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

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO,
Plaintiff- Appellee,

v.

ALEX AZAR II, ET AL.,
Defendants-Appellants.

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

BRIEF OF *AMICUS CURIAE* FIRST LIBERTY INSTITUTE IN SUPPORT OF APPELLANTS

KELLY J. SHACKELFORD
MICHAEL D. BERRY
STEPHANIE N. TAUB
LEA E. PATTERSON
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway
SUITE 1600
PLANO, TX 75075

JEFFREY M. HARRIS
Counsel of Record
TIFFANY H. BATES
ANTONIN SCALIA LAW SCHOOL
ADMINISTRATIVE LAW CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com

Counsel for Amicus Curiae

June 22, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

STATEMENT OF INTEREST[1]

First Liberty Institute is a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans. First Liberty provides pro bono legal representation to individuals and institutions of all faiths—Catholic, Islamic, Jewish, Native American, Protestant, the Falun Gong, and others.

First Liberty has represented or advised multiple healthcare professionals or organizations seeking to freely exercise their religious conscience rights without discrimination. First Liberty also filed a public comment in support of the Conscience Rule. Accordingly, First Liberty has a strong interest in the outcome of this litigation.

INTRODUCTION

The United States has long provided conscience protections for individuals and entities involved in healthcare. In the last 50 years, Congress has enacted roughly 25 federal statutes offering such protections. Yet many of those statutes have not been adequately enforced. That lack of enforcement, in turn, has led to a lack of awareness about conscience rights in the healthcare field and a rise in intolerance toward healthcare professionals who exercise their rights.

---

[1] No party's counsel authored this brief in whole or in part, and no person other than *amicus* and their counsel contributed money intended to fund the preparation or submission of this brief. The parties have been notified of *amicus*'s intent to file this brief and have consented to its filing.

In 2019, the Department of Health and Human Services (HHS) promulgated the Conscience Rule seeking to "ensure vigorous enforcement of Federal conscience and anti-discrimination laws." 84 Fed. Reg. 23,170 (July 22, 2019). Several states, localities, and groups challenged the Rule, alleging that it violated the Administrative Procedure Act and the United States Constitution. District courts in Washington, California, and New York ruled for the challengers on various grounds.

Amicus writes separately to address the district courts' conclusions that HHS exceeded its authority in defining certain terms, and to elaborate that HHS's definition of discrimination is a logical outgrowth of the Notice of Proposed Rulemaking. Far from enacting sweeping substantive changes to federal law, the Conscience Rule is a modest attempt to implement the will of Congress comparable to other administrative agency regulations. The Rule appropriately honors the determinations Congress made in protecting the conscience rights of medical professionals and should be upheld in its entirety.

ARGUMENT

I. HHS's definitions of statutory terms are reasonable and comport with the text of the statutes that Congress passed.

Congress has passed a number of federal statutes to protect the conscience rights of medical professionals who object to certain medical procedures including abortion, sterilization, and physician-assisted suicide. HHS promulgated the Conscience Rule to ensure that the government can adequately enforce these existing laws. The Conscience Rule defines several terms that appear in the underlying statutes, including "assist in the performance," "discriminate or discrimination," "entity," "healthcare entity," and "referral or refer for." 45 C.F.R. § 88.2. The California court erred in holding that the definitions "conflict with the statutes themselves." *City & Cty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001, 1011 (N.D. Cal. 2019).

"[A]dopt[ing] the reasoning set forth" in a parallel New York case, the Washington court also concluded that HHS exceeded its authority by defining certain terms in the manner that it did. *Washington v. Azar*, 426 F. Supp. 3d 704, 720 (E.D. Wash. 2019). The New York court concluded that the "Rule's definitions go beyond merely expressing what the statute has always meant" and that the definitions "do not inexorably follow from the spare terms used in the Conscience provisions." *New York v. United States Dep't of Health & Human Servs.*, 414 F.

Supp. 3d 475, 523 (S.D.N.Y. 2019) (cleaned up). "Courts confronted with challenges to agency rules" should, of course, "be concerned with agencies smuggling substantive changes into purported definitions." Stephanie N. Taub, NY v. HHS *and the Challenge of Protecting Conscience Rights in Healthcare*, 21 Fed. Soc. Rev. 10, 12 (2020). Yet far from enacting sweeping substantive changes to federal law, the Conscience Rule is a "modest attempt to implement the will of Congress." *Id.* Indeed, "[i]nstead of giving one broad definition of a term that covers all of the conscience statutes, the Conscience Rule defined terms with respect to each statute at issue." *Id.*

