURT: Okay. First column.

MR. TAKEMOTO: Bottom of the first column the Department says:

"For example, driving a person to a hospital or clinic for a scheduled abortion could constitute assisting in the performance of an abortion, as would physically delivering drugs for inducing abortion."

THE COURT: Well, this is talking about the driver, I guess. Well, I see the word "EMT" is in here, too.

Let me read more of it here.

MR. TAKEMOTO: Sure.

THE COURT: It says -- I'll go up to:

"As discussed earlier where EMTALA might apply in a particular case, the Department would apply both EMTALA and the relevant law under this rule harmoniously. To the extent possible EMTs and paramedics are trained medical professionals, not mere drivers. If commenters contend that driving a patient to a procedure should never be construed to be assisting in the performance of a procedure, the Department disagrees and believes it would depend on the facts and circumstances of each case. For example, the Department believes driving a person to a hospital or clinic for a scheduled abortion could constitute assisting in the performance of an abortion, as would physically delivering drugs for inducing abortion."

Those are two different scenarios there.

MR. TAKEMOTO: Yes.

THE COURT: So you're saying -- the Department says:

"...believes driving a person to a hospital for a scheduled abortion could constitute assisting in the performance."

So, to me, that is saying that the driver alone is assisting in the performance of an abortion, merely because

they are driving the patient in the ambulance to the hospital.

MR. TAKEMOTO: I would emphasize the word "could" in that sentence.

THE COURT: Yeah, could. It could.

MR. TAKEMOTO: In other words, it could not also.

THE COURT: But if the judge thinks that it could never qualify, then maybe that's a clear-cut example where at least, if I felt that way, I would say: This can't be --

MR. TAKEMOTO: This is --

THE COURT: -- under these statutes.

It seems to me that this is -- all right. So -- now, but the other one, though, is a little different. It says:

"...as would physically delivering drugs for inducing abortion."

That would be the EMT, not the driver, I guess. What does that mean, "as would physically delivering the drugs for inducing abortion"? What is that referring to?

MR. TAKEMOTO: Your Honor, it appears from the sentence that that is just -- is not necessarily referring to an EMT, although I am not entirely sure what that last --

THE COURT: It occurred to me maybe that's referring to the pharmacist, because there's a whole different issue on the pharmacist delivering drugs for inducing abortion.

So I don't know what that means. That's a strange phrase. Just kind of stuck on there. I don't know.

I don't see anything in those three statutes that could possibly justify an ambulance driver ever to do that. Honestly. I've read these back and forth. I don't see how you get there. Maybe that's just one example. Maybe parts of this are perfectly okay, but that one bothers me a lot.

MR. TAKEMOTO: Your Honor, the rule doesn't get there, is the short of it. The rule doesn't say that, you know, an EMT or ambulance driver providing emergency care to a person.

And, again, this is a very, very speculative situation, but it simply doesn't say that they must refuse care in that situation.

There is also this other statute EMTALA, which the Department says it will also --

THE COURT: Tell me what you think EMTALA requires.

MR. TAKEMOTO: In general, Your Honor, EMTALA requires the provision of emergency care by certain healthcare entities, such as an emergency department.

THE COURT: Regardless of what? Regardless of conscientious beliefs?

MR. TAKEMOTO: Well, your Honor, the statutes must be read harmoniously. But there may be situations where one has to -- does have to provide emergency care.

THE COURT: Let's say you have you a Catholic hospital and there is -- a woman comes in with an emergency

situation needing an abortion. Her life is in danger. She goes through the emergency room of a Catholic hospital. What does EMTALA require?

MR. TAKEMOTO: Your Honor, this -- this sort of situation is not really captured by the rule at all. The rule doesn't opine on that situation. So I don't --

THE COURT: I'm asking what EMTALA would require. If you don't want to answer, then I guess you don't have to.

I'm curious to know how these -- how we could harmoniously do what the regulation says you would do.

MR. TAKEMOTO: Yes, Your Honor. The reason why I say that is, again, this is a facial challenge. So they would need to show that they are always in conflict with one another, but they can only point to these speculative examples.

And so I'm afraid that I can't give you specifics on how EMTALA might be applied in a particular situation.

THE COURT: I want to change the subject a second. This is something I think I disagree with the plaintiffs on, but I'm talking out loud here. I haven't made up a final decision.

My understanding, before I met you more excellent lawyers, was that -- that any federal agency who administers a statute can issue interpretations to explain how it plans to carry out its part of the statutory scheme.

This is even where there is another legislative authority

by the agency. Like, the Comptroller of the Currency. The 1864 National Bank Act established the Comptroller of the Currency. And for many, many decades, a century I would say almost, the Comptroller has issued interpretive regulations, and they look just like any other -- they look like legislative regulations. They are in the C.F.R. But they are interpretive. They are not legislative. I could give you other examples, too.

But it never occurred to me that the agency had to have statutory authority to issue interpretive regulations. That's what plaintiffs say, I think. But I thought it was just inherent that any agency who has the duty to administer part of the statute can tell the public through an administrative, interpretive rule this is how we plan to do it.

All right. The other side spent some time on this. I want to give you a chance to tell me what the government's view is on that point.

MR. TAKEMOTO: Yes, Your Honor.

The first point that I would make is -- and I will be very brief on this, is simply to reiterate all of our statutory authority arguments. So for all those reasons, we think that the agency does has authority.

THE COURT: You were going to show me that. Show me in the reg where all that statutory authority is listed.

MR. TAKEMOTO: Yes. One moment, Your Honor.

(Brief pause.)

MR. TAKEMOTO: It begins at Page 23183 and continues on for four pages.

THE COURT: 23183?

MR. TAKEMOTO: Yes.

THE COURT: That can't be because this is just... This is comments and responses.

MR. TAKEMOTO: Yes. A commenter -- several commenters questioned the Department's statutory authority for the rule and the Department responded by explaining in detail what those authorities are.

In more summary fashion, as is the case with all rules, the complete list of authorities is at Page 23263, at the very beginning of the text of the rule.

But, your Honor, there are certain specific statutes that grant explicit authority to rule make in the area of Medicare, Medicaid and the Affordable Care Act.

And it's HHS's view that because it has been instructed by Congress to issue funds with certain conditions under the Church amendment, under the Weldon amendment, under the Affordable Care Act and others, that in order to disburse funds under those programs, it must comply with Congress's instruction. And so that's the essential -- that's the nut of the statutory authority argument.

Basically, how else is this supposed to work? Courts have

also held, it's worth noting, that individual plaintiffs lack a private right of action under these conscience statutes. So if plaintiffs are right, that HHS doesn't have the authority to issue even an interpretive rule in this area, how else are these statutes ever going to be enforced?

THE COURT: Help me on this. The Church amendment, does it even mention HHS? I don't see it. But maybe I'm...

MR. TAKEMOTO: No, Your Honor. Although it mentions statutes that HHS administers, such as the Public Health Service Act. And as Your Honor pointed out, all of these statutes, of course, concern the field of healthcare. And so HHS is the primary agency --

THE COURT: Who gives the money away to the hospitals? Is it HHS?

MR. TAKEMOTO: It depends on the funding stream, Your Honor. But, yes, it is HHS or a funding component within HHS.

THE COURT: And how far back does it go that HHS has been, I suppose, monitoring hospitals to see if they comply; is that right? I don't know. I'm asking. How far back in time does that go?

MR. TAKEMOTO: I don't have an exact date as far as back as it goes. I mean, of course, like -- you know, HHS has issued specific rules for these conscience statutes since 2008. Under the Bush administration that was the first regulation.

THE COURT: I understand. That happened in 2008. I

read that part.

MR. TAKEMOTO: Yeah.

THE COURT: And then the next administration rescinded most of it. Then it got reinstated, in stronger terms.

But let's go all the way back to the 70's, 80's and 90's. Did HHS then administer the funds that were passed for hospitals?

MR. TAKEMOTO: Yes. Under the -- as my colleague on the other side mentioned, the Uniform Acquisition Regulation, otherwise known as the UAR, permits HHS to develop its own set of regulations, which HHS has done through the HHSAR, H-H-S-A-R. And in those -- they are quite lengthy regulations, but the essential points of those regulations are that recipients of federal funds must comply with federal law.

And I would point Your Honor to 45 C.F.R. -- this is the provision of the HHSAR that allows HHS to withdraw funds for failure to comply with federal law. 45 C.F.R. 75.371 permits HHS, in certain circumstances, to withdraw all federal funds in a particular instance if the recipient fails to comply with federal law.

These regulations, I don't know the precise date when they were promulgated. They do preexist these regulations and they still exist today. So HHS is still bound by those regulations.

THE COURT: Did that come through the UAR?

MR. TAKEMOTO: Yes.

THE COURT: All right. So is this developed in your brief somewhere?

MR. TAKEMOTO: Yes.

THE COURT: All right.

MR. TAKEMOTO: In the statutory authority section of the briefs.

THE COURT: I asked the other side why we shouldn't just wait and see what develops. Maybe there never will be an ambulance driver to do that, and maybe we never will have that scenario occur.

And the answer to that was, well, the hospitals have to file a certification that the hospitals are in compliance, which means that they go to their ambulance drivers and they find out, I guess, that they -- that they would make -- I don't know what they would have to do, but they would have to somehow make sure they are in compliance with respect to their ambulance drivers, which heretofore they had never thought they had to. And so that's a concrete burden that is being placed on them now. Otherwise if they don't certify, they will lose their federal money.

I won't even get to the part about the labor union, but the certification process is something the hospitals have to go through right now as soon as this reg takes effect.

So that they do have a live controversy is the argument;

that they do have a need to know where they stand and whether they have to certify with respect to this entire regulation.

So what is your answer to that?

MR. TAKEMOTO: Your Honor, I would point -- once again, in the briefs we go into this in a little detail, where there are sections actually of the UAR, to answer Your Honor's previous question, that already require -- that already have auditing requirements and certification requirements.

So that's where -- that's where these requirements come up in the pre-existing regime. And so that -- I mean, this is essentially no different than the UAR in that respect.

THE COURT: Yes, but my -- okay. I didn't make it clear.

The plaintiffs say the hospital needs to know now whether these regs are valid or not and we don't have the luxury of waiting to see if somewhere down the road a -- and then litigating it at that point, which might be three or four years from now, because the -- because the hospital needs to make this certification pronto. And if it's not in compliance with the ambulance driver point, it's not going to be able to certify. And so it needs to know whether this ambulance driver rule is good from the get-go or not. So what -- that's the point.

It's the ripeness point I'm getting at now. What do you -- what to you say to that point?

MR. TAKEMOTO: Your Honor, my -- my basic argument on that point is that the existing certification requirements under the UAR continue to apply. And so in that sense there is no different obligation -- recipients of federal funds already have to certify that they are complying with federal law, which includes the conscience statutes.

So this doesn't add any existing requirement that creates a new injury for plaintiffs. It's basically a reiteration of their -- of their disagreement with the definitions here.

I mean, they know HHS's interpretation of these definitions at this point. Whenever they file a certification under the UAR, I don't see how that would be any different than this.

THE COURT: Well, do they have to certify that they are in compliance with the law, the statutes enacted by Congress, or do they have to certify that they are in compliance with the rule?

MR. TAKEMOTO: With the law. With federal law. It's Section 75.300(a) of the UAR, which requires compliance with, quote, U.S. statutory and public policy requirements.

So it's not --

THE COURT: Read that to me. Statutory and what?

MR. TAKEMOTO: Public policy requirements.

THE COURT: So does that pick up the rule or not?

MR. TAKEMOTO: Yes, Your Honor, because these are --

the rule is implementing the -- and interpreting the conscience statutes, and they contain statutory --

THE COURT: So the plaintiffs are correct to that extent; that the hospital has to certify that they comply with your rule.

MR. TAKEMOTO: They already have to certify that they are complying with the conscience statutes.

THE COURT: That part is true.

MR. TAKEMOTO: Yes.

THE COURT: But the statutes are not the rule. I'm telling you now, I think some parts of this rule are -- don't -- can't be justified under the statute.

So I'm just -- one opinion, but -- but the -- you have no authority to enact substantive law. You only have the authority to interpret. And your interpretation cannot add or subtract from what our Congress of the United States has told us is the law.

So if they want to say: We're in compliance with the statutes, and they have a good faith basis for it, they may be thinking in their mind, look, I don't care about that rule. I'm just going to certify the statute.

But if you're telling them that they -- if there is something in writing that says they have to certify that they are in compliance with your rule, that's a problem. Maybe it is ripe for us to determine.

So read me what is it -- what is it the certification is actually going to have to say?

MR. TAKEMOTO: Yes. So this is at Page 23270 of the rule.

THE COURT: 23-?

MR. TAKEMOTO: -270.

THE COURT: Wait, wait. 23270?

MR. TAKEMOTO: Yes. And this is actually worth looking at because it says --

THE COURT: Wait a minute. I've got to get there.

MR. TAKEMOTO: Sure.

THE COURT: This is so along.

You know, when I was your age, the whole C.F.R. and everything else was about one-third as long as it is now.

23270. All right. I'm at that page. What should I look at?

MR. TAKEMOTO: The top of the third column, Subsection (a). And this explains what recipients of HHS funds must certify; that the Department -- I'm sorry.

"Ensure that it is in compliance with Federal Conscience and Anti-Discrimination laws."

THE COURT: Well, I'm looking for the certification language.

MR. TAKEMOTO: My apologies, Your Honor. It's actually on Page 23269. It's the previous page.

THE COURT: All right. Wait a minute. 269, all right.

MR. TAKEMOTO: At the bottom of the middle column is where HHS explains the certification requirement.

THE COURT: All right. Here is what it says:

"A certification that the applicant or recipient will comply with applicable Federal Conscience and Anti-Discrimination Laws and this part."

So this part is the rule; correct?

MR. TAKEMOTO: Sorry, Your Honor. Which subsection are you reading from?

THE COURT: I'm reading from where you told me to. It's the middle column at the bottom called "Certification." It begins:

"Except for an application of recipient, to which Paragraph C of this section applies, every application for federal financial assistance or federal funds from the Department, to which 88.3 of this part applies, shall as a condition of the approval, renewal or extension of any federal financial assistance or federal funds from the Department, pursuant to the application, provide, contain or be accompanied by a certification that the applicant or recipient will comply with the applicable Federal Conscience and Anti-Discrimination Laws and this part."

MR. TAKEMOTO: Yes. And that includes the rule.

THE COURT: And this part is the rule.

MR. TAKEMOTO: Yes.

THE COURT: So how are they going to -- if they give that certification, they've got to roll over and they can't -- if they don't think that rule is valid, they've got to -- what is the remedy?

MR. TAKEMOTO: Your Honor, were the Courts to find that this was, as we discussed earlier, an inappropriate interpretation of the statutes, and that HHS exceeded its enforcement authority, and this part -- portion of the rule required recipients to comply with those invalid portions, the proper remedy would be, as the rule sets out, to be codified, Section 88.10, to sever the invalid portion of the rule.

THE COURT: Wait a minute. Okay. 8810. Very last page.

MR. TAKEMOTO: Yes.

THE COURT: Ha, ha, ha.

MR. TAKEMOTO: Best for last.

THE COURT: All right.

"Any provision of this part held to be invalid or unenforceable either by its terms or... shall be construed as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in

which event such provision shall be severable from this part."

Okay. So it's a -- so you say just sever -- whatever parts are invalid, you sever that. So if the ambulance part goes out, then the rest is okay. That's your view.

MR. TAKEMOTO: Yes, Your Honor. Although I would say that the ambulance example is different from this certification requirement in the sense that it is one example that, you know, cannot -- it's not as though that's like a portion of the rule. It's an example that would not invalidate it for facial reasons. Whereas, this provision, we're talking about it building invalid in toto.

THE COURT: Which provision?

MR. TAKEMOTO: Sorry. The certification provision.

THE COURT: Is that part of what's being briefed here, is that you want me to knock out the certification provision?

MR. TAKEMOTO: Yes. It's in the briefing.

THE COURT: So what if I were to say all you've got to do is certify that you're in compliance with the statutes. You don't have to certify that you're in compliance. This is just an interpretation. And then it would be up to you and your audit teams to go pour over the records and wait for a complaint and then maybe bring some enforcement action.

MR. TAKEMOTO: Yes, Your Honor.

THE COURT: I didn't realize that the certification provision was also in play.

There is a lot I don't understand about this. I've studied it a lot, believe me. Including reading legislative history.

But, you know, you all have had months. I want you to know how unfair your briefing schedule was. You had years to come up with the regulation. You had months on -- and all those lawyers to sit around thinking up your arguments.

And you, too.

And then you want me in a matter of days to decide this. And I've got one Law Clerk working with me on this. It's very -- it's topsy-turvy.

So, I mean, I'll get a decision out before this goes into effect. And don't ask me for TROs. I don't have time to do that either. I've got a lot of cases. Hundreds. So you should have given me more time on the briefs.

All right. I'm just complaining. We are about halfway through, and we're going to take a break for the court reporter. We'll come back in 15 minutes and then we'll come back to the other side.

And if you want somebody else over there to argue, that's fine. We will try to give as many as people as we can a chance to be heard. And then we're going to give you another chance to be heard.

So, thank you.

(Whereupon there was a recess in the proceedings from 9:50 a.m. until 10:09 a.m.)

THE CLERK: All rise. Court is back in session.

THE COURT: All right. Let's get back to work.

(Brief pause.)

MS. PALMA: My apologies, Your Honor, for not being in the courtroom.

THE COURT: That's okay. What's your name, please.

MS. PALMA: Neli Palma for the State of California.

Your Honor, if I may, I want to pull back a little bit. I agree with Your Honor that there are numerous specific definitions and scenarios in the rule that go far beyond what's contemplated by the Federal Conscience Statutes.

THE COURT: So far I've only said there's one. I didn't say there were many. I just said there was one.

There may be more, but I do think the ambulance thing is off base. That's one criticism of it.

But, okay. Go ahead.

MS. PALMA: And, Your Honor, I will provide for you additional concrete examples so that you --

THE COURT: I would like to have that. But I interrupted your main point. You were about to make a different point.

MS. PALMA: Yes. But what I would also like to add,

before I provide the Court additional examples, is that there are additional infirmities that require this rule be set aside in its entirety. They are both infirmities that flow from the APA and there are infirmities that flow from the Constitution, and I'll get to that in a moment.

But -- but we don't ask for vacatur of this rule very lightly. We think that it poses unworkable scenarios for the entirety of the healthcare industry in this country. And it goes beyond these few examples.

But I'll go back to providing the Court some additional concrete examples --

THE COURT: Don't do that yet.

MS. PALMA: Okay.

THE COURT: I'm interested in the point you just made. You said it was unconstitutional, and what was the other thing?

MS. PALMA: There were --

THE COURT: In violation of the APA. Let's stick with the APA. What is the APA violation?

MS. PALMA: Yes, Your Honor. If you give me a moment.

So on this note, the -- the case law is very clear that a new administration can't change policies once it comes into office.

What the law also states is that if the new administration

is going to disregard -- it can't disregard prior factual findings without providing a reasoned explanation. The reasoned explanation requirement is essential for judicial review.

And in this case the -- HHS has provided a couple of justifications for changing its policy here. One of them is that greater protections and enforcement tools are required to prevent the exodus of providers.

They have also explained in the rule that these additional protections and tools are warranted because of an increase in complaints related to conscience objections.

Now, on the issue of exodus of providers, they rely heavily on polling from about a decade ago where they questioned members of a religious medical association about their views about a potential rescission of the 2008 rule.

Now, not only is that polling outdated, but HHS in promulgating the 2011 rule already considered that data and comments related to that and disregarded that as a justification for failing to rescind the 2008 rule.

In fact, HHS at the time stated that the 2008 rule was not necessary because providers would continue to have protections under the Federal Conscience Statutes that have been in existence for decades.

And if you'll give me a moment.

(Brief pause.)

But in this instance HHS now indicates that there is an increase in conscience complaints and that somehow provides the justification for changing course and promulgating this rule. However, we now know that this assertion, that there has been an increase in complaints, is contrived and is not supported by the evidence in the record.

In fact, HHS in its briefing admitted that the vast majority of those complaints, the 343 which they reference, relate to matters outside the scope of the conscience statutes either because, one, they relate to objections to state mandates for vaccination, or they are complaints that are being lodged by patients or parents who also are outside the scope of these protections because they are not providers.

In fact, at the October 18th hearing in New York counsel -- the U.S. Department of Justice conceded that only 20 of those 343 complaints relate to the underlying conscience statutes.

THE COURT: Do you have the -- can you read to me from the transcript where that occurred?

MS. PALMA: Yes, Your Honor. I can do that.

"COURT: I appreciate that. So why don't we turn to the record.

"MR. BATES: Let's go to what Mr. Colangelo was saying about the number of complaints."

And, Your Honor, I am reading from the transcript at

Page 93 starting at Line 7.

"The record that Mr. Colangelo recites suggests that the number of complaints that were presented to the agency were not nearly the, quote/unquote, significant increase that the agency represented. Factually over the course of your briefs the number has gotten smaller and smaller and smaller. How many complaints does the agency say it received in the ramp-up to this rule?

"MR. BATES: So the agency stated in the rule that it received 343 alleging violations.

"COURT: That's what it said. But once we strip away things like vaccinations, what are we left with that actually implicate this rule?

"MR. BATES: So it is a smaller number, Your Honor. We have recited a number of them in our reply brief. I believe that we cited about ten in the brief and I know that plaintiffs have stated they believe there are 20 or 21. In terms of exact numbers, there are -- we can't cite all the ones in our reply that would fall here, but it would be something probably relatively similar to the number the plaintiffs provided.

"THE COURT: So we are not directionally agreeing with -- disagreeing with Mr. Colangelo's numerical

representations.

"MR. BATES: Not to the extent that plaintiffs have identified that a number of the complaints of those 343 do not allege violations that were relevant to the --

"THE COURT: I'm sorry. Let's go back to the 343. The agency at the time it proposed the rule presented that there had been a significant increase in the number of complaints that it used the 343 as a measure of that. If I am hearing you right, that 343, once we strip away complaints that deal with extraneous problems like vaccination, we are down to something like 20; correct?"