The promulgated definitions are eminently reasonable under the statutes. Take, for example, the Rule's definition of "referral or refer for." Those terms appear undefined in the Coates-Snowe and Weldon Amendments, both of which prohibit discrimination against entities that do not refer for abortions or certain abortion-related training. *See* 42 U.S.C. § 238n(a)(1)-(3); Further Consolidated Appropriations Act, 2020, § 507(d)(1), Pub. L. No. 116-94, div. A., 133 Stat. 2534, 2607 (2019). Instead of providing an exhaustive definition, the Rule relies on a "non-exhaustive list of illustrations to guide the scope of the definition" of "referral." 84 Fed. Reg. at 23,201. That includes "the provision of information in oral, written, or electronic form (including names, addresses, phone numbers, email or web

addresses, directions, instructions, descriptions, or other information resources), where the purpose or reasonably foreseeable outcome of provision of the information is to assist a person in receiving funding or financing for, training in, obtaining, or performing a particular health care service, program, activity, or procedure." *Id.* at 23,203. That definition is entirely consistent with the term's use in the underlying statutes and with its ordinary meaning. In fact, the Rule specifically relied on the dictionary definition of the term in crafting its definition. *Id.* at 23,200. According to Merriam-Webster, to "refer" is "to send or direct for treatment, aid, information, or decision." *Id.*; Refer, Merriam-Webster.com, bit.ly/3df2LqS.

The California court took issue with that definition, specifically because a sponsor of the Weldon Amendment indicated that "the Amendment was not meant to apply to the provision of abortion-related information." *City & Cty. of San Francisco*, 411 F. Supp. 3d at 1021; *see* 150 Cong. Rec. 25,044-45 (2004). To the extent a statement by a single member of Congress is even relevant, *see, e.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators."), the court failed to paint the complete picture of that statement, which explained that the Amendment would not affect the provision of abortion-related information "*by willing providers*." 150 Cong. Rec. 25,045

(emphasis added). As a result, both that statement and the Rule's definitions are entirely consistent with Congress's intent to provide robust conscience protections.

II. HHS's definition of discrimination is a logical outgrowth of the Notice of Proposed Rulemaking.

To the extent the Washington court accepted the New York court's determination that the "portions of the Rule that define 'discriminate or discrimination' were not a 'logical outgrowth' of HHS's notice of proposed rulemaking (NPRM)," *Washington*, 426 F. Supp. 3d at 720, that determination is wrong. To satisfy APA requirements, a final rule must be a "logical outgrowth" of the related NPRM. *Long Island Care v. Coke*, 551 U.S. 158, 174 (2007). While a final rule need not be identical to the NPRM, it must bear sufficient resemblance to the proposal in order for the NPRM to adequately apprise stakeholders of potential changes in the law. *Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986). There is no "precise definition" of what counts as a logical outgrowth of an NPRM. *Nat'l Mining Ass'n v. Mine Safety & Health Admin*., 116 F.3d 520, 531 (D.C. Cir. 1997). Instead, "[t]he adequacy of notice . . . must be determined by a close examination of the facts of the particular proceeding." *American Medical Ass'n v. United States*, 887 F.2d 760, 768 (7th Cir. 1989). As this Court recently held, this factual examination extends beyond the text of the proposed rule, involving an inquiry into "whether the changes in the final rule are a 'logical outgrowth *of the*

notice and comments received.'" *Empire Health Found. for Valley Hosp. Med. Ctr. v. Azar*, 958 F.3d 873, 882 (9th Cir. 2020) (quoting *Rybachek v. EPA*, 904 F.2d 1276, 1288 (9th Cir. 1990) (emphasis added)).

Contrary to the New York court's determination, 414 F. Supp. 3d at 561, the Conscience Rule satisfies this logical outgrowth test. The NPRM made clear that HHS was proposing to define discrimination, 83 Fed. Reg. 3892 (Jan. 26, 2018), and it sought input on "all issues raised by the proposed regulation." *Id.* at 3899. The Final Rule expanded the NPRM's definition of discrimination, but the additions were limited to clarifying ways that regulated entities could accommodate conscience issues. *See* 45 C.F.R. §§ 88.2(4)-(6). Moreover, the new provisions were added in direct response to stakeholder comments raising concerns about the lack of such language in the NPRM. *See* 84 Fed. Reg. at 23,190-93. The New York court thus erred in holding that the new provisions "far exceeded what a reader of [the] NPRM could have anticipated." 414 F. Supp. 3d at 560. Indeed, the fact that some commenters directly addressed the changes ultimately implemented in the Final Rule makes clear that the NPRM gave adequate notice about these matters. *See* 84 Fed. Reg. at 23,190-92.

A. The NPRM was sufficient to "fairly apprise" interested stakeholders of the proceedings.

For a final rule to be a logical outgrowth of a proposal, the NPRM must "fairly apprise interested persons" of the issues at stake in the rulemaking process. *Nat'l Black Media Coal.*, 791 F.2d at 1022 (quotation omitted). "The final rule need not be the one proposed in the NPRM," *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013), so long as "the agency has alerted interested parties to the possibility of the agency's adopting of a rule different than the one proposed." *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994).