I'm almost done, Your Honor.

"MR. BATES: In terms of complaints that would have dealt more directly with rights that were protected under the conscience section.

"COURT: I'm going to drill down a little bit more until we get the direct answer. "Yes" or "no." Are we down to about 20 that actually implicate these statutes as opposed to the other problems?

"MR. BATES: Yes. In that ballpark, Your Honor."

THE COURT: You did a pretty good job.

(Laughter.)

THE COURT: All right. But where does 343 number

show up in this big long regulation?

MS. PALMA: Okay. I can provide that for you, Your Honor, if you just give me a moment.

(Whereupon document was tendered to counsel.)

MS. PALMA: Thank you.

So the number is on Page 23229. It's in the first column about halfway down that first column. And it states:

"OCR received 343 complaints alleging conscience violations."

THE COURT: 229, first column?

MS. PALMA: Yes, Your Honor. It would be the -- the paragraph beginning with the word "some commenters."

THE COURT: Okay.

MS. PALMA: And it's halfway down that paragraph.

THE COURT: All right. Let me just read. It says:

"Some commenters have suggested that the 34 complaints that OCR received between November 2016 and January 2018 that allege coercion, violation of conscience or discrimination do not necessitate this final ruling. These commenters misconstrue the reasons for the rule. The increase in" --

Is that a colon or semicolon? I can't quite tell.

"The increase in complaints received by OCR is one of the many metrics used to demonstrate the importance of this rule. During fiscal year 2018 the

most recently completed fiscal year from which data are available, OCR received 343 complaints alleging conscience violations."

So you're telling me that that's the number that actually turned out to be 21?

MS. PALMA: Yes. And, Your Honor, HHS has stated that, quote, in the rule:

"This increase underscores the need for the Department to have proper enforcement tools available to appropriately enforce all Federal Conscience and Anti-Discrimination Laws. This is the justification that they are providing for both the promulgation of the rule with its Draconian enforcement tools."

THE COURT: But let's -- all right. So let's say it's a mistake. What does the law say when it's a factual error like that in the stated reasons for adopting the rule?

MS. PALMA: So --

THE COURT: I'll give you a different example. Let's say that the Highway Safety Board says that we're going to -- we've received 343 complaints about some problem on the highways. And it turns out there really was just 21, but they issue the rule anyway.

Does that mean the rule is invalid? It can be set aside by a judge because the preamble has the -- or as in this case, the explanation is in error factually.

MS. PALMA: Yes, Your Honor. Well, first of all, we don't believe it's an error or a mistake. We believe that it's misrepresentation.

And on this the Supreme Court stated in *State Farm* that:

"It is arbitrary and capricious if there is an explanation for the rule that is contrary to the evidence before the agency."

And I think also relevant here is the Ninth Circuit's case in *Organized Village of Kake v USDA*, 795 F.3d 956. And there the Ninth Circuit stated that:

"When a new administration reverses a policy, an agency may not, consistent with *State Farm*, simply discard prior factual findings without a reasoned explanation."

And I'll explain a little bit why I think that *Organized Village of Kake* is relevant.

In that case it involved a challenge to an exemption of what was known as the USDA's Roadless Rule, which limited construction of roads and harvest timbering in national forests.

In 2001 the USDA had determined that it was necessary to exempt a national park from the Roadless Rule in order to preserve certain areas.

Just two years later, in 2003, based on the exact same record, the USDA reversed course and said that that exemption

was no longer needed to preserve those exact same areas. In other words, that the existing forest plan was sufficient to preserve them without the roadless rule.

The same is true here, where HHS is now reversing its prior finding that the existing conscience protections sufficiently protect providers on the basis of purported increase in conscience complaints.

We know that that justification is -- can't stand. And in *Department of Commerce versus New York* the Supreme Court -- that's at 133 Supreme Court 2551, the Supreme Court stated that:

"A Court need not accept agency justifications that are contrived."

As is the case here.

The Court went on to state at 2576:

"To do so would render the Court's review for the requisite reasoned explanation to support a policy change an empty ritual."

THE COURT: Which case was that about contrived?

MS. PALMA: It's the *Department of Commerce versus New York*. And that is the -- a census, census -- citizen census.

THE COURT: Is that Chief Justice Roberts decision?

MS. PALMA: I believe that is the case, Your Honor.

And the same is true here, where the Court need not accept

this contrived justification. And in case the Court was curious about the additional justifications that they have suddenly looked at those old comments rescinding the 2008 rule and reconsidered their merit or that there is some additional justification related to a purported increase in litigation, well, the Ninth Circuit in *Organized Village of Kake* also rejected that as a reasoned explanation for a policy change.

So that's exactly right, Your Honor. It's not a mistake. It's a misrepresentation. And that provides reason enough to set this rule aside.

THE COURT: Are these 343 complaints in the administrative record somewhere?

MS. PALMA: They certainly should be, Your Honor. And I believe that -- yes, Your Honor. And we -- we actually provided a declaration by Randy Chance as part of our original moving papers, and she reviewed those complaints and provided some relevant statistics concerning those complaints.

And, for example, she determined that 81 percent of the complaints that were included in the administrative record related to issues like vaccination. She also indicated that about 76 percent of them were from patients or parents. Again, complainants outside the ambit of the rule.

In terms of complaints related to abortion, there were only 18 and of those seven of them, for example, related to objections to healthcare plans covering abortion, and only four

of them actually related to -- were from providers objecting to assisting in participating in an abortion. So out of all of those --

THE COURT: What were the circumstances of the four?

MS. PALMA: Your Honor, I'd have to, you know, pull those up. I'm just quoting from the -- the declaration reviewing these complaints.

THE COURT: Okay. All right.

MS. PALMA: Your Honor, if I may, I'd like to move on to the issue of ripeness.

THE COURT: Okay.

MS. PALMA: In this case this issue is ripe for judicial review now because starting day one the rule requires the plaintiffs to immediately adjust their conduct to avoid a devastating loss of funding.

In this case *Abbott Labs v. Gardener* is directly on point. That's at 387 U.S. 136. In that case there was a -- it involved a challenge to the every-time rule wherein cosmetic companies -- or pharmaceutical companies would be required to include the common name on all advertising and labeling along with the market -- marketing name. And the pharmaceutical companies were put in a difficult position where they either would have to destroy all of their labels and marketing materials to comply with this rule or -- and, also, reprint all of this material at great expense or continue to proceed, as

they have, with a good faith belief that they complied with the statute, but not with the rule, but risked sanctions in the form of penalties and reputational losses, as the Court found.

The same is true here, where the rules certification and assurance requirements and compliance requirements require recipients and sub-recipients to comply throughout the duration of funding and as a condition of continued funding. And we know that these requirements will begin day one:

One, because defendant specifically rejected a comment to delay compliance for one year to provide regulated entities a safe harbor to come into compliance;

And, two, their implementation costs demonstrate that there are significantly higher costs starting year one as compared to years two to five, which are in its analysis.

Now, what does that mean on the ground in terms of having to comply starting day one if this rule is allowed to take effect?

For California, the evidence shows that MediCal, California's Medicaid program, would need to expend somewhere between $4.5- to $6.5 million to come into compliance, and this includes coming -- establishing an oversight structure so that MediCal can ensure that all of its sub-recipients, which include all 58 counties, come into compliance with this rule.

The California community colleges would need to spend over $7 million to ensure compliance at its 90 health centers,

including centers that are operated by local hospitals.

Particularly affected will be the Department of State Hospitals and the California Department of Corrections and Rehabilitation. They must immediately implement policies to ensure that their patients and their inmates receive medically necessary care.

And for CDCR that includes its transgender patients. And CDCR is under constitutional requirements and legal requirements, in fact, court orders, to ensure that transgender inmates get medically necessary care.

You had a question about that, Your Honor?

(No response.)

MS. PALMA: No?

But this won't just fall on the State of California. We've hinted at the fact that Santa Clara and San Francisco will also immediately and adversely have to change their policies, hiring practices, collective bargaining agreements and MOUs to ensure that life-saving care is provided to their patients.

This includes the -- for Santa Clara, the Santa Clara Valley Medical Center. We have declarations from Santa Clara's emergency medical services, its behavioral health services and its pharmacy services wherein they are going to have to try to figure out what will happen if pharmacists start denying women emergency contraception.

For San Francisco, you have declarations before you, Your Honor, from San Francisco General Hospital's emergency department, its Women's Options Center, and even the MOU with San Francisco General Hospital's nurses where immediate changes must take effect. And these providers cannot, consistent with their legal and ethical duties and their missions, take a wait-and-see approach to decide how to address refusals, particularly in the event of medical emergencies.

And I'll just go back to this entire scenario about, you know, whether -- whether -- the rule specifically cites the *Means* case. That's a situation where a woman was suffering from a pregnancy that was failing, and she went to a hospital, and she was turned away because she -- she had an infection that could cause harm and death to her, but she was turned away three times from the hospital because the hospital that she had gone to realized that the treatment might involve termination of that pregnancy to save her life. And she was turned away, as I indicated, three times. And then she sued because much later she found out why she had been turned away, because of the Catholic dictates of the hospital.

Well, that case is cited in multiple occasions in the rule as an example of discrimination against healthcare providers.

So to the extent that counsel is indicating that these scenarios aren't covered by the rule, that's exactly what's covered by the rule. And we know that by the inclusion of the

Means case here.

I'd like to give the Court an additional example of another place where the rule adds to a statute. And I think here it's important to look at the definition of "healthcare entity."

Now, "healthcare entity," as it is defined in Weldon, within the health insurance market, includes only the definition of health insurance plan.

By contrast, the rule --

THE COURT: I'm sorry. Which statute is that?

MS. PALMA: This is Weldon, Your Honor.

THE COURT: Okay.

"Healthcare entity includes an individual physician or other healthcare professional, hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility organization plan."

MS. PALMA: Yes, your Honor. And if you look at the rule at Page 23264, that's where the rule's definition of "healthcare entity" is defined for purposes of Weldon.

THE COURT: Okay.

MS. PALMA: And that's in the first column all the way down at the bottom.

THE COURT: I'm sorry. 264?

MS. PALMA: Yes, Your Honor.

(Brief pause.)

THE COURT: Okay. I see it.

MS. PALMA: Yes. And now the definition under the rule when compared to the statutory definition includes a health insurance insurer -- health insurance plan, which is original to the statute, a plan sponsor, or a third-party administrator. So they are adding to this rule here.

THE COURT: I'm sorry. This is for Weldon?

MS. PALMA: Yes, Your Honor.

THE COURT: I thought -- but Weldon does call out a provider-sponsored organization, a health maintenance organization, but not health insurance issuer; is that your point?

MS. PALMA: Yes, a plan sponsor.

THE COURT: I thought your argument was that it didn't call out pharmacist.

MS. PALMA: This is, yet, another concrete example where we have the agency expanding statutory terms.

THE COURT: All right. I agree that those aren't in there, but you left out of your present description pharmacist. The rule does include pharmacist in that very definition, but the statute does not.

MS. PALMA: Yes. That's yet another concrete example of expansion --

THE COURT: All right. But the ones you're focusing on are a health insurance issuer; right?

MS. PALMA: Yes. Just for background, Your Honor, a plan sponsor, that's generally considered an employer. And I'll tell Your Honor why that's relevant.

It is relevant because if you look at appendix Exhibit 396, HHS previously made a determination on what "healthcare entity" means within the context of Weldon.

And I have a copy of the exhibit, if Your Honor would like to see that.

THE COURT: Yes, please.

(Whereupon document was tendered to the Court.)

THE COURT: Tell me again what it is.

MS. PALMA: It is appendix Exhibit 396. And this is part of the administrative record.

THE COURT: This is, but it used to be what?

MS. PALMA: So I'll give you a little bit of background, Your Honor.

There is mention both in the rule and in the briefing that HHS in promulgating the rule sought to clarify on what they referred to as a high profile closure of a Weldon -- of three Weldon complaints against the State of California. And these were complaints that were lodged by religious employers relating to the non-discriminatory healthcare coverage requirement that California has of its health plans.

And in ruling in California's favor in this 2016 letter, HHS looked at the statutory terms and the legislative history of Weldon and determined that Weldon and its definition of "healthcare entity" by its terms, and this is on Page 4 of the exhibit, included only the health plans, but not purchasers of insurance companies.

And this is the second paragraph in the findings, Your Honor.

THE COURT: Page what?

MS. PALMA: Page 4.

THE COURT: Okay.

"By its plain terms the Weldon amendment's protections..."

Is that what you're talking about?

MS. PALMA: Yes.

THE COURT: (As read)

"...extend only to healthcare entities and not to individuals who are patients of or institutions or individuals that are insured by such entities."

I don't know. That's too complicated for me to figure. What is the point here?

MS. PALMA: The point here, Your Honor, is that HHS made a determination that the statutory definition of "healthcare entity" in Weldon did not encompass the plan sponsors, the religious employers who had filed these

complaints against the State of California.

THE COURT: Okay. That would be interesting. So where does it say that Weldon does not cover a plan sponsor?

MS. PALMA: So it's in that paragraph, Your Honor, that it is not purchasers of these plans. In the paragraph you just read.

THE COURT: (As read)

"Not to individuals who are patients of or institutions or individuals that are insured by..."

I don't see how -- that's referring to individuals. It says:

"And not to individuals who are patients of or institutions or individuals that are insured by such entities."

MS. PALMA: I know it's a little complicated, Your Honor, and I apologize --

THE COURT: It's a logic problem. I can't understand what they are trying to say.

MS. PALMA: Yes. If you read it in the context of the entire letter, Your Honor, and also the fact that in the following paragraph they speak to the fact that the insurance companies who receive the letter from HHS -- from the Department of Managed Healthcare, California's regulatory agency, that they already changed their health plans to cover abortion in response to the letter that's being objected to by

the Complainants.

It's a little convoluted, Your Honor, but basically the gist of this letter is that religious employers aren't covered under the definition of "healthcare entity" in Weldon.

THE COURT: I don't know. Can you really -- I mean, look at that paragraph. That next paragraph is saying that none of the insurance companies that have medical insurance plans objected to providing coverage for abortions, and that they all voluntarily modified their plan documents to cover abortion, and, quote:

> "None of them has indicated to OCR that it has a religious or moral objection to abortion or to providing coverage for abortion."

So it seems like the last sentence says:

> "As a result, there is no healthcare entity protected under the statute that has asserted religious or moral objection to abortion and, therefore, there is no covered entity that has been subject to discrimination within the meaning of the Weldon amendment."

Help me out here. I don't see how you get out of that that OCR made a determination that health insurance carriers were not covered.

What it seems to be saying is health insurance carriers that don't make objections on religious grounds are not

covered, but maybe I'm missing something.

MS. PALMA: Yes, your Honor. And I apologize that it isn't as crystal clear as it could be here.

But if you look at the background information at the bottom of Page 1, it describes who filed the complaint and says that it was:

"Religious organizations, a church-run school and employees of a religiously affiliated university."

So those are the complainants, and those are the ones who were determined by HHS in 2016 not to be covered under Weldon's protections. They determined that it only included the health plans themselves per the language of the statute.

Does that clarify it for Your Honor?

THE COURT: No. But maybe if I thought about it long enough. Let's see. Let me look at that first sentence.

(Brief pause.)

THE COURT: (As read:)

"Concluded its investigation into... So-and-so is engaged in discrimination under the Weldon amendment by issuing letters to several health insurers directing them to amend their plan documents to remove coverage, exclusions and limitations regarding elective abortions. OCR received three complaints challenging the CDMHC letter filed on behalf of a religious organization, churches and a

church-run school and employees of a religiously affiliated university."

So I am -- I can see that some church organizations complained to OCR about the rule in California that the insurance companies had to provide coverage for abortions, but I don't see where it ever says that insurance -- a health insurance carrier per se is not covered.

What they seem to be saying in the last part is that a health insurance carrier that's not objecting on the religious grounds.

See, the objection wasn't by the insurance carrier. It was by the church.

MS. PALMA: Yes. And I think it's one of those situations, Your Honor, where it needs to be read within the context of the rule. And the rule specifically points to the closure of this complaint and discusses the fact that the rule is meant to reverse the finding in this letter. The rule no longer --

THE COURT: Where is that? Let's look at that then.

MS. PALMA: Okay. Thank you, Your Honor.

THE COURT: I think you're right. I did see that in the rule somewhere.

MS. PALMA: Yes. That's what I'm referring to.

THE COURT: Where would that be? But let's look at it. I want to see how it was worded.

(Brief pause.)

MS. PALMA: So, Your Honor, the discussion -- it's -- actually, this letter is discussed in numerous places in the rule, but the discussion starts at 23177.

And actually probably the key part is, if I can turn Your Honor to 23178, the following page. And at the bottom, the very last paragraph that starts on this page, it says:

"Addressing confusion caused by OCR sub-regulatory guidance."

THE COURT: I'm sorry, what? I'm at 178, but I don't see what -- what column do I look at?

MS. PALMA: The final column, the very last paragraph that begins at the bottom of that page.

THE COURT: All right. I see it.

MS. PALMA: And it discusses, as I indicated, that they are seeking with this rule to clarify confusion caused by closures of certain complaints against California. That's the letter we have been reviewing here.

And if you give me a minute, Your Honor, I'll -- they actually tried to explain here what I've explained to you as to who is covered and not covered by the rule.

Okay. It says -- it's the -- halfway down that paragraph that starts at the top, it says:

"Relying on an interpretation of legislative history instead of the Weldon amendment's text, OCR

has declared that healthcare entities are not protected under Weldon unless they possess a religious or moral objection to abortion and concluded that the insurance issuers at issue did not merit protections because they had not raised any religious or moral objections."

Finally:

"OCR called into question its ability to enforce Weldon against the state at all because, according to the letter, to do so would potentially require the revocation of federal funds to California in such a magnitude as to violate state sovereignty and constitute a violation of the Constitution."

THE COURT: Is that in there? That last point?

MS. PALMA: I'm sorry, Your Honor?

THE COURT: That point about violating the Constitution and state sovereignty and so forth, is that also in this letter you handed up?

MS. PALMA: Oh, yes, Your Honor.

THE COURT: Where is that?

MS. PALMA: That's also on Page 4. And this is -- Page 4, the last paragraph that starts there.

And they indicate that -- that -- basically, and I'll paraphrase, but Your Honor can read just to confirm my interpretation; that they are -- they are indicating that

limiting Weldon's healthcare entity protections solely to help insurance plans, as stated in the statute, avoids the potentially unconstitutional interpretation of Weldon that might require HHS to remove all HHS education and labor funding from the State of California if they read it beyond its plain meaning.

THE COURT: Yeah, I see what you're talking about.

MS. PALMA: And just to even clarify further. If we go back to the rule, this distinction between who is protected under Weldon is specifically explained in the rule. And they say:

> "OCR's closure letter concluded that the Weldon amendment's protection of health insurance plans included insurers of health insurance plans, but not institutions or individuals who purchase or are insured by those plans."

In other words, not the complainants here.

So what's interesting there, Your Honor, is that this is almost like a bill of attainer; right? You now disagree with this policy, and you change your statutory language to fit in to this scenario where they -- they now want to find the plan -- find that the plan sponsors have protections under Weldon so that they can find the State of California in violation of Weldon because of its healthcare coverage requirement.

And this is not one of those attenuated circumstances where we're waiting for the next shoe to fall. In fact, Exhibit B of the Palma declaration includes a letter that OCR sent to the State of California on August 30th, 2018 telling them that they were reopening these -- this complaint against the State of California. So this old complaint from 2016 is now been reopened.

So if you have a reopened complaint and you change your rule to suddenly include plan sponsors, then you're necessarily getting ready to find the State of California in violation of the rule the date it takes effect.

And that's why I think that the ripeness challenges should be rejected. Not only because of the ***Abbott Laboratory's*** factor that they -- that the rule requires immediate and costly compliance efforts of all the providers before the Court, but also this fact that they are basically laying in wait against the State of California to find it in violation.

I really do think, Your Honor, that, you know, given how many times the State of California is referenced in this rule, that if this rule was allowed to take effect, we're going to be number one on the list of the entities that get a knock on the door from OCR.

THE COURT: Okay. I -- I still have questions about what the 2016 ruling was, but I don't need to take your time up on that. I need to give the other side a few minutes, too.

But go ahead, and I'll let you make one more point.

MS. PALMA: I'm happy to answer any additional questions to clarify the 2016 rule, but -- but otherwise I'm happy to move on to the spending laws.

THE COURT: Wait.

MS. PALMA: Okay. I will, Your Honor.

THE COURT: Don't go to the spending clause. Give me examples of where the rule adds to or subtracts from what's in the statutes. That's what you were just doing. The healthcare -- it was one of those things that would take so long to develop your argument.

MS. PALMA: I know.

THE COURT: It took 45 minutes. 45 minutes to develop it, and I'm still not sure I understand it.

So give me one that's clear cut. Like the ambulance driver. That one I can understand in three minutes. Give me one that's easy to understand.

MS. PALMA: Okay. I can do that, Your Honor.

Let's talk about the definition of discrimination that's new and in the rule.

THE COURT: Okay.

MS. PALMA: And what that does to make the operation of healthcare entities across the nation completely unworkable.

If you look at the definition of discrimination, it basically -- that's what precludes a healthcare provider from

trying to find a reasonable accommodation or would preclude a finding of undue hardship in a situation where someone might object to providing a medical service or engaging in a medical activity that they believe is contrary to their moral, religious or other beliefs because, you know, there --

THE COURT: Listen. See, you're going off on tangents again. Let me see if I've got your argument right from the way I understand it now.

You want me to read Title VII into these amendments and put in an undue hardship qualification to the word "discriminate." But that undue hardship phrase is never, never, never in any of those three statutes, but you want me to say: Well, it's under -- Title VII has it, so logically it ought to also go under these three statutes.

But the Government says: No, we're not going to have an undue hardship.