The New York court erroneously characterized the NPRM as offering only a general notice of HHS's intended change in the definition of discrimination. 414 F. Supp. 3d at 559. The NPRM, however, offered both a general statement and a concrete four-part proposed definition, along with multiple paragraphs explaining its reasons for the definition. 83 Fed. Reg. at 3892-93. In this way, the NPRM shows that HHS was well aware of the issues the Final Rule ultimately addressed, and specifically sought comment on those issues. The explanatory text following the proposed definition notes that a "functional concept of 'discrimination'" must ensure that "religious individuals or institutions be allowed a level playing field[.]" *Id.* at 1392. Conscientious objectors cannot be "disqualif[ied] . . . from participation in a program or benefit" or denied admission to a program receiving federal grant money

on the basis of their beliefs. *Id.* In response to concerns expressed by interested parties during the notice-and-comment period, the Final Rule expanded the NPRM's definition to clarify how entities can accommodate conscientious objectors without running afoul of the principles laid out in the NPRM.

Moreover, HHS removed the fourth section of the NPRM definition in response to comments raising concerns that its language was vague or overbroad. 84 Fed. Reg. at 23,190. In its place, the Final Rule's definition substituted a new fourth section, which clarifies that entities subject to the conscience provisions laid out in the Rule "shall not be regarded as having engaged in discrimination" when protected entities voluntarily accept measures to accommodate their protected conduct, religious beliefs, or moral convictions. 45 C.F.R. § 88.2(4). Section five of the Final Rule's definition affords regulated entities the capacity to require protected entities to inform them of conscience-based objections to performing specific tasks to the extent there is a reasonable likelihood that the protected entities would be asked to perform such tasks, with the caveat that such inquiries can occur only after hiring or awarding of a grant or benefit, not during the interview process. 45 C.F.R. § 88.2(5).

The sixth section of the Final Rule's definition further clarifies that staffing rotations are an acceptable method of accommodating protected entities' rights to abstain from conduct they object to, so long as protected entities are not required to

take any additional action and are not excluded from fields of practice on the basis of their protected objections. 45 C.F.R. § 88.2(6).

Contrary to the New York court's suggestion, these additions are not "a distinctly different and more burdensome definition." 414 F. Supp. 3d at 560 (quotation omitted). These changes in the Final Rule do not "revea[l] that the agency [has] completely changed its position" without giving notice to affected parties. *CSM Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009). Nor are the resulting revisions "surprisingly distant" from the definition in the NPRM. *Id.* at 1080. Rather, they fit squarely within the framework of the NPRM's stated goals and provide concrete guidance for regulated entities based on comments received. Thus, the NPRM was sufficiently clear that "affected part[ies] should have anticipated the agency's final course in light of the initial notice." *Agape Church*, 738 F.3d at 412 (quotation omitted).

B. The Final Rule demonstrates HHS's responsiveness to stakeholder input.

While the NPRM's text is the primary determinant of whether a final rule is a logical outgrowth of a proposal, courts "have also taken into account the comments, statements, and proposals made during the notice-and-comment period." *Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 512 F.3d 696, 699 (D.C. Cir. 2008). When agencies receive valuable input through the notice and comment process, they

are "free to adjust or abandon their proposals … without having to start another round of rulemaking," *Kooritzky*, 17 F.3d at 1513; *see also Ne. Maryland Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951 (D.C. Cir. 2004) ("[a]gencies [ ] are free—indeed they are encouraged—to modify proposed rules as a result of the comments they receive").

The changed language in the Final Rule here responds directly to stakeholder feedback offered during the notice-and-comment period. As the Final Rule notes, clarifying language was inserted to address concerns about vagueness, 84. Fed. Reg. at 23,190, and whether the proposed definition would prohibit employers from accommodating religious objections. *Id.* at 23,191.

Public comments discussing an issue can serve as evidence that an NPRM adequately conveyed the relevance of that subject to the rulemaking proceeding. *See Shell Oil Co. v. EPA*, 950 F.2d 741, 757 (D.C. Cir. 1991). Here, as noted above, HHS's insertion of the language codified at 45 C.F.R. §§ 88.2(4)-(6) responded directly to issues raised by affected parties. The fact that these stakeholders knew their concerns were pertinent speaks to the sufficiency of the NPRM to "'fairly apprise interested persons' of what [was] at issue in the rulemaking," *New York*, 414 F. Supp. 3d at 558 (quoting *Nat'l Black Media Coal.*, 791 F.2d at 1022), and bolsters the Final Rule's validity as a logical outgrowth of the NPRM.