So you criticize them for not putting something into the statute that's not even in the statute. So I think that's your argument. You tell me in your own words how close that is.

MS. PALMA: So under the rule of discrimination, it -- the -- the rule does many things to make the present landscape of how religious accommodations are presently dealt with in the healthcare industry; not in any other industry, just in this industry, which I think in and of itself poses some issues.

But, for example, the rule prevents an employer from inquiring of the prospective employee whether they might object to providing any healthcare service or engaging in any healthcare activity.

So, in essence, they are precluded from inquiring of the prospective employee whether they can even perform the essential functions of their job.

THE COURT: Are you sure? I could have sworn I read -- recently in reading this whole long rule, I could have sworn that I saw in the comments that the -- that they had given the -- the agency decided that they would allow that, but maybe I misread it.

MS. PALMA: No, Your Honor. In fact, they did concede in the hearing in New York that the rule has no undue burden exemption. So this is -- it's not just --

THE COURT: No, no. That's a different point.

But your point that you could not inquire during an interview of a prospective employee, would they have an objection? And I thought I read somewhere where the government said yes, the hospital could do that.

Now, maybe I am not -- my memory is not perfect, so help me out on that.

MS. PALMA: I -- you know, I haven't seen that in the rule, Your Honor.

THE COURT: I could have sworn I saw that in --

somewhere in one of these -- you know, in this tiny print.

MS. PALMA: Yes. What the rule states is they can't inquire in advance. And once the employee has been hired, they can only inquiry once per year unless this is some reasonable justification, which is not defined.

THE COURT: Show me where it is in the rule and maybe that will clear it up.

MS. PALMA: Okay, Your Honor. Give me a moment to find that. The writing is small for me as well.

(Brief pause.)

MS. PALMA: So, your Honor, I'm looking at Page 23192.

THE COURT: 192?

MS. PALMA: Yes.

THE COURT: All right.

MS. PALMA: And it states in the penultimate paragraph there:

"The definition also clarifies that employers cannot use information gained from this process to discriminate against any protected entity or employee and any attempts to, for example, ask questions of the prospective employer or grant applications concerning potential objections before hiring or a grant award will require a persuasive justification because of the risk of unlawful, but difficult to detect,

quote/unquote, screening of applicants."

THE COURT: Well, it does allow it if there is a persuasive justification.

MS. PALMA: Which is not defined, Your Honor.

THE COURT: Well, but you said it was a flat out --

MS. PALMA: I think I misspoke as to what the standard was. I'm sorry, Your Honor.

THE COURT: All right. So maybe it can be done.

MS. PALMA: Yes. And if you look at Page 23263, Your Honor.

THE COURT: 263?

MS. PALMA: Yes, Your Honor. And it -- in the middle of the last column it uses similar language stating:

"Such inquiry may only occur after hiring of, contracting with or awarding of a grant or benefit to a protected entity and once per year thereafter unless supported by a persuasive justification."

THE COURT: I'm sorry. What column?

MS. PALMA: The last one, Your Honor, about halfway down. It's in Subsection 5.

THE COURT: Okay. I see that.

MS. PALMA: Okay. And just to move along quickly on the issue of undue hardship. It's quickest to go straight to the transcript from the New York hearing.

And I'm looking at Page 107 at the bottom, Lines 21 to 25,

and it states as follows. And this is very quick:

"THE COURT: As to that, do you agree that the rule adopts a different framework with respect to discrimination and then Title VII?

"MR. BATES: The rule does not include the undue hardship."

So we have an entirely different framework that's been set up that vastly expands and alters what has long been perceived as required by the conscience statute and this new process and -- this new accommodation process is really what makes it unworkable.

So we're put in a situation where we can't ask -- let's go back to the EMT and the woman in the ambulance in Central Park. We can't ask those -- those ambulance drivers -- only within these limited circumstances can we ask them if they have an objection.

This doesn't account for the fact that objections to providing services can develop over time. So they may have not had one once they were -- they were asked shortly after hiring and maybe something has happened, you know, after the once per year that they have been asked this information.

This creates a situation where, coupled with our inability to ask and, you know, the fact that discrimination states that -- the definition of discrimination states that the accommodation is acceptable so long as it is accepted by the

employee. That's what it says now.

Whereas, within the Title VII framework the case law specifically says that the accommodation that's provided to the employee need not be the best one. It may not even be the one that's suggested by the employee. So as long as it's reasonable.

Under this framework that's being established by this rule, it's -- it's only acceptable if it's accepted by the employee. It's an absolute --

THE COURT: Can I -- there may be a premise here that I'm missing, and so I -- don't get into Title VII yet.

MS. PALMA: Okay.

THE COURT: But let's go back, say, six months ago before this rule was ever -- or before this rule was promulgated.

Was the practice at a hospital to inquire about religious objections for the purpose of figuring out where they could hire somebody?

In other words, let's say, they were hiring a nurse that was going to be on the floor where abortions were done.

To my mind, it would be a very reasonable question to say: Well, look, this is a job for somebody that's going to do abortions. Do you have any problem doing abortions?

And then they would say: Yeah. By the way, I don't like abortions. So I have religious objections.

So the hospital would say: Well, we're not going to hire you.

Now, is that the way it worked? How did it work -- don't get into Title VII yet.

MS. PALMA: Okay.

THE COURT: How did it work under these amendments, the Weldon and so forth? How did it work -- what did a hospital do before?

MS. PALMA: So the -- the plaintiffs have provided numerous declarations that speak to what the current practice is.

For example, there is an abortion provider who provided a declaration indicating that because of the nature of the work and services that they provide and the fact that they are often targeted, that providers have been killed going to work, they need to be assured that -- that employees can abide by the missions of those clinics.

So the declarations actually do indicate that they do request in advance.

You have providers also within the --

THE COURT: Let's just pause on that. Wait. Don't go.

So, to me, that's entirely reasonable, but is that allowed under the statutes? Just under the statutes? As you read the statutes themselves, can a prospective employer refuse to hire

somebody on the ground that they would have a religious objection to doing what the very job they are hiring for requires?

MS. PALMA: The rule -- the current statutory framework would permit this inquiry to be made.

THE COURT: All right. And let's say the inquiry is made and the answer is: No, I won't do abortions under any circumstance.

And then the prospective employer says: Well, by the way, don't you know that that's what the job is? We don't have another job. That's the job.

Can't the prospective employer then say: We can't hire you.

Does the statute say they have got to hire them anyway?

MS. PALMA: Your Honor, so there actually is a case that we've cited in our Title VII portion in our moving papers where that exact scenario happened, where somebody applied for a position with an abortion clinic and somewhere along the lines it was determined that she was a member of the Pro-Life Nurses Association, and at that point the hiring process ceased. And in that case -- that's the *Shelton* case that's cited there. And the outcome of that case is that this was a permissible inquiry under the existing statutory --

THE COURT: Permissible inquiry, yes. But I'm asking: Can they refuse to hire her for the job once they know

that? Does the refusal to hire violate an amendment?

MS. PALMA: We don't believe so, Your Honor, not under the --

THE COURT: What did that case say? What did that decision say?

MS. PALMA: You know, Your Honor, I don't have that information before me. I'd have to go back and look at it.

But it is the *Shelton* case, specifically on that. And it is -- it's my recollection right now that there was not a violation that was found in Title VII, which is part of the existing statutory framework, Your Honor.

And further --

THE COURT: Wait, wait. Don't get into Title VII yet.

MS. PALMA: Okay.

THE COURT: I'm having so much trouble understanding these Church amendment and so forth.

Which one of these amendments cover applicants for employment?

MS. PALMA: None of them, Your Honor.

THE COURT: I thought I saw one of them had applicant for employment.

(Brief pause.)

THE COURT: Okay.

"No entity which receives a grant" -- is that

right -- "may discriminate in the employment, promotion or termination of employment of any physician or other healthcare personnel or discriminate in the extension of staff or other privileges to any physician."

Okay. So far that doesn't say "applicant."

MS. PALMA: And, Your Honor, just to clarify, I have been reminded that the *Shelton* case said that the termination of that hiring process was acceptable because there was -- because an accommodation would be unreasonable under Title VII.

THE COURT: Okay. Now, in number (e), Subsection (e) of Church does refer to applicant, but it's a different context.

It says:

"May deny or otherwise discriminate against any applicant, including applicants or internships and residencies for training or study."

So that is not the same as, you know, regular full-time employment.

MS. PALMA: Your Honor, I have a few additional cites of declarations that we have been provided -- that we have provided that discuss the hiring process and how it currently takes place. I could provide those to the Court, if you would like.

THE COURT: Just read out the names of them somehow

that we can look at them later.

MS. PALMA: Yes, your Honor.

THE COURT: My Law Clerk will write them down.

MS. PALMA: The *Barnes* declaration at Paragraph 21.

The *Cody* declaration at Paragraph 6.

And the *Valle* declaration at Paragraph 18. And that's V, as in Victor, A-L-L-E.

And those declarations also speak to the fact that some of these providers hire for providing services to the LGBT community. And there it's also important for them to ensure that when they are hiring, that -- that the employee will be agreeable with the mission, to be open and to provide non-discriminatory care to the community broadly, including to the LGBT individuals.

THE COURT: Well, I think all those questions would be fair questions for a hospital to ask.

And I'm going to ask the government, when you come up here, do any of these amendments prohibit a hospital or clinic or anyone who receives federal funds from asking a prospective nurse or doctor whether they have religious objections to performing abortions or any other kind of medical procedure.

I don't see it per se in the -- my quick review here, but I have been doing it very quickly.

Okay. I've got to let the other side have a few comments. So I don't know if time will permit for anything more.

So let me hear from the government. Why don't we start with that question. Who is going to go next?

Okay. And your name?

MS. ANDRAPALLIYAL: Good morning, Your Honor. Vinita Andrapalliyal behalf of defendants.

THE COURT: Andrapalliyal.

MS. ANDRAPALLIYAL: Andrapalliyal, yes, Your Honor.

THE COURT: Andrapalliyal, okay. Welcome.

And what is the answer to the question that I just had, which is under Church, Weldon or Coats-Snowe is there any statutory provision that would prevent a hospital receiving federal funds from inquiring of a prospective nurse or doctor whether they would object to participating in an abortion?

MS. ANDRAPALLIYAL: Well, your Honor, all three amendments prohibit discrimination on the basis of a particular employee's, you know, conscience objections to specific medical procedures --

THE COURT: If they are employees, yes. But they are not employees when they are just applying. They are prospective.

So where -- which one of these, if any of these statutes, would pick that situation up?

MS. ANDRAPALLIYAL: Well, let me broaden what I said.

You know, it -- these amendments protect, you know, any institution or individual healthcare entity from

discrimination. And so they don't necessarily distinguish between prospective and current employees.

THE COURT: Well, I get that. But I'm looking at the statutes and it -- and it says "healthcare entity." All right. And one of them specifically defines it to include "an individual physician, post graduate physician training, and a participant in a program of training." And one of them specifically calls out "applicant for training." But none of them call out applicant for employment.

So my -- I think what I'm asking you, my reading it, is an applicant for employment specifically called out by any of the amendments?

MS. ANDRAPALLIYAL: The specific language of those amendments do not refer to an applicant. However, the definitions, as my colleague noted, are inclusive and do not distinguish between prospective and current employee.

THE COURT: Okay. Maybe that's true. Now, does your -- does the rule in question include applicants for employment?

MS. ANDRAPALLIYAL: If Your Honor might give me just one moment to find that in the rule?

THE COURT: Let's figure that part out. What page would the "healthcare entity" be?

(Brief pause.)

MS. ANDRAPALLIYAL: Your Honor, I would refer to you

Page 23264 of the Federal Register.

THE COURT: "Healthcare entity." Okay.

MS. ANDRAPALLIYAL: And at the very bottom of that first column the agency states that:

"An individual physician or other healthcare professional, including a pharmacist, healthcare personnel, participant in a program of training in the health professions, an applicant for training or study, post graduate physician training program, et cetera."

THE COURT: But does it call out applicant for employment? I don't see it.

(Brief pause.)

THE COURT: Well, let me just -- tell me what -- I mean, you're the -- you're the one who knows the rule.

Under this rule that you're defending, if a hospital performs abortions and they have an opening on the abortion ward for a nurse, that's what they want, somebody who will do that.

And they post the job and they say: This job is for abortions. And applicants come in. Can the HR Department in doing the interviews ask the question: By the way, do you have any moral or religious objection to doing abortions?

And then if the answer is, yes, I do, then the hospital says: Well, we can't hire you because that's what the job is.

So is that legal under the rule?

MS. ANDRAPALLIYAL: Yes, Your Honor.

I would point you -- I would refer you to Page 26 -- 23263 of the rule, in the "discrimination" definition.

And the rule does state, the last column, middle of it, that while a -- you know, an entity that is subject to this rule may, you know, ask whether a particular entity, individual or otherwise, has an objection to performing or participating or assisting in the performance of a specific procedure, they can do that, but only after hiring the individual.

And, you know, that is what the rule states, but I -- I want to pull back a little and, you know, remember this is a facial challenge here. We're talking about whether this rule can be upheld under any set of facts.

And given the other protections in the rule that allow entities to ask not only once a year, but any time there is a reasonable likelihood that an individual or entity may be asked to perform or assist in the performance of a particular activity that's protected under the conscience statutes, whenever there is that reasonable likelihood, the employer can ask and then make accommodations. And that's higher up in that paragraph:

"An entity may require a protected entity to inform it of objections to performing, referring for, participating in or assisting in the performance of

specific procedures, et cetera, to the extent that there is a reasonably likelihood -- reasonable likelihood that the protected entity may be asked in good faith to undertake these actions.

THE COURT: It says:

"Such inquiry may only request occur after the hiring of," and then "once per calendar here thereafter."

MS. ANDRAPALLIYAL: Unless supported by a persuasive justification.

And that persuasive justification standard would encompass a situation where there is a reasonable likelihood that an individual may -- or other entity may be asked to perform or assist in the performance of an activity to which he or she objects. And that objection is protected under the conscience statutes.

THE COURT: Now, is that explanation of the phrase "persuasive justification" explained somewhere in the rule, or is that just you talking?

MS. ANDRAPALLIYAL: Yes, Your Honor. That's -- well, that -- you know, as a threshold issue, it's -- it's encompassed earlier up in the paragraph where, you know, it says, Subsection 5, starting on Line 3 -- or Line 2:

"An entity subject to any prohibition in this part may require a protected entity to inform it of

objections to performing, referring for, participating in or assisting in the performance of certain procedures."

And I'm skipping down a couple lines:

"...but only to the extent that there is a reasonable likelihood that the protected entity may be asked in good faith to perform, refer for or participate in or assist in the performance of any" --

THE COURT: Then it goes on to say:

"Such inquiry may only occur after the hiring unless it is supported by a persuasive justification."

MS. ANDRAPALLIYAL: Yes.

THE COURT: And my question is: Is the phrase "persuasive justification" later explained?

See, they did have that Title VII discussion somewhere, and you decided not to do the hardship exception. It might have come up under that.

MS. ANDRAPALLIYAL: Yes, your Honor.

I refer you to 23191, where, as Your Honor refers, to, you know, that Title VII discussion was taking place.

THE COURT: 23191. Which part should I look at?

MS. ANDRAPALLIYAL: Well, at -- in the last paragraph, middle of the page -- well, let me start, actually, second column, very end of the page where it says "Comment."

"The Department received comments expressing

concern that the proposed definition of discriminate or discrimination would prohibit employers from accommodating religious objections by placing the conscientious objector in a different position potentially requiring double staffing."

And in response the Department says that it:

"...agreed with this concern in part and is adding language to acknowledge the reasonable accommodations that entities make for persons protected by these laws."

And further down it notes:

"To address concerns raised by these commenters, the Department is adding new Paragraphs 5 and 6 in the discrimination definition to clarify that, within limits, employers may require a protected employee to inform them of objections to referring or participating in or assisting in the performance of specific procedures, programs, research, counseling or treatments, to the extent there is a reasonable likelihood that the protected entity or individual may be asked in good faith to refer for, participate, assist in the performance of such conduct, and that the employer may use alternate staff or methods to provide or further any objected-to conduct."

And so I acknowledge that doesn't specifically flesh out

the persuasive justification standard, but the text of the rule indicates that the persuasive justification standard is tied to whether there is a reasonable likelihood that the protected entity is going to be asked to perform --

THE COURT: Okay, wait. Go on. The next paragraph said -- this is the agency talking in this explanation.

Quote:

"On the other hand, as a general matter, it is not an acceptable practice under Federal Conscience and Anti-Discrimination Laws for covered entities to deem persons with religious or moral objections to covered practices, such as abortion, to be disqualified for certain job positions on that basis.

"For example, a hospital receiving public health service funds could not deem a doctor or a nurse with a religious objection to performing abortions to be ineligible to practice obstetrics and gynecology on that basis.

"An important purpose of law, such as Church amendments, is to prevent fields, such as obstetrics and gynecology, from being purged of pro-life personnel just because abortion is legal and some healthcare entities perform them.

"In this sense the Department disagrees with commenters who essentially contend that pro-life

medical personnel can be placed outside of women's health positions for that reason.

"The Department need not address in this rule whether a covered entity could disqualify a person with religious or moral objections to covered practices, if such covered practices made up the primary or substantial majority of the claims of the position -- I'm sorry, majority of the duties of the position, as the Department is not aware of any instances in which individuals with religious or moral objections to such practices have sought out such jobs."

I don't know, that kind of seems like -- that's very much on point and then seems to be saying that the Department is probably going to say you can't disqualify somebody on account of their religious beliefs, but you don't need to address it because you don't think it's ever going do come up. Well, I don't see how you can say that it's not going to come up.

I come back to the -- the example I gave. If the job that you're trying to fill somebody for is specifically to do abortions and somebody doesn't want to do abortions, I just don't see how -- I just think they've got to ask that question and they have to turn them down. They should be disqualified, would be my view, but -- if I was running the hospital.

MS. ANDRAPALLIYAL: A few points on that you, your

Honor.

THE COURT: Help me out.

MS. ANDRAPALLIYAL: Sure. First, the Department is saying that it is not aware of any instance in which an individual with a religious or moral objection to, for example, abortion, applies for a job as an abortion provider. It's not aware of that happening.

And, again, this is one --

THE COURT: But counsel has given me some case, something about an underground person came in that was a pro-life nurse and applied for the abortion job. Something like that.

What was the name of that case? Just give me the name. You don't get to make a speech.

MS. PALMA: Your Honor, I do have to clarify about the *Shelton* case.

THE COURT: *Shelton*.

MS. PALMA: It is *Hellwege* -- so H-E-L-L-W-E-G-E -- *v. Tampa Family Health Centers*, 103 F. Supp. 3.d 1303. And this case is actually cited in the rule and it is the exact scenario that I described.

THE COURT: What was the year of that case?

MS. PALMA: It's a 2015 case. And the Title VII claim was allowed to proceed.

And that's just an indication that the existing statutory

rubric works and is available for the protection of --

THE COURT: Now, see, you're making a speech. Okay. No, no.

All right. Your turn. Let's go back to the government. Well, it sounds like that *Shelton* case is close to a scenario that the government -- HHS said it couldn't -- HHS said it couldn't imagine could happen.

MS. ANDRAPALLIYAL: Well, your Honor, the *Shelton* case, as my opposing counsel noted, is not that case. The *Shelton* case involved a nurse who was already hired, who had registered objections and filed a Title VII lawsuit after she was terminated. So that is not a case on point here, and --

THE COURT: It is hard to imagine that someone would knowingly apply for a job at an abortion clinic if they were against abortions.

I get that point, but -- but I'm talking about a big hospital where the hospital needs somebody for that ward and -- okay.

MS. ANDRAPALLIYAL: You know, it does strain logic a bit to imagine this hypothetical.

But, you know, even if it happened, the Department is saying that, you know, if the job is such that the primary or substantial majority of the duties of the position involve the objected-to conduct, the Department is not saying that you have to hire that person anyway. That's not -- it's leaving that

open.

And so that -- you know, that example, that hypothetical is not a reason to invalidate this rule in toto.

THE COURT: Okay. What else? Keep going. They said a lot on the other side and I want to give you a chance to respond.

MS. ANDRAPALLIYAL: Thank you, Your Honor. If I may just have a second here.

(Brief pause.)

MS. ANDRAPALLIYAL: Yes, Your Honor. I did want to respond to a lot of the points made here, and I'll try to be quick.

So, you know, we were talking about whether this rule is arbitrary and capricious under the APA. Now, agency action is upheld where the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made. And that's exactly what the agency did here.

Now, we acknowledge that this issue of conscience objections to certain procedures, that is, you know, a policy issue that inspires strong feelings on all sides of the issue. But at the end of the day, this Court, nor should plaintiffs, substitute their judgment for that of the agency. And the agency offered sufficient explanation --

THE COURT: I want you to know I agree totally with that. I take an oath to uphold the law and the Constitution.

I am not a politician.

Now, I may have political views, but I put all those to one side. Judges are not elected. This is -- we've got to follow the law.

So I agree with you totally. Whatever I rule is not going to be based on politics.

So you're right about that substituting judgment, but the other side is not asking me to do that. They are asking me -- they raise points like this one. They said, you're own preamble says that there were 343 conscientious objectors. Then it turns out that, really, there was only 21.

MS. ANDRAPALLIYAL: Yes, Your Honor.

THE COURT: Isn't that kind of a major goof?

MS. ANDRAPALLIYAL: I'd like to address that, Your Honor. Thank you for raising it.

THE COURT: Please.

MS. ANDRAPALLIYAL: HHS did not misrepresent the number of comments it received or the number of complaints it received here. In the final rule it noted that it had received 343 complaints in fiscal year 2018.

THE COURT: From conscientious objectors, it said. That's on Page 229. Let's look at how it was worded.

MS. ANDRAPALLIYAL: Yes, let's.

THE COURT: Because you're not reading it the way it was actually worded.

229.

"OCR received 343 complaints alleging conscience violations."

MS. ANDRAPALLIYAL: Exactly, Your Honor. "Alleging."