III. The Rule honors the decisions Congress made in protecting the conscience rights of healthcare professionals.

The California court described the underlying conscience statutes as Congress's attempt to "protect [healthcare professionals] from discrimination for their refusal to perform" abortions, sterilization, and certain other medical procedures "due to religious or ethical beliefs." *City & Cty. of San Francisco*, 411 F. Supp. 3d at 1012. The court erroneously concluded, however, that the Rule's definitions "significantly expand[] the scope of protected conscience objections" to the detriment of "the effective delivery of health care to Americans." *Id.* In fact, rather than "derogat[ing]" the decisions Congress made, *id.*, the Rule honors those decisions.

Discriminatory conduct violating conscience rights in healthcare is widespread. Just in the last few years, states, localities, and even medical schools have passed legislation or enacted policies attempting to coerce healthcare professionals to participate in or facilitate certain procedures or activities to which they have moral or religious objections. For example, in 2014, California issued a new interpretation of the Knox-Keene Act requiring all organizations with religious objections to abortion—including churches—that provide maternity care insurance to also cover abortions. *See Foothill Church v. Rouillard*, No. 2:15-cv-02165 (E.D. Cal., Oct. 23, 2017). Illinois imposed a similar abortion insurance mandate in 2019.

See Illinois Baptist State Ass'n v. Illinois Dep't of Ins., No. 2020MR000325 (Ill. 7th Jud. Cir. Court, June 10, 2020). And only a few years before that, the University of Medicine and Dentistry of New Jersey adopted a policy requiring all nursing students—including those with religious objections—to participate in abortion procedures. *See* Seth Augenstein, *UMDNJ, 12 Nurses Settle Lawsuit Claiming They Were Forced to Assist with Abortions*, NJ.com (Dec. 23, 2011).

Conscientious objectors have also faced countless lawsuits that seek to override their decisions to decline to participate in certain procedures. For example, the American Civil Liberties Union sued a Catholic hospital group because they would not violate their religious beliefs by performing abortions. *Am. Civil Liberties Union v. Trinity Health Corp.*, No. 15-cv-12611 (E.D. Mich., Apr. 11, 2016). These cases are a mere sampling of this type of discrimination, which is widespread. *See generally*, First Liberty et al., *Public Comment Supporting Proposed Rule "Protecting Statutory Conscience Rights in Health Care"* (Mar. 27, 2018) ("First Liberty Comment"), bit.ly/3fDNu4B.

For example, *amicus* represented three faith-based pregnancy resource centers in a lawsuit challenging a 2010 Austin law requiring centers that oppose abortion and certain forms of contraception to post false and misleading signs at their front entrances. A federal district court held that Austin's ordinance was

unconstitutionally vague, and Austin was forced to pay almost a half-million dollars as a result of their violation of the centers' constitutional rights. *See Austin Lifecare, Inc. v. City of Austin*, No. A-11-CA-875-LY (W.D. Tex. June 23, 2014). Similarly, in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (Jun. 26. 2018), *amicus* represented legal scholars as *amici curiae* supporting pregnancy resource centers forced to post notices to which they conscientiously objected that would provide information about availability of abortion services.

These incidents are only the tip of the iceberg. There are myriad examples of the pervasive and worsening discrimination and hostility against religious healthcare practitioners and attempts to override their conscience rights. *See* First Liberty Comment at 7-10. Such rampant attempts to override healthcare practitioners' conscience rights threaten the ability of people of faith to participate in the healthcare profession. The Conscience Rule seeks only to allow healthcare professionals to carry out their work consistent with their moral, religious, and ethical beliefs, while providing the best care for their patients. The Rule is an eminently reasonable attempt to follow the protections that Congress provided in the relevant statutes and should be upheld in full.

CONCLUSION

The Court should reverse the decisions below.

Respectfully submitted,

/s/ Jeffrey M. Harris

KELLY J. SHACKELFORD
MICHAEL D. BERRY
STEPHANIE N. TAUB
LEA E. PATTERSON
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway
SUITE 1600
PLANO, TX 75075

JEFFREY M. HARRIS
Counsel of Record
TIFFANY H. BATES
ANTONIN SCALIA LAW SCHOOL
ADMINISTRATIVE LAW CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com

Counsel for Amicus Curiae

June 22, 2020

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) __20-15398, 20-15399, 20-16045, and 20-35044____

1. I am the attorney or self-represented party.

2. **This brief contains 3,090 words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

3. I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[X] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

[ ] it is a joint brief submitted by separately represented parties;
[ ] a party or parties are filing a single brief in response to multiple briefs; or
[ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature */s/ Jeffrey M. Harris* **Date** 6/22/20

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2020, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

/s/ Jeffrey M. Harris