And HHS did not rely on these complaints for the substance of what was contained in them. It simply noted that it received 343 complaints from people who were saying that their conscience rights were violated.

And zooming back, you know, in the notice of proposed rule making, HHS notes -- and that's Page 3886 of the NPRM. And I will pull that up so I can read it to you directly.

THE COURT: But the point is that only 21 of those would have been covered by the statutes in question.

MS. ANDRAPALLIYAL: Well, your Honor, we disagree with that.

But the point is not what percentage of those complaints were meritorious. HHS is just noting that it received 343 complaints, and in -- let me see here. You know, in -- from 2008 to 2016 it only received 44 complaints. That's over, like, a -- I'm sorry.

Yes. 2008 to 2016, I believe. They only received 44 complaints over that eight-year period, 34 of which were filed since the November 2016 election.

So before November 2016, there were only about 10 complaints that OCR received.

And it was just noting that is a large uptick in the number of complaints it received in 2018 as compared to the past. And it was using the fact that it received so many complaints as yet another data point, as you noted, one of the many metrics it considered in finding that, you know, there is a lot of public interest, increasing public interest in conscience rights. Yet, another reason why it should explain to the public and to regulated entities what the obligations and rights are under these statutes.

THE COURT: All right. Go ahead.

MS. ANDRAPALLIYAL: And that's -- that's what I wanted to explain about these complaints. It was not a misrepresentation. HHS was not saying that all 343 are meritorious.

It does push back on the number that plaintiffs have identified, and we do want to step back here and make a wholesale objection to the numerous declarations --

THE COURT: I think their point was that -- that if you read this paragraph, it at least implies that there were 343 objections based on conscience that would have violated these three statutes. But when you look at them, they don't. Most of them are about vaccinations, which are not covered by these statutes.

MS. ANDRAPALLIYAL: Well, respectfully --

THE COURT: So the -- their point is your agency was

trying to make it look like there has been an uptick in violations of the three statutes, therefore, you have a rule to construe the three statutes. That was the -- that's the argument.

Whether the -- they are not saying they were or they were not meritorious. It was the implication that they dealt with these three statutes, and it turns out that only 21 of them did.

MS. ANDRAPALLIYAL: Well, your Honor, respectfully, I don't read this part of the rule to say that all 343 complaints are meritorious. You know, it just said that the -- the complaints alleged conscience violations.

And there are more than three statutes, Federal Conscience Statutes at issue here. I believe there are almost two dozen.

So, again, there is just one data point. The fact that it received so many more complaints than it did in the past supports the need to explain, you know, what the rights and obligations under these two dozen statutes are.

THE COURT: Do any of the other -- it's true. There have been subsequent -- you know, like, the euthanasia -- I mean, the assisted suicide. But do any of those later statutes cover vaccinations?

MS. ANDRAPALLIYAL: Your Honor, I'm aware of two Federal Conscience Statutes that specifically mention vaccinations.

One is 42 U.S.C. 1396(s), which pertains to pediatric vaccinations. And it creates -- you know, affirms an obligation for entities subject to the rule to follow state law and, you know, incorporate any religious exemptions that are in state law.

And another statute, 29 U.S.C. 669(a)(5) pertains to occupational illness, exams and tests. So there are those two statutes in there. That's what I wanted to say about the complaints.

But I do want to push back on the notion that HHS didn't adequately explain why it changed course from the 2011 rule. HHS provided several reasons for doing so.

It noted recent documented instances of alleged and demonstrated conscience discrimination, not only in the complaints that it received, but in litigation occurring around the country.

It noted recent state laws that appear to run afoul of these Federal Conscience Statutes.

It relied on comments received during the 2008 and 2011 rule makings, as well as this most recent round of rule making, in which commenters, many commenters, noted that they had personally faced discrimination in the healthcare industry on the basis of their religious or moral beliefs.

And it also relied on a survey of religious medical professionals. 40 percent of the nearly 3,000 respondents

reported facing discrimination or pressure during their careers to disregard their religious or moral objections.

And so, you know, for all these reasons the agency explained itself. It explained that the 2011 rule was only three sentences long. It only implicated three of the nearly two dozen Federal Conscience -- only referred to three of the nearly two dozen Federal Conscience Statutes out there. And on the basis of everything that I just mentioned, the agency decided, you know, a more -- a clearer framework and a clearer explanation of how it was going to enforce these statutes was necessary.

And as to access to care, you know, plaintiffs stated the agency didn't adequately consider the impact to the rule and access to care, but access to care was actually the first set of comments to which HHS responded in the rule.

The agency noticed -- noted that access to care was a critical concern of the agency. And on 23181, Your Honor, the agency noted that...

(Brief pause.)

The agency noted that, you know, in support of its conclusion that this rule was likely to improve access to care overall by inviting more individuals and entities who hold particular religious and moral objections. You know, instead of stigmatizing them and making them exit the field or, you know, make them feel like they shouldn't be entering the

healthcare field all together, that instead those individuals and entities would feel empowered to enter the field and offer more care overall.

The agency noted that it was illogical to assume that there are a significant number of healthcare providers in the space today who object to providing certain services, but are doing so anyway over those objections. Instead it was more logical to conclude that there were people who just weren't providing care, who had decided that it wasn't worth it, and that those people were sitting on the sidelines.

And, you know, the agency was entitled to consider evidence on both sides and to make a judgment and explain why it did so, and that's what it did. That's what it did here.

The agency --

THE COURT: Let me ask you about pharmacists, because I noted that the -- none of those statutes call out pharmacies or pharmacists, but the rule now defines healthcare entity to include a pharmacist, a medical laboratory and a pharmacy.

So what -- how did those words get in there?

MS. ANDRAPALLIYAL: Your Honor, my understanding is that for the same reason HHS concluded that EMTs and paramedics could be considered healthcare professionals under certain circumstances, so, too, could pharmacists, who are professionals in the healthcare space providing, you know, access to certain medications and so on.

THE COURT: Well, give me an example where a pharmacist might have a religious objection to filling a prescription?

MS. ANDRAPALLIYAL: I can't think of one off the top of my head, Your Honor.

THE COURT: It's kind of hard. But wouldn't you agree that filling a prescription for some pharmaceutical thing is not the same as participating in an abortion in the surgery room; right?

MS. ANDRAPALLIYAL: It's certainly not an identical act, but whether it falls within the definition of "assist in the performance," that, I think, would depend on the facts and circumstances.

THE COURT: Okay. What else would you like to say?

MS. ANDRAPALLIYAL: Your Honor, I want to object to all the declarations that plaintiffs have brought into this case, to the extent that they are being used, you know, just to bolster their APA claims. APA is record review.

Your Honor should be making your decision based on the administrative record and not based on declarations that the plaintiffs have put into this, put on the docket.

THE COURT: I don't know. It is true. Normally it is based on the administrative record.

MS. ANDRAPALLIYAL: And, Your Honor, I would cite *Southwest Center for Biological Diversity versus U.S. Forestry*

Service. It's a Ninth Circuit case, 100 F.3d 1443 for that proposition.

THE COURT: Okay. Done?

MS. ANDRAPALLIYAL: If Your Honor has any other questions, I'm happy to take them.

THE COURT: Not -- I've lots of questions I guess I could ask, but I would just be rambling.

So you please have a seat. I'll give the other side a moment or two for -- literally just a few moments.

MS. NEMETZ: Good morning, Your Honor. My name is Miriam Nemetz and I represent the plaintiffs in the Santa Clara case. I appreciate the opportunity to speak and I'll try to be as quick as possible.

THE COURT: I'll give you about five minutes.

MS. NEMETZ: Okay. I just want to address because pharmacists do raise objections to prescribing certain -- dispensing certain medication. For example, emergency contraception; Plan B, which is the morning after medication; and other types of -- other types of medication.

THE COURT: So in the real world, you're telling me pharmacists actually have voiced such an objection?

MS. NEMETZ: Absolutely, absolutely.

THE COURT: So do they refuse to carry those kind of drugs or do they do it anyway? What's the -- what's happening?

MS. NEMETZ: Individual pharmacists who works for --

a pharmacist who works for, let's say, Santa Clara could, in theory, you know, raise such an objection and there might not be anybody available to dispense the medication.

So this is an instance in which the new accommodation rules -- the new accommodation structure that's put in place by the rule is -- creates potentially huge problems for providers and it also creates the risk of harm to patients. Because there are two -- we've talked about a lot of things that the rule does looking at it sort of narrowly, but these definitions, they -- they -- as they are described in the preamble, they have a very substantial impact on how -- on the role of healthcare objections, how our healthcare system will function.

So whereas previously providers have -- their policies reflect their understanding that the people -- there is -- a limited number of their employees are in a position to raise objections under these protections and now -- so the doctors and nurses, those who are providing care.

So under the rule it's been made very clear that virtually any healthcare employee now, you know, is -- may raise objections. So that imposes -- you know, that makes it very difficult to manage the objections.

And the number one goal of our clients, who are the county, which runs hospitals and providers of medical services, is to ensure that they can deliver -- continue to deliver care

to patients, which is their priority, while also respecting legitimate religious objections that are protected by these statutes.

So this just upsets the whole system that's in place. So now in addition to expanding the number of people that are covered, they have to, you know, inquire about -- or who may raise objections, it also limits their ability to accommodate, because the old accommodation system has now been thrown out the window.

I mean, it's been in place for decades. It is consistent with Title VII, but it's -- it's one that they have specifically adopted to comply with these rules and under the -- and now that's been changed.

And so whereas before a reasonable accommodation would be acceptable and one that didn't impose an undue -- an undue hardship on the employer under the rule, there is no undue hardship. There is no undue hardship exception, number one. And number two, it has to be voluntary.

So what happens -- providers need to know what happens, and this happens all the time.

I'm just going to grab my water.

What about if the employee doesn't accept the accommodation? They don't know how to manage the objections now.

There also is a very substantial -- so we think that --

and a lot of the issues that we've talked about, these are problems with the rule that were raised in comments.

So we talked a lot about the absence of an emergency exception. I don't want to spend too much time on that, but commenters pointed out to the agency what about -- our policies, our policies require our staff -- they are allowed to lodge objections, but everybody has to help in an emergency or patients may die.

So the proposed -- the notice of proposed rule making and the final rule, as we have discussed, say: Hey, maybe -- it's very often the religious objections made -- you may be able to raise a religious objection in an emergency. So now the question is, before them, do we have to change all our policies?

And so the agency, when making such a big change in what the status quo is, and receiving comments, lots of comments which said, you know, this conflicts with EMTALA or this --

THE COURT: Well, look. Let me step back for a moment.

I see what you're saying. You're saying, look, this upsets the apple cart. This upsets the way we do business.

But if you think about the broad sweep of history, every anti-discrimination rule, that same argument was made that -- when it came to Title VII for example. And, in fact, the word "women" got put into it as a gimmick by some senator to try to

kill Title VII, but it got passed anyway.

Well, let's fast forward to about the last ten years. The word "sex" was in there and somebody decided, well, maybe that will cover gays. Right? And that issue is right now in the Supreme Court.

MS. NEMETZ: It is, Your Honor.

THE COURT: And the same argument was made by -- that you're making by the opponents that said, look, this upsets the apple cart. This upsets the way we do business. We've always assumed that it only covered men and it only covered women. We never thought it covered gays. And so if that's going to happen, only Congress can do it.

I mean, you would have been a good lawyer for the people opposing that, because that's exactly the argument.

So every time that there is a -- the public policy against discrimination comes up in some context, this argument gets made.

Now, this time it's -- it's religious discrimination. It's not the word "sex." It's the word, you know, "religion."

And, of course -- but, you know, the Congress -- if, in fact, the plaintiffs -- the defendants are partially correct or correct all together, then yes. Discrimination that our Congress has outlawed and if you have been violating the law all this time, yes, you're going to have to figure out a new way to do business. So I don't see the argument.

So the fact this has been the way it's always been done and, therefore, I should just let it ride, that -- that very argument was made against blacks. Against women. Against gays. Against every form of trying to undo the discrimination, that we have got to let the status quo keep going.

I've lived long enough to have heard that argument before.

MS. NEMETZ: I would like to respond, if I may, Your Honor.

THE COURT: Please. Go right ahead.

MS. NEMETZ: I appreciate that. I have sort of two responses.

One, this is a rule. There isn't -- Congress hasn't changed the law. And so the -- the Department has decided to adopt a rule that changes -- you know, adopts a certain definition of assisted performance; that adopts a new framework for discrimination, and is required to do that in a reasoned manner and undertake reasoned decision making.

So one of the -- and one of the things that was required to do is assess the relevant -- the benefits and burdens of the rule. And it was required to, therefore, look at the -- it got a lot of comments saying: This will harm patients. You are increasing the universe of people who may raise objections.

And the Department agreed, that it has an obligation to assess benefits and burdens under several executive orders, and that's part of its reasoned decision making.

THE COURT: Well, it made a stab at doing that, didn't it?

MS. NEMETZ: Well, under *State Farm* and other cases, there must be a connection between the decision and the facts that were before the agency. And what the department did was say: We really aren't -- acknowledged that there could be harm to patients. There would be more religious objections raised by more people and that -- and that patients could be harmed by that because they could be denied care or care could be delayed.

And they received a lot of information from people explaining the ways in which parties are harmed, can be harmed by religious objections, especially if they are not -- if providers can't manage them appropriately. And then ultimately they said we're unable to quantify this.

On Page 23-252 the agency said:

> "The impact on health outcomes from the exercise of conscientious objections assisted a useful quantitative estimate. The Department lacks the predicate for estimating the impact on health outcomes of any change in the availability of services and, yet, still concluded the Department expects any decrease in access to care to be outweighed by overall increases in access generated by the rule."

And as Ms. Palma has explained, they only had, you know,

some anecdotal evidence and they kind of speculated that there might be more -- somehow more providers would become available if there was better protection against conscience -- conscience objections, dismissed all the data that was submitted to them about all the harm to patients, and just sort of said: We think -- you know, we think the benefits are going to outweigh the burdens.

But that didn't involve the application of its expertise. It just didn't have the data. It admitted that it didn't have the data to -- it didn't have the data to quantify impact. And so it wasn't justified and sort of, you know, ignoring the potential impact on patients. And, certainly, this is in the health care system. We want to make sure patients are cared for.

So one other argument I want to make, Your Honor, is we've also brought a claim under the establishment clause and --

THE COURT: This is a brand new point. I'll give you one minute to make it.

See, this is where the lawyers just go -- you think I have all day to work only on your case, which I couldn't even begin to dent in one day, and now we're going to open up a brand new thing on establishment clause.

Okay. Go ahead. One minute, please.

MS. NEMETZ: This case is governed by the United States Supreme Court's decision in ***Estate of Thornton versus***

Caldor. *Caldor* was a case in which Connecticut -- Connecticut passive -- passed a statute which required employers to respect -- employees were entitled not to work on the Sabbath of their choice. And employers were required to accommodate their -- those choices.

And so -- you know, and the Court held that that violated the establishment clause because the government cannot mandate religious accommodations for employees that materially burden non-beneficiaries.

And that is exactly what the rule does. It imposes on employers an absolute duty to accommodate religious objections without regard to cost. That is the significance of the elimination of any undue burden requirement.

So the Court said in *Caldor*, and the language of the statute applies squarely here; that this Connecticut statute about Sabbath observance was forbidden because it imposed on employers and other employees, quote:

> "An absolute duty to conform their business practices to the religious practices of the employee no matter what burden or inconvenience this imposes on the employer or fellow workers."

THE COURT: So your argument would be that the Weldon amendment as written, the Church amendment, Coats-Snowe, as written, they are illegal.

MS. NEMETZ: No, that is not true. We are focused

here on the departments, the rules elimination of any --

THE COURT: I promise you, this is not a legislative rule. This is an interpretive rule. Your argument would only matter if this was a legislative rule.

So don't worry about that point. I'm convinced that this can only be an interpretive rule all day long, 24/7. So it -- it either stands or falls on the interpretation and it's not going -- what counts is what Congress said, and we cannot add or subtract from that.

Now, you, yourself, were saying what Congress said is constitutional. True.

MS. NEMETZ: If it is interpreted in the manner that -- that the agency has put forth in this rule is unconstitutional.

THE COURT: So if it got all the way up to the Supreme Court, you would be standing there saying: If the agency is right, then this would violate the establishment clause.

Well, I'm only -- I don't have -- it would take me nine months to work through the many, many, many scenarios and go through -- do you know how long thing is? It's hundreds of pages.

So I can't do that. I can pick out three or four and see what I think on those. And then the rest of it's going to have to come up on a case-by-case, I guess. So it's -- it's only an

interpretive rule.

MS. NEMETZ: The problem is that --

THE COURT: I think I agree that the ambulance drivers can't be included. So I -- I don't see any statutory basis for that. Maybe there is some other problems with it, too.

MS. NEMETZ: I think probably you could say that the undue burden, the absence of an undue burden exception --

THE COURT: The undue burden is not in the statutes themselves.

MS. NEMETZ: It's not in the statutes of -- I'm at the point, Your Honor, if I could just take a minute on that. The undue burden in Title VII appears in the definition of "discrimination." There is a -- there is a -- in the case of a --

THE COURT: It doesn't apply -- these religious discrimination conscience provisions, Weldon, Coats-Snowe and Church, plus all the ACA ones, none of them have a hardship provision.

MS. NEMETZ: They were adopted right after these -- this particular provision of Title VII. And this particular provision of Title VII said that:

> "There was an affirmative provision that said the failure to accommodate a religious practice where it did not impose an undue burden" -- and that means a

diminimus burden -- "would be discrimination."

So that is -- that Title VII provision is requiring neutrality by employers by not allowing them to discriminate based on something they can readily accommodate.

So if Congress had that in mind when you say the word "discriminate," it doesn't mean you're discriminating if you don't accommodate any religious objection no matter how disruptive it is to your operation. Certainly, Congress did not have that in mind.

And so to say they didn't include an undue burden exception, they also didn't affirmatively require an absolute accommodation, which is what the rule seems to do.

THE COURT: Okay. I see someone passed a note up to you, so I don't want to disappoint the messenger. So go ahead and read the note, and then I've got to bring it to a close.

MS. NEMETZ: Under -- if you conclude that certain parts of the rule are -- when you say that it's an interpretive rule, I think you're thinking about the definitions and they are describing what the statute means.

But they are also asserting enforcement authority over the rule that is not present in the statutes. And so those are not interpretations. Those have -- those are imposed new substantive requirements.

THE COURT: That's a good point. That I -- I did not -- I was unaware of until the hearing, I'm sorry to say.

But I've got to think about that. That's a good point.

MS. NEMETZ: Thank you, Your Honor.

THE COURT: Is that in the briefs?

MS. NEMETZ: Yes.

THE COURT: Is that in your brief, too?

MR. TAKEMOTO: It is.

MS. NEMETZ: Yes. That's an important part of the challenge to the rule, is our concern about the enforcement provisions, which go beyond the other authority that the HHS might have.

And one of the reasons why there is so much concern in the regulated community is that they are at risk of losing -- not only did they have a lot of new requirements, we've talked a lot about certification and insurance, but they are at risk of losing all their funding if they don't comply.

And so it's -- it's hard for them to wait for a specific -- they have to adopt new policies now so they can function. They have to think about ahead of time every possible application of the rule --

THE COURT: When is the date these certifications are due?

MS. NEMETZ: You have to certify when you apply for new funding, I believe, and that is on a rolling -- it happens on a rolling basis.

THE COURT: When does the -- it's going to take me

awhile to work my way through all this. So I would like to get an order out before the due date. But I don't know when the due date is.

MS. NEMETZ: The rule is scheduled to go into effect currently on November 22nd, Your Honor.

THE COURT: I have about three weeks and two days.

MS. PALMA: May I say something quickly, Your Honor? I apologize. It's me again.

The Court has available the remedy under APA Section 705 to delay the effective start date of the rule if it would like additional time to resolve these very important issues that are of grave magnitude for not just providers here in California, but across the nation.

THE COURT: Where does it say that?

MS. PALMA: It's Section 705.

So, Your Honor, actually, if you will recall, the delay -- the rule was delayed from July to November 22nd on the basis of a stipulation that was submitted by the parties under 705.

So we would be asking the Court to basically extend it one further time based on that statutory authority.

THE COURT: Maybe you all could meet-and-confer and see if you could agree on a later start date, but -- possibly. I would look at 705 and see.

All right. There is a chance, one out of three, that I am going to call for a second round of oral argument; two out of

three I won't. But this is a case -- you know, you all have dedicated your lives to it, and I see how important it is to you, and I'm not to the point that I feel I have a good handle on this.

So, maybe. We'll see. If I do, I will call you in and give you have at least a week's notice.

MR. TAKEMOTO: Your Honor.

THE COURT: Yes, sir.

MR. TAKEMOTO: I promise to be quick. Twenty seconds.

THE COURT: Go ahead.

MR. TAKEMOTO: Just because the opposing side raised Section 705.

For the Court to find that the effective date of the rule should be postponed, it needs to meet certain factors. We haven't briefed that.

And so to the extent that plaintiffs want to invoke that, that's something that needs to be briefed before the Court makes a decision one way or the other.

THE COURT: How long would it take to brief that? You're probably busy, too. But how burdensome is that to brief?

MR. TAKEMOTO: Your Honor, my understanding is that for the Court to find those factors, it's essentially the preliminary injunction factors. So it would be on a similar

time scale to that.

THE COURT: I'm very unlikely to grant a preliminary injunction or TRO.

You lawyers should have given me more time. You all had lots of luxury in the briefing and then you expected me to spend night and day working on your case and putting -- you gave me only three weeks from the hearing.

So I'm going to try to do it, but I think you should have been more considerate of the Court's burden.

All right. We will end for today. I think you all did a great job, so I appreciate it.

Did you two come all the way from Washington?

MR. TAKEMOTO: Yes, indeed.

THE COURT: I appreciate you traveling so far. Thank you for that.

All right. Good luck to both sides.

(Proceedings adjourned.)

CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Wednesday, November 6, 2019